THE SUPREME COURT

[Supreme Court Record No. S:AP:IE:2020:000044]

O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
Charleton J.

BETWEEN:

PATRICK J. KELLY

APPELLANT

-AND-

THE MINISTER FOR AGRICULTURE, FISHERIES & FOOD, THE MINISTER FOR FINANCE, THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Ms. Justice Dunne dated 30th of March, 2021.

1. In a judgment delivered on the 17th December, 2019, ([2019] IECA 299), the Court of Appeal, (McGovern, Baker, Costello, JJ.), upheld a decision of Hedigan J. in the High Court ([2012] IEHC 558), to refuse the appellant's application to judicially review a determination by the Government of Ireland (the third appellant), to dismiss the appellant from the position of Harbour Master at Killybegs Fishery Harbour Centre with effect from 30th September, 2009.

2. The process leading to the decision comprised of an investigation, an appeal to the Civil Service Appeal Board and, ultimately, the government. The appellant contends that the first instance investigation into his conduct was tainted by bias. On this, the appellant relies particularly on what transpired at a meeting which took place in 2004 between a Minister, who was also a local TD, the Assistant General Secretary of the Department of the Marine, and the official appointed to carry out the investigation. The appellant contends the allegations at the meeting tainted the entire disciplinary process which followed, culminating in his dismissal. The appellant, additionally, relies on the fact that the same Minister, who had made the complaints in 2004, participated in a Cabinet meeting of the government in 2009 which decided that the appellant should be dismissed from his Civil Service position.

3. The respondents deny that there was any, or any sufficient, evidence of bias in the procedures adopted. They submit that the evidential and legal tests for establishing bias were not met. They contend that the Minister's participation in the government decision could not cause a legal apprehension of bias.

The Court of Appeal

4. The Court of Appeal judgment, now appealed to this Court, outlines the background facts. The Court of Appeal held that the appellant's case, that the decision-making process had been tainted, either by actual or objective bias, could not succeed; and that the criteria for finding either category of bias had not been satisfied. The judgment held that the first

involvement of the Minister in 2004 occurred some weeks after the decision to initiate a review into the appellant's conduct had been taken. The court held that, as a result of this timing sequence, the Minister's meeting derived from conduct during the disciplinary process, and not prior to, or extraneous to it. Thus, the claim of bias was unsustainable (See *Orange Limited v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159, Barron J.). The appeal court held that, even had there been grounds for a finding of either form of bias, any taint or flaw was rectified by the hearing before the Civil Service Appeal Board, where the appellant had been afforded the opportunity to present his case, and to call witnesses. The court considered that the main facts constituting the basis of allegations warranting the recommendation to dismiss the appellant had not, in fact, been significantly in dispute either before Mr. Fitzpatrick, the investigator appointed by the Department of the Marine, or the Appeal Board. Finally, the Court of Appeal held that the decision by the government, where the Minister, Mary Coughlan TD, was present, was governed by constitutional and legal protection, where, as a matter of necessity, the government was involved in a simple binary process, either to act upon, or reject the opinion of the Civil Service Appeal Board, which had recommended the appellant's dismissal.

5. The legal principles as to bias are set out in the case-law. But their application in any given case is contextual. A fuller understanding of the issues will be gained from the narrative contained in the "background" of the facts, as well as the outline of the legal submissions of the parties.

The Grant of Leave

6. On the 15th June, 2020, this Court granted the appellant leave to bring an appeal. The Court considered that the case raised issues of law of general public importance. These related to the test for bias itself, and its application in this case, on the twin questions of the meeting in 2004 involving the Minister, the Assistant General Secretary of the Department of the

Marine, and the investigating officer, and, second, the participation of the Minister in the government decision in 2009 to confirm the dismissal of the appellant from his post.

7. There is a large degree of agreement between the parties as to the legal principles. But it is necessary to consider the facts in some detail.

Background

8. The appellant was appointed to the established Civil Service position of Harbour Master at Killybegs Fishery Harbour Centre ("KFHC") in 1996. The position was full-time, twenty-four hours a day, seven days a week. A condition of the post was that the appellant was not to be connected with any outside business which would interfere with the performance of his official duties. It was not disputed that, whilst acting as Harbour Master of KFHC, the appellant provided pilotage services to vessels using the harbour. It was also accepted he was a director and 1% shareholder of a company, North West Marines Services Limited ("NWMS"), which provided commercial pilotage services for reward to vessels using the harbour. It was acknowledged that the appellant carried out the vast majority of pilotage services at Killybegs on behalf of that company. Among the questions which arose, therefore, were whether he was legally entitled to carry out these activities, and whether he did so for personal gain?

The Review by the Department

9. On 23rd August, 2004, an anonymous complaint was received by the Department of the Marine & Natural Resources ("the Department"), which alleged that, whilst Harbour Master in Killybegs, the appellant had been engaged in commercial pilotage for a number of years. The Department had previously (February 2004) decided to conduct a broad management review of the practices and procedures at fishery harbour centres, commencing at Killybegs.

10. The subsequent chronology of events is of some importance. The decision to investigate the position in Killybegs on foot of the complaint was taken on the 6th September, 2004. Mr. Tony Fitzpatrick, the personnel officer of the Department, was appointed to carry out the

investigation. The appellant was formally notified of this decision on 18th October, 2004. Pending completion of the investigation, he was suspended from his post with immediate effect in accordance with s. 13 of the Civil Service Regulation Act, 1956.

The Events in October, 2004

11. On or about the 8th October, 2004, the then Teachta Dála and Minister, Mary Coughlan, a minister of a different Department of State, made a complaint to the Assistant General Secretary of the relevant Department of the Marine & Natural Resources, Dr. Beamish, regarding her concerns relating to harbour management at Killybegs. Dr. Beamish sent an email to Mr. Fitzpatrick and the Secretary General of the Department, Mr. Brendan Tuohy. This recorded his telephone call with Minister Coughlan. Dr. Beamish made a note that the Minister had a concern that the appellant had employed his brother-in-law in the harbour, allegedly without following due process, and that the appellant was switching off the CCTV system there. No other complaints were specified in that email.

12. The Minister took up an offer from Dr. Beamish that she should meet Mr. Fitzpatrick, to outline her full range of concerns in the matter. This meeting involving the Minister, Dr. Beamish, and Mr. Fitzpatrick, took place on 15th October, 2004. Mr. Fitzpatrick's notes of the meeting recorded that the Minister then outlined a wider range of complaints in relation to the appellant. The fact that the Minister had made these complaints was not made known to the appellant at this time. The appellant's case is that this meeting coloured Mr. Fitzpatrick's conduct of the investigation.

13. By letter of the 18th October, 2004, the appellant was informed that the investigation would be carried out pursuant to the Civil Service Disciplinary Code, Circular 1/92. He was told that, in the event that the activities were substantiated, they might be deemed to constitute gross misconduct, irregular or unsatisfactory behaviour, and a range of possible sanctions might be applied, including, potentially, dismissal.

14. Mr. Fitzpatrick, the personnel officer by then charged with the investigation, appointed Mr. Brian Bolger, a retired civil servant, to assist him. Mr. Fitzpatrick requested Mr. Bolger to carry out a preliminary process to establish and present relevant facts in relation to the complaints made against the appellant, and that Mr. Fitzpatrick would then decide whether a *prima facie* case existed, meriting a full disciplinary investigation.

15. When he was notified of the decision to initiate an investigation-process, the appellant sought a preliminary meeting with Mr. Fitzpatrick. This took place on the 21st October 2004. The appellant was informed of his rights. Under the Disciplinary Code, he was not entitled to be legally represented at the investigation stage, but he could make representations himself, and appeal any recommended disciplinary sanction to the Civil Service Appeal Board ("the Appeal Board") where he might be legally represented. Mr. Bolger's investigation took place over three months, from October to December, 2004. He then presented a preliminary report to Mr. Fitzpatrick, who decided a full investigation was warranted.

16. On the 8th March 2005, Mr. Fitzpatrick interviewed the appellant in relation to a series of specific concerns. These not only included an allegation of operating NWMS, a private company, but also imposing compulsory pilotage at Killybegs. It was alleged the appellant carried out pilotage functions for reward. It was also claimed he held significant sums of personal cash on the Department's property. It was said he requested employees of the Department to convert Irish Punts to Euro. He was accused of disposing of a barge belonging to a limited company (Finn Valley Oil), whilst acting as Harbour Master. It was also claimed he engaged in misconduct regarding a clean-up operation following an oil spillage at Abbott Ireland in 1999. Allegations were made regarding the deployment of a departmental boom at Sligo in 2001. He was accused of abuse/obstruction of an employee of Finn Valley Oil in 1999/2000. It was said he used the Department's heating oil for non-official purposes. It was asserted he was guilty of misconduct in the acquisition of and payment for curtains from a firm

named A&S Fabrics in 2000/2001. Finally, he was accused of waiving what are called "syncrolift" charges for certain vessels.

17. At the meeting with Mr. Fitzpatrick on 8th March 2005, the appellant was afforded the opportunity to comment on each of the allegations. He stated that it was his understanding that he could receive payment for pilotage in his own time. On the 4th August, 2005, Mr. Fitzpatrick produced his provisional conclusions and findings, which he had arrived at on the balance of probabilities. In relation to each allegation, he identified the evidence he had taken into account, and copies of the evidence were enclosed with the letter. Mr. Fitzpatrick found the preponderance of the allegations had been shown to be true. He held that three allegations were not substantiated by the evidence, and that the fact of holding of large amounts of personal cash on the Department's premises did not constitute a breach of the disciplinary code.

18. The appellant was asked to furnish responses within fourteen days in accordance with the terms of the Circular. He sought and obtained a number of extensions of time. His trade union representative, Mr. Staunton, wrote to Mr. Fitzpatrick on 13th September, 2005, requesting certain documentation, including unredacted statements by staff-members of KFHC. Mr. Fitzpatrick offered to provide unredacted statements, only if the appellant gave a written undertaking that these would be used solely for the defence of his position in the disciplinary process, and not for the purpose of defending himself in respect of criminal charges apparently pending before the Circuit Court. The appellant declined to give such an undertaking. Mr. Fitzpatrick then refused to furnish him with the statements in unredacted form. The appellant contends this also evinces evidence of bias.

19. The appellant then submitted evidence and corroborating material to Mr. Fitzpatrick. Part of his case was an affidavit sworn by Captain McGowan of NWMS, where it was accepted that the appellant had operated as a harbour pilot at Killybegs harbour for the last ten years, occasionally assisted by Captain McGowan. After that date, and until Autumn 2008, he had

been assisted by Martin Connell, by then the acting harbour master. Captain McGowan said that the appellant had been made a director of NWMS, so that, in case of an accident causing damage to a vessel or the harbour, he would be covered by limited liability. Material was provided from NWMS' accountant which stated that the appellant was a director of the company, but had received no remuneration, and that he had drawn no salary in his capacity as a director, or in any other capacity. The appellant also submitted documentation which, it is said, showed that the Department had been aware of his pilotage activities, and had acquiesced therein.

20. Following this, between February and April, 2006, Mr. Fitzpatrick conducted further meetings with other KFHC staff and the appellant. On the 20th June, 2006, Mr. Fitzpatrick furnished the appellant with a revised statement of allegations, having regard to the additional information he had received. He enclosed underlying documents. The appellant was again invited to respond and informed of his entitlement to meet with Mr. Fitzpatrick. The appellant was informed that, in light of the nature of the allegations, the appropriate sanction might be dismissal from the Civil Service. Mr. Fitzpatrick informed the appellant that he proposed to recommend accordingly to the Minister.

21. Thereafter, Mr. Fitzpatrick left the Department and moved to the Revenue Commissioners. The Department was reorganised, and its functions were transferred. This resulted in delay. Despite the fact that he had left the Department of the Marine, it was deemed appropriate that Mr. Fitzpatrick continue with the investigation. This procedure was permitted under Paragraph 5.3 of the Circular. He received authorisation to continue the investigation by Mr. Brendan Tuohy, Secretary General of the relevant Department, on 10th October, 2006. On 12th and 13th October, 2006, further inconclusive meetings took place, addressing what the respondents now refer to as a "blizzard of correspondence" from the appellant.

22. Mr. Fitzpatrick had been succeeded by Mr. David Hanley as personnel officer in the Department. On the 1st February, 2007, Mr. Fitzpatrick wrote to Mr. Hanley, setting out the outcome of his investigation. This reflected the body of the revised report of June, 2006. The evidence relied on by Mr. Fitzpatrick was considerably expanded. He had conducted further interviews and received more information. The letter did not deal with the possibility of sanction, or request the appellant to respond to the allegations, as it was not addressed to Mr. Kelly. The concluding section of the letter set out the various issues raised by the appellant by way of defence and Mr Fitzpatrick's response to these.

23. In August 2007, Mr. Hanley, the new personnel officer, furnished the appellant with the unredacted witness statements made against him on an unconditional basis. No submissions based upon these were made either to Mr. Fitzpatrick, or later to the Appeal Board. On 2nd September, 2008, the final report recommending the appellant's dismissal was issued.

24. On 1st October, 2008, the appellant's trade union representative, Mr. Staunton, wrote to Mr. O'Reilly, by then Mr. Hanley's successor as personnel officer. Mr. Staunton's purpose in doing so was to appeal the dismissal recommendation to the Appeal Board. Mr. Staunton requested the Appeal Board should take a *de novo* approach to the case. He submitted that the appellant had never denied doing most of the activities of which he was accused, claiming that he had been instructed to carry out these activities by his superior and by other agencies connected to the Department, such as the Coast Guard. He requested that he and the appellant be allowed to give oral evidence, and to make oral submissions. In this letter, Mr. Staunton raised "other suspicions" about the background to the investigation, which are considered later in more detail.

25. The independent Appeal Board, chaired by senior counsel, sat on the 12th January, 2009, 4th February, 2009 and 12th March, 2009. The appellant was represented by Mr. Staunton. The appellant asked the Appeal Board to hear the evidence of four of his witnesses, not twelve

as previously indicated. In the event, the Board heard from two witnesses. During the hearing, a chronology of events was produced by the Department, to which Mr. Staunton objected. The Board disregarded the document. It will be necessary to return to this chronology later.

26. On the 14th July, 2009, the appellant and Mr. Staunton were notified of the decision of the Appeal Board. The Board addressed the various grounds of appeal raised. It rejected a contention that there had been an obligation on Mr. Bolger, the investigator appointed by Mr. Fitzpatrick, to interview the appellant, or that there was a requirement that the report of Mr. Bolger be put to the appellant for his response. The Board was satisfied Mr. Fitzpatrick had considered the relevant evidence fairly and carefully and conducted a thorough investigation. It rejected the appellant's complaints about being prevented from making his case.

27. The Appeal Board gave consideration as to the circumstances in which the appellant became involved in commercial pilotage. It found the appellant was a director and 1% shareholder in NWMS. Captain McGowan was another director and 50% shareholder. His wife held the other 49%. It held the company was paid for commercial pilotage work at Killybegs Harbour, but that the appellant had received no payment from the company. It set out the appellant's case was that he was involved in the company only to secure insurance cover for commercial pilotage work, and to provide cover for the Department. The Appeal Board observed that it was difficult to understand the appellant's motivation in working as a commercial pilot in circumstances where he never received any benefit from so doing, and where, on his own case, he was actually legally entitled to engage in such activity. The Board did not accept his contention that his involvement with NWMS was primarily to provide insurance cover for the Department. It noted the accounts of NWMS, which showed that it retained significant profits in 2003 and 2004. The Board did not accept that the appellant would not derive any benefit from his pilotage work, holding that the company was paid for the work he carried out, and whether the appellant determined to draw any income, or not, was a matter

within his own discretion. The Board concluded the appellant was aware that there was a serious conflict of interest, and that he had sought to deal with the matter in an ambiguous fashion in correspondence and downplay his role as a commercial pilot.

28. The Board also upheld Mr. Fitzpatrick's findings concerning the oil spillage at Abbott Engineering and the deployment of a boom at Sligo harbour. These findings were to the effect that the appellant's conduct amounted to misconduct inappropriate to his official position warranting disciplinary action. But on these, the Board disagreed with Mr. Fitzpatrick's recommendation as to the appropriate sanction. The Board held that these two incidents were sufficiently serious to justify only the imposition of substantial penalties, but not dismissal.

29. On the 17th July, 2009, Mr. Bert O'Reilly, a Departmental official, informed the appellant that the Department intended to recommend to the government his dismissal from his post as Harbour Master. The letter informed the appellant that he could submit representations within fourteen days to be included in the papers sent to Cabinet. On 31st July, 2009, Mr. Staunton made a further submission on behalf of the appellant. He enclosed a statement from the appellant for this purpose. These were included along with the letter of suspension and the opinion of the Appeal Board.

30. On 30th September, 2009 the government met. Minister Coughlan was present. Among the issues considered was whether to take a decision pursuant to s. 5 of the Civil Service Regulation Act, 1956, to dismiss the appellant. The government decided to dismiss the appellant from his post in accordance with the provision. He was so informed on the 2nd October, 2009.

31. By letter of the 28th January, 2010, solicitors for the appellant wrote to the personnel officer, requesting copies of all instruments authorising Mr. Fitzpatrick to continue with the investigation into the appellant subsequent to his transfer from the Department and the date of transfer. These had not previously been requested. The request was reiterated on the 15th

February, 2010. On 22nd March, 2010 the appellant applied for, and was granted, leave to seek judicial review by way of *certiorari* to quash the government decision of 30th September, 2009.

The Minister's Involvement

32. At this point, it is helpful to again identify the precise legal issues which fall for consideration. These are the legal effect of the 2004 meeting between the Minister and the investigating officer, and the participation of the Minister in 2009 in the decision to confirm the dismissal of the appellant from the post.

33. It will be recollected, therefore, that the decision to initiate the investigation had been taken on 6th September, 2004. Dr. Beamish's notes of the first phone call recorded that, six weeks later, on the 8th October, 2004, the Minister was "very annoyed about what was going in the harbour management in Killybegs and was considering putting it down in writing". On the 15th October, 2004, Mr. Fitzpatrick and Dr. Beamish attended the Minister's office where she relayed her further concerns about certain matters at KFHC. The appellant's case is that Dr. Beamish could only have concluded that Mr. Fitzpatrick was the appropriate person for the Minister to meet in the circumstances. It is also said that it must be "presumed" that the Minister was informed of the decision to investigate and suspend the appellant at, or before, the meeting with her. There is no official record of what transpired at that meeting. However, Mr. Fitzpatrick did prepare personal handwritten notes, which included:

> "▪ Difficult man
>
> ▪ People apoplectic – not acceptable
>
> ▪ HM piloting boats, getting paid cash, not DMarine books
>
> ▪ No security system – PK doesn't want
>
> ▪ Anti-social behaviour (drinking) (college) XXX haunt
>
> ▪ Girl in office. Nervous breakdown – not well
>
> ▪ PK bullyboy

- PK Money (beat wife) doorman nearly killed youngfella
- Shot every dog in D'gal town"

34. The appellant cites this material, noted by Mr. Fitzpatrick, as evidence of bias, and that, despite what was said at the meeting, Mr. Fitzpatrick continued his investigation, and took the various procedural steps which have been outlined earlier. The appellant also relies on, *inter alia*, Mr. Fitzpatrick's unwillingness to provide unredacted copies of the witness-statements. He complains that neither Dr. Beamish's email in relation to his prior telephone call with the Minister, nor Mr. Fitzpatrick's handwritten notes of the subsequent meeting were provided to him in a timely way. As a result, he contends, at the time of the disciplinary process he was left unaware of the Minister's involvement. By the time he had any real awareness of the position, the matter had then been processed through by Mr. Fitzpatrick, and then to the Appeals Board.

How the Issue Came to Light

35. As recorded earlier, Mr. Fitzpatrick's final report, recommending dismissal, was issued on the 2nd September, 2008. Mr. Staunton, the Trade Union representative, had written on the 1st October, 2008 indicating that the appellant wished to appeal. It is now necessary to deal with the "suspicions" which Mr. Staunton raised in that letter. Mr. Staunton wrote, then, that he could not stress enough his own suspicion that Mr. Fitzpatrick had based his decision upon more than the documentation based in the report. He wrote that, since a "meeting in Sligo", Captain McGowan, through the office of the Information Commissioner, had unearthed considerable documentation which "were [sic] never put [by Mr. Fitzpatrick] to him [the appellant] for comment. This is grossly unfair to him".

36. The Appeal Board refused a *de novo* hearing, as its jurisdiction to review was limited to grounds specified in Clause 4.3 of Circular 1/1992. The oral hearing took place before the appeals board on 12th January, 2009, 4th February, 2009 and 12th March, 2009. After the commencement of that hearing, the Department sought to provide a chronology of the

disciplinary process, which, for the first time, referred to the telephone conversation between Dr. Beamish and the Minister on the 8th October, 2004. The Appeal Board disregarded the chronology.

37. The appellant submits now this material demonstrated that the Department considered the Minister's involvement and complaints formed part of the disciplinary process, and that the Appeal Board hearing was the first intimation he had into any such involvement. However, the appellant says that the chronology did not set out anything of the content of the conversations, or the nature of the Minister's representations to Dr. Beamish, or the existence of an email from Dr. Beamish to Mr. Fitzpatrick, or make any reference to the subsequent meeting between the Minister, Mr. Fitzpatrick, and Dr. Beamish. No reference was made to the Minister during the disciplinary hearing, and the Appeal Board had no knowledge of the Minister's involvement in the disciplinary process. At the appeal, Mr. Staunton had objected to the admission of the chronology as part of the case, and it was handed back.

38. The appellant points out that the Appeal Board held that dismissal was grossly disproportionate in respect of what are identified as three of the four allegations, but held against him on the commercial pilotage complaints. However, the appellant submits, even though it was accepted pilotage was always necessary at Killybegs Harbour, the Appeal Board was not aware that Martin Connell, the acting Harbour Master appointed after the appellant's suspension, had continued to carry out commercial pilotage for which NWMS was paid. He submits that the Appeal Board was unaware of Mr. Connell's role when it concluded that the decision to dismiss the appellant was not grossly disproportionate in respect of the other findings. The appellant's case is that, at the date of his dismissal, the appellant had no clear knowledge of the Minister's prior involvement with the disciplinary process, save for the reference in the chronology furnished to him in the appeal.

39. As recorded earlier, the application for leave was made to the High Court on the 22nd March, 2010. Prior to this, on the 15th December, 2009, the Department provided the appellant with a copy of Dr. Beamish's email to Mr. Fitzpatrick. The appellant's case is that this was the first clear indication that the appellant had that the Minister had made allegations against him. It was only in an affidavit of discovery, sworn on the 23rd June, 2010 in the subsequent judicial review proceedings, that, for the first time, disclosure was made concerning the meeting between Mr. Fitzpatrick, Dr. Beamish and the Minister. Requests for notes of this meeting were refused. The respondents refused to make voluntary discovery of the notes. Ultimately, discovery was ordered. What was provided then was, first, an illegible copy of handwritten notes of the meeting, and a redacted, typed, version. On foot of correspondence from the appellant's solicitor, a typed version of the full handwritten notes was eventually provided to the appellant by letter dated the 13th July, 2011. The appellant's case is that only then did he have full knowledge of the representations which the Minister had made against him, to be seen by then in the context of her presence at the government meeting of 30th September, 2009. The appellant lays some emphasis on the fact that Mr. Fitzpatrick's explanation of his failure to provide the notes was due to his unawareness that they were "on file".

The Appellant's Submissions on the Law

40. The appellant's case falls for consideration under a number of headings. Broadly, these concern submissions as to both actual, and/or objective bias, both at the first instance review or investigation, and up to the ultimate decision by the government. The appellant submits that the flaws could not be cured by the appeal, as the process was tainted at the outset, that the Appeal Board was limited in its role and reliant on Mr. Fitzpatrick's investigation, and that, in 2009, there was bias at the ultimate government decision-making level. The appellant puts much weight on the absence of disclosure of the Minister's involvement until late in the day.

41. The appellant's case is based on Article 40.3 of the Constitution, and Article 6(1) of the ECHR. Reference is made to definitions of bias to be found in textbooks, such as Hollander & Salzedo, *Conflicts of Interest*, 4th Edition, (Sweet & Maxwell, London, 2011); and Hogan & Gwynn Morgan, *Administrative Law in Ireland*, 5th Edition, (Round Hall, 2019). The appellant refers to passages from *R v. Gough* [1993] AC 646 (Lord Goff of Chieveley), in terms of bias being such an "insidious thing" that a decider might unconsciously be affected by it. It is submitted on behalf of the appellant that the approach of the courts has been to look at the relevant circumstances, and consider whether there is such a degree of possibility of bias that the decision should not be allowed to stand. The appellant relies on *Orange Limited v. Director of Telecoms (No. 2)* [2000] 4 IR 159, and well-known passages from *Dimes v. Proprietors of Grand Junction Canal* (1852) 10 E.R. 301 ; *Goode Concrete v. CRH* [2015] 3 I.R. 493; *R v. Bow Street Magistrate, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119; *Bula v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412; *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40; *O'Callaghan v. Mahon* [2008] 2 I.R. 514; and *Reid v. IDA* [2015] 4 I.R. 494. The appellant submits that, at its simplest, the test is whether there is a reasonable apprehension or suspicion that a decision-maker would not have a fair hearing from an impartial judge, (Denham J. in *Bula*), or "where there is reasonable apprehension or suspicion that the decision-maker might have been biased". (Keane C.J. *Orange (No. 2)*). The issue is fact-specific. (*Locabail (UK) Ltd v. Bayfield Properties Ltd*. [2000] Q.B. 541).

42. In particular, the appellant relies on the decision of this Court in *Reid v. IDA* [2015] 4 I.R. 494. In *Reid*, McKechnie J., speaking for the Court, stated that:

> *"The test now to be applied is centrally rooted on the necessity of establishing and maintaining the confidence of the public in the integrity of public administration generally. Thus, the prism through which the issue must be considered is that of a reasonable observer's perception of what happened."* (para. 74).

43. As to the first instance review, the appellant's case is that a reasonable observer would conclude that there is a sufficient degree of possibility that Mr. Fitzpatrick's investigation could have been influenced by the Minister's representations to him. It is said such a reasonable observer would reasonably apprehend that Mr. Fitzpatrick could be contaminated by the Minister's intervention, and that Mr. Fitzpatrick should never have attended the meeting to discuss the appellant's management of KFHC. Having done so, he should have recused himself. It is said his own averments of objectivity are of no relevance, and that the test is that of the reasonable hypothetical observer, as confirmed by *Reid*.

44. The respondents submit many months elapsed between the 2004 meeting and Mr. Fitzpatrick's subsequent steps and conclusions. They cite *Harrison v. Charleton* [2020] IECA 168, where Noonan J. observed in the Court of Appeal, that *"the whole point about objective bias [was] the* ***potential*** *for something to act on the mind of the decision maker which might rob the decision of perceived impartiality. Something long forgotten cannot possess that quality*" (emphasis added).

45. The appellant responds to this point by submitting that it has never been suggested by Mr. Fitzpatrick that he did not recall the content of the meeting with the Minister and that the furthest he goes regarding disclosure is that he was unaware that the notes of the meeting were "on file". The appellant contends there was no attempt by the respondents to explain the failure to properly record the existence of the 2004 meeting, and that this, in itself, raised serious questions as to whether the respondent had met the duty of candour imposed on public authorities in public law litigation, as they avoided providing full details of the meeting until they were compelled so to do in litigation. Here, the appellant relies on dicta of Lord Donaldson M.R. in *R v. Lancashire County Council ex parte Huddleston* [1986] 2 All ER 941, that public authorities must put "*all the cards face upwards on the table*" when conducting public law

litigation. (See also the recent judgment of this Court in *RAS Medical Limited v. The Royal College of Surgeons in Ireland* [2019] IESC 4, Clarke C.J., at para. 6.9).

Rectifiable on Appeal?

46. The appellant contends that the elapse of time which took place for the completion of the investigation by Mr. Fitzpatrick is immaterial. It is said that, if Mr. Fitzpatrick's investigation was tainted by bias, it is unsustainable to say that the process might have been rectified by the Appeal Board's review. It is submitted that the contention that the Appeal Board's review could rectify actual bias is "extraordinary", with significant and far-reaching consequences, especially in light of the fact that the Appeal Board was limited from conducting a *de novo* review of the appellant's conduct, as its jurisdiction for review was limited by the governing regulations. The appellant's case was that Mr. Fitzpatrick's role went beyond mere fact-finding, and included an adjudicative function, whereby he had actually recommended sanctions to the Department, which adopted them. It is said that, while the Appeal Board might have been able to cure minor procedural or administrative defects, it could not remedy something as fundamental as a flawed disciplinary process, which a reasonable observer could apprehend had been tainted by bias from the outset.

The Minister's Participation at Government Level

47. The second, connected, aspect of the appellant's case relates to the Minister's participation in the government's decision to dismiss the appellant. It is said that this is to be seen in the light of the Minister's earlier comments in 2004 about the appellant, which indicate either animus, or actual bias, or a reasonable suspicion of objective bias. It is said that, rather than participating in the government decision, the Minister ought to have recused herself. The appellant does not accept the observation of the Court of Appeal, at para. 100, that, as the court may not speculate as to what role, if any, Minister Coughlan played in the government decision

of the 30th September, 2009, the appellant cannot advance a case of actual bias. The appellant says that, in making this finding, the Court of Appeal erred.

48. It is further contended that the Court of Appeal erred in holding that, in an assessment of the test for bias, the role for elected representatives differed from that of a judge. It is said the observations made by the Court of Appeal on this point are to be contrasted with McKechnie J.'s statement in *Reid*, at para. 78, to the effect that the test for bias remained the same, right throughout the ambit of public administration, given that the underlying purpose of the test was confidence in the objectivity of all such persons or bodies. Thus, it would be invidious if the standard should differ as between one entity and another. The appellant submits the same terminology applies, irrespective of status or position, in this case, of the Minister. Reference is made to the recent observation of this Court in *Kerins v McGuinness* [2019] IESC 11, to the effect says that the entitlements of individuals are not set at nought just because the Oireachtas is involved.

49. The appellant submits that what was involved in the government decision was not simply an executive process, but an adjudicatory function, where different standards are applicable. Thus, it is contended, it was wrong for the Minister to participate in a decision even on a single issue that required a binary answer, that is to say, whether to dismiss the appellant or not, when her previous comments demonstrated that she had a personal animus against him, and when, it is submitted, her position as local T.D., and her status as An Tánaiste, meant that her views were likely to carry significant weight during a Cabinet discussion. On this basis, therefore, the appellant contends that the decision to dismiss the appellant was tainted with bias and flawed.

The Respondents' Case

50. It is necessary to move then to the respondents' case which, standing over the judgment now appealed, lays considerable emphasis on the undisputed facts of the case. The respondents

rely on Mr. Fitzpatrick's denial of any bias, to be seen in the context of the considerable elapses of time involved. It is said that the question of the Minister's involvement was not known to the Appeal Board which assessed the situation entirely independently from Mr. Fitzpatrick. The respondents' case is that the Cabinet's role was confined and limited by statute and by the Constitution.

51. More specifically, the respondents say that, from the outset, the appellant was fully aware that it was inconsistent with his role as Harbour Master to pilot boats in KFHC, and that such pilotage should only take place in an emergency. The Department had made clear that his involvement in commercial pilotage was a breach of the terms and conditions of his employment. Nonetheless, the appellant was involved in setting up North West Marine Services Limited, together with Captain Tony McGowan, a business partner. It is said the appellant unambiguously accepted that NWMS received payment for the work that the appellant carried out when conducting pilotage, and that this was a flagrant and deliberate breach of the appellant's terms and conditions of employment.

52. The respondents draw attention to the evidence that the accounts for NWMS, which were signed by the appellant, showed the company had a cash balance of €153,474, and retained profits of €142,978. When questioned at the Appeal Board hearing as to the source of these sums, the appellant responded that it was mainly pilotage. The accounts for the company for the year ended 31st December, 2004 recorded a profit after tax for the company of €29,570, and its cash balance of €164,156. Retained profits were €172,548.

53. The respondents contend that government circulars specifically prohibit an officer from engaging in outside occupations or work during hours of duty. (Circular 16/1936 and Circular 15/79). They also refer to a specific written instruction from the Department to the appellant to cease from piloting, made in 1996, 1997, repeated on the 4th July, 2000, and in March of 2003.

Mr. Fitzpatrick's Denial of Bias, and the Undisputed Findings

54. The respondent relies on the fact that Mr. Fitzpatrick averred by affidavit that he did not take the meeting with the Minister into account in the investigation and he did not rely on anything that was conveyed to him there. Ultimately, but only after the elapse of a number of years since the meeting with the Minister, Mr. Fitzpatrick recommended that dismissal should take place in relation to a number of allegations. These concerned operating a private company offering marine services; carrying out pilotage and providing pilotage services for reward. They also comprised of submitting a falsified tender document for the removal of a Finn Valley Oil barge certifying an order for payment of an invoice purportedly from the same source for the removal of the barge from Killybegs Harbour whilst knowing that the barge had not been removed in its entirety, and arranging and paying for the scuttling of the hull of the barge in the Harbour itself. Mr. Fitzpatrick also concluded that the appellant had received payment in a personal capacity for carrying out a clean-up operation of an oil spillage at Abbot Engineering, and that he did this while working as a Harbour Master. He found the appellant did not inform his line manager that he was taking annual leave for this action, as would have been required. Mr. Fitzpatrick concluded that he was not on annual leave during this time, and that he utilised some of the KFHC workforce while they were on duty and being paid by the Department. He found that the appellant did not instruct the workforce to take annual leave during the operation. Mr. Fitzpatrick also found that the appellant used the Department's resources in the deployment of a boom at Sligo Harbour for personal gain. He concluded that these actions constituted gross misconduct, justifying dismissal pursuant to s. 5 of the Civil Service Regulations Act, 1956.

The Appeal Board reached its conclusions having no knowledge of the Minister's involvement

55. The respondents submit that the question of the Minister's involvement arose only tangentially at the Appeal Board when Mr. Staunton challenged the timeline supplied to the Board by the first named respondent. Following this, the respondents submit the Board returned

the timeline and did not consider it. Contemporaneous notes made by two officials show that Mr. Staunton's objection followed a consideration by him of the chronology which had contained a reference to Ms. Coughlan having contacted Dr. Beamish. Neither he, nor the appellant, raised any issue concerning the reference to Minister Coughlan during the appeal hearing. It is said the Appeal Board had no knowledge of the Minister's involvement, returned the timeline document, and did not consider it further.

56. The respondents deny that the appellant's successor, Mr. Connell, had been carrying out pilotage for personal reward, or that he had any entitlement to be paid for this. They state that, at all times, the appellant had maintained he had never personally received payment from NWMS for commercial pilotage, but had acknowledged that the company did receive payment for the work he had carried out while conducting pilotage. The respondents draw attention to the appellant's claim that, while he was engaged in such work, he was not carrying that work out as Harbour Master, but, rather, on behalf of the company. He accepted he did not inform anyone in the Department of his involvement in commercial pilotage, and specifically, did not inform the Department of his involvement in NWMS.

57. The respondents point out that the appellant's stated reason for his involvement in setting up NWMS, to provide insurance cover to the Department in respect of the commercial pilotage work in which he was involved, contrasts with his stated position that he was not acting in his capacity as Harbour Master when carrying out the pilotage.

58. The respondents point out the Appeal Board rejected the appellant's explanation as to why NWMS had been established. The Board had noted the retained profits. It rejected the appellant's contention he had derived no benefit from pilotage work, and found his company had been paid for the work he carried out as a pilot, and that the decision not to draw income from the company had been a matter within his own discretion. The Board found that the

appellant was aware of a conflict of interest. He had sought to deal with the matter in an ambiguous fashion and to downplay his role.

59. The respondents reject the appellant's characterisation that the Board's findings were limited by the regulations, and over-reliant on Mr. Fitzpatrick's report. They say the appellant admitted conduct on the pilotage issue was a breach of his conditions of employment, warranting dismissal. The respondents draw attention to the fact that the Appeal Board had referred to evidence from one of the appellant's own witnesses, who had testified that the appellant carried out the vast majority of all commercial pilotage in Killybegs. Thus, the Board concluded, the sanction of dismissal was not grossly disproportionate, although there was a finding that two of the allegations were not of sufficient seriousness as to warrant dismissal.

60. The respondents criticise the appellant's "careful and terse averments" in evidence, to the effect that no evidence had been adduced to support the inference that the retained profits in the company were derived from his pilotage activities. This was in conflict with his own statement to the Appeal Board, as recorded in contemporaneous notes.

61. The respondents contrast the appellant's contentions regarding Mr. Fitzpatrick's lack of candour, with his own alleged failure to furnish detail of the financial benefits derived from NWMS, on behalf of which he carried out the vast majority of commercial pilotage in Killybegs, save to deny he received personal gain.

62. Finally, the respondents submit the Appeal Board, in fact, did carry out its own review of the totality of the allegations, and that, in the absence of any knowledge or apprehension of the Minister's involvement, the Board was not, as alleged by the appellant, highly reliant on the integrity of Mr. Fitzpatrick's findings of fact. The Appeal Board did not believe that the sanction of dismissal was grossly disproportionate.

The Role of the Government

63. As to the role of the government, the respondents submit that, in considering the recommendations concerning the appellant's case, the government was required by law, as a matter of necessity, only to determine on the question of proposed dismissal, and not any other proposed sanction, in accordance with s. 5 of the Civil Service Regulation Act, 1956. The acts of the government were collective acts, and not individual acts by a particular Minister. The government was not engaged in any finding of fact, or determination of guilt or responsibility. It was simply presented with a recommendation to dismiss the appellant from the Civil Service following what is said to have been a full and fair examination of the appellant's case, and that it was asked to confirm that decision.

The Respondents' Submissions on the Law

64. The respondents' submissions also come under two categories of objective bias and actual bias.

Objective Bias

65. On objective bias, the respondents state that the test, while expressed in general terms, must be applied in the particular circumstances of an individual case, followed by a particularly careful exercise of the faculty of judgment. (per Denham J. in *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412, at 441, para. 20; see also *O'Neill v. Beaumont Hospital Board* [1990] ILRM 419, *Dublin Well Woman Centre Limited v. Ireland* [1995] 1 ILRM 408, by this Court in *O'Callaghan v. Mahon* [2008] 2 I.R. 514).

66. Relying on statements by Barron J. in *Orange Limited v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159, the respondents contend that the chronology of events shows the decision to review pre-dated the Minister's involvement, and the Court of Appeal had correctly concluded that a relevant factor constituting bias is that it must be shown to pre-date the decision making process, and be external to the process. The manner in which proceedings were conducted

could not, in itself, create a reasonable suspicion of bias, (para. 80 of the judgment under appeal). The test is the view of a reasonable person well informed as to the essential background and particular circumstances of the individual case. (per McKechnie J. in *Reid v. IDA* [2015] 4 I.R. 494).

Actual Bias

Mr. Fitzpatrick's Review and Investigation

67. The respondents say that Costello J. correctly rejected any finding of actual bias, and that the Court of Appeal correctly found that Mr. Fitzpatrick's conduct during the decision-making process could not establish either actual or objective bias. Thus, the evidence for bias must arise from a factor outside the process impugned. (See paras. 87 to 90 of the judgment of Costello J.). The respondents rely on passages from the judgment of Costello J. in the Court of Appeal, where she held that the appellant had pointed to the failure of Mr. Fitzpatrick to disclose the involvement of the Minister, which he characterised as concealment, as evidence sufficient to satisfy this test. He said the court was entitled to infer actual bias on the part of Mr. Fitzpatrick on the basis that no civil servant could avoid actually being influenced by a Minister who expressed herself in such strong terms. Thereafter, he could not properly have conducted the investigation once the meeting had taken place and ought to have recused himself.

68. Costello J. held at para. 88:

> *"In my judgment, the appellant has not shown that the trial judge erred in law in his approach to this argument. It is established law that the conduct of the decision maker during the process cannot establish bias. The evidence for bias must arise from a factor outside the process impugned. Likewise, any alleged perversity of the decision maker's decision cannot be taken as evidencing bias."*

69. On the chronology issue, the respondents emphasise the evidence that the decision to investigate the allegations relating to the appellant's commercial activities at a meeting attended by the Secretary General, Mr. Tuohy, four weeks prior to the comments made by Ms. Coughlan in a telephone conversation with Dr. Beamish, which was conveyed to Mr. Fitzpatrick and to Mr. Tuohy by email dated the 8th October, and almost six weeks before the meeting with the former Minister, attended by Mr. Fitzpatrick and Dr. Beamish, on about the 15th October. It is said Mr. Fitzpatrick confined himself entirely to the specific allegations under investigation and did not take into account the content of the representation. This was to be seen in light of the fact that the appellant did not seek to challenge by way of cross-examination, Mr. Fitzpatrick's evidence before the Appeal Board.

70. Costello J. held:

> *"Furthermore, Orange is authority for the proposition that one cannot infer bias from a series of decisions made by the decision maker during the decision-making process, such as the decision to furnish unredacted documents on a conditional basis. Still less could one infer bias from the mere fact that a civil servant had a meeting with a minister from another department at the commencement of the investigation.*
>
> *Any such possible inference must be set against the proven fact of an extraordinarily careful and thorough forensic investigation which took place over a period of four years. It is important to note that Mr. Fitzpatrick did not uphold a number of allegations made against the appellant. ...".*

71. Costello J. continued:

> *"To a large extent the conclusions of Mr. Fitzpatrick in relation to the pilotage allegations were based upon documents, invoices and diary entries of the appellant which were not challenged.*

In light of all of this evidence, and in light of the ample opportunity afforded to the appellant to reply to the allegations made against him, the failure of Mr. Fitzpatrick to notify the appellant of the fact of the email from Mr. [sic] *Beamish, of his meeting with Minister Coughlan on 15 October 2004 and of complaints she made, which he did not investigate, to my mind falls very far short of establishing that the report of Mr. Fitzpatrick was tainted by actual bias against the appellant."*

72. The respondents point out that Costello J. went on to hold, at para. 91 of the judgment, that:

"… even had the investigation conducted by Mr. Fitzpatrick been tainted by actual bias, by reason of the involvement of the Minister, to my mind the conduct of the appeal by the appeal board rectified any flaw that may have existed in the process. It is common case that the appeal board knew nothing of the involvement of Minster Coughlan in the investigation in October 2004."

The Appeal Board

73. The respondents submit, therefore, that, before the Appeal Board, the appellant was afforded and availed of the opportunity to call witnesses, and thus to challenge any finding of fact made by Mr. Fitzpatrick in his report of September, 2008. It is said that, critically, he chose not to dispute – and indeed admitted to – all but two of the critical facts in relation to the central issue of pilotage by the appellant at KFHC. Costello J. held:

"I have already held that the appeal board is not bound by the findings of fact made by the personnel officer, as it is free itself to find facts based upon evidence adduced before it. While the Circular refers to the report prepared by the appeal board as an "opinion", it must be emphasised that it is this opinion which was sent to the third named respondent, not the report of Mr. Fitzpatrick. … That opinion was based upon

facts which were either accepted by the appellant or which were upheld by the appeal board who heard full submissions and fresh evidence in relation to the disputed issues."

74. On this basis, the respondent contends that the appellant did not meet the test for establishing either actual or objective bias; that the meeting between Mr. Fitzpatrick and the Minister could have had no impact on the opinion of the Appeal Board; and that the opinion of the Appeal Board alone had been furnished to the government for its decision. The meeting between Mr. Fitzpatrick and the Minister in October, 2004 could have had no impact on the opinion of the Appeal Board as it did not know of it.

75. The respondents place reliance, too, on the contention that any absence of disclosure concerning the meeting is without merit, as what occurred before the Appeal Board was based on hearing evidence from the appellant himself. It was an agreed fact that he carried out commercial pilotage on behalf of a company of which he was a shareholder and director. The Appeal Board had noted that the appellant appeared "most reluctant" to address any issue in a direct fashion and "frequently managed to cloud the issue rather than clarify it". The Board did not accept that the appellant would not derive any benefit from his commercial pilotage work.

76. The respondents submit the appellant's own witness had accepted that the appellant had carried out the vast majority of commercial pilotage in the harbour. He was aware of the conflict of interest and this was a serious breach of trust such as to warrant the sanction. Thus, the respondents contend the Court of Appeal correctly concluded that, as a matter of law, the conclusions of Mr. Fitzpatrick in relation to the pilotage allegations were, to a large extent, based upon documents, invoices and diary entries of the appellant, which were common case and not challenged. Thus, the hypothetical, reasonable and independent observer could have no reasonable apprehension of bias in relation to the ultimate decision to dismiss the appellant from his post as Harbour Master. No reasonable apprehension of bias on the part of Mr. Fitzpatrick could arise out of the Minister's original engagement in the process. (para. 96).

The Government's Decision

77. Turning to the government decision, the respondents submit that the decision to dismiss the appellant could only have been made by the government, acting in accordance with Article 28.4.3° of the Constitution, as a collective authority. Thus, under that Article, the confidentiality of discussions of the government are to be respected in all circumstances, save where the High Court determined disclosure should be made. It is said no application was made for disclosure of the Cabinet discussions, and the confidentiality of these were accepted by the appellant, who made no attempt to go behind them. The sole submission was that Minister Coughlan ought to have recused herself from Cabinet deliberation. (See *Attorney General v. Hamilton (No. 1)* [1993] 2 IR 250). On this, the respondents rely on Costello J.'s conclusion that the assessment of whether a decision is tainted by bias must be fact specific, and dependent upon the nature of the issue to be decided upon. (para. 98). The government was simply asked either to affirm the recommended sanction and dismiss the appellant, or to refer the appellant to the appropriate decision-maker for a lesser sanction. It was no function of the government to review the opinion of the Appeal Board on the findings of misconduct. The respondents submit that the appellant fails to take into account the fact that the government decision to terminate the appellant's employment was one involving a constitutional requirement, together with a statutory obligation. Collective Cabinet responsibility entailed that a decision, once taken, bound each member of the Cabinet. Hence, the constitutional status given to the Cabinet and its decisions, entailed that such decisions are at a higher level than those of other bodies, boards or entities. The constitutional status accorded to the Cabinet meant that a special deference was accorded to government decisions. The process in which the Cabinet was involved in this instance was one uniquely vested in the government by the Constitution and was put to the Cabinet by the relevant Minister, that is, the Minister for Agriculture. The government was not involved in any finding of fact, or determination of guilt or responsibility.

There was, therefore, no question of Minister Coughlan being obliged or required to recuse herself from Cabinet. A decision had to be taken by the government, each member of which had an obligation to share in the collective responsibility of such a decision and did so. The government was not engaged in findings of fact, determinations of guilt or responsibility. Rather, being presented with a recommendation following an examination of the case, in accordance with the principles of fair procedure and natural justice. It was asked to confirm that decision as a matter of necessity.

78. The respondents' case is that the mere fact that, earlier in 2004, Minister Coughlan had commented adversely on the appellant, could not, without more, provide a sustainable objection to her participating in the government decision in 2009. The jurisprudence applicable to judges cannot be applied simpliciter to a decision of government. Of necessity, a greater margin of appreciation must be granted to public representatives than might be appropriate to grant to judges in relation to their pronouncements or representations. Public representatives ought not to be constrained from expressing their views or representing their constituents, lest they be prevented at a future date from participating in decisions of government, save in the most exceptional or extreme circumstances. (para. 103 and 104 of the Court of Appeal judgment). The respondents submit that the Court of Appeal was correct in referring in detail to the timescale between 2004 and 2009. Minister Coughlan had expressed views in trenchant terms about the conduct of the appellant in 2004. But it was five years later, after an exhaustive process, that she participated in Cabinet when the government was asked to confirm, or reject, the sanction recommended. She had no involvement of any kind in the process between October, 2004 and September, 2009. She was not charged with investigating, much less deciding, the substantive allegations which were investigated.

79. Reiterating, under this heading, that the independent Appeal Board had been entirely unaware of the Minister's interest or involvement, that it reached its own conclusions in relation

to those allegations, and found that the most significant of the allegations were established, the respondents submit that the government decision was based upon those Appeal Board's conclusions. The Minister was not in any sense a decision maker prior to 30th September, 2009. A reasonable observer of what happened prior to the meeting of the government could have had no reasonable apprehension regarding the fairness or impartiality of the process. That assessment would not reasonably be changed by reason of the fact that Minister Coughlan did not withdraw from the Cabinet deliberations on the appellant's case. Thus, the respondents contend, the decision of the Court of Appeal should be upheld.

Discussion

80. The authors of *Administrative Law in Ireland*, 5th Edition, Hogan, Gwynn Morgan & Daly, (Round Hall, Dublin, 2019), at para. 13-29, make the following observations on fair procedure, constitutional justice, and natural justice:

> *"To start with the ancient and seminal principle of natural justice, this consists of two fundamental procedural rules: first, that the decision maker must not be biased (nemo iudex in causa sua); and, secondly, that anyone who may be adversely affected by a decision should not be condemned unheard, rather he or she should have the best possible chance to put his or her side of the case (audi alteram partem)."*

81. This case, as has been seen, raises important issues as to bias in decision-making in the area of public administration. In the course of the submissions on behalf of the appellant, counsel has stated that natural justice has now been recast as constitutional justice and refer in that context to the observation of Walsh J. at page 242 in the case of *McDonald v. Bord na gCon* [1965] 1 I.R. 217, where he stated that:

> *"In the context of the Constitution natural justice might be more appropriately termed constitutional justice and must be understood to import more than the two well*

established principles that no man shall be a judge in his own cause and audi alteram partem".

82. The authors of *Administrative Law in Ireland* go on to describe the nature of bias at para. 14-01, saying as follows:

"The principle against bias, or the rule that no person shall be a judge in his own cause, (nemo iudex in causa sua), is fundamental and "as old as the common law itself". Arguably, this is the more important of the two major rules of constitutional justice. After all, if a decision maker is biased – if the referee is one's opponent's father – what point is there in taking part at all? At a fundamental level, what trust can there be in institutions? By contrast, the other principle – the fair procedure rule – says that a protagonist must be equipped to make the best possible case on his own behalf. But a violation of this rule still leaves open the possibility that a wise and impartial decision maker will take all matters into account justly. The principle against bias is a far-reaching concept which applies not only in public administration but in the procedure of courts, the latter point being elaborated in Part E. Bias may be conscious or unconscious and does not necessarily mean "a corrupt state of mind". This is one of the features which distinguishes bias from bad-faith (mala fides), though admittedly there is a great deal of overlap between the two concepts."

83. Reference was made by counsel on behalf of the appellant to the U.K. textbook, *Conflicts of Interest*, 4th Edition, referred to previously, by Hollander & Salzedo, in which it is stated at page 209 that:

"Any judge who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to a fair trial and thus violates one of the most fundamental principles underlying the administration of justice."

84. They go on to add that the word "judge" referred to above is shorthand, but that the principles apply equally to magistrates, arbitrators, regulatory tribunals, and other makers of judicial or *quasi*-judicial decisions.

85. Two quotations from the case of *Orange Communications Limited v. Director of Telecommunications Regulations* [2000] 4 I.R. 159 will serve to illustrate the parameters of bias. First of all, Barron J., in the course of his judgment at page 221, described bias as:

> *"In law it is any relationship, interest or attitude which actually did influence or might be perceived to have influenced a decision or judgment already given or which might be perceived would influence a decision or judgment yet to be given. The general nature of the relationship, interest or attitude is not capable of precise definition. The relationship may be family, social or business. The interest may be financial or proprietary. The attitude may be one of good will or ill will."*

86. He went on to say at page 222:

> *"Bias can be of two types: conscious - which in the cases has also been referred to as actual or subjective; and perceived - also referred to as objective or unconscious. The reason why the decision is not allowed to stand in the case of conscious bias is the perception that the decision was influenced by some existing relationship, interest or attitude (which I shall refer to as a factor) and would have been different, if it had been absent.*
>
> *In the case of perceived bias, it is not allowed to stand because of the perception that the decision given … might have been different, in the absence of the particular factor, . Nevertheless, there must be some substance in the factor before it can be thought to affect the process."*
>
> He added at p. 228:

"C*learly, the principles of bias are too wide to be set out in one definition. However, it seems to me that the essence of bias is the existence of some factor as already explained that constitutes a set of circumstances from which a reasonable observer might conclude that there was a real possibility that such factor would cause the decision maker to seek a particular decision or which might inhibit him or her from making his or her decision impartially and independently without regard to such factor. As I have already indicated, this factor must predate the decision complained of or the contemplated hearing".*

87. Geoghegan J., in the same case, stated, at pages 251 to 252, as follows:

"…there are in effect three different situations where bias may arise.

(1) The rare case of proved actual bias. For such bias to be established it would be necessary actually to prove that the judge or the tribunal or the adjudicator … was deliberately setting out to mark or hold against a particular party ....

(2) A situation of apparent bias where the adjudicator has a proprietary or some other definite personal interest in the outcome of the proceeding competition or other matter on which he is adjudicating. In that case, there is a presumption of bias without further proof.

(3) Even in cases where there is no evidence of actual bias and no evidence of the adjudicator having any proprietary or other interest in the outcome of the matter, there will still be held to be apparent bias if a reasonable person might have apprehended that there might be bias because of some particular proven circumstance external to the matters to be decided in the case such as for instance a family relationship in circumstances where objection may be taken …".

88. The authors of *Administrative Law in Ireland* comment on the different categorisations offered by both Geoghegan J., and Barron J., where they observed at para. 14-04 that:

"…Barron J. wisely perhaps conflated categories 2 and 3".

89. It is unnecessary to dwell on the particular categorisations of bias, although it has excited a degree of academic discussion. Nevertheless, the descriptions given by Barron J. and Geoghegan J. in *Orange* are of assistance in explaining the various categories of bias, or more accurately, perhaps, the circumstances in which bias can arise. Suffice it to say, that in this case, the appellant relies on allegations of both actual bias, and objective bias.

90. Costello J., in the course of her judgment in the Court of Appeal, referred to the observations of Barron J. on the subject of bias, and in particular his observations at page 222 of the report referred to above, and she said:

> *"[Barron J.] emphasised that the relevant factor must be shown to pre-date the decision making process and be external to the process. The manner in which proceedings were conducted could not, in itself, create a reasonable suspicion of bias."* (See para. 80 of her judgment).

91. A number of other paragraphs from the judgment have been referred to in the course of submissions in relation to the subject of bias. I propose to refer to a number of those. In doing so, it is worth bearing in mind the point noted by Hollander & Salzedo, referred to above, that *"actual bias as a ground for disqualification is very rare."* This is a point also noted by Geoghegan J. in *Orange*, as referred to previously. Keane C.J. in his judgment in *Orange* also reflected on the difficulty of establishing actual bias. He referred to the well-known decision of the Court of Appeal in England in the case of *Locabail (UK) Limited v. Bayfield Properties Limited & Anor.* [2000] Q.B. 451, where the Court said, at pp. 471-472:

> *"Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any*

judgment given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists. …"

92. Keane C.J., after quoting from *Locabail*, observed at page 187 as follows:

"In the case of a non-judicial decision maker, such as the first defendant in the present case, the difficulty referred to in that passage as to questioning a judge about extraneous influences affecting his mind does not necessarily arise. But the difficulty of proving actual bias remains and we are, of course, concerned with a case in which the trial judge found that there was no actual bias. The authorities, however, lend no support whatever to the proposition which found favour with the trial judge in the present case, i.e. that the court is entitled to infer from the establishment of a number of errors in the impugned decision, or the process leading to the decision, that the decision itself was vitiated by the existence of bias which can be equated to objective bias."

93. Before leaving the judgment of this Court in the case of *Orange*, it would be worth emphasising a number of points set out in the judgment of Barron J. First of all, at page 221 of his judgment, he noted that bias, insofar as it may have been found to exist, "*will always predate the actual decision or contemplated decision. Bias does not come into existence in the course of a hearing.".* He went on to observe that it may become apparent in the course of a hearing, and, as he said, in that way alert a party to the possibility of bias and "*so enable such party to establish facts which show that the attitude adopted by the decision maker in the course*

of the hearing was one which might have been expected having regard to those facts". Thus, he emphasised that bias was something that had to predate the decision. He reviewed a number of authorities from other jurisdictions, including *Locabail*, referred to previously, the Canadian decision of *Re Gooliah and Minister of Citizenship and Immigration* [1967] 63 DLR (2d) 224, and *Anderton v. Auckland City Council* [1978] 1 NZLR 657, amongst others, and concluded by describing the essence of bias in the passage which is referred to above, in para. 86.

94. Costello J., in commenting on the judgment of Barron J., emphasised two points. Firstly, the fact that the relevant factor said to be evidence of bias must be shown to predate the decision-making process and be external to the process. Further, the manner in which the proceedings were conducted could not create a reasonable suspicion of bias. (See para. 80). She observed, at para. 82 of her judgment, that:

> *"Barron J. held that the party asserting that the decision was tainted by actual bias on the part of the decision maker must show that the result would have been different but for the presence of the relevant factor. Importantly, neither the egregious conduct of a decision maker at a hearing nor the perversity of the decision maker's decision may be taken as evidencing bias."*

95. There are a number of observations which can be made at this point about the question of actual bias. First of all, as pointed out by the learned authors of *Administrative Law in Ireland*, actual bias is rarely found to exist, and therefore an allegation of actual bias is rarely likely to succeed. (See para. 14-05, Footnote 10). Secondly, in order to establish actual bias, it is necessary to show that the decision-maker reached his or her decision, having been influenced by some existing relationship, interest, or attitude, without which the decision would have been different. Thirdly, the relevant issue said to have influenced the decision-maker is one that must be shown to have predated the decision-making process and be external to the process. (See the judgment of Barron J. in *Orange*, referred to above).

96. It will now be necessary to consider the matters relied on by Mr. Kelly to suggest that there was actual bias on the part of Mr. Fitzpatrick, in coming to the recommendation that Mr. Kelly should be dismissed. Mr. Kelly has always maintained that the key issue in this case is the involvement of the Minister, and her complaints in relation to him. He has referred to the "concealment" of the involvement of the Minister and relies on this in relation to the question of actual bias and objective bias. Insofar as it concerns the question of actual bias, the key facts relied on by Mr. Kelly concern the following matters:

1. The email of the 8th October, 2004, from Dr. Beamish to Mr. Fitzpatrick concerning the Minister's complaints.

2. The meeting of the 15th October, 2004 between the Minister and Mr. Fitzpatrick (and Dr. Beamish).

3. The failure of Mr. Fitzpatrick to recuse himself from carrying out the investigation, following this meeting.

4. The approach taken by Mr. Fitzpatrick in the course of the investigation in relation to the provision of statements made by witnesses in an unredacted form. Mr. Fitzpatrick refused to provide unredacted versions of the witness statements, in the absence of an undertaking from Mr. Kelly as to the use to be made of the documents.

5. The fact that the Appeal Board did not uphold the sanctions recommended by Mr. Fitzpatrick in relation to two of the complaints in respect of Mr. Kelly. This was also contended to be evidence of actual bias on his part.

97. The complaint as to actual bias on the part of Mr. Fitzpatrick stems from the fact of his attendance at a meeting with the Minister on the 15th October, 2004. It is not suggested that Mr. Fitzpatrick had any pre-existing relationship with, or attitude towards, Mr. Kelly, or any pre-existing interest or attitude which might have influenced his decision on foot of the investigation which was about to take place. Coupled with the attendance at the meeting with

the Minister, there is a complaint about decisions taken by Mr. Fitzpatrick in the course of the investigation, and with his conclusions and recommendations as to sanction. It has been suggested that the matters complained about in respect of Mr. Fitzpatrick, which arose in the course of the investigation, are evidence of the influence of the Minister over Mr. Fitzpatrick, in the course of the investigation.

98. A number of observations can be made on the issue of actual bias, as contended for in this case. First of all, it is important to bear in mind that, by the time the meeting took place, a decision had already been taken to initiate an investigation into Mr. Kelly and his conduct as Harbour Master, as a result of the complaints made in the anonymous letter of the 11th August, 2004. Secondly, the Minister had contacted the Department through the Assistant Secretary to make further complaints about Mr. Kelly in his capacity as Harbour Master. As a TD for the area, I see no reason why she would not be entitled to bring forward the complaints she had in relation to Mr. Kelly by bringing it to the attention of the relevant Department and its officials. This is part of the legitimate work of a TD, and the fact that one is a Minister does not take away from this entitlement. It is unfortunate that there is no proper note of the meeting, and that such note as there is indicates that the Minister, while conveying her complaints, went further than was necessary or appropriate in doing so by relaying unsavoury local gossip about Mr. Kelly. Complaint was also made about the lack of a proper note of the meeting, and the fact that the existence of the meeting was not disclosed to Mr. Kelly for a very considerable period of time. As it happened, the complaints outlined by the Minister did not form any part of the subsequent investigation. It should also be borne in mind that, before the investigation properly got underway, there was a preliminary phase in which Mr. Bolger carried out an examination to establish the relevant facts in relation to the complaints made against Mr. Kelly. Ultimately, it was on foot of the report furnished by Mr. Bolger that Mr. Fitzpatrick was to decide whether or not a *prima facie* case existed meriting a full disciplinary investigation.

99. As I have said, while the Minister made complaints about Mr. Kelly, those complaints were not the subject of the investigation carried out by Mr. Fitzpatrick. Had her complaints become the subject of the investigation, the involvement of the Minister would have become known, including the fact of the meeting with the investigating officer. I should add that, even if the complaint of the Minister had been part of the investigation, it does not follow that a meeting between the investigation officer and the Minister would have been inappropriate or improper in any way. There is no reason why a Minister is not entitled to make a complaint about the conduct of a person in the position of Mr. Kelly, if it is appropriate to do so. In circumstances where her complaints did not form part of the investigation, the meeting between the Minister and Mr. Fitzpatrick in which she conveyed her complaints about Mr. Kelly is, to my mind, irrelevant notwithstanding the pejorative terms in which she conveyed her complaints.

100. One further factor requires to be borne in mind. As previously referred to, much has been made on behalf of Mr. Kelly of what has been described as the "concealment" of the meeting between Mr. Fitzpatrick and the Minister. It should be recalled that, when this matter was investigated by Mr. Fitzpatrick, and he made his recommendation, it was open to Mr. Kelly to bring an appeal to an Appeal Board, which he did, and, at the Appeal Board, the respondents had sought to introduce a document with a timeline for the purpose of setting out the background to the matter before the Appeal Board. That document contained a reference to the communication from the Minister, but, as will be recalled, Mr. Kelly objected to its admission, and therefore it did not go before the Appeal Board hearing. Given those circumstances, it is difficult to see that there was any active attempt on the part of the Department of Agriculture, or Mr. Fitzpatrick, to conceal the existence of the meeting at that stage, even if Mr. Kelly had not been aware of the meeting while the investigation was being conducted by Mr. Fitzpatrick. These matters must be taken into account in considering that either the fact of the meeting

itself, or the non-disclosure of the fact of the meeting during the course of the investigation, could give rise to a reasonable apprehension of bias on the part of Mr. Fitzpatrick.

That is only one part of the complaint in relation to actual bias on the part of Mr. Fitzpatrick. As has been seen above, complaint was also made in relation to certain decisions of Mr. Fitzpatrick in the course of the investigation, and in relation to the recommendations made by him. In essence, what is complained of by Mr. Kelly in this regard is that, having regard to the fact that the Minister, at the meeting on the 15th October, 2004, expressed herself in such strong terms, that it was inevitable that a civil servant in the position of Mr. Fitzpatrick could not have avoided being influenced by the Minister, given the strength of her views. It was in this context that complaint was made as to the decisions of Mr. Fitzpatrick taken in the course of the investigation, and it is said that those are evidence of actual bias against Mr. Kelly. It is clear from the case law referred to above that, in considering the question of actual bias, decisions made or taken in the course of an investigation or proceedings cannot, of themselves, give rise to an inference of bias. In this context, I agree with the observations of Costello J., at para. 88 of the judgment of the Court of Appeal, to the effect that the conduct of the decision-maker during the process cannot establish bias as bias must arise from a factor outside the process impugned. Further, Costello J. rejected the notion that evidence of bias could be found in any alleged perversity of the decision-maker's decision. Reference has been made previously, at para. 71 of this judgment, to the comments of Costello J. to be found at the end of para. 89 of her judgment where she highlighted the extent of the unchallenged evidence against Mr. Kelly, but it is also useful to consider the first part of that paragraph, in which she said:

> *"Any such possible inference must be set against the proven fact of an extraordinarily careful and thorough forensic investigation which took place over a period of four years. It is important to note that Mr. Fitzpatrick did not uphold a number of allegations made against the appellant. He stopped inappropriate searching of the appellant's*

office immediately when it came to his notice. He conducted six meetings with the appellant in respect of which the appellant was furnished with all of the materials upon which Mr. Fitzpatrick relied. He was afforded more than a year to respond to the allegations and the detailed material supporting the allegations."

She concluded her consideration of the subject of actual bias, finding that the evidence in the case fell far short of establishing that the report of Mr. Fitzpatrick was tainted by actual bias against Mr. Kelly. (See para. 91 of her judgment, which is set out in para. 70 hereof).

101. I agree with the conclusions of Costello J. on this issue. It is clear from the case law set out above that cases of actual bias are very rare. They will involve either bias towards or against the individual, subject to the decision-making process. To paraphrase Geoghegan J. in the *Orange* case in a passage referred to previously, it would be necessary to prove that the decision-maker was deliberately setting out to hold against a particular party, irrespective of the evidence. Mr. Kelly has not proved that Mr. Fitzpatrick reached his conclusions irrespective of the evidence. On the facts of this case, there is simply no evidence to support the contention that Mr. Fitzpatrick was so influenced by the meeting with the Minister that he deliberately found against Mr. Kelly in relation to some of the complaints made, with the consequences in relation to the sanctions recommended. I therefore would reject the contention that there was actual bias on the part of Mr. Fitzpatrick.

102. The Court of Appeal went on to consider whether, if there had been actual bias on the part of the Mr. Fitzpatrick, the conduct of the appeal by the Appeal Board could have rectified any flaw in the process. Given that I am satisfied that there was no actual bias on the part of Mr. Fitzpatrick, it does not seem to be appropriate or necessary to express any view on this question.

Objective Bias

103. I now turn to the issue of objective bias. Relying on the facts previously outlined, it was contended that the decision made by Mr. Fitzpatrick at the conclusion of his investigation was tainted by objective bias on his part, by reason of his attendance at the meeting on the 15th October, 2004 with the Minister. It is also claimed that the decision of the government to accept the recommendation to dismiss Mr. Kelly was tainted by objective bias, by virtue of the involvement of the Minister in the meeting of the 15th October, 2004, and her participation in the Cabinet decision made on foot of the recommendation of Mr. Fitzpatrick. I propose to deal with these contentions separately.

104. Reference has been made previously to a number of authorities on the subject of objective bias such as *Dimes*, *Goode Concrete*, *Bula*, *Kenny*, *O'Callaghan* and, of course, *Orange*. The *locus classicus* for a discussion on the subject of objective bias must be the statement of Lord Campbell in the leading case of *Dimes v. Proprietors of the Grand Junction Canal* (1852) 10 E.R. 301 in which it was stated by Lord Campbell, at page 315, as follows:

> *"No one can suppose that [the Lord Chancellor] could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. … we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence".*

105. The passage above has been regarded as the starting point for a consideration of the subject of objective bias in many subsequent cases. This Court has considered the appropriate test for objective bias in a series of cases, and perhaps one of the more helpful descriptions of the appropriate test for objective bias was that set out by Denham J., (as she then was), in the case of *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412, at page 441, when, having considered a number of authorities from a number of jurisdictions, she observed as follows:

> *"The submissions in relation to the test to be applied roved worldwide. However, there is no need to go further than this jurisdiction where 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."*

106. The fact that the test is an objective one has been reiterated in other cases referred to previously, such as *Kenny, O'Callaghan*, and *Goode Concrete Limited*. Thus, in *O'Callaghan v. Mahon* [2008] 2 I.R. 514, Fennelly J., at page 666 of his judgment, referred to the passage from the judgment of Denham J. quoted above, and observed that the statement of principle made by her in the passage cited seemed to him to be decisive (see page 666). Fennelly J. went on to consider a number of further authorities, including a decision of the High Court of Australia in the case of *Vakauta v. Kelly* (1989) 167 CLR 568. He went on to set out his conclusions, at para. 80 of his judgment, saying as follows:

> *"The principles to be applied to the determination of this appeal are thus, well established:-*
>
> *(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."

107. Fennelly J. returned to the subject of the hypothetical observer in his judgment in the case of *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40, at page 45, in which he made further observations as to the person by whose standards in any given case it would be adjudged that there was a "reasonable apprehension" or suspicion that the decision-maker could have been biased, that is, an independent person, not over-sensitive, and who has knowledge of the relevant facts. (See page 45).

108. It has to be said that there is little disagreement between the parties in relation to the test to be applied as to whether or not objective bias has been established on the part of a decision-maker. Two further decisions may be of assistance. The first is the decision of this Court in the case of *Reid v. I.D.A.* [2015] 4 I.R. 494, in which the judgment of the Court was delivered by McKechnie J. At para. 74 of his judgment, McKechnie J. set out the test for objective bias in the following terms:

"The test for this class of objection is now well established: in short, it is the reasonable suspicion or the reasonable apprehension test. Whilst the latter description has been preferred in Bula Limited v. Tara Mines Limited (No.6) [2000] 4 I.R. 412, both terms continue to be used interchangeably. No longer is there any real suggestion that the

once alternative approach, namely a real likelihood of bias, should be considered. The test now to be applied is centrally rooted … in the integrity of public administration generally. Thus, the prism through which the issue must be considered is that of a reasonable observer's perception of what happened. Therefore, as has been said on numerous occasions, what the parties, the witnesses or even us judges think, is not decisive. It is what the reasonable person's view is, albeit a person well informed of the essential background and particular circumstances of the individual case."

109. He went on to recite the test, as outlined by Denham J. in *Bula Limited*, in the passage cited previously. He also made reference to the decision in *Kenny*. McKechnie J. went on to make the following observation at para. 78 of his judgment:

"Could I perhaps however add two observations to the above? Firstly, in my view, the test remains the same right throughout the ambit of public administration: given that the underlying purpose of the test is confidence in the objectivity of all such persons and bodies, it would be invidious if the standard should differ as between one entity and another. Secondly, it is well established that even though the relevant decisions of the IDA were taken by a multi-member Board, and the allegation of bias is against one member only, nonetheless, if sustained, the decision of the entire body is invalid: O'Driscoll v. Law Society of Ireland [2007] IEHC 352, (Unreported, High Court, McKechnie J., 27th July, 2007), at para. 56, pp. 51 and 52; Connolly v. McConnell [1983] I.R. 172."

110. The latter passage is a useful clarification of the point that the test remains the same no matter what aspect of public administration is in issue. The second point emphasised in the latter passage by McKechnie J. is the fact that a finding of objective bias against one member of a body, when that body has the responsibility of making a decision, will taint the decision of the body overall.

111. The other authority that might be of assistance is the decision in the case of *Harrison v. Charleton* [2020] IECA 168. In that case, the applicant had claimed that a reasonable apprehension of bias existed against the respondent, who was the chairman of what came to be known as the Disclosures Tribunal, due to his professional involvement with a witness, who was previously involved with an earlier tribunal of investigation, (The Morris Tribunal), in which the respondent had acted as counsel for the tribunal some 15 years previously. The allegation of bias in that case was rejected by the High Court, and the Court of Appeal. In the course of his judgment on behalf of the Court of Appeal, Noonan J. made the following observation:

> *"... one cannot be expected to disclose something of which one is unaware. The whole point about objective bias is the potential for something to act on the mind of the decision maker which might rob the decision of perceived impartiality. Something long forgotten cannot possess that quality."*

Thus, it is clear that an allegation of objective bias by reason of matters which occurred many years earlier, and which are long forgotten, will not give rise to a reasonable apprehension of bias on the part of a decision-maker.

112. Bearing in mind the test of the reasonable observer outlined above, it is necessary to consider once again the matters relied upon by Mr. Kelly to support his contention that the reasonable observer, who is not unduly sensitive, and armed with all the relevant facts, would reasonably apprehend that there is a risk that the decision-maker in his case was not fair and impartial. First and foremost, Mr. Kelly relies on the meeting that took place between Mr. Fitzpatrick and the Minister. A number of points are made arising from that meeting. First of all, it is suggested that there was a sufficient degree of possibility that Mr. Fitzpatrick's investigation could have been influenced by the Minister's representations to him. It is said that the reasonable observer would reasonably apprehend that he could be contaminated by the

Minister's intervention. According to Mr. Kelly, Mr. Fitzpatrick should never have attended the meeting to discuss any issues concerning Mr. Kelly's management of the Harbour with the Minister. Having done so, it is said, he should have recused himself. The point is made that Mr. Fitzpatrick's averments to the effect that he was not influenced by the Minister's representations are of no relevance to the assessment of the reasonable observer.

113. Complaint is also made by Mr. Kelly in regard to the failure to disclose the meeting with the Minister in the course of the investigation. This is characterised as a lack of candour, and criticism is made of the fact that Mr. Fitzpatrick had indicated that he was not aware that his notes of the meeting were on file. In addition, complaint is made of the fact that there was no proper record kept in relation to the meeting. In this context, Mr. Kelly has questioned whether the respondents have met the duty of candour imposed on public authorities in public law litigation. Accordingly, it is contended that the court should have regard to what was stated by the Minister in the course of the meeting, and by Mr. Fitzpatrick, to the effect that he was unaware that the notes were on file. It is argued that, against this background, the reasonable observer could conclude that there was a probability that the Department, at the highest level, intended the meeting to be "off the record", and therefore to be concealed. Insofar as the respondents contend that there was a significant elapse of time between the meeting complained of, and the conclusion of the investigation, that this was not relevant in circumstances where it has not been suggested that Mr. Fitzpatrick did not recall the nature of the meeting with the Minister.

114. Reference is made to para. 95 of the judgment of Costello J., and the emphasis on the timing of the meeting with the Minister, and the fact that the investigation took over four years to complete. Mr. Kelly makes the point that reliance on the passage of time is unsustainable, as it fails to take into account the nature of bias, and how it operates. Although it is accepted that bias can diminish over time, it is nonetheless submitted that bias can act both consciously,

and unconsciously, on the mind of a decision-maker, so as to influence his or her decision. It was further submitted that representations made to a civil servant by a Minister at the outset of an investigation might potentially act upon the mind of the civil servant during the course of the investigation, and therefore inhibit the decision-maker from conducting the investigation with impartiality. Therefore, it is contended that there has to be a reasonable suspicion that Mr. Fitzpatrick could have been continuously influenced, whether consciously or unconsciously, by the Minister's interventions.

115. There are a number of observations I would make in relation to these matters. First of all, the fact that Mr. Fitzpatrick was not aware of the existence of his notes on file does not seem to me to be evidence of a lack of candour on his part, or, indeed, on the part of the respondents generally. If there was genuinely an intention on the part of the Department, or Mr. Fitzpatrick, to conceal the existence of the meeting, it is difficult to understand why reference to the communication from the Minister should have been made in the chronology of events provided to the Appeal Board.

116. It is necessary to consider whether a civil servant at the level of Mr. Fitzpatrick would be influenced by a meeting with a Minister, of the kind that took place here. Mr. Fitzpatrick was about to undertake an investigation into Mr. Kelly's conduct as Harbour Master, as a result of complaints made to the Department. The Minister, a local TD, also had complaints to make, and undoubtedly had an entitlement to bring those complaints to the attention of the Department. It is unfortunate that the Minister, in making those complaints, used intemperate language, as is evident from Mr. Fitzpatrick's notes of the meeting, which have been set out previously. However, it is useful to bear in mind that the complaints made by the Minister did not form any part of the investigation. To that extent, and so far as Mr. Fitzpatrick was concerned, the complaints of the Minister were irrelevant to his investigation.

118. In considering this issue overall, it seems to me that the approach taken by Costello J., in the Court of Appeal, is a useful one. At para. 95 of her judgment, she outlined a list of the facts that would be known to the hypothetical, reasonable, independent observer, as follows:

- the allegations which resulted in the decision to investigate the activities of the appellant and the fact that the decision was initiated in response to an anonymous letter received in August 2004;
- the decision to investigate the activities of the appellant was taken on 6 September 2004;
- Mr. Fitzpatrick was asked to undertake the investigation as he was the personnel officer of the Department;
- the scope of the matters to be investigated and the matters which were excluded from the investigation;
- the meeting between Minister Coughlan and Mr. Fitzpatrick;
- the allegations against the appellant made by Minister Coughlan in October 2004;
- the fact that the appellant was not informed of either the fact of the meeting or the details of her complaints concerning the appellant;
- the investigation took place over four years;
- the appellant was furnished with all of the documents upon which Mr. Fitzpatrick relied in reaching his preliminary, and then final, conclusions;
- the appellant was afforded the opportunity to respond to all of the allegations made against him and to make submissions orally and in writing;
- that much of the material consisted of invoices and the appellant's own diary entries;
- that this evidence was not disputed by the appellant;

- the appellant defended the allegations on the basis that (a) he was entitled to engage in pilotage, (b) this activity did not give rise to a conflict of interest with his position as harbour master and, (c) he received no remuneration for his pilotage;
- Mr. Fitzpatrick rejected some of the allegations against the appellant;
- while not legally represented, the appellant had the benefit of legal advice throughout the process;
- the appellant was represented by a very experienced trade union official throughout the process;
- the appellant had the possibility of being legally represented at the appeal before the Appeal Board;
- that the appellant was afforded the opportunity to call witnesses before the Appeal Board;
- the appellant chose not to call any witnesses relevant to the essential ingredients of the charges laid against him;
- the appellant called two witnesses who addressed the issue whether he received remuneration for his services as a pilot and whether the admitted activity was prohibited or condoned by the Department;
- the independent Appeal Board reached its own conclusion as to whether the complained of activity was permitted or constituted a conflict of interest justifying the dismissal of the appellant from the post of harbour master;
- the appeal board was unaware of any involvement of Minister Coughlan in the process;
- the government was furnished with the report of the Appeal Board but not Mr. Fitzpatrick's report;

- they received a memorandum setting out the background, some background documentation, the reasons for the memorandum and the representations made by, and on behalf, of the appellant;
- the role of, and the options open to, the government; and
- Minister Coughlan was a member of government and present in Cabinet when the government took the decision to dismiss the appellant.

119. Costello J. went on to say:

"I find there is no error on the part of the trial judge in his conclusion that no reasonable apprehension of bias on the part of Mr. Fitzpatrick can arise out of the Minister's original act in the process."

120. The Court of Appeal, as can be seen from the matters set out above, dealt with the issue of objective bias on the part of Mr. Fitzpatrick very carefully, and clearly had regard to the test for objective bias enunciated in cases such as *Bula v. Tara Mines*, and *O'Callaghan v. Mahon*, referred to above. It is difficult to accept as a general proposition that a meeting between the Minister and an investigating officer would give rise to a reasonable apprehension in the mind of a reasonable observer acquainted with all the relevant facts, that the investigation would not be impartial. There is nothing in the evidence to suggest that Mr. Fitzpatrick was influenced consciously or subconsciously by the meeting with the Minister notwithstanding the unfortunate terms in which she expressed her views. The fact that Mr. Fitzpatrick found that some of the complaints against Mr. Kelly could not be sustained is strong support for the view that he acted fairly and impartially in the course of his investigation. Accordingly, I can see no error on the part of the Court of Appeal in the manner in which this issue was dealt with.

121. I now want to turn to the final issue that arises for consideration, and that concerns the role of the Minister in the decision of the Cabinet to dismiss Mr. Kelly, and the argument that

the decision was tainted by objective bias by reason of her participation. Both the High Court, and the Court of Appeal, rejected Mr. Kelly's arguments in this regard. The High Court, in its decision, dealt with this issue on the basis that the role of a Minister in this regard was part of the executive function of a Minister, and, as such, was not part of an adjudicative process. The trial judge made the following observation, at para. 6.14 of his judgment:

> *"Can there be bias, either objective or subjective where there is no adjudication? Can it arise where, as here, there is simply a duty to affirm a recommendation or exercise its discretion and refuse to dismiss? Should a Minister who has expressed previously a view on the complaint which finally ends up before her in Cabinet be precluded from participation in the decision whether to dismiss or not? If, for example, the Government or any member thereof stated publicly a determination to stamp out corruption in a particular area of the civil service, would it or the Minister in question be precluded from deciding to accept a recommendation to dismiss an officer in that area found to have acted corruptly following a fair investigation and after an appeal? The answer to all these questions seems to me to be "no". Is a Minister who has publicly expressed a view on an issue obliged to forgo participation in vital decisions concerning that issue? To preclude a Minister from participating in decisions on matters upon which they have expressed views, in my view, confuses the adjudicatory function with the executive process. Thus, in my view, the Minister's participation in Cabinet when the decision was made to dismiss the applicant is beyond challenge herein."*

122. I have no difficulty with some of the observations made by the trial judge in this regard. Thus, I agree that, if the government, or a member thereof, had stated publicly a determination to stamp out corruption in an area of the civil service, that would not preclude the Minister or the government from accepting a recommendation to dismiss an officer in that area found to have acted corruptly following the affording of due process to the person concerned. Secondly,

as a general proposition, I would not consider that a Minister, who has publicly expressed a view on an issue, is thereby obliged to forego participation in vital decisions concerning that issue. It is implicit in the comments of the trial judge that there is a difference between an adjudicatory and an executive process. I cannot see any difficulty in a Minister expressing a view, strong or otherwise, in relation to a particular issue, and then making a decision thereon. That is the nature of the role of a Minister, and it would be entirely stifling of government function if Ministers could not express views on issues, and then make decisions in relation to those issues. The work of government is multifaceted, complex and encompasses the making of many decisions involving all sorts of issues, be they political, economic or otherwise. The impact of government decision making may be big or small. However, that is not, in truth, what is at issue in these proceedings. Here, the government was engaged in carrying out a statutory function entrusted to them by the legislature concerning a decision to dismiss an established civil servant, the harbour master at Killybegs. The Court of Appeal in its judgment, at para. 98, made the following observation:

> *"Any assessment of whether a decision is tainted by bias must be fact specific and must depend on the nature of the issue to be decided. Section 5 of the Civil Service Regulation Act, 1956 provides that "every established civil servant shall hold office at the will and pleasure of the government." The decision to dismiss the appellant was a decision which could only be made by the government. The government was asked to either affirm the recommended sanction and dismiss the appellant, or to refer the appellant to the appropriate decision maker for a lesser sanction for the serious misconduct the appeal board found had been established."*
>
> That much is so.

The judgment continued by saying:

"It was no function of the government to review the opinion of the appeal board on the finding of misconduct, much less review the facts and substitute its own view for that of the appeal board."

123. I have some hesitation in accepting that the function of the government in reviewing the question as to the dismissal of a civil servant is so limited.

124. It is apparent that a certain amount of information was provided to the Cabinet before its decision was made. Thus, as can be seen from para. 99 of the judgment of the Court of Appeal, a number of documents were provided to the Cabinet in relation to the issue as to whether or not Mr. Kelly should be dismissed, including representations made on behalf of Mr. Kelly, documentation between the Department and Mr. Kelly concerning the provision of commercial pilotage services, the transcript of a meeting with Mr. Fitzpatrick on the 8th March, 2005, a further extract from a meeting on the 12th October, 2006, statements from Mr. Martin Connell, an affidavit of Captain McGowan regarding the involvement of Mr. Kelly and Captain Connell in pilotage. The Court of Appeal in this regard noted that the information was provided so that the government members would have the necessary information to enable them to take a decision on whether or not to dismiss Mr. Kelly. But the Court of Appeal added that it was "not so they could review the findings of the appeal board". I agree with the proposition that the function of the Cabinet was to decide whether or not to dismiss Mr. Kelly, and that their function was not to act, as it were, as some form of appeal body from the decision of the Appeal Board. However, there was a decision to be taken by the Cabinet, and that, clearly, was a decision as to whether or not Mr. Kelly should have been dismissed. They were provided with the documentation relevant to that decision and had to consider it. They had a choice to make as to whether or not Mr. Kelly should be dismissed.

125. It was noted in the judgment of the Court of Appeal that any issue as to what discussions took place at the Cabinet meeting concerned cannot arise by reason of Cabinet confidentiality.

Therefore, the Court of Appeal concluded that no issue could be raised in relation to the question of actual bias on the part of the Minister. The decision of the Court of Appeal was therefore limited to an issue as to objective bias on the part of the Minister..

126. When considering this question, the Court of Appeal had regard to the decision in the case of *Locabail*, and to the observations of McKechnie J. in *Reid*, which have been referred to previously. The Court of Appeal considered the nature of the decision-maker. A distinction was drawn between judges and those who are members of the government. The view was expressed as follows:

> *"This means that the jurisprudence as regards bias as it applies to judges cannot be applied simpliciter to a decision of the government. Of necessity, a greater margin of appreciation must be granted to public representatives than may be appropriate to grant to judges in relation to their pronouncements or representations. Public representatives ought not to be constrained from expressing their views or representing their constituents, lest they be prevented at a future date from participating in decisions of government, save in the most exceptional or extreme circumstances."*

127. I appreciate the concern expressed by the Court of Appeal at the possibility of inhibiting public representatives from freely expressing their views, representing the interests of their constituents, and making representations in relation to issues arising in their constituencies, with relevant government Departments. However, I have some concern that the statement in para. 104 of the judgment, to the effect that "*the jurisprudence as regards bias as it applies to judges cannot be applied simpliciter to a decision of the government*". It seems to me that that insofar as this government decision was concerned with the potential dismissal of a civil servant, the view of the Court of Appeal is at odds with the decision of this Court in *Reid*, where it was observed, at para. 78, that the test for bias *"remains the same right throughout the ambit of public administration: given that the underlying purpose of the test is confidence*

in the objectivity of all such persons and bodies, it would be invidious if the standard should differ as between one entity and another". I accept that the Minister's involvement in the investigation of this matter is confined to two points. The first point was her engagement with the Department, and with the Assistant Secretary General, which was followed up by the meeting which took place on the 15th October, 2004. The second engagement by the Minister was her participation in the Cabinet decision to dismiss Mr. Kelly. It must be recalled that the purpose of the meeting in 2004 was not simply to raise concerns but was to make complaints. It is true to say that, in the intervening period, a long and detailed investigation took place, and the Minister had no hand, act or part in any of that process. Equally, it is true to say that the matter came before an independent Appeal Board which reached its own conclusions on the matter. Does this mean then that the involvement of the Minister in the Cabinet meeting that decided to dismiss Mr. Kelly was not tainted by objective bias? It is, in my view, impossible to conceive of a situation in which the hypothetical, reasonable observer, aware of the relevant facts, would not have had a reasonable apprehension of bias, by reason of the involvement of the Minister in the ultimate decision to dismiss Mr. Kelly. The Minister, at the commencement of the process, had contacted the Department, through the Assistant Secretary of the Department, and had outlined to him "*a range of serious concerns*" that she had in relation to the management of the Harbour. This was followed up by a meeting between the Minister and Mr. Fitzpatrick, as referred to previously. It is clear that the Minister expressed trenchant views in relation to Mr. Kelly, which went far beyond any concerns that might have existed in relation to Mr. Kelly's conduct as Harbour Master. Then, although the Minister had no further involvement in the investigative process, when the matter came before the Cabinet, she participated in that Cabinet meeting at which the decision to dismiss Mr. Kelly was taken. If a similar situation had arisen in any other area of public administration, I have no doubt that there would be no hesitation is saying that the decision taken was one which was tainted by objective

bias. The fact that this decision was taken by the government does not, in my view, mean that the decision is immune from being tainted by objective bias. If a judge had raised issues of concern in relation to an individual, and, for example, had made a complaint to the Gardaí alleging some breach of the criminal law against an individual, and did so in the sort of pejorative terms that occurred in this case, and that person was subsequently brought before the same judge in relation to a criminal trial on different allegations, could anyone have any doubt that that judge should not hear the case? It should have been apparent to the Minister that it was inappropriate for her to participate in the Cabinet decision leading to the dismissal of Mr. Kelly, given her previous interest and involvement in the matters at issue, and thus she should not have participated in the meeting. I, therefore, disagree with the conclusion of the Court of Appeal that, "*the reasonable observer could have no reasonable apprehension that the decision taken in relation to the appellant was not taken following a fair hearing by an impartial decision maker, the government*".

128. It is, undoubtedly, the case that the Minister had strong views to express in relation to Mr. Kelly, and that she voiced those to Mr. Fitzpatrick in the course of the meeting with him. She was entitled to make complaints about his conduct even if she did so in pejorative terms. However, she should not have participated in the Cabinet meeting at which the decision to dismiss Mr. Kelly was taken bearing in mind her trenchant views. In my view, the hypothetical reasonable observer would have a reasonable apprehension as to the possibility that the decision taken by the government by reason of the presence of the Minister at the Cabinet meeting was tainted by bias. In the circumstances, I would allow the appeal on this ground.