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<i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	ICOS No: 2020/44988/01
	Delivered: 22/01/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION OF TERESA SCOTT
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Mr Frank O'Donoghue QC (instructed by Jones Cassidy Brett Solicitors) for the applicant
Mr Aidan Sands BL (instructed by Departmental Solicitor's Office) for the respondent

HUDDLESTON J

Introduction

[1] This is an application for leave to bring judicial review proceedings.

[2] The Order 53 Statement seeks the following relief:

- "(a) An Order of Certiorari bringing up and quashing the decision of the Department of the Economy ("the Department") as respondent to appoint an external investigator to conduct an investigation in accordance with [certain] Terms of Reference ("the Terms of Reference").
- (b) such further and other relief as the Court may deem appropriate.
- (c) All necessary and consequential directions."

[3] As with all such applications the test at this stage of the case is if there is an arguable case.

[4] The respondent was represented by Mr Aidan Sands BL and the applicant by Mr Frank O'Donoghue QC.

Background Facts

[5] The applicant has been the Principal and Chief Executive Officer of the Northern Regional College (“the College”) since her appointment in 2014. Her employer is the Governing Body of the Northern Regional College (“the Governing Body”) but the College’s sponsoring department is the respondent. The College is a Non-Departmental Government Body.

[6] From the papers before the court it would seem that there have been a number of whistleblowing complaints or “protected disclosures” (i.e. per Part VA Employment Rights (NI) Order) made over a protracted period of time. Three of those were fully investigated and rejected by the Department and the fourth was not pursued by the particular complainant. Counsel for the applicant suggests that this is evidence of a concerted campaign against her. A fifth alleged protected disclosure (and the one that has led to these proceedings) was received by the Department on 28 October 2019 from, I am led to believe, a source other than the originator of the other earlier complaints. The applicant believes that there is overlap in content between the respective disclosures and indeed with the content of a grievance and Industrial Tribunal claim launched by a particular member of staff.

[7] The applicant alleges that the complaints have been encouraged (at least in part) by virtue of a “promise” given by the Department to an identified complainant in December 2018 that the Department would conduct or require the Governing Body to conduct an investigation into the applicant’s general conduct.

[8] Whilst the applicant accepts the Department’s legal entitlement to investigate protected disclosures where they are in the public interest she does not accept that the Department has the ability to investigate matters relating to the applicant’s general conduct and performance which she feels are properly matters that lie with the Governing Body as her employer (under the College’s Articles of Government.)

[9] The applicant also rejects that the Department has the power to instigate a wide ranging investigation using an external investigator – an investigation which she asserts has been unduly protracted (in part she admits by the Covid pandemic) but more particularly by virtue of its scope.

Grounds of Challenge

[10] The applicant’s grounds of challenge are:

- (i) That the Terms of Reference of the investigation are ultra vires the powers of the Department. In particular, that the Department has no power to investigate matters relating to the conduct or discipline of members of staff of the College, including the applicant. Those are matters the applicant asserts lie exclusively within the jurisdiction of the Governing Body;

- (ii) That the Department has failed to adopt a neutral position and has made a promise or given an assurance to the [original] complainant (in December 2018) that it would conduct or arrange for the holding of a culture leadership and followership review at the College. The decision ultimately taken by the Department was taken when it became apparent to the Department that the Governing Body was resistant to the demands made of it by the Department that the Governing Body should conduct such a review either at that time or at all;
- (iii) The decision of the Department to pursue this investigation with such wide Terms of Reference was a decision taken without taking into account properly or at all relevant considerations and, in particular, that the Department has failed to take into account either properly or at all or give any proper weight to the following facts:
 - (a) The fact that the Governing Body (other than its Chairman) did not consider the investigation to be appropriate in any way;
 - (b) The fact that the applicant had been the subject of sustained investigation both by the Department and the College as a result of protected disclosures and a grievance made by a single member of staff (or, if not, a very small number of staff);
 - (c) That the applicant's annual appraisal in 2019 conducted by the Acting Chairman of the Governing Body had demonstrated that there was neither a problem with the applicant's leadership nor a need for any form of external investigation;
 - (d) The risk that the investigation would damage irretrievably the applicant's reputation, authority and position within the College;
 - (e) The fact that the investigation could not on any practical level be conducted in a manner by which the applicant's right to confidentiality could be respected, let alone guaranteed;
 - (f) The inevitable lengthy duration of the investigation;
 - (g) The risk of injury to both the applicant's physical and mental health that might result.
- (iv) For the reasons that are set out at (iii) above that the decision of the Department to investigate a fifth public interest disclosure in this particular way using an external independent investigator supported by the Head of Fraud within the Department, is Wednesbury irrational.

- (v) That the Department failed to cease the investigation having regard to the representations made to the Department by and on behalf of the applicant;
- (vi) The failure of the Department to cease the investigation having regard to the representations made to the Department by and on behalf of the Governing Body and its withdrawal from the process of joint commissioning the investigation;
- (vii) The failure of the Department to cease the investigation having regard to contumelious delay caused by the Covid pandemic.

Evidence

[11] The evidence lodged in support of the application consisted of an affidavit on the part of the applicant together with voluminous supporting information to which her counsel took me as part of the consideration of the application.

[12] The Department has chosen not to lodge a replying affidavit at this stage. It has challenged some of the factual assertions made by the applicant but has done so through the skeleton argument and position paper lodged by Mr Sands on its behalf.

Whistleblowing/Protected Disclosures

[13] The term “whistleblowing” is the term that has been adopted where a third party makes a “protected disclosure.” The right to “blow the whistle” on certain conduct protected by Part VA of the Employment Rights (NI) Order 1996 where a worker makes a disclosure to a relevant public body which is in the public interest.

The Respondent’s Argument

[14] The respondent argues that there is no error of law demonstrated by the applicant’s Order 53 Statement.

[15] Its position is that the only live complaint is the disclosure which the Department received on 28 October 2019 and that it is a public interest matter and that the impugned decision is one which relates rather to the Terms of Reference of the investigation rather than the investigation itself.

[16] On the principal point on the question of its vires the respondent says that as the ultimate sponsoring body it has an overarching role in relation to the policy, strategic development and financing of all Further Education Colleges. It says that the relationship between the College, the Governing Body and the Department is governed by the Further Education (NI) Order 1997 (“the 1997 Order”) and claims extensive powers pursuant to Article 4, namely that it is empowered “to do all that is necessary or expedient for the purposes of the exercise of its duty under Article 3 of the 1989 Order [i.e. the Education Reform (NI) Order 1989] insofar as relates to further education.”

More particularly pursuant to Article 18 it suggests that it has specific power to arrange “for the carrying out by any person of studies designed to improve economy, efficiency and effectiveness in the management or operation of an institution of further education.” Those two provisions, it says, gives it general and wide ranging powers.

[17] With specific reference to the present application the respondent says that under the Management Statement and Financial Memorandum (“MSFM”) with the College it is directly responsible for ensuring that the College has robust governance arrangements in place and that the applicant, as its accounting officer, has a direct responsibility to address “any significant problems arising in the College whether financial or otherwise” – an obligation owed directly to the Department (see paragraph 3.3 MSFM).

[18] The respondent makes the point that it is not seeking to reopen the earlier disclosures but the fact of the fifth disclosure, made by someone who has not previously made any disclosures, is something which constitutes a public interest disclosure which it feels obliged to investigate.

[19] The respondent accepts, further, that its investigation of the complaint can in no way interfere with the contractual relationship as between the applicant and the Governing Body – acknowledging that the most it can do is bring any findings coming out of the investigation to the attention of the Governing Body itself but that it cannot in turn insist upon any disciplinary investigation, or indeed, require that any other action be taken under the contract of employment.

[20] In short, the respondent says that the mere fact that the investigation may in some respects touch and concern matters that could “potentially be relevant to disciplinary issues” does not mean that it invalidates its power to investigate. To illustrate the point in the respondent’s position paper it uses the example of investigations undertaken by organisations such as the Health and Safety Executive which may touch on potential disciplinary issues but which cannot, per se, have any bearing on the contract of employment itself.

[21] In looking specifically at the Terms of Reference the respondent focuses on the scope (set out in paragraph 3.1) (and in sub-paragraph (e) in particular), namely that “consideration of operational, management, governance or control matters which may need to be brought to the attention of DFE or the NRC” are directly in point to achieve an objective (paragraph 4-1(b)) which is “[the] identification of matters ... which require urgent and important consideration by either the Department or the Governing Body.” In that regard the respondent says that there is no evidence the Department has not taken all relevant factors into account or that it has done other than act in a neutral position, and that indeed by appointing an independent investigator the Department says that the investigation is wholly independent of the Department itself. It makes the point the Department is entitled, if it wished, to have undertaken such an investigation under its own internal mechanisms but that it chose in this case to appoint an independent investigator and that that investigator is merely supported,

in an administrative capacity, by one of its employee's, Jacqueline McLaughlin, who has no decision making capacity whatsoever. It says, broadly, that the collateral grounds argued for by the applicant based on delay and/or irrationality or reasonableness (in the Wednesbury sense) have no basis.

[22] In short it asserts that the Department has the power to investigate complaints of alleged wrongdoing within sponsored bodies such as the College and that for the applicant to argue otherwise is patently incorrect.

The Applicant's Argument

[23] The applicant argues principally that the statutory scheme relating to protected disclosure set out in Part VA of the Employment Rights (NI) Order 1966 relates to disclosures that are in the public interest. It follows, says the applicant, that if the complaint is not a public interest matter then the jurisdiction to determine it must rest with the Governing Body as the applicant's employer and that the Department cannot use the general powers set out in the 1997 Order (as above) to usurp the statutory function of the Governing Body or to impose itself upon the contractual relationship between it and an individual employee. It seems to me that its focus on this arises from the title ascribed to the Terms of Reference themselves, namely that it is termed "[an] investigation into allegations of *misconduct in NRC*" which it says is well beyond the scope of a whistleblowing allegation in the strict sense.

[24] In essence, the applicant believes that the respondent is straying beyond the permissible boundaries as a response to the Governing Body's refusal to conduct a further (and fifth) general investigation. This, it states, appears to be why the investigation was initially described as one which was to be "*jointly managed*" between the Governing Body and the Department but now one that is being pursued solely by the Department. To the extent that it was originally suggested to be a "joint" investigation it is quite clear from the correspondence passing between the Governing Body and the Department that the Governing Body has since decided in no way to participate in any such a joint approach.

[25] As a result the applicant argues that on its first ground that it has a reasonable prospect of success in its argument that the respondent has exceeded its jurisdiction.

[26] In support of Ground 2 the applicant says that the respondent has compromised itself by making a promise (in December 2018) that it would conduct or arrange for the holding of a culture and leadership review at the College.

[27] This assertion is based on an email of 5 December 2018 from Alan Russell to an earlier complainant (i.e. not the current complainant) stating that the Department would:

“Given the seriousness of the concerns raised, consideration is being given to the undertaking of an independent review of the leadership of the College, with a particular focus on College leadership culture and employee relations and also considering the most specific concerns raised. This is something we are considering asking the Governing Body to commission, but reporting to the Department on all aspects ...”

[28] As I have said those requests were made but (in the final instance) were rejected by the Governing Body. The applicant, in support of Ground 2, on the basis of the email says that this is a promise by which the Department fettered its discretion.

[29] The applicant, in support of Ground 3, identifies the factors which ought to have been taken into account by a rational Department and which she feels have been ignored. The lack of support of the Governing Body is one such consideration but so, the applicant says, is the fact that the respondent has failed to take into account that the applicant has been the subject of four previously failed whistleblowing allegations or been the subject of investigation and that there is no evidence that consideration has been given to the impact that the ongoing investigations might or would have either upon her leadership of the College or upon her mental health and well-being.

[30] Similar arguments are raised in relation to support Grounds 5 and 6 – all to support the argument for irrationality.

[31] Ground 7 (Delay) is cited by the applicant on the basis of the fact that the investigation has been ongoing now for almost 10 months – although it is acknowledged (in part) the impact that Covid has had on this.

[32] To put the matter in context, however, the Department has agreed to stop the investigation pending the outcome of the instant application and determination of the judicial review itself.

Discussion

[33] The applicant, through her counsel, made it very clear to the court that she saw an application for judicial review as course of last resort – but one that she was forced to adopt in all the circumstances. The kernel of her case is not to prevent the proper investigation of any whistleblowing allegations but what she does *“object to ... is the determination of the respondent to conduct a wide ranging investigation into allegations of misconduct focused on the applicant”* (see paragraph 32 of the appellant’s skeleton argument).

[34] It appears to me that the question is one of degree. The Department asserts what I will call a general right to carry out investigations (as indicated at paragraphs

[16] and [17] above). In its case it has emphasised that the general powers vested in it to do so under the 1997 Order and in its presentation before the court sought to explain and emphasise the policy related and public interest aspect of its case – no doubt to bolster those public interest aspects of the case and to take the argument back to the policy and governance high ground. That is certainly the thrust of the respondent’s skeleton argument and allied position paper as advanced by Mr Sands. But, I fear, that it is difficult to achieve that goal successfully in the way in which the particular investigation in question was initially approached.

[35] The applicant, for her part, and no doubt because of the history of the previous four investigations, has interpreted the present further investigation – even though it has been prompted by a different source/complainant – as more of a personal attack upon her. No doubt this has arisen or at least been influenced in large part because the Governing Body, notwithstanding the earlier approval of the approach by its Chairman, in the final instance refused to participate in the investigation notwithstanding that the Department has decided to proceed with the investigation. Added to that one has to consider the actual approach:

- The labelling of the Terms of Reference as an investigation to “*misconduct*” has undoubtedly heightened the applicant’s concerns; similarly pursuant to paragraph 2.2 (Background) of the Terms of Reference it cites:

“incidents which occurred between December 2018 and October 2019 which allege bullying and intimidation of staff and misuse and abuse of power by the CEO/Principal.”

- Pursuant to paragraph 3(d) there is reference to the fact that the “*subject of the investigation will be given an opportunity to reply*” – clearly being a reference to the applicant herself and finally the indication;
- That the investigation would be undertaken by “*Mr Harry McConnell, Independent Equality and HR Consultant, assisted by J McLaughlin, DfE Fraud and Raising Concerns Unit ...*”

[36] The interpretation which the applicant has placed on the Terms of Reference has possibly not been assisted by Mr McConnell’s suggestion which was made directly to the applicant that she “*had a case to answer.*”

[37] The cumulative effect seems to me to be quite specific and appears to be directed towards an investigation into the actions of the applicant.

[38] I can quite see the respondent’s argument that it is acting under its more general and wide ranging powers of investigation and that on the facts of this case the cumulative effect of the allegations in all probability might well justify a conclusion that there be (to quote the aspirations set out in paragraph 2.5 of the Terms of Reference) “*a review of leadership, followership, culture and behaviours in the*

College” which it had tasked the Governing Body to undertake. Given the Governing Body’s refusal to participate, it seems to me that the approach which was finally adopted is arguably too focused upon the applicant rather than the all-encompassing review which the respondent now suggests is being undertaken. Certainly I think it is arguable that the Terms of Reference blur the line between what falls within the competence of the Governing Body and what is properly within the competence of the Department. This confusion arises no doubt because the Department’s intention was originally to approach it on a joint basis, yet the Terms of Reference do not appear to have been altered when the Governing Body decided to cease participating in that endeavour, nor does it appear that the Department then addressed the question of what the true purpose of its investigation might be.

[39] Given that position, I find that the threshold has been met, that there is an arguable case and accordingly grant leave.