Neutral Citation [2015] IEHC 442

THE HIGH COURT

JUDICIAL REVIEW

[Record No.2014/179 JR]

BETWEEN

BRIAN CULBERT

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 10th day of July 2015.

Introduction

1. These proceedings concern certain procedures adopted by the respondent in the course of a disciplinary process against the applicant, as a result of the decision of the Supreme Court in *Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47. The Supreme Court determined that, upon a true construction of the Garda Síochána (Discipline) Regulations, 2007, a board of inquiry convened under the regulations is obliged to give reasons for its findings and for the recommendation that it makes to the Commissioner.

2. In this case the respondent made a decision to dismiss the applicant, after receiving a report from a board of inquiry. The specific issues in the case arise from the fact that, while the applicant's appeal against the respondent's decision to dismiss him was pending, the board of inquiry that had considered his case was asked to reconvene in order to give reasons for its recommendation that he be dismissed.

3. In so far as it is relevant to these proceedings, a Garda disciplinary process commences with an internal investigation. Having considered the results of that investigation, the Commissioner may establish a board of inquiry. That body makes findings on the charges made against the member and recommendations as to what, if any, disciplinary action should be taken. The Commissioner then decides whether or not to accept that recommendation. There is a right of appeal to an Appeal Board from the decision of the Commissioner.

Background facts

4. In December, 2011, the respondent appointed a senior officer to investigate alleged breaches of discipline concerning the applicant. As a result of that investigation a board of inquiry was established on 20th May, 2013, in accordance with the provisions of Regulation 25 of the regulations.

5. The breaches of discipline as alleged against the applicant were disobedience of orders, two counts of falsehood, improper practice and abuse of authority. It is not necessary, for the purposes of this judgment, to set out any of the detail of the matters giving rise to those allegations. There is no dispute about the fact that, if established, they came within the definition of "serious" breaches of discipline as dealt with in Part 3 of the regulations. A "serious" breach is one which, in the opinion of the Commissioner, may be subject to dismissal, requirement to retire or resign as an alternative to dismissal, reduction in rank, or reduction in pay.

6. The board of inquiry convened on the 4th September, 2013. Each alleged breach of discipline was formally put to and admitted by the applicant. Evidence in relation to the charges was adduced. Witnesses as to character were called on behalf of the applicant, and written and oral submissions were presented in mitigation of penalty.

7. At the conclusion of the hearing the board found the applicant in breach of discipline in respect of each of the five counts. In accordance with its statutory functions the board made a report, containing its recommendation to the respondent with regard to the taking of disciplinary action. The recommended action was dismissal. The report was in a standard form and the board did not give reasons for its recommendation.

8. On the 4th October, 2013, the respondent ordered that the applicant be dismissed from An Garda Síochána with effect from midnight on the 25th October, 2013. The decision was communicated by way of a standard form which simply recited that, "having regard to" the recommendation of the board of inquiry, the respondent had decided to dismiss him.

9. Regulation 33 provides that not later than seven days after receiving notification of the Commissioner's decision, the member concerned may give notice of appeal against the determination of the Board of Inquiry, or the disciplinary action decided on, or both. The regulation further provides at paragraph (3) that the appeal may be based on one or more of the following grounds:

> (a) specified provisions of the regulations were not complied with;
>
> (b) the determination is not justified, having regard to the evidence heard by the board of inquiry;
>
> (c) all of the relevant facts –
>
> > (i) were not ascertained,
> >
> > (ii) were not considered, or

(iii) were not considered in a reasonable manner;

(d) the member was not given a reasonable opportunity to be heard and to respond to matters raised;

(e) the disciplinary action which the Commissioner has decided to take …is disproportionate in relation to the breach of discipline concerned.

10. By notice of appeal dated the 10th October, 2013, the applicant appealed in relation to the disciplinary action decided upon by the respondent. The notice listed as his grounds of appeal a claim that the relevant facts were not properly ascertained or considered, that the disciplinary action was disproportionate and that Regulation 4 had not been complied with. Regulation 4 requires that where disciplinary sanction is being considered, due regard shall be had to the record of service, previous conduct and circumstances of the member and to any other relevant matter.

11. On the 5th November, 2013, the Supreme Court delivered judgment in the case of *Kelly v The Commissioner of An Garda Síochána*, discussed further below.

12. On the 6th November, 2013, the respondent established a Board of Appeal in relation to the applicant's case.

13. The applicant's solicitor provided the Appeal Board with a written statement of grounds of appeal on the 10th December, 2013, having been requested to do so. The grounds were set out under the following headings:

i. Prematurely conducting a Board of Inquiry

ii. Failing to conduct a proper hearing

iii. Failing to deliberate properly or at all on submissions made on behalf of the appellant

iv. Failing to consider alternative sanctions

v. Failed to have regard to and consider relevant precedent

vi. Failing to consider carefully and fully the evidence of witnesses called on behalf of Garda Culbert

vii. Failure by the Board to consider in full and understand the charges brought against Garda Culbert and as such made and improper and unreasonable recommendation to the Commissioner

viii. Failing to comply with Regulation 4 of the Garda Síochána (Discipline) Regulations 2007.

ix. Failing to appreciate and understand the implementation of Garda policy at operational level

x. Submitting Garda Culbert to unfair and disproportionate sanction.

xi. Imposed punitive and excessive sanction

xii. Failing to consider all of the relevant facts in the case

xiii. Failure to notify Garda Culbert in writing of the reasons for his dismissal as required by law.

14. Each of these headings was briefly elaborated upon. Under the last heading it was complained that the applicant had not been given reasons in writing for either the recommendation for dismissal by the board of inquiry or the decision to dismiss by the respondent.

15. A hearing date of the 27th February, 2014, was set for the appeal. However, on the 28th January the applicant's solicitor wrote to the chairperson of the Appeal Board seeking a postponement. This was acknowledged on the 1st of February.

16. On the 29th January, Superintendent Synnott of Garda Internal Affairs wrote to the chairperson of the board of inquiry making a request in the following terms:

"In light of the decision of the Supreme Court, on 5th November 2013, in the case of John Kelly v. Commissioner of An Garda Síochána [2013] IESC 47, it would be appreciated if you could reconvene the members of the Board of Inquiry, Chief Superintendent Coburn and Superintendent Sarah Meyler, in order to provide the Commissioner with a report outlining the reasons for the decision of the Board and the reasons for the penalty recommended by the Board in this matter."

17. Superintendent Synnott wrote on the same date to the chairperson of the Appeal Board, to inform her of this request and to assure her that on receipt of the report the applicant and the Appeal Board would be notified. However, she did not at this stage inform the applicant or his advisors of the step she had taken.

18. On the 5th February, 2014, the chairperson of the Appeal Board wrote to the applicant's solicitor, stating that the hearing was being adjourned to the 7th of April

"on the grounds that an additional report is being sought from the Presiding Officer outlining the reasons for the decision of the Board of Inquiry."

19. Mistakenly, but perhaps not surprisingly, the applicant's solicitor interpreted this letter as meaning that the Appeal Board itself was seeking the additional report. He responded on the 19th February, stating it to be his belief that

"the process you have embarked on is outside of your remit and in those circumstances, my client's case is being dealt with unfairly and without due regard to proper and transparent process."

20. On the 26th February, the chairperson of the Appeal Board replied, saying that the Board had directed Garda Internal Affairs "*to notify you of their decision to seek a report from the Presiding Officer outlining the reasons for the decision of the Board of Inquiry*." The letter referred to the Kelly decision.

21. This letter was followed a day later by a letter from Superintendent Synnott, informing the applicant's solicitor that, "*in the light of*" the decision in *Kelly*, the members of the inquiry board had reconvened on the 10th February, 2014, in order to provide the Commissioner with a report outlining the reasons for their decision and for the penalty recommended by them. It was stated that a copy of the report would be furnished, upon receipt, to the applicant, his solicitor and to each member of the Appeal Board.

22. The applicant's solicitor then protested, by letter dated the 14th March, that the proceedings in the matter were taking place "*outside of the scope of the legislative framework and in excess of authority conferred*". It was considered that the process was beyond any possibility of correction and an undertaking to set aside the procedures in their entirety was called for.

23. Chief Superintendent McLoughlin, the head of Internal Affairs, replied on the 20th March. He referred to *Kelly* and said that the applicant in those proceedings had

> *"challenged the decision of an appeal board to refuse the hearing of his appeal on the basis that the Board of Inquiry did not give reasons."*

24. He went on:

> *"The Supreme Court agreed that the Board of Inquiry should give reasons for its decision. However, the Supreme Court remitted the matter back to the Board of Inquiry in order for reasons to be given for its decision.*
>
> *In compliance with the Supreme Court judgment, this office wrote to the Presiding Officer of D/Garda Culbert's Board of Inquiry requesting the reasons for the Board of Inquiry's decision.*
>
> It is not agreed that your client's right to a fair hearing encompassing basic fairness of procedures has been compromised as a result of compliance with the Supreme Court ruling."

25. The applicant was granted leave on the 24th March, 2014, (Peart J.), to apply by judicial review for an order of prohibition restraining the respondent from taking any further steps in the pending disciplinary discipline proceedings; *certiorari* in respect of the appointment of both the board of inquiry and the Appeal Board, and in respect of any decision or action taken by either body, and various declarations.

The decision in Kelly v. The Commissioner of An Garda Síochána [2013] IESC 47

26. In *Kelly* a board of inquiry had been appointed to conduct a hearing into allegations against the applicant. The board found that all of the charges had been established and recommended his dismissal. In its "report" to the Commissioner, the board included this recommendation, lists of witnesses and exhibits from the hearing, the statements of the witnesses and a transcript of the hearing. It did not give reasons for either its findings of guilt or the recommendation for dismissal.

27. The Commissioner accepted the recommendation and dismissed the applicant, who appealed.

28. The appeal board dismissed the appeal without a hearing, under a power conferred by the Regulations to do so where the grounds of appeal were "*without substance or foundation*".

29. The applicant then instituted judicial review proceedings seeking to quash, *inter alia*, the recommendation of the board of inquiry, the decision of the Commissioner to accept the recommendation and dismiss him and the decision of the appeal board to dismiss the appeal.

30. Giving the judgment of the Supreme Court, O'Donnell J. referred to the general proposition of law, exemplified in *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59, that a decision-maker is obliged to give reasons for his or her decision. The following passage from *Mallak* was cited:

> *"In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."*

31. O'Donnell J. stressed that the decision of the court in *Mallak* did not simply ascertain a general principle applicable without more to all administrative decisions

> *"The principle must be analysed in the context of the relevant statutory or administrative regime."*

32. The judgment goes on, therefore, to analyse the process, described as "self-contained" for dealing with allegations of breaches of discipline under the Regulations.

33. It is noted that under Regulation 30, the presiding officer of a board of inquiry shall, within 21 days of the conclusion of the inquiry, submit a written report to the Commissioner and forward a copy of that report to the member concerned. Regulation 30(2) provides that the report "*shall include*" (in summary) copies of the material before the board, the transcript of the hearing, the determination of the board as to whether or not the member was in breach of discipline and the recommendation of the board as to any disciplinary action to be taken.

34. It is then for the Commissioner to decide, within 14 days of receipt of the report, on the appropriate disciplinary action. In relation to a member under the rank of inspector, the Commissioner may take any action up to and including dismissal upon his or her own authority. However, if the action proposed by the Commissioner is more severe than that recommended by the board, the member must be given an opportunity to make representations.

35. The regulations relating to the conduct of the appeal process provide specifically, in Regulation 37(3) that the appeal board must

communicate its decision and the reasons for that decision in writing.

36. O'Donnell J. noted that the Regulations under consideration were those which applied to allegations of "serious" breaches of discipline.

> *"It is to be expected therefore that the procedures established leading to such a result would be both careful and elaborate, as indeed they are."*

37. It was said that it was impossible to know what view the respective decision-makers had taken on the facts of the case, because neither of them had explained their respective decisions in even the most rudimentary way.

> *"The remarkable and somewhat unsettling fact is that Garda Kelly was dismissed by the application by the Appeal Board of a test the content of which was and remains unknown, to facts which are themselves, even now, unclear. In relation to the actual decision leading to his dismissal, not only does Garda Kelly not know the view the Board of Inquiry took of the facts, but, and perhaps more importantly, he does not know at this stage what the Board of Appeal thought the Board of Inquiry had decided in relation to all the facts."*

38. On analysis of the regulations, the Court concluded that it was envisaged that the report of the board of inquiry to the Commissioner should contain some account of the Board's reasoning. It was also noted that that board did not itself impose a sanction, but recommended it.

> *"It is for the Commissioner to decide, in the light of the Board's determination of the facts, and recommendation as to penalty, what penalty he or she considers appropriate. Thus, in every case the conclusion of the Board's inquiry must go to another decision-maker (the Commissioner and in some cases the Government) and in many cases will be considered by a third decision maker (the Appeal Board). Thus, when the Regulations impose an obligation on the Board of Inquiry to 'submit a written report to the Commissioner' such an obligation must be read in the light that the Regulations themselves contemplate important decisions being made, and possibly reviewed, on foot of that written report. This in itself suggests that the Regulations contemplated a narrative setting out the views, and therefore the reasons, of the Board."*

39. With reference to the role of the Commissioner, the Court said:

> *"The Commissioner of An Garda Síochána has many other important functions besides making determinations on discipline within the force, and it seems very unlikely that the Regulations would have contemplated that he or she should approach the important task, of determining appropriate sanctions in cases of serious breach of discipline, within the limited timescale provided for, by perusing not just the full witness statements and exhibits, but as in this case the transcripts of five days of hearing, without any narrative indicating the analysis of that material which the Board of Inquiry must have carried out to come to the conclusion that it did."*

40. The Court continued:

> *"By the same token it is relevant to consider the other contemplated recipient of the report of the Board of Inquiry. Regulation 33 contemplates an appeal by the member in the case of a breach of discipline found. It is not necessary here to resolve any question as to the nature of the appeal contemplated. It was argued on behalf of the Commissioner that it was no more than a review akin to judicial review of the proceedings of the Board of Inquiry. On the other hand, counsel for the appellant pointed to the power of the Appeal Board to hear evidence on oath from any party and contended that in an appropriate case there could be a rehearing. But even taking the narrower approach suggested on behalf of the Commissioner, it seems to follow that, if the Appeal Board is to carry out such a function, it must know not just the decision arrived at by the Board of Inquiry but why and how it did so."*

41. Finally, the Court observed that having regard to the structure and functions of the regulations, it made little sense to provide for a requirement that the Appeal Board give reasons for its decision after a full appeal unless the scheme also required the giving of reasons at the earlier stages in the process.

42. In determining the appropriate remedy in the case, the Court noted that a failure to give reasons would normally lead to the quashing of the unreasoned decision.

> *"However, no complaint is made about the five day hearing before the Board, and it was not argued that the conclusion of the Board was not open to it on the evidence before it. Furthermore the Applicant made a realistic offer in advance of the High Court hearing suggesting that the Appeal Board's decision could be set aside to permit a full appeal. In this case I consider it to be both wasteful and unhelpful to require a further first instance rehearing of these matters… The frailties complained of by the Applicant arise from the point when reasons were not given for the Board's decision. If such reasons are now provided the Applicant will be entitled to appeal. Any Appeal Board will have not only the material before the Board of Inquiry and the reasons offered but also the consideration of the matter that has been a product of the judicial review procedure. Accordingly in the particular circumstances of this case, I would quash the decision of the Appeal Board upholding the Commissioner's decision dismissing the applicant and direct that the Board of Inquiry furnish reasons for its decision, and that the matter should then proceed from that point. I would however give the parties liberty to apply in the event of any practical difficulty."*

The Applicant's Submissions

43. On behalf of the applicant Mr. Burns S.C. accepts that, in the wake of Kelly, the respondent was attempting to rectify the situation in this case. However, he says that the respondent should have applied to the High Court to quash the report of the Board of Inquiry. The procedure adopted ignores the fact that in Kelly, the Supreme Court granted an order of *certiorari* coupled with a remittal and directions from the Court as to how the matter should proceed.

44. It is submitted that once the Commissioner has acted on the recommendations of the Board of Inquiry, the latter body is *functus officio*. The implication of what has occurred is that Garda Internal Affairs considers that it has the right to go back to the board of inquiry and request further steps to be taken, without reference to the member. The reconvened meeting of the Board took place without notice to the applicant, in circumstances where its failure to give reasons was one of his grounds of appeal. If the applicant had been aware of the proposal to hold that meeting he would have made representations to the effect that it could not lawfully be

held.

45. It is pointed out that the letter from Chief Superintendent McLoughlin makes it clear that the requested report from the board of inquiry will go to the members of the Appeal Board. There was no suggestion that the respondent might reconsider the matter in the light of the report, and it is absurd to ask the board of inquiry for its reasons after the respondent has acted upon its recommendation.

46. Mr. Burns says that the entire process has been tainted before ever reaching the Appeal Board, and that the applicant is now entitled to a rehearing before a board of inquiry. This argument is based on the fact that the appellant had, in his appeal grounds, made criticisms of the conduct of the hearing at first instance. If all that is asked for at this stage is that the reasons be given by the board of inquiry, it is not unreasonable to think that the members of that board might be tempted to add to the reasons they had at the time.

47. In relation to the final order of the Supreme Court in *Kelly*, Mr. Burns says that the Court was expressly making a decision as to the best way to proceed in the particular circumstances of the case. The judgment should not be taken as authority for parties to take a "DIY" approach. Reliance is placed upon the statement by O'Donnell J. that the normal remedy in cases of a failure to give reasons is to quash the unreasoned decision, and it is submitted that there are no countervailing considerations to disentitle the applicant from that relief. He is also, it is contended, entitled to prohibition because of the "*whole series of irregularities*".

48. It is accepted that the pleadings do not expressly seek *certiorari* in respect of the respondent's decision, but it is submitted that it must fall, being based upon an unreasoned decision, and being itself unreasoned.

The Respondent's submissions

49. On behalf of the respondent Mr. Power S.C. lays emphasis on the fact that this is a case involving serious allegations, which were admitted by the applicant. Where admissions are made, the questions of fact are straightforward so there is no need to give reasons. In any event reasons should not be seen as an end in themselves. However, what happened here was a "not unreasonable" effort to comply with *Kelly*. It is submitted that the phrase "*in the particular circumstances of this case*" as used by O'Donnell J. must be understood to mean "this type of case".

50. It is submitted that in *Kelly* the Supreme Court was dealing with a matter that turned entirely on disputed facts. The Court specifically linked the necessity for the board of inquiry to give reasons to the appeal board process. There was no reference to the Commissioner, because it would be unrealistic to expect him or her to read the material. The Court did not expect a reasoned decision from him, and therefore the Appeal Board would not be expected to consider his reasons.

51. It is contended that the applicant is out of time to challenge the respondent's decision, and the respondent reserves her position as to what effect an order quashing the board of inquiry's decision would be in circumstances where the case is really about what happened afterwards.

52. In answer to a question as to what the purpose of asking the board of inquiry for its reasons at this stage was, Mr. Power said that knowing the reasons would inform the decision of the Appeal Board. It would consider the respondent's decision in the light of those reasons. The applicant has been premature in bringing these proceedings and should instead be making submissions to the Appeal Board either to the effect that the reasons should not be considered, or as to the weight to be attributed to the reasons in these circumstances.

53. It was confirmed that the reconvened meeting took place without any representation from the Garda authorities, and it was therefore submitted that there was no prejudice to the applicant arising from the fact that he was not notified in advance.

54. Mr. Power says that since the board of inquiry is obliged to give reasons, it cannot be said to be *functus officio* until it does.

Conclusions

55. In my view the respondent's case is based on a misreading of the judgment of the Supreme Court in *Kelly*. While the focus was on the Appeal Board – since that body had dismissed the applicant's case without a hearing, and without knowing the reasons for either the Commissioner's decision or the recommendation upon which it was based - the Court did not suggest that the Commissioner could not be expected to consider the report of the board of inquiry. It specifically said, in the passage quoted above, that the Commissioner could not be expected to approach the important task conferred on him or her in these matters by perusing not just the full witness statements, exhibits but also the transcripts, *without any narrative* indicating the analysis by which the board had come to its conclusions. This was part of the reason why the Court felt that the regulations themselves, and not merely the application of general administrative law principles, required the board to state its reasons.

56. It has to be borne in mind that it is the Commissioner who bears the statutory responsibility for deciding on the disciplinary sanction in these matters, not the board of inquiry.

57. That being so, I can see no point to the procedure adopted in this case. The idea that the appeal against the Commissioner's decision should proceed on the basis that the appeal board will have the board of inquiry's reasons for its recommendation, where the Commissioner who accepted the recommendation did not, seems somewhat unreal.

58. The Supreme Court decided "in the particular circumstances" of *Kelly* that it would be wasteful and unnecessary to direct a full first instance rehearing. It chose instead to direct that the board of inquiry should give its reasons

> *"and that the matter should then proceed from that point".*

59. "That point", having regard to the regulatory structure, is the point at which the board's report is finalised and sent to the Commissioner. I do not see anything in the judgment to suggest that the Commissioner's statutory function was to be bypassed, with an appeal to be conducted as if it did not matter that he had made a decision based on an unreasoned report.

60. It seems to me that in making the order that it did, the Supreme Court was exercising the discretion that a court always has in relation to remedies in judicial review. "The particular circumstances" of the case is a phrase that means what is says, and was not intended to lay down a general rule as to what should happen in pending disciplinary cases.

61. In the circumstances of this case, I do not believe that an order of prohibition would be appropriate. The applicant admitted his guilt of the charges laid against him. The hearing before the board of inquiry was conducted on that basis, and the appeal was

against sanction only. Prohibition will be granted in those circumstances only in the rarest of circumstances – see the judgment of the Supreme Court in *S.A. v Director of Public Prosecutions* [2007] IESC 43. In a context such as this, I consider that the court is entitled to take into account the public importance of the role of members of An Garda Síochána, the proper investigation of any misconduct on their part and the statutory origin of the role of the respondent in determining disciplinary sanctions.

62. I do consider it appropriate to remit the matter, to be reheard by a board of inquiry. I do this partly on the basis that I have no evidence as to what happened at the reconvened meeting of the board on the 10th February, 2014. I do not know whether the members of the board had a firm, collective view as to what their reasons had been for a decision made some three months earlier or whether they might have wished to consider the transcripts further. If for some reason they did not finalise their decision at that stage, it might not be helpful to ask them to do so at this stage. In any event, this is a far less complex matter than *Kelly* in terms of the logistics of a fresh hearing.

63. I have considered whether or not it would be practicable, for the purposes of an order of *certiorari*, to distinguish between the determination of guilt and the recommendation as to penalty but I think that this might only lead to further complications in the event that a differently composed board has to be appointed.

64. I therefore propose to grant an order of *certiorari* in relation to the determination and recommendation of the board of inquiry.

65. It follows that although no specific relief was sought in respect of the Commissioner's decision, it must necessarily be treated as void.