

THE HIGH COURT

Record No: 2017/293JR

BETWEEN:

DECLAN GILL

Applicant

-and-

DEPARTMENT OF AGRICULTURE, FOOD AND THE MARINE

Respondent

JUDGMENT of Ms. Justice Tara Burns delivered on 28th September, 2018

1. The Respondent is tasked with the statutory function of ensuring the presence of a meat inspection service in meat plants throughout the country for the purpose of certifying meat products as safe and suitable for human consumption in compliance with the State's obligations under Irish and EU legislation. It engages qualified veterinary surgeons as Temporary Veterinary Inspectors (TVIs), to carry out this meat inspection service. Such TVIs are engaged as independent contractors and are placed on a panel from which they are engaged to provide this service, as required.

2. The Applicant is a Veterinary Surgeon who, in 1998, was placed on the Respondent's TVI panel. In November 2002 he was assigned as a TVI by the Respondent to Rosderra Irish Meats, which is a privately owned and operated meat plant. The Applicant's earnings from his engagement with the Respondent are his primary source of income. An averment to this effect, by the Applicant, was put in issue by the Respondent in the papers filed in the matter. However, the issue was not pursued avidly before me. The consensus appeared to be that while the Applicant had other business interests, they were at a low level and that, as averred to by him, his earnings from his engagement with the Respondent were his primary source of income. Having regard to the affidavit evidence, I am of the opinion that a cessation of the income received by the Applicant through his engagement with the Respondent would have significant consequences for him.

3. The terms of the Applicant's engagement as a TVI are contained in the Respondent's "Conditions of Engagement of Part-time Temporary Veterinary Inspectors". Clause 1.6 of which provides:-

"The functions of the TVIs are to assist the permanent veterinary staff at meat plants. The TVIs will be assigned to and perform these functions by direction of the Veterinary Inspector (VI) at the meat plant... Where a TVI is not performing his...duties as required by the VI or is persistently late in attending his...rostered shifts the VI will notify him/her accordingly. After three such notifications, the VI reserves the right, in consultation with the Personnel Division, to remove that TVI from his position of seniority on the panel or as a final measure removal from the panel altogether."

4. On the morning of 9th November 2016, the day after the US election which was won by Donald Trump, the Applicant attended at the premises of Rosderra Irish Meats on foot of scheduled duties with the Respondent. As he walked to the inspection line, he donned a Donald Trump mask which he then removed. The Personnel Manager was present at the inspection line and as the Applicant walked towards him, wearing the Donald Trump mask, he made a fist pump gesture. This was captured on CCTV.

5. Later the same day, the Personnel Manager made a complaint by email regarding this incident to the Respondent. The terms of his complaint were that he had been approached by the Applicant wearing a Halloween mask; that he was threatened with a closed fist by him; and that the words "You're dead" were spoken by the Applicant, arising from which he feared for his safety. On 16th November 2016, the Personnel Manager made a written complaint to the Respondent re-stating what he alleged had occurred.

6. On 16th November, the Applicant was notified by letter of the allegation made by the Personnel Manager in the following terms:-

"It has been alleged that you approached a member of food business operator staff in the course of his tour of the plant, that you were wearing a Halloween type mask and that you threatened that member of staff with a closed fist and made a comment that caused him to fear for his safety (copy of still image attached). Given that you were contracted by the Department to provide a meat inspection service on that day, the Department expects that you would have fulfilled your contract in a professional manner, that you would have been appropriately attired throughout your attendance at the meat plant, that you would have engaged with all workers in the plant, including food business operator staff, in a respectful and professional manner and that any engagement by you with food business operator staff, would solely have been in connection with the professional delivery of the service you were contracted to provide... please...provide your comment on this...matter on or before Friday the 25th November 2016."

7. The Applicant had not received any other documentation in relation to this incident, most particularly, anything in terms of a Clause 1.6 notification prior to receipt of this letter.

8. Correspondence ensued between the Applicant's solicitors and the Respondent wherein certain requests were made for material. Of note, an email was sent by the Applicant's solicitor on 23rd November 2016 denying that the Applicant had threatened the Personnel Manager or uttered the words alleged.

9. On 14th December 2016, a request was made by the Applicant's solicitor for further time to forward detailed Representations on behalf of the Applicant. However, a short representation regarding the incident of 9th October 2016 was included with that letter. It stated:-

"For avoidance of doubt it is denied that Dr Gill threatened a member of staff as alleged or at all. It is specifically denied that he made the comment alleged or any comment. It is further denied that the said member of staff was caused to fear for his safety. Dr Gill could not have anticipated the member of staff's presence as he had never before attended at that part of the factory floor."

Dr Gill, pursuant to a "bet" and in jest was wearing a mask depicting the face of Donald Trump following his election the previous evening. He did not threaten the member of staff with a closed fist but rather made a celebratory hand gesture as was used by President elect Trump a number of hours previously. Indeed, Dr Gill whilst agreeing that his

actions may have been ill-advised, saw no difficulty in them in light of the fact that he had previously, following the election of Barack Obama, worn a "Barack Obama mask" to the factory and there were no reports or complaints from the floor on that occasion. Dr Gills' actions were not threatening.

Whilst the admissibility of the CCTV footage is denied, it is clear that on a full role of same, persons in the background are seen to be smiling and laughing.

Furthermore there is no evidence to support the allegation (which is denied) that Dr Gill made the comment alleged or any comment."

10. On 16th December 2016, the applicant was informed that this matter would be considered by a Decision Group who would make a decision as to whether this issue was one which warranted his removal from the TVI panel. The Applicant was afforded further time to make representations regarding the matter.

11. Submissions filed on behalf of the Applicant on 8th February 2017 stated:-

"Our client has been charged with approaching [the personnel manager] wearing a Halloween type mask, threatening [the Personnel manager] with a closed fist and making a comment that caused him to fear for his safety, more specifically it appears to be alleged in your letter of 16th November 2016 that Dr. Gill

a) Did not fulfil his contract in a professional manner,

b) Was not appropriately attired throughout his attendance at the meat plant,

c) Did not engage with all workers, including food business operator staff in a respectful and professional manner and

d) Did not ensure that any engagement between Dr. Gill and the food business operator staff solely in connection with the professional delivery of the service he was contracted to provide.

Our client denies he was guilty of any wrong doing on 9th November 2016. This was the morning after the U.S. election result and Dr. Gill attended at the premises and put on a mask, which was not a Halloween type mask as described in your letter, rather it was a Donald Trump mask, he wore the mask while he walked the inspection line where the mask was removed, he wore the mask as a joke and for the purpose of entertaining his colleagues at the plant. We are instructed that Dr Gill, some eight year earlier, attended at the plant wearing a Barak Obama mask. No issue was taken with this conduct at that time. He only wore the mask for a very short period of time and as a joke given the election results. Mr. Gill denies categorically making any threat either of a physical or verbal nature to [the personnel manager]. Dr Gill approached [the personnel manager] on the floor of the plant and made a fist pump similar to that made by Donald Trump repeatedly during the election campaign and following the results. It was not a threatening gesture and it is submitted that it is clear from the footage furnished that it was not interpreted as such by [the personnel manager] – nor could it reasonably have been so interpreted. It is submitted that on no reasonable interpretation of the CCTV footage furnished could [the personnel manager] have had cause to believe that his safety was endangered. Dr Gill did not make any comment to [the personnel manager]. He did not engage with [the personnel manager]. Dr Gill's conduct was in jest and for the purpose of a joke: such conduct is not prohibited. It is submitted it is entirely unrealistic and idealistic to suggest that jocular conduct in a workplace, particularly a factory floor could be prohibited or indeed should be prohibited. Dr Gill's conduct was jocular in nature. No member of staff complained about his conduct. Indeed no complaint was made by [the personnel manager] at the time of the incident. He did not seek to address the situation at the time. He did not complain or suggest at the time that he found Dr Gill's conduct represented a threat to his safety and he did not request another member of management to intervene. Dr Gill did not behave in a disrespectful manner to [the personnel manager]: he behaved in a jocular manner which was clear having regard to the fact he was wearing a Donald Trump mask and engaged in the Donald Trump fist pump. No other issue was raised with regard to Dr Gill's conduct on the 9th November 2016 and it is denied he did not behave in a professional manner.

It is entirely rejected that any engagement between Dr Gill and the food business operator staff must solely be in connection with the professional delivery of the service he was contracted to provide. Dr Gill has been providing services to the Rosderra Meat plant ... since December 2002. During that time relationships naturally develop between the TVI and staff. It is entirely unrealistic to suggest that all engagements should be limited to the professional delivery of the service. If that were so every TVI in the country would be called to account for their actions. Conversations take place amongst staff on many different issues to include sport, activities outside of work, family life and there is an engagement at a jocular level which is part and parcel of the working dynamic. Simply put, it is entirely unfair and unreasonable to seek to build a case or charges against Dr Gill based on an unreal interpretation of what is and should be expected from a TVI.

[The personnel manager] did not fear for his safety. His safety was not put at risk and the safety of other staff was not at risk. [The personnel manager] was in no way threatened by Dr Gill and Dr Gill reserves the right to challenge [the personnel manager] on his allegations to this effect. On behalf of Dr Gill we therefore formally request an oral hearing into this matter. [The personnel manager] has had issues with our client over the years and his complaint concerning the incident of the 9th November 2016 is motivated by his desire to remove Dr Gill from Rosderra Meats and in that respect his complaint, its origins, motivations and its substance must be challenged on behalf of Dr Gill. In this regard, Dr Gill awaits his data access entitlement to be complied with in full and he requires to be furnished with a full copy of the CCTV footage for the ten minutes prior to the incident in question and for an hour post the incident in question.

Please therefore confirm that an oral hearing will be arranged at which the allegation that [the personnel manager] was put in fear for his personal safety can be tested by all appropriate means including the cross examination of [the personnel manager]."

12. The Respondent responded to the Applicant's submission by return rejecting the Applicant's request for an oral hearing. The letter stated:

"The terms of Dr Gill's engagement as an independent contractor are set out in the 2004 Conditions of Engagement of

Temporary Veterinary Inspectors. That document does not envisage the holding of oral hearings or the cross examination of individuals. As a result, the Department will not be holding an oral hearing in respect of this matter."

13. The Decision Group convened on 17th February 2017. It determined that the Applicant was in fundamental breach of his contract with the Respondent and decided to remove the Applicant from the TVI panel. It stated:-

"Having reviewed all the material provided we have established, based on the CCTV images and Dr Gill's own submission, that he was wearing inappropriate attire in the work place and made an inappropriate gesture (a closed fist) directed towards [the personnel manager], which is all the less appropriate given that Dr Gill's legal representatives acknowledge that [the personnel manager] has had issues with Dr Gill over the years. We have reviewed the matter without considering whether a verbal threat was made or not.

We have found Dr Gill's behaviour to be inappropriate. This behaviour, which was clearly planned to cause disruption, raises concerns in relation to Health and Safety in an industrial operational environment, and in relation to maintaining food hygiene in a food business operation."

14. The Applicant principally seeks an order of certiorari quashing the Decision of the Respondent of 20th February, removing him from the panel of TVIs. The grounds of his challenge can be summarised under the following headings:-

- a) Clause 1.6 of his Conditions of Engagement with the Respondent was not utilised by the Respondent in relation to this issue;
- b) Despite the Respondent acknowledging that it was required to afford the Applicant natural and constitutional justice, it failed to comply with these requirements in that an oral hearing was not held;
- c) The Applicant was not informed of the allegation which the Respondent ultimately considered;
- d) The Respondent's decision to dismiss him from its panel in respect of this incident was unreasonable and irrational.

The Applicant's Claims

15. The Court will deal firstly with points b) and c) and will do so jointly as they are interlinked.

Whether an Oral Hearing was required and whether the Applicant had sufficient notice of the allegations he was facing

16. An oral hearing was not held during the Decision Group's deliberations. The explanation provided by the Respondent as to why this did not occur is that there was no necessity for same arising from the fact that the Decision Group determined to examine the incident of 9th November 2016 on the basis of the Applicant's submissions to it, in which he admitted wearing the mask and making a fist gesture. The Respondent submits that in circumstances where there were no facts in dispute, there was nothing to controvert. The Respondent also asserts that the Applicant's terms of engagement do not envisage holding an oral hearing.

17. In relation to the latter point, in circumstances where the Respondent accepts that it was required to afford the Applicant natural and constitutional justice and where it is averred to in an affidavit sworn on the Respondent's behalf that the Decision Group did consider at its meeting whether an oral hearing should be held, the fact that the terms of engagement did not provide for same is not a material consideration.

18. The Respondent may well be correct that in light of what the Decision Group determined to decide at its meeting, having excluded the "threat" allegation from its consideration, that a cross examination of the Personnel Manager was not required and in reality would have served no useful purpose. However, deciding not to afford cross examination facilities to the Applicant, in light of the issue which the Decision Group was now determining, was not the end of deciding whether an oral hearing of some description should be provided. It must be considered whether other components of an oral hearing, such as permitting the applicant to give evidence on his own behalf or make submissions, should have been afforded to the Applicant. The Respondent's response to such a submission is that the Applicant had been given the opportunity to make submissions regarding the 9th November incident and indeed had taken that opportunity. Counsel for the Respondent posed the question - what more could have been said on the Applicant's behalf.

19. The Applicant's complaint in this regard is that when providing his written explanation of 9th November and making submissions in relation to the issue, he was addressing the "threat" allegations of the Personnel Manager rather than dealing with issues as to whether he had planned to cause disruption; had acted in a manner so as to raise serious concerns for Health and Safety and had acted in a manner so as to raise serious concerns for food hygiene.

20. In accordance with *In Re Haughey* [1971] IR 217, the basic components of fair procedures require that the Applicant:-

- a) Be furnished with a copy of the evidence against him;
- b) Be allowed to cross-examine his accuser;
- c) Be allowed to give rebutting evidence; and
- d) Be allowed to address the decision maker in his own defence.

21. In *Doupe v. Limerick County Council* [1981] ILRM 456, Costello J., set out the requirements of the *audi alteram partem* rule as follows:-

"The rule of audi alteram partem does not require that every administrative type order which may adversely affect rights must be preceded by a judicial type hearing involving the examination and cross examination of witnesses. It requires that adequate notice of the case which an applicant has to meet be given to him and that an adequate opportunity be afforded to answer any objections which may be taken to his application."

22. Considering the case law, the respondent may well be correct, that in certain circumstances, affording the Applicant the opportunity to either give evidence on his own behalf or make oral submissions on these issues was not required to comply with fair

procedures and would have achieved nothing; that adequate opportunity through written submissions was sufficient. However, that is the very nub of the case which causes me concern. The Applicant, when making his detailed and lengthy written submission to the Decision Group, did not realise that determinations that he had planned to cause disruption; had acted in a manner to raise serious concerns for health and safety and food hygiene were up for consideration by the Decision Group.

23. The Respondent points to the letter of 16th November and the written submission filed on behalf of the Applicant on 8th February 2016 to establish that the Applicant had sufficient notice that other "charges" were being considered against him. While I accept the argument that the Applicant should have been aware that a wider context was being considered regarding his behaviour on the 9th November in terms of his professional duties, I do not accept that the Applicant should have been aware thereof that the specific matters he was found to have committed were made known to him through that correspondence.

24. Accordingly, I am of the view that sufficient notice was not given to the Applicant of the charge against him which would have enabled him to make appropriate and directed submissions in response. The Applicant was never given an opportunity to challenge an allegation that he had planned to cause a disruption; that he had acted in a manner so as to raise serious concerns for Health and Safety; that he acted in a manner so as to raise serious concerns for food hygiene.

25. The Respondent asserts that as the Decision Group only decided not to consider the "threat allegation" on the day of the decision, there was no opportunity for them to inform the Applicant of what he now stood accused of. Clearly this situation could have been remedied by the Decision Group determining to adjourn matters so as to inform the Applicant of what they were now considering having determined not to consider "the threat allegation". This was not done and is fatal to the decision reached by the Decision Group in my opinion.

26. Accordingly, I am of the opinion that adequate notice was not given to the Applicant of allegations which the Respondent ultimately found against the Applicant, which meant that he never was put in a position to make his case to the Respondent regarding such allegations.

27. While there is no necessity for me to proceed to determine the other claims which have been made by the Applicant, in light of the above findings, I will set out my views in relation to same for the sake of clarity.

Clause 1.6

28. Clause 1.6 of the Terms of Engagements was not utilised in the process of removing the Applicant from the Panel of TVIs in relation to this incident. The Respondent argues that Clause 1.6 relates to the performance of veterinary duties by a TVI rather than their personal behaviour. Counsel for the Respondent argues that as the conduct complained of was the Applicant's personal behaviour rather than the carrying on of his veterinary duties, there was no requirement for the Respondent to use the procedure set out in Clause 1.6 and that instead, the Respondent could investigate in a free standing manner an alleged fundamental breach of contract by the Applicant.

29. The terms of Clause 1.6 are set earlier in this judgment at para. 3. Clause 1.6 comes into play when a "TVI is not performing his duties as required by the VI or is persistently late in attending his rostered shifts"

30. I agree with the Respondent's argument in this regard so far as it relates to the threat allegation which it initially was determining. The conduct alleged against the Applicant had nothing to do with him performing his veterinary duties as required by the VI.

31. Accordingly, the Respondent acted within jurisdiction in not invoking Clause 1.6 when commencing its "threat allegation" investigation.

32. However, when what was being investigated altered, a question arises whether the Respondent should have applied the Clause 1.6 requirements to the allegations then being considered.

33. I am of the view that the Respondent was not required to use the Clause 1.6 procedure even for the purpose of investigating the determinations which were ultimately found against the Applicant. While findings of acting in a manner that raised serious concerns for health and safety and food hygiene were made, the actions underlying the findings remain personal conduct by the Applicant rather than his performance of his veterinary duties. Accordingly, I am of the view that Clause 1.6 was not required to be invoked by the Respondent at any stage of the investigation.

Unreasonable and Irrational Decision

34. In the cold light of day and with hindsight, the Applicant must know that his actions on the day were inappropriate. He must regret terribly that he engaged in such foolishness. However, the fact that he was dismissed from the Panel and effectively lost a very significant portion of his earnings seems very extreme for his accepted behaviour.

35. The Respondent's decision on what it was investigating only appears reasonable when one learns that there was a significant history between the Applicant and the Personnel Manager at Rosdarra. I have very purposefully omitted any reference to the other matters which were under investigation regarding the Applicant and Rosdarra as the Decision Group apparently was not made aware of same and only had knowledge of some difficulty between the Applicant and the Personnel Manager arising from the submissions made by the Applicant where he refers in a very vague and non-detailed manner to same.

36. There is no evidence before me that the Decision Group were aware of anything other than the specific allegation of 9th November and a vague reference by the Applicant to the Personnel Manager having issues with him over the years; that the threat allegation was motivated by a desire by the Personnel Manager to have the Applicant removed from Rosdarra.

37. Obviously, in a Judicial Review, I have no jurisdiction to act as an Appeal Court from the initial decision maker, nor can I substitute my decision for that of the initial decision maker unless I am of the view that that decision "*plainly and unambiguously flies in the face of fundamental reason and common sense.*" per *The State (Keegan) v. Stardust Compensation Tribunal* [1986] IR 642.

38. In *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 IR 701, Chief Justice Murray stated at paragraph 55 of the judgment:-

"In reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the

principles of law according to which the decision ought to have been taken. In doing so the court may examine whether the decision can be truly "said to flow from the premises" as Henchy J put it in Keegan, if not it may be considered as being "fundamentally at variance with reason and common sense". In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see not reason why the court should not have recourse to the principle of proportionality in determining those issues."

39. At first glance, the decision to dismiss the Applicant from the panel for briefly wearing a Donald Trump mask whilst making a celebratory hand gesture appears to me not only to plainly and unambiguously fly in the face of fundamental reason and common sense but more particularly, to be completely disproportionate to the act of complained of.

40. However, the Respondent makes a significant point that the context of the relationship between the Respondent and Rosderra is a delicate one in terms of meat inspections by the State being carried out at a private business enterprise and that jocular behaviour by an individual contracted by the State to carry out this service is inappropriate. Further, the Respondent argues that in a situation where the Applicant indicated that the Personnel Manager had issues with him over the years and wanted to have him removed from Rosderra, acting in a jocular manner was all the more inappropriate.

41. Having very carefully considered the Respondent's submissions in this regard, I still remain of the view that the decision to dismiss the Applicant from the panel for this behaviour flies in the face of fundamental reason and common sense and is disproportionate. Using a sledgehammer to crack a nut is a most appropriate adage for this case.

42. Accordingly, I am also of the opinion that the decision of the Decision Group was both unreasonable and irrational.

Other issues raised

43. Other issues were raised by the Applicant in the course of the hearing: he claimed that other employees of the Respondent were involved in the decision making process, I do not find that to be the case.

44. The Respondent had raised an issue of the availability of Judicial Review to the Applicant claiming that this was a private law issue. This argument was not particularly pursued in the course of the hearing. In any event, I find that Judicial Review is available to the Applicant as the decision to remove the Applicant has a sufficient public element to it in light of the statutory role the Respondent is carrying out by contracting with TVIs for the provision of a meat inspection service which the State is required to provide pursuant to domestic and EU legislation.

45. I therefore will make an Order of *certiorari* quashing the decision of the Respondent removing the Applicant from all Temporary Veterinary Inspector panels of the Respondent.