Neutral Citation [2013] IEHC 141

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 935 JR]

BETWEEN

ANTHONY PURDY

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Kearns P. delivered on 11th April, 2013

These proceedings arise from a decision of the respondent made on the 15th October, 2012 to dismiss the applicant from his position as clerical officer in An Garda Síochána. They were commenced by leave of the High Court (Peart J.) granted on the 12th November, 2012. A stay on the order to dismiss the applicant was granted on the 14th December, 2012. The applicant herein is seeking an order of *certiorari* quashing the aforementioned decision purporting to dismiss him from his employment with effect from the 12th November, 2012.

The reason given by the respondent for such dismissal was that the applicant's position as clerical officer was now untenable following his plea of guilty on the 7th October, 2010, to an offence contrary to s.6 of the Child Pornography and Trafficking Act 1998, namely, possession of child pornography, before Judge O'Donnell in the Dublin Metropolitan District Court. On the 19th April, 2011, the said charge was struck out following payment by the applicant of a contribution to the Rape Crisis Centre.

The grounds upon which the applicant is seeking relief are set out at paragraph (e) of the Statement of Grounds, the more pertinent grounds being the following:-

> (a) The decision of the respondent to dismiss the applicant was disproportionate in the circumstances and therefore unreasonable;
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> (b) The decision of the respondent to dismiss the applicant was *ultra vires* his powers, in particular in relation to Paragraph 65 of the Civil Service Disciplinary Code;
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> (c) The Respondent has failed to provide the reasons for his decision to dismiss the applicant, in particular the exceptional circumstances warranting a departure from the Civil Service Disciplinary Code Appeal Board's ruling on sanction and thereby failing to comply with the Civil Service Disciplinary Code, in particular Paragraph 65.

BACKGROUND FACTS

The applicant is employed as a clerical officer attached to the Finger Print Section, Garda Headquarters, Phoenix Park, Dublin 8. On the 21st June, 2010, the applicant was charged on foot of Charge Sheet No. 10428712 with possession of child pornography, an offence contrary to s.6 of the Child Pornography and Trafficking Act 1998.

Following the laying of this charge against the applicant, a charge which constitutes an allegation of serious misconduct within the meaning of Circular 14/2006 Civil Service Disciplinary Code, revised in accordance with the Civil Service Regulation (Amendment) Act 2005, disciplinary proceedings were instigated against him. These disciplinary proceedings were conducted by the Civilian Human Resources Directorate of An Garda Síochána pursuant to the Code.

By letter dated the 12th July, 2010, the applicant was notified by Fachtna Murphy, the then Commissioner of An Garda Síochána that, in light of the above, he was being suspended immediately on ordinary remuneration.

By letter dated the 15th July, 2010, the applicant was informed by the Civilian Human Resources Directorate that its Director, Mr. Alan Mulligan, had been appointed to investigate the allegations upon which the offence alleged in Charge Sheet No. 10428712 were founded and that a disciplinary investigation would remain in abeyance pending the outcome of the criminal investigation.

On the 7th October, 2010, the applicant entered a plea of guilty to the above charge.

On the 19th April, 2011, the said charge, as laid out on Charge Sheet No. 10428712, was struck out following payment by the applicant of a contribution (€2,500) to the Rape Crisis Centre.

The applicant was notified by Mr. Mulligan, by letter dated the 19th August, 2011, of a recommendation made by him to Commissioner Martin Callinan, with which the Commissioner agreed, that the applicant be dismissed from his position as clerical officer. Prior to formal dismissal, submissions were invited and were made by letter, dated the 21st October, 2011.

By letter dated the 10th January, 2012, the applicant was informed by Mr. Mulligan that his employment as clerical officer was to be terminated, the Commissioner having considered his case, together with reports and submissions made, and reached such a decision. However, the applicant was advised of his right of appeal to the Civil Service Disciplinary Code Appeal Board (hereinafter referred to as "the Board") in accordance with the Civil Service Regulations. Written submissions were made on behalf of the applicant to the

Board by the applicant's solicitors on the 23rd January, 2012. In response, Mr. Mulligan made written counter-submissions on the 14th February, 2012.

On the 19th April, 2012, a hearing of the above Board took place at which the applicant and Mr. Mulligan were both present and made detailed oral submissions.

On the 20th June, 2012 the Board determined that the sanction of dismissal was disproportionate to the misconduct alleged. Consequently, the Board recommended that the following sanctions be imposed on the applicant instead of a dismissal:-

1) deferral of increment for a period of 5 years from the date of suspension on the 12th July, 2010;

2) debar from competition for a period of 5 years from the date of suspension on the 12th July, 2010;

3) transfer out of An Garda Síochána to an alternative position within the Civil Service.

The applicant was informed by Mr. Mulligan, by letter of the 9th July, 2012, that he remained of the opinion that the Board's sanctions were not proportionate and the applicant's dismissal was thus warranted, but that in accordance with paragraph 63 of the Code, he had referred the matter to the Commissioner, as the appropriate authority for review before making a final decision. The applicant was also informed of his right to make representations to the Commissioner which he did on the 10th and 15th August, 2012.

Despite the determination of the Board, the respondent herein, Commissioner Martin Callinan, notified the applicant, by letter dated the 15th October, 2012, of his dismissal from his position as clerical officer in An Garda Síochána with effect from the 12th November, 2012.

The reason given by the respondent for such dismissal was the same as that given by the Commissioner earlier, that is to say that he could not allow this type of conduct within An Garda Síochána and as such the applicant's position as clerical officer therein was now untenable.

THE LEGISLATIVE FRAMEWORK

Although the applicant is not employed by the Commissioner, the Commissioner exercises significant authority in respect of the applicant's employment status, pursuant to Section 2 of the Civil Service Regulation (Amendment) Act 2005 which provides that the "appropriate authority" in respect of an established civil servant who is of a grade below that of principal officer is to be the Head of the Scheduled Office in which the civil servant is serving. Accordingly, as the applicant is currently employed in An Garda Síochána, the "appropriate authority" in respect of the applicant within the meaning of the Act of 2005 is the Commissioner.

Section 7 of the Act of 2005 provides that, where the Government so authorises, the powers and functions of the Government in respect of a civil servant may be exercised by an "appropriate authority". Section 4(1) of the Public Service Management Act 1997, provides that the Head of a Scheduled Office, in the applicant's case the Commissioner, shall have the authority, responsibility and accountability for carrying out a number of duties in respect of that Scheduled Office including:

> "h) Subject to the Civil Service Regulation Act 1956, the Civil Service Commissioners Act 1956, the Defence Acts, 1954-1993 (in respect of civilian employees recruited or appointed under the Defence Acts 1954-1993) and any other Act affecting the appointment, performance, discipline or dismissal of civil servants or civilian employees of the Department of Defence, managing all matters pertaining to appointments, performance, discipline and dismissals of staff below the grade of principal or its equivalent in the department of Scheduled Office;…"

Section 9 of the Act of 1997 provides that the Commissioner may assign responsibility for the performance of functions to an officer of a Scheduled Office, in this case being Mr. Alan Mulligan, the applicant's Personnel Officer. This officer shall, by virtue of s. 9(f) of the Act of 1997, perform on behalf of the Commissioner functions in respect of appointments, performance and discipline of personnel in the area of the assignment. However, the Commissioner retains the responsibility for disciplinary action, in accordance with s.10 of the Civil Service Regulation (Amendment) Act 2005 which amends s.15 of the Civil Service Regulation Act 1956.

Allegations of misconduct against a civil servant must be dealt with under Circular 14/2006: Civil Service Disciplinary Code revised in accordance with the Civil Service Regulation (Amendment) Act 2005 (hereinafter referred to as "the Code"). If serious misconduct is alleged, paragraph 33 of the Code provides that disciplinary action including dismissal in accordance with the procedures set out in paragraphs 34-41 of the Code may arise, as serious misconduct is viewed as a

> "serious breach of the Civil Service rules and procedures or of recognised and accepted standards and behaviour which results in a breakdown of the relationship of trust and confidence between the Department/Office and the member of staff concerned. Serious misconduct will justify disciplinary action set out in this Code including dismissal…"

The term "disciplinary action" is defined in paragraph 15 of the Code as:

> "action taken by the appropriate authority under the Civil Service Regulation Act by reason of, or as a direct consequence of a finding that the officer concerned has, in the opinion of the appropriate authority, failed to perform his or her duties to an adequate or appropriate standard, or has been guilty of misconduct, irregularity, neglect or unsatisfactory behaviour".

According to paragraph 16 of the Code, disciplinary action shall comprise any of the following actions taken in accordance with paragraph 15 above:

> "i. formal written notes placed on the officer's personnel file
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> ii. deferral of an increment
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> iii. debarment from competitions or from specified competitions or from promotion for a specified period of time
>
> iv. transfer to another office or division or geographical location
>
> v. withdrawal of concessions or allowances

vi. placing the civil servant on a lower rate of remuneration (including the withholding of an increment)

vii. reducing the civil servant to a specified lower grade or rank

viii. suspending the civil servant without pay, or

ix. dismissal.

Paragraph 35 of the Code states that:

> "Where an allegation of serious misconduct…has been made against an officer…the Personnel Officer shall consider the matter. The Personnel Officer shall cause such investigation or such further investigation as he or she considers appropriate to the matter to be undertaken. The Personnel Officer shall provide the officer with a written statement of the matter that is to be the subject of the investigation. The Personnel Officer shall arrange an interview with the officer against whom the allegation is made…and any other appropriate persons…"

Where the Personnel Officer is satisfied on the basis of consideration and such investigation as he has had undertaken, that disciplinary action as provided for in the Code is warranted, he shall, according to paragraph 37 of the Code furnish the officer, in this case being the applicant, with the following documentation:-

i The probative material gathered in the course of the investigation supporting the allegation which he or she will take into account in arriving at a decision;

ii A statement of the penalty which, having regard to the breach or breaches of the code alleged, he or she considers appropriate and

iii A copy of the code.

The officer concerned shall then submit a response in writing to the allegations within a specified period of time and may request a meeting with the Personnel Officer to consider the allegation in the light of the material gathered in the course of the investigation. The officer concerned may be accompanied at any such meeting by a serving civil servant of his choice or by a whole-time official of the union holding recognition for his or her grade.

Paragraph 40 of the Code provides that having considered any response by the officer concerned and any written or oral representations made by or on behalf of the officer concerned, the Personnel Officer shall decide whether the allegations have been substantiated and, where he or she is satisfied that conduct warranting disciplinary action has been established, shall inform the officer concerned in writing as soon as possible of the decision reached and of the action that "it is proposed to recommend to the appropriate authority". At the same time, the officer should be informed that he may make written representations to the appropriate authority or seek a review of the procedures by the Board.

Paragraph 41 of the Code states:

> "Where termination of employment is proposed, the Personnel Officer shall make a recommendation to the appropriate authority and provide him or her with a written report on the circumstances of the case. The decision to dismiss an officer will be made by the appropriate authority based on the report and the recommendation made to him or her."

Therefore, once the Personnel Officer makes a recommendation to the appropriate authority pursuant to the provisions of paragraph 41 of the Code, a decision must be taken by the appropriate authority based on the report and the recommendation made to him. In circumstances where a decision is then made by the appropriate authority to take disciplinary action against an officer in accordance with paragraphs 33 to 41 of the Code, an appeal may then be made to the Board as provided for by paragraph 42 of the Code.

Paragraph 43 of the Code thereafter sets out the constitution of the Board and the process to be adopted by the Board. Paragraph 49 provides that a review of disciplinary proceedings by the Board may be sought by the officer concerned on one or more of the following grounds:

"i. The provisions of this code were not adhered to

ii. All the relevant facts were not ascertained

iii. All the relevant facts were not considered, or not considered in a reasonable manner

iv. The officer concerned was not afforded a reasonable opportunity to answer the allegation

v. The officer concerned could not reasonably be expected to have understood that the behaviour alleged would attract disciplinary action

vi. The sanction recommended is disproportionate to the underperformance or misconduct alleged."

The officer concerned may, upon notification to him by the Personnel Officer or the appropriate authority that disciplinary action has been decided to be taken against him in accordance with paragraphs 33-41 of the Code, request in writing to the Personnel Officer or appropriate authority that the disciplinary proceedings be reviewed by the Board.

Paragraph 52 of the Code sets out the procedure to be followed in the event that the officer concerned has requested that the disciplinary proceedings be reviewed by the Board. In this context, the officer concerned is obliged to provide a written statement to the Board of the grounds in paragraph 49 on which the review is being sought. The Personnel Officer must then submit a written statement in response. The Board may also request further written submissions from the officer concerned or the appropriate authority, to be furnished within a specified time and format.

In circumstances where the Board has decided to review the disciplinary procedures having considered the submissions made under paragraph 52 of the Code, paragraph 55 of the Code provides that a hearing shall take place. Persons may be invited by the Board to give evidence at the hearing, either orally or in writing. The officer concerned may choose to make oral submissions to the Board if he

so wishes, in accordance with paragraph 57 of the Code. Proceedings before the Board shall be informal and the officer concerned and Personnel Officer are entitled to be present where the Board meets for the purpose of hearing oral submissions or taking oral evidence.

Paragraph 60 of the Code states that:-

> "Having made such inquiries as it considers necessary and having considered any submissions made or evidence given, the Board shall form an opinion as to whether or not a case has been established on one or more of the grounds set out in paragraph 49 and shall issue its opinion within ten working days to the Personnel Officer, the officer concerned and their representatives."

Where the opinion of the Board is to the effect that such a case has been established by the officer concerned, paragraph 61 of the Code provides that the Board may, in such circumstances, recommend to the Personnel Officer or appropriate authority as the case may be that:

> "i. no further action shall be taken in the matter, or
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> ii. the disciplinary action decided by the Personnel Officer or appropriate authority should be amended in a specified manner, or
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> iii. the case should be reconsidered by the Personnel Officer to remedy a specified deficiency in the disciplinary proceedings (in which event the provisions of the code continue to apply)."

In circumstances where the disciplinary action recommended by the Board falls within the jurisdiction of the Personnel Officer, as it did in the applicant's case, and the Personnel Officer still wishes to take the action he had earlier proposed, he must then refer the matter to the appropriate authority for review before making a final decision, in compliance with paragraph 63 of the Code which provides that:

> "Where, following the issue of an opinion by the Board, the Personnel Office proposes to take disciplinary action other than in accordance with that opinion, he or she shall refer the matter to the appropriate authority for review before making a final decision."

The Personnel Officer is then obliged to inform the officer concerned accordingly who must be given an opportunity to make representations to the appropriate authority, within a specified time. The appropriate authority, then in reviewing the matter, shall, pursuant to paragraph 63 of the Code, be supplied with any representations made by the officer concerned and any opinion delivered by the Board.

Paragraph 65 of the Code states that:

> "In general, it is expected that the opinion of the Board will be taken into account and decisions to implement disciplinary action contrary to the opinion of the Board should be an exceptional event."

In such circumstances, a decision to dismiss an officer must be made by the appropriate authority, in accordance with s. 9(1) (f) of the Act of 1997. This decision should be communicated to the officer in writing.

APPLICANT'S SUBMISSONS
Counsel on behalf of the applicant submitted that in light of the Board's sanction recommending the applicant's transfer out of An Garda Síochána and into another department within the Civil Service, the Commissioner had failed to address himself to the right question when determining whether the applicant's dismissal was appropriate. It was contended that the Commissioner's letter of 15th October, 2012, inferred that he was solely concerned about permitting the applicant to continue in his position as clerical officer with An Garda Síochána in light of the nature of the offence he was charged with and subsequently pleaded guilty to.

It was further submitted that the Commissioner had failed to state reasons for the applicant's dismissal or, if he had stated reasons, those reasons were not directed, as they should have been, to exceptional considerations warranting a departure from the opinion of the Board. In judicial review terms, he had addressed his mind to the wrong question. He had not identified an "exceptional event" to justify a decision contrary to the view of the Board but had merely re-stated his original decision.

RESPONDENT'S SUBMISSIONS
It was contended by counsel for the respondent that the Commissioner had not acted "*ultra vires*" his powers, in particular in relation to paragraph 65 of the Code and that the sanction of dismissal was not disproportionate in the circumstances. It was further contended that the applicant had placed the wrong interpretation on paragraph 65 of the Code especially the phrase, "exceptional event". It did not mean that there had to be exceptional reasons for departing from the view of the Board but only that the reason for his different view be based on an exceptional event. The offence in this case clearly fell into such a category.

It was also submitted by the respondent that the issue of unfairness on the merits of the decision by the Commissioner to dismiss the applicant herein is not an appropriate matter for judicial review. It was further submitted that there was an alternative remedy open to the applicant in the present case, one that was infinitely more suitable in the circumstances, namely an appeal to the Employment Appeals Tribunal, as provided for in Appendix 2 of the Code.

DECISION
The essential legal principles underpinning the law on judicial review were recently reiterated by the Supreme Court in the case of *Rawson v. The Minister for Defence* [2012] IESC 26, in which Clarke J. stated the following at paras 6.1- 6.10:-

> "6.1 It is trite law to say that judicial review is concerned with the lawfulness of decision making in the public field. Where a decision is made by a public person or body which has the force of law and which affects the rights and obligations of an individual then it hardly needs to be said that the courts have jurisdiction to consider whether the decision concerned is lawful. If it were not so then it is hard to see how such a situation would be consistent with the rule of law. For if decisions materially affecting the rights and obligations of individuals could be made in an unlawful fashion the rule of law would not be upheld.
>
> 6.2 While the circumstances in which a decision made by a public person or body may be found to be unlawful are varied,

it is possible to give a non-exhaustive account of the principal bases by reference to which such a finding might be made. First, the decision must be within the power of the person or body concerned. Second, the process leading to the decision must comply both with fair procedures and with whatever procedural rules may be laid down by law for the making of the decision concerned. Third, the decision maker must address the correct question or questions which need to be answered in order to exercise the relevant power and in so doing must have regard to any necessary factors properly taken into account and must also exclude any considerations not permitted. Fourth, in answering the proper questions raised and in assessing all matters properly taken into account the decision maker must come to a rational decision in the sense in which that term is used in the jurisprudence.

6.3 There may, of course, be many variations or additions to that very broad description of the matters that need to be assessed in order to decide whether a decision affecting rights and obligations has been lawfully made. However, it seems to me that a party faced with a decision which affects their rights and obligations must be entitled to assess whether they have a basis for challenging the lawfulness of the decision in question. The courts have consistently held that it is an inherent part of the judicial review role of the courts that parties need to know enough about the process and the decision which affects them to be able to mount a challenge to that decision on the grounds of unlawfulness in an appropriate case.

6.4. In *O'Donoghue v. An Bord Pleanála* [1991] I.L.R.M 750, Murphy J. said, at p. 757:-

> 'It is clear that the reason furnished by the Board (or any other tribunal) must be sufficient first to enable the courts to review and secondly to satisfy the persons having recourse to the tribunal that it has directed its mind adequately to the issue before it. It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations ...'

6. 5 Sometimes, of course, the process itself will provide for an appeal. It has consistently been held that parties who have a right of appeal within a process are entitled to sufficient information to enable them to consider, and if appropriate to mount, such an appeal. For example, Finlay P. in *State (Sweeney) v. Minister for the Environment* [1979] I.L.R.M 35, stated that it was necessary '... to give ... (to an) applicant such information as may be necessary and appropriate for him, firstly, to consider whether he has got a reasonable chance of succeeding in appealing against the decision of the planning authority and secondly, to enable him to arm himself for the hearing of such an appeal.'

6.6 Kelly J. came to a similar view in *Mulholland v. An Bord Pleanála* (No.2) [2006] 1 I.R. 433 at 460.

6. 7 More recently in *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 Murray C.J. said that a failure to supply sufficient reasons would affect the applicant's 'constitutional right of access to the Courts to have the legality of an administrative decision judicially reviewed could be rendered either pointless or so circumscribed as to be unacceptably ineffective'.

6. 8 While the primary focus of a number of the judgments cited, and indeed aspects of the decision in *Meadows* itself, were on the need to give reasons as such, there is, perhaps, an even more general principle involved. As pointed out by Murray C.J. in *Meadows* a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness. How that general principle may impact on the facts of an individual case can be dependant on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned on this appeal, the particular basis of challenge. In some cases the material on which a challenge might be considered may be obvious. Where, for example, the challenge is based on a suggestion that the relevant decision maker did not have jurisdiction at all, it will, at least in the majority of cases, be possible to assess that question by reference to a comparison between the decision made and its scope on the one hand and the law (whether statute or otherwise) conferring the decision making power on the other. Where the challenge is based on the process or procedures followed then, again in the majority of cases, any party having standing to challenge the decision will have participated in the process (or will be able to point to an arguably unlawful exclusion) and will be likely to be well familiar with what happened and thus able to assess whether there is any legitimate basis for challenge.

6.9 However, where the possible basis for challenge is concerned with the decision making itself then there is the potential for a greater deficit of ready information. Where the possible basis for challenge is founded on an absence of the correct question being addressed, incorrect considerations being applied or an irrational decision, any party wishing to assess the lawfulness of the decision will need to know something about the decision making process itself. While, as already pointed out, this is not a "reasons" case per se nonetheless the underlying rationale for the case law on the need to give a reasoned but not discursive ruling, while not strictly speaking applicable, seems to me to have a bearing on a case such as this where the issue is as to whether the decision maker addressed the correct question. *White & Anor. v. Dublin City Council & Ors*. [2004] 1 I.R. 545, is a good example of a case in which a decision was quashed because the decision maker asked himself the wrong question. The case concerned a question as to whether a revision to a planning application required to be re-advertised. Fennelly J. found that the decision maker had, in reality, asked himself whether planning permission should be granted rather than whether some members of the public might reasonably wish to object to the plans as modified. It is clear from the judgment that the court had available to it sufficient materials to enable an analysis to be conducted as to the question addressed by the decision maker.

6.10 However, if a person affected does not have any sufficient information as to the question which the decision maker actually addressed then it surely follows that that person's constitutional right of access to the courts to have the legality of the relevant administrative decision judicially reviewed is likely to be, in the words of Murray C.J. in *Meadows*, 'rendered either pointless or so circumscribed as to be unacceptably ineffective'."

Applying the above to the facts of the present case, I am satisfied that the decision to dismiss the applicant herein was within the power of the Commissioner as the appropriate authority pursuant to the Act of 1997, the Act of 2005 and the Code. I am further satisfied that the process leading up to the decision to dismiss the applicant did, in fact, comply both with fair procedures and with the procedural rules laid down by the Code and the relevant Acts mentioned above.

I am satisfied on the facts of the present case that the Commissioner's decision to dismiss the applicant was due to the fact that the applicant had pleaded guilty to a criminal offence, its seriousness reflected in the penalty attached to it, namely a fine not exceeding

€1,500 or imprisonment for a term not exceeding twelve months or both on summary conviction or a fine not exceeding €5,000 or imprisonment for a term not exceeding five years or both on indictment. The Commissioner made it perfectly clear in his letter of the 15th October, 2012, in dismissing the applicant, that the commission of the offence of possession of child pornography is one that An Garda Síochána simply cannot condone, stating that:

> "In your case it was alleged that you engaged in serious misconduct within the meaning of the Civil Service Disciplinary Code, in that you pleaded guilty to an offence contrary to Section 6 of the Child Trafficking and Pornography Act, 1998. I cannot allow this type of conduct within An Garda Síochána."

It is difficult to ascertain what other reason could have been provided and how this reason for the applicant's dismissal could have been made any more explicit. The applicant was never in any doubt and could never have been in any doubt as to the reason for the Commissioner's decision.

It is necessary to remember here, I think, that in accordance with the Code and the relevant Acts mentioned above, that the Board's view was a mere recommendation. It was always open to the Commissioner to take a different view regarding the applicant than the opinion reached by the Board in the matter. To reiterate paragraph 65 of the Code in full again:

> "In general, it is expected that the opinion of the Board will be taken into account and decisions to implement disciplinary action contrary to the opinion of the Board should be an exceptional event."

It has to be again emphasised here that "exceptional event" does not mean "exceptional reason" and could be just as easily described as a "rare event". As such, it was well within the authority of the Commissioner to view the nature of the offence to which the applicant was charged with and pleaded guilty to as an exceptional event and in the circumstances exercise his discretion to depart from the decision of the Board.

Furthermore, I am satisfied that, not only did the Commissioner address the correct question in reaching his decision to dismiss the applicant in the present case, but he also rationally answered that question having regard to all relevant factors and after having properly taken all relevant material before him into account. I am further satisfied that the Commissioner was entitled to take the view that the conduct admitted by the applicant was of a nature that warranted being classified as "serious misconduct" defined in Appendix 2 of the Code as including, *inter alia*, "disrespect for the law, e.g. knowingly acting in an illegal way that has implications for official employment/criminal conviction that has implications for official employment" and, therefore, such as to justify dismissal.

The remedy sought by the applicant herein, namely *certiorari*, is a discretionary remedy. It is well settled law, not only in this jurisdiction, that in considering the exercise of its discretion, a court must consider whether there is an alternative remedy available to the applicant and the appropriateness and effectiveness of such a remedy to the matter in question.

In *O'Donnell v. Tipperary (South Riding) County Council* [2005] IESC 18 [2005] 2 I.R. 483 Denham J. (as she then was) set out the applicable law at paragraph 6.1/p. 487 of her judgment as follows:-

> "The common law relating to the discretion to be exercised by a court, when there is an application for judicial review in circumstances where there is an alternative remedy, is well settled. In a High Court judgment in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 at p. 509 Barron J. held:-
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> > 'The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind. Analysis of the authorities shows that this is in effect the real consideration.'

This approach was adopted by the Supreme Court in *Buckley v. Kirby* [2000] 3 I.R. 431, and further endorsed by Denham J. (as she then was) in *Stefan v. Minister for Justice* [2001] 4 I.R. 203 wherein she states at p. 217:-

> "Once it is determined that an order of *certiorari* may be granted, the court retains a discretion in all the circumstances of the case as to whether an order of *certiorari* should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of *certiorari* is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether *certiorari* is the appropriate remedy to attain a just result."

While it is accepted that the applicant in *O'Donnell v. Tipperary (South Riding) County Council,* unlike this applicant, had already commenced proceedings before the Employment Appeals Tribunal, this alternative remedy nevertheless remains open to the applicant to pursue. Denham J. stated at para. 6.6/p.489 of her judgment in *O'Donnell*:-

> "In assessing the nature of the alternative right of appeal and judicial review, there are a number of relevant factors. Included in these factors are the following. First, the fact that the applicant has already commenced this alternative remedy and that there has been a hearing of the matter over two days. This appeal now stands adjourned pending this judicial review. While these appeal steps are not a determinative factor, in the circumstances they are a weighty factor. Secondly, the issues which the applicant raises relate to natural justice and to fairness, which relate to the merits of the case also, which issues may be addressed and determined by the Employment Appeals Tribunal. Thirdly, the matters raised do not relate to net issues such as points of law or jurisdiction. Fourthly, the essence of the issue raised relates to evidence as to the allegedly fraudulent actions of the applicant and this may be dealt with fully by an appeal before the Employment Appeals Tribunal, rather than as a review of procedure. It is manifestly a matter for an appeal process rather than a review of procedure. Fifthly, the applicant seeks reinstatement of his post and he referred to the low statistical figures for reinstatement by the Employment Appeals Tribunal. I have considered this as a factor but I do not give it a heavy weighting given that the Tribunal has the jurisdiction to hear an appeal and to reinstate, and the applicant may present his full case on the appeal. Sixthly, there is a right of appeal from the Employment Appeals Tribunal to the Circuit Court, then to the High Court and on a point of law to this court."

Thus, the applicant herein is not precluded from taking this alternative option open to him. Additionally, the Employment Appeals Tribunal in considering the applicant's claim in relation to unfair dismissal, will require that the Commissioner establish, not only that he had substantial grounds justifying the applicant's dismissal, but, also that he followed fair procedures before such dismissal.

Furthermore, in accordance with Appendix 1 of the Code, the applicant, if he wishes to make such a claim must give formal notice in writing to the Rights Commissioner or the Employment Appeals Tribunal within 6 months of the alleged dismissal. Therefore, as the original date of the applicant's dismissal is the 12th November, 2012, the applicant herein is still in time to follow this course of action.

Taking all of the above matters into consideration, I am refusing to grant the relief sought.