APPROVED **[2024] IEHC 154**

<u>THE HIGH COURT</u>

Record No: 2022/2114P

Between:

PASCAL HOSFORD

Plaintiff

-AND-

MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION, MINISTER FOR PUBLIC EXPENDITURE AND REFORM, IRELAND AND THE ATTORNEY GENERAL

Defendants

<u>THE HIGH COURT</u>

Record No: 2022/2115P

PASCAL HOSFORD

Plaintiff

-AND-

MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION

Defendant

NO REDACTION REQUIRED

<u>THE HIGH COURT</u>

Record No: 2022/2116P

PASCAL HOSFORD

Plaintiff

-AND-

MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION, MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT, MINISTER FOR PUBLIC EXPENDITURE AND REFORM, IRELAND AND THE ATTORNEY GENERAL

Defendants

<u>THE HIGH COURT</u>

Record No: 2022/5733 P

PASCAL HOSFORD

Plaintiff

-AND-

MINISTER FOR EMPLOYMENT AFFAIRS AND SOCIAL PROTECTION, MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT, THE WORKPLACE RELATIONS COMMISSION, THE LABOUR COURT, THE MINISTER FOR FINANCE, MINISTER FOR PUBLIC EXPENDITURE AND REFORM, IRELAND AND THE ATTORNEY GENERAL

Defendants

<u>JUDGMENT of Mr Justice Rory Mulcahy delivered on 19 March 2024</u>

Introduction

1. This judgment concerns four identical motions by the defendants, one in each of the above-mentioned proceedings, to strike out the plaintiff's claims pursuant to Order 19, Rule 28 of the Rules of the Superior Courts for failing to disclose a cause of action or being

frivolous and vexatious, or, in the alternative, pursuant to the inherent jurisdiction of the Court as being an abuse of process. In the further alternative, the defendants seeks orders setting aside the plaintiff's Statements of Claim, as being irregular in form, pursuant to Order 124, Rule 1 of the Rules.

2. In addition, the defendants seeks orders restraining the plaintiff from issuing any further proceedings relating to or touching upon the Plaintiff's disclosures in relation to proprietary company directors without obtaining the prior leave of the President of the High Court, or a judge nominated by him (an *Isaac Wunder* Order).

3. The plaintiff also issued a motion seeking to consolidate the four different proceedings. For practical reasons, that motion did not proceed pending the determination of the defendants' motions.

4. Before considering each set of proceedings in turn, it is necessary to consider the background to all of these proceedings.

Background

5. The plaintiff is now retired but, until November 2019 he had been a civil servant since 1977 and, in particular, had been in the Department of Social Welfare, or its equivalent ("**the Department**") since 1985. In 2009, he was transferred to the Scope Section of that Department, in which role he came into conflict with his employers regarding the appropriate classification of individuals working in companies of which they were directors and shareholders and in particular, whether in certain circumstances such individuals might be classified as self employed for pay-related social insurance (PRSI) purposes, depending on the nature of their shareholding in the company and other factors. The details of that dispute are set out in a judgment of the High Court (Noonan J) in which the plaintiff unsuccessfully sought judicial review of his employer's decision to transfer him to a different section within the Department on the basis that the decision to transfer him was for an alleged improper purpose (see *Hosford v Minister for Social Protection* [2015] IEHC 59). As noted by Noonan J in the course of his judgment:

> *"It is fair to say that the applicant developed a very definite and perhaps even passionate view of the law in this regard which he considered should be applied without regard to any policy considerations. The applicant alleges that the Department operated a policy in relation to this issue which was unlawful and he expressed that view on numerous occasions to his superiors and other parties both inside and outside the Department."*

6. The plaintiff did not appeal that decision, but those judicial review proceedings were far from the last claim brought by Mr Hosford arising from his employment with the Department.

7. On 20 October 2017, the plaintiff made a complaint to the Workplace Relations Commission (WRC) that he had been sanctioned or penalised by his employer for making a protected disclosure, contrary to section 12 of the Protected Disclosures Act 2014, as amended ("**the 2014 Act**"). That complaint was rejected by the WRC in an adjudication dated 20 September 2018. The plaintiff appealed to the Labour Court which rejected his appeal in a determination dated 25 March 2019. The plaintiff then brought a statutory appeal to the High Court, which appeal was dismissed in a judgment of Meenan J delivered on 25 February 2020 (*Hosford v Department of Employment Affairs and Social Protection* [2020] IEHC 138).

8. Mr Hosford appealed that decision to the Court of Appeal which concluded that it had no jurisdiction to hear an appeal from the decision of the High Court on his statutory appeal ([2021] IECA 335). The Supreme Court refused leave to appeal from the decision of the Court of Appeal by determination dated 24 June 2022 ([2022] IESCDET 78). The Supreme Court also refused leave to bring a direct, or leapfrog, appeal from the decision of the High Court, by determination dated 4 November 2022 ([2022] IESCDET 120).

9. The plaintiff made a further complaint to the WRC on 14 February 2019 under section 6 of the Payment of Wages Act 1991, as amended ("**the 1991 Act**") and also the 2014 Act. These complaints related to payment of wages during the plaintiff's extended absence from work due to sickness in 2018 and also further allegations of penalisation arising from his protected disclosures. The WRC concluded that both complaints were not well-founded in

an adjudication dated 6 November 2019. That decision was affirmed by the Labour Court in two separate determinations dated 14 August 2020.

10. The plaintiff made two further complaints to the WRC dated 11 December 2019 and 30 January 2020, both under section 6 of the 1991 Act. The complaints related to deductions made from the plaintiffs' statutory pension lump sum and his final statutory pay respectively arising from alleged overpayments he had received prior to his retirement. The plaintiff complained about the lawfulness of Department of Public Expenditure and Reform (DPER) Circular 07/2018 in accordance with which the deductions had been made. The WRC formed the view that the payment of a pension is not to be regarded as "wages" for the purpose of the 1991 Act and so concluded, in an adjudication dated 28 May 2020, that it did not have jurisdiction to investigate the deduction from the pension lump sum. In addition, it concluded that it did not have jurisdiction to address complaints about the Circular. It did, however, conclude that the complaint regarding the deduction from his final salary payment was not well-founded. The Labour Court affirmed this decision in a determination dated 9 April 2021. It is averred in the grounding affidavit of Ms Lorraine Williams that the plaintiff appealed the Labour Court determination on a point of law to the High Court, but the basis for that appeal have not been relied on in this application. In any event, the appeal (*Hosford v Minister for Employment Affairs and Social Protection*, Record No. 2021/120 MCA) was dismissed in an *ex tempore* judgment of Meenan J dated 27 May 2021.

11. In addition to his appeal to the Labour Court from the WRC adjudication, on 21 July 2020, the plaintiff issued proceedings by way of notice of motion in the High Court, agitating for two separate categories of declaratory relief (*Hosford v Ireland and Ors*, Record No. 2020/161MCA). The first category related to the deductions from his pay the subject of the complaint to the WRC. That complaint had been determined by the WRC at the time the proceedings were instituted, but the Labour Court appeal was still pending. The second category of relief sought consisted of declaratory orders to the effect that the applicant and members of the Oireachtas had *locus standi* to pursue proceedings regarding the treatment of company directors for social insurance purposes, the issue which had been the subject of the extended dispute with his employers detailed by Noonan J in his 2015 judgment.

12. The respondents to those proceedings brought a motion to dismiss the proceedings as being irregular in form and an abuse of process. In a judgment dated 3 March 2021, the High Court (Simons J) dismissed those proceedings in their entirety ([2021] IEHC 133). On the question of the irregularity of the proceedings, the court noted that the principal claims made by Mr Hosford were ones which more appropriately by way of judicial review. It noted Mr Hosford's reliance on the fact that he was a lay litigant:

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

13. The court concluded that no part of the proceedings could be salvaged having regard to the procedural prejudice that would do to the respondents:

> *"The failure to go by way of judicial review proceedings is no mere technical defect. It is not simply a matter of "a heading on a piece of paper", as glibly stated by the applicant. Rather, it represents an abuse of process in that it has allowed the applicant to avoid the necessity of having to comply with the safeguards put in place to ensure that a public authority is not subject to frivolous or vexatious litigation. Had the applicant gone by way of judicial review, it would have been mandatory for him first to obtain the leave of the court to apply for judicial review. This would have entailed the applicant having to satisfy the court that he had arguable or stateable grounds; that the*

application had been made within the three month time-limit; and that there was not an adequate alternative remedy available to the applicant by way of statutory appeal. It would also have been necessary for the applicant to join the Workplace Relations Commission and/or the Labour Court to the proceedings."

14. The court had regard to the fact that the plaintiff's appeal before the Labour Court was still pending at that time and concluded that he was required to exhaust those procedural rights, noting that it was open to him, in principle, to challenge the validity of the Payment of Wages Act 1991 in the event that his argument didn't find favour with the Labour Court.

15. In addition to concluding that the proceedings should be struck out as irregular in form, the court concluded that they should be dismissed as an abuse of process, firstly, for having by-passed the requirements of Order 84, applicable to judicial review proceedings, but also on the grounds of *res judicata*, regarding the decision to re-assign him. Finally, the court concluded that the claim for relief in relation to *locus standi* disclosed no reasonable cause of action. Simons J concluded that it was impermissible to seek a free-standing declaration that a person has *locus standi* divorced from the legal issues sought to be ventilated.

16. On 21 August 2020, the plaintiff made a number of further complaints to the WRC alleging constructive dismissal contrary to section 8 of the Unfair Dismissals Act 1977, as well as wrongful penalisation contrary to section 12 of the 2014 Act. The events giving rise to these complaints were said to have occurred in 2019, and he was, therefore, outside the 6-month time limit to bring such a complaint. The plaintiff attributed his delay to having to wait for the conclusion of the High Court proceedings and the judgment of Meenan J of 25 February 2020, referred to above. In an adjudication dated 9 July 2021, the WRC concluded that his complaints were out of time and dismissed them. This decision wasn't appealed.

17. On 12 May 2021, the plaintiff filed an application for leave to seek judicial review against Dail Eireann and a number of the defendants in the motions before the Court (*Hosford v Dail Eireann and Ors*, Record No. 2021/466JR). He sought to challenge decisions of the Public Accounts Committee arising from his protected disclosures. In addition, as discussed below, he raised some of the matters the subject of the proceedings now before the court. The High Court (Meenan J) refused the plaintiff leave to seek judicial review in an *ex tempore* decision dated 29 November 2021. On appeal, the Court of Appeal

likewise refused leave in an *ex tempore* decision dated 28 March 2022. As appears from the transcript of the Court of Appeal judgments, the plaintiff explained that the nub of his complaint in those proceedings related to the treatment of proprietary directors for social insurance purposes. Both judges who delivered *ex tempore* decision, Faherty and Collins JJ, concluded, in refusing relief, that the plaintiff did not have *locus standi* to pursue any such complaint. The Supreme Court refused leave to appeal in a determination dated ([2022] IESCDET 83).

The Current Proceedings

18. The plaintiff issued three sets of proceedings on 31 May 2022 by way of Plenary Summons. Unusually, each was accompanied by an affidavit. He delivered Statements of Claim in each of those proceedings on 28 June 2022. He issued the fourth set of proceedings on 14 November 2022. He provided an affidavit in those proceedings on 27 January 2023 and delivered a Statement of Claim on 21 February 2023. The four sets of proceedings are described below.

*2022/2114P ("**the 2114P Proceedings**")*

19. In his consolidation motion, Mr Hosford describes these proceedings as mainly relating to the constitutionality of the mandatory manner via which State employers make deductions concerning overpayments from an employee's constitutionally protected pension entitlements.

20. The Plenary Summons seeks a declaration that DPER Circular No. 07/2018, pursuant to which deductions had been made to his pension lump sum, breached his constitutional rights, the European Convention on Human Rights and the EU Charter of Fundamental Rights. He seeks an Order that the deduction was unlawful and should be repaid. He also seeks an order that virtually all public sector employees were subject to the same unlawful conditions.

21. His affidavit and Statement of Claim are in similar terms, save that the affidavit anticipates an argument that the proceedings are statute-barred and he contends that they are not because they are taken within the six-year limit for tort actions and regarding breaches

of contract and argues that the courts have full discretion to allow actions to proceed even if the actions are potentially statute-barred. His affidavits filed in the first three sets of proceedings contain the same argument.

22. Both affidavit and Statement of Claim refer to a complaint made to the Pensions Ombudsman and the Financial Services and Pensions Ombudsman (FSPO). It is pleaded that the FSPO has invoked section 52(f) of the Financial Service and Pensions Ombudsman Act 2017 which entitles the Ombudsman to discontinue investigating a complaint where, in the opinion of the Ombudsman "*the subject matter of the complaint is of such a degree of complexity that the courts are a more appropriate forum*." He pleads that his complaint to the FSPO was that the deduction from his pension lump sum was an act of maladministration or an act of unlawfulness.

23. As articulated in the Statement of Claim, the plaintiff's complaint relates to the fact that an overpayment of wages of €6702.60 which had occurred was taken from his pension lump sum without his consent. He seems to acknowledge that this was done in accordance with the applicable DPER Circular, but complains that that Circular is in different terms to Circulars applicable to other public servants, e.g. An Garda Siochána.

2022/2115P ("***the 2115P Proceedings***")

24. The plaintiff describes these proceedings, in his consolidation motion, as mainly relating to this being a test case seeking that the Superior Courts would set out some new legal tests concerning whether there has been unlawful penalisation of by employers under the 2014 Act. He says that the case relates to the separation of powers.

25. The Plenary Summons in these proceedings is relatively straightforward. The only defendant named in the plenary summons is the Minister for Social Protection. The plaintiff seeks declarations that he was unlawfully penalised by the defendant contrary to section 13 of the 2014 Act for having made protected disclosures. Section 13 of the 2014 Act provides for a remedy in tort where a person causes detriment to another person because that person has made a protected disclosure:

(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.

26. The plaintiff also seeks a declaration that his resignation on 1 November 2019 amounted to an unlawful constructive dismissal. He asks the court to set legal guidelines regarding the protections in the 2014 Act.

27. The affidavit and Statement of Claim are in similar terms. They are much more extensive documents than the Plenary Summons and consist of a combination of pleas, legal submissions and complaints about earlier decision-making processes. Ireland and the Attorney General are named as additional defendants and the plaintiffs seeks a variety of declarations and orders not referenced in the Plenary Summons, though, insofar as can be discerned, related thereto. There is an additional claim regarding an alleged breach of separation of powers but it is far from clear to what this relates.

2022/2116P ("***the 2116P Proceedings***")

28. In these proceedings, the plaintiff challenges the constitutionality of section 5(5) of the Payment of Wages Act 1991 and seeks orders that the deductions made from his final pay were unlawful. He seeks repayment of that deduction in the sum of €2163.70.

29. As appears from his Statement of Claim, his complaint is that the 1991 Act statutorily excludes fair procedures and that the words *"fair and reasonable, having regard to all the circumstances*" should be inserted into section 5(5) of the 1991 Act.

30. Circular 07/2018 ("**the Circular**") is exhibited to the affidavit delivered with the plaintiff's Plenary Summons, even though it is expressly challenged only in the 2114P proceedings. As appears therefrom, the Circular was issued pursuant to section 17 of the Civil Service Regulation Act 1956, as amended. Pursuant to that provision, the Minister for Public Expenditure and Reform may fix the terms and conditions of service of public servants and, for that purpose may make such arrangements as the Minister thinks fit, and may vary or cancel those arrangements.

31. The Circular makes that clear that any overpayments made during the course of employment with the civil service must be repaid, and sets out various mechanisms for so doing from which employees must choose. It includes a provision for what are termed "exceptional and hardship" arrangements.

32. In the 2114P Proceedings, Mr Hosford compares the provisions of the Circular with those of the circular applicable to An Garda Siochána which refers to "*agreement being required in order that the overpayment can be recouped from any gratuity or pension payments due*." He exhibits a portion of the Garda circular in the affidavit delivered in these proceedings which contains this statement. That extract also provides that where an arrangement for repayment is not made within one month of the date of a garda's departure from the force, appropriate legal proceedings will be brought. It expressly states that An Garda Siochána do not have the discretion or authorisation to write off any overpayment.

2022/5733P ("***the 5733P Proceedings***")

33. It is clear from his Statement of Claim and the affidavit he furnished after issuing the proceedings, that the plaintiff's concern in these proceedings is with the treatment for social insurance purposes of proprietary company directors, the subject matter of the dispute with his employer described in Noonan J's judgment in 2015. He also complains about section 16 of the Social Welfare (Miscellaneous Provisions) Act 2013 ("**the 2013 Act**"), pursuant to which employment of persons who are the beneficial owners of the company with whom they have a contract of service is deemed to be excepted employment for the purpose of certain provisions of the Social Welfare Consolidation Act 2005, and therefore such persons are not regarded as employed contributors for the purpose of the Act. The plaintiff characterises this amendment as retrospective legislation.

34. The Statement of Claim traverses a variety of matters, including seeking a declaration that he has *locus standi* to bring the proceedings. It refers to an audit by the Comptroller and Auditor General, various decisions of the Labour Court, the Tax Appeals Commissioner, the Social Welfare Chief Appeals Officer, none of which relate to Mr Hosford personally.

Applicable Principles

35. In *Scotchstone Capital Fund Ltd v Ireland* [2022] IECA 23, the Court summarised the principles applicable to applications to strike out proceedings (at para. 290):

> *"In essence these are:*
> *a) An application for a strike out of a plaintiff's claim on the basis of the inherent jurisdiction is not a substitute for summary disposal of a case;*
> *b) The jurisdiction exists, not to prevent hardship to a defendant from defending a case, but to prevent against an abuse of process of the court by the plaintiff, e.g. causing a manifest injustice to the defendant in being asked to defend a case which is bound to fail;*
> *c) The burden of proof is on the defendant;*
> *d) There is a degree of overlap between bound to fail jurisprudence and cases which are held to be frivolous and vexatious. However, the latter are cases which may have a reasonable chance of success but would confer no tangible benefit on a plaintiff or are taken for collateral or improper motives or where a plaintiff is seeking to avail of scarce resources of the courts to hear a claim which has no prospect of success;*
> *e) The standard of proof is on the defendant/respondent to show that the claim is bound to fail or frivolous or vexatious;*
> *f) Bound to fail may be described inter alia, as devoid of merit or a claim that clearly cannot succeed;*
> *g) Frivolous and vexatious must be understood in their legal context as claims which are, inter alia, futile, misconceived, hopeless;*
> *h) The threshold for the plaintiff successfully to defend such a motion is not a prima facie case but a stateable case;*
> *i) It is a jurisdiction only to be used sparingly, in clear cut cases and where there is no basis in law or in fact for the case to succeed;*
> *j) The court must accept that the facts as pleaded by the plaintiff in considering whether an Order pursuant to O.19, r. 28 may be made but in the exercise of its inherent jurisdiction the court can to some extent look at and assess the factual basis of the plaintiff's claim;*
> *k) Where the legal or documentary issues are clear cut it may be safe for a court to reach a conclusion on a motion to dismiss;*

l) Even where a plaintiff makes a large number of points, each clearly unstateable, it may be still safe to dismiss; and

m) In some cases, even if the factual disputes are clear cut or may be easily resolved, the legal issues or questions concerning the proper interpretation of documentation may be so complex that they are unsuited to resolution within the confines of a motion to dismiss."

36. In *Clarington Developments Ltd v HCC International Insurance Company plc* [2019] IEHC 630, the High Court (Simons J) helpfully summarised the distinction between the court's jurisdiction under Order 19. Rule 28 and the court's inherent jurisdiction:

"24. For the reasons explained by the Supreme Court in Lopes v. Minister for Justice Equality and Law Reform *[2014] IESC 21; [2014] 2 I.R. 301, [16] to [18], it is important to distinguish between the jurisdiction to strike out and/or to dismiss proceedings pursuant to (i) Order 19 of the Rules of the Superior Courts, and (ii) the court's inherent jurisdiction. An application under the Rules of the Superior Courts is designed to deal with circumstances where the case as pleaded does not disclose any cause of action. For this exercise, the court must assume that the facts—however unlikely that they might appear—are as asserted in the pleadings.*

25. By contrast, in an application pursuant to the court's inherent jurisdiction, the court may to a very limited extent consider the underlying merits of the case. If it can be established that there is no credible basis for suggesting that the facts are as asserted, and that the proceedings are bound to fail on the merits, then the proceedings can be dismissed as an abuse of process. In order to defeat a suggestion that a claim is bound to fail on the facts, all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings.

26. Whereas it is correct to say that—in the context of an application made pursuant to the court's inherent jurisdiction—it is open to the court to consider the credibility of the plaintiff's case to a limited extent, the court is not entitled to determine disputed questions of fact."

37. In *Mullaney v Ireland* [2023] IECA 195, the Court of Appeal (Costello J) noted that it is impermissible to bring proceedings for the purpose of challenging final orders made in earlier proceedings (at para. 8):

> *"It is an abuse of process to bring proceedings whose purpose and effect is to launch impermissible collateral attacks on valid, final, un-appealed Orders of the High Court."*

38. In *Murphy v Canada Life Assurance Ireland Ltd* [2016] IECA 128, the Court of Appeal (Hogan J) considered the applicability of the doctrine of *res judicata* to administrative decisions:

> *"8. In my view, it is perfectly clear, both as a matter of principle, statute and authority that, broadly speaking, a claimant cannot advance a complaint to the FSO and then, should that claim prove unsuccessful, re-litigate the same matter before the High Court under the guise of separate proceedings. There is a clear public interest in the finality of litigation, coupled with a requirement that a litigant should advance the entirety of a claim and not endeavour to litigate matters in a piecemeal basis. The potential for the abuse of the litigious process by repeated applications is manifest.*
>
> *9. These principles are reflected in the doctrine of* res judicata*, so that a matter which has been finally judicially decided cannot generally be re-opened. The principles of* res judicata *serves not only to protect these important public interests, but also to safeguard the legitimate interests of litigants to ensure that they are not harassed by the unnecessarily burdensome litigant who endeavours to re-open matters which have already been judicially determined.*
>
> *10. The doctrine does not apply simply to judicial findings, but also to administrative determinations which, in the nature of things, are final."*

39. In order to ground a plea of *res judicata*, a decision must be a decision on the merits. In *Moffitt v ACC* [2007] IEHC 245; [2008] 1 ILRM 416, an application to dismiss proceedings, the High Court (Clarke J, as he then was) noted the following:

> *"3.2 The principal basis advanced on behalf of ACC for suggesting that these proceedings are bound to fail is that the same issues have already been determined. In that context it is important to identify the scope of the doctrine of* res judicata*. It is well settled that in order for a plea of res judicata to succeed, the judgment upon which it is founded must be a final and conclusive judgment on the merits."*

40. In the House of Lords decision in *The Sennar (No. 2)* [1985] 1 WLR 490 (cited with approval by the High Court (Hogan J) in *Celtic Atlantic Salmon (Killary) Ltd v Aller Aqua Ireland Ltd* [2014] IEHC 421; [2014] 3 IR 214), Lord Brandon stated as follows (at p. 499):

> *"Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned."*

41. In *Moffitt*, Clarke J also considered the relevance of the plaintiff being a litigant in person when addressing an argument that the claim should be dismissed. He considered that in that case, the defendant's application to dismiss was not based on a plea of *res judicata*, the precise issue not having been raised in previous proceedings, but rather one encompassed by the rule in *Henderson v Henderson*, which bars not only those claims which *have* been pursued in previous proceedings, but also those claims which *ought to* have been brought forward in earlier proceedings, but which were not. He concluded:

> *"4.8 In those circumstances it seems to me that I need to consider, on a broad basis, the merits of allowing, or not allowing, Mr. Moffitt to continue with these proceedings. It is important, in relation to this aspect of the case, (though it would not have been relevant in respect of a pure* res judicata *point) to note that Mr. Moffitt represented himself. The points now sought to be relied on are purely legal points and Mr. Moffitt could not, in those circumstances, have been expected to raise them. In those circumstances much less blame attaches to him for those issues not having been raised in his previous proceedings, than might be the case had he been represented."*

The Arguments

42. Rather than rehearse in detail the parties' arguments, I will summarise them briefly here and then address them as appropriate when considering the application of the relevant principles to each case.

43. The defendants argue all four sets of proceedings should be dismissed on a variety of grounds. In particular, they argue that each set of proceedings seeks to re-agitate matters which have been finally determined in administrative tribunals or the courts. They contend, therefore, that all issues raised are *res judicata* and that, accordingly, each set of proceedings constitutes an abuse of process and should be dismissed in the exercise of the court's discretion. Where the plaintiff has not appealed decisions of administrative bodies, the defendants argue that he is bound by those decisions and/or that the principles of *res judicata* apply, and that the plaintiff cannot avoid that consequence by failing to exhaust available remedies.

44. In addition, they argue that the proceedings are irregular in form and should be dismissed on that ground. In this respect, the argument isn't simply that the Statements of Claim do not follow the requirements of the Rules of the Superior Courts, rather that each set of proceedings are, in effect, challenges to administrative decisions which are more appropriately pursued by way of judicial review. By pursuing the proceedings by way of plenary action, Mr Hosford, it is argued, has impermissibly avoided procedural safeguards in the same way as he was found to have done in *Hosford v Ireland and Ors* [2021] IEHC 133.

45. The defendants further argue that the claim disclose no reasonable cause of action. In this regard, the defendants didn't engage in, or ask the court to engage in, a line-by-line examination of the multiple pleas and arguments advanced in each set of proceedings. They referred to the decision of the High Court (McGovern J) in *Doherty v Minister for Justice, Equality and Ors* [2009] IEHC 246 (at para. 14):

> *"14. Where the extent of the scandalous or vexatious pleading is sufficiently gross and extensive, it seems to me that it is not the function of the court to sift through the material in the statement of claim to see if, perhaps, somewhere within it, a claim can be found*

in the proper form. The court is entitled to have regard to the document as a whole. There might well be cases where there is an isolated pleading here or there which may be scandalous or vexatious, but the greater part of the document contains pleadings in a proper form. In those cases, the courts can strike out the offending portions of the pleadings. But that is not the case here."

46. The defendants contend that as each set of proceedings raised matters which had previously been rejected by administrative tribunals and the courts, where each challenge to an administrative decision was long out of time, and where, in respect of the 5733P proceedings, the plaintiff lacks any standing to bring the claim, each set of proceedings was bound to fail.

47. As regards *locus standi*, they defendants noted that the plaintiff is not a proprietary company director and therefore has no direct interest in the treatment of such persons for social insurance purposes and, therefore, no entitlement to pursue a claim regarding such treatment.

48. The plaintiff contends that none of the issues he raises have been finally determined by the courts. Insofar as issues have been raised before, for procedural reasons, the substance of the plaintiff's complaint has not been addressed. He points to indications from a variety of administrative bodies and courts that his complaints should be advanced in the manner he now seeks to do. As noted above, he argues that, because he has issued plenary proceedings, the time limits applicable to judicial review proceedings do not apply to these proceedings.

49. Insofar as his current or past proceedings are or were in improper form, he argues that this is explained and should be excused by his position as a lay litigant. As he did before Simons J, he refers in this regard to the decision of the High Court (Ryan J) in *Bennett v Egan* [2011] IEHC 377, in which he noted (at para. 19) that "*a court has to be careful in dealing with a lay litigant to make sure that a defect in procedural steps does not shut out a genuine claim.*"

50. He argues that he is directly affected by the claim in relation to the tax treatment of company directors because of the impact the issue had on him in the course of his employment. In the alternative, he argues that he should be entitled to pursue the claim in

the public interest, because no person actually affected would wish so to do, arguing that no director who obtained the benefit of what the plaintiff considers unlawful tax treatment would challenge that treatment because "*turkeys don't vote for Christmas*".

Application to the Plaintiff's Cases

51. Although the Defendants contend that all four actions "*overlap and are interlinked such that it is hard to disentangle the issues arising*", it seems to me that the 2114P and 2116P arise from issues which are only tangentially linked to the 2115P and 5733P proceedings. The 2114P and 2116P proceedings, which I propose to deal with together, seek to challenge the constitutionality of a Ministerial Circular (the 2114P proceedings) or statutory provisions (the 2116 proceedings) which were engaged when the defendants made deductions from the plaintiff's pension lump sum and final salary respectively, on the basis that he had previously been overpaid, when he sought to challenge those deductions. It may be that that any overpayment occurred because of previous issues between the plaintiff and his employer in relation to protected disclosures, although even that suggested connection is tenuous, but that appears to be the only link to the question of how the 2014 Act operates, or to the underlying issue the subject of the plaintiff's protected disclosures, the treatment for social insurance purposes of company directors. Those latter two issues are the subject of the other two sets of proceedings. The 2115P proceedings concern the protections afforded to those making protected disclosures, and the 5733P proceedings concern the treatment of company directors. I propose, therefore, to address the 2115P and then the 5733P proceedings first, before addressing the other two claims together.

The 2115P proceedings

52. In the 2115P proceedings the plaintiff seeks declarations that he was wrongfully penalised and/or constructively dismissed as a result of the protected disclosures he made between April 2019 and November 2019. He seeks to pursue a tort action pursuant to section 13 of the Protected Disclosures Act 2014.

53. It is clear that the subject matter of his complaints in these proceedings have already been addressed in complaints to the WRC. As set out above, the plaintiff brought two

separate complaints to the WRC regarding penalisation, in 2017 and 2019. Both were dismissed. The 2017 complaint was appealed to the Labour Court and then the High Court and was the subject of a judgment of Meenan J, referred to above, delivered on 25 February 2020. That decision was, in turn, appealed to the Court of Appeal, and leave to appeal was refused by the Supreme Court. Similarly, the 2019 complaint was appealed to the Labour Court and dismissed. No appeal was brought to the High Court.

54. In August 2020, the plaintiff lodged a complaint with the WRC pursuant to the Unfair Dismissals Act 1977, as amended, that he had been constructively dismissed arising from the defendants' treatment of him for having made protected disclosures. In addition, he again complained that he had been penalised for making protected disclosures, contrary to section 12 of the 2014 Act. As appears from the WRC adjudication, that complaint related to emails sent in July and August 2019. Both complaints were dismissed by the WRC as being out of time. There was no appeal to the Labour Court

55. In light of the above, the defendants argue that the issues advanced in these proceedings are *res judicata* and should therefore be dismissed as bound to fail. In addition, they rely on section 13(2) of the Protected Disclosures Act 2014. This provides:

> *(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* [i.e. a claim to the WRC that there has been unlawful penalisation, contrary to section 12 of the 2014 Act].

56. It is clear, therefrom, that although a remedy in tort exists where a person alleges that they have suffered to their detriment as a result of making a protected disclosure, that person must elect between pursuing a claim in tort, or, in the alternative, pursuing a complaint under the Unfair Dismissals Acts or a complaint to the Workplace Relations Commission that that person has been penalised for making a protected disclosure contrary to section 12 of the 2014 Act.

57. The plaintiff says, in effect, that his constructive dismissal complaint, and the complaints of penalisation arising from matters which occurred in 2019, were not addressed on the merits but rather, were dismissed for being out of time and that there is therefore "*no substantive WRC decision*". He says, therefore that *"logically, the plaintiff saw no point in an appeal to the Labour Court and instead decided to lodge a tort test case to the High Court, where the question of time limit does not arise – such being six years."*

58. It is difficult to discern any basis upon which the plaintiff contends, or could contend, that he be entitled to re-agitate his complaints regarding penalisation first made to the WRC in 2017 and which were the subject of substantive determinations by the WRC, Labour Court and, in respect of some complaints at least, have already been determined by the courts, including, by way of determination, the Supreme Court. Similarly, his subsequent complaint of penalisation was the subject of a WRC adjudication dated 6 November 2019 and a Labour Court determination dated 14 August 2020. Although the plaintiff's Plenary Summons refers only to matters which arose between April 2019 and November 2019, his Statement of Claim expressly criticises the decisions of the Labour Court and High Court (see, for instance, paragraphs 37, 40 and 109) in relation to the earlier complaints.

59. The height of the plaintiff's case in relation to those earlier complaints is that the administrative bodies and the Courts misapplied the law and he wants the courts to review the law in this area, treating his case as a test case. There is no basis upon which the courts could entertain such an application in relation to the matters the subject of his 2017 and 2019 complaints to the WRC. Those matters have been finally determined on the merits by an appropriate administrative body, or by a court, and the doctrine of *res judicata* prevents the plaintiff from pursuing them afresh. Insofar as he pursues any additional claim in tort, that claim is barred by section 13(2) of the 2014 Act.

60. In respect of his complaints regarding constructive dismissal and penalisation arising from events occurring between April 2019 and November 2019 the plaintiff elected, in the first instance, to pursue a complaint to the WRC rather than pursue claims in tort. Again, it is clear that the subject matter of the August 2020 complaint is the same matter the subject of these proceedings. This is stated in terms at paragraph 28 of the plaintiff's Statement of Claim, and at paragraph 93, the plaintiff pleads that it was within the discretion of the WRC

to grant an extension of time and he sets out the reasons which he claims justified his delay in lodging his complaint.

61. In those circumstances, the plaintiff would, if the substance of his claim had been determined by the WRC, be barred from pursuing the same complaints in these proceedings and any claim in tort would be barred by section 13(2). The question, for present purposes, is whether the dismissal of his proceedings as being out of time attracts the same consequences, *i.e.* a conclusion that the proceedings are *res judicata* and/or are barred by section 13(2)?

62. The question is complicated by the potentially anomalous position created by sections 12 and 13 of the 2014 Act. Those sections provide for alternative remedies and, in effect, an obligation to elect between them. However, the time limits applicable to the remedies appear, *prima facie*, to be different. A claim that a person has been penalised for making a protected disclosure, contrary to section 12 of the 2014 Act, can be pursued in the WRC pursuant to section 41 of the Workplace Relations Commission Act 2015, as amended. Section 41(6) provides that the WRC shall not entertain a complaint made more than six months after the contravention the subject of complaint. Section 41(8) provides that the six-month time limit can be extended for no more than a further six months where the WRC is satisfied that the failure to make the complaint within six months was for "reasonable cause". Section 8(2) of the Unfair Dismissals Act 1977, as amended, imposes similar time limits for claims for redress under that Act.

63. By contrast, section 13 simply creates a cause of action in tort. Section 11(2) of the Statute of Limitations Act 1957, as amended, imposes a six *year* time limit for causes of action founded on tort. In this case, the plaintiff was found to be out of time to pursue a complaint to the WRC. It is, at the very least, arguable that a claim in tort would not, at that time, have been statute-barred. Does the plaintiff's election of a remedy which was statute-barred prevent him from pursuing a remedy which, arguably, is not?

64. It is clear that the *merits* of Mr Hosford's complaints about penalisation and constructive dismissal were not determined by the WRC. If there were any doubt about this, it is, somewhat unusually, stated in express terms in the WRC adjudication, in circumstances where, it appears, the WRC was required to issue what it termed a "Corrected Order". The

original published decision had included the following statement under the heading 'Findings and Conclusions':

> *"Following submissions on the extension of time limits a full hearing of the [sic] both parties' cases on the substantive matters followed."*

65. The Correction Order provides the following clarification:

> *"In fact, the matter was decided on the preliminary point related to time limits and there was no full hearing of both parties' cases on the substantive matters. The decision in respect of the complaints in the matter is unaffected by this correction which was a drafting error."*

66. The plaintiff did not pursue an appeal to the Labour Court and therefore, arguably, failed to exhaust his remedies. But, assuming for present purposes that the WRC was entitled to conclude that his claim in that forum was statute barred, the plaintiff may be correct insofar as he suggests that an appeal to the Labour Court would have been futile.

67. In those circumstances, and having regard to the draconian nature of the remedy sought, and the requirement that the jurisdiction to dismiss be exercised sparingly, it does not seem to me that it could be concluded at this stage that the matters which were the subject matter of the August 2020 complaint to the WRC and which are pursued in these proceedings must be regarded *res judicata* such that it would constitute an abuse of process to permit the plaintiff to pursue them in these proceedings.

68. In addition, whether section 13(2) operates as a complete bar on a person pursuing a claim in tort in respect of the same matters which have been the subject of complaints to the WRC, but which were dismissed as being out of time, gives rise to a novel and complex issue of law which would, in my view, be inappropriate for determination on a motion to dismiss. That is not to suggest that the defendants should not, in due course, be permitted to argue that the WRC decision *does* operate as a bar on these proceedings succeeding, whether pursuant to section 13(2) or on the basis of the doctrine of *res judicata*, rather that it would be premature to dismiss the proceedings *in limine.*

69. The defendants also seek an order setting aside the plaintiff's claim as being irregular in form, pursuant to Order 124, Rule 1 of the Rules of the Superior Courts. That Rule provides:

1. *Non-compliance with these Rules shall not render any proceedings void unless the Court shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court shall think fit.*
2. *…*
3. *Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the notice of motion.*

70. The matters referred to in the Notice of Motion are that the parties and reliefs named in the Statement of Claim are different from those pleaded in the Plenary Summons, and that the reliefs claimed are more appropriately sought by way of judicial review.

71. As set out below, Order 84 of the Rules of the Superior Courts does not create judicial review as an exclusive remedy, and therefore seeking relief by way of plenary summons doesn't render the procedure adopted inherently infirm. More fundamentally, however, the plaintiff's claim is a claim in tort pursuant to section 13 of the 2014 Act and therefore, plenary proceedings *are* the appropriate form for that claim. The defendants' objection on that ground must therefore be rejected.

72. However, the additional complaints are well made and the Statement of Claim is manifestly deficient. The addition of Ireland and the Attorney General is not appropriate for a claim in tort and would, in any event, have required an application to add additional defendants. The multiplicity of declarations sought in the Statement of Claim, most of which seek declarations as to the state of the law and are not appropriate for any form of proceedings, are also inappropriate for a tort action.

73. Many of the pleas relate to matters already determined, or which have no relation to the plaintiff's case. It is not until paragraph 76 of the Statement of Claim that the plaintiff begins to address the matters which I have concluded it would be premature to dismiss at this stage of the proceedings. Some of the pleas, or rather arguments, included thereafter are difficult to follow. The claims regarding abuse of power and breach of separations of power disclose

no reasonable cause of action and have no relation to a tort claim for detriment suffered on account of having made a protected disclosure.

74. The plaintiff's Plenary Summons seeks four reliefs. The first three, taken together, are no more than claims that the plaintiff has suffered detriment between April 2019 and November 2019 for making protected disclosures and seeks damages in tort pursuant to section 13 of the 2014 Act. The claims are tolerably clear and he should be permitted, for the time being, to pursue them. The fourth relief, that the Superior Courts treat this case as a test case and set out new legal tests is simply superfluous. The significant portions of the Statement of Claim which do not relate to the valid claims in the Plenary Summons, however, either disclose no reasonable cause of action or are an abuse of process insofar as they raise issues already decided.

75. It seems to me that the degree of surgery required to the Statement of Claim to confine it to the case which I have concluded the plaintiff is entitled to pursue would be so comprehensive as to render the pleading unusable. In the circumstances, I propose making an order setting aside the plaintiff's Statement of Claim and directing him to deliver a new Statement of Claim, confined solely to his claim in tort pursuant to section 13 of the 2014 Act.

The 5733P Proceedings

76. In these proceedings, the plaintiff asks the court to address an issue of long concern to him, the treatment of proprietary directors for social insurance purposes. The difficulty for him, however, is that this is a claim which he simply does not have standing to bring. As characterised by Simons J in *Hosford v Ireland* [2021] IEHC 133 *"this is not an issue which affects the applicant personally."*

77. The plaintiff, however, asserts an interest, first because of the impact that being a whistleblower in relation to the application of the relevant statutory provisions has had on him, or in the alternative, because he falls within the exceptional category of cases where "public interests" claims have been allowed. He references *Coogan*, *Irish Penal Reform Trust, Mohan, Digital Rights Ireland*, and *Schrem*. None of these cases suggest that a person in Mr Hosford's position would be permitted to prosecute the claim disclosed in these

proceedings. In *Mohan v Ireland* [2019] IESC 18; [2021] 1 IR 293, the Supreme Court (O'Donnell J, as he then was) observed (at p. 301):

> *"11. Standing is not, as a general rule, established by a simple desire to challenge legislation, no matter how strongly the putative claimant believes the provision to be repugnant to the Constitution. It is now clear that there is no* actio popularis *(a right on the part of a citizen to challenge the validity of legislation without showing any effect upon him or her, or any greater interest than that of being a citizen) in Irish constitutional law, although, of course, some jurisdictions do permit such claims."*

78. In *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49; [2020] 2 ILRM 23 , the Supreme Court (Clarke CJ) reviewed the relevant authorities including those cited by the plaintiff and reiterated that the foregoing represented the general position:

> *"7.21 I would accept, therefore, that there are circumstances in which an overly strict approach to standing could lead to important rights not being vindicated. However, that does not take away from the importance of standing rules in our constitutional order. The underlying position was reiterated in the recent decision of this Court in* Mohan*, which reemphasised the need, ordinarily, for a plaintiff to be able to demonstrate that they have been affected in reality or as a matter of fact by virtue of the measure which they seek to challenge on the basis that it breaches rights. That remains the fundamental proposition. The circumstances in which it is permissible to accord standing outside the bounds of that basic principle must necessarily be limited and involve situations where there would be a real risk that important rights would not be vindicated unless a more relaxed attitude to standing were adopted."*

79. There is no question of any important or constitutional rights not being vindicated in this instance. Mr Hosford doesn't assert any breach of any person's constitutional rights. In fact, he argues that no company director affected by the operation of the relevant statutory provisions would complain about them, since they are receiving a benefit to which he suggests they are not entitled. It seems to me that the plaintiff's remedy lies in the political rather than the legal realm. That this is so is apparent from the extraordinary list of persons that the plaintiff identifies as potential witnesses in an appendix to his Plenary Summons, a

list including Revenue Commissioners, academics, politicians, senior civil servants and former Attorneys General. The plaintiff clearly envisages some form of roving public inquiry.

80. As appears from the transcript of the Court of Appeal *ex tempore* judgments in that case, both Faherty and Collins JJ concluded that the plaintiff did not have standing to challenge section 16 of the 2013 Act. In fact, Faherty J expressly concluded that she did *"not see any exceptionality arising, such as would exempt Mr Hosford from the requirement to establish* locus standi*."* Collins J went further:

> *"I agree with Ms Justice Faherty that the applicant doesn't have standing to challenge section 16 but, more than that, the ground as formulated is without merit, in my opinion, arguable or otherwise. What is said is that the section is unconstitutional because the statute fails to meet the special constitutional requirements concerning the enactment of rare retrospective legislation. In fact, the section applies retrospectively only to the extent that the person affected by elect that it should apply to them and, therefore, the point has no merit."*

81. What is apparent from the foregoing is that not only has it already been determined that Mr Hosford has no standing to impugn the measures he challenges here, but also that Mr Hosford has pursued substantially the same claims which are the subject of the 5733P proceedings in previous proceedings, and those claims have been rejected on the merits. It is clear, therefore, that, as the defendants claim, the plaintiff has no standing to pursue the issues the subject matter of the 5733P proceedings and/or the issues raised are *res judicata*. Therefore, in light of the principles set out above, it would be an abuse of process to permit Mr Hosford to pursue those claims again here.

82. In the circumstances, the 5733 P proceedings are bound to fail and should be dismissed.

The 2114P and 2116P Proceedings

83. The 2114P Proceedings are directed to the deduction from the plaintiff's pension lump sum of €6702.60 on 1 November 2019. The plaintiff pleads that this was done in accordance with DPER Circular No. 07/2018 which provides for the making of such deductions without

an employee's consent in the event of an overpayment to that employee. He pleads that this was a breach of his constitutional rights and was unlawful.

84. The 2116P Proceedings are directed to a separate deduction, this from the plaintiff's final salary payment, of €2163.70 on 1 November 2019. The plaintiff pleads that, insofar as this deduction was found to be in accordance with section 5(5) of the Payment of Wages Act 1991, the provisions of section 5(5) are unconstitutional. Section 5 of the 1991 Act prohibits deductions from employees wages save in specified circumstances. Section 5(5) states that nothing in section 5 applies to a deduction from wages which is, *inter alia*, for the purpose of reimbursing an employer in relation to an overpayment of wages or overpayment of expenses.

85. The defendants contend that all these complaints have already been addressed in other fora, including by the Court of Appeal in its *ex tempore* judgments of 28 March 2022 and are, therefore *res judicata*. The plaintiff says that arguments about the DPER Circular and this deduction have never been determined and were not addressed at all by the Court of Appeal.

86. It's clear that the WRC and Labour Court determined that they did not have jurisdiction to deal with the complaint about the deduction from the plaintiff's pension sum at all, on the basis of their interpretation of the term "wages" in the Payment of Wages Act 1991. At the time of Simons J's judgment in *Hosford v Ireland*, the plaintiff's appeal to the Labour Court was still pending. Simons J dismissed those proceedings but in so doing he observed:

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

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

87. The plaintiff argues that what he is now seeking to do in these proceedings is to precisely pursue the course which the High Court has previously indicated was, at least in principle, open to him to pursue. He has exhausted his procedural remedies and is now pursuing a constitutional claim by way of plenary action.

88. It appears, however, that before issuing these proceedings, the plaintiff also made complaints to the FSPO and issued judicial review proceedings against, *inter alia*, Dail Eireann, in which the validity of the Payment of Wages Act 1991 was put in issue. His complaint to the FSPO is not in evidence, but Mr Hosford's Statement of Claim suggests that it arose out of the same circumstances as the claim to the WRC and Labour Court about the deduction from his lump sum. The FSPO response *is* in evidence and it does appear, as Mr Hosford pleads, that the FSPO invoked section 52(f) of the Financial Service and Pensions Ombudsman Act 2017 which entitles the Ombudsman to discontinue investigating a complaint where, in the opinion of the Ombudsman "*the subject matter of the complaint is of such a degree of complexity that the courts are a more appropriate forum*."

89. In his judicial review proceedings, *Hosford v Dail Eireann*, 2021/466JR, the plaintiff included a variety of claims which clearly included claims relating to the Payment of Wages Act 1991 and Civil Service Circular 10/2017. That Circular is also a DPER Circular and is an earlier version of the Circular impugned by the plaintiff in the 2114P proceedings. It is in substantially the same terms as Circular 07/2018. As appears from the *ex tempore* decision of Faherty J, she rejected those claims on the basis that, at that time, they were the subject of a pending complaint to the FSPO and that matters therefore *"would more properly lie in the adjudication processes provided for in the particular legislation*". In those circumstances, the learned judge did not address the substance of Mr Hosford's complaint:

she could not have anticipated was that the FSPO would invoke section 52(7) of the FSPO Act.

90. Collins J, however, *did* address the substance of Mr Hosford's grounds regarding the constitutionality of section 5(5) and the Civil Service Circular. He concluded that the plaintiff had shown no basis for impugning the constitutionality of that section or of the Circular, noting that Civil Service Circular 10/2017 was not before that Court. He described it as:

91. *"[Q]uite inconceivable that the Court could give leave to challenge a circular, in circumstances where the circular is not before us and where all that has been said about it is that it differs in some slightly unclear way from some other circulars that apply to other civil servants or public servants more generally, with no effort being made by Mr Hosford to demonstrate even to the threshold that any particular provision of that circular is contrary either to European law, the provisions of the Convention or the constitution."*

92. The third judge, Binchy J, is recorded as having expressed his "complete agreement" with both Faherty and Collins JJ.

93. For completeness, it should be noted that, in his submissions, Mr Hosford also appears to suggest that the subject matter of the 2116P proceedings were raised in his appeal of the Labour Court determination of 14 August 2020, stating in his submissions that he was content for the High Court to dismiss those proceedings *"as on the issue here, is replaced by the proceedings here, i.e. No. 2022/2116*." Those proceedings are not before this Court, however, and this is not a point advanced by the defendants. In the circumstances, I don't, for the purposes of this judgment, rely on that apparent concession.

94. It appears, therefore, that that plaintiff's complaints regarding the deductions were finally determined before the WRC and Labour Court. Certain arguments which the plaintiff now advances were not determined by the WRC and Labour Court on the basis of their view that they lacked jurisdiction to consider them. The plaintiff did not challenge those conclusions. It is not, however, necessary for me to consider whether, in those circumstances, the WRC and Labour Court decisions should be treated as final determinations such as to ground a bar to further proceedings on the basis of the doctrine of *res judicata*. That is because the plaintiff did, in fact, bring further proceedings, Record No.

2021/466JR, which *were* determined by the High Court and Court of Appeal. He sought leave to bring judicial review of a number of matters, principally, it would appear, decisions of the Public Accounts Committee. However, those proceedings also included challenges to section 5 of the 1991 Act and the DPER Circular (or a more or less identical Circular) challenged in these proceedings. That claim was rejected. Moreover, it is clear that it was rejected on the merits. True, Faherty J had regard to the fact that the plaintiff then had a complaint pending before the FSPO, but Collins J, with whom Binchy J agreed, clearly considered the substance of his complaint regarding the 1991 Act and the Circular and concluded that the threshold for the grant of leave was not met. In the circumstances, these claims have previously been determined and it would be an abuse of process to permit the plaintiff to reformulate his case but pursue substantially the same challenge in fresh proceedings. The suggestion by the FSPO that the complaint made to it would more appropriately be dealt with by the courts does not operate to set aside the doctrine of *res judicata*.

95. Even had the plaintiff not had substantially the same claims determined in those judicial review proceedings as he now advances here, it would be appropriate to dismiss the claims in the 2114P an 2116P proceedings on the grounds that they fail to disclose a reasonable cause of action. In *Hosford v Ireland* [2021] IEHC 133, as here, the case sought to be advanced involved a challenge to an administrative decision by a public authority, albeit in this case the grounds relate to the lawfulness of statutory provisions and a civil service circular. As Simons J noted, in *Shell E & P Ireland Ltd v. McGrath* [2013] IESC 1; [2013] 1 IR 247, the Supreme Court confirmed that Order 84 does not provide an exclusive remedy for an aggrieved party who wishes to obtain a declaratory order. It is permissible in principle to proceed by plenary action. However, the procedural safeguards provided under Order 84 apply by analogy to any such plenary action. These include the requirement to obtain leave, to establish a sufficient interest and to move the application within three months of the decision giving rise to the claim for a declaratory relief.

96. Simons J notes that *Shell E & P Ireland* does suggest a degree of procedural flexibility, but that there are limits. It is clear that they have been exceeded here. Had the plaintiff brought these proceedings by way of judicial review, he would have been required to seek and obtain leave by establishing that he had arguable grounds for the case he wished to make. He cannot avoid that obligation by issuing plenary proceedings.

97. In fact, as it happens, Mr Hosford *did* bring judicial review proceedings challenging the provisions he now seeks to challenge afresh, 2021/466JR. He failed to meet the threshold for the grant of leave on that occasion. Leaving aside that he is not permitted to simply "have another go", he has, in this instance, failed to overcome the deficiencies noted by Collins J in that earlier application. He has, on this occasion, put the relevant civil service circulars before the court, but he has not explained how either the 1991 Act or the relevant circular infringe his constitutional rights.

98. His claim in relation to section 5(5) is that it should be amended by adding the words *"fair and reasonable, having regard to all the circumstances*" as, on his case, the section statutorily excludes fair procedures. This argument, and his complaint more generally, appears to misunderstand section 5 of the 1991 Act and its operation. Section 5(1) prohibits an employer making a deduction from an employee's wages unless certain criteria are met. Section 5(5) simply provides that that *prohibition* doesn't apply where the purpose of the deduction is the reimbursement of an overpayment of wages. Nothing in section 5(5) mandates deductions, or excludes fair procedures. In light of the provisions of Section 17 of the Civil Service Regulation Act 1956, as amended, the impugned circular formed part of Mr Hosford's terms and conditions of service. The Circular contains a variety of mechanisms by which overpayments can be recouped, from which an employee can choose. The employer will only impose a re-payment arrangement where the employee fails to elect from the available options. The Circular also provides a right of appeal. His complaint that the deductions from his pension lump sum and final salary payment are unlawful or in breach of his constitutional rights because he failed to provide his written consent to those deductions does not disclose an arguable case.

99. Insofar as the plaintiff seeks to rely on his status as a lay litigant, that cannot overcome the shortcomings in these proceedings. Moreover, it is clear that Mr Hosford *did* know the appropriate procedure for challenging these administrative decisions, and availed of it.

100. Accordingly, I will make an order dismissing both the 2114P and the 2116P proceedings as being an abuse of process and disclosing no reasonable cause of action.

The Isaac Wunder Order

101. In addition to orders dismissing the plaintiff's various claims, the defendants seek an *Isaac Wunder* Order restraining him from bringing any further proceedings relating to or touching upon the Plaintiff's disclosures in relation to proprietary company directors .

102. In *Riordan v. Ireland (No. 5)* [2001] 4 IR 463, the High Court (O'Caoimh J) discussed the jurisdiction to make an *Isaac Wunder*-type order (at p. 465):

> *Where the court is satisfied that a person has habitually or persistently instituted vexatious or frivolous civil proceedings it may make an order restraining the institution of further proceedings against parties to those earlier proceedings without prior leave of the court. In assessment of the question whether the proceedings are vexatious, the court is entitled to look at the whole history of the matter and it is not confined to a consideration as to whether the pleadings disclose a cause of action. The court is entitled in the assessment of whether proceedings are vexatious to consider whether they have been brought without any reasonable ground. The court has to determine whether the proceedings being brought are being brought without any reasonable ground or have been brought habitually and persistently without reasonable ground.*

103. The court referred to Canadian jurisprudence which suggested matters "*which tended to show a proceeding was vexatious.*" (at p. 466):

> *"(a) the bringing up on one or more actions to determine an issue which has already been determined by a court of competent jurisdiction;*
>
> *(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;*
>
> *(c) where the action is brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;*

(d) where issues tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings;

(f) where the respondent persistently takes unsuccessful appeals from judicial decisions."

104. In *Irish Aviation Authority and Anor v Monks and Anor* [2019] IECA 309, the Court of Appeal (Collins J in a concurring judgment) cautioned against treating an *Isaac Wunder* order as some form of ancillary relief (at para. 7):

"It is, therefore, critically important that a court asked to make an Isaac Wunder *order should anxiously scrutinise the grounds advanced for doing so. It should not be seen as some form of ancillary order that follows routinely or by default from the dismissal of a party's claim, whether on its merits or on a preliminary strike-out motion. That is so even if considerations of* res judicata *and/or* Henderson v Henderson *arise. The court must in every case ask itself whether, absent such an order, further litigation is likely to ensue that would clearly be an abuse of process. Unless the court is satisfied that such is the case, no such order should be made. It is equally important that, where a court concludes that it is appropriate to make such an order, it should explain the basis for that conclusion in terms which enable its decision to be reviewed. It is also important that the order made be framed as narrowly as practicable (consistent with achieving the order's objective)."*

105. It does not appear to me that the background to these proceedings justifies the making of an *Isaac Wunder* Order at this juncture. Although the plaintiff has long pursued his complaint regarding the treatment of company directors for social insurance purposes, the lion's share of his dispute on that issue appears to have occurred during the course of his employment. As noted above, that dispute may have been the proximate cause of a number of other disputes, but it couldn't be said that the plaintiff has habitually or persistently issued proceedings on the company director issue, nor are any of the other features summarised by

O'Caoimh J in *O'Riordan* present. I have, of course, refused to dismiss the 2115P proceedings, insofar as the plaintiff pursues a claim in tort for detriment he alleges that he has suffered for having made a protected disclosure.

106. In *Michael and Thomas Butler Ltd v Bosod Ltd* [2021] IESC 59, the Supreme Court (MacMenamin J) refused to make an *Isaac Wunder* order but in its judgment made clear that this refusal should not be "misinterpreted":

> *"35. In the event that the appellants seek to re-litigate any matter related to these cases further, the appellants, or any person purporting to advise them, or act on their behalf, would be well-advised to bear in mind that the respondents would, in such event, be entitled to apply immediately to the High Court for an order restraining the further prosecution of such proceedings. This litigation has now ended."*

107. I echo those words of caution. The refusal of the application to make an *Isaac Wunder* order is not an invitation to the plaintiff to re-cast his complaints in the dismissed proceedings in some other form. Any attempt to do so would, no doubt, be met with further claims to dismiss and a fresh application for an *Isaac Wunder* order to which any court would likely be more receptive.

Conclusion

108. For the reasons set out above, I propose to make the following orders:

(a) Dismissing the 2022/5733P proceedings as an abuse of process pursuant to the inherent jurisdiction of the court;
(b) Dismissing the 2022/2114P proceedings and the 2022/2116P proceedings pursuant to Order 19, Rule 28 of the Rules of the Superior Courts as disclosing no reasonable cause of action and as an abuse of process pursuant to the inherent jurisdiction of the court;
(c) Refusing the application to dismiss the 2022/2115P proceedings;
(d) Setting aside the plaintiff's Statement of Claim in the 2022/2115P proceedings pursuant to Order 124, Rule 1 of the Rules of the Superior Courts and directing that the plaintiff deliver a new Statement of Claim confined to the claim set out in his

Plenary Summons, *i.e.* a claim in tort pursuant to section 13 of the Protected Disclosures Act 2014.

109. I will list the matter for mention on 9 April 2024 at 10.30 am for the purpose of making final orders and dealing with the question of costs.