

**THE HIGH COURT**

[2022] IEHC 326

[2021/223 MCA]

**BETWEEN**

**REGINALD CARROLL**

**APPELLANT**

**AND**

**THE RESIDENTIAL TENANCIES BOARD**

**FIRST NAMED RESPONDENT**

**AND**

**TERRY ROLAND AND MARGARET ROLAND**

**SECOND NAMED RESPONDENTS**

**JUDGMENT of Ms. Justice Bolger delivered on the 31<sup>st</sup> day of May, 2022**

**Introduction**

1. This an appeal by a tenant pursuant to s. 123 of the Residential Tenancies Act 2004 (as amended) against a determination order issued by the first named respondent (hereinafter referred to as the “RTB”) dated 28 July 2021. For the reasons set out below, I am refusing the

appellant's appeal and any relief pursuant to s.123 (5). The determination of the RTB upholding the notice of termination stands.

2. In accordance with s. 123 (3) of the Act, any of the parties concerned may appeal to the High Court on a point of law. The appellant, who is a lay litigant, brought his appeal by notice of motion dated 23 August 2021 grounded on his affidavit. The parties filed several further affidavits as well as written legal submissions.

3. The appellant sought further relief by way of a notice of motion dated 18 February 2022 but that motion was not properly issued, and therefore not properly before this Court. I have not considered that motion or the relief sought therein in this application.

4. The appellant seeks a number of irrelevant reliefs including discovery, an order quashing the seven-day notice and reinstating his Part 4 tenancy, and damages. However, s.123 only allows the court to cancel or vary the determination order that was made by the RTB. That is the sole remit of this Court.

### **Background**

5. On 1 March 2020, the appellant entered into a tenancy agreement with the second named respondents (hereinafter referred to as "the landlords") in respect of a property at Burtonport in Co. Donegal. On 18 January 2021, the landlords served a notice of determination on the appellant which cited six grounds for termination of the tenancy and gave a termination date of 28 January 2021. On 25 January 2021 the appellant applied to the RTB for dispute resolution, claiming that the notice of termination of 18 January 2021 was invalid. An adjudication hearing took place on 24 February 2021 which held against the appellant. The appellant appealed on 11 March 2021. The tenancy Tribunal hearing was

scheduled for 11 May 2021 and on that date the appellant was granted an adjournment to allow him an opportunity to compel the attendance of a Garda Steede. The hearing reconvened on 9 June 2021. On that day of the Tribunal hearing, Garda Steede attended but explained that he was precluded for operational reasons from giving any information to the Tribunal while a separate garda investigation of the appellant's complaint against his landlord was in progress. The appellant applied for an adjournment so that the outcome of the Garda investigation would be known and the evidence gathered would be available for submission to the Tribunal. The Tribunal refused this application and later set out its reasons for doing so in its report. The hearing continued on 9 June and some evidence was heard, and resumed for further evidence on 18 June 2021. The Tribunal made its determination on 23 June 2021 and notified the RTB. The RTB made its determination order on 28 July 2021. After the Tribunal had made its determination on the 23 June, the appellant wrote to the Tribunal by email dated 26 July 2021, to which he attached a letter he had received from the DPP dated 21 July 2021 which confirmed that his complaint to the Gardaí had been decided locally. The appellant claimed that this demonstrated that Garda Steede had lied to the Tribunal, and he asked that Garda Steede now be forced to comply with his subpoena, and that the Tribunal's decision be delayed until his evidence was given. The appellant also said that he had expected to receive a transcription from the audio recording of the hearing, and highlighted what he claimed was an anomaly between an initial and subsequent version of the landlord's statement. He thanked the Tribunal for a good hearing. By email dated 27 July 2021, the RTB confirmed that the Tribunal hearing had concluded, no further submissions could be furnished, and the case could not be delayed or reheard as the hearing that concluded on 18 June 2021 was the final Tribunal hearing in the matter.

### **Determination**

6. The Tribunal upheld the termination and in its report set out the background, the evidence heard, and its findings in respect of the six grounds identified in the notice of termination along with its reasons for those findings. Grounds 2 and 5 of the six grounds were upheld.

7. In respect of ground 2, the Tribunal made the following finding of fact: -

“The Tribunal has two accounts of the events that occurred in the early hours of 17 January 2021 at the house of Ms. Grace McDermott. The Tenant says that he went on foot to the house looking for his cat and that he had a torchlight. He said that he did not drive to the house but went on foot using a path on the bank that lies between the two houses. The witness, Ms. [Mc]Dermott says that she was awoken about 2:15am by her daughter screaming and shouting, and who said that the Tenant was driving around the house.

Regardless of the disagreement between the two accounts, it is common case that the Tenant went with a torch or drove the car headlights to the neighbour’s house at about 2:15am.

The Tribunal accepts the evidence of the neighbour that the behaviour of the Tenant did cause fear to a person living in the vicinity of the dwelling. The Tribunal is satisfied that this would cause fear to most people... [t]he Tribunal finds this behaviour to be anti-social behaviour as defined by section 17(1)(b) of the Act”.

8. In respect of ground 5, the Tribunal made the following finding of fact: -

“It is common case that the landlord’s wife took a space or shovel from the dwelling to her sister’s [neighbouring] house, but the Tenant went by a path

across the bank between the dwelling and the sister's house for the purpose of retrieving the spade, that he was carrying a garden fork or pitchfork and that the Landlord's wife dropped the spade.

The Tenant said in evidence that he wanted to retrieve the spade because it carried potential forensic evidence in relation to the altercation at the dwelling. The Landlord's wife appears to have taken the spade to remove it from the scene of the altercation because she considered it to be a weapon that had allegedly been used in that altercation.

The Tribunal considers that the evidence of the Landlord's wife who is coherent and logical and fits with the uncontroversial facts mentioned above. While the tenant may have felt that he needed to retrieve the spade for the reason set out above, it did not justify him threatening the Landlord's wife with a fork and putting her in great fear.

The Tribunal finds that the Tenant acted in a threatening manner against the Landlord's wife putting her in great fear as she had no refuge and her husband the Landlord was some distance away. The Tribunal finds that no other interpretation could possibly be put on the actions of the Tenant other than this. The Tribunal finds this behaviour to be antisocial behaviour as defined by Section 17(1)(b) of the Act".

### **The court's jurisdiction pursuant to s. 123**

9. This is a statutory appeal on a point of law, the principles of which have been set out in a number of decisions including *Deely v. The Information Commissioner* [2001] 3 IR 439 and *Fitzgibbon v. Law Society* [2015] 1 IR 516. More recently O'Malley J. in *Petecel v.*

*Minister for Social Protection* [2020] IESC 25 emphasised the narrow scope of this type of appeal.

10. In *Fitzgibbon*, Clarke J. (as he then was) set out how errors of law might arise in a determination or in how a decision maker reached their conclusions, such as the lack of any evidence to support a finding, or an inference being drawn on facts which no reasonable decision maker could have drawn. Clarke J. referred to the high degree of deference to be paid by an appellate body to a decision of a first instance body on the facts.

11. The only decision to which the applicant referred in his submissions was that of Barrett J. in *Marwaha v. RTB* [2016] IEHC 308 in which Barrett J. summarised four key principles as to the court's role in an appeal under s. 123 as follows: -

- “1) The court is being asked to consider whether the Tenancy Tribunal erred as a matter of law (a) in its determination, and/or (b) its process of determination;
- 2) The court may not interfere with first instance findings of fact unless it finds that there is no evidence to support them;
- 3) As to mixed questions of fact and law, the court (a) may reverse the Tenancy Tribunal on its interpretation of documents; (b) can set aside the Tenancy Tribunal determination on grounds of misdirection in law or mistake in reasoning, if the conclusions reached by the Tenancy Tribunal on the primary facts before it could not reasonably be drawn; (c) must set aside the Tenancy Tribunal determination, if its conclusions show that it was wrong in some view of the law adopted by it.

4) Even if there is no mistake in law or misinterpretation of documents on the part of the Tenancy Tribunal, the court can nonetheless set aside the Tribunal's determination where inferences drawn by the Tribunal from primary facts could not reasonably have been drawn".

12. Barrett J., quite correctly, warned that those principles do not fall to be applied in a vacuum and do not give the court what he referred to as "free-wheeling authority" to embark upon a consideration of the Tribunal's determination.

13. As well as citing the decision in *Marwaha*, the appellant referred in rather vague terms to the principle of constitutional fairness, Articles 6 and 14 of the European Convention of Human Rights, the principle of *audi alteram partem*, abuse of process, and the Victims' Rights Directive 2012/29. The appellant did not elaborate on how those principles and provisions were relevant to his case and simply requested the court to consider them "in the appropriate way".

#### **Was there an error of law in the Tribunal's determination?**

14. This Court can only make orders pursuant to s. 123(5) of the Act, cancelling or varying the determination, where it is satisfied that there is an error in the law that was applied in the determination, or an error in the process applied by the Tribunal. A finding of fact cannot be interfered with unless there was no evidence to support that finding, or a conclusion was drawn that could not have been drawn by any reasonable decision maker.

15. For the reasons I set out below, I do not consider the appellant has identified any such error in the determination, which is a lengthy and carefully considered analysis of the extensive evidence given to it, and a proper application of the relevant legal provisions. The

Tribunal acted fairly and properly in how it conducted the hearing. The appellant was given the opportunity to be heard and to cross-examine the landlord and the landlord's witnesses. Considered reasons were given by the Tribunal for its decision to refuse the second adjournment that the appellant sought.

### **Consideration of the appellant's ground of appeal**

16. In his pleadings, his written submissions, and his oral submissions the appellant repeatedly sought to review and analyse the evidence that was furnished to the Tribunal. It was clear that this was not done in order to demonstrate to this Court that findings were made without evidence to support them, but rather to try to avail of another opportunity to criticise the landlord, the landlord's wife, and the landlord's sister-in-law who lives in the adjoining property to the rented house. It seems that the appellant misunderstood the function of the s.123 appeal, and wanted to run an appeal on the merits of the findings made rather than an appeal based on identified errors of law.

17. The appellant's grounds of appeal were set out by him in his notice of motion and expanded upon in his written submissions, in which he outlined 24 points which he claimed identified the points of law on which he based his appeal. A number of those points were repetitions of each other. It seems to this Court that what the appellant claims to constitute errors of law can be grouped into ten points, each of which I examine below: -

#### **(i) The Tribunal's treatment of Garda Steede's evidence**

18. Garda Steede attended the second day of the Tribunal hearing after the Tribunal had adjourned the hearing on the first day, to allow him to be subpoenaed to give his evidence. When Garda Steede attended, he explained that he had spoken to his superior officer and that



it was not possible for him to answer questions in relation to an incident that occurred at the rented house on 17 January 2021, as he did not want to jeopardise a live investigation. He confirmed that he was not in a position to answer any of the 23 questions which had been posed by the appellant. The appellant applied for an adjournment so that the outcome of the investigation by the Gardaí would be known and evidence gathered by the Gardaí would be available for submission to the Tribunal. This application was refused and the Tribunal gave its reasons in its subsequent determination, which were that the Tribunal considered that any criminal investigation or proceedings were independent of the dispute resolution process carried out under the Act, and that the standards of proof, the level of formality and that the possible penalties were all different. Garda Steede stated that he did not witness the incident complained of and could not give evidence in relation to it other than to confirm that a complaint was made. He could not say whether the appellant's behaviour on 17 January 2021 constituted antisocial behaviour as defined in the Act. The Tribunal considered that the appellant's 23 questions for Garda Steede all related to the appellant's allegation of assault by the landlord, and not to the allegation of assault by the appellant (which was one of the grounds for the termination of his tenancy). The Tribunal considered that delaying the hearing would be unfair to the landlord.

**19.** Subsequent to the finalisation of the Tribunal hearing, the appellant received a letter from the DPP dated 21 July 2021, in which it was confirmed that the appellant's complaint was decided locally. The appellant contends that this letter showed that Garda Steede had perjured himself in his evidence to the Tribunal on the 9 June 2021.

**20.** The letter of 21 July 2021 does not mean that Garda Steele perjured himself. At the time, Garda Steede appeared before the Tribunal, where he said that the issues on which he was to be asked to give evidence were the subject of a live investigation and for that reason,

he could not give the Tribunal any information on it. The fact that a decision was made that some point prior to 21 July 2021 to deal with it locally is not inconsistent with what Garda Steede stated to the Tribunal on 9 June 2021.

**21.** The Tribunal refused the adjournment sought by the appellant, which was the second adjournment he had sought and the first that had been refused. The Tribunal set out their reasons for refusing the adjournment in their determination. The Tribunal is entitled to determine their own procedures as long as they do so within their legal and statutory powers and duties, and act fairly in doing so. I see no basis for criticising the reasons given for refusing the adjournment. I note that the appellant did not challenge the refusal of the adjournment until he received the letter of 21 July 2021. Given that I do not accept the appellant's contention that the letter is evidence of Garda Steede's perjury, and that the Tribunal's involvement was, by that point in time, at an end, there is no basis for criticising the Tribunal's decision to refuse the adjournment.

**22.** The appellant has not established any error of law in the Tribunal's treatment of Garda Steede's evidence or its decision to refuse the adjournment sought by the appellant on 9 June 2021.

**(ii) Analysis and consideration of the evidence given**

**23.** The criticisms made by the appellant of the Tribunal's analysis of the evidence, and conclusions it drew from it are too numerous to list here. He is particularly critical of the Tribunal's failure to consider what he claims were injuries caused to him by the landlord's wife, of the Tribunal ignoring (as he claims) photographs of those injuries, and of failing to consider what he maintained were untruths told by her and by her sister, Ms. McDermott. It is

clear from the Tribunal's determination that they did not share the appellant's negative view of either Ms. Roland or Ms. McDermott in that, for example, they described Ms. Roland as having given evidence which was "coherent and logical and fits with the uncontroversial facts". They accepted Ms. McDermott's evidence that the appellant's behaviour "did cause fear to a person living in the vicinity of the dwelling. The Tribunal is satisfied that this would cause fear to most people".

**24.** I consider it significant that the relevant findings made by the Tribunal on which the notice of termination was upheld, namely grounds 2 and 5, were both based on what was common case evidence between the parties, and not on the many conflicts in the evidence presented to the Tribunal. The findings were not based on any injuries that the appellant says he sustained.

**25.** In the Tribunal's finding on ground (2), the Tribunal relied on Ms. McDermott's evidence and made the following finding of fact: -

"The Tribunal has two accounts of the events that occurred in the early hours of 17 January 2021 at the house of Ms. Grace McDermott. The Tenant says that he went on foot to the house looking for his cat and that he had a torchlight. He said that he did not drive to the house but went on foot using a path on the bank that lies between the two houses. The witness, Ms. [Mc]Dermott says that she was awoken about 2:15am by her daughter screaming and shouting, and who said that the Tenant was driving around the house.

Regardless of the disagreement between the two accounts, it is common case that the Tenant went with a torch or drove the car headlights to the neighbour's house at about 2:15am.

The Tribunal accepts the evidence of the neighbour that the behaviour of the Tenant did cause fear to a person living in the vicinity of the dwelling. The Tribunal is satisfied that this would cause fear to most people... [t]he Tribunal finds this behaviour to be anti-social behaviour as defined by section 17(1)(b) of the Act”.

**26.** In relation to ground 5 the Tribunal made the following finding of fact: -

“It is common case that the landlord’s wife took a spade or shovel from the dwelling to her sister’s [neighbouring] house, but the Tenant went by a path across the bank between the dwelling and the sister’s house for the purpose of retrieving the spade, that he was carrying a garden fork or pitchfork and that the Landlord’s wife dropped the spade.

The Tenant said in evidence that he wanted to retrieve the spade because it carried potential forensic evidence in relation to the altercation at the dwelling.

The Landlord’s wife appears to have taken the spade to remove it from the scene of the altercation because she considered it to be a weapon that had allegedly been used in that altercation.

The Tribunal considers that the evidence of the Landlord’s wife who is coherent and logical and fits with the uncontroversial facts mentioned above. While the tenant may have felt that he needed to retrieve the spade for the reason set out above, it did not justify him threatening the Landlord’s wife with a fork and posting her in great fear.

The Tribunal finds that the Tenant acted in a threatening manner against the Landlord’s wife putting her in great fear as she had no refuge and her husband the

Landlord was some distance away. The Tribunal finds that no other interpretation could possibly be put on the actions of the Tenant other than this. The Tribunal finds this behaviour to be antisocial behaviour as defined by Section 17(1)(b) of the Act”.

27. In relation to the finding on ground 2, I note that the appellant, both in his evidence to the Tribunal and in his submissions to this Court, confirmed his attendance at Ms. McDermott’s home without permission at 2 a.m. on the 17 January 2021. In relation to the finding on ground 5, he confirmed he was carrying a pitchfork at the time of that incident. The findings made and conclusions drawn by the Tribunal were based largely on undisputed evidence and/or were reasonably open to them and/or were not findings that no reasonable decision maker could have made.

28. The appellant has failed to identify any error of law in the Tribunal’s analysis of the evidence, the conclusions drawn therefrom, or the findings made.

**(iii) The burden of proof**

29. The Tribunal applied the balance of probabilities standard of proof to the evidence it heard. Whilst the appellant contended that this fell short of the burden the Tribunal should have applied, he did not identify any basis, whether in legislation or case law, why the Tribunal should or could have been authorised to apply, for example, the criminal standard of beyond a reasonable doubt. The appellant relied on an extract from the Board’s website in which reference is made to its guidelines and the “high burden of evidentiary proof” required for a notice of termination. The reference to that is not inconsistent with the application of the balance of probability burden applicable to most civil litigation. Whilst the Tribunal did not

apply the “beyond reasonable doubt” burden and would not have been correct to have done so, there is nothing in their determination to suggest that they did not properly apply a high burden of evidentiary proof to the evidence. I note, again, that much of the findings made by the Tribunal upholding grounds 2 and 5 of the notice of termination were based on common case evidence and not on conflicting evidence.

30. The appellant has not identified any error of law in the Tribunal’s approach to the burden of proof in assessing the evidence it heard and the findings it made.

**(iv) Cross-examination of the landlord and his witnesses**

31. The appellant claims that he was treated unfairly in not being permitted to cross – examine the landlord and his witnesses on oral evidence and statements furnished to the adjudication.

32. The transcript of the hearing before the Tribunal confirms that the appellant was permitted to cross-examine the landlord and his two witnesses on the second and third days of the hearing. The appellant was repeatedly told by the Tribunal that they were considering a *de novo* hearing, and would not have regard to evidence given at the adjudication. In so doing, the Tribunal acted properly and in accordance with their legal and statutory duties and obligations, as confirmed by the decision of Baker J. in *Teniola v. RTB* [2014] IEHC 604 at para. 25 where she stated:

“The adjudicator has considerable flexibility in approach as is evident from s. 97 of the Act which enables him or her to offer assistance to the parties at stages in the process, and the legislation envisages that the adjudicator would govern his or her process. I note also from the provisions of s. 97(5) that the adjudicator may

look to whether certain procedural decisions by him would be of "practical benefit" to the parties and in respect to which he may offer assistance. This points to a legislative intent that the adjudication process be informal, and the adjudicator is given wide discretion with a view to achieving a degree of informality consistent with his obligation to arrive at an impartial result. The legislation must in my view be interpreted in such a way that the court ought not to require the degree of formality or process at the adjudication stage that would be afforded at the Tribunal appeal, or in a court. The discretion of the adjudicator on an application to adjourn the hearing must be seen in this context”.

33. The approach adopted by the Tribunal is also supported by the decision of Barr J. in *Stulpinaite v. RTB and Whelan* [2021] IEHC 178, where, at para. 7, he stated: -

“The right to cross-examine witnesses that may be called against a person is a fundamental right. However, it only arises where a person has given evidence at the hearing. One cannot have a free standing right to cross-examine people who are not called to give evidence at the substantive hearing”.

34. The appellant has not established any error of law in the Tribunal’s management of his cross-examination of the landlord and his witnesses.

(v) **The Tribunal’s treatment of the four grounds in the notice of termination not upheld by it**

35. Four out of the six grounds in the notice of termination were not upheld by the Tribunal. The appellant contends that the remaining two grounds (2 and 5) which were

upheld could not, therefore, have been viewed by the Tribunal as credible and were tainted by the Tribunal's decision not to uphold the other four grounds.

36. This argument was based on the appellant's suspicions and on conjecture and was not grounded by him on any legal authority. It is common for a decision maker to uphold some complaints made and decline to uphold others, for whatever reason. There is no legal basis to contend that once a decision maker decides that one or more complaints of a number made should not be upheld, that all complaints must then fall. That would represent an unfair balancing of the rights of a complainant and the person against whom the complaints are made.

37. The appellant has not identified any error of law in the Tribunal's treatment of the four grounds in the notice of termination not upheld by it.

(vi) **The Tribunal allowing the landlord to replace an initial statement with an amended version**

38. The landlords submitted an initial statement which included personal details in relation to Ms. McDermott and her medical condition. They sought to replace that statement with an amended version as there were concerns in relation to Ms. McDermott's rights to privacy and GDPR rights. The appellant claimed the alterations in the second statement went much further and that this was a further example of the preferential treatment that the Tribunal afforded to the landlord and his witnesses.

39. There is no basis for criticising the Tribunal permitting a statement, which included personal medical information about a witness, to be replaced with one that more properly affords the witness appropriate confidentiality about their medical situation. Even if the



appellant was correct in his suspicions about the unnecessary amendments made in the second statement (and I make no such finding), he had ample opportunity to deal with any “additional” evidence in his cross–examination of that witness.

40. The appellant has not established any error of law in the Tribunal’s decision to permit the replacement of the initial statement.

(vii) **The Tribunal’s treatment of Ms. McDermott’s evidence**

41. The appellant seeks to identify an error of law in the Tribunal’s treatment of Ms. McDermott’s evidence and the relevance of her illness. He refers in his notice of motion to her been “supposedly ill”, which he challenges on the basis of her apparently swimming in the sea the week before the hearing and engaging in light-hearted conversation with a solicitor. He seems to suggest that the Tribunal treated Ms. McDermott’s evidence differently and in an unduly lenient manner because of her illness.

42. I emphasise, again, that the Tribunal’s findings in relation to ground 2, insofar as they were based on Ms. McDermott’s evidence, were based on what was common evidence between her and the appellant and not on the evidence that was in conflict between them. Therefore, even if the appellant is correct in his suspicion that the Tribunal treated Ms. McDermott differently because of her illness (and I do not see anything indicative of that in the transcript), the appellant can rest assured that this did not prejudice him, given that the findings made against him were based on his own evidence and on Ms. McDermott’s undisputed evidence, i.e. that he attended without permission at her home at 2 a.m. with a bright light and caused her to feel intimidated.

43. The appellant has not identified an error of law in the Tribunal's treatment of Ms. McDermott's evidence.

(viii) **Trespass**

44. The appellant contends that the Tribunal erred in law in defining trespass as criminal trespass only.

45. The Tribunal made no finding relating to trespass. The grounds identified in the notice of termination were claimed to constitute antisocial behaviour as defined in s. 17 (1) (b) of the Act as follows: -

“(a) engage in behaviour that constitutes the commission of an offence, being an offence the commission of which is reasonably likely to affect directly the well-being or welfare of others,

(b) engage in behaviour that causes or could cause fear, danger, injury, damage or loss to any person living, working or otherwise lawfully in the dwelling concerned or its vicinity and, without prejudice to the generality of the foregoing, includes violence, intimidation, coercion, harassment or obstruction of, or threats to, any such person, or

(c) engage, persistently, in behaviour that prevents or interferes with the peaceful occupation—

(i) by any other person residing in the dwelling concerned, of that dwelling,

(ii) by any person residing in any other dwelling contained in the property containing the dwelling concerned, of that other dwelling, or

(iii) by any person residing in a dwelling (“neighbourhood dwelling”) in the vicinity of the dwelling or the property containing the dwelling concerned, of that neighbourhood dwelling”.

46. The Tribunal considered the evidence and concluded that two of the six grounds in the notice of termination established that the appellant had engaged in antisocial behaviour as defined in the relevant section.

47. The appellant has not established an error of law in relation to the Tribunal’s application of the evidence to that statutory definition.

**(ix) Recording**

48. The appellant claims to have been unfairly and unlawfully treated in not having had an audio recording of the hearing made available to him.

49. There is no legal obligation on the respondent to provide the parties with an audio recording of a hearing. Support for this can be garnered from the decision in *Fitzgerald v. O’Donnabháin & Ors* [2017] IESC, where the Supreme Court refused to grant an appellant leave to issue judicial review on the grounds that the proceedings were not recorded.

O’Donnell J. stated: -

“Even allowing for the fact that there is a low threshold for the grant of leave for judicial review, there does not appear to be any stateable ground for a declaration on a right to digitally record public proceedings prior to the introduction of the Digital Audio Recording (DAR) system”.

53. The appellant has not identified an error of law in relation to his access to a recording of the hearing.

(x) **Bias**

50. The appellant made several allegations of bias against the Tribunal which he seems to contend was motivated by his English nationality, thereby attributing xenophobia and/or racism to the members of the Tribunal. There is nothing in the transcript to support the appellant's suspicions. The fact that the Tribunal upheld 2 of the 6 grounds levelled against him in the notice of termination does not in itself evidence bias.

51. There is a high test of bias, as confirmed recently by the decision of Meenan J. in *Delaney v. PIAB* [2022] IEHC 85. At para. 10 Meenan J. cited Denham C.J. in *Goode Concrete v. CRH plc* [2015] 3 I.R. 493, in which she considered a number of earlier authorities: -

“(18) In *Bula Ltd v. Tara Mines Ltd* (No. 6) [2000] 4 I.R. 412 at p. 441 I stated:—

‘It is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test — it invokes the apprehension of the reasonable person’.

(19) In *Kenny v. Trinity College Dublin* [2007] IESC 42, [2008] 2 I.R. 40 Fennelly J. stated at p. 45 that the test had been described authoritatively in *Bula Ltd v. Tara Mines Ltd* (No. 6) [2000] 4 I.R. 412, in the words quoted above”.

Denham C.J. also cited the following passage from the judgment of Fennelly J. in

*O'Callaghan v. Mahon* [2008] 2 I.R. 514: -

“(551) ...

(a) objective bias is established, if a reasonable and fair minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts, reasonably apprehends that there is a risk that the decision maker will not be fair and impartial;

(b) the apprehensions of the actual affected party are not relevant;

(c) objective bias may not be inferred from legal or other errors made within the decision making process; it is necessary to show the existence of something external to that process;

(d) objective bias may be established by showing that the decision maker has made statements which, if applied to the case at issue, would effectively decide it or which show prejudice, hostility or dislike towards one party or his witnesses”.

52. The appellant falls well short of establishing anything that could constitute evidence of objective or actual bias.

(xi) **The Tribunal's refusal to engage with the appellant's submissions following the end of the hearing**

53. The Tribunal made its determination on 23 June 2021 and in accordance with s. 108(1), notified the Board of that determination. The Tribunal's role at that point in time had come to an end.

54. The appellant wrote to the Tribunal by email dated 26 July 2021 requesting them to take further steps. The Tribunal responded by email dated 27 July 2021 confirming that the Tribunal had concluded and that further submissions could not be furnished.

55. The Tribunal's conduct in this regard was consistent with its powers and duties pursuant to s. 108 of the Act.

56. The appellant has identified no error of law in the Tribunal's refusal to accept further submissions from him at a point in time when the hearing had concluded

### **Conclusions**

57. For the reasons I have set out above, I am satisfied that the appellant has not identified any error of law in the respondent's determination. The appellant's appeal is disallowed and the determination of the Board stands.

### **Indicative costs**

58. Given that the appellant has failed to establish any error of law on which the determination of the Tribunal could be challenged, and has failed in his attempt to have the determination cancelled or varied, it seems to me on an indicative basis that the RTB is entitled to their costs of defending this appeal. Again, on an indicative basis, I do not consider that the second named respondents are entitled to their costs (although I note that they were lay litigants and may therefore not have incurred any significant cost), as I do not consider it was necessary for them to participate in the appeal as they could have relied on the defence put forward by the board. In that context, I have had regard to the decision of Baker J. in *Doyle v. RTB* [2016] IEHC 36 which seems to support the view that the costs of the notice

party should not be allowed unless there was good reason for them to participate and there was something additional that they had to contribute:-

“13... I consider that the costs of a notice party are not necessarily always to be treated as costs which ‘follow the event’, and the matter of costs will depend on the degree of participation of the notice party and whether that was justified

...

19... I consider the question to be whether the notice party is a necessary party as a litigant, and accordingly the question is not merely one of whether a notice party had legitimate financial or economic interests to protect, as nearly all notice parties will be in that position, but whether it had interests to protect which were different from those of the Tribunal

...

28. I can, it seems to me, distinguish the judgment of Clarke J. in *Usk and District Residence Association Ltd v. Environmental Protection Agency* because the reason why costs were granted to Greenstar, the notice party in that case, was that Greenstar had a particular and unique interest in the details of the result of the case which concerned the manner in which a waste facility was to be operated, and Greenstar's engagement was of a unique degree having regard to the importance of those details.

29. I conclude that the receiver was not a necessary party in these proceedings as a litigant, and that the interests which the receiver sought to protect coincided with those of the PRTB, and, insofar as a different emphasis was sought to be applied to certain arguments or facts, the approach of the PRTB might have been usefully informed by pre-litigation engagement between the receiver and PRTB”.

**59.** If any of the parties disagree with this indicative view on costs, I will allow them an opportunity to make oral submissions to me and I will fix 15 June at 10 a.m. for that purpose, along with any other submissions in relation to final orders to be made. I will also hear any submissions the parties wish to make about the costs that were reserved from the interlocutory injunction application. If either party wishes to make written submissions to me (which I am not directing but they are free to do so if they wish), these should be furnished to the other side and lodged with the court one week before the date on which the matter is back before this Court.