

**APPROVED
NO REDACTION NEEDED**



**THE COURT OF APPEAL
CIVIL**

Appeal Number: 2022/67

**Whelan J.
Binchy J.
Allen J.**

Neutral Citation Number [2023] IECA 186

**IN THE MATTER OF THE EMPLOYMENT EQUALITY ACT, 1998
AND IN THE MATTER OF THE EQUALITY ACT, 2004
AND IN THE MATTER OF THE WORKPLACE RELATIONS ACT, 2015**

BETWEEN

OLUMIDE SMITH

APPELLANT

AND

CISCO SYSTEMS INTERNETWORKING (IRELAND) LIMITED

RESPONDENT

Judgment of Mr. Justice Allen delivered on the 21st day of July, 2023

Introduction

1. I have read the comprehensive judgment delivered by Whelan J. and I agree with it, as well as with the judgment of Binchy J.
2. When this panel sat on 16th March, 2023 to hear Mr. Smith's appeal against a judgment and order of the High Court (Meenan J.) dismissing an appeal which he had brought against a determination of the Labour Court given on 26th April, 2018, Mr. Smith applied that Binchy J. and I would recuse ourselves from dealing with the appeal.
3. Mr. Smith's application was made without notice to the respondent and on the basis of an oral submission, which was unsatisfactory on both counts. The recusal application was calculated to, and in the event did, disrupt the business of the court and postponed the hearing of the appeal.
4. The recusal application was advanced on a number of grounds. The first ground – to which Whelan J. has referred as the *Judge Binchy Ground* – was that Binchy J. was a member of a panel which on 15th June, 2022 dismissed an appeal by Mr. Smith in proceedings which Mr. Smith had brought against the Office of the Ombudsman and was a member of a panel which on 17th October, 2022 had refused an application by Mr. Smith for an extension of time to appeal against a judgment of the High Court (Noonan J.) made on 23rd January, 2019 in these proceedings. The second ground – to which Whelan J. has referred as the *Judge Allen Ground* – was that I was a member of the panel which on 17th October, 2022 which had heard Mr. Smith's application for an extension of time to appeal and had delivered an *ex tempore* judgment with which the other members of the panel agreed. The third ground – to which Whelan J. has referred as the *E-mail Ground* – was that following a request by a Circuit Court judge in 2020 that incoming e-mails to him from Mr. Smith be blocked, all of Mr. Smith's e-mails to the Courts Service were blocked for a time. The fourth ground – to which Whelan J. has referred as the *Complaint Ground* – was that Mr. Smith had made

complaints to the Judicial Conduct Committee against Binchy J. and me, which had not been finally disposed of and the existence of which was said to warrant our recusal.

5. Whelan J. has dealt comprehensively with the *Judge Allen Ground*, the *Judge Binchy Ground* and the *E-Mail Ground*.

6. As to the *Judge Allen Ground* and the *Judge Binchy Ground*, the basis of the recusal application was solely that Binchy J. had heard other proceedings involving Mr. Smith and that Binchy J. and I had heard another application in these proceedings, both of which were decided against Mr. Smith. In fact, on each occasion the panel was unanimous but that makes no difference. It is well settled that the fact that a judge has either heard other proceedings involving the objecting litigant or other applications in the same proceedings is not in itself a basis on which recusal may properly be sought. See for example *In the matter of Decobake Limited (In Liquidation)* [2022] IECA 31.

7. As to the *E-mail Ground*, it was not suggested that either Binchy J. or I had any knowledge of, still less involvement in, the blocking of Mr. Smith's e-mails.

8. These first three grounds were transparently misconceived and the recusal application on these grounds could easily have been disposed of summarily. However, the fourth ground – *the Complaint Ground* – was novel. It was that ground which prompted the court to reserve judgment and it is that ground which I wish to address.

The recusal application on the Complaint Ground

9. Mr. Smith asked that Binchy J. and I would recuse ourselves on the ground that he had lodged complaints of misconduct against us with the Judicial Conduct Committee which were still pending. The recusal, he suggested, was in the interest of fair procedures. He suggested that “*certain things [had] occurred in other proceedings which concern[ed] his*

human rights.” Mr. Smith referred to the Irish Human Rights Commission and the Judicial Council Act.

10. Mr. Smith expressed concern as to the “*appropriateness of discussing exact details*” and made reference to a confidentiality clause in the procedure – which I understood to be a reference to the Judicial Conduct Committee Complaints Procedures. He suggested that the complaints were “*valid complaints of abuse of human rights*” and that Binchy J. and I should recuse ourselves “*pending assessment of [his] complaints.*” At one stage there appeared to be a suggestion of an unspecified fraud on my part but Mr. Smith later clarified that in asserting that the judgment of 17th October, 2022 had been procured by fraud, he was not making an allegation of fraud against me. While Mr. Smith was not prepared to articulate the basis of the complaints, he said that Binchy J. and I both knew the precise substance of the complaints which had been filed against us.

11. Counsel for the respondent, as I have said, had not had notice of the application and so had not had the opportunity to prepare detailed legal submissions. However, counsel emphasised that the application was based on apprehended bias and that there had been no suggestion of actual bias on the part of either judge. Counsel argued that nothing had been said which would give rise to a reasonable apprehension of bias on the part of a well-informed observer. He suggested that the application gave rise to a public policy concern and that if the court were to accede to the application, this would open the floodgates to recusal applications based only on the fact of a complaint against a judge.

12. In reply, Mr. Smith submitted that the full details of his complains were protected by confidentiality and that the respondent had no right to know the details. He drew a distinction between the fact of the complaints – which he said he was entitled to disclose and to rely on – and the substance or content of the complaints – which he maintained he was

constrained by the confidentiality requirements of the Judicial Conduct Committee Complaints Procedures from disclosing.

13. The basis of Mr. Smith's application was not absolutely clear. He certainly advanced the fact – that is the mere fact, without regard to the substance – of the complaints as a ground on which Binchy J. and I ought to recuse ourselves. However, he made the point more than once that Binchy J. and I were each aware of the substance or basis of the complaints which had been made against each of us. He did not suggest that either of us were aware of the substance or basis of the complaint against the other, or that Whelan J. was aware of the substance of the complaint against either of us. Mr. Smith seemed to be suggesting that in deciding whether we should recuse ourselves from dealing with his appeal, we would each take into account our own knowledge of what had been said in the complaints, but could not disclose that information either to the respondent, to allow the respondent an opportunity to make submissions, or in the reasons for which we might decide to accede to or refuse the application.

14. The application posed a number of possible dilemmas. On the one hand, if Mr Smith was entitled to call for the recusal of two of the panel of judges who had been assigned to hear the case by reason only of the fact that he had filed complaints with the Judicial Conduct Committee, this would be a recipe for chaos. It would mean that any litigant could eliminate any judge by the simple expedient of sending an e-mail, or successive e-mails, to the Judicial Conduct Committee. A plaintiff or an appellant could choose his court by filing complaints against any judge he might not want to hear his case, and a defendant or respondent could stymie his opponent's case by filing complaints against all the members of the relevant court. On the other hand, the Oireachtas and the Judicial Council – with a view to promoting and maintaining high standards of conduct among judges – have put in place an elaborate process whereby proper complaints against judges can be investigated and determined and any

engagement by a judge the subject of a complaint of misconduct with the merits of the complaint would potentially trespass on the functions and powers assigned by law to the Judicial Conduct Committee.

15. If Mr. Smith was correct in his submission that a complainant to the Judicial Conduct Committee is precluded by the confidentiality of the procedure from disclosing the nature of his complaint, a litigant with a valid complaint of judicial misconduct might be precluded from making a proper recusal application, or might be compelled to abandon his complaint to make his recusal application.

16. The court therefore took time to reflect on the question of the impact – if any – of the Complaints Procedures established under the Judicial Council Act, 2019 on the established law governing recusal.

The Complaints Procedure under the Judicial Council Act, 2019

17. The Judicial Council was established on 19th December, 2019 pursuant to the Judicial Council Act, 2019. The functions of the Council are set out in detail in s. 7 of the Act of 2019 but as the Council's website puts it, the four main pillars of its remit are to achieve excellence in the performance of judicial functions, high standards of conduct among judges, an independent judiciary, and public confidence in the judiciary and the administration of justice.

18. The Act provides for the establishment by the Council of a number of committees, including a Judicial Conduct Committee, the functions of which are to promote and maintain high standards of conduct among judges. By s. 43(4) of the Act of 2019 the Judicial Conduct Committee is independent in the performance of its functions.

19. Section 50 of the Act of 2019 provides that a complaint concerning the conduct of a judge that is alleged to constitute judicial misconduct may be made to the Registrar of the Judicial Council – who acts as Secretary to the Judicial Conduct Committee – in accordance with the procedures specified by the Committee under section 52. Such a complaint may be made by a person who is directly affected by the conduct or who witnessed it and, by s.

51(1), must ordinarily be made no later than three months after the date of the occurrence or alleged occurrence alleged to constitute judicial misconduct that occasioned the complaint.

20. By s. 53 of the Act of 2019, each complaint is first assessed by the Registrar for admissibility. By s. 53(3) complaints that relate solely to the conduct of proceedings before a judge in respect of which there is a remedy available to the complainant in those proceedings, or by way of an appeal, or in proceedings by way of judicial review, or in any other proceedings, is not admissible.

21. Where the Registrar determines that a complaint is admissible, he or she must refer it to the Committee. Where the Registrar determines that a complaint is not admissible, he or she must notify the complainant of that determination and of the complainant's entitlement under s. 56 to seek a review of the determination by the Complaints Review Committee.

22. In the event that a complainant requests a review of a determination that a complaint is inadmissible, the Complaints Review Committee must determine whether it is or is not admissible, and notify the Registrar of its determination. In the event that the complaint is found to be admissible, the Registrar must refer it to the Judicial Conduct Committee and in any event the Registrar will give notice to the complainant and the judge of the outcome of the review.

23. On 22nd September, 2022 the Judicial Conduct Committee specified the Complaints Procedures required to be specified under s. 52 of the Act and the relevant provisions of the

Act came into operation on 3rd October, 2022 by virtue of the Judicial Council Act, 2019 (Commencement Order) 2019 (S.I. No. 492).

24. Para. 2.1 of the Complaints Procedures provides that a complaint may be made, in the prescribed form, preferably through the website of the Judicial Council, or by post, by any person who is directly affected by, or who witnessed, conduct that could, if substantiated, constitute judicial misconduct. Thereafter, as to the making of complaints and the assessment of their admissibility, and as to how complaints found to be admissible are to be dealt with, the procedures more or less mirror the very detailed provisions of the Act.

25. Para. 28 of the Complaints Procedures, under the heading “*Confidentiality*” provides that:-

“28.1 Unless otherwise provided within the 2019 Act, the particulars of complaints made, or investigations conducted by the Registrar, the Complaints Review Committee, the Panel of Inquiry or the Judicial Conduct Committee, as the case may be, shall be confidential.

28.2 If, notwithstanding paragraph 28.1, confidential information becomes public, the judge concerned may request that the Judicial Conduct Committee issue a statement to confirm that the complaint is ongoing, clarify the procedural aspects of the proceedings, explain the judge’s right to a fair hearing and provide the judge’s response to the complaint.”

26. Para. 29.1 sets out that it is an offence to publish or disclose any evidence given or the contents of any document produced by a witness while giving evidence to a Panel of Inquiry or to the Judicial Conduct Committee in private except as directed by a court, or to the extent necessary in the interests of fair procedures and with the written consent of the chairperson of a Panel of Inquiry or the Judicial Conduct Committee, as may be appropriate.

27. Section 41 of the Act of 2019 prohibits the disclosure by any person of confidential information obtained by him or her while performing functions as a member of the Council, the Board or a committee, or as the Secretary, Registrar or member of staff of the Council, or as a consultant, adviser or other person who is or was engaged under contract or other arrangement with the Council.

28. Chapter 4 of the Act of 2019 provides for the resolution of complaints – with the consent of the judge and the complainant – by informal means. Chapter 5 provides for the investigation of complaints by a panel of inquiry appointed by the Judicial Conduct Committee. Section 68(5) provides that:-

“(5) A hearing of a complaint before a panel of inquiry shall be conducted in public unless the Judicial Conduct Committee decides that in order to safeguard the administration of justice the hearing shall be conducted in whole or in part otherwise than in public.”

29. Chapter 6 of Part 5 of the Act of 2019 is entitled “*Miscellaneous provisions relating to Judicial Conduct Committee and panels of inquiry*”. Section 82 provides that:-

“(1) Subject to this Act, proceedings relating to the investigation of a complaint under this Part shall be conducted otherwise than in public.

(2) Any proceedings before a court arising out of or connected with a complaint, the admissibility of a complaint, an investigation of a complaint under this Part or the determination of such an investigation shall be conducted in public unless the court directs that in order to safeguard the administration of justice the proceedings should be conducted in whole or in part otherwise than in public.

(3) A person (including a member of a panel of inquiry or the Judicial Conduct Committee) shall not disclose or publish any evidence given or the contents of any document produced by a witness while giving evidence to a panel of inquiry

or the Judicial Conduct Committee otherwise than in public under this Part, except –

(a) as directed by a court,

(b) in accordance with section 83, or

(c) to the extent otherwise necessary in the interests of fair procedures and with the consent in writing of the chairperson of the panel of inquiry or the chairperson of the Judicial Conduct Committee, as may be appropriate.

(4) Subsection (3) shall not operate to prohibit the publication of a report under this Act of the findings by a panel of inquiry made on the basis of evidence given otherwise than in public, or the publication of a report under section 87 of information, referred to in subsection (6) or (7) of that section, arising from a determination of the Judicial Conduct Committee made on the basis of evidence given otherwise than in public.

(5) A person who contravenes subsection (3) shall be guilty of an offence and shall be liable on summary conviction to a class A fine.”

30. The broad scheme of the Act, then, is that complaints are first screened for admissibility and if found to be admissible are referred by the Registrar to the Judicial Conduct Committee, which – unless the complaint can otherwise be disposed of – appoints a panel of inquiry to investigate and report. By s. 68(5) of the Act, the hearing before a panel of inquiry is presumptively to be conducted in public but by para. 28.1 of the Complaints Procedures the process is confidential up to that point. Absent argument and the presence before the court of the Judicial Conduct Committee, I could not decide the question but it does appear to me that the requirement in para. 28.1 that “*the particulars of complaints made*” shall be confidential extends to the fact of the complaint as well as the content. Para.

28.2 contemplates that if “*confidential information becomes public*” a statement may be issued by the Judicial Conduct Committee, at the request of the judge concerned, to confirm the fact that the complaint is ongoing, as well as the procedural aspects of the proceedings and so forth. It seems to me that this is probably intended to extend to a case in which the fact – but not necessarily the content – of a complaint against a judge becomes public: but if that was the intention, it might have been unambiguously spelled out.

31. Finally in this regard, it is of some significance to note that by s. 94 of the Act of 2019 of the Freedom of Information Act, 2014 does not apply to a record relating to the making or investigation or the resolution by informal means of a complaint under Part 5 or to an investigation pursuant to a referral by the Judicial Conduct Committee to a panel of inquiry. This, it seems to me, is consistent with an intention that complaints against judges should be assessed and investigated in private up to the point that a complaint found to be admissible and referred by the Judicial Conduct Committee to a panel of inquiry comes to be heard by the panel of inquiry.

32. I pause here to make clear that I am not to be thought to criticise Mr. Smith for having been in breach of the confidentiality requirement of the Complaints Procedures for referring to the fact that he had made a complaint against me. Rather my object is to examine the scheme of the Complaints Procedures and the statutory provisions on which they are based with a view to determining their impact – if any – on the theretofore settled law.

Mr. Smith's complaints

33. I will come to whether it is relevant but the fact is that on 5th January, 2023 Mr. Smith filed a complaint with the Judicial Conduct Committee of alleged misconduct by me on 17th October, 2022 – which was the date on which I sat with Collins and Binchy JJ. to hear his

motion for an extension of time – and on 20th October, 2022 – which was the date on which my *ex tempore* judgment was published on the Courts Service website. I was formally notified by the Registrar of the making of the that complaint by letter dated 10th January, 2023. For the reasons given in his determination of 13th January, 2023, the Registrar found that the complaint was inadmissible. In accordance with the Complaints Procedures, Mr. Smith was notified of the Registrar’s determination and of his right to seek a review by the Complaints Review Committee, which he availed of. As of the date of the recusal application, the Complaints Review Committee had not issued its determination of the admissibility of the complaint. On 1st March, 2023 – after the panel had been assigned to hear Mr. Smith’s appeal – Mr. Smith filed a further complaint of alleged misconduct by me on 15th January, 2023 – which was a Sunday. I was formally notified of the making of that complaint by the Registrar by letter dated 9th March, 2023. As of the date of the recusal application, that second complaint had not been assessed for admissibility by the Registrar.

The reasonable observer

34. Whelan J. has carefully and comprehensively examined the authorities but I think that it is useful to reprise some headline points.

35. The relevant legal principles were quite recently considered by the Supreme Court in *Kelly v. Minister for Agriculture* [2021] 2 I.R. 624. That case involved a challenge by way of judicial review to a decision of the Government to dismiss a civil servant on the ground that it was tainted by the involvement of the Minister in the investigation of the complaint against the applicant and in the later decision of the Government to confirm the dismissal. While *Kelly* was a challenge to a decision which had been made as opposed to a recusal application and while the decision maker was the Government as opposed to a judge, the Supreme Court

found that the test for objective bias was the same throughout the ambit of public administration so that the test to be applied to a Government decision concerned with the dismissal of a civil servant was similar to that which applied to judges. In *Kelly* there was some disagreement and difference of emphasis in the judgments delivered in the Supreme Court as to the application of the law to the facts, but there was agreement as to the applicable principles of law.

36. Following the well-established test propounded by the Supreme Court in *Bula Ltd. v. Tara Mines Ltd. (No. 6)* [2000] 4 I.R. 412, the Supreme Court held that the test for objective bias was whether a reasonable person in the circumstances would have a reasonable apprehension that the applicant would not have a fair hearing from an impartial judge. The Court emphasised that the test was an objective test which invoked the apprehension of a reasonable person and not the apprehensions of the affected party.

37. Following its previous decision in *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40, the Court said that the hypothetical observer was an independent person who was not over-sensitive and who had knowledge of the relevant facts. O'Donnell J. (as he then was) said that the reasonable bystander was expected to be not just fair, but robust and aware that a standard for objective bias that was met if even a suspicion could be voiced could result in a near-impossible test that could be too easily invoked by disappointed parties who could not point to any weakness in the individual decision. Demanding an unduly rigorous test would exact a very heavy price in decisions set aside and outcomes delayed.

38. Applying well-established principles, the Court said that objective bias could not be inferred from legal or other errors made within the decision-making process. Rather, it is necessary to show the existence of something external to that process, such as, for example, that the decision maker had made statements that, if applied to the case in hand, would effectively decide it, or that showed prejudice, hostility or dislike towards a party or his

witnesses. Dunne J., approving of the approach which had been taken by Costello J. in this court, said that in considering whether or not objective bias was established, a useful approach was to list all of the facts that would be known to the hypothetical, reasonable, independent observer.

39. There is one other important principle to which I should refer which did not arise in *Kelly* and which applies in particular to recusal applications. In *Bula (No. 6)* Denham J. (as she then was) said, at p. 449:-

“A judge has a duty to sit and hear a case. However, in certain circumstances it is appropriate that he or she disqualify himself or herself from a particular case. The test is not whether that judge believes he or she would be impartial. Nor is it whether the judge or judges on a motion to set aside such a judgment believes the judge was or would be impartial. Nor is it whether the parties consider the judge impartial. The test is objective.”

40. In *Rooney v. Minister for Agriculture* [2001] 2 I.L.R.M. 37 – a judgment later approved by the Supreme Court in *Goode Concrete v. CRH plc* [2015] 3 I.R. 493 – Keane C.J. said:-

“Where one or other party does invite a judge to disqualify himself, the established and prudent practice has been for the judge concerned to disqualify himself if he has any reservations about the matter. On the other hand a judge cannot permit a scrupulous approach by him to be used to permit the parties to engage in forum shopping under the guise of challenging the partiality of the court.”

41. The Supreme Court in *Goode Concrete* also cited with approval the decision of the High Court of Australia in *Ebner v. Official Trustee* [2000] HCA 63, (2000) 176 A.L.R. 644 where it was said:-

“In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that would result if an appellate court were to take a different view of the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable.”

42. And in *Ryanair Ltd. v. Terravision London Finance Ltd.* [2011] 3 I.R. 192, Kelly J. (as he then was) cited with approval a statement made by the Court of Appeal in England in *Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.* [2000] Q.B. 451 where that court said:-

“If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.”

43. Finally, it is worth recalling that the reasonable observer who has knowledge of all the relevant facts may be better informed than the parties, or the judge. For example, in *Goode Concrete* the Supreme Court deemed the High Court judge to have been aware of the details of a financial interest in the respondents of which the judge was unaware but was part of an investment portfolio under the management of a professional adviser.

Discussion

44. The statutory function of the Judicial Conduct Committee is to promote and maintain high standards of conduct among judges. The informed observer must be taken to be familiar with the terms of the Judicial Council Act, 2019 and the Complaints Procedures specified by the Judicial Conduct Committee.

45. At one end of the scale, the scheme of the Act contemplates that there may be instances of judicial misconduct of such seriousness as ultimately to warrant a referral by the Judicial Conduct Committee to the Minister for Justice for the purposes of a motion pursuant to Article 35.4.1 of the Constitution calling for the removal from office of a judge. At the other end of the scale, the scheme contemplates that complaints may – and almost inevitably will – be made by litigants who are simply dissatisfied with the outcome of their case. Legitimate complaints may be made but also complaints which, variously, allege conduct which could not constitute judicial misconduct conduct, or relates to the conduct of a judge in the course of proceedings in respect of which a judicial remedy is available, or which are frivolous and vexatious, or which simply fail to say what it is that the judge is supposed to have done.

46. I have carefully considered whether – if I am correct in the view which I have provisionally expressed that the confidentiality of the Complaints Procedures extends to the fact as well as the content of any complaint – the hypothetical informed observer should be taken to be aware of the existence of the complaint. In this case, of course, Mr. Smith has raised the fact of the complaint in open court and so the reasonable observer must be imputed with knowledge of the fact of the complaint. But to the extent that it is on the fact of the complaint that is relied upon as requiring my recusal, it seems to me that if Mr. Smith had never referred to it, the informed observer must nevertheless be taken to be aware of it. The test for objective bias being whether a reasonable person in the circumstances would have a reasonable apprehension that Mr. Smith would not have a fair hearing from an impartial judge. It seems to me that his recusal application is secondary. In every case the complainant will know and except, perhaps, in the case of a complaint made on the very eve of a hearing date, the judge will know of the fact of the complaint. If the mere existence of

the complaint is something that would, if raised, require disqualification, it seems to me that if it was never raised, it would require disqualification on the judge's own motion.

47. The informed observer will know that every complaint against a judge is first examined for admissibility. He or she will know that pursuant to the Complaints Procedures, the Registrar will immediately notify the judge of the complaint, the particulars thereof, and the name of the complainant. The informed observer may contemplate that the judge may be bemused or irritated or annoyed or concerned by the complaint but will know – as Sedley L.J. put it in *Bennett v. Southward BC* [2002] EWCA Civ. 223 – that judges are expected to have, and do have, broad backs. No more than in a case where a previous decision of a judge has been appealed by a litigant, the mere fact of a complaint will not be perceived by a reasonable and reasonably robust observer as an impediment to the discharge by the judge of his duties.

48. The informed observer will know whether the complaint has been screened for admissibility and whether it has been determined to be admissible. He or she will know whether the complaint has been admitted and, I think, whether it has been referred to a panel of inquiry. However, I do not think that the informed observer can be taken to know whether a complaint which has not yet been assessed by the Registrar for admissibility is admissible or, in the case of a complaint determined by the Registrar to be inadmissible and in which the complainant has sought a review, what the outcome of a review by the Complaints Review Committee might be. It seems to me that the legal hypothesis of a reasonable observer would be stretched to breaking point if the judge were to attempt to contemplate what the view of the reasonable observer might be of the admissibility of a complaint against him or her. Or, it might be said, it would be impermissible for the reasonable observer – as it unquestionably would be for the judge – to usurp the statutory function of the Registrar or the Complaints Review Committee, as the case might be.

49. In the scheme of the Complaints Procedures, it seems to me that there is no distinction to be drawn between a complaint which has not yet been assessed for admissibility by the Registrar and a case in which the complaint has been determined by the Registrar to be inadmissible but is the subject of a review. As I understand the Complaints Procedures, the review by the Complaints Review Committee is a *de novo* assessment of the admissibility of the complaint, in the conduct of which no weight will be given to the fact that it has previously been determined to be inadmissible. Nor do I believe that a complaint found by the Registrar to be inadmissible is to be taken to have been inadmissible for as long as the complainant has the right to seek a review.

50. In this case, at the time of the recusal application, Mr. Smith's complaint against me of 5th January, 2023 was the subject of a review and his complaint of 1st March, 2023 had not been assessed by the Registrar for admissibility. While in fact the complaint of 1st March, 2023 was soon after determined by the Registrar to be inadmissible and both complaints were later determined by the Complaints Review Committee to be inadmissible, this is irrelevant to the assessment of the recusal application, which must be by reference to the position as it then stood.

51. The informed observer will be familiar with the allocation of work amongst the judges of the relevant court. He or she will know that judges do not get to choose the cases which are assigned to them. In the case of some High Court lists and in every case in the Court of Appeal, he or she will know that the judge will have been assigned some time in advance of the scheduled hearing date and may have undertaken a good deal of reading in preparation for the oral hearing.

52. In my view, the mere fact that complaints had been made against a judge, which had not been determined to be admissible, could not give rise to an apprehension on the part of a

reasonable, informed and robust independent observer that the complainant would not have a fair hearing from an impartial judge.

53. Accordingly, I decline to recuse myself on that ground.

54. I emphasise that on this application I am dealing with a complaint which had not been screened for admissibility. It may or may not be that different considerations would apply to a case in which – on the day the judge sits to hear the case – the complaint has been found to be admissible but I leave that question over to a case in which it may arise.

55. The next issue is whether the nature or terms or substance of the complaint might warrant the recusal of the judge.

56. Whatever about the fact of the complaint, the Complaints Procedures are quite clear that, unless otherwise provided in the Act, the particulars of the complaint are confidential. With the caveat that the point was not argued, it is not obvious to me that Mr. Smith's recusal application could be accommodated within the category of "*proceedings before a court arising out of or connected with a complaint...*" in s. 82(2), so as to presumptively require to be conducted in public. On first impression, at least, s. 82(2) appears to be directed to challenges to the process or findings under the Complaints Procedures. If that is so, it might nevertheless be argued that the objective in the Complaints Procedures to preserve confidentiality must yield to the overarching requirement that justice be seen to be done.

57. However, it seems to me that any issue as to the confidentiality of a complaint of misconduct against the judge evaporates when it is recognised that the Complaints Procedures are quite separate to the principles which the judge is required to apply in determining whether he or she should hear the case.

58. In principle, grounds for objection to a judge hearing a case might also be grounds for a complaint of misconduct, and vice versa, but the two are not coextensive. A valid ground for an objection – for example that the judge had previously condemned a party or one of his

witnesses as unreliable – might not on any stretch be regarded as judicial misconduct.

Similarly – and it is not necessary that I should hypothesise what it might be – an incident of misconduct on the part of the judge in the past which was witnessed by a litigant might not warrant the later recusal of the judge in a case in which the person who witnessed the earlier misconduct might be involved. That is not to say that a reasonable observer might not question the impartiality of a judge who had previously been the subject of a finding of misconduct on a complaint by one of the litigants in a case before him or her: the distinction being between a litigant who had previously merely witnessed an incident and a litigant who had previously made a complaint of judicial misconduct which had been upheld or acknowledged. Or, in principle, although there might never have been a complaint to the Judicial Conduct Committee, a litigant might be able to point to an instance of conduct of the part of a judge which would give rise to a reasonable apprehension that he or she would not have a fair hearing from an impartial judge.

59. The point is that a judge assigned to hear a case who is called upon to recuse himself or herself – or independently – must consider whether in all the circumstances an informed reasonable observer would have a reasonable apprehension that the litigant would not have a fair hearing from an impartial judge. For the reasons given, I do not think that the mere fact that a complaint has been made against a judge will be sufficient. Nor do I think that the fact that the circumstances relied upon in support of a recusal application have or have not been the subject of a complaint to the Judicial Conduct Committee is material to the assessment of the recusal application.

60. If the informed observer is to be taken to be aware of the existence of a complaint, it seems to me to follow that he must be taken to be aware of the content of the complaint. It is not appropriate that I would hypothesise what it might be, but it is not impossible to contemplate that the substance of a complaint of misconduct by a litigant might give rise to a

reasonable apprehension that the litigant would not have a fair hearing. Indeed, it seems to me that it is not impossible to contemplate that the substance of a complaint of misconduct made by someone other than the parties before the court and of which the parties might be unaware, might give rise to such a reasonable apprehension.

61. Going back to *Kenny*, a recusal application might be warranted – or the recusal of a judge of his own motion required – by the fact that the judge had previously said something which, if applied to the case in hand, would tend to show prejudice, hostility, dislike or prejudgment. It seems to me that in principle the existence of an unresolved complaint of such conduct which, if substantiated, could constitute judicial misconduct might, separately, be a ground on which a judge might be asked to – or might decide of his or her own volition that he or she should – recuse himself or herself. Critically, however, while on a recusal application, the judge will be entitled to say whether the circumstances are such as could give rise to a reasonable apprehension of bias, he or she will have no role in deciding the admissibility or substance of any complaint which has been made.

62. In the case in hand, the hypothetical reasonable observer would be aware of the fact and the terms of the complaints of judicial misconduct. He or she would be aware of the fact that the first complaint was ruled inadmissible by the Registrar of the Judicial Conduct Tribunal and of the fact that – as he was entitled to do under the Judicial Conduct Committee Procedures – Mr. Smith had applied for a review of that ruling by the Complaints Review Committee and that the review is pending. He or she would be aware of the fact and terms of the second complaint and that the assessment by the Registrar of its admissibility has yet to be made.

63. The test for objective bias being whether a reasonable person in the circumstances would have a reasonable apprehension that Mr. Smith would not have a fair hearing from an impartial judge, the mere fact of the complaints could not be the basis of any such reasonable

apprehension. If that were so, a frivolous complaint to the Judicial Conduct Committee would achieve what a frivolous application to the judge could not, and, on the authorities, should not.

64. In a case such as the present, it seems to me that – although they are separate – there is an inescapable tension between the Judicial Conduct Committee Procedures and the duty of the judge to whom a recusal application is made. On the one hand, the judge cannot possibly engage with the question of the admissibility and *a fortiori* the substance of the complaints. On the other hand the judge must decide whether the circumstances are such as to warrant recusal.

65. Mr. Smith’s primary submission was that by reason only of the existence of the complaints, Binchy J. and I should recuse ourselves and I have dealt with that. However, he also made the point that my colleague and I were aware of the nature of the complaints. If Mr. Smith’s recusal application could correctly have been regarded as “*proceedings before a court arising out of or connected with a complaint*” – within the meaning of s. 82 of the Act of 2019 – which, as I have said, I am inclined to doubt, he would not have been constrained by para. 28 of the Complaints Procedures from relying on the particulars of his complaints. Moreover, he may have misunderstood any requirement of confidentiality under the Complaints Procedures as precluding reliance on the facts on which his complaints were based in support of his recusal application. The recusal application fell to be dealt with on a stand-alone basis by reference to such evidence and argument as might be adduced and made in support of it, without any need to refer to the complaints. Whether the grounds for the recusal coincided or overlapped with the complaints was immaterial. In any event, as I have said, I think that notwithstanding any confidentiality requirement, he was, as I was, and the informed observer must be taken to have been aware of the terms as well as the fact of the complaints.

66. I therefore come to the question as to whether the terms of the complaint could have given rise to a reasonable apprehension of bias. This, I think, requires that I should contemplate separately whether, independently of the complaint, the facts disclosed could have given rise to the requisite apprehension, and whether the fact of the unresolved complaint in those terms could have given rise to the requisite apprehension.

67. Mr. Smith's complaint of 5th January, 2023 was that on 17th October, 2022 at the Court of Appeal sitting in Hugh Kennedy Court, Gandon Building, Four Courts, Dublin 7:-

“Mr. Justice Senan Allen (on his own accord; and as the Chairman of a biased panel of three Presiding Judges and as an active State Actor and participant in the Judiciary's on-going application of the racist bias, partiality, harassment, discriminatory treatment, penalisation and victimisation program; denial of service, effective access to justice and effective remedy) committed errors of facts and errors of law during the Court of Appeal Hearing and Determination of the Employment Equality Acts 1998 to 2011 matter: Olumide Smith -v- Cisco Systems Internetworking (Ireland) Limited [2022/95] on 17-Oct-2022 where Mr. Justice Senan Allen applied [/misapplied] different rules to comparable situations ... and applied [/misapplied] same rule to different situations and disproportionately failed to apply the rule of law in breach of: 1. Common sense [reference was made to a large number of cases] 2. Due Process and Due Procedure in relation to the provision of adequate time to properly hear my Case. 3. The principle of equal treatment, fair procedures, equality of arms, adversarial proceedings. Fair trial, a reasoned Decision, effective access to justice and access to an effective remedy on the grounds of racial or ethnic origin; and 4. [a long list of various rules of the Rules of the Superior Courts, provisions of European Council Directives, the Universal Declaration of Human Rights, the Charter of Fundamental Rights of the

European Union, the European Convention on Human Rights, the Constitution of Ireland, the Employment Equality Acts, 1998 to 2011, the Terms of Employment (Information) Acts, 1994 to 2001, and the Organisation of Working Time Act, 1997.”

68. Reference was made to e-mails to the Judicial Council of 16th December, 2022 and 19th December, 2022 and attachments to those e-mails which, it was said:-

“... presents the Court of Appeal’s atrocities on 16-Jul-2021, 06-May-2022, 21-Jul-2022, 29-Jul-2022, 07-Oct-2022 and 13-Oct-2022 that were extended into further acts of victimisation, unfair and discriminatory treatment on the ground of racial or ethnic origin and failure to apply the rule of law on 17-Oct-2022.”

69. Although not apparent from the complaint, it will be recalled that 17th October, 2022 was the date on which I sat with Collins and Binchy JJ. to hear Mr. Smith’s application for an extension of time to appeal against a judgement and order of the High Court (Noonan J.) of 23rd January, 2019 and 20th October, 2022 was the date of publication of the *ex tempore* judgment which I had delivered on 17th October, 2022.

70. Mr. Smith’s complaint was quite long and not at all easy to follow but what it boiled down to was that I had heard his motion for an extension and refused it. There was a bald – and I am bound to say wild – allegation of racist bias and so on on the part of the entire judiciary, in which it was asserted that I was a participant but the substance of the complaint – such as it was – was that I had committed errors of law and of fact in the decision I made on 17th October, 2022. There was no attempt to identify what the supposed errors might have been, but it is well established that objective bias cannot be inferred from legal or other errors made within the decision making process. Thereafter, the complaint comprises a litany of legal rules which it was asserted I had breached but there is no indication as to what those asserted breaches were.

71. The hypothetical reasonable observer will be taken to have known – and anyone else will be able to see at [2022] IECA 238 – that Mr. Smith’s application was considered and decided by reference to well established principles and that the decision had nothing to do with the application of different rules to comparable situations or Mr. Smith’s ethnic or racial origins.

72. If I were to assume that Mr. Smith invited me to recuse myself from hearing his appeal on the grounds set out in his complaint, I unhesitatingly find that there is nothing in what he said that could possibly give rise to a reasonable apprehension of bias in the mind of an independent and informed reasonable observer. Neither would a reasonable observer apprehend from the existence of the unresolved complaint to the Judicial Conduct Committee that Mr. Smith would not have a fair hearing from an impartial judge.

73. Mr. Smith’s complaint of 1st March, 2023 was that “*In or around 15-Jan-2023*” at the Court of Appeal, Four Courts, Dublin 7:-

“... there are Human Rights abuse issues with the constitution and composition of a prejudiced panel of three Presiding Judges that shall hear the substantive Employment Equality Acts 1998 to 2011 matter: Olumide Smith -v- Cisco Systems Internetworking (Ireland) Limited [The Court of Appeal Record Number: 2022/67] that comprises Mr. Justice Senan Allen who I filed prior Complaints against.”

74. The complaint went on to refer to “*two unbiased, impartial, independent and competent Findings of Primary Facts, reasonable Conclusions and reasoned Decisions that found against Cisco Systems Internetworking (Ireland) Limited*” in favour of Mr. Smith.

75. With no disrespect, Mr. Smith’s second complaint is even more difficult to follow but it is clearly directed to the composition of the panel assigned by the President of the Court of Appeal to hear this appeal, Record No. 2022/67. Apart altogether from everything else, the informed observer will have known that the assigned judges had no hand, act or part in their

assignment. Insofar as Mr. Smith relied on the fact that he had filed a prior complaint, that *per se* was not a ground on which I could or should recuse myself from dealing with an appeal which had been assigned to me. On one view, at least, the reasonable observer might conclude that Mr. Smith's measure of impartiality is a favourable decision.

Conclusion

76. In principle, the mere making of a complaint of misconduct by a judge to the Judicial Conduct Committee cannot have the effect of disqualifying a judge from hearing a case in which the complainant is involved. By the same token, the mere existence of such a complaint is not a basis on which the judge could or should recuse himself from hearing a case.

77. Insofar as Mr. Smith relies on the facts subtending his complaints as requiring me to recuse myself, there is no basis disclosed for any apprehension that he will not have a fair hearing from an impartial judge.

78. Similarly, insofar as Mr. Smith relies on the fact that the substance of his complaint is unresolved, there is no basis for any reasonable apprehension that he will not have a fair hearing from an impartial judge.

79. I decline Mr. Smith's application and would propose that the list judge be asked to assign the earliest possible date for the hearing of the appeal.

80. Whelan and Binchy JJ. have authorised me to say that they agree with this judgment.

