



**UNAPPROVED  
NO REDACTION REQUIRED  
THE COURT OF APPEAL**

**Appeal Number: 2020/111  
Neutral Citation: [2021] IECA 335**

**Faherty J.  
Ní Raifeartaigh J.  
Pilkington J.**

**BETWEEN/**

**PASCAL HOSFORD**

**APPELLANT**

**- AND -**

**DEPARTMENT OF EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION**

**RESPONDENT**

**Judgment of Ms. Justice Faherty dated the 15<sup>th</sup> day of December 2021**

1. What arises for determination here is a preliminary objection made by the respondent (“the Department”) to the jurisdiction of the Court to entertain the substantive appeal brought by Mr. Hosford from the judgment (25 February 2020) and Order (10 March 2020) of the High Court (Meenan J.) dismissing the appeal brought by Mr. Holford from a determination of the Labour Court, which in turn had rejected a claim brought by Mr. Holford under the Protected Disclosures Act 2014 (“the 2014 Act”).

2. While Mr. Holford's substantive appeal is not before the Court, in order to put what the Court has to determine into context, it is necessary to explain the background to the proceedings and the procedural history to this point in time.

3. At all relevant times, Mr. Hosford, a Higher Executive Officer, was employed as a manager in the finance section of the Department's Facilities Management Unit, a role he held since June 2014. It is not in dispute that Mr. Hosford made a number of protected disclosures under the provisions of the 2014 Act to the Department. In or around 2017, he was subject to disciplinary procedures in the workplace. The particulars of alleged misconduct were set out in a letter dated 26 June 2017 under a number of headings. It was stated that the matters set out in the letter would be raised in accordance with the Civil Service Disciplinary Code and Mr. Hosford was requested to attend a meeting some days later. The result of the disciplinary process was that Mr. Hosford was to receive a final written warning.

4. He appealed this decision pursuant to an internal appeals procedure. The appeal was refused. Thereafter, he appealed the matter to an external appeals officer. That appeal was also unsuccessful.

5. Subsequently, Mr. Hosford made a complaint to the Workplace Relations Commission ("WRC") pursuant to s.41(1) of the Workplace Relations Act 2015 ("the 2015 Act") in which he claimed that in being disciplined he had been penalised for having made a protected disclosure, contrary to the provisions of s. 12 of the 2014 Act.

6. Mr. Hosford was unsuccessful in his claim before an Adjudication Officer of the WRC. That ruling, given on 20 September 2018, was appealed by Mr. Hosford to the Labour Court. On 25 March 2019, the Labour Court issued its determination in which it dismissed Mr. Hosford's appeal and affirmed the decision of the Adjudication Officer.

7. On 15 April 2019, Mr. Hosford appealed the Determination of the Labour Court to the High Court. His appeal was brought pursuant to s.46 of the 2015 Act. He set out some 10 grounds of appeal on points of law.
8. For the reasons set out in his judgment of 25 February 2020, Meenan J. dismissed the appeal. He concluded that *“insofar as there were findings of fact made by the Labour Court, these were supported by evidence and the provisions of the Act of 2014 were correctly interpreted and applied”*. The Order of the High Court dismissing Mr. Hosford’s appeal was perfected on 14 April 2020.
9. By Notice of Appeal dated 12 May 2020, Mr. Hosford purports to appeal to this Court against the judgment and Order of Meenan J.
10. In its notice dated 29 May 2020, the Department takes issue with Mr. Hosford’s various grounds of appeal. More fundamentally however, it seeks to have the appeal struck out on the basis that same is misconceived having regard to the provisions of s. 46 of the 2015 Act. In short, the argument advanced by the Department is that pursuant to s.46 of the 2015 Act, no appeal lies to this Court from the judgment and Order of the High Court.
11. In order to understand how it is that the Department maintains that the appellate jurisdiction of this Court is not available to Mr. Hosford, it is instructive firstly to have regard to the provisions of s.12 of the 2014 Act which ground Mr. Hosford’s substantive complaint against the Department.
12. Section 12 of the 2014 Act provides, in relevant part:  

“12. (1) An employer shall not penalise or threaten penalisation against an employee, or cause or permit any other person to penalise or threaten penalisation against an employee, for having made a protected disclosure...

(3) Schedule 2 shall have effect in relation to an alleged contravention of sub section (1).”

**13.** Schedule 2, to the 2014 Act provides:

*“Decision under section 41 of the Workplace Relations Act 2015*

1. A decision of an adjudication officer under section 41 of the Workplace Relations Act 2015 in relation to a complaint of a contravention of section 12(1) shall do one or more of the following, namely –

- (a) declare that the complaint was or, as the case may be, was not well founded,
- (b) require the employer to take a specified course of action,
- (c) require the employer to pay to the employee compensation of such amount (if any) as the adjudication officer considers just and equitable having regard to all the circumstances, but not exceeding 260 weeks’ remuneration in respect of the employee’s employment calculated in accordance with regulations under section 17 of the Unfair Dismissals Act 1977.

*Decision of Labour Court on appeal from decision referred to in paragraph 1*

2. A decision of the Labour Court under section 44 of the Workplace Relations Act 2015, on appeal from a decision of an adjudication officer referred to in paragraph 1, shall affirm, vary or set aside the decision of the adjudication officer.”

**14.** Thus, the 2014 Act provides that where an employee considers that they have been penalised for having made a protected disclosure contrary to the provisions of that Act they can make a complaint and seek redress from the WRC in accordance with s.41 of the 2015 Act, and, thereafter, appeal the decision of the Adjudication Officer to the Labour Court in accordance with the provisions of the 2015 Act.

**15.** Nothing further is provided for in the 2014 Act with regard to what is to happen after an appeal of an Adjudication Officer decision to the Labour Court. However, the position is comprehensively dealt with in the 2015 Act which provides the adjudicative structure in respect of myriad statutory employment disputes, including a complaint under s.12(1) of the 2014 Act. The enactment of the 2015 Act resulted in the creation of a system where statutory employment disputes could be informally resolved *via* an adjudication process comprising Adjudication Officers of the WRC with the Labour Court acting as a final court of appeal subject to the right of either party to bring a further appeal from a Labour Court determination to the High Court on a point of law. Clearly, in enacting the 2015 Act, the Oireachtas saw fit to provide for a more streamlined adjudication and appeals structure to be in place for the determination of employment disputes than had pertained previously, including putting in excepting provisions such as that contained in s.46 of the 2015 Act.

**16.** In broad brush, Part 4 of the 2015 Act provides that a complaint that an employer has contravened a provision specified in Part 1 or 2 of Schedule 5 of the Act, or a dispute as to the entitlement of an employee under an enactment specified in Part 3 of Schedule 5, is to be referred for adjudication to an Adjudication Officer of the WRC. Section 41 of the Act provides, in relevant part:

“41. (1) An employee (in this Act referred to as a “complainant”) or, where the employee so consents, a specified person may present a complaint to the Director General that the employee’s employer has contravened a provision specified in *Part 1 or 2 of Schedule 5* in relation to the employee and, where a complaint is so presented, the Director General shall, subject to section 39 , refer the complaint for adjudication by an adjudication officer.

...

(5) (a) An adjudication officer to whom a complaint or dispute is referred under this section shall—

- (i) inquire into the complaint or dispute,
- (ii) give the parties to the complaint or dispute an opportunity to—
  - (I) be heard by the adjudication officer, and
  - (II) present to the adjudication officer any evidence relevant to the complaint or dispute,
- (iii) make a decision in relation to the complaint or dispute in accordance with the relevant redress provision, and
- (iv) give the parties to the complaint or dispute a copy of that decision in writing.

(b) In this subsection “relevant redress provision” means—

- (i) in relation to a complaint under this section of a contravention of a provision of an enactment specified in Part 1 or 2 of Schedule 5 the provision of that enactment specified in Part 1 of Schedule 6,
- (ii) in relation to a dispute as to the entitlements of an employee under an enactment specified in Part 3 of Schedule 5, the provision of that enactment specified in Part 1 of Schedule 6, and
- (iii) in relation to a complaint under subsection (3), paragraph 1 of Schedule 2 to the Act of 2012.”

**17.** Section 12(1) of the 2014 Act is listed in Part 1 of Schedule 5 to the 2015 Act and, accordingly, where an employee complains that his employer has contravened s.12(1) of the 2014 Act, the complaint lies to the WRC in accordance with s.41 of the 2015 Act.

**18.** A decision made by an Adjudication Officer of the WRC can be appealed to the Labour Court in accordance with s.44 of the 2015 Act. It provides as follows:

“44. (1) (a) A party to proceedings under section 41 may appeal a decision of an adjudication officer given in those proceedings to the Labour Court and, where the party does so, the Labour Court shall—

- (i) give the parties to the appeal an opportunity to be heard by it and to present to it any evidence relevant to the appeal,
- (ii) make a decision in relation to the appeal in accordance with the relevant redress provision, and
- (iii) give the parties to the appeal a copy of that decision in writing.

(b) In this subsection “relevant redress provision” means—

- (i) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a complaint under that section of a contravention of a provision of an enactment specified in Part 1 or 2 of Schedule 5 , the provision of that enactment specified in Part 2 of Schedule 6 ,
- (ii) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a dispute as to the entitlements of an employee under an enactment specified in Part 3 of Schedule 5 , the provision of that enactment specified in Part 2 of Schedule 6 and
- (iii) in relation to an appeal from a decision of an adjudication officer under section 41 relating to a complaint under subsection (3) of that section, paragraph 2 of Schedule 2 to the Act of 2012.

(2) An appeal under this section shall be initiated by the party concerned giving a notice in writing to the Labour Court containing such particulars as are determined by the Labour Court in accordance with rules under subsection (5) of section 20 of the Act of 1946 and stating that the party concerned is appealing the decision to which it relates.

(3) Subject to subsection (4), a notice under subsection (2) shall be given to the Labour Court not later than 42 days from the date of the decision concerned.

(4) The Labour Court may direct that a notice under subsection (2) may be given to it after the expiration of the period specified in subsection (3) if it is satisfied that the notice was not so given before such expiration due to the existence of exceptional circumstances.

(5) A copy of a notice under subsection (2) shall be given by the Labour Court to the other party concerned as soon as may be after the receipt of the notice by the Labour Court.

(6) The Labour Court may refer a question of law arising in proceedings before it under this section to the High Court for determination by the High Court and the determination of the High Court shall be final and conclusive.

(7) Proceedings under this section shall be conducted in public unless the Labour Court, upon the application of a party to the appeal, determines that, due to the existence of special circumstances, the proceedings (or part thereof) should be conducted otherwise than in public.



(8) The Labour Court may, by notice in writing given to the parties to an appeal under this section, correct any mistake (including any omission) of an administrative or clerical nature in a decision under this section in relation to the appeal.

(9) (a) In proceedings before the Labour Court under this section, the appellant or respondent (including an appellant or respondent to whom paragraph (b) applies) may be accompanied and represented by—

- (i) a trade union official within the meaning of section 11 of the Act of 1990,
- (ii) an official of a body that, in the opinion of the Labour Court, represents the interests of employers,
- (iii) a practising barrister or practising solicitor, or
- (iv) any other person, if the Labour Court so permits.

(b) In proceedings before the Labour Court under this section, the appellant or respondent may, if he or she has not yet attained the age of 18 years, be accompanied and represented by his or her parent or guardian.”

**19.** Once the Labour Court has made its decision under s.41 of the 2015 Act, a party is entitled to appeal therefrom in accordance with s.46 of the 2015 Act:

“46. A party to proceedings before the Labour Court under this Part may, not later than 42 days from the service on that party of notice of the decision of the Labour Court in those proceedings, appeal that decision to the High Court on a point of law, and the decision of the High Court in relation thereto shall be final and conclusive.”

**20.** As can be seen, the appeal to the High Court from the decision of the Labour Court is limited on two bases. Firstly, any such appeal is limited to points of law. Secondly, the decision of the High Court in respect of any such appeal “shall be final and conclusive”.

**21.** Counsel for the Department says that s.46 of the 2015 Act is an exception to the right of appeal to this Court as provided for in Article 34.4.1 of the Constitution. He emphasises that the provisions of s.46 were enacted after the Thirty Third Amendment to the Constitution (establishing the Court of Appeal) and submits that it can therefore be taken that the Oireachtas expressly legislated in s. 46 for an exception to the right of appeal to this Court from the High Court.

**22.** The Department emphasises that that is the nature of the appeal which the Oireachtas has chosen to provide with regard to a complaint made pursuant to s.12 of the 2014 Act. It is submitted that this was not unusual or exceptional in circumstances where provisions for such exceptions are made in relation to other areas of law including planning law and landlord and tenant law, and in legislation governing freedom of information. It is submitted that a right of appeal to all the courts is not necessarily required under the Constitution.

**23.** The Department says that if this Court is satisfied that the provisions of the s.46 are clear and unambiguous then the restriction on the right of appeal therein provided comes within the exception provided for in Article 34.4.1 of the Constitution and, accordingly, no appeal lies to the Court of Appeal from the judgment and Order of the High Court in this case.

**24.** Mr. Hosford does not challenge the Department’s assertion that the provisions of s. 46 are clear and unambiguous, rather, he advances a number of reasons as to why this Court should be satisfied that it has jurisdiction to hear and determine his appeal. These arguments are addressed later in this judgment.

## **Discussion**

**25.** Pursuant to the Constitution, decisions of the High Court are appealable to the Court of Appeal. Article 34.4.1 of the Constitution provides:

“The Court of Appeal shall–

- (i) save as otherwise provided by this Article, and
- (ii) with such exceptions and subject to such regulations as may be prescribed by law,

have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.” (emphasis added)

As can be seen, the appellate jurisdiction of the Court of Appeal may be curtailed in certain circumstances. The Department’s case is that s.46 of the 2015 Act constitutes such curtailment and is an exception provided for by law within the meaning of Article 34.4.1.

**26.** Prior to its amendment by the Thirty Third Amendment of the Constitution, the former Article 34.4.3 of the Constitution was in materially identical terms to Article 34.4.1 in relation to the appellate jurisdiction of the Supreme Court from the High Court. As set out by Delaney and McGrath on *Civil Procedure*, 4<sup>th</sup> Ed.2018, at 23:11:

“This provision was subject to extensive judicial consideration which will still be of relevance in considering the circumstances in which the appellate jurisdiction of the Court of Appeal may be circumscribed.”

**27.** Indeed, we see from the myriad case law on the former Article 34.4.3, that any provision that seeks to curtail the constitutional appellate jurisdiction of the Court of Appeal must be “*clear and unambiguous*”. This was emphasised in no uncertain terms by Walsh J. in the Supreme Court decision in *People (AG) v. Conmey* [1975] IR 341:

*“...any statutory provision which had as its object the excepting of some decisions of the High Court from the appellate jurisdiction of this Court, or any particular provision seeking to confine the scope of such appeals within particular limits, would of necessity have to be clear and unambiguous. The appellate jurisdiction of this Court from decisions of the High Court flows directly from the Constitution and any diminution of that jurisdiction would be a matter of such great importance that it would have to be shown to fall clearly within the provisions of the Constitution and within the limitations imposed by the Constitution upon any such legislative action.”*

**28.** This *dictum* applies equally to this Court’s jurisdiction pursuant to Article 34.4.1 of the Constitution as it applied to the jurisdiction formerly vested in the Supreme Court under the former Article 34.4.3.

**29.** As Collins J. opined in *Irish Prison Service v. Cunningham* [2021] IECA 19, *“this Court’s appellate jurisdiction from the High Court is available to litigants as of right. It is the final court of appeal to which litigants have access as of right.”* While, as noted by Collins J., the Supreme Court may under Article 34.5.4 permit an appeal from the High Court and an appeal from this Court (whose decisions are otherwise final and conclusive), no litigant has the right to bring such an appeal. For all those reasons, it follows that any ouster of this Court’s jurisdiction to entertain an appeal from the High Court will be scrupulously examined, in like manner as the Supreme Court policed the ouster of its former jurisdiction under Article 34.4.3.

**30.** However, as is made clear in the relevant jurisprudence, subject to the overarching requirement that the provision be *“clear and unambiguous”*, there is no single formula of words which is required in legislation to curtail appellate jurisdiction. This was confirmed

in the judgment of Clarke J. in *L O'S v. Minister for Health and Children* [2015] IESC 61 at para. 3.3 (albeit with words of caution) wherein he stated:

*“It is worth noting that attempts to restrict or exclude a right of appeal to this Court from the High Court have been expressed by the legislature in differing formulas over the years. The Constitution clearly confers on the Oireachtas the right to exclude or regulate an appeal from the High Court to this Court or, under the new regime in place since the 33rd Amendment came into effect, to the Court of Appeal. Obviously, there are different ways in which it might be considered appropriate to bring about such exclusions or restrictions. In some cases it may be considered appropriate to exclude the right entirely. In other cases some limited form of appeal may be considered to be appropriate. On that basis, it could not be suggested that only one formula of words should be used, for the desired legislative result may itself be different from case to case. However, it does have to be said that use of different language in different legislative measures designed to achieve the same end is a recipe for confusion.”*

**31.** The provisions of s. 46 of the 2015 Act use language similar to the language used in other statutes which have been considered by the courts. In *Eamonn Andrews Productions Limited v. Gaiety Theatre Enterprises Limited* [1973] IR 295, the legislative scheme set out in s. 39 of the Courts of Justice Act 1936, as re-enacted by s.48 of the Courts (Supplemental provisions) Act 1961, and which provides that a decision of the High Court on appeal from the Circuit Court “*shall be final and conclusive and not appealable*” was held to constitute a valid exception to the appellate jurisdiction of the Supreme Court pursuant to the then Article 34.4.3 of the Constitution.

**32.** The meaning of “final and conclusive” was also considered in *Canty v. Private Residential Tenancies Board* [2008] IESC 24. In *Canty*, the Tenancy Tribunal set up under

the Residential Tenancies Act 2004 had made a number of determination orders. Mr. Canty appealed those orders pursuant to s. 123(3) of the 2004 Act which provides for an appeal to the High Court from a determination of the Tribunal “on a point of law”. Section 123(4) of the 2004 Act provides:

“The determination of the High Court on such an appeal in relation to the point of law concerned shall be final and conclusive.”

**33.** On 8 August 2007, ([2007] IEHC 243), Laffoy J. refused Mr. Canty’s appeal against two determination orders. Mr. Canty then sought to appeal the judgment of Laffoy J. The Private Residential Tenancies Board brought a motion to strike out the appeal on the grounds that no appeal lay to the Supreme Court having regard to the provisions of s.123(4) of the 2004 Act.

**34.** In an *ex tempore* ruling delivered on 4 April 2008, the Supreme Court determined it had no jurisdiction to hear the appeal brought by the appellant against the judgment and order of Laffoy J. However, it reserved its judgment on whether the appellant was entitled to appeal the costs order that had been made against him in the High Court. The appellant had argued that s. 123(4) of should not be interpreted as denying him the right to appeal to the Supreme Court to challenge the costs order that had been made against him.

**35.** In giving judgment on this issue ([2008] IESC 24), Kearns J. considered that the question as to whether the appellant was precluded from appealing the costs order “*can only be resolved by considering the precise wording of any statute which purports to limit the right of appeal to this court*”. He opined that any statute which purported to remove even a limited right of appeal on an issue such as costs “*should be so phrased as to make this intention clear*”. The intention that no further appeal should lie from any aspect of the decision of the High Court judge should be obvious from a reading of the provision in question.

36. Kearns J. contrasted s.123(4) with a number of other excepting provisions, including s.42(8) of the Freedom of Information Act 1997 which provides:

“The decision of the High Court on an appeal or reference under this section shall be final and conclusive”

37. He also looked to s.39 of the Courts of Justice Act 1936, as re-enacted by s. 48 of the Court (Supplemental Provisions) Act 1961, which provides:

“The decision of the High Court or of the High Court on Circuit on appeal under this Part of this Act shall be final and conclusive and not appealable.”

38. Kearns J. had no difficulty in construing those provisions “*as altogether precluding any further appeal*”. When contrasted with the language used in those provisions, in the view of Kearns J., s.123(4) was unsatisfactorily drafted in a number of respects and it was not clear on whether an appeal against a costs ruling was precluded. Accordingly, the Supreme Court held that the appeal against the order for costs was not excluded by the terms of s.123.

39. The meaning of “final and conclusive” was again considered by the Supreme Court in *Canty v. The Attorney General and the Private Residential Tenancies Board* [2011] IESC 27 following an appeal by Mr. Canty from the decision of the High Court (McKechnie J.) refusing a declaration in judicial review proceedings that the provisions of s.123(4) of the Residential Tenancies Act 2004 were unconstitutional. In the High Court, McKechnie J. concluded, *inter alia*, as follows:

“... the legislature, by virtue of the 2004 Act, established a framework by which disputes between landlords and tenants could be resolved, with the intention of that being done informally, expeditiously, and as cheaply as possible. Bodies with particular expertise were set up within this framework to discharge the functions assigned to them. ... In such circumstances it is not in the least surprising to find a

*statutory provision regulating or restricting a person's right of appeal from such a body. In the instant case provision is made for a right of appeal from a determination of the Tribunal to the High Court, but only "on a point of law". By that stage of the process all questions of disputed fact and all issues of merit will have been dealt with by that expert body and their findings on such matters are determinative. No appeal from such conclusions is permitted. The only further recourse which a party has is to seek the opinion of the High Court on a point of law. That being the position, it is entirely predictable that any right of appeal is limited, as it is that the Oireachtas might, at that stage, seek to end the litigious role of the parties. Whether that has been achieved in this particular case depends, however, on the meaning of "final and conclusive" in s. 123(4) of the Act."*

**40.** McKechnie J. went on to find that the words "final and conclusive" as appearing in s.123(4) had only one meaning. He stated:

*"Such a phrase is not ambiguous and is not capable of having any meaning other than that which the words plainly and unambiguously mean and were intended to mean. On my interpretation of the phrase, the situation is that once the High Court has expressed an opinion on the statutory appeal, then that decision ends the litigation between the parties. This is what I think final, and this is what I think conclusive means: "final", as being in the last stage of the process, and "conclusive" as meaning decisive by way of end. ... It seems to me that the Oireachtas is entitled under Article 34.4.3 of the Constitution to adopt a policy with regard to finality in landlord and tenant matters as between contracting parties. I am of the view that this was the intention behind the establishment of the 2004 Act, and certainly the intention of subs. (4) in s. 123. I do not read that restriction as exceeding what is authorised by Article 34.4.3 of the Constitution. There is in my*



*view no ambiguity in the language of the subsection: the only meaning of it is that which I have endeavoured to describe. Consequently I cannot accept Mr. Canty's submission that he has made out an arguable case for the interpretation as suggested by him and secondly, given the statutory framework against which the restriction must be judged, it cannot in my opinion be said to be incompatible with the provisions of Article 34.4.3 of the Constitution.”*

**41.** Writing for the Supreme Court, and in upholding the decision of the High Court on the constitutionality of s.123(4), Denham J. observed, *inter alia*, that:

*“Statutory schemes which provide specialist tribunals to determine matters in specific areas are an important part of a modern state. Fair procedures within the scheme leading to a decision on fact by a tribunal with an appeal on a question of law to the High Court, gives a litigant a right to a hearing and to an appeal. This is a universally recognised scheme of decision-making within a specialist area. In the context of the scheme established under the Act of 2004, the words in s. 123(4) are clear and unambiguous and should be so construed.”*

**42.** In *Stokes v. Christian Brothers High School Clonmel* [2015] IESC 13, [2015] 2 I.R. 509, the Supreme Court considered the effect of s.28 (1) and (2) of the Equal Status Act 2000, which provided for a right of appeal from a decision of the Director of the Equality Tribunal to the Circuit Court. Section 28(3) stipulated that “[n]o further appeal lies, other than appeal to the High Court on a point of law”. The Supreme Court was divided on the meaning of this provision.

**43.** In giving judgment for the majority, Clarke J. cited s. 39 of the Courts of Justice Act 1936 (quoted at para.37 hereof) and s.123(4) of the Residential Tenancies Act 2004 (quoted at para. 32 above and which uses the same “final and conclusive” language as contained in s.46 of the 2015 Act) as examples of “*less ambiguous phraseology*” than the

different wording in the Equal Status Act 2000 which was under consideration in *Stokes*. In *Stokes*, the Supreme Court unanimously affirmed that, for the purposes of Article 34. 4.3 of the Constitution, any statutory restriction on the right of appeal to the Supreme Court must be “*clear and unambiguous*”. Having regard to that high threshold, Clarke C.J. duly concluded that the wording of s.28(3) of the Equal Status Act 2000 was not free from ambiguity and thus “*insufficient to meet that high constitutional test*”. He was not satisfied that the language used was sufficient to exclude an appeal to the Supreme Court and concluded that it was appropriate to proceed to consider the merits of the appeal.

44. On the other hand, Hardiman J. (with whose dissenting judgment McKechnie J. agreed) expressed the view that the phrase “no further appeal shall lie...” was perfectly clear and definite in meaning and entirely lacking in ambiguity. He concluded that no appeal lay to the Supreme Court in the circumstances.

45. While, therefore, there was a difference of opinion among the members of the Supreme Court in that case, nothing turned on it given that Clarke J. concluded that he would in any event dismiss the appeal on the merits.

***“Final and conclusive” in the 2015 Act***

46. The question here is whether s. 46 of the 2015 Act clearly and unambiguously ousts the jurisdiction of this Court to hear and determine Mr. Hosford’s appeal. While the meaning of “final and conclusive” in the context of the 2015 Act has not, until this case, come to judicial attention, as we have seen, precisely the same language was considered by the Supreme Court in *Canty v. The Attorney General and the Private Residential Tenancies Board* [2011] IESC 27.

47. Moreover, counsel for the Department submits that the meaning afforded to the words “final and conclusive” by Clarke J. in *Stokes* as “*that used in the majority of legislative provisions by which an appeal to the Supreme Court is excepted*” (at para. 82)

is authoritative for the purposes of this Court finding that Mr. Hosford's appeal is excepted pursuant to s.46 of the 2015 Act. He submits that this Court can be so satisfied given that in *Stokes*, Clarke J. opined that s.123(4) of the Residential Tenancies Act 2004 (which uses the same "final and conclusive" language as contained in s.46 of the 2015 Act) involves "*less ambiguous phraseology*" than the different wording in the Equal Status Act 2000 which was under consideration in *Stokes*, and which was found not to exclude an appeal to the Supreme Court. It is also submitted that the *dictum* of Denham J. in *Canty* underscores the strong policy reasons for the concept of "final and conclusive".

**48.** As already alluded to, in his oral submissions to this Court, Mr. Hosford fairly acknowledged that the provisions of s.46 are clear and unambiguous as to their meaning and effect. That concession notwithstanding, in his written submissions, he requests that the Court strike down s.46 of the 2015 Act as being repugnant to and in breach of the Constitution, the EU Charter on Fundamental Rights ("the EU Charter" or "Charter") and/or the European Convention on Human Rights ("ECHR" or "the Convention").

**49.** In his oral submissions, Mr. Hosford clarified that he was not pursuing his argument that the provisions of s.46 of the 2015 Act are unconstitutional, but he maintained his position that the statutory preclusion on an appeal to this Court offends both the Charter and the Convention and for that reason this Court should strike down s.46 of the 2015 Act as being repugnant to and in breach of the EU Charter and the ECHR, thereby providing this Court with jurisdiction to hear his appeal.

**50.** Of course, unlike the position in *Canty* ([2011] IESC 27) where the constitutionality of s. 123(4) of the Residential Tenancies Act 2004 was challenged in judicial review proceedings, it was never open to Mr Hosford, in the within proceedings, to challenge the constitutionality of s.46 of the 2015 Act. This is because the Labour Court could never have decided on the validity or constitutionality of s.46 of the 2015 Act and, accordingly,

Mr. Hosford could not then, in his limited appeal to the High Court, seek to challenge the constitutionality of s. 46. As said by Denham J. in *Canty*:

*“... no question as to the validity of any law can be raised in a Tribunal under the Act of 2004. Therefore no such issue could arise on appeal on a point of law to the High Court and Article 34.4.3 could not arise for consideration.”*

**51.** What falls to be considered here is whether the decision of the High Court, founded as it is on a limited form of appeal from the Determination of the Labour Court, is “final and conclusive” such that this Court’s jurisdiction pursuant to Article 34.3.1 is ousted. On any reading of s.46 and taking cognisance of the jurisprudence referred to earlier, the provisions of s.46 are “clear and unambiguous” and, as earlier referred to, Mr. Hosford does not demur in this regard.

**52.** I turn now to the basis upon which Mr. Hosford nevertheless maintains that this Court should find that it has jurisdiction to hear and determine his appeal. His primary argument is that s.46 falls foul of the provisions of the EU Charter. Fundamentally, in terms of his substantive complaint pursuant to the 2014 Act, Mr. Hosford’s position is that, to date, all judicial fora have wholly failed to address their statutory duties, including basic first principles of protected disclosure law, namely to precisely determine what, under the 2014 Act, are or are not statutory “acts of protected disclosures”. This lacuna, he says, is in the context where nine out of ten of all whistle-blower cases are unsuccessful.

**53.** He submits that the statute law in issue here, namely s.46 of the 2015 Act which provides that “the decision of the High Court on a point of law shall be final and conclusive” stems from longstanding previous statutory provisions – originally dating from 1946 and are thus from a different and outmoded era and time. While it is conceded that the language used in s.46 “final and conclusive” is clear and unambiguous, he nevertheless maintains that there is much more at stake as regards citizens’ rights. He points to the fact

that the language used in s.46 is taken from statutes which pre-date the EU Charter. He submits that a number of rights under the Charter are at play and require urgent consideration in circumstances where those rights have mirror images in both the ECHR and the Constitution.

**54.** He points especially to Article 17.1, 31.1, 41, 47 and 52.1 of the Charter. He submits that the statutory restriction as found in s.46 of the 2015 Act is not found in other like jurisdictions' statutes with regard to employment law and employee citizen rights. He points to the provisions of the UK Employment Tribunals Act 1996 whereby there is provision for an appeal on any question of (employment) law to the Court of Appeal with the leave of the Employment Appeals Tribunal (High Court) or the leave of the Court of Appeal. He further points to provisions concerning an appeal to the UK Supreme Court with the leave of that court on points of law of "general public importance" and which contain a statutory "leap frog" provision where "... the benefits of the earlier consideration by Supreme Court outweigh the benefits of consideration by the Court of Appeal..."

**55.** He further points to other common law jurisdictions such as Australia, Canada and New Zealand which he says have appeal provisions similar to those provided in the UK.

**56.** He submits that it is in the foregoing context, and where Irish employees are regarded as "second-class citizens" that this Court should examine whether or not s.46 of the 2015 Act is unlawful under EU law. He maintains that employees making complaint pursuant to the provisions of s.12 of the 2014 Act should have the same avenue of appeal as that afforded under the Irish equality legislation.

**57.** Insofar as the Department points to the fact that he has not pleaded in his Notice of Appeal that s.46 falls foul of the EU Charter, he submits that this Court can nevertheless look at the issue "as part of the bigger picture". He points to the fact that despite his requesting that it do so, the Department has not set out the policy behind the enactment of

s.46 of the 2015 Act. He contends that insofar as the Department relies on the *dictum* of Denham J. in *Canty* to the effect that the adjudication by specialist tribunals is part and parcel of a modern state and that such tribunals, together with an appeal on a point of law to the High Court, constitute a universally recognised scheme of decision-making within a specialist area, neither the WRC nor the High Court on a point of law in fact constitute a tribunal, sitting as each body did with a sole adjudicator or judge, as the case may be.

**58.** Essentially, Mr. Hosford says that no mischief could ensue were this Court to strike down s.46 of the 2015 Act, thereby providing a forum to determine his appeal, particularly in circumstances where there is provision in other common law countries for the appellate structure he advocates, and given the requirements of Article 52 of the Charter, and especially where the objective that is sought to be achieved in the appeal is to clarify the law on the protection of whistle blowers.

**59.** Notwithstanding Mr. Hosford's submissions, I am satisfied that neither the EU Charter nor the case law of the CJEU as referred to at Appendix A to his written submissions have any application to the present case. Mr. Hosford's reliance on the principles and provisions of EU law is entirely misguided in circumstances where the 2014 Act, which forms the basis of his substantive complaint of penalisation, is based exclusively on Irish legislation and does not implement any EU law or any EU Directive. Moreover, no issue of EU law in respect of the 2015 Act was raised in the High Court. In any case, like the 2014 Act, the 2015 Act is an Irish statute and not underpinned by any principle of EU law or EU Directive. As I have said, the right of Mr. Hosford under the 2014 Act to be protected, as the long title to the 2014 Act puts it, "from the taking of action against [persons] in respect of the making of certain disclosures in the public interest..." does not emanate from any principle of EU law or EU Directive. This is the position

notwithstanding that Ireland is due to transpose Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law into law by 17 December 2021.

**60.** The provisions of the Charter are clear as to its scope: Article 51 provides:

“1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.” (emphasis added)

**61.** The issue raised by Mr. Hosford, being an issue solely of Irish law, does not come within the scope of the Charter. In short, as the 2014 Act is not implementing EU law, the Charter has no applicability.

**62.** Equally, Mr. Hosford’s reliance on ECHR jurisprudence is misguided, to my mind. In the first instance, he did not plead or argue a breach of the ECHR before the High Court. Secondly, insofar as his submissions to this Court invoke the provisions of the ECHR, the first thing to be observed is that there is no right *per se* to an appeal provided for in Article 6 ECHR. Nor does the case law of the European Court of Human Rights (“ECtHR”) support the right to an appeal in the case of every dispute.

**63.** In any event, when one considers that Mr. Hosford has had the benefit of two appeals i.e. first, from the decision of the Adjudication Officer to the Labour Court and second, to the High Court on a point of law from the Determination of the Labour Court (with the possibility of an appeal to the Supreme Court subject to obtaining leave of the Supreme

Court), it is difficult to conceive how this does not constitute an effective remedy for the purposes of Article 6 ECHR.

**64.** Furthermore, the *dictum* of Denham J. in *Canty*, wherein she refers to the use of specialist tribunals being internationally recognised, lends support to the finding that Mr. Hosford has had access to an effective remedy and the benefit of fair procedures within the particular context of this particular specialist area.

**65.** At the end of the day, Mr. Hosford has had the benefit of two full hearings of his substantive complaint, firstly before an Adjudication Officer of the WRC and secondly by the Labour Court. Thereafter, he availed an appeal on a point of law to the High Court.

**66.** With regard to Mr. Hosford's reliance on what is provided for in other common law jurisdictions in relation to the right of appeal in cases such as his, it must be noted that he has still available to him the possibility of an appeal to the Supreme Court in circumstances insofar as he can apply to the Supreme Court for leave to appeal the judgment and Order of the High Court pursuant to the Article 34.5.4 of the Constitution, subject to his meeting the applicable criteria for such application. As set out in *Pepper Finance Corporation (Ireland) DAC v. Cannon* [2020] IESC 2, the Supreme Court held that it retained jurisdiction, following the Thirty Third Amendment of the Constitution, to entertain an appeal if the criteria set out in Article 34.5.4 of the Constitution are satisfied: namely that the decision involves a matter of "general public importance" and/or "the interests of justice" and that there are "exceptional circumstances" warranting an appeal. The decision in *Pepper* was recognised by Simons J. in *Zalewski v. Workplace Relations Commission* [2020] IEHC 178, as permitting the possibility of an appeal to the Supreme Court notwithstanding that there is no appeal from a decision of the High Court under the 2015 Act.

**67.** As put by Simons J. at para. 41:



*“First, the jurisdiction previously exercised by the rights commissioners and the Employment Appeals Tribunal has now been transferred, in effect, to the adjudication officers and the Labour Court. Secondly, the right of appeal to the Circuit Court has been removed. There is a right of appeal against a decision of the Labour Court to the High Court on a point of law, and the decision of the High Court in relation thereto shall be final and conclusive. (This is subject to the possibility of petitioning the Supreme Court for leave to appeal: Pepper Finance Corporation v. Cannon [2020] IESC 2).”*

**68.** The decision of the Supreme Court in *Zalewski* ([2021] IESC 24) did not demur in regard to the possibility of a party, post the “final and conclusive” decision of the High Court, petitioning the Supreme Court for leave to appeal.

**69.** Insofar as Mr. Hosford, in his written submissions, requests the guidance of this Court on the appropriateness of his petitioning the Supreme Court for leave to appeal the decision of the High Court, he must appreciate that this Court has no function in that regard: any such application is for Mr. Hosford to pursue, should he be so minded and the consideration of any such application is entirely a matter for the Supreme Court pursuant to Article 34.5.4 of the Constitution.

### **Summary**

**70.** For the reasons set out above, I am satisfied that the objection taken by the Department to this Court’s jurisdiction to determine Mr. Hosford’s appeal from the decision of the High Court is well founded. Accordingly, this Court has no jurisdiction to hear or determine the appeal Mr. Hosford has lodged.

**71.** As Mr. Hosford has been wholly unsuccessful in relation to the preliminary issue which the Court was asked to determine, it would appear to follow that the Department is entitled to recover the costs of the preliminary issue against him. If either party wishes to

contend for a different order they will have liberty to apply to the Court of Appeal Office within 21 days and a brief hearing will be arranged on the issue of costs. If no application is made within fourteen days by either party, then the order the Court proposes will become operative. If a hearing is requested and results in an order in the terms I have suggested, the party that requested it may be liable for the additional costs of such hearing.

**72.** As this judgment is being delivered electronically, Ní Raifeartaigh J. and Pilkington J. have indicated their agreement therewith and the orders I have proposed.