# AN CHÚIRT UACHTARACH
# THE SUPREME COURT

S:AP:IE:2021:000027

**O'Donnell C.J.**
**Charleton J.**
**O'Malley J.**
**Woulfe J.**
**Hogan J.**

**Between/**

**TIBOR BARANYA**

**Appellant**

**AND**

**ROSDERRA IRISH MEATS GROUP LIMITED**

**Respondent**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 1st day of December 2021**

## Introduction

**1.** There is, perhaps, an understandable reticence on the part of many to complain in respect of the failings of officialdom. Human nature being what is, many have learnt to their own personal cost that discretion and silence is often the better part of valour. Prompted, perhaps, by a succession of controversies affecting the public life of this State, the Oireachtas evidently considered that it would be desirable in the public interest that those who, with reasonable cause, draw attention to such perceived failings should enjoy a measure of protection against the risk of victimization in such circumstances.

**2.** This is the general background to the Protected Disclosures Act 2014 ("the 2014 Act"). It seems implicit in both the Long Title to the 2014 Act and aspects of its general structure that the Oireachtas envisaged that most complaints for which protection is sought would

relate to matters of general public interest. But, as we shall presently see, the actual definition of what may constitute a protected disclosure for the purposes of the 2014 Act is not so confined. Indeed, the 2014 Act also extends (albeit with certain exceptions) to complaints made in the context of private employment which are personal to the complainant, so that in effect it must be assumed that the Oireachtas considered that the disclosure of those complaints was, in general at least, also a matter of public interest. This is the background to the present appeal, so the question now presented is the question of whether a communication made by an employee in a meat plant to his supervisors on 15th September 2015 constitutes a "protected disclosure" for the purposes of s. 5 of the 2014 Act. The issue arises in this way.

**The background to the appeal**

**3.** The appellant, Mr. Baranya, is a Hungarian national who had been employed as a skilled butcher by the respondent, Rosderra Irish Meats Group Ltd. ("Rosderra") in a meat plant since 2000. In June 2015 Mr. Baranya left the employment of Rosderra on foot of a compromise agreement so that he could either return to Hungary or take up employment opportunities in the Netherlands. A few weeks later Mr. Baranya contacted Rosderra to say that his plans had not come to fruition and he was allowed to recommence work with Rosderra on 6th July 2015.

**4.** Mr. Baranya's employment consisted of what was described as "scoring" a large number of carcasses on a daily basis. He contends that upon his return to work he informed his employer that he no longer wanted to do this type of work as it caused him a good deal of pain. It is the events of 15th September 2015 which, however, are critical for our purposes. It is common case that on that day Mr. Baranya said that he was in pain and indicated to his supervisor that he wished for a change of role. The exact words which were uttered are, however, a matter of dispute. Did he, as Mr. Baranya claims, go further and say that he was in pain as a result of work? Or did he – as Rosderra maintain – simply say that he was in pain? I shall return presently to this point.

**5.** Three days later Mr. Baranya was dismissed. Rosderra maintain that he was dismissed because he had effectively walked off the production line having not waited for management to address his request to change jobs. While Mr. Baranya maintains that he had in effect been in continuous employment for more than twelve months, he also claimed that he had been dismissed because he had made a protected disclosure by way of the communication he had made on 15th September 2015.

**6.** Mr. Baranya then sought to challenge his dismissal by initiating a claim for unfair dismissal before the Work Place Relations Commission on 8th October 2015 under the Unfair Dismissals Acts 1977 to 2015 ("the 1977 Act"). The 1977 Act does not generally apply to employees who have less than one years' continuous service with the employer who dismissed him: see s. 2(1)(a) of the 1977 Act (as amended). There is, however, an exception where an employee who does not have this continuous service is dismissed by reason of a protected disclosure: see s. 6(2D) of the 1977 Act (as inserted by s.11(1)(c) of the 2014 Act). The question, accordingly, of whether Mr. Baranya did in fact make a protected disclosure (and, if so, whether he was dismissed by reason of this fact) also assumes importance in the context of the very application of the 1977 Act to this dismissal.

**7.** This complaint was first referred to an Adjudication Officer of the Workplace Relations Commission. In her decision of 21st August 2018 she rejected the complaint that the dismissal resulted wholly or mainly from having made a protected disclosure within the meaning of s. 5 of the 2014 Act. While she did find that Mr. Baranya did make complaints "in and around 18th September 2015" about the pain he was experiencing while working on the production line, she drew a distinction between a grievance and a protected disclosure. The communication amounted, she found, simply to the expression of a grievance and it did not amount to a protected disclosure.

**8.** Having failed before an adjudication officer, Mr. Baranya duly appealed that decision to the Labour Court in accordance with s. 8A of the 1977 Act. In its determination of 8th April 2019 the Labour Court found that the communication in question did not constitute a protected disclosure "because it did not disclose any wrongdoing on the part of Rosderra" and that the communication in question "was in fact an expression of grievance and not a protected disclosure." I propose presently to return in some detail to this aspect of the decision of the Labour Court given its crucial importance so far as this appeal is concerned. It may, however, be convenient to record at this point that in arriving at its conclusion that this was a grievance the Labour Court appears to have been influenced by the provisions of the Industrial Relations Act 1990 (Code of Practice on the Protected Disclosures Act 2014) (Declaration) Order 2021 (SI No. 464 of 2015).

**9.** This finding was upheld by the High Court (O'Regan J.) in her judgment delivered on 13th February 2020: *Baranya v. Rosderra Irish Meats Group Ltd*. [2020] IEHC 56 in which she found that the appellant had failed to establish any error of law on the part of the Labour Court. By a determination dated 2nd July 2021 this Court granted leave to appeal pursuant to Article 34.5.4 of the Constitution: see [2021] IESCDET 72.

**The 2014 Act**

**10.** The Long Title of the 2014 Act states that it is:-

> "An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of making of certain disclosures in the public interest and for connected purposes."

**11.** Mr. Baranya contends that his communication to Rosderra falls within the meaning of "protected disclosure" in s. 5 of the 2014 Act, which states as follows:

> "5. (1) For the purposes of this Act "protected disclosure" means, subject to subsection (6) and sections 17 and 18, a disclosure of relevant information (whether before or after the date of the passing of this Act) made by a worker in the manner specified in section 6, 7, 8, 9 or 10.
>
> (2) For the purposes of this Act information is "relevant information" if–
>
> (a) in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and
>
> (b) it came to the attention of the worker in connection with the worker's employment.
>
> (3) The following matters are relevant wrongdoings for the purposes of this Act –
>
> (a) that an offence has been, is being or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation, other than one arising under the worker's contract of employment or other contract whereby the worker undertakes to do or perform personally any work or services,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered
>
> (e) that the environment has been, is being or is likely to be damaged,

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

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

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

(7) Subject to subsection (7A), 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."

**The decision of the Workplace Relations Commission: ADJ-00000108**

**12.** The complaint lodged on 8th October 2015 to the WRC was referred to an Adjudication Officer who gave parties an opportunity to be heard and to present evidence related to the complaint over a four-day hearing period. During the hearing Mr. Baranya argued that he had continuous service dating from 21st October 2000 on foot of the submission that the compromise agreement signed by him should be rendered null and void for the reason that he was not aware of the true nature of that agreement; and that the contract adduced by Rosderra purportedly showing that Mr. Baranya had signed a new 12-week contract on 6th July 2015 had not been signed by him. Mr. Baranya also maintained that on various dates, and especially on 15th and 18th September 2015, he made a protected disclosure to Rosderra in relation to concerns he had for his health, safety and welfare at work as a result of injuries he sustained in the course of his employment and that he was dismissed by reason of that disclosure.

**13.** On the other hand, Rosderra contended that in or around May 2015 Mr. Baranya advised the Human Resources Manager that he wished to resign, as he intended on exploring new employment opportunities in the Netherlands, but that he wanted compensation for an alleged injury in February 2013. Rosderra said that it accepted Mr. Baranya's resignation and offered a sum of €4,500 in full and final settlement of all claims arising from Mr. Baranya's employment, which Mr. Baranya was said to have agreed to. Mr. Baranya subsequently contacted Rosderra in or around early July 2015 enquiring as to whether or

not he could return to work. Rosderra claimed that it reviewed its staffing needs and advised Mr. Baranya that he could return on a 12-week contract, which he did on 6th July 2015.

**14.** In respect of Mr. Baranya's protected disclosure claim Rosderra denied that any protected disclosure was made and that anything Mr. Baranya did in fact disclose had no bearing on Rosderra's decision to terminate his employment. Specifically, Rosderra denied that Mr. Baranya made the alleged communication in relation to a 'relevant wrongdoing' and that even if Mr. Baranya had raised a complaint regarding a workplace injury this would not constitute a 'protected disclosure'.

**15.** By way of a decision dated 21st August 2018 the Adjudication Officer found that Mr. Baranya voluntarily left his employment on 2nd June 2015 in order to pursue new job opportunities and that, when that did not work out, he sought and received fresh employment again with Rosderra which commenced on 6th July 2015. The Adjudication Officer went on to accept that Mr. Baranya did make complaints about pain he was experiencing while working on the line "in or around 18 September 2015" but she also found that this communication was a "grievance" rather than a protected disclosure and that in any case Mr. Baranya was dismissed for "walking off the line". The complaint of unfair dismissal was therefore not upheld.

**The determination of the Labour Court: No. UDD1917**

**16.** Mr. Baranya appealed the Adjudication Officer's decision to the Labour Court, which was heard by the Court on 21 February 2019 and resulted in a determination delivered on 8th April 2019. The Court sought to consider both Mr. Baranya's claim that he had continuous service from 21st October 2000 in accordance with the Unfair Dismissals Act 1977, and his claim that he made a protected disclosure on 15th September 2015 and that he was dismissed as a result of this disclosure.

**17.** So far as it is relevant, Mr. Baranya's case in respect of his claim of continuous service was that his understanding of the terms of his departure from Rosderra was that the 'door was open' if he wanted to return and that, upon resuming his employment on 6th July 2015, he was working under his old terms and on a permanent basis. Mr. Baranya maintained his denial that he was given or indeed signed a 12-week contract.

**18.** As for Mr. Baranya's claim that he was dismissed by reason of a protected disclosure, Mr. Baranya again maintained that when he returned to work on 6th July 2015 he advised his supervisor that he did not want to do the back-scoring job as it caused him a lot of pain. In particular Mr. Baranya contended that on 15th September 2015 "the pain had reached such

a degree that I repeated my concerns to Mr. Dunne (supervisor) that I was in a lot of pain due to the work that I had to perform, and could I move to another job". It was Mr. Baranya's case that he made this same disclosure later that day to the Health and Safety Officer and also to the Human Resources Manager and that these disclosures were protected disclosures in line with s. 5 of the 2014 Act.

**19.** In a section titled "discussion and decision" the Court found that the communication by Mr. Baranya in this case "related to the fact that he wanted to change roles as he was in pain." The Court went on to explain that the "communication did not disclose any wrongdoing on the part of the Respondent" and that the communication appeared to be an expression of a grievance and not a protected disclosure. That being so the Court determined that Mr. Baranya did not make a protected disclosure in accordance with the 2014 Act and, therefore, that his claim must fail. I propose presently to return to consider in more detail aspects of this determination.

**The judgment of the High Court: [2020] IEHC 56**

**20.** The High Court judgment, now appealed to this Court by way of a leapfrog appeal, was delivered by O'Regan J. on 13th February 2020. Before that Court Mr. Baranya set out six grounds of appeal:

> "(1) There was an error of law by the Labour Court, reading into s. 5 of the 2014 Act a requirement that a protected disclosure state an allegation of a relevant wrongdoing on the part of the employer.
>
> (2) The Labour Court erred by determining that the appellant's communication was a grievance rather than a protected disclosure.
>
> (3) The Labour Court erred in interpreting Statutory Instrument 464/2015 (the SI) by determining that the SI prevented the subject matter from being a protected disclosure, thereby [accepting the] ability of the SI to amend the 2014 Act.
>
> (4) The Labour Court failed to consider the full facts of the evidence given.
>
> (5) The Labour Court erred in its failure to consider the full remit of s. 5(3) of the 2014 Act.
>
> (6) The Labour Court erred in law by its failure to have any due regard to the fact that the appellant sought out the Health and Safety Officer of the respondent to raise his concerns for his own health and safety."

**21.** Rosderra denied the asserted errors and supported the Labour Court's conclusion that the alleged protected disclosure was a grievance only, and that Mr. Baranya's communication could not be interpreted as falling within s. 5 of the 2015 Act. Rosderra further submitted that the Labour Court had correctly applied and interpreted s. 5(3) of the 2014 Act and that evidence showed that Mr. Baranya had actually informed his employer of "the fact that he wanted to change roles as he was in pain" which did not disclose any wrongdoing on part of Rosderra, which a disclosure of information must do in order to come within the Act.

**22.** In dismissing the appeal, O'Regan J. held that Mr. Baranya had failed to establish any error on the part of the Labour Court. She concluded that the Labour Court had found as a finding of fact that the communication alleged by Mr. Baranya to be a protected disclosure "related to the fact that he wanted to change roles as he was in pain" and that this communication therefore "did not disclose any wrongdoing on the part of the respondent." Accordingly, in dealing with the various grounds of appeal set out in the notice of motion O'Regan J. concluded that:

> "(1) The appellant has failed to demonstrate that the Labour Court misread or misinterpreted s.5 of the 2014 Act by requiring the appellant to state an allegation of a relevant wrongdoing. Section 5(2) defines relevant information as information in the reasonable belief of the worker, tends to show one or more of the relevant wrongdoings. That some information in the relevant communication, must attribute some act or omission, on the part of the respondent, that the appellant might reasonably believe tends to show one or more of the relevant wrongdoings is clearly necessary. In the absence of any asserted act or omission the concept of relevant information is not fulfilled in the instant communication as found by the Labour Court.
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> (2) The Labour Court did not determine that the appellant's communication was a grievance "rather than" a protected disclosure. It stated that the communication was a grievance and not a protected disclosure. I accept that if the words "rather than" had been included this would possibly demonstrate a view on the part of the Labour Court that a grievance can never be a protected disclosure.
>
> (3) The appellant has failed to demonstrate that the Labour Court in fact determined that the SI had an ability of amending the 2014 Act whether explicitly or implicitly.
>
> (4) It seems to me abundantly clear that the Labour Court did in fact consider the initial asserted communication that the appellant made, however, having heard oral evidence and having regard to the documents before the Labour Court, the Labour Court found

that the communication made was more circumspect than asserted by the appellant and did not reveal any act or omission on the part of the respondent that might be considered any form of wrongdoing.

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

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

**What constitutes a "protected disclosure" for the purposes of the 2014 Act?**

**23.** Before considering in any detail the actual determination of the Labour Court and the ensuing judgment of the High Court by way of appeal on a point of law, perhaps the first question which arises is whether a complaint made by an employee to his or her employer about workplace safety is capable of being regarded as a protected disclosure for the purposes of the 2014 Act. Here it may be first observed that as an aid to the drafting of the legislation in question it has been found necessary to give the words "worker" and "relevant wrongdoings" an extended meaning. No issue at all arises in relation to Mr. Baranya's status qua worker but the definition of the term "relevant wrongdoings" in s. 5(3) of the 2014 Act merits further consideration.

**24.** Section 5(3) provides that the following matters are relevant wrongdoings for the purposes of the Act:

"…(b) that a person 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*…;

(d) that the health or safety of any individual has been, is being or is likely to be endangered….” (emphasis added)

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

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

**27.** The point nevertheless is that many complaints made by employees which are entirely personal to them are nonetheless capable of being regarded as protected disclosures for the purposes of the 2014 Act. This is also true of complaints regarding workplace safety under s. 5(3)(d), a point clearly illustrated by the sheer breadth of the language contained in the sub-section: "health or safety of any individual"… "has been, is being or is likely to be endangered."

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

**29.** It is against this background that we can now proceed to examine the manner in which the Labour Court addressed this matter. The determination of the Labour Court is, in fact, critical because it was the finder of fact in this matter, with an appeal to the High Court only on a point of law.

**The determination of the Labour Court**

**30.** As I have already indicated, the determination of the Labour Court first sets out the background to the dispute and the respective contentions of the parties. Under the heading "The Law", the Labour Court first set out the provisions of s. 5 of the 2014 Act. It then referred in the following terms to paragraphs 30 and 31 of the Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014)(Declaration) Order 2015 (SI No. 464 of 2015)("the 2015 Code of Practice"):

> "30. A grievance is a matter specific to the worker i.e. that worker's employment position around his/her duties, terms and conditions of employment, working procedures or working conditions.

A grievance should be processed under the organisation's Grievance Procedure. A protected disclosure is where a worker has information about a relevant wrongdoing.

31. It is important that a worker understands the distinction between a protected disclosure and a grievance. The organisation's Whistleblowing Policy should make this distinction clear."

**31.** The Court then proceeded to its determination and decision:

"Discussion and decision

The issue for the Court to consider is whether the communication made by the Complainant was a protected disclosure or a grievance. For the purpose of the Act a protected disclosure is a disclosure of relevant information which the Worker reasonably believes shows one or more relevant wrongdoing. In this case the communication by the worker related to the fact that he wanted to change roles as he was in pain.

The communication did not disclose any wrongdoing on the part of the Respondent. It appears to the Court therefore that the Complainant's communication was in fact an expression of a grievance and not a protected disclosure. In those circumstances the Complainant cannot rely on the exception to one year's continuous service set out in section 2 and s6 (2) (ba) of the Act and therefore his claim does not fall within the scope of the Act.

Determination

For the reasons set out above the Court Determines that the Complainant does not have the requisite service to pursue his complaint of unfair dismissal and therefore his complaint must fail. The Court also determines that the communication by the Complainant was not a protected disclosure and therefore his claim that his dismissal was for having made a protected disclosure must also fail."

**32.** Two issues immediately arise following a consideration of this determination. First, what was the extent to which the Court was influenced by the terms of the 2015 Code of Practice? Second, what precisely were the facts found by the Labour Court itself? We can now proceed to consider these issues in turn. Before proceeding to consider these issues, I should

observe that the question of the status and effect of the 2015 Code of Practice did not feature centrally in the appeal (although it was a matter discussed in the judgment of the High Court) until it was raised by a member of the Court in the course of oral argument. In these circumstances I feel that this Court has little alternative but to address this point, not least given its potentially wider significance.

**The 2015 Code of Practice**

**33.** The 2015 Code of Practice was promulgated by the Minister as a statutory instrument pursuant to the provisions of s. 42(3) of the Industrial Relations Act 1990 ("the 1990 Act"): see Industrial Relations Act 1990 (Code of Practice on Protected Disclosure (Declaration) Order 2015 (SI No. 464 of 2015). Section 42 envisages first that a code of practice "concerning industrial relations" can be prepared by what is now the Workplace Relations Commission and submitted to the Minister, who may then publish it as a statutory instrument. Section 42(3) of the 1990 Act is also of potential significance, as this provides that the Minister may by order declare that the code shall be a code of practice "for the purposes of this Act". This is reflected in the precise language of Article 2 of the 2015 statutory instrument itself. Yet it might be observed in passing that it is not clear that the 2014 Act properly comes within the scope of s. 42 of the 1990 Act, since the term "concerning industrial relations" would normally be understood as referring to matters concerning disputes in the workplace, typically as between employers and trade unions.

**34.** Assuming, however, for the purposes of this judgment that the 2014 Act does in fact come within the scope of s. 42 of the 1990 Act, then the actual status of the code is addressed by s. 42(4) of the 1990 Act which provides that "in any proceedings before a court [or] the Labour Court…. a code of practice shall be admissible in evidence and any provision of the code which appears to the court, body or officer concerned to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

**35.** While on this basis the Labour Court was thus clearly empowered by s. 42(4) of the 1990 Act to have regard to the terms of the 2015 Code of Practice, the difficulty in the present case is that the 2015 Code does not accurately reflect the terms of what the 2014 Act actually says. Specifically, the 2015 Code introduces a distinction between "a grievance" and "a protected disclosure", even though no such distinction is drawn by the 2014 Act itself, which makes no reference at all to the concept of a personal grievance. Just as importantly, the 2015 Code states that complaints specific to the worker in relation to

"duties, terms and conditions of employment, working procedures or working conditions" are personal grievances which cannot amount to protected disclosures.

**36.** I cannot avoid observing that in these two respects the 2015 Code has thereby erroneously misstated the law. For all the reasons I have already ventured to explain, it is clear that purely personal complaints in relation to the issues of workplace health or safety can in fact be regarded as coming within the rubric of protected disclosures for the purposes of s.5(2) and s. 5(3) of the 2014 Act.

**37.** It is perhaps unnecessary to examine the precise effects of s. 42(4) of the 1990 Act. One thing is, however, perfectly clear. Subject only to the special case of European Union legislation, Article 15.2.1 of the Constitution vests the Oireachtas with exclusive legislative powers. As this Court has made clear in a series of decisions from *Cooke v. Walsh* [1984] IR 710 onwards, the effect of this constitutional provision is that primary legislation can only be amended or varied by the Oireachtas itself and not by any other subordinate body. This is a key fundamental constitutional principle because the Constitution itself contemplates that laws can be enacted only by the deliberative processes of democratically elected public representatives in the manner envisaged by Articles 20 to 24 and not through any other forum or (the special case of European Union legislation once again aside) by any other means. This Court cannot allow this process to be set at nought, as to do otherwise would not only be at variance with the guarantee of democratic government in Article 5 of the Constitution, but would also offend basic rule of law principles.

**38.** This means in turn that the true scope of an Act of the Oireachtas cannot be varied or amended (whether by extension or restriction) by reference to the provisions of an administrative code such as the 2015 Code, even if s. 42(4) of the 1990 Act elevates such codes to the status of a statutory instrument. Yet, so far as the present case is concerned, if effect were to be given to the 2015 Code – with its new concept of personal grievance and its exclusion of purely personal complaints from the scope of protected disclosure – it would effectively mean that the 2014 Act had been treated by an administrative body such as the Labour Court as if it had been *de facto* amended in this fashion..

**39.** It is, however, difficult to avoid the conclusion that this is just what has happened in the present case. While in her judgment O'Regan J felt that she could not read the determination of the Labour Court as meaning that that court "was of the opinion that a grievance can never amount to a protected disclosure", I find myself coerced to the opposite conclusion. For my part I think that it is clear that the Labour Court relied on a code of practice which was, in at least two material respects, clearly wrong and (unfortunately)

quite misleading. All of this led the Court to reach the conclusion that a purely personal complaint regarding workplace health or safety essentially fell outside the scope of the 2014 Act. The Court accordingly fell into legal error and on this ground alone the decision cannot be allowed to stand.

**The Labour Court's finding of fact**

**40.** There remains the question of what Mr. Baranya actually said. It is agreed that he said that he was in pain and that he wished to be assigned another role. Taken in isolation it might be said that such a communication in itself did not amount to a protected disclosure because it did not allege wrongdoing in the sense envisaged by s. 5(3)(d) of the 2014 Act. An employee might, for example, be in pain for any number of reasons which were unconnected with workplace health or safety. A complaint of that particular kind would accordingly not amount to a protected disclosure.

**41.** Yet these words cannot be taken purely in isolation, as there was the context of the complaints which had been made by Mr. Baranya in the months which proceeded his dismissal. Accordingly, on one view of the evidence it might be said that a complaint that he was in pain could only realistically be linked to (an implied) complaint in respect of workplace health and safety, although this would ultimately be a matter for the Labour Court to assess. To my mind no precise form of words is required for this purpose: it would suffice that it was clear from the general context in which the communication had been made that a complaint in relation to workplace health or safety had been made by the worker concerned, either expressly or by necessary implication and that it tended to show that health or safety had been or would be endangered. One should also observe that Mr. Baranya also contends that he said that he was in pain "due to work", although this is denied in emphatic terms by Rosderra.

**42.** This is where the role of the fact finder assumes critical importance. Given the dispute as to what was actually said and the precise context in which those words were uttered, it fell to the Labour Court to make very clear findings of fact on these points. The Court was thus obliged to find the primary facts (i.e., what was actually said) and then to draw such conclusions or inferences (which are sometimes described as secondary facts) from those words and their surrounding general context as it thought appropriate.

**43.** In essence, therefore, the issue for the Labour Court was first to ask what precisely did Mr. Baranya say and, second, to inquire whether, having regard to the general context of the words actually uttered, they amounted to an allegation of "wrongdoing" in the sense of

both s. 5(2) and s. 5(3)(d) of the 2014 Act, i.e., did those words expressly or by necessary implication amount to an allegation tending to show that workplace health and safety was or would be endangered, even if that complaint was personal to him. The 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.

**44.** *If* these two questions can be answered in the affirmative – a matter which I again stress is for the Labour Court as fact finder in the first instance and in respect of which I offer no view – then the complaint can be regarded, at least in principle, as a protected disclosure.

**45.** Where I respectfully part company with the judgment of O'Regan J in the High Court is that I cannot agree that there was a sufficiently clear finding of fact on the part of the Labour Court in respect of these matters. On this point the Court simply states that the communication "by the worker related to the fact that he wanted to change roles as he was in pain." This would appear rather to be a description of the complaint as distinct from a specific finding of fact as such, a point underscored by the use of the word "relates." This statement on the part of the Court is, however, ambiguous on this critical issue as it is again unclear as to whether Mr. Baranya alleged that he was in pain by reason of workplace health and safety issues or, alternatively, whether he just simply said he was in pain and did not attempt to connect it (whether expressly or by necessary implication) to any issues of workplace health or safety.

**46.** The failure on the part of the Labour Court to make the appropriate findings of fact can only be regarded as an error of law on its part: see, *e.g., National University of Ireland v. Ahern* [2005] IESC 40, [2005] 2 IR 577 at 584 per McCracken J. I would accordingly also allow the appeal on this ground.

## Conclusions

**47.** In summary, therefore, I would allow the appeal because, first, the Labour Court applied the 2015 Code of Practice which erroneously stated that purely personal complaints in relation to workplace health and safety fell outside the scope of protected disclosures for the purposes of s. 5 of the 2014 Act and, second, because the Court failed to make sufficiently clear and precise findings of fact as to what exactly was said.

**48.** I would accordingly remit this matter to the Labour Court so that it can determine afresh whether the utterances of Mr. Baranya amounted to a "protected disclosure" for the purposes of the 2014 Act in the light of the conclusions and general guidance contained in this judgment. In the event – but I again stress *only* in that event - that that Court were to decide that there was a protected disclosure, it would then be a matter for that Court to decide the subsequent question of whether the dismissal was wholly or mainly brought about by virtue of the protected disclosure and was accordingly rendered unfair as a result by reason of the operation of 6(2)(ba) of the 1977 Act (as inserted by s. 11(2) of the 1977 Act).