APPROVED **[2021] IEHC 133**

THE HIGH COURT

2020 No. 161 MCA

BETWEEN

PASCAL HOSFORD

APPLICANT

AND

IRELAND
THE ATTORNEY GENERAL
MINISTER FOR SOCIAL PROTECTION
MINISTER FOR PUBLIC EXPENDITURE AND REFORM
MINISTER FOR BUSINESS ENTERPRISE AND INNOVATION

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 3 March 2021

INTRODUCTION

1. This judgment is delivered in respect of an application to strike out the within proceedings as being irregular in form and as representing an abuse of process. The proceedings have been commenced by way of notice of motion, notwithstanding that the proceedings are not of a type for which an originating notice of motion is permitted under the Rules of the Superior Courts.

2. The applicant is a retired civil servant who had previously worked in what is now known as the Department of Social Protection. In these proceedings, the applicant seeks to agitate for two broad categories of declaratory relief as follows. The first category relates

to two incidents in a long running employment dispute between the applicant and the Department. These incidents involved the making of deductions to the applicant's pay and pension on the occasion of his retirement in 2019; and the reassignment of the applicant within the Department for a period of time in 2013.

3. The second category of relief sought consists of declaratory orders to the effect that the applicant and members of the Houses of the Oireachtas would have *locus standi* to pursue proceedings in respect of the treatment of company directors for social insurance purposes. It should be explained that this is not an issue which affects the applicant personally. The applicant had, however, been employed for a time in a managerial role within the section of the Department which dealt with this issue. The applicant says that it came to his attention in this role that certain classes of company director were (allegedly) being improperly characterised as self-employed for social insurance purposes.

4. The respondents contend that all of the above issues have previously been agitated by the applicant, before the Workplace Relations Commission and before the High Court, respectively. It is further contended that the present proceedings fail to disclose any reasonable cause of action, and are an attempt to reopen matters already decided (*res judicata*).

5. One of the principal issues for determination in this judgment is whether it represents an abuse of process for the applicant to pursue his employment grievances in the present proceedings in circumstances where those grievances are in one instance, pending before the Labour Court, and, in the other, the subject of an unappealed judgment of the High Court.

PROCEDURAL HISTORY

6. The present proceedings have their immediate genesis in a complaint made by the applicant to the Workplace Relations Commission in December 2019. As explained below, however, the underlying dispute between the applicant and his former employer has been ongoing for a much longer period of time.

7. The applicant is a retired civil servant who had worked in the Department of Social Protection ("***the Department***") until 1 November 2019. The essence of the complaint to the Workplace Relations Commission had been that the Department had acted unlawfully in making certain deductions from the applicant's pay and pension on the occasion of his retirement. These deductions were made in purported recovery of what the Department maintains was an overpayment of a form of sick pay to the applicant for a period of some four months (25 February to 14 June 2019). The sum involved is €8,866.30. The deductions had been applied to monies owing to the applicant in respect of accrued non-statutory annual leave (€2,163.70) and to the applicant's lump sum pension payment (€6,702.60).

8. The complaint to the Workplace Relations Commission had been the subject of an initial determination by an adjudication officer on 28 May 2020. The determination entailed two principal findings as follows. First, that the adjudication officer did not have jurisdiction under the Payment of Wages Act 1991 to investigate the complaint that the Department had acted unlawfully in making a deduction from the applicant's pension lump sum. This finding is based on the adjudication officer's understanding of the definition of "*wages*" under section 1 of the Act. Secondly, that the deduction applied to the pay in respect of the accrued non-statutory leave days had been lawful. The adjudication officer held that the Department had complied with the provisions of

section 5(5) of the Payment of Wages Act 1991 with regard to the recoupment of an overpayment of wages to the applicant.

9. The applicant has exercised his statutory right of appeal to the Labour Court against the determination of the adjudication officer. As part of his appeal papers, the applicant has filed a very detailed submission dated 3 July 2020, running to some nine pages. The position adopted by the applicant in this submission is that the adjudication officer and the Labour Court have full jurisdiction to determine his complaint (including the pension aspect). The applicant also contends that any deduction from wages must be "*fair and reasonable*" having regard to all the circumstances. It is said that the deductions were made in breach of the applicant's legitimate expectations, and that the Department had not indicated an intention to make such deductions when issues in respect of the applicant's pay came before the Workplace Relations Commission previously in the context of an earlier complaint.

10. The appeal is pending before the Labour Court, and is listed for hearing on 16 March 2021. (The hearing will be a "*virtual*" or "*remote*" hearing). The applicant confirmed to me that he intends to pursue this appeal, and will be participating at the hearing on 16 March 2021.

11. The within proceedings were commenced by issuing a notice of motion out of the Central Office of the High Court on 21 July 2020. This was done within a matter of weeks of the applicant having submitted his appeal to the Labour Court on 3 July 2020. As discussed under the next heading, the within proceedings are irregular in form.

12. The notice of motion seeks four declaratory orders. Two of these cut against the legal issues arising in the appeal pending before the Labour Court. More specifically, the applicant seeks a declaratory order to the effect that the provisions of section 5(5) of the Payment of Wages Act 1991 are null and void. It is said, in particular, that the provisions

of the legislation are repugnant to the Constitution of Ireland and to the European Convention on Human Rights. Allied to this relief is a claim for a declaratory order that the Workplace Relations Commission and the Labour Court have jurisdiction to invalidate national legislation. The judgment of the Court of Justice of the European Union in Case C-378/17, *Minister for Justice and Equality v. Workplace Relations Commission* is cited as authority for this proposition.

13. Another one of the four reliefs sought in the notice of motion is also directed to what might be described as the long running employment dispute. This relief is directed to the events of September 2013 when the applicant had been reassigned within the Department. The applicant had sought to challenge the reassignment at the time by way of judicial review proceedings. These proceedings were dismissed by the High Court (Noonan J.) by reserved judgment delivered on 6 February 2015, *Hosford v. Minister for Social Protection* [2015] IEHC 59. The applicant did not appeal against this judgment.

14. The applicant now seeks declaratory relief in the present proceedings to the effect that the *submissions* made to the High Court on behalf of the Minister for Social Protection in the earlier judicial review proceedings are repugnant to EU law, repugnant to the Constitution of Ireland, and repugnant to the European Convention on Human Rights. More specifically, it appears from the grounding affidavit sworn by the applicant in the present proceedings that the gravamen of his complaint is that the pleas and submissions made on behalf of the Minister in the earlier judicial review proceedings, to the effect that a decision to reassign a civil servant does not attract constitutional justice nor an obligation to state reasons, are incorrect as a matter of law.

15. The fourth and final declaratory relief sought in the present proceedings is directed to the issue underlying "*protected disclosures*" which the applicant had made pursuant to the Protected Disclosures Act 2014. In brief, it is the applicant's long held belief that the

treatment of certain types of company directors for social insurance purposes is erroneous. More specifically, the applicant alleges that certain proprietary company directors, i.e. directors who hold a particular proportion of the shareholding of the company, were improperly characterised as being self-employed rather than as employees of the relevant company. On his interpretation, a significant number of directors have been paying social insurance contributions at the incorrect rate. The implication being that the companies involved have not paid the proper employer contribution and that the directors involved will not have an entitlement to certain social insurance benefits. This is an issue which the applicant says came to his attention in the course of his employment in the relevant section of the Department which dealt with the treatment of company directors. The applicant regards himself as a "whistle-blower".

16. Significantly, the declaratory relief sought in the present proceedings is confined to a declaration to the effect that the applicant or, alternatively, a member of the Houses of the Oireachtas, would have *locus standi* to pursue a legal challenge. No relief is sought in respect of the substance of the matter. The applicant explained at the hearing before me that he intends to issue separate proceedings against the members of the Houses of the Oireachtas, and this appears to be the rationale underlying the declaratory order sought at paragraph D(2) of the notice of motion

17. The respondents issued a motion on 18 November 2020 seeking to have the present proceedings struck out and/or dismissed on the grounds *inter alia* that they are procedurally irregular, represent an abuse of process, are frivolous and vexatious and disclose no reasonable cause of action. The motion came on for hearing before me on Monday, 22 February 2021 and I reserved judgment to today's date. In preparing this judgment, I have had regard to the oral submissions; to the written submissions of both parties (which in the applicant's case are set out in a document entitled "*Established*

Law"); and to a short email sent by the applicant to the Registrar the day following the hearing. As requested, I have also had regard, insofar as relevant, to the applicant's written submission of 11 December 2020 to the Court of Appeal in other proceedings.

DETAILED DISCUSSION

FORM OF PROCEEDINGS IS IRREGULAR

18. The applicant has purported to institute these proceedings by issuing a notice of motion out of the Central Office of the High Court. The form of proceedings is irregular. Proceedings may only properly be instituted by way of an originating notice of motion in those limited categories of cases where this is prescribed under the Rules of the Superior Courts or under legislation. The present proceedings do not come within any of those categories.

19. The principal claims which the applicant seeks to advance (paragraphs (A) and (C) of the notice of motion) are ones which should properly have been brought by way of an application for judicial review under Order 84 of the Rules of the Superior Courts. This is because the proceedings are directed primarily to an *ongoing* statutory decision-making process pursuant to the Payment of Wages Act 1991, as carried out by an adjudication officer and the Labour Court pursuant to the procedures prescribed under the Workplace Relations Act 2015. The present proceedings are concerned with public law issues in that they seek declaratory relief as to the nature and extent of the statutory jurisdiction being exercised under the Workplace Relations Act 2015. They also relate to the nature and extent of the rights enjoyed by the applicant in his (former) role as a civil servant.

20. (As explained presently, the other two declaratory reliefs sought (paragraphs (B) and (D) of the notice of motion) are ones which would fall to be struck out irrespective of the form in which they were brought).

21. The applicant emphasises that he is representing himself without the benefit of legal representation, and invites the court to "correct" any procedural irregularities. The applicant relies in this regard on the judgment of Ryan J. (then sitting in the High Court) in *Bennett v. Egan* [2011] IEHC 377, to the effect that a court has to be careful in dealing with a lay litigant to ensure that a defect in procedural steps does not shut out a genuine claim. This is, of course, an important consideration. There are, however, limits to a court's discretion to condone non-compliance with procedural requirements. The objective of the Rules of the Superior Courts is to safeguard the rights of all parties to litigation. The constitutional right of access to the courts is not the prerogative of one side alone. It also entails a right to fair procedures in the defence of proceedings. Whereas a court may show some indulgence to a party, such as the applicant, who chooses to represent themselves in proceedings, this cannot be done to the detriment of the rights of the other parties. A court must protect the procedural rights of the opposing parties, and, relevantly, must uphold the principle of the finality of litigation. This is so even in proceedings brought by a litigant in person.

22. It should also be observed that the applicant is highly educated (holding a professional qualification in accountancy) and had occupied a managerial role in the civil service. The applicant has experience of litigation, having previously represented himself in judicial review proceedings (issued in 2013), and in a statutory appeal to the High Court against a decision of the Labour Court (issued in 2019). Tellingly, the proceedings taken by the applicant in 2013 were in the form of judicial review proceedings and thus the

applicant had been on notice of the requirement to apply for leave to pursue an application for judicial review when he instituted the present proceedings in July 2020.

23. The approach to be taken to procedural irregularities is addressed as follows under Order 124 of the Rules of the Superior Courts.

> 1. Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.
>
> 2. No application to set aside any proceeding for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.
>
> 3. Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion.

24. As appears, the courts have a wide discretion as to how to treat non-compliance with the Rules of the Superior Courts. This discretion must be informed by the overriding imperative of advancing the interests of justice and ensuring that all sides' constitutional right of access to the courts is properly respected. The factors to be considered in the exercise of this discretion include (i) the nature and extent of the breach of the Rules of the Superior Courts; (ii) whether the breach has caused prejudice to the other party(s) to the proceedings; and (iii) the purpose which the particular rule which has been breached is intended to achieve.

25. I have carefully considered whether it might be possible to salvage at least some of the reliefs sought in these proceedings, notwithstanding their irregular form. For the reasons which follow, however, I have concluded that the proceedings cannot be remedied because of the prejudice this would cause to the respondents' procedural rights.

26. The failure to go by way of judicial review proceedings is no mere technical defect. It is not simply a matter of *"a heading on a piece of paper",* as glibly stated by the applicant.

Rather, it represents an abuse of process in that it has allowed the applicant to avoid the necessity of having to comply with the safeguards put in place to ensure that a public authority is not subject to frivolous or vexatious litigation. Had the applicant gone by way of judicial review, it would have been mandatory for him first to obtain the leave of the court to apply for judicial review. This would have entailed the applicant having to satisfy the court that he had arguable or stateable grounds; that the application had been made within the three month time-limit; and that there was not an adequate alternative remedy available to the applicant by way of statutory appeal. It would also have been necessary for the applicant to join the Workplace Relations Commission and/or the Labour Court to the proceedings.

27. These safeguards would have been especially important in this case. Leave to apply for judicial review would inevitably have been refused in circumstances where the applicant has not only invoked his statutory right of appeal to the Labour Court, but is actively pursuing that appeal. (*Buckley v. Kirby* [2000] IESC 18; [2000] 3 I.R. 431). No proper explanation has ever been provided as to why the applicant should not be required to exhaust this right of appeal before having recourse to the High Court. The applicant can advance his interpretation of the Payment of Wages Act 1991 before the Labour Court, and the Labour Court has jurisdiction under Part 4 of the Workplace Relations Act 2015 to refer a question of law arising in the proceedings before it to the High Court for determination. Even in the absence of such a reference, the applicant himself will have a statutory right of appeal to the High Court against the decision of the Labour Court on a point of law.

28. (The applicant must be taken to be cognisant of his right of appeal in circumstances where he has, in fact, previously invoked the statutory right of appeal in *other* proceedings which he has taken. The High Court (Meenan J.) delivered a reserved judgment on the

matter, *Hosford v. Department of Employment Affairs and Social Protection* [2020] IEHC 138. The Court of Appeal is to rule presently on a preliminary issue as to whether it has jurisdiction to entertain an appeal against that judgment).

29. It is instructive to contrast the position of the applicant in the present proceedings with that of the applicant in *Zalewski v. Adjudication Officer* [2019] IESC 17; [2019] 2 I.L.R.M. 153. Mr Zalewski sought to challenge the constitutional validity of the decision-making machinery provided for under the Workplace Relations Act 2015. A preliminary issue arose as to whether Mr Zalewski had a "sufficient interest" to maintain his constitutional challenge in circumstances where the respondents had conceded that the decision of the Workplace Relations Commission should be set aside on narrow, non-constitutional grounds. The Supreme Court held that Mr Zalewski was entitled to pursue his constitutional challenge. Having challenged the Workplace Relations Commission Act 2015, he was not required to pursue his claim for the payment of unpaid wages under a statutory scheme which he contended to be inconsistent with the Constitution of Ireland.

30. By contrast, the applicant in the present proceedings maintains the position in his statutory appeal that the Labour Court has full jurisdiction to determine his complaint, and that this jurisdiction extends to the setting aside, if necessary, of any conflicting provisions of the Payment of Wages Act 1991. The applicant has not sought to challenge the constitutionality of the decision-making procedures under the Workplace Relations Act 2015. Having regard to this history, the applicant is obliged to exhaust his procedural rights under the decision-making mechanisms provided for under the Workplace Relations Act 2015. These mechanisms allow for recourse to the High Court, by way of a reference of a question of law or by way of an appeal on a point of law.

31. In summary, the breach of the Rules of the Superior Courts involved in this case is a fundamental breach which goes to the heart of the proceedings. It is a breach which has undoubtedly caused prejudice to the respondents in that, as explained, it has deprived them of the procedural protections which the judicial review procedure under Order 84 is intended to vouchsafe.

32. There is no countervailing prejudice to the applicant. The applicant is not being precluded from having recourse to the High Court, rather it is the *timing* of such access that is being regulated. As explained earlier, there are two mechanisms by which the matter can come before the High Court from the Labour Court, i.e. a reference by the Labour Court or an appeal by the unsuccessful party. Moreover, it is open, in principle, to the applicant to challenge the validity of the Payment of Wages Act 1991 thereafter in the event that the Labour Court does not accept his interpretation of the legislation.

33. Finally in this regard, it should be emphasised that this judgment does not entail any finding on the underlying merits of the applicant's arguments as to the interpretation or validity of the Payment of Wages Act 1991. This judgment is confined to finding that the manner in which the applicant has sought to agitate these issues in these proceedings is, having regard to the particular circumstances, an abuse of process.

ORDER 84: LIMITS TO PROCEDURAL FLEXIBILITY

34. For the reasons set out under the previous heading, I have concluded that not only are the present proceedings irregular in form, they also represent an abuse of process. In reaching this conclusion, I am mindful that the rigid distinction between public law and private law proceedings endorsed by the House of Lords in *O'Reilly v. Mackman* [1983] 2 A.C. 237 does <u>not</u> apply in this jurisdiction. It is not the position, therefore, that public law proceedings must always be brought by way of an application for judicial

review pursuant to Order 84. It is, in principle, open to an individual to go by way of plenary proceedings in certain cases. There are, however, a number of aspects peculiar to the present proceedings which indicate that the matter could only properly be pursued by way of judicial review.

35. The leading judgment on the procedural requirements governing public law proceedings is that of the Supreme Court in *Shell E & P Ireland Ltd v. McGrath* [2013] IESC 1; [2013] 1 I.R. 247 ("***Shell E & P Ireland***"). The judgment confirms that the approach adopted by the High Court in *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 ("***O'Donnell***") is correct. There, Costello J. had held that Order 84 does not provide an *exclusive remedy* in matters of public law where an aggrieved person wishes to obtain a declaratory order. Costello J. further held that the apprehension that plenary actions would be used as a device to defeat the protections given by Order 84 was not a real danger, and did not justify the conclusion that proceedings by plenary action for declaratory relief against public authorities must be an abuse of process.

36. Crucially, however, the judgment emphasises that the procedural safeguards provided under Order 84 apply, by analogy, to plenary actions. The judgment had been concerned principally with whether the time-limits under Order 84 could be applied by analogy. However, Costello J. did advert to *other* aspects of the judicial review procedure including the requirement to apply for leave. It was stated that the court could determine, on a motion to try a preliminary issue in a plenary action, whether an application was so frivolous or vexatious or so devoid of merit that leave would never have been granted and so stay the plenary action. Equally, the question of whether a plaintiff had a "sufficient interest" could be determined as a preliminary issue in a plenary action, and were the court to conclude that the plaintiff had no standing, then the court could dismiss

the proceedings as it would have done had an application for judicial review been brought.

37. The judgment in *Shell E & P Ireland* had also been concerned with time-limits. The Supreme Court ultimately held that the Order 84 time-limits applied, by analogy, to a *counterclaim* which had been made in plenary proceedings.

38. The judgment contains some general observations as to the importance of adopting the correct form of procedure. See, in particular, paragraph 43 of the reported judgment as follows.

> "[…] It would make a nonsense of the system of judicial review if a party could by-pass any obligations which arise in that system (such as time limits and the need to seek leave) simply by issuing plenary proceedings which, in substance, whatever about form, sought the same relief or the same substantive ends. What would be the point of courts considering applications for leave or considering applications to extend time if a party could simply by-pass that whole process by issuing a plenary summons?"

39. The following additional observations were made at paragraph 47 of the reported judgment.

> "In addition it may well be that there is an underlying principle behind both the jurisprudence in this jurisdiction and that of the United Kingdom. It may well be that a party should not be able to gain an unfair advantage in litigation by means of adopting a particular procedure as the vehicle for that party's claim. There are, of course, sound reasons of policy why there are different types of procedures for different types of cases. Sometimes the reasons why different procedures are followed in different types of cases stem from underlying differences in the types of cases concerned which warrant a different procedural approach. It may well be that a party who seeks to avoid the legitimate procedural requirements applicable to a particular type of case by deploying the procedural device of bringing proceedings in an unusual or atypical way (even if such a process is not prohibited) may find that the courts are understandably reluctant to allow such an advantage to be taken. However, it is again, in my view, unnecessary to reach any concluded views on any such underlying principle so as to be able to resolve this case."

40. The above observations are, strictly speaking, *obiter dicta*. Nevertheless, the judgment in *Shell E & P Ireland* does suggest that whereas a degree of procedural flexibility is

allowed, there are limits. There will be some cases where the failure to go by way of judicial review will represent an abuse of process. I am satisfied that the present proceedings are such a case. This is because these proceedings seek to cut across proceedings taken by the applicant himself pursuant to the statutory adjudication process provided for under the Workplace Relations Act 2015. The applicant elected to pursue his grievances in respect of the deductions made to his pay and pension by making a complaint to the Workplace Relations Commission. The decision of first-instance went against him, and the applicant has not only invoked, but is actively pursuing, his statutory right of appeal to the Labour Court. The interaction between statutory appeals and legal proceedings is expressly addressed under Order 84. More specifically, Order 84, rule 20(6) provides that the High Court may adjourn an application for leave until an (administrative) appeal is determined or the time for appealing has expired. The case law also establishes that the existence of an alternative remedy by way of appeal is a factor which militates against the grant of leave to pursue judicial review proceedings. This is especially so where, as on the facts of the present case, the appeal has been actively pursued. (*Buckley v. Kirby* [2000] IESC 18; [2000] 3 I.R. 431).

41. The reasons for saying that judicial review is the appropriate form of procedure in the present case have been set out in greater detail above, and do not require to be repeated here. (See paragraphs 26 to 32 above).

42. The conclusion that the present proceedings should be struck out is predicated on a finding that it represents an abuse of process for the applicant to have by-passed Order 84 and, instead, to have commenced the proceedings by issuing a notice of motion. The same conclusion eventuates even if one were to assume that the form of the proceedings was regular. This is because the safeguards under Order 84 would continue to be relevant, albeit that they would apply by analogy only. As explained in *O'Donnell*, it is

open to a court to dismiss non-judicial review proceedings by analogy with the procedural requirements under Order 84. This can be done by way of a preliminary application. The present proceedings could equally have been dismissed on this alternative basis.

ABUSE OF PROCESS TO REAGITATE MATTERS WHICH ARE RES JUDICATA

43. The applicant has sought a declaratory order to the effect that the *position* which had been adopted by the Minister for Social Protection, in earlier judicial review proceedings taken by the applicant himself, is repugnant to the Constitution of Ireland and the European Convention on Human Rights. For the reasons set out below, this aspect of the present proceedings represents an abuse of process. This is because it entails an attempt to reagitate the very issues which had been determined against the applicant in the earlier judicial review proceedings and are *res judicata*.

44. The applicant had instituted judicial review proceedings in 2013 seeking to challenge a decision to assign him to a different role within the Department (High Court 2013 No. 805 J.R.). This reassignment had been short-lived, with the applicant being *further* reassigned some months later in June 2014 to a role with which he had been content. The judicial review proceedings were heard towards the end of January 2015, and the High Court (Noonan J.) delivered a reserved judgment on 6 February 2015, *Hosford v. Minister for Social Protection* [2015] IEHC 59.

45. The applicant did not pursue an appeal against this judgment to the Court of Appeal. The applicant explained, at the hearing before me last week, that an accommodation had been reached between the parties at the time whereby the respondents agreed not to enforce a costs order against the applicant. The High Court had made a costs order against the

applicant on 6 February 2015, but the parties subsequently applied on 16 March 2015 to have the costs order vacated.

46. It is evident from paragraph (B) of the notice of motion in the present proceedings that the applicant now seeks to reagitate the precise issue which had been determined against him in the earlier judicial review proceedings. The issue is the extent, if any, to which a decision to reassign a civil servant attracts the full panoply of fair procedures under the Constitution of Ireland and under the European Convention on Human Rights. This precise issue has been determined, in the context of the reassignment of the applicant within the Department in 2013, as follows by the High Court (Noonan J.) in *Hosford v. Minister for Social Protection* [2015] IEHC 59 (at paragraph 19).

> "The applicant accepts that he was and remains liable to transfer at the sole discretion of the respondent. It could not realistically be suggested that every decision to reassign a civil servant to different duties engages the Constitutional and Convention rights and that the party thereby affected must be afforded fair procedures including for example the right to make submissions or be given reasons. That would be evidently absurd. There is clearly a range of decisions in the context of employment that may be taken which are merely administrative or managerial in nature and do not give rise to such rights or which are amenable to judicial review. The position may be different where the decision complained of is disciplinary in nature and involves the imposition of a penalty or perhaps dismissal. On occasion, a civil servant may not like being transferred from one role to another but that is an incident of the job and not a matter for judicial review. It is debateable whether there is any public law element arising in such circumstances."

47. The applicant seeks to get around the fact that this issue is *res judicata* by purporting to challenge the correctness of the pleadings filed, and submissions made, on behalf of the Minister for Social Protection in those earlier proceedings. Put otherwise, rather than attack the judgment head-on, the applicant seeks instead to criticise the pleadings and submissions which the opposing side made in the judicial review proceedings in which the judgment had been delivered. With respect, this attempt to treat the pleadings and submissions made by one side in proceedings as reviewable in their own right, separate

from the actual findings of the High Court, is entirely artificial. The simple fact of the matter is that the proposition which the applicant seeks to advance, namely that the transfer or reassignment of a civil servant attracts a particular level of fair procedures, is one which he argued unsuccessfully before the High Court in the earlier proceedings. The issue has been determined against him. It is contrary to the principle of *res judicata*, and an abuse of process, for the applicant to seek to relitigate the issue.

48. It should be noted that, on the day following the hearing before me, the applicant sent a short email to the Registrar assigned to this case. This email sought to add to the applicant's submissions on this point. Tellingly, the gist of the email was to the effect that the High Court's judgment in the earlier proceedings contains errors of law, and that it had been a "*personal impossibility*" for the applicant to have appealed the judgment at the time for financial reasons. Put otherwise, the applicant now directly criticises the judgment itself, rather than the submissions which led to that judgment.

49. All of this simply reinforces my conclusion that the present proceedings are an abuse of process in that the ambition of same is to reagitate matters which have been rendered *res judicata* by the judgment in the earlier proceedings. The abuse of process is all the greater in that the applicant had avoided having to pay the costs of the earlier proceedings by agreeing not to pursue an appeal. The applicant cannot approbate and reprobate. Having taken the benefit of the agreement on costs, the applicant cannot seek to use the present proceedings to challenge the very findings which he agreed not to appeal.

NO REASONABLE CAUSE OF ACTION DISCLOSED

50. Turning now to the fourth declaratory order sought, this discloses no reasonable cause of action. The applicant is seeking, in effect, a freestanding declaration that he has *locus standi* to pursue an unspecified complaint as to the treatment of certain proprietary

company directors for social insurance purposes. No substantive relief is sought, and there is no meaningful attempt to identify the decision(s) sought to be challenged, nor even the underlying legislation which it is alleged has been misapplied in practice.

51. As counsel for the respondents correctly submits, the question of whether an individual has *locus standi* or a sufficient interest to pursue a legal challenge cannot be determined in the abstract. This would be the antitheses of the approach set out in the established case law since *Cahill v. Sutton* [1980] I.R. 269, and most recently affirmed by the Supreme Court in *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49; [2020] 2 I.L.R.M. 233.

52. The objective of a *locus standi* requirement is to ensure that proceedings have "*the force and urgency of reality*" (see page 283 of the reported judgment in *Cahill v. Sutton*). This objective applies not only to constitutional challenges, but also applies *mutatis mutandis* to judicial review proceedings. (*Grace v. An Bord Pleanála* [2017] IESC 10).

53. The case law indicates that, in some instances, an individual will be entitled to pursue proceedings in the public interest, notwithstanding that he or she does not have a direct personal interest in the outcome. Crucially, however, a case-specific inquiry will be necessary to assess whether standing can be asserted on this basis. In particular, it will be necessary to consider the grounds of challenge advanced and the underlying legislative scheme; and to examine whether there might be other individuals better qualified to pursue the proceedings. See, for example, the assessment of the position of the two co-applicants in *Grace v. An Bord Pleanála*.

54. It follows, by definition, that the question of *locus standi* cannot be determined in the abstract, divorced entirely from the legal issues which it is sought to ventilate. Put shortly, irrespective of the form of the proceedings, it is impermissible to seek a freestanding declaration that a person has *locus standi*.

55. These considerations have an added importance in the present case given that the limited papers filed by the applicant do not indicate whether his concerns are confined to the legislative regime as it stood prior to the enactment of the Social Welfare and Pensions (Miscellaneous Provisions) Act 2013. This legislation expressly addresses the position of proprietary company directors, i.e. a director who is either (a) the beneficial owner of the company, or (b) able to control 50 per cent or more of the ordinary share capital of that company. If the applicant is concerned principally with the pre-2013 Act legislative regime, then any legal proceedings may well be out of time.

56. The applicant has also sought a declaratory order to the effect that any member of the Oireachtas has *locus standi* to refer questions of law "*to the Superior Courts for the full legal guidance and to clarify principles*". It seems from the submissions made by the applicant at the hearing before me that this second declaration is considered by him to be relevant to a further set of High Court proceedings which he intends to issue in short course against members of the Houses of the Oireachtas. Again, this relief is inadmissible and does not disclose any reasonable cause of action. It is not permissible to seek a freestanding declaration in respect of *locus standi*. This is especially so where what is sought is a declaration that a third party has *locus standi*. The applicant is not entitled to assert a right on behalf of a third party (*jus tertii*).

CONCLUSION AND FORM OF ORDER

57. For the reasons set out in detail herein, I have concluded that the within proceedings are irregular in form and represent an abuse of process. This court will, accordingly, make an order dismissing the within proceedings in their entirety.

58. In summary, the reliefs sought at paragraphs (A) and (C) of the notice of motion are ones which could only properly be sought by way of an application for judicial review pursuant to Order 84 of the Rules of the Superior Courts.

59. The relief sought at paragraph (B) represents an abuse of process because it entails an attempt to reagitate the very issues which had been determined against the applicant in the earlier judicial review proceedings and are *res judicata*. (*Hosford v. Minister for Social Protection* [2015] IEHC 59).

60. The declaratory relief sought at paragraphs (D)(1) and (2) discloses no reasonable cause of action. This court cannot grant a freestanding declaration to the effect that either the applicant or a member of the Oireachtas has *locus standi* to pursue unspecified proceedings.

61. It should be reiterated that this judgment does not entail any finding on the underlying merits of the applicant's arguments as to the interpretation or validity of the Payment of Wages Act 1991. This judgment is confined to finding that the manner in which the applicant has sought to agitate these issues in these proceedings is, having regard to the particular circumstances, an abuse of process.

62. Insofar as the allocation of costs is concerned, the attention of the parties is drawn to the notice published on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

63. The default position under Part 11 of the Legal Services Regulation Act 2015 is that a party who has been "*entirely successful*" in proceedings is *prima facie* entitled to costs against the unsuccessful party. The court retains a discretion, however, to make a different form of costs order.

64. The starting position, therefore, is that the respondents are *prima facie* entitled to an order for costs in their favour in that they have been entirely successful, and the proceedings have been dismissed. My *provisional* view is that an order of costs should be made in favour of the respondents as against the applicant. The proposed costs order would include all reserved costs and the costs of the written legal submissions. If the applicant wishes to contend for a *different* form of costs order, he should notify the respondents' solicitor accordingly; and both sides should then file written legal submissions within two weeks of today's date. Such submissions are not to exceed 2,000 words.

Appearances

The applicant represented himself as a litigant in person
Sarah-Jane Hillery for the respondents instructed by the Chief State Solicitor

Approved
Garrett Simons