

**THE HIGH COURT**

**[2022] IEHC 335**

**[Record No. 2021/188 MCA]**

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 46 OF  
THE WORKPLACE RELATIONS COMMISSION ACT, 2015**

**AND IN THE MATTER OF THE PROTECTED DISCLOSURES ACT  
2014**

**BETWEEN:**

**TOM NOLAN**

**APPELLANT**

**AND**

**FINGAL COUNTY COUNCIL**

**RESPONDENT**

**JUDGMENT delivered by Ms. Justice Siobhán Phelan on the 2<sup>nd</sup> day of June, 2022**

**INTRODUCTION**

1. This application come before the Court by way of an appeal on a point of law pursuant to s. 46 of the Workplace Relations Commission Act, 2015 [hereinafter “the 2015 Act”] from a decision of the Labour Court made on the 5<sup>th</sup> of July, 2021 [hereinafter “the Decision”] in connection with a claim brought by the Appellant pursuant to the provisions of the Protected Disclosure Act, 2014 [hereinafter “the 2014 Act”].

2. The appeal was uncontested by the Respondent who is the Appellant’s employer. There was no appearance from the statutory notice parties to the appeal.

3. Section 46 provides for an appeal on a point of law taken by a party to proceedings before the Labour Court and the decision of the High Court in relation thereto “*shall be final and conclusive*”. In determining this appeal on a point of law, I have heard submissions from the Appellant only.

4. This appeal is concerned with the proper interpretation of “*relevant wrongdoing*” as defined by s5(3) of the 2014 Act, having regard to the terms of the exemption as provided for under s. 5(3).

## **BACKGROUND**

5. The factual background is undisputed. In summary, the Appellant was successful in an internal competition for the post of Acting Grade 7 in or about September 2013. From his appointment and until the matters the subject of complaint to the WRC arose, he was responsible for Traveller housing issues. It is claimed that he had an unblemished work history and had never been subject to discipline or criticism by his employer. In the course of 2017 and 2018, however, he claimed to have been subjected to harassment and intimidation from a number of service users both at his place of work and outside his place of work in connection with his work role. These included being approached and threatened, not least being visited at his home. The Appellant reported these incidents to his line manager and it is the Appellant’s case that his reporting of these matters constituted a protected disclosure within the meaning of the 2014 Act.

6. The response of the Respondent to the Appellant’s report was to transfer him to a different role at a different location. In consequence of this transfer the Appellant’s position was downgraded to Grade 6, which the Respondent referred to as his “substantive post” as he was no longer acting up in the Grade 7 position. It was the Appellant’s case as referred to the Workplace Relations Commission [hereinafter “the WRC”] that the Respondent’s response to his protected disclosure constituted penalisation within the meaning of the Act of 2014.

7. The Appellant’s complaint to the WRC was couched in the following terms:

*“I was promoted to a Grade 7 position in the Traveller Housing Section, Fingal CC in 2013. This was and ins a very challenging role and section. I was subject to harassment, intimidation and threatening behaviour as part of my role dealing with the public. I notified my employer of a number of particularly bad incidents of harassment and threatening behaviour in late 2018. Following this notification, I was removed from the section where I was working for 5 years approximately and subsequently I was*

*demoted to Grade 6 (Senior Staff Officer). I did not request this demotion and/or relocation. This was against my wishes. I was informed of this change of role /demotion by email. As a result of that demotion, my pay is significantly less and I have lost out on pension increments.....I disclose information which showed that wrongdoings (as defined under s. 5(3) of the Protected Disclosure Act, 2014) had occurred, were occurring and were likely to occur. In particular Section 5(3)(a) and (d) in that regard. In summary these wrongdoings were acts of harassment, threats and intimidation to which I was subject to by certain service users of the Travellers Housing Section. It is clear from the facts that arising from my valid Protected Disclosure to my supervisors/managers and not any other reason, I was demoted (to Grade 6) and transferred (to a different section) and I have accordingly suffered significant detriment and penalisation”*

8. In addition to proceedings under the 2014 Act, the Appellant also commenced proceedings pursuant to the provisions of the Protection of Employees (Fixed Term Work) Act 2003, the Terms of Employment (Information) Act 1994 and the Payments of Wages Act 1991. None of the latter claims are before me and they remain outstanding before the Labour Court.

9. The matter first came on for hearing before an Adjudication Officer of the WRC in July 2019 and the parties made written submissions, as is normal practise. The Adjudication Officer issued his determination on 14<sup>th</sup> August 2020. In respect of the protected disclosure claim he found that the matters reported by the Appellant did not amount to protected acts and in those circumstances, he did not have to consider the question of penalisation under the legislation and accordingly the complaint failed. In relevant part of the Decision, the WRC stated:

*“Upon consideration of the relevant legislation and aforementioned case law, I find that the aforementioned traumatic incidents endured by the Complainant were not committed by the Respondent or its servants or agents but by a third party who were effectively end users outside of the workplace. I have not been persuaded nor has any evidence been adduced or submitted that satisfied me that protected disclosures can be made in relation to actions by a third party/end user outside of the workplace as in the circumstances of this particular case.”*

**10.** The matter was appealed by the Appellant to the Labour Court and again in accordance with the practise of that Court both parties made written submissions. Of its own motion the Labour Court invited supplemental submissions from the parties in respect of two decisions of the High Court identified as relevant to issues arising on the appeal, namely *Power v. HSE* [2019] IEHC 462 (Allen J.) on the question of fixed term contracts and *Baranya v. Rosderra Irish Meats Group Limited* [2020] IEHC 56 (O'Regan J.) on the protected disclosure issue. The parties both elected to make further written submissions.

**11.** It was the Appellant's case before the Labour Court that the matters he reported to his superiors constituted "*relevant wrongdoings*" as defined in the 2014 Act and that his report constituted the giving of "*relevant information*". Of note, the Appellant did not invoke the internal protected disclosure procedure when making his complaint, but the Appellant contended that it nonetheless constituted a protected disclosure. It was further disputed by the Respondent that the Appellant had made a protected disclosure within the meaning of the 2014 Act because it was contended that none of the complaints related to acts or omissions of the employer or any of its officers or employees. It was argued that the Appellant made no allegations of any nature that the Respondent or its personnel had engaged in conduct that meets any of the listed "*relevant wrongdoings*". The Respondent's position might be summarised as being that the complaints did not constitute protected disclosures because they were reported under the Respondent's Health and Safety Framework and not the Respondent's Protected Disclosure policy and because they did not disclose relevant information in relation to wrongdoing by an employer.

**12.** During the course of the hearing and during the course of the submissions, including the submissions requested directly by the Labour Court, no reference was made by either of the parties or by the Court to the relevance of Section 5(5) of the 2014 Act. Arguments were instead advanced as to whether or not the Appellant was required to make a protected disclosure only in accordance with the Respondent's Protected Disclosure Procedure, whether the disclosure being made by the Appellant constituted a grievance and related matters. While the Labour Court adjourned the fixed term contracts claim pending final decision on appeal in *Power v. HSE*, it proceeded to deal with the protected disclosure issue.

**13.** Although the manner in which the complaint was made outside of the Respondent's internal Protected Disclosure Procedures was the subject of submission before the WRC and

the Labour Court, it was not relied upon in the Decision of the Labour Court under appeal and therefore will not be addressed further in this judgment. Further, whether the change in the Appellant's working terms and conditions constituted penalisation within the meaning of the Act was not determined by the Labour Court and is not a question upon which this I express any view. Ultimately, as apparent from the terms of its decision, the Labour Court determined the case on the basis of its interpretation of Section 5(5) of the 2014 Act.

**14.** Counsel on behalf of the Appellant submitted before me that given the central role it played in its decision, it was remiss of the Labour Court to not expressly invite the parties to make submissions in respect of s. 5(5) of the 2014 Act. In the event, it appears that neither the Appellant nor the Respondent addressed submissions to the question of the proper interpretation of the scope "*relevant wrongdoing*" for the purposes of s. 5(3) having regard to the terms of s. 5(5) of the 2014 Act which is the now the issue which comes before me on this appeal on a point of law.

## **STATUTORY PROVISIONS**

**15.** It is implicit in the Long Title to the Protected Disclosure Act, 2014 that it was intended that the Act would make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest. Be that as it may, s. 5 of the 2014 Act which defines a protected disclosure makes to reference to a disclosure in the public interest.

**16.** Indeed, the only substantive reference to the public interest investigation of a protected disclosure in the 2014 Act as enacted appears in s. 19 of the Act which amends the Garda Síochána Act, 2015 by vesting the Garda Síochána Ombudsman Commission (GSOC), a prescribed body in respect of An Garda Síochána, with a power to investigate protected disclosures if it appears desirable in the public interest to do so. Since its enactment, s. 5 has been amended by the introduction of a new s. 5(7A) which provides for a protected disclosure relating to the unlawful acquisition, use or disclosure of a trade secret (within the meaning of the European Union (Protection of Trade Secrets) Regulations 2018) provided that the worker has acted for the purposes of protecting the general public interest. There is otherwise no public

interest requirement provided for under s. 5 of the 2014 Act. The Supreme Court in *Baranya* has considered this issue in some detail.

17. The proper interpretation of s. 5 and specifically s. 5(5) is core to the within proceedings. It is prescribed as follows:

*“5. (1) For the purposes of this Act “protected disclosure” means, subject to subsection (6) and sections 17 and 18, a disclosure of relevant information (whether before or after the date of the passing of this Act) made by a worker in the manner specified in section 6, 7, 8, 9 or 10.*

*(2) For the purposes of this Act information is “relevant information” if—*

*(a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and*

*(b) it came to the attention of the worker in connection with the worker’s employment.*

*(3) The following matters are relevant wrongdoings for the purposes of this Act—*

*(a) that an offence has been, is being or is likely to be committed,*

*(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker’s contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,*

*(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*

*(d) that the health or safety of any individual has been, is being or is likely to be endangered,*

*(e) that the environment has been, is being or is likely to be damaged,*

*(f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,*

*(g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or*

*(h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.*

*(4) .....*

*(5) A matter is not a relevant wrongdoing if it is a matter which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer.*

*(6) ....*

*(7) ....*

*(7A) ....*

*(8) In proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is."*

**18.** It is apparent from the foregoing that "*relevant wrongdoing*" is widely defined and includes commission of criminal offences, failure to comply with legal obligations, endangering the health and safety of individuals, damaging the environment, miscarriage of justice, misuse of public funds, and oppressive, discriminatory, grossly negligent or grossly mismanaged acts or omissions by a public body.

**19.** Section 5 does not expressly require that any of these wrongdoings be caused by an act or omission of the employer but rather that the information comes to the worker's attention in connection with his or her employment. Section 5(5) operates to exempt particular matters from the scope of the Act by excluding matters which it is the function of the worker or the worker's employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer. Accordingly, even where it is the function of the worker or the worker's employer to detect, investigate or prosecute, the exclusion will not operate unless the information is not in relation to an act or omission on the part of the employer.

## **DECISION OF THE LABOUR COURT**

**20.** The Decision of the Labour Court records the background to the case, the Complainant's case and the Respondent's case and no issue was raised in this regard by the Appellant.

**21.** The Complainant's representative's submissions (which had been presented orally and in writing) were summarised as follows:

*“The Complainant's representative submitted that the Complainant had made a protected disclosure by raising the issues with his line manager and that the outcome of same was that he was moved and lost his allowance. The Complainant's representative submitted that in line with section 5(1) of the Act the Complainant had disclosed relevant information in the manner required. The fact that the Complainant had not titled his complaints a protected disclosure did not take from the fact that is what they were. The relevant wrongdoings were in line with section 5(3) and in particular 5(3)(a) and (d). In accordance with section 6(!) of the Act the Complainant had made a disclosure to his employer. It was his submission that the Complainant was penalised contrary to s. 12(1) of the Act.”*

**22.** The Decision records succinctly that the Respondent did not accept that the Complainant had made a protected disclosure or that he was penalised.

**23.** The Labour Court identified that the primary issue for it was whether the matters raised by the Complainant with his employers constituted a protected disclosure. It was only if they did that the Court would then be required to consider the question of penalisation. The Decision proceeds to refer to ss. 5(1), 5(2)(a), 5(3), 5(4) and 5(5) of the 2014 Act and continues in the operative part of the Decision to conclude that a protected disclosure had not been made in the following terms:

*“It was not disputed before the Court that the incidents reported did not consist or involve an act or omission on the part of the Employer. The position put forward by the Respondent was that they were Health and Safety issues which were unfortunately a hazard of the position the Complainant held and the department he was working in. The Complainant did not dispute that these were health and safety issues. However, it was their position that this did not prevent them from being protected disclosures in line with the Act. The Court would accept that the mere fact that an issue is a health*



*and safety issue cannot automatically mean that it is excluded from the protections of the Act. However, section 5(5) of the Act does provide that a matter is not a relevant wrongdoing if it is the function of the Respondent to investigate the wrongdoing. The parties both accepted that the wrongdoings complained of were a threat to the Health and safety of the Complainant and arose from the position he held within the Respondent's organisation. This raises the question as to whether these wrongdoings were something that it was the function of the Respondent to investigate. The Court notes that under the Safety, Health and Welfare at Work Act 2005 employers have a duty to provide a safe place and safe systems of work as far as is reasonably practicable for their workers. It appears to the Court that in order to meet that duty the Respondent would have to investigate any wrongdoing that threatened the Health and Safety of their workers as happened in this case. That being the case the Court determines that the issues in this case would fall within the parameters of section 5(5) of the Act as a matter the Respondent is required to investigate and therefore would not be a relevant wrongdoing."*

**24.** On the basis of the finding that the complaint did not relate to “*relevant wrongdoing*” as defined by the Act, the appeal failed. As is clear from the reasoning set out above, the conclusion of the Labour Court flowed directly and exclusively from its interpretation of s. 5(5) of the Act.

## **ISSUE OF LAW**

**25.** The fundamental issue in this appeal is whether the Labour Court erred in law in concluding in reliance on s. 5(5) of the 2014 Act that the complaint made by the Appellant did not constitute a “*relevant wrongdoing*” within the meaning of s. 5(3) of the 2014 Act.

**26.** The Appellant also complains that at no point in the exchange of submissions before the WRC or the Labour Court was any reference made by any party or by the WRC or by the Labour Court to s. 5(5) and submissions were never invited from the parties directed to the exclusion provided for in s. 5(5) and how it fell to be construed. In submissions, the Appellant identifies this failure as a breach of his right to fair procedures in the conduct of the proceedings.

27. Mr. Mallon BL on behalf of the Appellant accepts a fair procedures issue would normally be raised by way of judicial review proceedings but submits that the failure to invite submissions on an issue central to the decision might also be characterised as an error of law on the part of the Labour Court which could be addressed on a statutory appeal. In his submission before me, Mr. Mallon BL submitted that the absence of provision for the costs of successful legal challenges where no cause is shown by a *legitimus* contradictor, as in this case, makes the remedy of judicial review or a statutory appeal inaccessible. This was by way of explanation for not separately pursuing judicial review proceedings.

28. I accept that where a party is the victim of a failure by the WRC or the Labour Court to meet the requirements of fair procedures and constitutional justice in proceedings before them, the absence of provision to recover the legal costs in such cases may result in meritorious challenges not being taken. The impact this has on the question of the effectiveness or reality of judicial review as a remedy in such instances warrants serious and proper attention in an appropriate case. As the complaint articulated by Mr. Mallon BL in submissions is not an issue which arises for determination as a point of law on the appeal as pleaded, however, I refrain from further comment beyond noting his submission. I will confine myself in this judgment to the issue which squarely arises on the appeal as set out in the Notice of Motion.

## **DISCUSSION AND DECISION**

29. The Appellant's claim is based on the contention that the information he disclosed to his employer falls within at least two of the express heads identified in s. 5(3) specifically an offence within s.5(3)(a) on the basis that the individuals who harassed and abused the Appellant either had committed or were likely to commit an offence pursuant to the provisions of the Non-Fatal Offences Against the Person Act, 1997 and offences at common law and the endangerment of health or safety not only of the Appellant but of fellow workers was being or was likely to be endangered by the conduct under s. 5(3)(d).

30. Since the Decision of the Labour Court in this matter the Supreme Court has delivered judgement in *Baranya v. Rosderra Irish Meats Group Limited* [2021] IESC 77 on a leapfrog appeal from the decision of O'Regan J. in the High Court which the parties had

been referred to by the Labour Court. In the opening paragraphs of his judgment on behalf of the Supreme Court Hogan J. notes at para. 1:

*“Prompted, perhaps, by a succession of controversies affecting the public life of this State, the Oireachtas evidently considered that it would be desirable in the public interest that those who, with reasonable cause, draw attention to such perceived failings should enjoy a measure of protection against the risk of victimization in such circumstances. This is the general background to the Protected Disclosures Act 2014 (“the 2014 Act”). It seems implicit in both the Long Title to the 2014 Act and aspects of its general structure that the Oireachtas envisaged that most complaints for which protection is sought would relate to matters of general public interest. But, as we shall presently see, the actual definition of what may constitute a protected disclosure for the purposes of the 2014 Act is not so confined. Indeed, the 2014 Act also extends (albeit with certain exceptions) to complaints made in the context of private employment which are personal to the complainant, so that in effect it must be assumed that the Oireachtas considered that the disclosure of those complaints was, in general at least, also a matter of public interest.”*

**31.** The question presenting to the Court in *Baranya* was the question of whether a communication made by an employee to his supervisors constituted a “*protected disclosure*” for the purposes of s. 5 of the 2014 Act. The issue arose in circumstances where Mr. Baranya said that he was in pain and indicated to his supervisor that he wished for a change of role. It was disputed whether he added that the pain was a result of work. Three days later Mr. Baranya was dismissed. His employer maintained that he was dismissed because he had effectively walked off the production line without waiting for management to address his request to change jobs, whereas Mr. Baranya maintained that he had been dismissed because he had made a protected disclosure.

**32.** The complaint was first referred to an Adjudication Officer of the Workplace Relations Commission who rejected the complaint that the dismissal resulted wholly or mainly from having made a protected disclosure within the meaning of s. 5 of the 2014 Act drawing a distinction between a grievance and a protected disclosure. Mr. Baranya duly appealed that

decision to the Labour Court. In its determination the Labour Court found that the communication in question did not constitute a protected disclosure because it did not disclose any wrongdoing on the part of the employer but was in fact an expression of grievance and not a protected disclosure.

33. This finding was upheld by the High Court (O'Regan J.) in her judgment (*Baranya v. Rosderra Irish Meats Group Ltd.* [2020] IEHC 56) in which she found that the appellant had failed to establish any error of law on the part of the Labour Court. She concluded that the Labour Court had made a finding of fact that the communication alleged by Mr. Baranya to be a protected disclosure “*related to the fact that he wanted to change roles as he was in pain*” and that this communication therefore “*did not disclose any wrongdoing on the part of the respondent.*” Accordingly, in dealing with the various grounds of appeal set out in the notice of motion O'Regan J. concluded that (para. 1):

*“(1) The appellant has failed to demonstrate that the Labour Court misread or misinterpreted s.5 of the 2014 Act by requiring the appellant to state an allegation of a relevant wrongdoing. Section 5(2) defines relevant information as information in the reasonable belief of the worker, tends to show one or more of the relevant wrongdoings. That some information in the relevant communication, must attribute some act or omission, on the part of the respondent, that the appellant might reasonably believe tends to show one or more of the relevant wrongdoings is clearly necessary. In the absence of any asserted act or omission the concept of relevant information is not fulfilled in the instant communication as found by the Labour Court.*

*(2) The Labour Court did not determine that the appellant’s communication was a grievance “rather than” a protected disclosure. It stated that the communication was a grievance and not a protected disclosure. I accept that if the words “rather than” had been included this would possibly demonstrate a view on the part of the Labour Court that a grievance can never be a protected disclosure.*

*(3) The appellant has failed to demonstrate that the Labour Court in fact determined that the SI had an ability of amending the 2014 Act whether explicitly or implicitly.*

*(4) It seems to me abundantly clear that the Labour Court did in fact consider the initial asserted communication that the appellant made, however, having heard oral evidence and having regard to the documents before the Labour Court, the Labour Court found 9 that the communication made was more circumspect than asserted by the appellant and did not reveal any act or omission on the part of the respondent that might be considered any form of wrongdoing.*

*(5) The Labour Court specifically identified the entirety of s.5 of the 2014 Act including at para. (d), and there is no evidence adduced therefore by the appellant to suggest that the Labour Court failed to consider the full remit of s.5(3).*

*(6) The nature of the communication found to have been made by the appellant was that he wanted to change roles as he was in pain. The appellant has not demonstrated any error of law on the part of the Labour Court in placing significance on the fact that the appellant stated that he sought out the Health and Safety Officer of the respondent. If the appellant had been found to state, as was asserted by him, the cause of his pain was due to the work he had to perform, the appellant would not have been confined to making this assertion to the Health and Safety Officer only, but rather it would appear sufficient to make it some person for the purposes of drawing the assertion to the attention of his employer. Seeking out the Health and Safety Officer, having regard to the factual finding of the Labour Court of what the appellant actually said did not transform the appellant's statement, as found, into a protected disclosure."*

**34.** In addressing the question of what constitutes a “*protected disclosure*” for the purposes of the 2014 Act on appeal, the Court (Hogan J.) took as its starting point whether a complaint made by an employee to his or her employer about workplace safety is capable of being regarded as a protected disclosure for the purposes of the 2014 Act. He observed that the words “*worker*” and “*relevant wrongdoings*” had been given an extended meaning for the purposes of the legislation and he focussed on the definition of the term “*relevant wrongdoings*” in s. 5(3) of the 2014 Act stating (at paras. 25-28):

*“It is true that what may be termed the exclusionary provisions of s. 5(3)(b) – which I have taken the liberty of underlining - seek to exclude complaints which relate to the*

*worker's contract of employment. Taken on its own, this might suggest that purely private complaints which are entirely personal to the worker making the complaint fall outside the scope of the Act. But even here the apparent width of the statutory exclusion is deceptive and, at one level, ineffective. This may be illustrated by the following example. One may suppose that every contract of employment contains obligations regarding pay. It is, of course, clear from these highlighted words that an employee could not make a protected disclosure by means of a complaint in respect of any alleged contractual default on the part of an employer on any matter, including pay. Yet there seems no reason at all why a complaint made by an employee regarding an alleged failure on the part of an employer to comply with his or her statutory obligations regarding the mode and method of payment of wages under the Payment of Wages Act 1991 could not also be regarded – at least in principle – as a protected disclosure for the purposes of s. 5(3)(b) of the 2014 Act. To that extent, therefore, it might be said that s. 5(3)(b) did not achieve the objective it sought to achieve by excluding only contractual complaints which are personal to the employee concerned and it is, to that extent, anomalous.*

*26. It might be noted in passing that the UK Employment Appeal Tribunal had reached a similar conclusion in respect of the corresponding provisions of the UK legislation in *Parkins v. Sodexho* [2002] IRLR 109. There the Tribunal had concluded (at paragraph 16) that it could see “no real basis for excluding a legal obligation which arises from a contract of employment from any other form of legal obligation. It seems to us that it falls within the terms of the Act. It is a very broadly drawn provision.” As it happens, that legislation was itself amended in the United Kingdom by the Enterprise and Regulatory Reform Act 2013, so that protected disclosures must now clearly relate to the public interest, even if it is also the case that some complaints in relation to private contractual matters can nonetheless also be considered to be in the public interest: see here the judgments of Beatson and Underhill L.JJ. in *Chesterton Global Ltd. v. Verman* [2017] EWCA Civ 979. There is, incidentally, no legislation equivalent to the 2013 Act in this jurisdiction.*

*27. The point nevertheless is that many complaints made by employees which are entirely personal to them are nonetheless capable of being regarded as protected disclosures for the purposes of the 2014 Act. This is also true of complaints regarding*

*workplace safety under s. 5(3)(d), a point clearly illustrated by the sheer breadth of the language contained in the sub-section: “health or safety of any individual” ... “has been, is being or is likely to be endangered.”*

*28. It is perfectly clear from these words that the complaint does not have to relate to the health or safety of other employees or third parties: a complaint made by an employee that his or her own personal health or safety is endangered by workplace practices is clearly within the remit of the sub-section. Nor does the conduct in question necessarily have to amount to a breach of any legal obligation (although it would generally probably do so): it is sufficient that the employee complains that his or health or safety has been or is being or is likely to be endangered by reason of workplace practices, as this amounts to an allegation of “wrongdoing” on the part of the employer in the extended (and slightly artificial) sense in which that term has been used by s. 5(2) and s. 5(3) of the 2014 Act. It follows that a complaint made by an employee that his or her own personal health was being affected by being required to work in a particular manner or in respect of a particular task can, in principle, amount to a protected disclosure.”*

**35.** The Court noted the reliance placed by the Labour Court on the terms of the Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014)(Declaration) Order 2015 (SI No. 464 of 2015)(“the 2015 Code of Practice”) which distinguished between a grievance and a protected disclosure even though no such distinction is drawn by the 2014 Act itself and states that complaints specific to the worker in relation to duties, terms and conditions of employment, working procedures or working conditions are personal grievances which cannot amount to protected disclosures. Hogan J. considered that the 2015 Code of Practice erroneously misstated the law because (para. 36):

*“it is clear that purely personal complaints in relation to the issues of workplace health or safety can in fact be regarded as coming within the rubric of protected disclosures for the purposes of s.5(2) and s. 5(3) of the 2014 Act.”*

**36.** He added (at para. 39):

*“For my part I think that it is clear that the Labour Court relied on a code of practice which was, in at least two material respects, clearly wrong and (unfortunately) quite misleading. All of this led the Court to reach the conclusion that a purely personal complaint regarding workplace health or safety essentially fell outside the scope of the 2014 Act. The Court accordingly fell into legal error and on this ground alone the decision cannot be allowed to stand.”*

37. The Court then proceeded to consider whether the complaint made was capable of amounting to a protected disclosure noting that a complaint of pain on its own would not, without more, constitute a protected disclosure because it did not allege wrongdoing in the sense envisaged by s. 5(3)(d) of the 2014 Act. The Court observed that an employee might be in pain for any number of reasons which were unconnected with workplace health or safety. The Court then considered the context in which the complaint was made, however, noting that on one view of the evidence it might be said that a complaint that he was in pain could only realistically be linked to (an implied) complaint in respect of workplace health and safety, although this would ultimately be a matter for the Labour Court to assess. The Court concluded that in the *Baranya* case the issue for the Labour Court was first to ask what precisely did Mr. Baranya say and, second, to inquire whether, having regard to the general context of the words actually uttered, they amounted to an allegation of “*wrongdoing*” in the sense of both s. 5(2) and s. 5(3)(d) of the 2014 Act, i.e., did those words expressly or by necessary implication amount to an allegation tending to show that workplace health and safety was or would be endangered, even if that complaint was personal to him. The Court added (para. 43)

*“The allegation must, of course, contain such information – however basic, pithy or concise – which, to use the language of s. 5(2) of the 2014 Act, “tends to show one or more relevant wrongdoings” on the part of the employer: to adopt the words of Sales LJ regarding a parallel provision in the corresponding UK legislation, the disclosure must have “sufficient factual content and specificity” for this purpose: see *Kilraine v. Wandsworth LBC* [2018] ICR 1850 at 1861, even if it does merely by necessary implication.”*



**38.** Unfortunately, the judgment of the Supreme Court in *Barayana*, which has provided helpful clarification as to the correct interpretation of s. 5 of the 2014 Act, was not available when this matter came before the Labour Court. While the question before the Supreme Court in that case was not on all fours with the question in this case, the decision is relevant. Although not the basis for the decision of the Labour Court, the judgment makes clear that the 2014 Act does not differentiate between a grievance and a protected disclosure and that a protected disclosure can relate to a complaint as to health and safety in the workplace even though these are private matters which are personal to the employee.

**39.** As regards the s. 5(5) issue which lies at the heart of the Labour Court's decision in this case, it is noted that the employer in the *Barayana* case was a normal employer in the sense that it did not have a special or public law role in the detection, investigation or prosecution of wrongdoing. Like the Respondent in this case, however, it was subject to duties under the Safety, Health and Welfare at Work Act, 2005. In the case before me on appeal, the Labour Court accepted that the mere fact that an issue is a health and safety issue cannot automatically mean that it is excluded from the protections of the Act. This much is put beyond doubt by the very inclusion of s. 5(3)(d) as an express instance of relevant wrongdoing. It is, however, clear from the terms of its decision that the Labour Court relied on the fact that the parties both accepted that the wrongdoings complained of were a threat to the health and safety of the Complainant and arose from the position he held within the employer's organisation. The Labour Court found that as a result the employer had a duty to investigate, within the meaning of s. 5(5), consequent upon its duty to provide a safe place and safe systems of work under the Safety, Health and Welfare at Work Act 2005. It was for this reason that the Labour Court determined that the issues in this case would fall within the parameters of s. 5(5) of the Act as a matter which the Respondent is required to investigate and therefore would not be a relevant wrongdoing.

**40.** Counsel for the Appellant submits that were the Labour Court correct in its conclusion in this case that complaints regarding health and safety would fall outside the scope of the 2014 Act on the basis of a duty on the part of the employer to investigate as part of the general duty to provide a safe place and safe system of work, it would follow that the Supreme Court's findings in *Barayana* would be moot because the employer in that instance would similarly be bound to detect or investigate, if not prosecute. To this end, Counsel for the Appellant accepts that "to *detect*, to *investigate* or to *prosecute*" as these words are used in s. 5(5) are disjunctive

and it suffices to engage the application of s. 5(5) that one of the three functions i.e. to detect or to investigate or to prosecute, is present.

41. While I agree that the words “*to detect, to investigate or to prosecute*” fall to be interpreted disjunctively on a literal approach to the language used, I am not persuaded that Counsel for the Appellant is correct in his submission in reliance on *Barayana*. It seems to me that even on the Labour Court’s construction of the s. 5(5) exclusion in this case, that provision would not have applied to exclude the claim in the *Barayana* case. This is because if the complaint relates to workplace practices as it did in the *Barayana* case, then it would presumably consist of or involve an act or omission on the part of the employer and would therefore fall outside the exclusion in s. 5(5). While the complaint in *Barayana*, as described in the judgment, appears to have been referable to “*an act or omission on the part of the employer*” within the meaning of s. 5(5), the same cannot be said in this case. The acts complained of in this case are third party acts.

42. The potential significance of Hogan J.’s dicta in the Supreme Court judgment in *Barayana* at para. 43 of the judgment (quoted above) to the effect that the “*relevant information*” must contain an allegation which tends to show one or more relevant wrongdoings “*on the part of the employer*” was raised with Mr. Mallon BL during the course of the hearing, given that in this case the allegation of wrongdoing is not on the part of the employer. Mr. Mallon BL submitted that in this part of the judgment, Hogan J. was referring to the particular case before him which was concerned with whether an allegation had been made of pain *simpliciter* or of pain occasioned by work and therefore caused by the employer. He submitted that the reference to “*on the part of the employer*” in the *ratio* of the Court arose on the facts of the case because that was what the case was about. He submitted that it did not connote a finding by the Court that it was necessary that the wrongdoing be “*on the part of the employer.*”

43. Mr. Mallon submits that the suggestion that a wrongdoing must be on the part of the employer or one of its servants or agents is not supported by the wording of s. 5. Section 5(2) defines relevant information in a manner which does not entail a requirement that the worker show that the wrongdoing was caused by its employer, merely that it came to his or her attention in connection with his or her employment. It was also pointed that s. 5(3)(d), like other provisions of s. 5(3) makes no reference to the wrongdoing being that of an employer. This is undoubtedly the case. To read into s. 5(3)(d) a requirement that the endangerment to health

and safety of any person be caused by the employer in order to qualify as “*relevant wrongdoing*” would involve a manifest restriction of the scope of s. 5(3) achieved by the reading in of additional words which do not appear in the text as enacted.

44. In my view, I would impermissibly exceed my role in interpreting legislation were such a construction to be favoured by me. It seems to me to be to be wrong to interpret s. 5(3) on the basis that the “*relevant wrongdoing*” there described relates only to wrongdoing by an employer, recalling that s.5(3)(b) purports to exclude obligations arising under a contract of employment from the scope of “*relevant wrongdoing*” while s. 5(3)(d) provides in express for inclusion of the endangerment of the health and safety of any “*individual*” in a manner which appears to encompass employees and third parties. There is an obvious tension between these two provisions. The first seeking to exclude matters arising under a contract of employment from the scope of relevant wrongdoing and the other which appears clearly to encompass all health and safety matters, although these matters are normally considered to be encompassed within the contract of employment also. This same tension is alluded to by the Supreme Court in *Baranya* and they resolve the tension by interpreting the application of s. 5 widely.

45. Were one to read in a restriction into s. 5(3) of the 2014 Act limiting its application to wrongdoing on the part of an employer, it would significantly curtail the scope and ambit of the legislation in circumstances where, had the Oireachtas intended such a limitation, it could have expressly so provided. Restricting the scope of the legislation in this manner would not appear to reflect the statutory intention in providing for whistle-blower protection. The fact that the Oireachtas intended to make provision for far reaching protection of whistle-blowers is evident from s. 5(4) which provides that it is immaterial whether the relevant wrongdoing occurred in the State or elsewhere and s. 5(8) which provides that a disclosure is presumptively protected until the contrary is proved. However, whether “*relevant wrongdoing*” within the meaning of s. 5 is limited to wrongdoing which can be shown to be an act or omission of employer, which I consider doubtful, this is not precisely the question before me and I express no concluded view on it. The Labour Court did not determine that the 2014 Act does not protect disclosures of wrongdoing by third parties, rather it concluded that the subject matter was excluded from the scope of “*relevant wrongdoing*” because the Respondent was engaged in the detection, investigation or prosecution of the said wrongdoing within the meaning of s. 5(5) of the 2014 Act.

46. Turning then to the correct interpretation of s.5(5). As a limitation on the scope of the protection available under the 2014 Act, it falls to be narrowly construed. In essence it provides that if it is the worker's or the employer's role to detect, investigate or prosecute any wrongdoing and the wrongdoing reported relates to a person other than the employer, then it is not a wrongdoing for the purpose of the Act. An obvious example maybe where a member of An Garda Síochána reports wrongdoing by a person outside of An Garda Síochána. Such wrongdoing will not be covered by the 2014 Act where it relates to wrongdoing which it is the function of the Gardaí to detect, investigate or prosecute and as the wrongdoing will not have been committed by the employer. Another example might be a Revenue inspector who identifies wrongdoing during the course of an audit. A disclosure of relevant information in relation to such wrongdoing would not be a protected disclosure because it is the function of the Revenue to detect, investigate and prosecute revenue wrongdoings. Where the wrongdoing relates to practices within the Gardaí or the Revenue, however, s.5(5) will not serve to exclude from the scope of s. 5(2) relevant information in relation to those practices even though the disclosure is made by a member of An Garda Síochána or a Revenue official.

47. It seems to me that the Labour Court fell into error in construing the words "*to detect, to investigate or to prosecute*" widely as embracing general duties on an employer pursuant to an obligation to provide a safe place or safe system of work. While the words may have a disjunctive application, the manner in which they are associated with each other in s. 5(5) also informs their proper interpretation. The Respondent in this case has no role in the prosecution of health and safety omissions as described. In contrast both the Health and Safety Authority and An Garda Síochána may have. It seems to me that the language of "*function to detect, to investigate or to prosecute*" connotes either a public law role or at least an official role pursuant to a particular contractual obligation in detecting, investigating or prosecuting rather than a role which might be implied as arising from the general duties on an employer. Otherwise, s. 5(5) would render s. 5(3) entirely devoid of effect because an obligation to investigate wrongdoing in the workplace could be implied as a general duty of any employer. This cannot have been the statutory intention and the construction adopted by the Labour Court would substantially reduce the effectiveness of the 2014 Act.

## CONCLUSION

**48.** In summary, therefore, I would allow the appeal because it is my view that the Labour Court applied s. 5(5) on the erroneous basis that it excludes a complaint relating to health and safety which fell to be investigated by an employer. Interpreting s. 5(5) in a broad manner such as would exclude a complaint with regard to health and safety whether made against an employer or against a third party is an error of law which operates to defeat the purpose of s. 5(3)(d) which expressly provides for complaints in relation to the endangerment of the health and safety “*of any individual*”.

**49.** I would accordingly remit this matter to the Labour Court so that it can determine afresh whether the complaint amounted to a “*protected disclosure*” for the purposes of the 2014 Act in the light of the conclusions contained in this judgment.