Neutral Citation Number: [2013] IEHC 485

THE HIGH COURT

[2012 No. 885 JR]

BETWEEN/

PATRICK WALSH

APPLICANT

AND

JOSEPH REVINGTON, ANTHONY NOLAN AND GARDA

PATRICK O'SULLIVAN AND THE GARDA COMMISSIONER (No.2)

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 7th November, 2013

1. In a judgment delivered on 25th July, 2013, *Walsh v. Revington* [2013] IEHC 408, I held that the Garda Síochána Complaints Board had acted *ultra vires* in the manner in which it had dealt with the applicant's appeal. I accordingly granted an order of *certiorari* to quash that decision of the Board. The issue which now arises in this sequel to that first judgment is whether I should exercise the jurisdiction vested in the Court by virtue of the provisions of O. 84, r. 27(4) RSC which provides:

> "Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."

2. Before considering the issues which arise in relation to this application to remit to the Tribunal it is necessary to narrate afresh the underlying facts which gave rise to the order for *certiorari* in the first place. Those facts were, in summary, as follows: Garda Walsh was involved in an altercation at a popular music concert in September, 2007 as a result of which it was contended that he had not submitted to a drugs search and that he had been guilty of improper practice. He was ultimately charged with several breaches of discipline under the provisions of the Garda Siochána (Discipline) Regulations 2007 ("the 2007 Regulations"), namely:

> (i) discreditable conduct, namely, possession of a controlled drug;
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> (ii) discreditable conduct, namely, failure to submit to a legal drugs search;
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> (iii)improper practice, in that Garda Walsh identified himself as an off-duty member of An Garda Síochána when required to submit to a drugs search for the purposes of private advantage;
>
> (iv)misconduct towards a superior officer in that Garda Walsh used abusive and insulting language to Sergeant Murphy.

3. In the meantime, however, Garda Walsh had been charged with possession of a controlled drug (amphetamine). Garda Walsh was, however, acquitted on that charge by the District Court in November, 2008. Following the dismissal of the criminal prosecution the Garda Commissioner directed that the Board of Inquiry should not now consider the first charge of misconduct. The applicant then sought an order of prohibition restraining the hearing of the remaining disciplinary charges on the ground that their continuation would in effect be to duplicate the criminal charge and would be oppressive. These contentions were rejected by Kearns P. in a judgment delivered on 5th July, 2010: see *Walsh v. Garda Commissioner* [2010] IEHC 257.

4. In the wake of this decision the Board of Inquiry which had then been convened subsequently sat to investigate the three outstanding disciplinary charges. By decision dated the 30th September, 2010, the Board concluded that he was guilty of discreditable conduct in that he had failed to submit to a legal drugs search. In this regard the Board concluded that Garda Walsh had submitted to the test administered by the Gardaí only having struggled with Sergeant Murphy and having been overpowered by him. The Board did not find it necessary to determine whether the search organised by the security guards assigned by the concert promoters constituted a legal search for this purpose.

5. The Board also found that the fact that Garda Walsh had identified himself as an off-duty member of An Garda Siochána when required to submit himself to a drugs search under s. 23 of the Misuse of Drugs Act 1977, amounted to improper practice, in that it amounted to an endeavour to use his status as a member of the force for private advantage. The Board did not, however, accept that Garda Walsh had used insulting or abusive language in his dealings with Sergeant Murphy. In respect, however, of the two counts on which Garda Walsh had been found guilty, the Board recommended that he be required to retire or resign as an alternative to dismissal.

6. Garda Walsh successfully appealed these findings to the Appeals Board established pursuant to Article 34 of the 2007 Regulations. That Board recommended that these adverse findings be set aside and that the matter be determined afresh by a differently constituted Board of Inquiry.

7. A new Board of Inquiry was then established on 2nd December, 2011. The new Board determined that Garda Walsh was guilty of two breaches of discipline, namely, discreditable conduct and improper conduct, but rejected the third count. The Board recommended that Garda Walsh be dismissed in respect of breach No. 1 (discreditable conduct) and breach No.2 (improper practice). The Garda Commissioner decided to accept this recommendation and by decision dated 26th March, 2012, it was ordered that the applicant be dismissed from the force with effect from 16th April, 2012.

8. Garda Walsh then appealed that decision in turn to the Appeals Board. In its decision of 31st July, 2012, the Appeals Board affirmed

the conclusion in respect of the discreditable conduct, but allowed the appeal in respect of the count of improper practice. The reasons given by the Board were in the following terms:-

> "The Appeals Board affirms the decision of the Board of Inquiry in respect of
> (1) Discreditable Conduct on the grounds that the evidence before the Board of Inquiry was credible and consistent.
> The Appeals Board quashes the decision of the Board of Inquiry in respect of
> (2) Improper Practice on the grounds that while Garda Walsh did identify himself as a Garda there was no evidence before the Board of Inquiry to indicate that he improperly used his position as a member of An Garda Siochána for his private advantage.
> The Appeals Board recommends to the Commissioner that the member be dismissed in respect of the breach at (1) Discreditable Conduct on the grounds that such a penalty is fair and proportionate in all the circumstances."

9. I then continued by noting that where there is (as here) an appeal against the determination of a Board of Inquiry, Article 37 of the 2007 Regulations provides for four possible options. It may thus:

> "(a) affirm the determination and either –
> (i) affirm the decision of the Commissioner in relation to the disciplinary action to be taken or recommended, or
>
> (ii) substitute another disciplinary action of a less serious nature;
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> (b) quash the determination and the Commissioner's decision;
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> (c) if –
>
> (i) it decides that the member concerned has not committed the breach of discipline alleged but has committed another less serious breach of discipline,
>
> (ii) if it is satisfied that such a decision would not be unfair to the member concerned having regard to the fact that the other breach is not the breach alleged, quash the determination and decision and substitute another disciplinary action in respect of that breach, or
>
> (d) quash the determination and decision and decide that in the circumstances of the particular case another Board of Inquiry should be established by the Commissioner to determine whether the member committed a breach of discipline."

10. The 2007 Regulations do not provide for any special definition of the word "determination". I then went on to say in my judgment:

> "In the absence of any such definition I would interpret this word as referring simply to the decision of the Board of Inquiry which was under appeal. What, then, was that decision? It is hard to avoid the conclusion that the particular decision in question was a composite one consisting of two individual adverse findings of discreditable conduct and improper practice and which had recommended dismissal in respect of each individual breach of discipline. After all, the formal order of the Board of Inquiry (which was headed "Result of Inquiry") was in the following terms:-
> "Recommendation of Board of Inquiry;
>
> Having heard on oath the facts adduced the Board of Inquiry has determined:
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> …That the member concerned is in breach of the following breaches of discipline as alleged:
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> Breach No. 1 – Discreditable Conduct
>
> Breach No. 2 – Improper Practice."
>
> All of this coerces one to the conclusion that there was *one single determination* of the Board of Inquiry in respect of *two separate breaches* of discipline. A central feature of Garda Walsh's case was that the Board had acted *ultra vires* in purporting partially to allow the appeal while also recommending his dismissal in respect of the discreditable conduct ground."

11. I accordingly concluded that the Appeals Board had acted *ultra vires* in the following fashion:

> "Yet it must also be acknowledged that in at least two specific respects the Appeals Board purported to take action which was not expressly authorised by Article 34. Given that the decision under appeal was a "determination" of the Board of Inquiry, the Appeals Board could have either affirmed or quashed the determination in question. The Appeals Board has, however, been given no power to affirm one part of the determination on the one hand and to quash another part of that determination on the other. Nor has the Appeals Board been given the power to recommend that the applicant be dismissed in respect of that part of the determination (*i.e.,* the discreditable conduct charge) which the Board purported to affirm."

12. If the matter were to be remitted to the Board pursuant to O. 84, r. 27(4), it seems to me that, in the light of my ruling, it would have no alternative but to choose to exercise its powers under Article 37(d). It could not choose to exercise its powers under Article 37(a) since this involves the affirmation of the determination of the Commissioner. Nor it could it exercise its powers under Article 37(c), because this relates to a case where the Board was of the view that the member concerned had not committed the breach of discipline alleged but had in fact committed another lesser breach of discipline. It could, perhaps, in theory exercise its powers under Article 37(b) to quash the determination and the Commissioner's decision, but this would be inconsistent with its earlier conclusion that the applicant had been guilty of a breach of discipline.

13. In these circumstances, the only option realistic available to the Board consistent with the tenor of its own decision and, indeed, my first judgment, would appear to be to exercise its powers under Article 37(d), namely to quash the determination and to direct that a fresh Board of Inquiry should be established by the Commissioner.

14. All other things being equal, it is plain that an order of remittal for this purpose is both necessary and desirable and, subject to some qualifications I will presently address, I accept the incisive submissions of counsel for the Commissioner, Mr. McGuinness S.C., in that regard. Such a step is necessary in the first instance because the legal position of the parties would remain uncertain if the decision of the Appeals Board were simply quashed without any further order. It would not, for example, be clear whether the Board of Inquiry's original decision still stood and Garda Walsh could not know whether he had been dismissed on one count of breach of discipline or two. It would also be desirable to regularise the position of the parties from the somewhat unhappy situation in which they have found themselves, stemming in part from the somewhat awkward manner in which Article 37 of the 2007 Regulations has been drafted.

15. Counsel for the applicant, Mr. McDonagh SC, has nevertheless argued forcefully that matters are not equal and that it would be unfair to his client if there were to be a remittal resulting ultimately in a further hearing before a fresh Board of Inquiry. He pointed out that Garda Walsh has already faced a criminal trial after which he was acquitted. There was then a hearing before a Board of Inquiry in September, 2010 as a result of which there was a successful appeal to the Appeals Board. The culminated in a second hearing in December, 2011 and a further (partially successful) appeal to the Appeals Board whose decision has now been quashed in these judicial review proceedings. If the matter were to be remitted, then the applicant would be facing a third disciplinary hearing and having already endured the ordeal of a criminal trial.

16. It is true that in *McGrath v. Garda Commissioner (No.3),* Supreme Court, 26th January, 1993, the Supreme Court granted an order of prohibition restraining the continuation of disciplinary proceedings against the applicant Garda. That, however, had been a case where the disciplinary proceedings had been characterised by a series of errors, not least the application of the new 1989 Garda Siochána Regulations retrospectively to events which were alleged to have occurred in 1983 and 1984. Finlay C.J. stated that in these circumstances:

> "I have no doubt but that it would be quite unjust and an unfair procedure for them to be permitted now in the light of the decision of this court and the prohibition of those proceedings as invalid to institute any other proceedings in any form in respect of these events asserting that they were breaches of disciplinary code..."

17. It is not clear, however, that any wider principle can be extracted from this decision. It seems to reflect the fact that the applicant's case had been considered in three separate sets of proceedings by the Supreme Court and the decision seems largely to turn on its own facts.

18. Having reflected on the matter I am not persuaded that the same degree of prejudice is necessarily present in this case. One cannot deny but that in all probability the applicant will have to face yet another disciplinary hearing before a fresh board of inquiry with all the attendant strain and difficulties which this presents. This cannot be satisfactory for everyone concerned, not least for the applicant and his family. Yet I cannot overlook the fact that the Appeal Board found the applicant guilty of a serious disciplinary offence (discreditable conduct) in respect of which it had recommended dismissal. It is true that this decision was found by me to be *ultra vires*, but this judgment reflected the structure and wording of Article 34 of the 2007 Regulations rather than anything bearing directly on the decision itself. In fairness to the applicant, it must also, however, be borne in mind that he did also challenge the adequacy of the reasons given by the Board, but in the end it was not necessary for me to arrive at any concluded view on this question.

19. Mr. McDonagh S.C. has also argued that if the matter were remitted it would (or, at least, might) bring about a situation where the applicant would be deprived of the benefits of rulings already made in his favour. It goes without saying that it would be manifestly unfair to the applicant if by reason of the quashing of the Appeals Board decision he were now to face anything other than the single charge of discreditable conduct. In other words, even though I have determined that the Appeals Board's decision is *ultra vires* on the rather narrow ground which I identified, this cannot be allowed to take from the substance of the decision so far as it concerned the applicant, namely, that the Board of Inquiry's finding in his favour in respect of the abusive language charge and the Appeal Board's finding in his favour on the improper practice charge.

20. Nor do I overlook the fact that at earlier stages of the disciplinary process Boards of Inquiry and Appeals Board have taken different views on the precise *actus reus* of the discreditable conduct charge. Part of the difficulty here arises from the sequence of events giving rise to the charge in the first place. The gist of the allegation was that Garda Walsh struggled and then sought to evade a drugs search which private contractors were first performing on patrons seeking to re-enter the festival and, then, following an altercation, Garda Walsh was then referred to the Gardaí who were on site who conducted the search.

21. There is certainly much force in Mr. McDonagh's submission that (putting matters no higher) there has been a lack of consistency to date in the scope of the charge of discreditable conduct and whether that charge is directed towards the conduct in respect of the search by the private contractors or the subsequent search by members of An Garda Síochana. Nevertheless, it seems to me that any possible unfairness could be addressed by requiring any newly established Board of Inquiry to clarify the scope of this charge in much the same way as Tribunals of Inquiry have been required by this Court and the Supreme Court to clarify the scope of their terms of reference and the manner in which these are to be interpreted: cf. here the reasoning of Geoghegan J. and the Supreme Court in *Haughey v. Moriarty* [1999] 3 I.R. 1.

Conclusions

22. In conclusion, therefore, I will accordingly remit the matter to the Appeals Board pursuant to O. 84, r. 27(4). If it were necessary to do so, I would, however, grant the applicant an order restraining the further hearing of any disciplinary charges, save on the single charge of discreditable conduct.