

**THE HIGH COURT**

[2022] IEHC 86  
[Record No. 2020/ 5336 P]

**BETWEEN**

**JOHN BARRETT**

**PLAINTIFF**

**AND**

**THE COMMISSIONER FOR AN GARDA SÍOCHÁNA AND  
THE MINISTER FOR JUSTICE AND EQUALITY**

**DEFENDANTS**

**JUDGMENT of Ms. Justice Stack delivered on the 14th day of February, 2022.**

**Introduction**

1. The plaintiff is employed as Executive Director, Human Resources and People Development in An Garda Síochána, and his appointment is subject to, *inter alia*, the Civil Service Regulation Acts 1956 to 2005. The plaintiff is a member of the Senior Leadership Team, reporting to the Chief Administrative Officer of the Gardaí.
2. The proceedings arise out of a formal disciplinary process initiated by the Commissioner pursuant to the Civil Service Disciplinary Code, provided for in Circular 19/2016 ("the 2016 Code") on foot of a formal complaint made by Assistant Commissioner Fintan Fanning, who has since retired. This Code sets out the arrangements for dealing with disciplinary matters in the Civil Service and establishes a six step disciplinary procedure for civil servants, and was the Code by reference to which the disciplinary proceedings against the plaintiff, with which this application is concerned, were conducted.
3. The 2016 Code sets out the procedure to be commenced where concern has arisen, or an allegation has been made, that misconduct may have occurred on the part of a civil servant. Examples of misconduct and serious misconduct are provided in Appendix A to the 2016 Code.
4. Step 1 in the process is the commencement of the procedure by the "Relevant Manager". In the case of the procedures applied to the plaintiff, the Commissioner acted as Relevant Manager, and the issue raised by the plaintiff in relation to this is discussed later in this judgment. While a complaint of misconduct had been made against the plaintiff prior to the appointment of the Commissioner on 3 September, 2018, the Commissioner added further complaints arising out of the sending by the plaintiff of letters dated 29 June, 2018, 1 August, 2018, and 20 August, 2018, to his predecessor, Acting Commissioner Ó Cualáin and to another member of the Senior Leadership Team. These additional complaints were added by letter from the Commissioner to the plaintiff dated 17 October 2018.
5. On 25 September, 2018, the Minister, on the recommendation of the Commissioner, suspended the plaintiff on full pay pending the determination of the disciplinary procedures.
6. Step 2 of the procedure is the factual investigation. In this case, the investigation was conducted by an independent senior counsel, Mr. Ó Braonáin S.C. ("the Investigator").

The Terms of Reference governing the matters to be investigated in this instance included competence to make findings as to whether the plaintiff was guilty of "serious misconduct" within the meaning of the 2016 Code. In the course of the investigation, the Commissioner gave evidence and was cross examined by counsel for the plaintiff. However, just before the plaintiff was due to give evidence, he withdrew from the investigation complaining that it was unlawful. The fact that the investigation had at that stage been ongoing for a period of approximately two years is an issue in the proceedings as the defendants say that the plaintiff is guilty of delay and acquiescence, such as to deprive him of relief.

7. The Investigator issued his findings in a written report to the Commissioner dated 9 November, 2020. These included a finding that the plaintiff was guilty of "*serious misconduct*". These were furnished to the plaintiff by the Commissioner under cover of letter dated 16 November, 2020, and the plaintiff was invited to a disciplinary meeting on 30 November, 2020, but the plaintiff failed to attend. Preparation for that meeting, the meeting itself, and the outcome of it, are steps 3, 4 and 5 of the procedure established by the 2016 Code.
8. The plaintiff having declined to attend the disciplinary meeting or to make any submissions on the findings of the Investigator, the Commissioner proceeded to consider the report of the Investigator without the benefit of the plaintiff's submissions, and drew up the Relevant Manager's Report in which he stated that, in light of the Investigator's findings, he could no longer repose trust and confidence in the plaintiff or have him as a member of the Senior Leadership Team and he recommended that the plaintiff be dismissed with immediate effect. This decision as to the appropriate disciplinary sanction was step 6 of the procedure. Thereafter, the procedure provides for internal and external appeals. The appeal relevant to the plaintiff was the appeal to the Civil Service Disciplinary Code Appeals Board ("the Appeals Board"), and this is discussed further below.
9. The plaintiff was informed of the outcome of the disciplinary meeting by letter dated 16 December, 2020 and furnished with a copy of the relevant Manager's Report recommending dismissal. The plaintiff was informed in this letter that he had a right of appeal from that recommendation which might be lodged with the Appeals Board within five working days from the date of that letter.
10. The plaintiff chose not to avail of his right of appeal pursuant to the 2016 Code. As a result, the next step is for the Minister to consider the recommendation of the Commissioner that the plaintiff be dismissed. The Minister is not bound by the recommendation and the plaintiff had the right to make representations to the Minister as to why the recommendation should not be accepted. The plaintiff has indicated that he does not intend to make any such representations.
11. I return to the disciplinary procedures in more detail below when considering in more detail the arguments made by the plaintiff in support of his application for interlocutory relief.

### **The proceedings**

12. The plaintiff instituted these proceedings on 24 July 2020, but, despite the fact that the plenary summons and the statement of claim claimed that the letters of 29 June, 1 August and 20 August, 2018, were "*protected disclosures*" within the meaning of s. 5 of the Protected Disclosures Act, 2014 ("the 2014 Act"), and that the disciplinary process in relation to him was unlawful, the plaintiff made no application to this Court until 30 December 2020 when he obtained short service for this motion seeking interlocutory relief to 4 January 2021. On 4 January, 2021 the defendants gave undertakings that they would not take any action in respect of the subject matter of these proceedings for three weeks. Those undertakings were subsequently continued until the determination of this application for interlocutory relief.
  
13. The Orders sought in the Notice of Motion are as follows:
  - (I) restraining the defendants, their respective servants or agents from taking any or any further steps whatsoever, in relation to, on foot of and/or in reliance upon the purported recommendation by the first named defendant to the second named defendant on or about 16 December, 2020 to immediately terminate the plaintiff's employment;
  - (II) restraining the defendants, their respective servants or agents from taking any or any further steps whatsoever, including publishing of any statement, whether verbal or written, internally or externally concerning, in relation to, on foot of and/or in reliance upon the purported "relevant manager's Report" of the Commissioner furnished to the plaintiff on or about 16 December, 2020;
  - (III) restraining the Minister from terminating the employment of the plaintiff;
  - (IV) restraining the defendants, their respective servants or agents from taking any or any further steps whatsoever that may cause any or any further detriment, including professional reputational damage, to the plaintiff.
  
14. A further application for an order requiring the Commissioner to produce notes of a certain meeting and advices received by him in relation to the relevant Manager's Report of 16 December, 2020, was not proceeded with.
  
15. The following reliefs are claimed in the plenary summons:
  - (I) A declaration that one or more disclosures which the plaintiff made on or about 29 June and/or 1 August and/or 20 August, 2018 are "*protected disclosures*" within the meaning of s. 5 of the Protected Disclosures Act, 2014, as amended ("the 2014 Act");
  - (II) A declaration that, in breach of s. 6 and/or s. 8 of the 2014 Act, the Commissioner and/or the Minister, their respective servants or agents have and/or have attempted to limit and/or restrain the manner by which the plaintiff is entitled to have made one or more protected disclosures on those three dates;

- (III) A declaration that, as a result of the plaintiff having made one or more protected disclosures on the three named dates, the Commissioner and/or the Minister, their respective servants or agents have caused "detriment" to the plaintiff, within the meaning of and/or in breach of s. 13 (3) of the 2014 Act;
- (IV) A declaration that the commencement and/or the maintenance of disciplinary proceedings against the plaintiff by the Commissioner, his servants or agents on or about 3 May, 2018 and/or 17 October, 2018, was in breach of contract, unlawful and/or in breach of the plaintiff's right to natural constitutional justice;
- (V) A declaration that the suspension of the plaintiff by the second named defendant on or about 25 October, 2018, and/or its continuance is unlawful, in breach of contract and/or in breach of the plaintiff's right to natural and constitutional justice;
- (VI) An order restraining the Commissioner and/or the Minister, their respective servants or agents from causing any continued and/or further detriment to the plaintiff as a result of the plaintiff having made one or more protected disclosures;
- (VII) Damages pursuant to s. 13 of the 2014 Act;
- (VIII) Damages for breach of contract and breach of duty to include damages for breach of statutory duty;
- (IX) Damages for conspiracy;
- (X) damages for malicious falsehood.

The usual claims for interest pursuant to the Courts Act, further or other relief, costs, and interim and/or interlocutory relief, were also included.

16. The Statement of Claim pleads that the various statements of the plaintiff constitute "*protected disclosures*". A notice for particulars was raised on 2 November, 2020 requesting the plaintiff to set out the basis on which each of these disclosures were said to constitute "*protected disclosures*" and this has never been replied to. However, at the hearing of the application for interlocutory relief, counsel for the plaintiff identified the relevant provisions on which he was relying and the matter has been determined on that basis. In due course, those particulars will no doubt be furnished in writing.
17. Before turning to the legal issues which arise in this application for interlocutory relief, it is necessary to set out in some detail the events giving rise to the proceedings. In support of the application for interlocutory relief, the plaintiff swore a principal grounding affidavit and eight supplementary affidavits. He subsequently swore a replying affidavit and two further supplementary affidavits. The exhibits are also voluminous, and include the transcript of all of the oral hearings before the Investigator, as well as voluminous correspondence which would appear to include a substantial part, if not all, of the correspondence between the parties involved in the disciplinary process with which the proceedings are concerned.

18. There are, essentially, two broad strands to the application. First, it is said that the disciplinary proceedings are unlawful as being in the nature of "*detriment*" for having made one or more protected disclosures such that the process itself is unlawful as being contrary to s. 13 of the 2014 Act. Secondly, there are more generalised complaints about the disciplinary proceedings themselves.
19. As regards the first issue, there is no dispute between the parties that three letters written by the plaintiff on 29 June, 1 August and 20 August, 2018, gave rise to disciplinary proceedings against the plaintiff which have culminated in a recommendation by the Commissioner to the Minister to the effect that the plaintiff should be dismissed. Therefore, the plaintiff contends that these are protected disclosures such that the disciplinary proceedings are in themselves an unlawful detriment. He further contends that four other statements or disclosures made by him prior to 29 June 2018 are protected disclosures and that the disciplinary proceedings similarly constitute an unlawful detriment caused to him by reason of having made those protected disclosures.
20. The defendants' primary contention is that the matters pre-dating 29 June, 2018, have nothing to do with the disciplinary procedures and that those procedures were commenced solely on foot of the complaint of Assistant Commissioner Fanning and due to concerns arising out of the letters of 29 June, 1 August and 20 August, 2018. However, they contend that none of those three letters were "*protected disclosures*" within the meaning of the 2014 Act. They also deny that three of the four earlier disclosures or statements of the plaintiff are "*protected disclosures*."
21. It is necessary to refer first to the threshold to be met by the plaintiff on this application for interlocutory relief, as there was no consensus between the parties as to the applicable test.

**Threshold to be reached by the plaintiff**

22. The plaintiff's written submissions proceed on the basis that all aspects of the injunctive relief sought must be determined by reference to the well-established *Campus Oil* criterion of a fair or serious question to be tried. They do this, at least partly on the basis that on the return date of 4 January, 2021 when the plaintiff first sought injunctive relief against the defendants, this Court (Barton J.) referred to the threshold to be established by the plaintiff as a "*strong arguable case*" and there was no objection from the defendants.
23. I think the defendants are quite right when they state in their written submissions that it was inappropriate to place reliance on the comments of the judge who was simply receiving undertakings given by the defendants so as to allow them to file replying affidavits before a full hearing was conducted. There was no argument on or adjudication of this issue and consequently the defendants could not be bound by an ex tempore statement of this kind.
24. In summary, the plaintiff says he only has to meet the threshold of a "*serious*" or "*fair*" question to be tried as established by *Campus Oil v. Minister for Industry and Energy* (No.

- 2) [1983] I.R. 88. By contrast, the defendants say that the relief sought in effect seeks to continue the employer/employee relationship between the parties and to suspend, on an interlocutory basis, the recommendation of the Commissioner as contained in the Relevant Manager's Report that the plaintiff be dismissed. As such, the defendants say the higher test for seeking mandatory interlocutory relief, as set out in *Maha Lingham v. Health Service Executive* [2005] IESC 89 applies and the plaintiff must demonstrate a strong case for saying that he will succeed at trial.
25. It seems to me that there are two standards to be applied in this case. As regards what I understand to be the main thrust of the plaintiff's case, which is to restrain alleged detriment to the plaintiff as a result of having made one or more protected disclosures, it seems to me that the relief sought is prohibitory in nature. The "*detriment*" claimed in this case is the very instigation of a disciplinary process, including the investigative portion of it, against the plaintiff, which he said was done because he made various protected disclosures. In relation to this aspect of the case, which I am going to deal with first, it seems to me that the traditional *Campus Oil* test applies, because the application is to restrain a wrong prohibited by statute. I therefore consider the factual and legal issues relevant to reliance on the alleged protected disclosures from the point of view of whether the plaintiff has established a serious or fair question to be tried on those issues.
26. As regards the separate attack on the disciplinary process on fair procedures grounds, it seems to me that the plaintiff is there claiming wrongful dismissal at common law, and the principles by which a court will grant an injunction, even on an interlocutory basis, to compel an employer to remain in an employment relationship with his employee when trust and confidence have been lost must be applied. The key decision in that context is, as the defendants submits, *Maha Lingam v. Health Service Executive* where Fennelly J. (*per curiam*) found that the application for an interlocutory injunction restraining the defendant from dismissing the plaintiff was in substance a mandatory injunction and that the plaintiff must show "at least that he has a strong case that he is likely to succeed at the hearing of the action." That case was concerned with a consultant who held a temporary position and had been given three months' notice of termination, it was notable that (at p. 6) Fennelly J. stated that it was common for the courts to imply a term of good faith and mutual trust into contracts of employment. Such a term is not restricted to temporary contracts and applies here. Indeed, Appendix A of the 2016 Code gives, as an example of serious misconduct that may warrant dismissal or other serious sanction, "*a breach of trust and confidence*".
27. The significance of that is that courts are traditionally reluctant to grant injunctions restraining dismissal as they amount, in effect, to orders for specific performance of employment contracts. Where mutual trust between the employer and employee has been lost, it is not appropriate to compel the parties to continue in the relationship. In those circumstances, any breach of contract will generally sound only in damages. Therefore, at interlocutory stage, a plaintiff who seeks in substance to continue his employment must meet the higher test identified by the Supreme Court in *Maha Lingam*.

28. I am therefore satisfied that, insofar as the plaintiff makes a series of wide-ranging complaints about the lawfulness of the disciplinary procedure, the plaintiff must meet the higher threshold in *Maha Lingam*. However, insofar as he seeks to restrain detriment within the meaning of the 2014 Act, he need only meet the *Campus Oil* threshold of a serious or fair question to be tried. This does not require him to show a strong case that he is likely to succeed at trial.
29. In order to consider the first strand of the case, it is necessary to set out some key events which led to the plaintiff writing the letters of 29 June and 1 and 20 August, 2018. It will also be necessary to consider the Commissioner's reaction to those letters for the purpose of considering why he amended the complaint of Assistant Commissioner Fanning to include several complaints of his own relating to the conduct of the plaintiff in writing those letters.

**Background to the initiation of the disciplinary process against the plaintiff**

30. The third supplementary affidavit of the plaintiff deals with matters which are pivotal to the claim made in the within proceedings on the application for an interlocutory injunction. The background to the matters giving rise to the within proceedings is that, in or about May, 2017, the then acting Commissioner, Mr. Ó Cualáin, assigned the plaintiff to establish a process dealing with complaints made by former Assistant Commissioner Fintan Fanning. A senior counsel was retained to act as an independent expert to deal with those matters, and terms of reference were drawn up and agreed between Assistant Commissioner Fanning and the investigator in that process. Assistant Commissioner Fanning was legally represented in that process and his solicitors also acted for him in connection with his subsequent complaint against the plaintiff.
31. Shortly before that, in March, 2017, an internal selection competition had been commenced for placement of members of An Garda Síochána in the armed support unit. Interviews were conducted in relation to that competition and, in November, 2017, an individual garda appealed the interview board's refusal to the plaintiff's office. The plaintiff, together with a senior member of his staff, allowed the appeal and decided to advance the garda at the next stage of the internal selection process. This consisted of a physical training assessment in which the garda was unsuccessful. A complaint was made to former Assistant Commissioner Fanning by a member of the GRA Central Executive Committee as to why the plaintiff and his staff member had allowed the appeal. The upshot of this was that former Assistant Commissioner Fanning expressed the view to the plaintiff that the member had been unsuccessful in the selection process at first instance and that, in effect, the relevant Code of Practice had not been followed by the plaintiff. It was alleged that the plaintiff's action in so doing meant that the process was "ignoring merit-based selection".
32. By replying text message, this was fully denied and, while the plaintiff said he would review matters, he denied that merit-based selection had been ignored. The text message from the plaintiff concluded:

*"Consider carefully the matter i raised with you and reflect appropriately.  
Amplification is neither helpful or becoming. Be on notice. J."*

33. Former Assistant Commissioner Fanning replied that he was not sure that texts of that nature were helpful and, by email dated 19 November, 2017, he made a complaint about the plaintiff to Deputy Commissioner Twomey. The complaint made by Assistant Commissioner Fanning related, first, to his allegation that the plaintiff had breached the relevant Code of Practice in deciding that the member should move forward to the second part of the selection process, and secondly that the text message quoted above constituted a threat to him.
34. The plaintiff was informed by letter dated 21 November, 2017, from the Deputy Commissioner that Assistant Commissioner Fanning had made a complaint that the plaintiff's text message to him had amounted to a threat.
35. The allegation as to the breach by the plaintiff of the Code of Practice was dealt with separately and, on the basis of the affidavits, could not be said to have had anything to do with the disciplinary proceedings which were ultimately conducted against the plaintiff and are not therefore relevant to this judgment.
36. In response to Assistant Commissioner Fanning's complaint, Deputy Commissioner Twomey took steps to act on foot of it. He suggested mediation by an independent mediator, Mr. Peter Ward S.C., in a letter to the plaintiff of 21 November, 2017, but, while the plaintiff agreed to engage in mediation, former Assistant Commissioner Fanning declined to participate.
37. The letter from Deputy Commissioner Twomey of 21 November, 2017, to the then Commissioner, set out all of the steps taken by Deputy Commissioner Twomey, including informing the plaintiff in general terms of the complaint that had been made, the suggestion that the matter would be mediated, the fact that both Assistant Commissioner Fanning and Mr. Barrett had been provided with details of an independent employee assistance programme provider to address their welfare needs, should they require same, that the matter had been notified to the Commissioner for Public Service Appointments, and that, while Assistant Commissioner Fanning had requested consideration be afforded to the matter under s. 42 of the Garda Síochána Act, 2005 and be fully investigated, Deputy Commissioner Twomey thought it was more prudent to await clarification from Assistant Commissioner Fanning as to his subjective views of the alleged threat.
38. It is material to a consideration of some of the key issues in this application that, by 26 November, 2017, Assistant Commissioner Fanning had retained Mr. Sean Costello as solicitor, to represent him in connection with his complaint. They were already representing him in connection with the earlier matter and they specifically stated that their client regarded the matter serious and that he was formally requesting a full investigation.

39. In response, Ms. Kate Mulkerrins, the Executive Director, Legal and Compliance, and along with the plaintiff a member of the Senior Leadership Team, wrote to Assistant Commissioner Fanning's solicitors suggesting three names of suitably qualified individuals to conduct the investigation. One of these was Mr. Luán Ó Braonáin S.C., who was ultimately retained.
40. By letter dated 3 May, 2018, Ms. Mulkerrins wrote to Assistant Commissioner Fanning's solicitors pointing out that the views of the plaintiff had not been sought on the proposal to appoint Mr. O'Braonáin S.C., and that, since their client had been afforded an opportunity to make representations on the selection of an independent investigator, the plaintiff should be afforded an equal opportunity.
41. Ms. Mulkerrins then wrote to the plaintiff by letter dated 3 May, 2018 seeking his views on the appointment of Mr. Ó Braonáin. Ms. Mulkerrins made it clear in that letter of 3 May, 2018 that no person was entitled to veto the appointment of an independent investigator but, given that Assistant Commissioner Fanning had been asked for his view, it was appropriate to ask Mr. Barrett for his view. As no response was received, Ms. Mulkerrins wrote again to the plaintiff by letter dated 23 May, 2018 advising him that if he did not respond by 1 June, 2018, she would proceed to appoint Mr. Ó Braonáin. By letter dated 21 June, 2018, she wrote to the plaintiff noting that he had not responded to either of her letters and that she was "*now proceeding to appoint and brief Mr. Ó Braonáin S.C. in this matter*".
42. The plaintiff replied immediately by letter dated 29 June, 2018, the first of the three letters which ultimately led to the recommendation to the Minister that the plaintiff be dismissed.
43. In this letter, the plaintiff took issue with how Ms. Mulkerrins was dealing with Assistant Commissioner Fanning's complaint. I consider in more detail below whether this letter could be said, to the threshold required for the purposes of an interlocutory injunction, to constitute a "protected disclosure" within the meaning of the 2014 Act.
44. It seems that the plaintiff has taken the approach that everything up to the letter of 3 May, 2018, relates to a different process, and on that basis he says he was not consulted on the appointment of Mr. Ó Braonáin. However, it is evident, on reading the entire correspondence which has been exhibited to the grounding affidavit, that this is simply not the case. The separate processes contended for by the plaintiff and described by him as "the Ó Braonáin inquiry", occurring prior to 3 May, 2018, as opposed to what the plaintiff terms the "Mulkerrins process" commencing 3 May, 2018, are quite evidently the same procedure and the manner in which they have been dealt with in the third supplemental affidavit of the plaintiff constitutes, in my view, a mischaracterisation of what was, in fact, a continuous process, commencing with the complaint of Assistant Commissioner Fanning in November, 2017. Similarly, the plaintiff refers to the "Harris Process" as commencing with the Commissioner's letter of 17 October, 2018. However, it is again clear that all of these steps were taken in the same disciplinary proceedings

which commenced with the complaint of Assistant Commissioner Fanning in November, 2017.

45. It is beyond doubt that the Commissioner himself expanded the extent of the complaint and that consequently the necessary inquiry, a matter which I will describe in due course there is no "Ó Braonáin inquiry" in February 2018 which then ceased with a fresh process commencing on 3 May, 2018. I think it is quite clear that the letter of 3 May, 2018, arose entirely out of the initial complaint of Assistant Commissioner Fanning, which was expanded somewhat in December, 2018, to include an extension by Assistant Commissioner Fanning of the initial complaint to add that, as a result of the plaintiff's text he no longer felt safe at work.
46. The purpose of the letter of 3 May, 2018, was to formally notify the plaintiff that, arising out of the complaint of Assistant Commissioner Fanning, a formal disciplinary process pursuant to the 2016 Code was going to take place and that this might result in disciplinary sanction.
47. Furthermore, it is clear from the letter of 3 May, 2018, that the plaintiff was notified that the initial complaint of Assistant Commissioner Fanning that the plaintiff's text messages of November, 2017, constituted a threat to him, had been extended by Assistant Commissioner Fanning to a complaint that he felt unsafe at work.
48. The plaintiff disputes the substance of any of these complaints, and it is indeed notable that the Commissioner ultimately ceased any investigation of them as, in the course of the investigation of them, Assistant Commissioner Fanning failed to comply with his direction to substantiate his allegations. Accordingly, at that point, the Terms of Reference of the Investigator were amended by the Commissioner so as to remove those allegations from the investigation. However, that did not occur until March 2019, and there was no withdrawal by Assistant Commissioner Fanning of his complaints prior to that time.
49. However, it is quite clear from the correspondence from Assistant Commissioner Fanning's solicitors, sent throughout 2018, that he was not withdrawing the complaints. As an employee and co-worker of the plaintiff, he was entitled to look for an investigation of his complaints by his employer, and his employer, the Commissioner, acting through Ms. Mulkerrins as Executive Director of Legal and Compliance within An Garda Síochána, proceeded to conduct that investigation.
50. Employers have duties to all of their employees and, if a complaint is made and formal disciplinary procedures invoked by an employee, then the employee against whom the complaint is made has no right to demand that the procedures would not be employed. This is, in substance, what the plaintiff was – and is in these proceedings – demanding, but it is not something to which he has any right. Indeed, it is evident from the nature of the correspondence received from solicitors for Assistant Commissioner Fanning during 2018 that they were very firmly seeking that the formal investigation of the complaint would be progressed. Ms. Mulkerrins, on behalf of the Commissioner, had to be fair to

both parties in the manner in which she conducted the investigation, and this meant that she could not capitulate to the demands of either Assistant Commissioner Fanning or the plaintiff as to how the complaint should be investigated, and she certainly could not simply abandon it at the request of the plaintiff.

51. By letter dated 6 July, 2018, Ms. Mulkerrins pointed out to the plaintiff that Mr. Ó Braonáin was appointed following the plaintiff's failure to respond to her correspondence of 3 and 23 May, 2018. However, she gave the opportunity to the plaintiff to "set out the substantive basis for your out of time objection to his appointment." As the plaintiff was on leave she therefore set the time limit for the plaintiff to advise her of that substantive basis which expired after he returned from leave. She also took care to reassure the plaintiff that no decision to discipline him had been made and that his rights would be respected, stating:

*"I wish to reassure you that your rights, and indeed the rights of all parties in this matter, will continue to be fully respected, to that end, the reference to discipline in this context is not in my opinion a reasonable basis for your assertion of prejudice, but rather is included in deference to those rights, specifically the right to be put on notice that an investigation of this complaint may result in an adverse finding, which may in turn culminate in disciplinary proceedings against you."*

52. The plaintiff, however, did not in fact set out his substantive objection to the appointment of Mr. Ó Braonáin within the further time afforded to him. In the interim, several reminders were sent to Ms. Mulkerrins by Mr. Sean Costello & Co., who were pressing for the investigation of Assistant Commissioner Fanning's complaint to be progressed. Before however Ms. Mulkerrins could bring the matter any further, the plaintiff wrote a letter to Acting Commissioner O'Cualáin dated 1 August, 2018. I consider in more detail below whether this letter can be said to constitute a "protected disclosure" within the meaning of the 2014 Act. However, it can be noted at this point, that the plaintiff stated in this letter that he had spoken to Assistant Commissioner Fintan Fanning on 11 July and 27 July, 2018 and Assistant Commissioner Fanning had denied making any formal complaint against the plaintiff. This was reiterated in the subsequent letter to Acting Commissioner Ó Cualáin of 20 August, 2018.
53. On 25 August, 2018, Ms. Mulkerrins wrote to Messrs. Sean Costello & Co. advising them that the plaintiff was asserting that Assistant Commissioner Fanning had never made any formal complaint against the plaintiff. They were also advised that the plaintiff was alleging that Assistant Commissioner Fanning was not cooperating with Mr. Luan Ó Braonáin S.C. in his investigation. Accordingly, Assistant Commissioner Fanning's solicitor asked to confirm his position and to confirm as a matter of urgency whether he continued to require An Garda Síochána to treat his allegation that he was threatened by the plaintiff as a formal complaint requiring full investigation.
54. That confirmation was received speedily by letter dated 31 August, 2018. At that point, therefore, the position of An Garda Síochána and Ms. Mulkerrins, in particular, was that they were being told by solicitors acting for Assistant Commissioner Fanning that the

complaint was being maintained and that a formal investigation was required, and they were being asked to progress it.

55. Ms. Mulkerrins wrote by letter dated 16 September, 2018, to the plaintiff. Referring to the letters of 1 August and 20 August, 2018, she stated:

*"The tone of that correspondence is completely unprofessional and inappropriate. Please ensure all future correspondence you engage in is respectful and professional."*

She then informed the plaintiff that Assistant Commissioner Fanning's solicitors had specifically confirmed to her that he was maintaining his complaint and required it to be the subject of a formal investigation.

56. Ms. Mulkerrins then came under some pressure from Messrs. Sean Costello & Co. to progress matters on behalf of their client, and she replied by letter dated 28 September, 2018 pointing out that she had required clarification from his client which was addressed in their correspondence of 31 August, 2018. She then stated that she was proceeding to brief Mr. Ó Braonáin and that, owing to the courts vacation this had been delayed. She also pointed out that the Terms of Reference had not been agreed. The response of Assistant Commissioner Fanning's solicitors by letter dated 16 October, 2018, was that any definitive timeline, failing which their client would have no option but to "take these matters to a different forum", which I assume was a reference to the possible institution of proceedings in this court.

57. The current Commissioner was appointed on 3 September, 2018, and he wrote to the plaintiff on 17 October, 2018. It is clear from that letter that the Commissioner had reviewed the plaintiff's letters of 29 June, 1 August and 20 August, 2018, and that he took a very serious view of the manner in which the plaintiff was writing both to Ms. Mulkerrins and to Acting Commissioner Ó Cualáin. He stated that he was particularly concerned about the letters of 1 and 20 August, 2018, as they stated that the plaintiff would not engage in the investigative process despite putting forward no basis for objecting to Mr. Ó Braonáin S.C. He stated:

*"I harbour very serious concerns that the attitude, content and tone of your correspondence has any place in a respectful working environment. In this regard, I have deep concerns about the tone of your letters particularly with reference to your extremely wide-ranging criticism of two of your colleagues on the Senior Leadership Team, namely Ms. Mulkerrins and Assistant Commissioner Donal Ó Cualáin the then Acting Commissioner."*

58. The Commissioner went on to highlight that the letters appeared to make unfounded allegations of malevolence, corruption and incompetence on the part of both Ms. Mulkerrins and Acting Commissioner Ó Cualáin and pointed out that Messrs. Sean Costello & Co. had confirmed that Assistant Commissioner Fanning was both maintaining his

complaint and pressing for an investigation of it. It was also noted that the plaintiff had not replied to the letter of 16 September, 2018, informing him of that fact.

59. This letter is material to the more general complaints made about the lawfulness of the disciplinary process that ultimately proceeded against the plaintiff and resulted in the Commissioner's recommendation of 20 December, 2020, that he would be dismissed.
60. However, it is also material to the first strand of the case in that it is clearly a response to the letters of 29 June, 1 August and 20 August, 2018. It is therefore appropriate to break off from the narrative at this point and to consider whether the communications asserted by the plaintiff to be "protected disclosures" are such, at least to the threshold required for the purposes of an interlocutory injunction.

**Whether the disciplinary process should be restrained by injunction as being a "detriment" caused to the plaintiff because he made one or more "protected disclosures"**

61. To succeed in obtaining an interlocutory injunction restraining further continuance of the disciplinary process, the plaintiff has to demonstrate a serious or fair question to be tried that these three letters contain protected disclosures, the instigation of disciplinary procedures against him is a "*detriment*" within the meaning of s. 13 of the 2014 Act, and that the disciplinary process was commenced against him because he had made "*protected disclosures*"
62. Before doing so, it is necessary to set out the relevant law in relation to protected disclosures in this jurisdiction.

**Relevant provisions of the Protected Disclosures Act 2014**

63. The key provision is s. 5 of the 2014 Act, which defines "protected disclosure" and which provides:

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

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

- (a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and*
- (b) it came to the attention of the worker in connection with the worker's employment.*

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

- (a) that an offence has been, is being or is likely to be committed,*
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment*

*or other contract whereby the worker undertakes to do or perform personally any work or services,*

- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,*
- (e) that the environment has been, is being or is likely to be damaged,*
- (f) that an unlawful or otherwise improper use of funds or resources of a public body, or of other public money, has occurred, is occurring or is likely to occur,*
- (g) that an act or omission by or on behalf of a public body is oppressive, discriminatory or grossly negligent or constitutes gross mismanagement, or*
- (h) that information tending to show any matter falling within any of the preceding paragraphs has been, is being or is likely to be concealed or destroyed.*

*(4) ...*

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

*(6) ...*

*(7) Subject to subsection 7(A), [which is not relevant here] the motivation for making a disclosure is irrelevant to whether or not it is a protected disclosure.*

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

64. As is apparent from the definition of "*protected disclosure*", the disclosure must be made pursuant to ss. 6, 7, 8, 9 or 10 of the Act. However, only ss. 6 and 10 are relevant to the within proceedings. Section 6 of the 2014 Act provides:

*"(1) A disclosure is made in the manner specified in this section if the worker makes it—*

- (a) to the worker's employer, or*
- (b) where the worker reasonably believes that the relevant wrongdoing which the disclosure tends to show relates solely or mainly—*
  - (i) to the conduct of a person other than the worker's employer, or*

(ii) to something for which a person other than the worker's employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure the use of which by the worker is authorised by the worker's employer, makes a disclosure to a person other than the employer is to be treated for the purposes of this Act as making the disclosure to the employer.

65. Section 10 of the 2014 Act, provides:

"(1) A disclosure is made in the manner specified in this section if it is made otherwise than in the manner specified in sections 6 to 9 and—

- (a) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
- (b) the disclosure is not made for personal gain,
- (c) any one or more of the conditions in subsection (2) is met, and
- (d) in all the circumstances of the case, it is reasonable for the worker to make the disclosure.

(2) The conditions referred to in subsection (1)(c) are—

- (a) that, at the time the worker makes the disclosure, the worker reasonably believes that the worker will be subjected to penalisation by the worker's employer if the worker makes a disclosure in the manner specified in section 6, 7 or 8,
- (b) that, in a case where no relevant person is prescribed for the purposes of section 7 in relation to the relevant wrongdoing, the worker reasonably believes that it is likely that evidence relating to the relevant wrongdoing will be concealed or destroyed if the worker makes a disclosure in the manner specified in section 6,
- (c) that the worker has previously made a disclosure of substantially the same information—
  - (i) in the manner specified in section 6, or
  - (ii) in the manner specified in section 7 or 8,and
- (d) that the relevant wrongdoing is of an exceptionally serious nature.

(3) In determining for the purposes of subsection (1)(d) whether it is reasonable for the worker to make the disclosure regard shall be had, in particular, to—

- (a) the identity of the person to whom the disclosure is made,

- (b) *in a case falling within subsection (2) (a), (b) or (c), the seriousness of the relevant wrongdoing,*
- (c) *in a case falling within subsection (2)(a), (b) or (c), whether the relevant wrongdoing is continuing or is likely to occur in the future,*
- (d) *in a case falling within subsection (2)(c), any action which the employer of the worker or the person to whom the previous disclosure was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and*
- (e) *in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure the use of which by the worker was authorised by the employer.*

*(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.*

*(5) In subsection (1)(b) "personal gain" excludes any reward payable under or by virtue of any enactment."*

#### **Application of the 2014 Act to the facts**

66. It can therefore be seen that, in order to constitute a protected disclosure within the meaning of the 2014 Act, the following criteria must be satisfied:

- i. it is a disclosure of "*relevant information*" as defined by section 5(2);
- ii. made by a worker
- iii. in the manner specified in section 6, 7, 8, 9, or 10.

The definition of "*relevant information*" itself incorporates a number of requirements, notably that the employee reasonably believes that the information discloses "*relevant wrongdoing*" as defined in the Act.

67. As the plaintiff is admittedly an employee, the second condition is obviously satisfied, and I will therefore consider the eight protected disclosures put up by the plaintiff in support of this application by reference to the first and third conditions. Having identified whether there is a serious or fair question to be tried as to whether the contended for protected disclosures are in fact and in law "*protected disclosures*", I will then proceed to consider whether there is a serious or fair question to be tried as to whether the disciplinary process initiated against the plaintiff and culminating in the recommendation of the first defendant of 16 December 2020 that the plaintiff should be dismissed constitutes "*detriment*" of the plaintiff which should be enjoined.

68. For the sake of being comprehensive, it should be noted that the plaintiff in his affidavit contended that the eleven affidavits sworn by him in support of his application contained protected disclosures, but this position was abandoned at hearing.
69. Where an employee makes a protected disclosure within the meaning of s. 5, he or she enjoys very considerable protections under the 2014 Act. Key to these proceedings is that the plaintiff contends that the disciplinary process instigated against him, and significantly expanded by the Commissioner in his letter of 17 October, 2018, constitutes “*detriment*” of the plaintiff which is prohibited by the 2014 Act.
70. First, however, I need to deal with the contention of the defendants that the plaintiff is restricted to a claim before the Workplace Relations Commission and cannot proceed by way of plenary proceedings and application for interlocutory relief in this Court.

**Whether the plaintiff is confined to his remedies under s. 12 and Schedule 1 of the 2014 Act**

71. Section 12 of the 2014 Act provides as follows:

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

*“(2) Subsection (1) does not apply to the dismissal of an employee to whom section 6(2)(ba) of the Unfair Dismissals Act 1977 applies.”*

72. In addition, in the case of dismissal for having made a protected disclosure, the remedy is pursuant to the Unfair Dismissals Act, 1977. Section 11 (1) (b) of the 2014 Act amended s. 6 of the 1977 Act, so as to provide that this would be a ground for a finding that a dismissal was unfair.
73. Clearly, therefore, if the Minister proceeds to dismiss the plaintiff, and if these proceedings had not been brought, the plaintiff would have had a claim for unfair dismissal before the Workplace Relations Commissioner, with an appeal to the Labour Court and an onward appeal on a point of law to this Court. Short of dismissal, he can make a claim to the Workplace Relations Commission that he is being “penalised” for having made a protected disclosure.
74. However, the plaintiff is proceeding under s. 13, which provides:

*“(1) If a person causes detriment to another person because the other person or a third person made a protected disclosure, the person to whom the detriment is caused has a right of action in tort against the person by whom the detriment is caused.*

*“(2) A person may not both—*

*(a) pursue a right of action under subsection (1) against a person in respect of a matter, and*

- (b) *in respect of the same matter make or present against the same person—*
  - (i) *a claim for redress under the Unfair Dismissals Acts 1977 to 2007,*
  - (ii) *a complaint under Schedule 2, or*
  - (iii) *a complaint under section 114 of the Defence Act 1954 or section 6 of the Ombudsman (Defence Forces) Act 2004.*
- (3) *In subsection (1) "detriment" includes—*
  - (a) *coercion, intimidation or harassment,*
  - (b) *discrimination, disadvantage or adverse treatment in relation to employment (or prospective employment),*
  - (c) *injury, damage or loss, and*
  - (d) *threat of reprisal.*

75. Section 13 (2) makes it clear that a person may not both pursue a right of action for that tort and in respect of the same matter make or present against the same person a claim for redress under the Unfair Dismissals Acts, 1977 to 2007, a complaint under Schedule 2 of the 2014 Act (ie, a complaint of penalisation contrary to s. 12), or a complaint under s. 114 of the Defence Act, 1954 or s. 6 of the Ombudsman (Defence Forces) Act, 2004. Section 13 (2) therefore makes it clear that a person who alleges they are the subject of "detriment" by reason of their making of a protective disclosure has a right of election, which he has exercised in favour of bringing these proceedings.
76. It is true that s. 6 of the Unfair Dismissals Act, 1977, was amended by s. 11 (1) (b) of the 2014 Act, so as to provide that where an employee is dismissed for having made a protected disclosure, that should be an unfair dismissal. Section 11 (2) states that Schedule 1 contains provisions for interim relief in cases where a claim is brought for redress for a dismissal which is an unfair dismissal by virtue of s. 6 (2) (ba) of the 1977 Act.
77. Of course, the plaintiff has not been dismissed, and therefore there is no claim in being pursuant to the 1977 Act before the Workplace Relations Commission. However, it seems to me that s. 13 gives a person who claims that he has been caused detriment for having made a protected disclosure, a cause of action in tort which can be pursued, albeit once it has, no claim can be made under s. 11 (or indeed s. 12) thereafter.

**Whether the tort created by s. 13 sounds only in damages**

78. Similarly, the defendants argue that a cause of action in tort sounds only in damages. However, I think this proposition may not be correct, but, perhaps more pertinently, it is not so clearly correct as to deny the plaintiff any interlocutory relief he may be entitled to. The tort of trespass springs to mind immediately as a tort where it has long been held an injunction will lie, so as to properly vindicate the property rights of the landowner. Therefore, the mere fact that s.13 provides for a statutory tort does not, in my view,

automatically preclude the availability of an injunction. The plaintiff is therefore not precluded from seeking interlocutory relief on this ground.

79. It may be that, in the future, and perhaps at the substantive hearing of this case, the matter will be argued fully, and a definitive judgment arrived at. If that is to the effect that the tort created by s.13 only gives a remedy in damages, then in future cases interlocutory relief to restrain a tort within the meaning of s. 13 probably will not be available. However, unless and until the matter is determined in that fashion at full hearing, it cannot operate to deny this plaintiff interlocutory relief to which he would otherwise be entitled.
80. As the plaintiff is not precluded from seeking interlocutory relief, I now turn to each of the various statements of the plaintiff which he says are "*protected disclosures*" within the meaning of the 2014 Act for the purpose of considering whether there is a serious question to be tried that they are in fact "*protected disclosures*", as contended, and that there is a serious or fair question to be tried as to whether the disciplinary procedures culminating in the recommendation to the Minister that the plaintiff be dismissed are unlawful as a detriment to the plaintiff for having made one or more of these disclosures.
  - i. First and Third Protected Disclosure**
  81. The first protected disclosure relied upon was the plaintiff's disclosure in 2015 to a former Garda Commissioner of irregularities in relation to the financial management at the Garda College in Templemore.
  82. The third protected disclosure was the plaintiff's evidence to the Public Accounts Committee which conducted an investigation into those irregularities in 2017. That evidence was adverse to senior members of An Garda Síochána, including the then Commissioner and the Executive Director of Finance and Service.
  83. There is no doubt that the original disclosures and the subsequent evidence given to the PAC consisted of "*relevant information*" within the meaning of s. 5 as, first, it consisted of evidence as to fact and clearly constituted "*information*" and secondly it was "*relevant information*" within the meaning of the Act as, in the reasonable belief of the plaintiff, it tended to show one or more "*relevant wrongdoings*" as defined in s. 5(3)(f) and it came to the attention of the plaintiff in connection with his employment.
  84. In my view, for the purposes of this interlocutory application, I accept that these are "*protected disclosures*" and the key issue in relation to them is whether there is a serious question to be tried as to the extent to which the subsequent disciplinary procedure brought against the plaintiff is connected to his having made them.
  85. The difficulty is that there is no evidence that the making of these protected disclosures were in any way connected with the complaints and disciplinary process with which this case is concerned. An attempt is made at para. 29 of the first supplemental affidavit to link those events to letters written by the plaintiff on 1 and 20 August, 2018, which are of central relevance to these proceedings and to this application, by saying that, in those

letters, the plaintiff was conveying "relevant wrongdoing", which appears to be the failure of the Gardaí to suspend another member of the force who the plaintiff alleges was guilty of misconduct in relation to the PAC hearings or to investigate the financial regularities in question. However, I do not see how this establishes that the disciplinary procedure initiated against the plaintiff came about because he had given evidence to the PAC in 2017.

86. There is simply no evidence before me that either the plaintiff's initial disclosure of those irregularities or his evidence to the PAC in 2017 contributed in any way to the subsequent complaints as set out in the letter of 17 October, 2018. Accordingly, these matters cannot give rise to any interlocutory relief.
87. I should add that Ms. Mulkerrins was not appointed until December 2017, and was not in An Garda Síochána at the time of the PAC investigation, and the current Commissioner was not appointed until September, 2018. Neither of them were therefore personally affected by the hearings before PAC or the outcome of its investigations.

**ii. Second Protected Disclosure**

88. The plaintiff, in February, 2015, was appointed to act as the de facto Protected Disclosures Manager for former Sgt Maurice McCabe. The plaintiff alleges that on 7 February, 2017, Sgt McCabe made protected disclosures to the plaintiff which alleged wrongdoing *inter alia* against a former Garda Commissioner. He alleges that contrary to the protected disclosure policy of An Garda Síochána and/or contrary to the 2014 Act, the Chief Administrative Officer directed the plaintiff to supply Sgt McCabe's protected disclosures for onward transmission to former Commissioner O'Sullivan. The plaintiff says he protested this but was compelled to do so by way of oral and/or written direction. He then made a protected disclosure within the meaning of the 2014 Act to the Minister for Justice.
89. It is not disputed that this was a protected disclosure which disclosed relevant wrongdoing within the meaning of s. 5(3)(b) made in the manner specified in s. 8.
90. However, again the difficulty for the plaintiff is that he cannot show any link between this disclosure and the instigation of the disciplinary proceedings against him. There is no evidence of any connection between the two. In fact, it is clear from the affidavit evidence that steps were taken to investigate the plaintiff's allegations, but that he withdrew from that process. It appears that the plaintiff erroneously believed that the matter would be investigated by the Disclosures Tribunal but in fact it was outside the Terms of Reference of that Tribunal. The Minister subsequently discontinued the investigation on the basis that it did not disclose "relevant wrongdoing".
91. The plaintiff clearly retains a sense of grievance about the manner in which this protected disclosure was dealt with, but the fact is that a retired senior civil servant was appointed to investigate his disclosure and he withdrew from the process of investigation. All of the evidence is contrary to the suggestion which appears to be made at para. 32 of the Second Supplemental Affidavit that the Minister had failed to investigate the matter, but

even if I am wrong in that, there is no remedy in law for failure to investigate a protected disclosure as none is provided for under the 2014 Act: see *Conway v. Minister for Agriculture* [2020] IEHC 665.

92. In any event, there is no evidence to suggest that the Minister's action in concluding that further investigation of that protected disclosure was not warranted had any connection whatsoever with the commencement of the disciplinary proceedings the subject of this application or of the expansion by the Commissioner of the complaints to be investigated. Indeed, and the Commissioner gave evidence to the Investigator that he was not aware of this protected disclosure: see para. 3.33.33 of the Inspector's findings. However, the material point is that there is no evidence in these proceedings of any connection between the two.

93. I am satisfied therefore that this protected disclosure is irrelevant to the application for interlocutory relief.

**iii. The Fourth Protected Disclosure**

94. In February, 2018, the plaintiff give evidence to the Disclosures Tribunal. This evidence was averse to the then Commissioner and the former Chief Administrative Officer but was rejected as lacking in credibility. In these proceedings, the plaintiff says that his evidence to the Disclosures Tribunal constitutes a fourth protected disclosure.

95. The plaintiff contends that the report of the Disclosures Tribunal is not binding on this Court. I have serious doubts as to whether assertions of fact which have been found by a quasi-judicial process to be lacking in credibility could be accepted as amounting to protected disclosures within the meaning of the Act. As is apparent from *Jesudason v. Alder hey Children's NHG Foundation Trust* [2020] EWCA Civ. 73, discussed in more detail below, where an alleged protected disclosure relies on matters within the personal knowledge of the person making them, and where the allegations turn out to be false, there will be serious question marks over the ability of the person making the alleged disclosure to satisfy the requirement that he or she had a "*reasonable belief*" that the information tended to disclose relevant wrongdoing.

96. However, I do not have to come to a view on that as there is no evidence whatsoever that any of the complaints against the plaintiff had anything to do with his evidence to the Disclosures Tribunal. It seems that the plaintiff may be the subject of criminal investigation in relation to these matters but there is no evidence before me that there is any relationship between that and the Commissioner's personal decision to extend the complaints against the plaintiff so as to consider whether the letters of 29 June, 1 August and 20 August, 2018, constituted "*serious misconduct*" within the meaning of the 2016 Code so as to warrant dismissal or other serious sanction.

97. The plaintiff relies on the fact that the letter of 3 May, 2018, was written shortly after he had given evidence to the Disclosures Tribunal. However, this does not in itself raise a serious question to be tried as the correspondence leading up to that letter has been exhibited and this shows very clearly that the letter was written so as to progress the

investigation of a complaint that had been made against the plaintiff by Assistant Commissioner Fanning in November, 2017, that the Commissioner's complaints against the plaintiff were made because he had given evidence to the Tribunal.

98. In *Clarke v. CGI Food Services Limited* [2020] IEHC 368, Humphreys J. referred to the fact that employers could easily remove an employee from their position for ostensibly plausible reasons while, on the other side of the equation, it was possible for someone who is dismissed for legitimate reasons to claim that removal was due to some improper purpose. The upshot is that "*the court must look beyond mere face value on either side.*" (at para. 19)
99. Applying that approach to this case, it seems to me that one has to look beyond the mere assertion by the plaintiff of a connection with his evidence to the Disclosures Tribunal (or indeed any of the matters relating to the first, second and third statements by him which he contends are protected disclosures) and look at the circumstances as they appear from the affidavit evidence. That makes it clear, in my view, that the letter of 3 May, 2018, was written as part of a process which had commenced in November, 2017, and was not provoked or indeed resurrected or prioritised by the evidence (subsequently rejected as lacking in credibility) of the plaintiff to the Disclosures Tribunal.
100. Again, I note that the Commissioner gave evidence to the Investigator that this was a coincidence of timing and that the Disclosures Tribunal Report had played no part in his consideration. However, as before, the key issue is that there is no evidence in these proceedings to demonstrate a serious question to be tried as to whether disciplinary proceedings were commenced against the plaintiff because he had made all or any of those statements, and therefore the necessary causative link is missing.

**iv. The Fifth Protected Disclosure: letter 29 June 2018**

101. The fifth protected disclosure was the letter dated 29 June 2018 written by the plaintiff to Ms. Kate Mulkerrins. This letter is just over two pages long and was written explicitly in the context of the complaint made by Assistant Commissioner Fanning. Because the meaning of the letter is in dispute, it is necessary for me to set out my interpretation of the meaning of this letter.
102. The first paragraph acknowledges receipt of correspondence and the second explains why the plaintiff sought advice and also referred to time pressures upon him. The third paragraph sought clarification as to who had appointed Ms. Mulkerrins to address the matters in question and also sought details of the policy relating to the appointment.
103. The fourth paragraph complained about the manner in which Assistant Commissioner Fanning's complaint had been put to the plaintiff, the essential complaints being that this was not specific enough and there had been delay. The plaintiff said it had put him in an invidious position. The fifth and sixth paragraphs looked for disclosure of documents, in particular letters sent by Assistant Commissioner Fanning to Garda senior management in respect of the complaint and other related complaints. (It is not in fact clear that any

other related complaints existed, and this may have been the supposition of the plaintiff. In any event, these related complaints are not identified in any way in this letter.)

104. The seventh paragraph complained about the nomination of a person unknown to the plaintiff to deal with the complaint and indicated that the plaintiff felt that he should have been consulted and asked for suggestions on the appointment. This assertion, it should be noted, is clearly inaccurate as the plaintiff was asked on several occasions for his views on the appointment of Mr. Ó Braonáin S.C. and either failed to reply or failed to substantiate his apparent objection.
105. The eighth paragraph took issue with Ms. Mulkerrin's reference to discipline and suggested that she was already prejudiced against him. It was also suggested that her letter seemed to say that Assistant Commissioner Fanning had made representations to Garda management since November 2017.
106. It is difficult to see how this letter can fall within the definition of protected disclosure in the 2014 Act. I say this for several reasons.

**Whether the letter tended to disclose "relevant wrongdoings"**

107. First, relevant information is defined in s. 5 as information which, in the reasonable belief of the worker, "*tends to show one or more relevant wrongdoings*". "*Relevant wrongdoings*" are defined in s 5 (3), subparagraphs (a) to (h). It seems to me that only subparagraphs (b) and (g) could possibly be relevant. The whole thrust of the letter is that the plaintiff is not happy that he is the subject of a complaint by the then Assistant Commissioner and is unhappy with how it was being handled.
108. The defendants say that this cannot be a protected disclosure because, insofar as the letter makes a complaint that Ms. Mulkerrin or the Garda Commissioner has failed, is failing or is likely to fail to comply with a legal obligation, it can only be one "*arising under the worker's contract of employment*" and therefore cannot fall within subparagraph (b).
109. In the recent judgment of the Supreme Court in *Baranya v. Rosderra Irish Meats Group Limited* [2021] IESC 77, subparagraph (b) was interpreted as excluding only obligations derived from the contract of employment itself, rather than any statutory rights that might be enjoyed by an employee. The example of statutory rights given by Hogan J. in his judgment were those established by the Payment of Wages Act, 1991, as amended. It is notable that this Act does not purport to include in contracts any implied rights as to the payment of wages but creates statutory obligations, distinct from any contract of employment.
110. In this case, the plaintiff relies on his implied right to fair procedures, which appears to me to be an implied contractual right. As such, any complaint about procedures is not a complaint of "*relevant wrongdoing*" and accordingly, this letter cannot be a protected disclosure within the meaning of subparagraph (b).
111. However, it is arguable that the letter complains of an act or omission by the first defendant which is "*oppressive, discriminatory or grossly negligent or constitutes gross*

*mismanagement*” within the meaning of subpara. (g), albeit that, in my view, only the first and last could be relevant. One could argue that investigation of employees for non-existent complaints from other employees could constitute “*oppression*” or “*gross mismanagement*”. This provision was relied upon in the course of the application and I agree that a serious question has been raised as to whether it asserts “*oppression*” of the plaintiff. A mere assertion, of course, is not sufficient, a key issue being whether the letter goes beyond allegations and contains “*information*”.

**Whether the letter disclosed “information”**

112. However, leaving aside those issues which relate to the definition of “relevant wrongdoing”, the question must be asked: what “*information*” was disclosed in this letter? This requirement was recently stressed by the Supreme Court in *Baranya v Rosderra Irish Meats Group Ltd* [2021] IESC 77. The key issues in that appeal concern the important question of whether an alleged disclosure was precluded from being a protected disclosure as it related solely to the appellant’s employment, as already referred to above, and whether the Labour Court had made sufficiently clear findings of fact.
113. However, the Labour Court had also found that the complaint of a worker in that case had been an expression of grievance and not a protected disclosure. The Supreme Court held (at para. 35) that it was an error of law to distinguish between a grievance and a protected disclosure as these were not mutually exclusive phenomena. Furthermore, the inevitable implication of the Supreme Court judgment in that case is that a complaint about one’s statutory rights as employee (as opposed to merely contractual rights, which are excluded by the Act) can be both a personal grievance and a protected disclosure.
114. There is no doubt whatsoever that the fifth protected disclosure could be characterised as a “grievance”, and a strongly expressed one at that. However, that does not preclude it from being also a “protected disclosure” within the meaning of the Act. The question for consideration, therefore, is whether the letter only expresses a grievance, or whether it also discloses “*information*”.
115. Hogan J. in his judgment in *Baranya* (at para. 43) states that the correct issue for determination is:

*“what precisely did Mr. Baranya say and, second, to inquire whether, having regard to the general context of the words actually uttered, they amounted to an allegation of ‘wrongdoing’ in the sense of both s. 5 (2) and s. 5 (3) (d) of the 2014 Act, i.e., did those words expressly or by necessary implication amount to an allegation tending to show that workplace health and safety was or would be endangered, even if that complaint was personal to the him.”*

He continued:

*“The allegation must, of course, contain such information – however basic, pithy or concise – which, to use the language of s. 5(2) of the 2014 Act, ‘tends to show one or more relevant wrongdoings’ on the part of the employer: to adopt the words of*

*Sales LJ regarding a parallel provision in the corresponding UK legislation, the disclosure must have 'sufficient factual content and specificity' for this purpose: see Kilraine v. Wandsworth LBC [2018] ICR 1850 at 1861, even if it does merely by necessary implication."*

116. What I have to consider is: does the letter contain "information", i.e., factual material of sufficient specificity, which, in the reasonable belief of the plaintiff at the time that he wrote the letter, attempts to show one or more "relevant wrongdoings" within the meaning of the Act?
117. In my view, the letter plainly does not fall within the definition of "protected disclosure" because it fails the requirement to have "sufficient factual content and specificity" to amount to "information". *Kilraine*, which was referred to with approval by Hogan J. in *Baranya* was in fact cited to me by counsel for the defendants at the hearing which took place prior to the delivery of that judgment, and gives a good example of how to analyse a communication so as to distil from it the necessary factual content, separating it from the expression of any allegation or grievance, so as to consider whether it indeed discloses "information" so as to amount to a "protected disclosure". One of the communications put forward as a protected disclosure in that case was a letter of 10 December, 2009, which is set out at para. 15 of the judgment. The relevant part of the letter was as follows:

*"I think that it is also important to remind you that what has been achieved over the years has been despite bullying and harassment that was tolerated, and at times, not least at present, encouraged over that time by [named individuals], yourself and others, and also despite successive and repeated failure to honour LA [local authority] and individual agreements to extend my role and to provide career development. Since the end of last term, there have been numerous incidents of inappropriate behaviour towards me, including repeated sidelining, and all of which I have documented. As an example, I have brought to your attention the inappropriate behaviour of [named individual], and despite your undertaking have received no feedback."* [Emphasis in original.]

That letter of 10 December, 2009 appeared to have been written for the purpose of making a complaint that the claimant had not been included in a particular meeting. The Employment Appeals Tribunal had upheld the finding of the employment tribunal that this was not a disclosure which qualified for protection under the UK legislation. The Employment Appeals Tribunal agreed, on the basis that it did not provide "information", stating (at para. 32 of its decision, cited at para. 21 of the judgment of the Court of Appeal):

*"If one takes away the word 'inappropriate' from the highlighted section, it says nothing that is at all specific. It does not sensibly convey any information at all. On this basis, I consider the Employment Tribunal was justified in concluding as it did."*

118. In addition, in that case, the Employment Appeals Tribunal upheld the finding that the disclosure did not qualify for protection because it did not identify any wrongdoing within the meaning of the relevant section in that jurisdiction. The basis for this was as follows (see para. 32 of the decision, cited at para. 21 of the judgment of the Court of Appeal):

*"It is simply far too vague. 'Inappropriate' may cover a multitude of sins. It has to show or tend to show something that comes within the section."*

119. It should be noted that the relevant provision under consideration there was s. 43 B (1) of the Public Interest Disclosure Act, 1998, which is similar in its terms (but not identical) to the definition of "*relevant wrongdoing*" contained in s. 5(3), sub-paras, (a), (b), (c), (d), (e) and (g) of the 2014 Act. However, like s. 5, it requires the disclosure to be one of "*information which in the reasonable belief of the worker making the disclosure tends to show* [particular types of wrongdoing as defined in s. 43B]".
120. In my view, it is clear that no information was disclosed as a variety of complaints about the procedure which had been established to investigate the complaint made against the plaintiff were set out in the letter. This is not information and indeed far from disclosing anything, it is in essence a generalised complaint and a request for disclosure to the plaintiff.
121. In those circumstances, I am satisfied that there is no serious question to be tried as to whether the letter of 29 June, 2018 is a protected disclosure and it cannot provide a basis for the interlocutory relief sought here.

**v. The sixth and seventh protected disclosures**

122. The sixth protected disclosure is a letter of 1 August 2018 from the plaintiff to the then Acting Commissioner, and the seventh protected disclosure is a further letter from the plaintiff to the Acting Commissioner dated 20 August, 2018.
123. The letter of 1 August 2018, which is six pages long (excluding the heading), is in similar terms to the fifth protected disclosure, discussed above. This is a letter of complaint as to the manner in which the investigation into the plaintiff is being pursued. Again, I do not see how it "*discloses*" any "*information*". The only potential exceptions to this are, first, the statement by the plaintiff that Assistant Commissioner Fanning had stated to the plaintiff when he met him on two occasions in July 2017 that he had not made any complaint against him. The plaintiff also complains that none of the misconduct disclosed by the hearings before the PAC hearings in 2017 was investigated nor was anyone disciplined.
124. As regards the latter issue, this seems to me to be clearly in the nature of a complaint or grievance on the part of the plaintiff that he is being disciplined while others are not. It is too general to meet the requirements of *Kilraine* as approved by the Supreme Court in *Baranya*, but, even if I am wrong about that, I fail to see how it tends to disclose "*relevant wrongdoing*".

125. Returning to the plaintiff's statement in the letter that Assistant Commissioner Fanning was saying that he had never made a complaint at all, I think it would have to be accepted, at least at this interlocutory stage, that if the Acting Commissioner was aware that formal disciplinary procedures had been instituted against the plaintiff when in fact no complaint had been made, that would arguably come within s. 5(3)(g) as oppression of the plaintiff.
126. The alleged statement of Assistant Commissioner Fanning to the plaintiff that he had never made a complaint would come as a large surprise to any reader of the affidavits in this case because I think it is plain beyond doubt from the evidence that Assistant Commissioner Fanning had been pursuing a formal complaint against the plaintiff since November, 2017. He had refused to engage in mediation of his complaint against the plaintiff and his solicitors were dissatisfied that formal procedures had not commenced.
127. Not only that but Ms. Mulkerrins clearly decided to verify the plaintiff's assertion as she wrote by letter dated 28 August, 2018, to Messrs Sean Costello & Co. This certainly was new information, as evidenced by the subsequent letter to Mr. Sean Costello & Co. asking them to confirm on behalf of Assistant Commissioner Fanning that he was in fact maintaining his complaint that he had been threatened by the plaintiff and that he was making a formal complaint requiring full investigation. That elicited a reply which stated clearly:

*"My client at no stage has denied making any formal complaint against [the plaintiff]. His complaints were as set out and indeed in this respect I refer to your letter of the 29th January, 2018 [copy attached]."*

That could hardly be a clearer refutation of the "information" contained in the letter of 1 August, 2018.

128. However, that is not the end of the matter as it is only necessary to show that the plaintiff had a "reasonable belief" that this was true.

**Whether the plaintiff had a "reasonable belief" that his conversation with Assistant Commissioner Fanning showed that no complaint had been made against him**

129. It was indicated in the third page of this letter that the plaintiff had been advised "in writing" that Assistant Commissioner Fanning had made no complaint against the plaintiff. It is not entirely clear, but this appears to be an assertion that Assistant Commissioner Fanning had confirmed this in writing to the plaintiff. If that is so, it must be noted that written confirmation has never been produced at any stage. The sixth page of the letter said that the plaintiff had been assured that Acting Commissioner Ó Cualáin was the "recipient of an extensive correspondence from Assistant Commissioner Fanning which makes no reference to a formal complaint against [him]."
130. The question of whether a worker can have a "reasonable belief" that information tends to disclose wrongdoing when that information is without foundation has received some attention in England and Wales. The defendants relied on a decision of the English

Employment Appeal Tribunal, *Darnton v. University of Surrey* [2003] I.C.R. 615, at para. 29 of that judgment, the tribunal stated:

*"In our opinion, the determination of the factual accuracy of the disclosure by the tribunal will, in many cases, be an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure. Thus if an employment tribunal finds that an employee's factual allegation of something he claims to have seen himself is false, that will be highly relevant to the question of the worker's reasonable belief. It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part. The relevance and the extent of the employment tribunal's inquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s. 43B (1). We cannot accept [the claimant's] submission that reasonable belief applies only to the question of whether the alleged facts attend to disclose a relevant failure. We consider that as a matter of both Law and common sense all circumstances must be considered together in determining whether worker holds the reasonable belief. The circumstances will include his belief in the factual basis of the information disclosed as well as what those facts tend to show. The more the worker claims to have direct knowledge of the matters which are the subject of the disclosure, the more relevant will be his belief in the truth of what he says in determining whether he holds that reasonable belief."*

131. The thrust of that decision is that the lower tribunal erred in law in inquiring itself into whether the factual allegations were correct. The Appeals Tribunal held that, while that might be a useful tool to determine whether the worker's belief is reasonable, reasonable belief must be based on facts as understood by the worker, not as actually found to be the case (see para. 33).
132. Counsel for the plaintiff relied on *Jesudason v. Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73 on another issue but I have found it useful also in considering whether the plaintiff had a "reasonable relief" in writing the letters of 29 June, 2018, 1 August, 2018, and 20 August, 2018 that Ms. Mulkerrins and/or Acting Commissioner Ó Cualáin were breaching their obligations under the plaintiff's statutory rights as employee, and were engaged in acts of oppression in relation to him. At para. 48, the Court of Appeal reiterated that it was not appropriate for the Employment Appeals Tribunal in that case to consider, in the context of reasonableness, whether a particular complaint was made out or not:

*"A disclosure of alleged wrongdoing may be reasonable even though it is ultimately found to be unsubstantiated."*

133. The key question therefore would appear to be not whether the allegation was true (which it was not) but whether the plaintiff had a "*reasonable belief*" in the truth of it. As the belief must be "*reasonable*", it is not sufficient for him to believe it: there must be some reasonable or objective basis for believing it.
134. In *Jesudason*, it was reiterated that the question of reasonableness must be assessed at the time the complaint or concern is raised, not with hindsight after the complaint has been examined. The English Court of Appeal also stated (at para. 49) that reasonableness had to be assessed having regard to "all the circumstances of the case".
135. It seems to me that it is not possible that the plaintiff had a "reasonable" belief when writing the letters of 1 and 20 August that they tended to show that either Ms. Mulkerrins or Acting Commissioner Ó Cualáin were engaged in oppression of him. It must be assumed for the purposes of this interlocutory application that the conversations with Assistant Commissioner Fanning took place and that the plaintiff believed what he was being told. It will be for the defendants, if they wish, to test the credibility of any of these matters at trial.
136. However, it is difficult to see how the plaintiff could have believed, based solely on those conversations, that the Assistant Commissioner and Ms. Mulkerrins were aware that Assistant Commissioner Fanning had made no complaint against the plaintiff.
137. The plaintiff was well aware from November, 2017, when he was informed by Deputy Commissioner Twomey, that a formal complaint had been made against him by Assistant Commissioner Fanning, and that Assistant Commissioner Fanning was pursuing that complaint through the formal procedures under the 2016 Code. He must have been aware, given his position as Executive Director of Human Resources and People Development within An Garda Síochána that the Commissioner had no option but to investigate that complaint once it was made.
138. It could not reasonably be suggested to the Acting Commissioner (or indeed to Ms. Mulkerrins, who had carriage of the disciplinary procedures on behalf of the then Acting Commissioner), that based on the plaintiff's say so, and in essence in reliance on an alleged hearsay conversation with the complainant, Assistant Commissioner Fanning, the entire procedure should be dropped.
139. Furthermore, it could not have been reasonably believed by the plaintiff that no complaint had ever been made in the absence of sight of correspondence to that effect. There is reference in the letter of 1 August, 2018, to correspondence with the Acting Commissioner. However, the letter conveys that this correspondence was not furnished to the plaintiff. His view, as expressed in the letter of 1 August, 2018, and reiterated in the letter of 20 August, 2018, was solely based on his conversations with Assistant Commissioner Fanning where the latter referred to correspondence. However, there is no reference to any such correspondence being produced to the plaintiff at any time. I do not accept that the plaintiff had a "*reasonable belief*" that his conversations with Assistant Commissioner Fanning tended to disclose oppression of him and any reasonable person

would have looked for the correspondence he was being told existed or at the very least asked Assistant Commissioner Fanning to state this openly, in correspondence.

140. Furthermore, while the reasonable belief must be in the mind of the person making a protected disclosure at the time that he made it, it is notable that the very serious allegations of the plaintiff were never withdrawn or refined at any time, notwithstanding the swift denial of same by Assistant Commissioner Fanning through his solicitors. The allegation that no complaint had in fact been made remained, therefore, at all times at the level of pure assertion and was made without any reasonable grounds. This is indicative of the plaintiff's approach to the entire issue, which was to assert wrongdoing without in fact providing any reasonable basis for that assertion.
141. That being the case, I do not accept that the plaintiff had a "reasonable belief" at the time that he wrote the letters of 1 and 20 August, 2018, that the disciplinary proceedings instituted against him were instituted in bad faith, for an improper purpose or as an act of oppression against him. Insofar as the plaintiff had such a belief, it must have been entirely subjective because he did not have any reasonable basis for that belief.
142. A further and, in my view, important matter was raised by the defendants as tending to show that the plaintiff did not, at the time he wrote the letters of 29 June, 1 August or 20 August, 2018, have a "*reasonable belief*" that his letters tended to show wrongdoing: the plaintiff had detailed knowledge and personal experience of the procedures within An Garda Síochána for making protected disclosures. Indeed, the affidavits demonstrate that he was a veteran of that process. Nevertheless, he never asserted until 18 May 2020 that the letters of 1 and 20 August, 2018 were protected disclosures.
143. The plaintiff relies heavily on *Clarke v. CGI Food Service Ltd.*, for the proposition that there is no requirement to invoke a formal procedure or to describe a protected disclosure as such. That is entirely correct, so far as it goes, but *Clarke* goes no further than to disclaim any requirement that a formal invocation of an employer's protected disclosure is not necessary. That does not mean that the failure to avail of or refer to such a procedure at or around the time of making an alleged protected disclosure is entirely irrelevant.
144. In *Clarke*, Humphreys J. stated (at paras. 16 and 17):

*"The employer's submissions major on the claim that the plaintiff didn't make any mention of protected disclosures until after the dismissal. That may be so, and will no doubt be explored further at the WRC hearing, but that's not automatically crucial. There is no necessity for an individual employee to consider the situation in statutory terms until such time as adverse consequences such as dismissal materialise. Indeed, it could be counterproductive to do so... One can make a protected disclosure without invoking the 2014 Act or without using the language of 'protected disclosure. It is often only after the victimisation, dismissal or other adverse consequence arrives that one has to 'retrospectively' figure out what really happened and analyse it in the statutory language. There is nothing wrong with*

*that process and it is certainly different from 'retrospectively' creating a case from nothing."*

145. I am in complete agreement with that statement of law to the effect that there is no absolute requirement that a worker would have to invoke the language of the 2014 Act before he or she could receive its protections. The imposition of any such requirement could have the effect of undermining the purpose of the Act, which is to protect employees who bring wrongdoing to light. That would be particularly the case where a worker was less educated, had limited English, or was readily replaceable, though, as the facts of *Clarke* demonstrate, it is equally the case for employees in senior positions, the employee in that case being a group financial controller.
146. However, that is not to say that the failure by an employee to invoke statutory language may not be relevant in a particular case. Indeed, it is clear from *Clarke* that Humphreys J. envisaged that the issue of why the claimant had not invoked the procedures of the Protected Disclosures Act, 2014 at an earlier time would most likely be litigated at the substantive hearing before the Workplace Relations Commission.
147. On the facts of this case, the failure for almost two years to assert that these letters were protected disclosures is clearly relevant, given the particular position held by the plaintiff within An Garda Síochána and his own past experience of making and receiving protected disclosures. He was fully aware of those procedures and never referred to them at all until the disciplinary procedures were at a very advanced stage. This must cast significant doubt on whether he had a reasonable belief at the time he wrote the letters of 1 and 20 August, 2018, that he was disclosing information which tended to show relevant wrongdoing within the meaning of the 2014 Act.
148. A further point of distinction with *Clarke*, of course, in which the point was made that a claimant might not identify a statement as a protected disclosure until dismissal or other consequences had crystallised, is that the plaintiff was aware no later than receipt of the Commissioner's letter of 17 October, 2018, that the letters of 29 June, 1 August and 20 August, 2018, were the basis of significant additional complaints made against him by the Commissioner himself. Those complaints, along with the complaint of Assistant Commissioner Fanning, were referred to the Investigator and significant correspondence passed between the parties and the Investigator throughout 2019 and 2020. Furthermore, oral hearings were conducted on 11 November, 2019, 17 December, 2019, 15 January, 2020, and 31 January, 2020. Notwithstanding the detailed procedures applied to the complaints against the plaintiff, it was not until his solicitor's letter of 18 May 2020 that he asserted that the letters were in fact "*protected disclosures*".
149. In my view, on the specific facts of this case, the very late attribution to these letters of the status of "*protected disclosures*" is a further factor militating against the existence of a "*reasonable belief*" on the part of the plaintiff, at the time that he wrote them, that he was disclosing information that tended to show relevant wrongdoing.

150. The plaintiff relied on the fact that the letters of 1 and 20 August, 2018, were on 22 August, 2018, forwarded to the Minister pursuant to s. 41 of the Garda Síochána Act, 2005, as evidence that the Acting Commissioner must have recognised them at the time as protected disclosures. However, this point is not well-founded. That section requires the Commissioner to inform the Minister of a variety of matters, including national security risks and significant developments that “*might reasonably be expected to affect adversely public confidence in the Garda Síochána*” among others. The notification could have been for a variety of reasons: it is not probative of a belief that the correspondence constituted “*protected disclosures*”.
151. The plaintiff relied at hearing on the provisions of s. 5 (8) which provide that in proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is. However, I am quite satisfied on the text of the letters which are fully available to me that these are not protected disclosures.

### **Delay**

152. I have therefore concluded that the facts are sufficiently clear that it cannot be said that there is a serious question to be tried that any of the three letters which give rise to the subsequent disciplinary proceedings were in fact or in law “*protected disclosures*” within the meaning of the 2014 Act. That is the primary basis on which I refuse the application for an injunction. Furthermore, those earlier protected disclosures, which I have found to be such, are not connected with the disciplinary process and there is no serious question to be tried as to whether this is so.
153. However, even if I had not so found, I would have had to refuse the application for interlocutory relief, insofar as it was based on an alleged continuing tort within the meaning of s.13 of the 2014 Act, solely on the grounds of delay. The disciplinary process, insofar as the letters alleged to be protected disclosures are concerned, commenced with the Commissioner’s letter to the plaintiff on 17 October, 2018. That was shortly after the letters were written.
154. As previously stated, the plaintiff was very familiar with the protected disclosure regime and with the policy within An Garda Síochána for making them. It is inconceivable that, if he believed in June and August 2018 that he was making protected disclosures, he would not have so asserted and taken appropriate legal advice to act. On the timeline, the facts are clear and speak for themselves, and must be assessed at interlocutory stage in the context of the well-established principle that interlocutory relief will not be granted where there has been a delay in seeking it.
155. The relevant timeline here is that, by letter dated 17 October, 2018, the Commissioner had written to the plaintiff advising him that the existing disciplinary process in being against him in relation to the complaints originally made by Assistant Commissioner Fintan Fanning were being supplemented by complaints made by the Commissioner himself in relation to the contents of his letters of 29 June, 2018, 1 August, 2018, and 20 August, 2018. From that point on, if the plaintiff was of the view that the instigation of a process against him for having made in those three letters what he says he regarded as

protected disclosures, the onus was on him to move to seek such interlocutory relief as he deemed fit.

156. Insofar as the plaintiff relied on the matters referred to above as the first, second, third and fourth protected disclosures, the delay would be slightly longer, as there was absolutely no doubt from, at the latest, receipt by him of the letter of 3 May 2018, that the plaintiff was being subjected to disciplinary procedures under the 2016 Code.
157. The case is very clearly made in these proceedings that the very institution of the disciplinary action against the plaintiff for the writing of those letters itself constituted "*detriment*" for the purposes of s. 13 of the 2014 Act. For the purposes of an interlocutory hearing, I am satisfied that there is, at the very least, a serious question to be tried as to whether the concept of "*detriment*" within the meaning of s. 13 includes the instigation of a disciplinary process. The question is then why the plaintiff did not act to institute proceedings until 24 July, 2020. The general indorsement of claim in the plenary summons issued on that date quite clearly refers to the letters the subject of the Commissioner's complaint as being protected disclosures within the meaning of s. 5 of the 2014 Act. A statement of claim delivered 5 August, 2020, very shortly thereafter, is quite explicit in particularising the alleged detriment as causing, allowing or permitting the commencement and maintenance of what the plaintiff terms to be unlawful disciplinary proceedings against him since in or about 3 May, 2018 or 17 October, 2018. The statement of claim envisages that interim or interlocutory relief would be sought.
158. However, no such application was made until after the Commissioner had made his recommendation on 16 December, 2020, and after the time had expired for appeal to the Appeals Board.
159. The plaintiff appears to have taken the view that, having issued a summons, he could sit back and simply assume that his assertion that the disciplinary process was unlawful was enough to invalidate it. However, it is fundamental that, if there is no undertaking forthcoming to refrain from continuing what is said to be an unlawful course, a plaintiff must then move to obtain interlocutory relief to compel the defendant to desist. The mere issue of a summons is not enough.
160. Correspondence ensued between the parties in the course of which it became clear that the plaintiff was not going to exercise his right of appeal to the Appeals Board by 23 December, 2020, which was the deadline. That left him with the available remedy of making representations to the Minister as to why she should not accept the recommendation of the Commissioner. The Chief State Solicitor's Office communicated to the plaintiff by letter dated 23 December, 2020, that any application for an extension of time for its submissions to the Minister would be favourably considered by her. However, the plaintiff indicated that he would not be making representations and therefore would not seek any extension of time.
161. The plaintiff obtained short service from this Court (Creedon J.) on 30 December, 2020, on foot of an *ex parte* docket, and got a return date for 4 January, 2021. On that date the

defendants gave undertakings in order to secure time for replying affidavits and ultimately the hearing of the interlocutory injunction was listed in due course.

162. If the plaintiff wished to restrain “*detriment*” in the form of disciplinary proceedings which he said were in breach of the 2014 Act, then he had over two years to do so before any active steps were taken to seek interlocutory relief. That is a very serious and extraordinary delay in itself.
163. Furthermore, in July 2020, apparently the plaintiff’s legal team withdrew from the investigation before the Investigator on the basis that the process was unlawful and in contravention of the 2014 Act. It is entirely unclear as to why no steps were taken at that point to restrain the continuation of the investigation. In the context of an application of this nature for interlocutory relief, delay from July to December is considerable.
164. In my view, therefore, even if I were not satisfied that the plaintiff has not raised any serious question to be tried as to whether the protected disclosures which gave rise to the disciplinary procedures were in fact such within the meaning of s. 5 of the 2014 Act, I would nevertheless refuse the application on the grounds of delay.

**Legality of the disciplinary procedure pursuant to the 2016 Code**

165. A large number of points were raised about the legality of the disciplinary procedures employed by the Commissioner, and whether they complied with the 2016 Code and with fair procedures generally.
166. Before turning to consider these more generally, it should be noted that the plaintiff’s written submissions do not set these out as a separate cause of action from the complaint that the disciplinary procedures constituted unlawful “*detriment*” contrary to section 13. The alleged infirmities in the proceedings were said to constitute evidence as to the fact that the proceedings were in reality an attempt to cause him detriment for having made protected disclosures.
167. I am satisfied that the evidence as tendered to date is sufficiently clear to show that is not the case. It seems to me that the disciplinary proceedings were very clearly instituted in response to a complaint from Assistant Commissioner Fanning who rejected the option of mediation and insisted on formal investigation.
168. The alleged infirmities can only be understood as a claim that the plaintiff is at risk of wrongful dismissal by reason of legal infirmities in the procedures leading to the recommendation that he be dismissed. I now turn to consider the various infirmities alleged.

**(I) Whether the Commissioner had power to institute the disciplinary procedure pursuant to the 2016 Code**

169. The plaintiff argues that, by virtue of s.2(2)(h) of the Civil Service Regulation Act, 1956, as amended by s.73 of the Civil Law (Miscellaneous Provisions) Act 2008, the “appropriate authority” pursuant to the 1956 Act, insofar as the plaintiff is concerned, is the Minister

and not the Commissioner. Section 3 of the 1956 Act provides that, in that Act, "suspending authority" means, in relation to a civil servant each of the following -

- (a) the appropriate authority in relation to that civil servant,
  - (b) a person who, by virtue of sub. (2) of this section, is for the time being a suspending authority in relation to that civil servant.
170. Section 3(2) provides that the appropriate authority in relation to civil servants of a particular class may from time to time nominate a person holding a position in the civil service to be a suspending authority in relation to a civil servant of that class.
171. Section 13(1) also provides that a suspending authority may suspend a civil servant if-
- (a) it appears to that suspending authority that the civil servant has been guilty of grave misconduct or of grave irregularity warranting disciplinary action, or
  - (b) it appears to that suspending authority that the public interest might be prejudiced by allowing the civil servant to remain on duty, or
  - (c) a charge of grave misconduct or grave irregularity is made against the civil servant and it appears to that suspending authority that the charge warrants investigation.
172. It is accepted that, when the Minister on 25 October, 2018, suspended the plaintiff on full pay on the recommendation of the Commissioner, that on its face was lawfully done by the Minister. However, this objection to the lawfulness of the disciplinary procedure commenced by the Commissioner on 17 October, 2018, was made only in the most broad of terms. If I understand it correctly, it seems to proceed on the basis that only the "suspending authority" within the meaning of the 1956 Act can activate the procedures pursuant to the 2016 Code.
173. As appears from the brief factual introduction to this judgment, the Commissioner is not purporting to dismiss the plaintiff. He only has the authority to recommend to the Minister that the plaintiff be dismissed, but the Minister is entirely independent in the exercise of her functions under the 1956 Act and, even though she is entitled to give considerable weight to such a recommendation, she is not bound in any way by the recommendation of the Commissioner, which is a recommendation made in his capacity as "relevant manager" pursuant to the 2016 Code. This is why the plaintiff has a right to make representations to her before she decides whether to accept or reject the Commissioner's recommendation.
174. I am satisfied that this point is wrong in law, and I therefore refuse any injunctive relief on this ground.

**(II) Whether the investigator could be asked to consider whether the plaintiff's conduct amounted to "serious misconduct"**

175. At para. 13 of the plaintiff's fourth supplemental affidavit, he raises an issue as to whether the Commissioner acted lawfully in asking the Investigator to consider whether

the plaintiff's conduct amounted to "serious misconduct" within the meaning of the 2016 Code. Paragraph 13 claims that this is an impermissible transfer of power and such power vests in the "*relevant Manager, Appropriate Authority and/or the suspending Authority*".

176. Although it was not opened to me by either side at the hearing, I have considered the report of the independent investigator. It is clear from that, that legal submissions were made to the Investigator on behalf of the Gardaí, and that the question of what constituted "serious misconduct" within the meaning of the Code was primarily an issue of fact. Various authorities from this and the neighbouring jurisdiction and various employment law textbooks were cited in support of this proposition.
177. It must be noted that the plaintiff and his advisors withdrew from the investigation in or about July, 2020, when the Investigator ruled that he had no jurisdiction to consider issues under the 2014 Act. Accordingly, no submissions were made to the Investigator on behalf of the plaintiff.
178. The Investigator proceeded to draw up his report and make his findings. In doing so, he found that the plaintiff was guilty of "serious misconduct". I am satisfied that this is an issue of fact which was appropriate to refer to an independent investigator. The 2016 Code appears to give flexibility to the investigatory process and does not prescribe who precisely is to conduct it. It is envisaged that, in less complex cases, the civil servant's line manager (which would be the Chief Administrative Officer) would conduct the investigation but the Code appears to give a lot of discretion as to how an investigation is to be conducted where the facts are complex and there is a possibility that serious misconduct occurred.
179. However, as the ultimate decision rests with the Minister as "appropriate authority" and therefore "suspending authority" within the meaning of the 1956 Act, I am satisfied that the Minister will have to come to that conclusion herself, and the report is put before her as part of the Commissioner's recommendation, but does not in any way bind her or prevent her from reaching her own view. I would also stress that the report of the Investigator is an extremely thorough and detailed analysis of the alleged misconduct which, it must be recalled, consists of the writing of the letters of 29 June and 1 and 20 August, 2018 and the intemperate language and allegations against senior colleagues contained therein. The Minister, therefore, will be able to read those letters herself and consider the recommendation in light of those letters and make up her own mind on them. I am satisfied that there is no substance in this point such as would warrant the granting of an injunction.

**(III) Whether the Terms of Reference breached 2016 Code**

180. At paragraph 14 of the fourth supplemental affidavit, the plaintiff complains that by providing that the investigation would take place notwithstanding any refusal or failure to cooperate with it or any part of it, this is a breach of the terms of the 2016 Code.
181. I do not agree. The 2016 Code at p.4 states that a Civil Servant who fails to comply with a disciplinary process "without reasonable cause" will be in breach of his/her terms of

employment and will be subject to disciplinary action. The plaintiff asserts that he had reasonable cause to withdraw from the disciplinary process in July 2020 when the investigator ruled that he had no jurisdiction to consider whether the plaintiff had made protected disclosures. The withdrawal was, in essence, to invoke the plaintiff's rights (as he saws it) by way of legal proceedings, and a summons was issued. A short adjournment was afforded for the purpose of allowing the plaintiff to apply to court for injunctive relief, but no such application was made. In my view, the Investigator was entitled to proceed given that it appeared to him that the plaintiff was not in fact about to apply to court to seek to restrain the investigation.

182. I would accept that, if there were a sufficiently serious legal defect in disciplinary proceedings such as to meet the test in *Rowland v. An Post* [2017] 1 I.R. 355 and this had already taken place, then it would be reasonable to withdraw from the proceedings in order to seek the necessary relief from the court.
183. However, on the facts of this case, the plaintiff did not apply to court but merely issued a summons and turned his attention to the pleadings. If he had a serious concern at that point that the process had gone "*irremediably wrong*" then the plaintiff should have made his application. However, an application for injunctive relief was necessary to justify withdrawing from the process at that stage. Otherwise, the civil servant in question could frustrate the process by merely issuing proceedings.
184. For the avoidance of doubt, there was nothing at that stage of the process by reference to which the plaintiff could have satisfied the *Rowland v. An Post* test, other than his claim that the entire process had been instituted because he had made protected disclosures. Apart from the delay arising from the fact that the process was in being for over two years at that point, if the plaintiff could show a serious question to be tried for saying that the whole process was a ruse to penalise him or cause him detriment for having made a protected disclosure (which in this case he cannot), then it would have been appropriate to injunct the proceedings. However, in this case, the plaintiff did not make any move to apply to court until after he had been served with the Relevant Manager's Report.
185. Insofar as the procedures before the Investigator are said to be unlawful because he determined that he had no jurisdiction to consider whether any of the matters before him were protected disclosures, in my view, this determination was manifestly correct. As set out above in the context of one of the defendants' preliminary objections to the application for interlocutory relief, the Act provides that a person who has made a protected disclosure may either invoke the procedure under s. 12 or under s. 13, or, if he has been dismissed, claim that he has been unfairly dismissed within the meaning of the 1977 Act. The first and last of these are a matter for the Workplace Relations Commission while a claim pursuant to s. 13 is a matter for the courts.
186. A person retained to provide an independent assessment of issues of fact material to a disciplinary procedure under the 2016 Code has no jurisdiction to make any kind of binding ruling on this issue. Indeed, as the plaintiff himself asserts, he is entitled to come to court to restrain the proceedings themselves as being a "*detriment*" within the

meaning of the 2014 Act. The Investigator could only undertake a consideration of matters within his Terms of Reference. I am satisfied, therefore, that this ground of challenge fails.

**(IV) Alleged failure of the investigator to interview highly relevant witnesses**

187. There was complaint, apparently throughout the investigative procedure and certainly in these proceedings, that the investigator failed or refused to interview highly relevant witnesses, in particular, former Acting Commissioner Ó Cualáin, Ms. Kate Mulkerrins and/or Mr. Joseph Nugent. I am satisfied that this Court has no basis in fact or in law for intervening on this ground.
188. The plaintiff seems to have misunderstood the nature of the allegations against him. It was, as I understand it, at all times the case made by the Commissioner in his complaint against the plaintiff that the three letters forming the basis of the allegations against him constituted "serious misconduct", not because they sought information about the process in which he was involved or sought to make representations in his defence, but because they constituted an unprofessional and unwarranted attack on other members of the Senior Leadership Team, alleging that they had acted corruptly and in bad faith when there was no basis for such allegations. Furthermore, the Commissioner, it would appear from a précis of his evidence as contained in the Investigator's report, also was of the view that the letters constituted an attempt by the plaintiff to completely avoid the disciplinary process to which he was lawfully subject.
189. That being the case, the central focus of the inquiry was in fact the text of the letters, the statements in them by the plaintiff, and whether these were premeditated statements, and whether the making of statements of that kind by a person in the plaintiff's position amounted to misconduct. Those allegations against the plaintiff had to be considered in light of the text of the letters themselves, and whether the Commissioner could reasonably say that, in light of the letters, he no longer had any trust and confidence in the plaintiff to discharge his position as Executive Director of Human Resources and People Development.
190. I am satisfied that the plaintiff, in alleging that these other individuals should give evidence, was seeking to extend the investigation of the allegations against him into an inquiry about allegations which he was putting forward against these individuals. That does not appear to me to have been material to the investigation.
191. If I am wrong in this, it should be noted that any complaint that not all of the relevant facts were ascertained or considered is a ground for appeal pursuant to para. 4.2 of the 2016 Code. The plaintiff therefore had a perfectly adequate remedy for this complaint, which he has chosen not to exercise.
192. I would decline any injunctive relief on this basis.

**(V) Alleged breach of confidentiality**

193. The plaintiff has put forward nothing more than a bare assertion to suggest that news of this suspension was leaked by or on behalf of the Commissioner to the media. This

information could have come to the media in any number of ways. There is no evidence before me as to how it occurred, and I would therefore refuse injunctive relief on this ground because there is no evidence to support it.

194. In any event, I fail to see how improper disclosure of confidential information to the media of the plaintiff's suspension could in any way undermine the lawfulness of the process conducted pursuant to the 2016 Code.

**(VI) Failure to pay the plaintiff's legal costs**

195. The plaintiff complains that, while he was allowed to have solicitor and counsel represent him before the inquiry and throughout the disciplinary process, his legal costs were not discharged. Ms. Larkin, a Solicitor and Head of Employment Law in An Garda Síochána, who has sworn a comprehensive affidavit on behalf of the Commissioner, has stated in her affidavit that the Commissioner retained solicitor and counsel because it was evident from the prior dealings with the plaintiff that he would seek legal counsel in the inquiry. However, I do not have to come to any conclusions as to why solicitor and senior counsel were necessary in this investigatory process, nor do I have to consider whether the plaintiff would have been entitled to legal representation as a matter of right.
196. Failure to pay costs is peculiarly a matter which can be compensated in damages if – which I am not concluding – failure to pay the legal costs constituted a breach of the plaintiff's rights. It could not grant an application for interlocutory relief of the kind sought here.

**(VII) Assessment of the Commissioner's evidence**

197. The plaintiff complains at para. 18 of his fourth supplemental affidavit that the Commissioner's evidence required verification. As already stated, it seems to me that the plaintiff has misunderstood the basis on which the complaints, which survived to formal investigation and findings, were made. One of the essential issues was whether the plaintiff's action in writing the letters and the manner in which he expressed himself and made allegations against a member of the Senior Leadership Team and the Acting Commissioner were such that the incoming Commissioner could repose trust and confidence in him. As highlighted at the beginning of this judgment, Appendix A to the 2016 Code identified breach of the implied term of trust and confidence as an issue material to the question of whether a civil servant was guilty of "serious misconduct".
198. The Commissioner's evidence was designed to explain why he could no longer repose trust and confidence in the plaintiff for the manner in which he expressed himself and the attacks which he made on his peers in those letters. This complaint therefore appears to me to be unsubstantiated.
199. There may have been other matters put to the Commissioner in cross-examination, many of which have been re-ventilated in these proceedings. It seems to me from the Investigator's findings that he was satisfied that these matters were not in fact material to the issue which he had to consider, which was whether a person in the plaintiff's position, having had the benefit of time and, it would appear, legal advice, should have expressed himself in the manner which he did to his peers and to the Acting

Commissioner. It should also be noted that the plaintiff withdrew from the process and never gave evidence to the Investigator. If he had, he might have been in a position to explain why he wrote the letters. Unfortunately, this never occurred. I am satisfied there is no merit to this complaint.

**(VIII) Alleged bias or pre-judgment on the part of the Commissioner**

200. At para. 26 of his eighth supplemental affidavit, the plaintiff alleges that the making of a recommendation by the Commissioner in a disciplinary process which continued (after Assistant Commissioner Fanning failed to substantiate his complaint and the Terms of Reference were amended to remove any reference to his complaint against the plaintiff) only in respect of complaints made by the Commissioner is a breach of the principle of *nemo iudex in causa sua*. The plaintiff's written submissions do not deal with this point in any detail, although it is mentioned as a factor supporting the plaintiff's contention that the entire disciplinary process is a device designed to conceal the fact that he is being penalised for having made protected disclosures.
201. Indeed, the plaintiff's written submissions expressly state that he is *not* seeking an employment injunction, and that the application is confined to an application to restrain penalisation or detriment to the plaintiff within the meaning of the 2014 Act: see para. 66. However, as I have found that the letters of 29 June, 1 August and 28 August, 2018, were not protected disclosures, that is sufficient to deal with the plaintiff's case as advanced in his written submissions.
202. Having said that, fair procedures are sufficiently important, in my view, to require at least some consideration of whether there is such a clear unfairness so as to justify the grant of interlocutory relief on the basis that the recommendation of the Commissioner was so unfairly made that it cannot be acted upon. My findings on this issue are based, however, without the benefit of any detailed submissions having been made on this point at hearing, and indeed no authorities were cited in support of the application of this principle to the procedures applied to the plaintiff.
203. In this case, the Commissioner made his recommendation as "*Relevant Manager*" within the meaning of the 2016 Code. The plaintiff had a right of appeal to the Civil Service Disciplinary Appeals Board, which is wholly independent of the Commissioner. Pursuant to para. 4.6 of the 2016 Code, the Appeals Board has the power, *inter alia*, to substitute another "*more suitable*" disciplinary action. That is not the only power the Appeals Board could have exercised had the plaintiff appealed, but it is perhaps the most material one, as discussed further below. Had the Board substituted a recommendation that no disciplinary action be taken, or a more suitable disciplinary action be taken, the Minister would then consider the recommendation of the Board rather than that of the Commissioner.
204. There appears to be some uncertainty in the caselaw as to whether a breach of fair procedures at first instance can be cured on appeal. In *Carroll v. Bus Átha Cliath* [2005] 4 I.R. 184, Clarke J. restrained the continuance of a disciplinary procedure until adequate

details of the complaint against the plaintiff had been furnished to him. This was despite the fact that the plaintiff had the right to appeal.

205. By contrast, in *McKelvey v. Iarnród Éireann* [2019] IESC 79, Charleton J., referred to his judgment in *McNamee v. Revenue Commissioners* [2016] IESC 33 when expressing the view that where there was a two-stage process where rights were afforded at the second stage, that would meet the requirements of fair procedures. *McNamee v. Revenue Commissioners* applies a much earlier authority, *Gammell v. Dublin County Council* [1983] ILRM 413, which is to the effect that, where a decision does not become legally effective until a second stage of the procedure is concluded and where any want of fair procedures at the earlier stage is cured in the later stage, certiorari will not lie.
206. *Gammell* concerned an order pursuant to s. 31 of the Local Government (Sanitary Services) Act, 1948, which was served on the plaintiff without the right to make representations (a clear breach of *audi alteram partem*) but where the plaintiff had been informed of her right to make representations to the Minister for Local Government within 14 days of receiving notice of the proposal to make an order. The plaintiff did not exercise that right and the Order was made. Carroll J. refused a declaration that the order was void, distinguishing it from a case where the person to whom the decision was directed actually suffered a detriment pending completion of the second stage of the procedure, as had occurred in *Ingle v. O'Brien* (1975) 109 ILTR 7, where a taxi driver had his licence revoked and could not drive until his appeal had been heard, even though he had had no right to make representations before he had been deprived of his licence.
207. *Gammell* was referred to with approval in *McNamee v. Revenue Commissioners* where the issue was whether the nominated officer who had issued a Notice of Opinion pursuant to s. 811 of the Taxes Consolidation Act, 1997, as amended, had prejudged the issue of whether a particular transaction was a tax avoidance transaction such that the taxpayer should be deprived of the tax advantage derived from it. In such an instance, the taxpayer may appeal to the Appeal Commissioners who form their own view of the matter, including whether the transaction is or is not a tax avoidance transaction. They are not confined to a review of the nominated officer.
208. On the authority of *Gammell*, as recently approved in *McNamee*, which was itself cited with approval in *McKelvey* in a case where any want of fair procedures would be cured by complaint to the Workplace Relations Commissioner, it would seem that the plaintiff should have availed of his right to appeal to the Board and that would be a clear answer to any complaint about want of fair procedures.
209. However, as against that line of authority, there is the leading case of *Stefan v. Minister for Justice* [2001] 4 I.R. 203, where the Supreme Court held that the Hope Hanlan procedures on foot of which asylum applications were dealt with prior to the commencement of the Refugee Act, 1996, as amended, rejected the notion that an appeal could cure a clear breach of fair procedures (a failure to translate, and therefore even to consider, a key part of the asylum application) at first instance. Interestingly, those procedures somewhat mirrored those at issue here as, absent an appeal to the

Refugee Appeals Authority, the Minister for Justice could proceed to make a determination on the asylum application on foot of the first instance decision whereas, if an appeal were lodged, she would have had to await the outcome of that appeal. In other words, no formal decision on the asylum application could be made until any appeal were concluded, but in the absence of such an appeal, the Minister could proceed to a decision. That is clearly analogous to the situation under the Code and the Supreme Court was clear in *Stefan* that that constituted a two stage bifurcated process, notwithstanding a single decision by the Minister before the application could stand rejected. That reasoning would suggest that the recommendation of the "Relevant Manager" under the 2016 Code is separate and distinct from any appeals decision.

210. However, it seems to me that there are two important factors at play here which mean that I do not have to grapple further with this issue.
211. The first of these is that this injunction is sought in the employment context. It seems to be acknowledged (see Ryan, *Redmond on Dismissal Law*, 3rd ed., (Dublin, 2017), paras. 7.60 to 7.70, that the principle of necessity, somewhat out of fashion in other contexts, retains some vigour in the employment context where the strict application of *nemo iudex in causa sua* would make it impossible for employers to dismiss employees, where, of necessity, they will have a view, prior to the institution of any disciplinary procedures, of the merits of their employees. Strict enforcement of the rule, therefore, would make it impossible to dismiss an employee and in particular, it might be difficult to observe in small companies where it is impossible, in practice, to empanel an entirely independent disciplinary body.
212. An Garda Síochána is not, of course, a small institution. The difficulty arises, however, in an entirely different way. The necessity for the involvement of the Commissioner here arises because of the very seniority of the plaintiff. As stated in the replying affidavit of Ms. Larkin, at para. 164, this was a factor which led to the necessity for the Commissioner himself to consider whether dismissal was warranted. Given the seniority of the plaintiff in An Garda Síochána, the personnel available to so act was decidedly limited. Indeed, it is clear from the plaintiff's affidavits that he would have objected to Mr. Nugent, who as Chief Administrative Officer was the plaintiff's line manager, acting as Relevant Manager. Indeed, it is not clear who the plaintiff says would have been competent to act in this role.
213. Secondly, there is the very important consideration that the Commissioner in this instance did not himself purport to decide whether or not the plaintiff was guilty of "serious misconduct". He retained an independent senior counsel to consider that matter and was cross examined for four days on this and other matters, before the Investigator came to his decision. It was open to the Investigator to find that the letters did not constitute "serious misconduct", but on the contrary, in a detailed report, he expressed himself satisfied that the writing of the letters did indeed constitute "serious misconduct".

214. However, it must be noted from the Relevant Manager's Report that the Commissioner adopted the Investigator's findings in full, including the finding of "*serious misconduct*". The key finding, therefore, was not one made by the Commissioner.
215. When this is taken together with the availability of an undoubtedly independent body to review the recommendation to dismiss, it does not seem to me that the plaintiff can show a strong case that he is likely to win at trial on the basis that the procedures leading to the recommendation to dismiss were unfair. The plaintiff has therefore failed to meet the *Maha Lingham* test which governs this application insofar as wrongful dismissal is claimed.
216. I would add to my conclusions on this strand of the case that I do not agree with the defendants' submission that the test in *Rowland v An Post* has not been met as the Minister is yet to make her decision. Very little remains of the disciplinary process and the application has been brought at a time when it is possible to judge whether it has gone "*irremediably wrong*". In my view, it has not, but in relation to this second strand of the case, where the objection was prematurity rather than delay, I am satisfied that this objection must fail.

### **Conclusion**

217. I am satisfied that there is no serious question to be tried on the issue of whether any of the statements or matters put forward at hearing as protected disclosures, and referred to above as the First, Second, Third and Fourth Protected Disclosures, contributed to the instigation of disciplinary procedures against the plaintiff. There is no evidence to link them to either the investigation of the complaint which was undoubtedly made by Assistant Commissioner Fanning against the plaintiff in November, 2017, or the subsequent complaints of the Commissioner himself as set out in his letter of 17 October, 2018.
218. While the complaints of the Commissioner were undoubtedly the result of correspondence including the letter of 29 June 2018 and were explicitly based on the letters of 1 and 20 August, 2018, to his predecessor, I am satisfied that there is no serious or fair question to be tried as to whether any of these three letters could be said to be protected disclosures. These letters consist predominantly of grievances and allegations, very forcefully expressed, and the only information contained in any of them is the reference in the letter of 1 August, 2018, and repeated in the letter of 20 August, 2018, that Assistant Commissioner Fanning had never made a complaint against the plaintiff and that Ms. Mulkerrins and former Acting Commissioner Ó Cauláin were aware at all times that there was no complaint against the plaintiff and nevertheless prosecuted, in bad faith, what was essentially a bogus and illegal disciplinary process against him.
219. Any consideration of the correspondence exhibited by the plaintiff to his numerous affidavits demonstrate that this is simply not correct and that, at all material times, Assistant Commissioner Fintan Fanning was actively pursuing a formal complaint against the plaintiff, through his solicitors and had rejected mediation as an alternative to formal investigation. Although Assistant Commissioner Fanning ultimately failed to substantiate

his allegations to the Investigator who was appointed by the Commissioner to investigate them, that does not mean that the Head of Legal and Compliance or the former Acting Commissioner were ever aware that he might not back up his complaint.

220. However, the material question is whether the plaintiff, at the time he wrote the letters of 29 June, 1 August, and 20 August, 2018, had a reasonable belief that Ms. Mulkerrins and the former Acting Commissioner had acted in bad faith or for an ulterior purpose. Some form of objective basis for such a belief must exist in order for it to constitute a "*reasonable belief*", as required by the 2014 Act. I do not see that there is any serious question to be tried on this issue. The plaintiff, given his position and experience, was well aware that if a formal process was put in train, as it evidently had been in this instance, any confirmation by Assistant Commissioner Fanning that he had never in fact made a complaint would have to exist in some kind of verifiable form, most likely by way of written correspondence to either Ms. Mulkerrins who was in charge of establishing the disciplinary process being demanded by Assistant Commissioner Fanning's solicitors or indeed to the plaintiff. The plaintiff could not have reasonably believed that no complaint was made without receiving some form of verifiable confirmation of that fact. The very concept of a "*reasonable*" belief denotes the need for objective evidence to support the belief. That is lacking here.
221. Whatever may have been Assistant Commissioner Fanning's true intent in making the complaint, it could not be said, on any reasonable basis, that Ms Mulkerrins or Acting Commissioner Ó Cualáin were acting in an oppressive or illegal fashion unless there was information showing that they knew that this was so. No such information was put before Acting Commissioner Ó Cualáin nor indeed has it been tendered in this application. The latter fact is relevant to the issue of whether the plaintiff had a "*reasonable belief*" in the assertions he was making at the time he wrote those letters because, given the voluminous documentation tendered in evidence for the purposes of this application, one would expect it to have been produced. The fact that it has not at least strongly suggests that it does not exist.
222. On the contrary, all of the evidence before this Court is that a formal complaint was being made and was actively pursued through solicitors from late 2017, through 2018, and into 2019.
223. The fact that the letters of 29 June, 1 August and 20 August, 2018, were not referred to as protected disclosures until mid-2020 is similarly evidence, on the facts of this particular case, that the plaintiff himself, despite his position and extensive experience of the making and receipt of such disclosures, did not himself regard them as such at the time that he wrote the letters, at the time they formed the basis of complaints against him by the Commissioner, or indeed, throughout his engagement with the investigative process for which he engaged junior and senior counsel. Unlike *Clarke v. CGI*, the consequences of those letters had crystallised as of 17 October, 2018, and the plaintiff was well aware of that from the explicit statement to that effect by the Commissioner of his serious concerns arising out of the writing of those letters.

224. As regards the more generalised fair procedure points made in relation to the procedures which took place under the 2016 Code, I do not think that any of these demonstrate a strong case that the plaintiff is likely to succeed at hearing, which is the applicable test where a plaintiff seeks to restrain dismissal on procedural grounds. Such an order would in effect compel the continuance of the employer/employee relationship in a situation where the Commissioner has expressed his lack of trust and confidence in the plaintiff. The plaintiff has not reached that threshold.
225. It is true that the Commissioner made the complaints and also made the recommendation that the plaintiff would be dismissed. However, he had in the interim retained an independent senior counsel to investigate whether the plaintiff's conduct could amount to "serious misconduct", which was an important safeguard from the plaintiff's point of view, ensuring that an independent consideration of this fundamental issue was reached.
226. In any event, the plaintiff had the right to appeal to the Appeals Board which is entirely independent of the Commissioner and, no doubt for his own reasons, has decided not to avail of that appeal procedure. Had the plaintiff availed of his right to appeal, it would have been the Appeals Board who would have made the relevant recommendation to the Minister and this Board has the power, *inter alia*, to recommend that no disciplinary sanction be imposed or that a lesser one would be taken. The plaintiff, therefore, had the right to protect himself against any disproportionate recommendation on the part of the Commissioner. The fact that it is the Commissioner's own recommendation which must now be considered by the Minister therefore flows from the plaintiff's decision not to appeal the Commissioner's Recommendation. The appeal procedure was fully capable of affording full procedural rights to the plaintiff.
227. I would therefore refuse the application. I will list the matter before me in early course to hear the parties on the question of when the existing undertakings should be withdrawn or discharged and on the issue of the costs of this application.