Neutral Citation: [2015] IEHC 94

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 542 JR]

BETWEEN

PETER NOWAK

APPLICANT

AND

IRISH AUDITING AND ACCOUNTING SUPERVISORY AUTHORITY

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 17th day of February, 2015

Background Facts

1. Between October 2006 and August 2009, the applicant was employed as a trainee accountant with the firm PricewaterhouseCoopers ("PwC"). During the course of his employment, he was involved in statutory audits of investment funds. In two such audits, the applicant came across what he regarded as certain irregularities which he drew to the attention of his superiors in PwC. His superiors took a different view and it would appear that this led to a degree of friction with the applicant. The applicant was ultimately dismissed from his employment and this is the subject of a claim by the applicant before the Employment Appeals Tribunal.

2. Arising out of the foregoing, on the 13th September, 2011, the applicant made a complaint against PwC to the Chartered Accountants Regulatory Board ("CARB"), the regulatory and disciplinary arm of the Institute of Chartered Accountants in Ireland ("ICAI"). The complaint related to alleged non-compliance with accounting and audit standards in respect of the two audits in question. CARB gave its decision in an e-mail of the 14th September, 2012, from Mr. Derek Dee, Senior Complaints Case Manager in which Mr. Dee said that having reviewed the PwC response, in both cases the accounting was in accordance with the companies' accounting policies and complied with relevant accounting standards. He went on to say that there was therefore no evidence that PwC may have been guilty of misconduct and he did not intend to open a formal complaint file in relation to the matter.

3. A further exchange of emails occurred between the applicant and Mr. Dee in which the applicant voiced his dissatisfaction with the decision and indicated that he wished to have an independent review of the decision. Mr. Dee explained that no formal complaint file was opened and there was thus no right to a review. In effect, it would appear that Mr. Dee concluded that there was no *prima facie* case on the evidence sufficient to warrant a formal investigation.

4. The applicant then made a complaint to the respondent by letter dated the 7th November, 2012, which he describes in his grounding affidavit as relating to possible breaches of the ICAI's Disciplinary Bye-Laws. This letter raises a number of alleged defects in Mr. Dee's decision which have the appearance of quasi-judicial review type grounds. They include that the decision was made by the wrong CARB official who in any event failed to give sufficient reasons, CARB erroneously concluded that there was no formal complaint in existence, an independent review was denied, the decision was not fair and impartial and PwC's response had not been furnished to the applicant. By letter of the 1st July, 2013, the applicant made a data access request which was dealt with by the respondent.

5. On the 26th June, 2014, the respondent gave its decision on the applicant's complaint and concluded that there were no issues identified which would warrant further examination in the context of its function under s. 23 or s. 24 of the Companies (Auditing and Accounting) Act 2003 ("The Act").

6. By order of Cregan J. made on the 16th September, 2014, the applicant was given leave to apply for judicial review and seek an order of *certiorari* quashing the respondent's decision, a declaration that the decision is unlawful and an order of mandamus directing the respondent to conduct a statutory enquiry pursuant to s. 23 of the Act. The application is based on two grounds, that the decision was unreasonable and/or irrational and that the respondent erred in law in failing to give reasons or justify its failure to do so.

The Statutory Framework

7. The respondent is a statutory body established by the Act and is a company limited by guarantee. The replying affidavit of the respondent's chief executive officer, Ms. Helen Hall sets out the background to the respondent's role and functions. The long title to the Act provides that the Act establishes the respondent and empowers it to supervise the regulatory functions of certain recognised and prescribed accountancy bodies, which include the ICAI. The objects of the respondent are set out in s. 8 which provides:

> "(1) The principal objects of the Supervisory Authority, which are to be included in its memorandum of association, are-
>
> (a) to supervise how the prescribed accountancy bodies regulate and monitor their members,
>
> (b) to promote adherence to high professional standards in the auditing and accountancy professions,
>
> (c) to monitor whether the accounts of certain classes of companies and other undertakings comply with the Companies Acts, and
>
> (d) to act as a specialist source of advice to the Minister [for Enterprise, Trade and Employment] on auditing and accounting matters."

8. The functions of the respondent are to be found in s. 9 and they include granting recognition to accountancy bodies, approving the constitution and bye-laws of such bodies, supervising recognised bodies in relation to a variety of matters including how they monitor their members, their investigation and disciplinary procedures, standards in the profession and of relevance here, under s. 9 (2) (d):

> "to conduct under *section 23* enquiries into whether a prescribed accountancy body has complied with the investigation and disciplinary procedures approved for that body under *paragraph (c);"*

9. The Act establishes a board of directors and the office of chief executive officer and provides for the funding and staffing of the respondent. The Act goes on to provide at s. 23 (2):

> "Following a complaint or on its own initiative, the Supervisory Authority may, for the purpose of determining whether a prescribed accountancy body has complied with the approved investigation and disciplinary procedures, enquire into-
>
> (a) a decision by that body not to undertake an investigation into a possible breach of its standards by a member,
>
> (b) the conduct of an investigation by that body into a possible breach of its standards by a member, or
>
> (c) any other decision of that body relating to a possible breach of its standards by a member…"

10. Section 24 of the Act makes provision for investigations by the respondent into possible breaches of a prescribed accountancy body's standards by a member.

11. Ms. Hall avers in her affidavit that the respondent has a staff complement of 13 employees including 5 members of staff in the unit responsible for the supervision of prescribed accountancy bodies known as the Regulatory and Monitoring Supervision unit ("RMS"). There are 9 prescribed accountancy bodies and the RMS has some 18 statutory functions including supervising the manner in which these bodies regulate and monitor their members.

12. Ms. Hall says that these bodies are primarily responsible for the receipt and investigation of complaints relating to their members which they must process in accordance with procedures approved by the respondent. The exercise of the respondent's powers under s. 23 is used on an exceptional basis and since its establishment in 2006, there have been 5 such enquiries. She says that any such enquiry will focus on processes and procedures and the respondent has no role in evaluating judgments made in individual complaints. It has no investigators on its staff.

Submissions

13. The applicant, who appeared in person, cited a number of authorities in support of his contention that the decision of the respondent was irrational and unreasonable. In fact he went considerably further than the grounds on which he obtained leave by submitting that the decision was made in bad faith and attempted to conceal wrongdoing by the ICAI who were covering up for PwC.

14. The basis for this submission appears to be that documents discovered/disclosed to the applicant appeared to indicate that the respondent's board had considered initiating a s. 23 enquiry but the respondent subsequently denied considering establishing an enquiry on foot of his complaint. This appears to stem from a misunderstanding by the applicant of the documents. Ms. Hall has sworn that a document entitled "Complaints Summary" which relates to 6 different complaints made by the applicant including the one in issue which it stated was "awaiting outcome of Board's S23 considerations" in fact referred to an ongoing review of the respondent's s. 23 processes unrelated to the applicant's complaint. The applicant had not sought to cross-examine Ms. Hall on the contents of her affidavit.

15. The applicant submitted that the respondent had at the time of his complaint established no criteria governing initiation of s. 23 enquiries and the decision was contrary to their mission statement. He criticised the respondent's regulatory supervision route for dealing with his complaint as being inadequate for dealing with deliberate, dishonest and fraudulent non-compliance by the ICAI. He went on to criticise the CARB decision on the same grounds as in his original complaint to the respondent.

16. On the second ground, failure to give reasons, the applicant again referred to a number of well known authorities and submitted that there was a failure to disclose underlying reasoning in breach of fair procedures, natural and constitutional justice and EU law.

17. Counsel for the respondent, Mr. Fanning BL submitted that the applicant's grievances had their origins in the fact that he was dismissed by PwC and had failed his accountancy examinations. This had led to a multiplicity of litigation including proceedings against PwC before the EAT, a claim against the ICAI, a claim in the High Court against the Data Protection Commissioner arising from a request by the applicant to see his exam papers, which claim failed and was under appeal to the Supreme Court, 6 complaints to the respondent and the within proceedings. He said the applicant misunderstood the role of the respondent which was an oversight one and not to act as a court of appeal from decisions of prescribed accountancy bodies. He contended that the power of the respondent to initiate a s. 23 enquiry was entirely discretionary as the section made plain and was in fact exercised in exceptional cases only as shown by the fact that there had been 5 enquiries in 9 years.

18. He argued that the applicant's claim was bound to fail for three reasons. First, the applicant had no *locus standi* to bring the proceedings because he had no, or no sufficient, interest in them. Secondly, the impugned decision was manifestly reasonable and rational. Thirdly, the respondent had no duty to give reasons and even if it did, it had given sufficient reasons. Further, the applicant had not sought reasons and detailed reasons were now given in Ms. Hall's affidavit which also demonstrated clearly that there was no unreasonableness or irrationality in the decision.

Analysis of the Issues

19. It is clear from the express wording of s. 23 that the decision whether or not to initiate an enquiry is a matter entirely within the discretion of the applicant. The discretion is not limited or circumscribed by the statute and appears to be at the wider end of discretionary powers afforded to public bodies. It is of course well settled that this does not mean that the court cannot supervise the exercise of such powers in certain limited circumstances. It does however mean that for the court to intervene on the grounds that the power has been exercised in an unreasonable or irrational manner, it must be satisfied by very clear evidence that this has occurred. This is particularly so in the case of a body with specialist knowledge such as the respondent – see *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323. As Charleton J. remarked in *Garda Representative Association v. Minister for Finance* [2010] IEHC 78 (at para. 20):

> "Absent an unfair process or a consideration outside of the jurisdiction imposed by the legislation, the strength of a

> challenge that must be mounted by an applicant in judicial review proceedings with a view to showing an unlawful or unreasonable decision is squarely dependent upon the breadth of the particular discretion conferred by legislation."

20. The extent, if any, to which the applicant's rights may be affected by the decision is also a material consideration.

21. Thus the threshold to be crossed by the applicant is a high one. Many of the leading authorities make this plain. In *State (Keegan) v. Stardust Tribunal* [1986] 1 I.R. 642, Henchy J. considered that the impugned decision must be shown to fly in the face of fundamental reason and common sense. In *O'Keeffe v. An Bord Pleanala* [1993]1 I.R. 39, Finlay C.J. was of the view that the applicant had to establish that the decision-making authority had before it no relevant material which would support its decision.

22. More recently, the Supreme Court in *Meadows v. Minister for Justice, Equality and Law Reform & Ors* [2010] IESC 3 reaffirmed these principles.

23. It seems to me in the present case that there is absolutely no evidence of anything approaching unreasonableness or irrationality in the impugned decision, less still evidence that would satisfy the heavy burden born by the applicant. His contention that there was bad faith shown by the respondent is manifestly groundless quite apart from the fact that this was not a ground upon which leave was granted. The supposed basis for this allegation is dealt with above and has been comprehensively rebutted in the affidavit of Ms. Hall who was accused of lying on oath by the applicant in the course of his oral submissions to the court. Such an allegation could not possibly be sustained in the absence of cross-examination and the applicant made no application in that regard. Accordingly, I entirely reject the applicant's contentions on this issue.

24. The respondent's letter of the 26th June, 2014 explains in clear terms that its remit is limited to supervising compliance by the relevant professional bodies with approved investigation and disciplinary procedures and the respondent has no role to play in mediating individual cases but rather has an oversight role of the regulatory system. This appears to be a reasonable summary of the effect of the legislation.

25. The respondent's letter goes on to state:

> "Your letter of the 7 November 2012 and the documentation submitted have been considered in detail. On completion of this detailed review, it was concluded that there were no issues identified which would warrant further examination in the context of the Authority's functions under Section 23 or 24 of the Companies (Auditing and Accounting) Act 2003."

26. Thus, the applicant was informed that his complaint and all the documents he submitted were considered in detail and the reason given for the refusal to initiate an enquiry under s. 23 was that the applicant had not identified any issue which would warrant such an enquiry. In my view, this conclusion was well within the respondent's discretion under the section and a reason was given for the manner in which it was exercised. Whilst the applicant may be dissatisfied with the reason given, that does not affect its validity.

27. There have been many cases where brief and succinct reasons have been held sufficient to withstand scrutiny by the court. See for example *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26 and *FP v. Minister for Justice* [2002] 1 I.R. 164.

28. In my view it is also of significance that at no time following receipt of the decision did the applicant seek any elaboration of the reasons given. As stated by Finlay C.J. in *O'Keeffe* (at p. 76):

> "It is of importance, though not necessarily vital, to my decision on this issue that no request was made by or on behalf of the plaintiff in this case for the elaboration of, or explanation of, the reasons as stated in this document."

29. This is particularly relevant in the context of the more detailed reasons furnished in Ms. Hall's first affidavit. Had the applicant written to the respondent seeking reasons before resorting to judicial review proceedings in this court, it may well be that same could have been avoided.

30. Even if one were to conclude that insufficient reasons were given, it seems to me that it must at the least be questionable if in fact the respondent had any duty to give reasons to the applicant for its decision not to institute an enquiry. There is a degree of analogy with a decision by the Director of Public Prosecutions not to bring a prosecution in a particular case. Thus in *H v. DPP* [2006] 3 I.R. 575, the Supreme Court held that, absent *mala fides*, the Director could not be called upon to give reasons for such a decision. The court considered that in deciding whether or not to initiate a prosecution, the Director was not settling any question or dispute or deciding rights or liabilities. As the duty to give reasons stems from a need to facilitate full judicial review, the limited intervention available in the context of decisions of the Director obviated the necessity to disclose reasons. In this case, the respondent's decision did not have the potential to decide or affect rights or liabilities. This leads me to the final issue.

31. Quite apart from all of the foregoing, it seems to me that the applicant has a very real difficulty in demonstrating that any prejudice has accrued or will accrue to him as a result of the decision under challenge. It is well settled since *Cahill v. Sutton* [1980] I.R. 269 that in order to have sufficient standing to seek judicial review, an applicant has to show an interest in the outcome of a challenge to the matter in issue, be it legislation or an administrative decision. This requires the applicant to satisfy the court that his interests have been or will be adversely affected.

32. In the present case, the applicant can point to no detriment suffered by him in consequence of the decision not to initiate a s. 23 enquiry. Even if one were to assume for a moment that an enquiry commenced, such enquiry found that CARB had acted in error, CARB revisited the applicant's original complaint and the outcome was a sanction against PwC, that would confer no tangible benefit on the applicant. Accordingly, it seems to me that the applicant has failed to establish that he has the requisite standing to bring these proceedings.

33. I will therefore dismiss this application.