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HSC/13/9 DETERMINATION NO. HSD142  
(R-132077-H&S-13/JT, R-132075-H&S-13/JT)

SECTION 29(1), SAFETY, HEALTH AND WELFARE AT WORK ACT, 2005

PARTIES :

ROAD SAFETY AUTHORITY  
(REPRESENTED BY MC CANN FITZGERALD SOLICITORS)

- AND -

MR [REDACTED]  
(REPRESENTED BY IRISH MUNICIPAL, PUBLIC AND CIVIL TRADE UNION)

DIVISION :

Chairman : Ms Jenkinson  
Employer Member : Ms Cryan  
Worker Member : Ms Tanham

SUBJECT:

1. Appeal of Rights Commissioner's Decisions R-132075-H&S-13/JT - R-132077-H&S-13/JT.

BACKGROUND:

2. On the 23rd May, 2013 the Workers appealed the Rights Commissioner's Decisions in accordance with Section 29(1) of the Safety Health and Welfare at Work Act, 2005. A Labour Court hearing took place on the 14th August 2013 and was completed on 12th May, 2014. The following is the Determination of the Court:

DETERMINATION :

This is an appeal by [REDACTED] and [REDACTED] against the Decision of a Rights Commissioner in a complaint of penalisation made against the Road Safety Authority. The complaint was made pursuant to Section 27 of the Safety Health and Welfare at Work Act 2005 (hereafter referred to as the Act). The Rights Commissioner found that the complaint of penalisation was not well-founded.

For ease of reference in this Determination the parties are referred to as they were at first instance. Hence, [REDACTED] and [REDACTED] will be referred to as “the Complainants” and the Road Safety Authority will be referred to as “the Respondent”.

The Complainants maintained that the disciplinary action taken against them on 23<sup>rd</sup> April 2013 following their refusal to follow an instruction which they believed to be in contravention of the protection afforded them under the Act amounted to penalisation by the Respondent within the terms of Section 27 of the Act. The Complainants referred their claims under the Act to the Rights Commissioner on 24<sup>th</sup> April 2013.

### **Background**

The Complainants are employed by the Respondent as Statutory Driver Testers for 14 years and 22 years.

In 2011 as part of its action plan under the Public Service Agreement 2010-2014 (PSA) the Respondent made a number of proposals identifying areas to save costs, improve productivity and provide better customer service, in accordance with its remit under the Agreement. One of the efficiencies identified was the use of electronic hand held devices (“a *Tablet* ” device) to mark the driving test in real time as opposed to paper marking sheets.

At the time the Trade Union had concerns relating to its health and safety, training and the most appropriate device to be used. The matter became the subject of a Labour Court hearing in June 2012 where the Court recommended (Labour Court Recommendation No: 20309) that the Union should co-operate with the new technology and its use should be monitored by the Respondent to address any health and safety issues that may arise.

When the Complainants refused to attend training relating to use of the device during a driving test to capture marks they were subjected to disciplinary action and placed on administrative leave. This action by the Respondent they claim constituted penalisation within the terms of Section 27 of the Act.

The Court instructed the Union to address the legislative provisions of the Act under which its claim is submitted. Further submissions were furnished to the Court from both sides.

### **Summary of Complainant's Case**

Mr. Denis Rohan, IMPACT on behalf of the Complainants submitted the Respondent penalised the Complainants by taking disciplinary action against them when the

Complainants refused to follow an instruction which they believed was in contravention of protections afforded them under the Act. Mr. Rohan stated that despite the fact that difficulties with the use of the device in certain circumstances were brought to the Respondent's attention, it proceeded to introduce the device into driver testing without addressing these difficulties.

Mr. Rohan stated that the Complainants had no objection to the introduction of such technology provided the necessary conditions and standards were met. However, they had a difficulty using the device in a moving vehicle because of safety concerns identified by both vehicle manufacturers and the "Tablet" manufacturer, i.e. not to place any object between the person and the vehicle airbag. On Thursday 18<sup>th</sup> April 2013 the Complainants were requested by management to use the hand held device in a moving vehicle as part of a training exercise. They refused to do so due to the safety concerns. Management directed them to undertake the training arranged and on refusing to do so advised them they were being placed on suspension with immediate effect pending a meeting under the Disciplinary Procedure as set out in the Civil Service Disciplinary Code.

The Complainants claimed that they were summarily suspended from duty with pay for refusing to carry out a reasonable instruction to complete training in accordance with Section 13 (1)(f) & (g) of the Act. The Complainants were issued with letters dated 23<sup>rd</sup> April 2013 informing them that they had been issued with written warnings under Stage 2 of the Civil Service Disciplinary Code for failure to obey an allegedly reasonable instruction to complete its training programme for its new Electronic Data Capture (EDC) system including its in-car familiarisation module.

They were also informed that they were expected to resume duty that same day and agree to follow reasonable instruction, otherwise further disciplinary action up to and including dismissal would ensue.

Mr. Rohan submitted that by the actions it took the Respondent failed to take account of the protection afforded by the Act whereby protection is provided to employees who have legitimate concerns regarding the use of a piece of equipment which they believe is unsafe.

Mr Shay Fleming B.L. on behalf of IMPACT stated that the Complainants raised strenuous and objectively justifiable health and safety concerns with the Respondent in good faith setting out why they should not be required or instructed to use this "Tablet" device while supervising driver applicants during live road tests. He submitted that the Respondent's imposed system of work is inherently unsafe. Mr Fleming maintained that the risk assessment carried out by Respondent failed to address the "Tablet" manufacturer's and the vehicle manufacturers' safety warnings.

He said that while the Complainants have indicated their willingness to embrace the introduction of this new technology as part of their work., they have serious health and safety concerns in certain circumstances and specifically when they are examining driving test applicants while vehicles are being driven by test applicants on public roads, where both the Tablet manufacturer's and the vehicle manufacturer's specific warnings warn against their use near or in an air bag deployment area.

The vehicle manufacturers refer to hazard and risks consequent on the placing of any persons, pets, objects or other items in the space between the passenger seat occupant and the deployment area of a vehicle's airbag due to the real possibility of injury to the passenger seat occupant and others when airbags inflate rapidly. Therefore, the Complainants informed the Respondent of their reasons for not participating in the "in-car" part of the Tablet training and invoked the provisions of Section 13(1)(a) of the Act in support of their action.

Section 13(1)(a) requires the Complainants as the Respondent's employees *inter alia* to *"take reasonable care to protect his or her safety, health and welfare and the safety, health and welfare of any other person who may be affected by the employee's acts or omissions at work. "*

Mr Fleming submitted that the Respondent either ignored these warnings completely or alternatively, failed to investigate the validity or adequacy of the warnings, in any event he maintained that the Respondent had failed to make any enquiries with the manufacturers thereby ensuring that the system of work being imposed on the Complainants was safe, so far as is reasonably practicable.

Mr Fleming submitted that the Respondent penalised the Complainants contrary to Section 27(3) (a) (b) and (c) of the Act for:-

- (a) acting in compliance with Section 13(1)(a) of the Act; and / or
- (b) for exercising their right to invoke Section 13(1)(a) of the 2005 Act; and / or
- (c) for complaining to, confronting and challenging the Respondent regarding the "Tablet" manufacturer's warnings and the various vehicle manufacturers' warnings regarding the placing / using articles in the deployment area of airbags.

Mr Fleming submitted that the Respondent's reaction to the Complainants' refusal to participate in the 'in-car' familiarisation programme without their concerns being addressed was a knee-jerk reaction by the Respondent for the sole purpose of penalising them. He said the Complainants had a legitimate expectation that the Respondent would conduct reasonable and proportionate investigations with the necessary suppliers, vehicle manufacturers or their representative organisations in order to establish the validity or otherwise of the Complainants' claims.

Mr Fleming contended that notwithstanding that the Respondent's Director of Corporate Services summarily suspended both Complainants on 18<sup>th</sup> April 2013, this same Director nonetheless presided over the disciplinary hearings, assumed the roles of the Respondent's complainant, investigator, prosecutor and independent decision maker and imposed reprimands by way of written warnings and caused them extreme embarrassment by frog-marching them from the Respondent's headquarters. The Director also had a real interest in ensuring that the time line for the introduction and implementation of the new Electronic Data Capture system would not be adversely affected by the Complainants' invoking and exercising of their rights under Section 13 of the Act.

Mr Fleming submitted that the use of the Respondent's "Tablet" device as a piece of work equipment in the passenger seat of a moving vehicle is prohibited by

EU Directives 89/655/EEC, 89/391/EEC and 90/270/EEC and contravenes the provisions of the Safety, Health and Welfare at Work (General Applications) Regulations 2007 [S.I. 299 of 2007]. Consequently, the Respondent's insistence on the Complainants using such a device in that environment is unlawful.

Mr Fleming maintained that the Respondent had failed to prepare a statutory risk assessment which considered and / or incorporated the "Tablet" manufacturers and vehicle manufacturers' warnings regarding the placing of articles in the deployment area of airbags.

Mr Fleming submitted that notwithstanding there have been no recorded accidents to date involving the use of the Respondents new Electronic Data Capture system, the fact that such an event has not yet presented itself cannot rule out any such foreseeable event occurring in the future. He stated that while the deployment of an airbag as a result of a drive test collision is not recorded in employer incident reports, there was one US reported case (*CIREN Case Number 857078152*) which occurred in August 2004 in which a driver suffered a fractured bone in her right hand probably as a result of loose objects in the vehicle. He also referred to the case of *Kevin Doyle - v - Electricity Supply Board [2008] IEHC, 88, Quirke J.* found for the cable joiner plaintiff in circumstances where the Plaintiffs claim was the first of its type for the work equipment complained of notwithstanding that the tool in question had been sold in sixteen countries around the world without any report of a similar injury resulting from its use.

Mr Fleming held that the Respondent's allegation that it disciplined the Complainants for failing to comply with a reasonable instruction is wrong and is itself unreasonable, inappropriate and unsafe in all the circumstances.

He contended that while an employee may be disciplined or dismissed for refusing to comply with a reasonable and lawful order, or to carry out a reasonable and lawful task, it is submitted that if an instruction is unreasonable, unlawful or illegal, a refusal to carry it out will not give rise to a fair dismissal c.f. *Brown v McNamara Freight UD 745/1987*.

Mr Fleming stated that in any case of alleged insubordination, an employee's alleged insubordination must be examined fairly and impartially to ascertain if in the first instance, the subject matter of the alleged insubordination is the subject matter of an issue currently on the Respondent's work or project agenda, or whether an objective safety consideration exists. In support of his contention, Mr Fleming cited the case of *Gunners Barlow and Hanlon v Minister for Defence 2007* ; the complainants were members of the Defence Forces who were ordered to remove rubbish in the vicinity of their barracks. The complainants said that the latex gloves provided to them were inadequate. While they did not refuse to carry out the work, they sought appropriate personal protective equipment (PPE) for the work involved and any risk assessment which the military authorities had carried out and argued that the gloves issued were appropriate to the task of routine litter collection and that the soldiers involved were uniformed in a layered "combat" smock or tunic, trousers and combat boots, all of which were considered PPE. The Rights Commissioner found that the work in question "could have been dangerous." The

military authorities had carried out a risk assessment but they failed to show it to the soldiers. The Rights Commissioner found that it was the employer's failure to show the risk assessment that constituted a breach of Section 27 of the 2005 Act and awarded the gunners compensation each in the amount of €500.

In the instant case Mr Fleming submitted that the Complainants consider that they have acted honestly, reasonably and in good faith in refusing to obey the Respondent's instructions for raising relevant health and safety issues and taking appropriate action to avoid their own health and safety and that of third party driver applicants being put at risk.

Mr. Fleming cited a number of Labour Court cases in support of his contention, namely:

*HSE Dublin North East – v – Annamay Tiernan Labour Court Determination HSD088* where the complainant, an Emergency Medical Technician (EMT) was assigned to an ambulance station in Cavan. On 10<sup>th</sup> August 2006 she reported for night duty. The second EMT who was due to work with her was out sick and it had not been possible to secure a replacement EMT. The complainant was told she would have to work alone that night. She received a call from ambulance control to collect a stable patient from Navan and transfer the patient to Drogheda. The complainant refused and was suspended. The following day she was asked to attend to a Stage Two disciplinary hearing. On the 14<sup>th</sup> August 2006, the complainant contacted the Health and Safety Authority and made a complaint. On the 18<sup>th</sup> August 2006, the disciplinary hearing was upgraded to a Stage Three hearing, carrying a penalty, if upheld, of a final written warning. On 27<sup>th</sup> August 2006 the complainant was given a final written warning, suspended without pay for the duration of her shift on the night in question and her position on a Higher Diploma Course in Emergency Medical Technology was suspended for a period of nine months. She appealed without success.

She claimed the disciplinary hearing and punishment amounted to penalisation under the Act. The respondent submitted that a sole operator on an ambulance is not unusual and that the complainant was not put on the emergency rota that night because she was working alone. The respondent submitted that adequate structures were in place to support her. The respondent argued that having been given a legitimate instruction and having been reassured as to her concerns the complainant's refusal to comply amounted to a disciplinary issue which was entirely a matter for the HSE. Ultimately the Court found that the complainant should have agreed, under protest if desired, to work as instructed on the night in question. The Court held that:

*"in reaching a decision on whether or not the complainant was victimised for expressing safety concerns, the Court must, under Section 27(6) of the Act, take account of all the circumstances and the means and advice available to the complainant at the relevant time.*

*The Court finds-*

- (a) That the complainant should have agreed, under protest if desired, to carry out the transfer on the night in question, given the assurances she received.*
- (b) That her claim of penalisation over this incident is not sound and is not upheld*

*c) That having complained to the HSA, she had her disciplinary process raised from a Stage 2 to a Stage 3 between the date of her complaint to the HSA and the date of the disciplinary hearing.*

*d) That the disciplinary procedures of the HSE were at best uncertain and were misused in as much as the then existing procedure only allows a Stage 3 hearing to occur consequent on events which should be dealt with at Stage 2 of the procedure.*

*e) That (c) and (d) above constitute penalisation of the Complainant, within the meaning of Section 27(2) of the Act, for making a complaint as outlined in Section 27(3)(c) of the Act.*

*Finally, the Court considered that the appropriate award was one of compensation for penalisation and awarded Ms. Tiernan the sum of €5,000 in compensation for the breach of the 2005 Act by the Employer.*

***Paul O'Neill v Toni & Guy Blackrock Limited, Labour Court Determination HSD 095, 21 ELR, 1*** where the Court noted that it is clear from the language of Section 27 that in order to make out a complaint of penalisation it is necessary for a claimant to establish that the detriment of

which he or she complains was imposed “for” having committed one of the acts protected by subsection 3. Thus the detriment giving rise to the complaint must have been incurred because of, or in retaliation for, the claimant having committed a protected act. This suggested that where there is more than one causal factor in the chain of events leading to the

detriment complained of the commission of a protected act must be an operative cause in the sense that “but for” the claimant having committed the protected act he or she would not have suffered the detriment. This involves a consideration of the motive or reasons which influenced the decision maker in imposing the impugned detriment.

Mr Paul O'Neill (the complainant) was employed by the respondent at their hairdressing salon from 2001 to 2007 when he was dismissed. The complainant contended that his dismissal arose because he had raised certain issues relating to health and safety with the respondent, namely, complaints about the latex gloves used to protect his hands. The respondent stated that the complainant was dismissed for persistent lateness and other acts of misconduct. At first instance the matter came before a Rights Commissioner who rejected the employee's claim of penalisation by dismissal under s.27 of the Safety, Health and Welfare at Work Act 2005. He appealed to the Labour Court.

Mr Fleming stated that on the facts of *Tony & Guy*, the Labour Court noted that it had: -

*“...carefully considered all of the evidence tendered in this case. In many material particulars there was a significant conflict in the evidence of the claimant compared to that of Ms McGrath relating to the issuance of warnings and the subject-matter of those warnings. The Court is, however, satisfied that the claimant did make complaints concerning health and safety matters arising from the change in the quality of gloves provided by the respondent. The Court is also*

*satisfied that following on from those complaints the respondent appeared to take issue with the claimant in respect of employment related matters which had not previously been a source of difficulty.*

*It also appears to the Court that the respondent adopted a formalistic approach to the use of its disciplinary procedure and appeared to proceed, with inordinate haste, from one stage to the next until the point was reached where the claimant's employment was terminated. The whole exercise was characterised by an absence of procedural fairness. In these circumstances it is difficult for the Court to avoid the conclusion that the respondent, whether consciously or unconsciously, was proceeding with a predisposition that the claimant's employment should be brought to an end.*

*The Court has no doubt that there were other employment-related issues with the claimant, of which the respondent has justifiable cause to complain. Nonetheless, the Court is satisfied, as a matter of probability, that, were it not for his complaints regarding health and safety, those issues would not have resulted in his dismissal. Accordingly the Court must hold that the aforementioned complaints were an operative reason for his dismissal and that his complaint of penalisation has been made out."*

***Oglaigh Naisunta na hÉireann Teoranta – v – Michael McCormack Labour Court Determination HSD 115***

This decision involved a complaint by the Employee that his Employer had contravened Section 27 of the 2005 Act due to the Employer's failure / refusal to deal with his complaint of bullying in circumstances where he had made a health and safety complaint to his employer. At first instance, the Rights Commissioner held against the Employee.

The Court held that the changing of the lock on the door of the Complainant's office and the unrequested return of all personal items from the office to the Complainant was unquestionably ill judged. While the Respondent stated that they could not support this action and it was carried out without the knowledge of the CEO, it was however carried out by a Director of the Board who was fully aware of the Complainant's situation and the Respondent did not at any stage explain this action to the Complainant personally. Furthermore, the Respondent ignored the matter when it was raised by the Complainant's Solicitor in correspondence on two occasions. The Court found that the Respondent's conduct in relation to this incident must be regarded as a retaliatory act in response to the Complainant's complaint.

***Finglas Cabs Limited – v – Margaret Redmond Labour Court Determination HSD 1111***

The substance of the Complainant's claim was that following the making of complaints concerning the inappropriate and menacing behaviour of a work colleague towards her, she was placed on unpaid suspension. The Complainant alleged that this action constituted penalisation within the meaning of Section 27(3)(c) of the Act.

The Court held the view that placing the employee on unpaid suspension must be viewed as a severe disciplinary sanction in circumstances where she was refusing to have any dealings with a colleague who was abusive and where management were not



supportive of her attempts to resolve the situation. The Court held that this disciplinary sanction was in its view totally inappropriate in the circumstances.

The Court was satisfied, as a matter of probability, that, were it not for her complaints regarding health and safety, the refusal to carry out her duties would not have arisen and she would not have been placed on unpaid suspension. The Court held that the employee's complaints were an operative reason for the sanction taken against her and that her complaint of penalisation was made out.

*Stobart (Ireland) Driver Services Limited – v – Keith Carroll [Judgement of Kearns P. delivered on the 20th December 2013]*

This was the Employer's appeal to the High Court from the Labour Court's decision where the employee had claimed penalisation under Section 27 of the Safety, Health and Welfare at Work Act, 2005. The Employee had been employed as a truck driver and whose employment had been terminated following his complaint to his employer of being tired, having worked excessive hours and that he was unable to fulfil further driving duties assigned to him.

The High Court determined that:

*24. The respondent's employment was undoubtedly terminated in the immediate aftermath of his refusal to work and his representations that he was too fatigued to drive. Penalisation under s.27(3) of the Act of 2005 states that "an employer shall not penalise or threaten penalisation against an employee for (a) acting in compliance with the relevant statutory provisions, (b) performing any duty or exercising any right under the relevant statutory provisions, (c) making a complaint or representation to his or her safety representative or employer or the Authority, as regards any matter relating to safety, health or welfare at work".*

*25. Section 13 as a whole sets out the employee's duties, and its ethos would, in the context of this case, oblige a driver to have regard for the safety and care of not just himself but also those who an employee such as he may meet if driving a heavy goods vehicle in a fatigued state. In fact the employee must under s.13(h)(i) "report to his or her employer or to any other appropriate person, as soon as practicable...any work being carried on, or likely to be carried on, in a manner which may endanger the safety, health or welfare at work of the employee or that of any other person".*

*26. There is no requirement in the Act to report any complaint via a grievance procedure. The Act specifically states "report...as soon as practicable". Thus the respondent in this case can be deemed to have made his complaint when he reported that he was too tired to drive. There is no requirement that he be "at work" in the strict sense of the term when he does so, so long as the work is "likely to be carried on". To limit an employee's ability to report a complaint to working hours would greatly inhibit the application of the Act. If, for example, an employee*

*was located in an open plan office and wished to complain discreetly that work was being carried out in an unsafe manner, it would be an unreasonable construction of the Act to limit his ability to make his complaint to working hours or the narrow confines of the place of work.*

.....

*42. In the present case the claimant alleges he was penalised under s.27 for a complaint made pursuant to s.13 of the Act of 2005. It is not submitted that he was unfairly dismissed under the Unfair Dismissals but that he was penalised due to a complaint made pursuant to s.13 of the Act of 2005 and this resulted in a penalisation by way of dismissal as per s.27 of the Act of 2005. The Act at s.27(2)(a) notes that penalisation can be “suspension, lay-off or dismissal (including a dismissal within the meaning of the Unfair Dismissals Acts 1977 to 2001), or the threat of suspension, layoff or dismissal”. It includes dismissal under the Unfair Dismissals Acts but does not in any way limit it to dismissal under that Act.*

**In its decision, the High Court stated: -**

*44. Looking first at the original Council Directive 89/391/EEC of 12 June 1989 on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work and at Council Directive 91/383/EEC of 25 June 1991 on Measures to Improve the Safety and Health at Work of Workers with a Fixed-Duration or Temporary Employment Relationship which set down procedures to improve the safety of workers and their rights, it is notable that the ethos behind the Acts of 1989 and 2005 is to ensure the health and safety of employees and those they may encounter in the course of their work.*

*45. There is no issue as to fair procedures. The caselaw as discussed above means that in the circumstances of this case ample reasons were given in the determination from the Labour Court and it is not a mandatory requirement that a grievance procedure be followed for a complaint to have been deemed to have been made.*

*46. Thus on the application of s.13 of the Act of 2005 the respondent in the case before the court acted appropriately in reporting his fatigue. He was subjected to penalisation as described by s.27 of the Act of 2005. He made a complaint of the risk to his safety and that of others if he were to drive in a fatigued state and was dismissed the following day.*

*47. Hence, the Court would dismiss the appellant’s appeal and uphold the determination of the Labour Court.*

### ***Summary of the Respondent’s position***

**Mr. Peter Shanley, B.L., instructed by McCann Fitzgerald Solicitors, on behalf of the Respondent, stated that while it is accepted that disciplinary action had been taken against the Complainants he denied that penalisation had occurred within the terms and meaning of Section 27 of the Act. He said that the disciplinary action taken against**

the Complainants was due to their refusal to comply with a reasonable instruction to participate in training which was given in accordance with the Department of Finance Circular 14/2006: Civil Service Disciplinary Code revised in accordance with the Civil Service Regulation (Amendment) Act 2005. Therefore he submitted that it was not related to any of the matters specified in Section 27(3) of the Act in respect of which 'penalisation' is prohibited, there was no causal connection between the disciplinary action and protected acts under Section 27(3). He said that the training was related to the implementation of an electronic data capture device by the Respondent in order to facilitate the marking of driver tests.

Mr. Shanley referred to Labour Court Recommendation No: 20309 which found in favour of the Respondent's proposal to introduce the hand held devices with due regard to health and safety concerns during implementation.

In this instance the Complainants failed and refused to attend the necessary training relating to the electronic data capture device. He stated that it was also noteworthy that pursuant to Section 13(d) of the 2005 Act employees have an obligation to co-operate with their employers so far as is necessary to enable their employers to comply with the relevant statutory provisions. No such co-operation was forthcoming from the Complainants.

Mr. Shanley referred to Section 13(f) of the Act whereby an employee is obliged, while at work to:

*"attend such training and, as appropriate, undergo such assessment as may reasonably be required by his or her employer or as may be prescribed relating to safety, health and welfare at work or relating to the work carried out by the employee".*

Mr. Shanley stated that the Respondent is satisfied that there was, and continues to be, no objective basis for the position adopted by the Complainants. He said that as part of the introduction of the new technology risk assessments had been conducted by relevant competent persons ratified as appropriate by the Health & Safety Authority and the comprehensive training scheduled for the Complainants complied with its obligations under the Act and all associated Regulations. A number of 'Proof of Concept' trials of technology, including, in 2009, the analysis of the motion Tablet were conducted.

The Respondent consulted with the Health and Safety Authority on a number of occasions to ensure it met its obligations in relation to the Act. Furthermore the Driver Testers also made a complaint concerning the project to the Health and Safety Authority on the 12<sup>th</sup> October 2012. The complaint was rejected by the Health and Safety Authority on 22<sup>nd</sup> February 2013 who indicated that *"the approach adopted by the Road Safety Authority in relation to the introduction of the electronic data capture technology in the context of the Safety Health and Welfare at Work Act 2005, both in relation to the preparation of the risk assessment and employee consultation seems reasonable"*.

By way of background to the case Mr. Shanley stated that in 2011, the Respondent commenced a public procurement process in accordance with EU procurement legislation, seeking an electronic data capture solution to replace the current use of the

paper based marking sheet on driving tests. On evaluation of the procurement, a solution was identified which consisted of a Samsung Galaxy 10.1" Tablet, design of the device and a support contract. The new technology reduces the size and weight of the approved method of recording test results and the new Tablet offers improved ergonomics.

The Respondent planned to invest €1,400,000 over three years on this project. In January 2011, the Respondent commenced discussions with the Driver Tester's trade union, IMPACT, regarding the implementation of such a device. IMPACT expressed their health and safety concerns in relation to introducing such a device, and prior to procurement, the Respondent commissioned an assessment by an independent ergonomist to assess the risk posed comparing the existing paper based system, the use of a Tablet device, and the use of an electronic pen. Having found no major issues with any of the options, recommendations made from that report were followed in the various stages of the project. The assessment was conducted by Leyden Consulting Engineers and entitled *"Ergonomic and Safety Evaluation of Proposed Methods of Recording Test Results in the Road Safety Authority"*. This report was presented to the Health and Safety Committee, who indicated that the report was comprehensive and agreed that its contents were accurate.

Mr. Shanley stated that the risk assessments carried out show that the risks associated with the role of the Driver Tester in the capture of driving test data in the vehicle have been reduced through the introduction of this new technology and that the Respondent is meeting its legislative obligations.

Mr. Shanley told the Court that in addition to engaging with IMPACT the Respondent engaged proactively with staff in order to gain input from them and keep staff informed of the various stages of the project.

Following continued engagement with IMPACT on the implementation of this and other efficiencies and customer service improvements, engagement at the LRC failed to reach agreement and the matter was referred to the Labour Court by IMPACT and the Court issued its Recommendation on 25<sup>th</sup> June 2012. Following the Labour Court Recommendation the Respondent engaged proactively with staff on the implementation of the device.

The risk assessments were presented to the Health & Safety Committee and discussion took place resulting in further suggestions for consideration and specifically the risk assessment process. The Respondent issued a consultation document to staff and requested their submissions on any aspect of the design, function and use of the device, entitled, *"Consultation Document, Electronic Data Capture Solution, Driver Testing Section, December 2011"*.

The key risk assessment document in relation to the risks associated with airbag deployment is the Telefonica Ireland report dated 30 November 2012 which is entitled *"Health and Safety Review of Electronic Recording of Driver Testing using Galaxy Tab and Bespoke Software for the Road Safety Authority"*.

Section 5 of the Telefonica Ireland report is headed *'Danger of Loose Objects in the*

*Case of Impact and Effects in the Event of Airbag Deployment'*. The report notes that a concern has been raised in relation to the effect of the airbag becoming activated and the Tablet device impacting the drive tester under the force of the airbag explosion. The report then analyses the frequency of injury caused by loose objects in a vehicle on impact and the rate of accidents/incidents that occur during driving test. The Telefonica Ireland report concludes as follows:

*"Given the low frequency of incidents during Driver Testing that result in injury and the low frequency of injuries reported as arising from loose objects in collisions reported in the CIREN and NASS databases, it can be inferred that the circumstances of any incidents which would result in injury to an employee from these factors would be "unusual, unforeseeable and exceptional" and given that implementation of control measures would be disproportionate to the risk encountered and may result in other unforeseen hazards arising this risk is as low as is reasonably practicable".*

It is clear that an objective and independent analysis of risk in relation to airbag deployment was undertaken on behalf of the RSA prior to any employees being asked to make use of the Tablet device during driving tests. Mr Shanley argued that it cannot therefore be argued that the RSA has somehow disregarded and/or failed to take cognisance of this issue in its deliberations relating to the use of the Tablet device by Driver Testers. He said that this report was made available to all staff members including the Complainants.

Mr. Shanley referred to the fact that this type of technological solution operates in other jurisdictions including the United States of America, with New York State DMV, who have since 2007 conducted in excess of 2,000,000 'Road Skills Tests' (the equivalent to the Irish driving test) using this technology.

With reference to the legal principles involved, Mr. Shanley stated that the Complainants appear to suggest that an alleged failure by the Respondent to comply with the general health and safety obligations imposed upon employers under the Act amounts to penalisation within its terms. He said that the Respondent does not accept that there any breaches of the Act in relation to the introduction of this new system of work, there have been ten separate risk assessments carried out and the risk rating has in fact been reduced by the introduction of the "Tablet". Furthermore, he referred to Labour Court decisions which found that there can be no connection between alleged general breaches of the Act by an employer and any act on the part of an employer which would fall to be regarded as 'penalisation' within the meaning of Section 27(3) of the Act. He held that in order to succeed in a case of penalisation the Complainants must not only establish that they suffered a detriment within the type referred to in Section 27 but that the detriment was imposed or was in retaliation for them acting in a manner referred to in Section 27(3). An alleged general failure to comply with the Act does not fall within the ambit of Section 27(3) of the Act.

Consequently, Mr. Shanley held that that an allegation of a breach of the general provisions of the Act is not sufficient to ground a claim for penalisation under Section 27. The Complainants must go further and show that any detriment suffered was because of, or was in retaliation for them having taken action of a type referred to in

Section 27(3) of the Act. He said that there is simply no evidence upon which to base a claim that the disciplinary action taken by the RSA was because the Complainants asserted any rights under Section 27(3) the Act. If the Complainants allege a general failure on the part of the Respondent to adhere to the Act then their remedy rests elsewhere; outside the terms of Section 27 of the Act.

Mr. Shanley stated that this issue was determined conclusively in the case of *Patrick Kelly T/A Western Insulation v Algirdas Girdziusi.*, the complainant suffered two broken arms and needed a number of stitches after falling off a ladder which was not properly secured. He submitted that the respondent company had failed to comply with certain statutory duties, and that he did not receive any proper health and safety training in a language he could understand. He claimed that this in itself constituted penalisation within the meaning of section 27 of the Act. The Labour Court found that there was no evidence of any causal connection between the alleged omissions of the respondent and any act on the part of the complainant of a protected type referred to in section 27(3) the Act. It held that the complaint was entirely misconceived and noted that:

*"In the instant case the Court makes no finding in relation to the alleged contraventions of the Act referred to by the representative of the Claimant. If there were any such contraventions the remedy is provided elsewhere in the Act and does not come within the jurisdiction of this Court. There is, however, no evidence of any kind to establish any causal connection between the alleged omissions relied upon and any act on the part of the Claimant of a type referred to at subsection (3). Indeed the import of the submissions made on behalf of the Claimant was that it was unnecessary to establish such a connection. That submission ignores the plain meaning of S27 when read as a whole".*

Mr. Shanley submitted that the Complainants have not shown that the purported invocation of Section 27(3) rights were an operative consideration leading to the disciplinary action that was taken by the Respondent. This is particularly so in circumstances in which health and safety concerns relating to the Tablet device had been raised by employees as far back as early 2011 without any sanction taken by the Respondent against such employees. Mr. Shanley submitted therefore that the decision to commence disciplinary action was based solely on the Complainants' failure to adhere to and follow a legitimate instruction to attend training and was not related, to any extent, to the matters set out in Section 27(3) of the Act.

Mr Shanley submitted that all of the evidence points to the fact that the disciplinary action taken by the Respondent was based on a failure by the Complainants to adhere to a reasonable instruction and, as such, was wholly unrelated to any of the matters set out in Section 27(3) of the Act. Disciplinary action was not related to a complaint regarding health and safety or the purported exercise of rights under Section 27(3) of the Act but was, rather, based on the failure to obey a clear and reasonable instruction issued by the Respondent to attend prescribed training.

Mr. Shanley referred to the case *Toni & Guy* where the Court provided an overview of the law relating to Section 27 of the Act and where the burden of proof rests in that regard.

*"This matter is before the Court by way of a complaint of penalisation within the meaning ascribed to that term by s. 27 of the Act of 2005. Hence, the Court is not concerned with the fairness of the dismissal per se. Its sole function is to establish whether or not the dismissal was caused by the Claimant having committed an act protected by s.27(3) of the Act.*

*It is clear from the language of this section that in order to make out a complaint of penalisation it is necessary for a claimant to establish that the detriment of which he or she complains was imposed "for" having committed one of the acts protected by subsection 3. Thus the detriment giving rise to the complaint must have been incurred because at or in retaliation for, the Claimant having committed a protected act. This suggested that where there is more than one causal factor in the chain of events leading to the detriment complained of the commission of a protected act must be an operative cause in the sense that "but for" the Claimant having committed the protected act he or she would not have suffered the detriment. This involves a consideration of the motive or reasons which influenced the decision maker in imposing the impugned detriment."*

**In terms of the applicable burden of proof, the Court held:**

*"Having regard to these considerations, it seems to the Court that a form of shifting burden of proof similar to that in employment equality law should be applied in the instant case. Thus the Claimant must establish, on the balance of probabilities, that he made complaints concerning health and safety. It is then necessary for him to show that, having regard to the circumstances of the case, it is apt to infer from subsequent events that his complaints were an operative consideration leading to his dismissal. If those two limbs of the test are satisfied it is for the Respondent to satisfy the Court, on credible evidence and to the normal civil standard, that the complaints relied upon did not influence the Claimant's dismissal."*

**Mr. Shanley contended it was clear that the decision to commence disciplinary action arose from their refusal to comply with a reasonable request to participate in the car familiarisation while they were attending the EDCD (tablet) training programme. It was for this refusal to comply with a reasonable instruction that the disciplinary process was commenced (and not because of any purported invocation of rights under Section 27(3) of the Act).**

**Mr Shanley submitted that any actions by employees to protect their health and safety under the cloak of Section 13 must be "reasonable", Employees cannot simply drop tools on the basis of a bald assertion that they are doing so in order to protect their health and safety: there must be a qualitative analysis of the reasonableness of the employees' actions.**

**In support of this contention Mr. Shanley also cited *HSE Dublin North East - and - Annamay Tiernan* . He said that whilst, ultimately, in this case the Court did find that the respondent penalised the complainant for making a complaint to the Health and Safety Authority (by raising the disciplinary hearing from a Stage Two to a Stage Three hearing) it is noteworthy that the first ground of 'penalisation' raised by the**

complainant failed.

Consequently the claim for penalisation made by the complainant in relation to action taken by her employer following her refusal to carry out an instructed task was not upheld. Mr. Shanley submitted that this case is good authority for the proposition that having been given a legitimate instruction and having been reassured as to concerns that had been raised over some period of time, the Complainants in the current case should have complied with the instruction issued by the Respondent to attend training (even under protest if necessary). Indeed it was specifically indicated by the Respondent to the Complainants that they could present for work under protest and, in such circumstances, a written warning would not issue. Mr. Shanley submitted that any claim for penalisation arising from the disciplinary action which followed a refusal to carry out a legitimate instruction is not sound and should not be upheld.

Mr Shanley also held that the Court ought to consider all of the relevant circumstances in determining whether or not the actions of the employees were "reasonable" as required by Section 13(1)(a). therefore the Court ought to consider what efforts the employer made to assuage the concerns of the employees. He referred to how the Labour Court has analysed the reasonableness of the actions of an employee in that context is the case of *Gernord Ltd t/a Gerflor - and - A Worker* Labour Court Determination HSD094 the complainant alleged that he was penalised in terms of Section 27(2)(a) of the Act when he was suspended from work in breach of Section 27(3)(c) and (f) of the Act. Following the discovery of areas where asbestos was present in ceilings in the workplace and where a fall of this material had occurred, the Company engaged a specialist safety company with qualifications in this field in order to contain the problem and secure the workplace, ensuring the safety of workers. The situation was explained to shift leaders, shop stewards and a full-time Trade Union Official. An agreement was received where the Company's plans to secure the area were accepted and the employees returned to work. The complainant was absent from work. He expressed misgivings about working in the affected area when assigned there on his return to work. He met individually with the safety specialist engaged by the Company, but was not convinced of his safety, especially in the context of having a registered disability.

The Company again requested that he return to work in the affected area, which had now been declared safe, and to do as his fellow-employees had following the clean-up and the advice of the safety consultant. He refused to do so and was suspended for two days in accordance with the terms of the Company/Union Agreement. He claimed that this constituted penalisation within the terms of Section 27 of the Act. The Company contended that the complainant was disciplined for failing to obey a legitimate instruction where all reasonable steps had been taken to ensure the safety of all workers and where an agreement had been entered into by the employer with the complainant's Trade Union to effect a resumption of work.

The Court reviewed the submissions of the parties and was satisfied that the Company took all reasonable precautions and actions to present a safe workplace to its employees. Furthermore, it agreed to provide the complainant with an individual interview with the safety consultants in order to allay his fears. In this context, and in the context of Section 8(2)(e) and (g) of the Act which say that the employer's duty extends to-



*(e) "providing systems of work that are planned, organised, performed, maintained and revised as appropriate so as to be, so far as is reasonably practicable, safe and without risk to health ".*

*(g) "providing the information, instruction, training and supervision necessary to ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees".*

The Court was of the view that the complainant should reasonably have acted under the legitimate instruction of his employer and returned to work. The Court, therefore, found that the complainant was suspended for failing to obey a legitimate instruction and was not penalised under the terms of Section 27(3) of the Act. Mr. Shanley submitted that the exact same principles apply to the instant case.

### *Witness Testimony*

Mr. Fleming requested both Complainants to give evidence. The Court heard the evidence of [REDACTED], following which it was confirmed for the Court that there was no requirement to hear [REDACTED] account of the events as his evidence would be similar to [REDACTED].

Mr. Shanley did not call any witnesses.

[REDACTED] evidence.

[REDACTED], one of the Complainants in this case, told the Court that he has been a Driver Tester for 22 years. He was also Chairman and Secretary of IMPACT within the Respondent organisation for fifteen years. Prior to the introduction of the "Tablet" he had operated a paper based system and had used one of the Respondent's folders. He said that when airbags were introduced into cars he discontinued with the folder and used only a light paper system. He said that when the Respondent commenced its introduction of the Tablet system he had concerns regarding its use in a moving vehicle. He participated in familiarization training on how to use the Tablet.

He said that the first occasion he raised his concerns was on 15<sup>th</sup> April 2013 when he spoke to Ms. Geraldine Browne, Ms. Catriona Coyne and the Training Officer. Ms. Browne informed him that she had completed risk assessments on the "Tablet", however, the witness said that this did not address his concerns to his satisfaction. He said that he specifically mentioned the car manufacturer's and the Tablet manufacturer's warnings. Ms. Browne explained that the assessment she conducted covered these concerns. He said that he was not happy with the risk assessments. He had read her assessment, which he said dealt with loose objects, but it was not to his satisfaction. She told him she could let him see the assessment she carried out, however he declined. He said that he had also read the Health & Safety Authority's report but was not satisfied that it covered his specific concerns.

When he informed his Training Officer that he was refusing to carry-out the in-car training on 18<sup>th</sup> April 2013, he was referred to Mr. Eugene Beatty. He told him that in

accordance with the Act, he was refusing to carry out the training. He was then referred to Ms. Coyne, Head of Driving Testing. Ms. Coyne asked him the reason for his refusal to carry out the training he replied that it was due to health & safety concerns. She indicated that if he continued to refuse to undertake the training instruction that she would have to refer him to Mr. Simon Buckley, Director of Corporate Services. She gave him fifteen minutes to think about it. He responded that he was not prepared to change his mind and he was duly referred to Mr. Buckley's office. The witness said that [REDACTED] was similarly referred.

The witness said that when he got to Mr. Buckley's office, Ms. Winters, HR was also present.

At the meeting the witness said that Mr. Buckley asked him if he was refusing to obey a reasonable instruction, he replied that in accordance with the Act he felt that it would be detrimental to his health and others to operate the Tablet in a moving vehicle. The witness said that the meeting got heated as Mr. Buckley would not accept his explanation. Mr. Buckley told him that he had fifteen minutes to think about his situation and make up his mind about what he was doing. When he refused Mr. Buckley informed him that he was suspended. He was asked to leave his Tablet and badge and he left. Mr. Buckley escorted both himself and [REDACTED] from the building.

The following day, on Friday 19<sup>th</sup> April 2013, a meeting under the Civil Service Disciplinary Code was set up in a local hotel. The Complainants attended and were represented by Mr. Rohan, Mr. Buckley and Ms. Winters were present. The witness said that he handed a letter to management which referred to the Tablet manufacturer's and vehicle warnings. Mr. Buckley told him that if he was prepared to turn up for training on the following Monday that everything would be OK, there would be no suspension, no warnings issued, all would be forgotten about. He told the witness that Ms. Browne had covered all the risks in the assessments she carried out, including the issue of airbag deployment. However, the witness said that he was still worried about the risk and refused the offer.

The witness said he received a letter dated 23<sup>rd</sup> April 2013 informing him that he was:-

*"being issued with a written warning under Stage 2 of the Civil Service Disciplinary Code, Circular 14/2006, for failure to obey a reasonable instruction to complete the training programme for Electronic Data Capture (EDC) including in the in-car familiarization module."*

The witness said that he contacted his union official when he received this letter and it was decided to refer a claim to the Rights Commissioner under the Act.

In cross-examination the witness accepted that early in 2011, health and safety issues regarding the introduction of the Tablet were raised by both the trade union and by the Health & Safety Committee. These issues related to tiredness, cancer risks, fatigue, heat generation, pregnancy etc., without any disciplinary issues ever arising.

The witness said that he had concerns about using a loose object in a moving vehicle; he said that the folder he previously used was not a loose object as he held it in his hands

and therefore had no concerns about using it, although he ceased using the folder about two years ago.

The witness confirmed that he is now using the Tablet.

He accepted that a detailed letter on 22<sup>nd</sup> February 2013 was sent on behalf of concerned employees by a representative of the Health & Safety Committee to the Health & Safety Authority outlining their concerns. He said that the Health & Safety Authority responded that everything was in order, without going into the specifics of the warnings referred to.

In response to questions from the Court the witness acknowledged that Ms. Browne's risk assessment report specifically dealt with airbag deployment in her risk assessment of the Tablet. He accepted that he had not ceased using the folder when airbags were introduced into cars; he affirmed that he ceased the practice in 2011 and had used the folder until then.

*Objection by Counsel for the Complainants*

Mr. Fleming had difficulty with the fact that Mr. Simon Buckley and Ms. Geraldine Browne were not called on behalf of the Respondent as he wished to cross-examine them. Mr. Fleming requested the Court to call both people as witnesses.

Mr. Shanley on behalf of the Respondent, stated that he did not intend to call witnesses as there were no facts in dispute.

The calling of witnesses is a matter for the parties and not the Court. It is a matter for the Respondent to decide what evidence to tender, as it is a matter for the Complainants. Records of all events, including minutes of the meetings referred to by the witness were submitted by both parties to the Court. In essence the Court was satisfied that the events which occurred in the relevant time period covered by the claim, were not in dispute.

*The Law*

The only issue for consideration by the Court is whether the Respondent's decision to issue disciplinary sanctions to the Complainants on 19<sup>th</sup> and 23<sup>rd</sup> April 2013 was influenced by their having invoked a protected act within the provisions of Section 27 (3) of the Act.

There is no dispute that the Complainants raised a matter relating to safety, health or welfare at work with the Respondent. Mr. Fleming submitted that as a result the Respondent penalised the Complainants contrary to Section 27(3) (a) (b) and (c) of the Act.

As this Court pointed out in *O'Neill v Toni and Guy Blackrock Limited* [2010] E.L.R. 21,

it is clear from the language of this section that in order to make out a complaint of penalisation it is necessary for a claimant to establish that the detriment of which he or she complains was imposed *“for”* having committed one of the acts protected by Subsection 3. Thus the detriment giving rise to the complaint must have been incurred because of, or in retaliation for, the Complainant having committed a protected act. This suggested that where there is more than one causal factor in the chain of events leading to the detriment complained of the commission of a protected act must be an operative cause in the sense that *“but for”* the Complainant having committed the protected act he or she would not have suffered the detriment. This involves a consideration of the motive or reasons which influenced the decision maker in imposing the impugned detriment.

In examining the case – the Court must consider whether the Respondent acted reasonably in light of the health and safety concerns raised in proceeding with the training/implementation of the device and if so then failure to carry out a work instruction is a disciplinary matter not “penalisation”.

In reaching a decision on whether or not the Complainants were victimised for expressing safety concerns, the Court must, under Section 27(6) of the Act, take account of all the circumstances and the means and advice available to the Complainants at the relevant time.

### *Conclusions of the Court*

Counsel for the Complainants submitted that the Respondent either ignored the warnings completely or alternatively, failed to investigate the validity or adequacy of the warnings. In any event he maintained that the Respondent had failed to make any enquiries with the manufacturers concerned to ensure that the system of work being imposed by the Respondent on the Complainants was safe, so far as is reasonably practicable. Mr. Fleming submitted that notwithstanding there have been no recorded accidents to date involving the use of the Respondents new Electronic Data Capture system, the fact that such an event has not yet presented itself cannot rule out any such foreseeable event occurring in the future. Therefore, in support of their actions the Complainants invoked the provisions of Section 13(1)(a) of the Act and informed the Respondent of their reasons for not participating in the "in-car" part of the Tablet training, but were penalised for doing so.

The Respondent on the other hand said that the implementation of the Tablet device project had undergone many phases and a number of risk assessments to ensure that all aspects of its introduction were dealt with, including health and safety concerns.

The Court notes that the project commenced in 2008, initial risk assessments were conducted at that time based on requirements of Safety, Health & Welfare at Work (General Application) Regulations Part 2 Workplace and use of work Equipment. There were a number of ergonomic investigations carried out. Consultations with the Health & Safety Committee, comprising of management and staff, were carried out, and submissions/recommendations were sought by the Respondent. A number of risk assessments were carried out since the initial assessment, including the following:-

- A number of 'Proof of Concept' trials of technology, including, in 2009, the analysis of the motion Tablet were conducted.
- The Respondent commissioned an assessment by an independent ergonomist to assess the risk posed comparing the existing paper based system, the use of a Tablet device, and the use of an electronic pen. This assessment was conducted by Leyden Consulting Engineers and entitled *"Ergonomic and Safety Evaluation of Proposed Methods of Recording Test Results in the Road Safety Authority"* dated 28<sup>th</sup> March 2011. Chapter 4 of the report dealt with *"Danger of loose objects in case of impact"*. It found that the risk posed by loose objects is not increased when compared to existing documented system. No major issues were found, the Health and Safety Committee, who indicated that the report was comprehensive and agreed that its contents were accurate.
- The Respondent issued a consultation document to staff and requested their submissions on any aspect of the design, function and use of the device, entitled, *"Consultation Document, Electronic Data Capture Solution, Driver Testing Section, December 2011"*.
- A Specific Absorption Rate (SAR) Report was requested from the hardware supplier and reviewed to ensure that the Tablet device met with regulatory compliance of WHO and EU Regulatory requirements, May 2012.
- The Respondent's Health & Safety Officer, Ms. Browne (Masters of Applied Science in Occupational Safety Engineering and Ergonomics, carried out a risk assessment and issued report on 14<sup>th</sup> May 2012, entitled *"Hazard Identification & Risk Assessment of Systems of Work for Electronic Data Capture of Driving Tests"*. This report assessed the *"effects in the event of airbag deployment"*. It found that the Tablet device inclusive of the ergonomic folder, weighs less than one kilogram, which is less than half the weight of the current paper based system and is considerably smaller. The report concluded that in accordance with HSA 2012 guidelines, to minimize any possible injuries in the event of airbag inflation, the device should be positioned on the lap (lying flat or raised slightly), with the seat positioned as far back in the vehicle as reasonably practicable.
- The Telefonica Ireland report, dated 30<sup>th</sup> November 2012, entitled *"Health and Safety Review of Electronic Recording of Driver Testing using Galaxy Tab and Bespoke Software for the Road Safety Authority"*. The report notes that a concern has been raised in relation to the effect of the airbag becoming activated and the Tablet device impacting the drive tester under the force of the airbag explosion. The report then analyses the frequency of injury caused by loose objects in a vehicle on impact and the rate of accidents/incidents that occur during driving test.

Section 5 is headed *'Danger of Loose Objects in the Case of Impact and Effects in*

*the Event of Airbag Deployment'* and concludes as follows:

*"Given the low frequency of incidents during Driver Testing that result in injury and the low frequency of injuries reported as arising from loose objects in collisions reported in the CIREN and NASS databases, it can be inferred that the circumstances of any incidents which would result in injury to an employee from these factors would be "unusual, unforeseeable and exceptional" and given that implementation of control measures would be disproportionate to the risk encountered and may result in other unforeseen hazards arising this risk is as low as is reasonably practicable".*

- On the 12<sup>th</sup> October 2012 the Driver Testers also made a complaint concerning the project to the Health and Safety Authority. The complaint was rejected by the Health and Safety Authority on 22<sup>nd</sup> February 2013 who indicated that *"the approach adopted by the Road Safety Authority in relation to the introduction of the electronic data capture technology in the context of the Safety Health and Welfare at Work Act 2005, both in relation to the preparation of the risk assessment and employee consultation seems reasonable"*.

The Leyden Consulting Engineers comparative analysis of the existing paper based system of work with the new EDC system found that the equipment for EDC presented a reduction of risks in comparison to the existing equipment issued due to its lighter weight and reduced dimensions. The Court was furnished, for demonstration purposes, with both the paper based system and the new EDC system and accepted that the EDC system was considerably lighter and smaller than the paper based system.

It is clear that an objective and independent analysis of risk in relation to airbag deployment was undertaken on behalf of the RSA prior to any employees being asked to make use of the Tablet device during driving tests.

Having considered the submissions made, the evidence tendered and the comprehensive details supplied to the Court, the Court is satisfied that the Respondent took all reasonable steps necessary to ensure as far as reasonably practicable the safety of Driver Testers. It conducted many risk assessments, underwent extensive consultation with staff and their representatives, it encouraged active consultation in relation to issues of concern and followed up with independent research from the appropriate authorities. On the specific issue of airbag deployment it specifically researched the issue of the possible danger of loose objects in the case of impact and effects of the airbag becoming activated and the Tablet device impacting the Driver Tester under the force of the airbag explosion. This concluded that any incidents which may result in injury would be "unusual, unforeseeable and exceptional" and the risks were as "low as is reasonably practicable".

No system of work is without risk, however in this context, and in the context of Section 8(2)(e) and (g) of the Act, the Court is satisfied that the Respondent provided as far as is reasonably practicable a safe system of work. While the Complainants obviously have the right to raise their concerns and should not be penalised for so doing, once those concerns had been addressed fully by the Respondent and the Respondent issued the instruction to use the Tablet device, any disciplinary action taken following the

Complainants refusal to do so was properly taken for failing to comply with a legitimate instruction and could not be construed as penalisation within the meaning of Section 27(3). The Court is of the view that the Complainants should reasonably have acted under the legitimate instruction of their employer and carried out the in car training.

Having reviewed *Circular 14/2006: Circular 14/2006: Civil Service Disciplinary Code revised in accordance with the Civil Service Regulation (Amendment) Act 2005*, the Court is satisfied the disciplinary sanction imposed on the Complainants was in accordance with the provisions of Section 5 (iv) and of the Formal Disciplinary Procedures contained in that Circular.

The Court, therefore, finds that the Complainants were suspended and disciplined for failing to obey a legitimate instruction and were not penalised under the terms of Section 27(3) of the Act.

In all of these circumstances the Court has concluded that there is no basis upon which it could interfere with the Decision of the Rights Commissioner. Accordingly the appeal is disallowed and the Decision of the Rights Commissioner is affirmed.

The Court so determines.

Signed on behalf of the Labour Court

13th June 2014  
SC

Caroline Jenkinson

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Deputy Chairman

NOTE

Enquiries concerning this Determination should be in writing and addressed to John Foley, Court Secretary.