Neutral Citation Number: [2009] IEHC 311

THE HIGH COURT

JUDICIAL REVIEW

2008 906 JR

GERALD MCCARTHY

APPLICANT

AND

THE IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE GOVERNOR OF CORK PRISON

RESPONDENTS

Judgment of Mr. Justice McMahon delivered the 13th day of May 2009.

Factual background

The applicant is a prison officer at Cork Prison. On 27th November, 2006, while the applicant was at work, a prisoner threw liquid out of his cell window hitting the applicant and wetting his hair and clothes. Believing the liquid to be human urine or bodily fluids the applicant sought medical attention. He was seen by the medical orderly who recorded, inter alia, "the left side scalp red and sore" and the applicant was advised that he should see his own GP. The applicant's GP, Dr. Eugene Morgan, who is a psychiatrist and, coincidentally, also a visiting doctor at Cork Prison, was able to see him at the prison on the day in question. Dr. Morgan, noting that the applicant was in an agitated state, referred him for serial testing to Dr. Mary Horgan, an infectious disease consultant. She advised him that the risk of contracting a disease such as Hepatitis C or HIV was low. Further testing proved negative. After the incident, the applicant was on sick leave from 27th November, 2006 to 17th January, 2007 during which time he was paid sick leave. Subsequently, Doctor Morgan certified that the plaintiff was unfit for 52 days as a result of the incident.

At the time of the incident, the applicant was already on the Schedule for Sick Leave without Pay, an arrangement operated by Human Resources within the prison system whereby those prison officers who have taken excessive sick leave are placed on notice that, should they be absent on sick leave, they will not be remunerated for such a period of absence. Under the terms of the respondents' circular 1/1982 and 6/1997, however, an exception provides that the applicant is entitled to sick leave with pay, if the absence was due to an occupational injury sustained in work.

Circular 1/1982 provides that:-

> "… if the personnel officer is satisfied that as a result of an occupational injury or disease, not due to negligence on the part of the officer, that period would not normally be combined with a period of absence due to ordinary illness so as to adversely affect sick pay entitlement". This means that unless the personnel officer is satisfied that the applicant's absence is due to "an occupational injury or disease" and is not due to the applicant's own negligence, then the applicant would not be paid when he is out on sick leave. That is what is at issue here: whether the applicant who went on sick leave for 52 days after the incident of 27th November, 2006, was entitled to be paid or not. Put in another way the exception provides that in spite of being on sick leave under the Schedule, the officer would still be entitled to be paid if:-
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> - the personnel officer is satisfied
> - that the period of sick leave (in this case 52 days) was as a result
> - of occupational injury or disease
> - not caused by the officer's own negligence."

From reading the circular it is important to bear in mind that it is the personnel officer that has to be satisfied in relation to the relevant matters before the applicant's absence is considered to merit pay during the leave.

Since no question of the applicant's negligence came into play in this case, nor could it on the facts, failure to comply with the terms of the circular of necessity meant that the personnel officer was of the view that there was not an occupational injury or disease which caused the applicant to be absent for 52 days.

The applicant was on full notice of the terms of the Scheme and in a letter dated 26th January, 2007 the governor of the prison wrote to the applicant stating that the sick leave taken by the applicant from 27th November, 2006 to 17th January 2007 should be without pay. The letter notified the applicant that he had 14 days to appeal the decision to the Minister if he so wished. The applicant appealed and on 29th May, 2007 he was notified by the Human Resources Directorate that the Minister having considered his appeal had decided to disallow it.

The application for judicial review is in respect of the decision of the Minister dated 29th May, 2007.

In a letter dated 21st March, 2007, Martina Maguire of the Human Resources Directorate wrote to the applicant and informed him as follows:

> "As you are aware any absence on sick leave will not be recorded as an injury on duty until completed injury on duty report forms, witness statements and observations from the Governor are submitted to personnel section and the Head of the Department is satisfied that the absence concerned arose as a result of an occupational injury or disease which was not due to negligence on the part of the officer.
>
> Based on the information contained in the injury on duty report and the statements from witnesses to the incident on 27 November 2006, this absence will not be recorded as an injury on duty on your sick leave record as the Head of the Department is not satisfied that the terms of circular 1/82 and 6/97 had been fulfilled."

The significance of this letter, emanating as it did from the Personnel Department, is that it must be taken to inform the decision communicated to the applicant on 26th January, 2007 by the deputy governor of the prison. As already noted, it is the personnel officer who must be satisfied under the schedule. The critical position of the personnel officer is also recognised in the letter of the 26th January, 2007, where the deputy governor states: "If you have grounds to appeal, please ensure that the appeal is forwarded to Human Resources, through the Governor, for consideration by the Minister within 14 days of receipt of this minute." It would appear therefore, that the letter dated 26th January, 2007 sent to the applicant was not the decision itself, which was taken by the personnel officer, but was merely written to convey the decision of the personnel officer to the applicant.

On this interpretation I have formed the view that the communication from Human Resources dated 21st March, 2007 sets out the reasons for the personnel officer's decision which was conveyed to the applicant by the deputy governor on 26th January, 2007.

Shortly after the Minister's decision of 29th May, 2007, the applicant engaged in correspondence with the respondents. The main thrust of this correspondence was an attempt by the applicant to establish more clearly and to his satisfaction why the decision not to pay him while on sick leave was made. I will refer to this correspondence later in the judgment.

The applicant challenges the decision of the Minister on the substantive grounds first, that there was a failure to give adequate reasons and secondly, that the decision should be struck down on the basis that it was unreasonable on the criterion established in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39. With somewhat less conviction the applicant also advanced an argument based on legitimate expectations.

The respondent opposed those arguments in its Grounds for Opposition and also raised the question of delay as a preliminary issue to be dealt with by the Court. In this connection it was agreed that the applicant did not commence the present proceedings until 14 months after the Minister's decision was delivered on 29th May, 2007.

I propose to deal with the delay issue first before addressing, if necessary, the other issues raised by the applicant.

Delay
Order 84, r. 21 (1) of the Rules of the Superior Courts 1986 provides that an application for leave to apply for judicial review shall be made:-

> "...promptly and in any event within three months from the date when grounds for the application first arose, or six months where the relief sought is certiorari, unless the Court considers that there is good reason for extending the period within which the application shall be made."

It is clear from reading the rule that an applicant seeking judicial review must bring his/her application promptly and in the case where he/she seeks certiorari not outside a limit of six months. There is of course an additional clause which enables the court to extend the period when there is good reason, but on ordinary principles of interpretation such extension should be construed narrowly. (*De Róiste v. Minister for Defence* (Unreported, High Court, McCracken J., 28 June 1999); upheld in the Supreme Court [2001] 1 I.R. 190)

When the appropriate time limit prescribed by the O. 84, r. 21(1) has expired, Hederman J. stated *in O'Flynn v. Mid Western Health Board* [1991] 2 I.R. 223, at 236) that:-

> "… the judge should be furnished with the reasons for the delay in the grounding affidavit and he should decide whether there are grounds for excusing the delay. Even if leave is granted at the ex parte stage, nonetheless, when the trial judge comes to hear the matter he must adjudicate upon whether the delay was reasonable and as such may be excused or not."

In *O'Connor v. Private Residential Tenancies Board* [2008] IEHC 205, Hedigan J. in dealing with this matter stated:-

> "In *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301, it is established that the test is an objective one and the applicant bears the onus of proof and must show that there are reasons 'which both explain the delay and afford a justifiable excuse for the delay' (Costello J. at p. 315). I was further referred to the judgment of Mr. Justice Barr in *Solan v. DPP and Wine* [1989] I.L.R.M. 491 and I was referred in particular to the following passage (at p.493):- 'In the absence of evidence explaining delay, there is no basis on which the court can exercise its discretion to grant an extension of time for making the applications'. The obligation of the Court to enforce time limits is based upon the need to have some finality in those proceedings which may be the subject of judicial review. It is very important that the courts do not readily grant such extension when the issue is raised at the hearing. What reasons are advanced here to explain the delay and/or to justify it? There do not appear to be any grounds advanced, presumably because there are none."

In the present case there has been a delay by the applicant of some 14 months and, in justifying this, the applicant states that during the time between the final decision and the commencement of proceedings, there had been ongoing correspondence between the parties. The applicant states that he had been trying to obtain the reasons for the decision and secondly, he was trying to resolve the problem without resorting to the courts. He refers in this regard to letters he wrote to the respondent on 11th June, 2007; 13th July, 2007; 10th August, 2007; 4th September, 2007 and 25th November, 2007. The applicant argues that it was reasonable not to seek to quash the decision when he was in correspondence with the department in relation to his claim. The applicant also says that some of the delay is due to the reluctance or failure by the respondents to furnish the applicant with reasons for the decision in a timely fashion. In his written submissions, the applicant also states that there was a failure by the respondent to accept his request to be medically examined. Finally, the applicant states that the respondents are not prejudiced by the delay and that no third party would be affected by the delay.

In support of his argument the applicant refers to *O'Donnell v Dun Laoghaire Corporation* (1991) I.L.R.M. 301 where at pp. 317-318 it is stated:-

> "[t]he evidence of the plaintiff was to the effect that he did not realise that he could pursue his complaint through the court, that he could not afford legal advice, that over a four year period he had written many letters to the department, to local members of parliament and to successive Ministers for Defence. On these facts it was concluded that the applicant had not disentitled himself by his delay to the remedy sought...I think therefore that his efforts to settle the dispute through the intervention of public representatives establish that there is a reasonable explanation as to why between June 1988 and July 1989 he did not institute these proceedings".

I do not find that this quotation greatly assists the applicant here. Few of the extenuating circumstances mentioned in O'Donnell are available to applicant in this case. The excuse advanced by the applicant in these proceedings is that he was in correspondence with the respondents and was trying to resolve the matter amicably. Both of these are laudable enough goals, but it cannot be the case that simply by corresponding with the respondents the applicant indefinitely extends the period within which he is obliged to commence proceedings under the Rules of the Superior Courts. If the case were otherwise, then an applicant could extend the time indefinitely, merely by engaging in letter writing. It must be remembered that O. 84, r. 21 (1) is not there simply for the convenience of the parties. It has a public dimension and it has been adopted to ensure the expeditious administration of justice.

Moreover, it is appropriate to examine the nature of the correspondence to see whether it ought to have an effect on the time periods involved. In the present case, the applicant states that he had been given no reasons for the decision in question and that in the circumstances he was entitled to demand the reasons so that he could be sufficiently informed to enable him to make proper decisions.

This brings me to a fundamental issue in this case: whether the applicant was furnished with reasons for the decision and, if so, when.

I have already determined that the letter of 21st March, 2007 sent from the Human Resources Directorate to the applicant set out the reasons for the decision first communicated to the applicant on 26th January, 2007. Given the nature of the scheme and the knowledge which the applicant had, it is clear that the personnel officer was not prepared to accept that the incident amounted to an occupational injury which justified 52 days absence on sick leave.

It is my view that the applicant knew enough then to enable him to make a meaningful decision as to whether he should challenge the decision or not. The applicant decided to appeal to the Minister and his appeal was disallowed on 29th May, 2007. It is from this time that the clock begins to run against him. In my view, it is not an argument that stops the clock, to say that the applicant subsequently learned from correspondence more details of the reasoning process, or that, perhaps, he even detected some weaknesses in the decision maker's analysis from this correspondence. I have already found that the letter to the applicant dated 21st March, 2007 from the Human Resources Directorate indicated with sufficient clarity the reason for the personnel officer's decision and "absence of reasons" cannot justify the further delay after 29th May, 2007. In disallowing the appeal, the Minister affirmed the personnel officer's decision and her reasons. Accordingly, the clock began to run against the applicant from 29th May, 2007. If the rule was otherwise, the applicant could keep postponing time from running against him by engaging in extensive correspondence and this must be so, even if the applicant learns from such correspondence matters which may strengthen his argument on appeal. It should be emphasised that time limits in such cases are set not for the benefit of the applicant only but, primarily perhaps, for the benefit of the public and the good administration of the legal system. The old maxim that it is in the interests of the State that there should be finality to litigation, still accurately reflects the policy for such time limits.

There is no obligation on the decision maker to give detailed and elaborate reasons for his decision. In this regard the dictum of O'Flaherty J in *Faulkner v. Minister for Industry and Commerce* [1997] E.L.R. 107 is worth quoting:-

> "I would reiterate, what has been said on a number of occasions, that when reasons are required from administrative tribunals they should be required only to give the broad gist of the basis for their decisions. We do no service to the public in general, or to particular individuals, if we subject every decision of every administrative tribunal to minute analysis." (At page 112)

In that case the applicant complained to the Labour Court that she had been discriminated against on the basis of sex in being passed over for promotion in the Civil Service. The only reason given by the Labour Court in rejecting the claim was:-

> "Having examined in detail the claimant's assessment records, the Court is satisfied that the Department had reasonable grounds other than sex or marital status for her non-promotion in April 1989."

The Supreme Court held that that was sufficient in the circumstances.

As I have said in the present case the only reasons for which the personnel officer could refuse to pay the applicant were those which were clear from the scheme itself. In stating that the terms of the circular 1/82 and 6/97 had not been fulfilled in the letter dated 21st March, 2007, the personnel officer was in effect stating that she was not satisfied " that a period of sick leave arose as a result of an occupational injury". From this it is clear that the personnel officer was finding that the incident did not amount to an occupational injury which could justify the period of absence of 52 days. In argument before the Court, the applicant suggested that the personnel officer found that there was "no occupational injury", but my view is that the personnel officer's focus was on whether the length of the absence (52 days) resulted from such a slight incident. The personnel officer decided that it did not, and she came to this decision having considered the medical evidence before her. In my view, this reason must have been clear to the applicant from 21st March, 2007.

One must make a distinction in this context between reasons and reasoning. I am of the view that the applicant's entitlement is to adequate reasons only. The applicant is not entitled to have explained to him the thought process that underlies the conclusion reached by the deciding officer in question. And it appears to me that it was the process that was occupying the attention of the applicant in the correspondence that followed from the decision of 29th May, 2007. The applicant is not entitled to have the reasons for the reasons explained to him. The law is not so demanding.

In these circumstances the applicant was not justified in delaying the matter for 14 months in the hope or expectation

that the difficulty would be resolved amicably. The truth that no settlement was likely must have dawned on him a lot earlier.

The final argument advanced by the applicant is that since the extension of time in this case would not prejudice the respondents or affect third party rights, the Court should grant the extension of time. To yield to this argument would be to do violence to the rule itself. It is true that third party rights and prejudice to the respondents may be relevant factors in some cases in convincing the court that an extension might be warranted. But, in my opinion, it is rarely sufficient reason on its own. In this regard the views of Clarke J. in *Kelly v Leitrim County Council* [2005] 2 I.R. 404 at 412 are relevant:-

> "… there is nonetheless a clear legislative policy involved in all such measures which requires that, irrespective of the involvement of the rights of third parties, determinations of particular types should be rendered certain within a short period of time as part of an overall process of conferring certainty on certain categories of administrative or quasi-judicial decisions. Therefore while it may well be legitimate to take into account the fact that no third party rights are involved, that should not be regarded as conferring a wide or extensive jurisdiction to extend time in cases where no such rights may be affected. The overall integrity of the processes concerned is, in itself, a factor to be taken into account."

Legitimate Expectation
The final argument which the applicant advances in support of his case rests on the principle of legitimate expectation. The applicant stated that when he raised the matter with Officer Michael Walsh, a staff services officer, as to whether he would be paid while on leave after 27th November, Michael Walsh made enquiries from the deputy governor. According to Officer Walsh, the deputy governor assured him that the applicant would be paid while on such leave. Officer Walsh relayed this to the applicant and the applicant says he relied on this assurance. The problem here of course is that there was no sworn affidavit from Officer Walsh to that effect and, in any event, the assurance relied on was not given directly to the applicant. Furthermore, the respondents in their submissions indicated that the deputy governor denied ever making such an assurance. Again, this was not on affidavit. In the circumstances there is no satisfactory evidence before this Court that the deputy governor gave any such assurance and, in any event, there was no evidence that it was given directly to the applicant. Finally, it should be noted that the applicant was, in fact, paid when he was on leave and it was only subsequent to the personnel officer's decision that the respondents indicated their intention to claw back the money it paid during the relevant sick leave period. This apparently was the way the scheme operated. So in a literal sense the applicant was paid while on leave and that is all that the deputy governor is alleged to have said. Moreover, the detriment which the applicant says he suffered was that he did not save this money but spent it and it was now being deducted at the rate of €20 per fortnight and that it would take 11 years for the sum in question (€5500 approximately) to be fully repaid. It could be argued in the circumstances that in spending the sum the applicant got value and enjoyed the money and accordingly, suffered no detriment in any event. For these reasons, and in particular because of the absence of satisfactory evidence on the issue, I reject the applicant's claim on this ground also.

It is not necessary because of my findings on the above issues to comment on the decision of the personnel officer which was in effect affirmed by the Minister. I am of the view, however, for the reasons stated above and noting in particular the two brief medical reports from Dr. Morgan, the applicant's GP, that were furnished by the applicant in support of his claim, that there is ample evidence to justify the decision of the personnel officer and subsequently affirmed by the Minister, and by no stretch of the imagination could the decision be deemed so unreasonable as to justify being set aside in judicial review proceedings.