Neutral Citation Number: [2011] IEHC 278

THE HIGH COURT

2011 266 JR

BETWEEN

CITY OF WATERFORD VOCATIONAL EDUCATIONAL COMMITTEE

APPLICANT

AND

THE SECRETARY GENERAL OF THE DEPARTMENT OF EDUCATION AND SCIENCE, TOMMY FLYNN, JACQUELINE Ní FHEARGUSA AND SEAN SLOWEY

RESPONDENTS

AND

ALPHA BETA

NOTICE PARTY

JUDGMENT of Mr. Justice Charleton delivered on the 27th day of July 2011

1. Section 29 of the Education Act 1998 provides for appeals from decisions within schools whereby a proposed pupil is declined enrolment, or an existing pupil is either suspended or expelled. Any such decision by school authorities may be appealed to the Secretary General of the Department of Education and Science. That official appoints a committee to hear the appeal, which I shall refer to as "the appeals committee". Section 29(4) indicates the procedures to be followed on that appeal. Hearings are to be conducted with a minimum of formality, consistent with giving all of the parties a fair chance to put their point of view; appeals are to be dealt with within thirty days of the receipt; and before there is any hearing, the parties are to be encouraged to reach any agreement that may be possible in the circumstances. Section 29(5) requires the appeals committee to make a written decision, giving reasons therein for its determination, and to notify the Secretary General of the Department who, under subs. 7, will notify the interested parties. These will usually be the parent of a child and the board of management of the school in question. Where an appeals committee, under subs. 6, allows an appeal, it can make a recommendation so that any issue which was upheld on the appeal may be addressed and remedied. These appeals are conducted by way of a complete re-examination. In other words, they are broadly the same as an appeal from the Circuit Court to the High Court; although the appeals committee is not bound by court procedures. This means that on appeal, the parties will be free to put fresh documents before the committee, or to offer new oral views or, what might loosely be called, oral testimony and to bring forward new people to be heard. Subsection 10 makes this clear; it provides that the appeals are to be "by way of a full re-hearing".

2. In Board of Management of *St. Molaga's National School v. Secretary General of the Department of Education and Science* [2010] IESC 57, (Unreported, Supreme Court, 23rd November, 2010) Denham J., for the Supreme Court, analysed the form of the relevant legislation and then stated at paras. 25 to 26:-

> "Consequently, the appeals process enables the appeals committee to have a full hearing on the matter and if so determined to replace its judgment on the matter for that of that [board of the school] and to make such recommendations as it considers appropriate. Such a decision is anticipated as a possible outcome of an appeal by the section itself, in the provisions enabling a Secretary General to require a board to remedy a situation in accordance with the recommendation of an appeal committee.
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> Thus the jurisdiction of an appeals committee is not limited to a review, for example, of the lawfulness or reasonableness, of a decision of a board of management."

The Facts in Issue

3. The pupil in question I will call Delta Beta, as he is a minor. At the time when all of the trouble to which I shall refer came to a head, he was only thirteen years of age. He was a pupil in St. Paul's Community College in Waterford City, which is a secondary school. Difficulties began in September 2009 almost as soon as he had entered first year. Up to Christmas 2009, there were a number of minor incidents of discipline and conduct and some more serious ones. The school responded by suspending him on a number of occasions. The school authorities also offered him counselling by arranging two home visits and by involving the school chaplain. After Christmas his bad behaviour persisted. There was name calling, using very unpleasant language, striking another student with his foot, assaulting a student and a failure to engage with school discipline. There were, again, counselling sessions and disciplinary reports and at least one further home visit. It was clear that the pupil was disruptive. On one occasion he threw a bag at a teacher and called her a very rude name. His mother appears to have responded on occasion to engagement with the teachers by anger; though on at least one occasion she apologised. A student who apparently called the boy some names was beaten up in the gym. On the 14th May 2010 he was put on a reduced timetable until the end of the term and then after his last suspension he was also required to engage with the discipline of school life.

4. On the 25th May 2010, a teacher saw him tripping up another boy. She pointed out to him that this conduct was dangerous. She asked for his mobile phone. It was, he responded, in another place. When he was refused leave to get it, he also reacted with bad language and a threat to headbutt the teacher. He then went to headbutt another teacher. That teacher asked him to stop but he repeated the manoeuvre. He then landed a spit on the teacher. As a response to the remonstrations of the staff, the student then turned and stormed out of the school, cursing aloud and kicking the doors. This is only an outline. I have not gone into detail as any adjudication on the facts is not for the High Court but for the school authorities and, if there is an appeal, for the appeals committee.

5. A special meeting of the board of management of the school was held on the 22nd June 2010. In the course of it, these issues

were discussed. The boy's father attended made a number of what seem to be sensible points. The school decided to expel the pupil. Under the school's internal process, there was a right of appeal from the decision of the board of management to the Waterford City Vocational Educational Committee. That appeal was taken by the boy's father and was unsuccessful.

Decision in issue
6. The matter was then appealed by the boy's father under s. 29 of the Education Act 1998, in the manner I have indicated. The appeals committee upheld the appeal, requiring the school to take the boy back, and stated that it made its decision for the reasons which follow:-

- "[Delta Beta] is only thirteen years old [date of birth given] and has been out of school since May 2010.
- There is a distinct lack of other educational alternatives for a boy such as [Delta] in the city of Waterford."

7. The appeals committee said that it took a range of issues into account, including the oral and written presentations of both parties; a presentation by the Education and Welfare Officer for Waterford; and the challenges experienced by the school in dealing with the boy's unacceptable behaviour. As the appeal was being allowed, the statutory scheme allowed for a recommendation to be made. The recommendation proposed the reintegration of Delta into the school on a phased basis; advised that the school draw on internal and external resources in the management of Delta's future behaviour; stated that behaviour support services nationally should be utilised; and, finally, indicated that Delta should negotiate a contract of behaviour between the school, his parents, and himself.

Challenge
8. A challenge by way of judicial review has been made on several grounds against the decision of the appeals committee. Of these, the most pertinent are that the appeals committee failed to give reasons; that the decision was contrary to common sense; and that the appeals committee exceeded its authority by taking into account school placements as opposed to confining itself to what is argued to be its sole function. That sole function is claimed to be that the appeals committee should put itself in the place of the board of management of the school and decide afresh whether the nature of the conduct of the pupil merited expulsion. It is further argued that the giving of additional reasons by the appeals committee outside of the terms of the document making the decision, by way of later affidavit filed in the High Court, is inadmissible.

Legal principles
9. The legal principles applicable to a judicial review of this kind can be concisely stated. The High Court, having a supervisory jurisdiction over administrative and judicial tribunals, is not entitled to engage in a usurpation of any fact-finding powers which is conferred on these tribunals or to otherwise take on their function. Instead, any decision as to the merits may only be reviewed if, of its nature, "[it] is unreasonable in sense that it plainly and unambiguously flies in the face of fundamental reason and common sense": see *Meadows v. Minister for Justice* [2010] 2 I.R. 701 at 827, per Fennelly J.; see further *Efe v. M.J.E.L.R.* [2011] IEHC 214, (Unreported, High Court, Hogan J., 7th June, 2011) which comments on the proportionality element of such an analysis. The detachment of the High Court from the decision under review is emphasised by the inability of the High Court, even on quashing the decision for that reason, to substitute its own view. Instead, the decision must be returned to the appropriate tribunal so that it may be considered afresh.

10. A denial of fair procedures can undermine the fairness of a decision-making process. The procedures properly to be adopted for an adjudication or hearing depend upon the nature of the decision to be made and the nature of the hearing contemplated by the relevant statutory context. Many kinds of hearing can be fair. The criminal trial model does not always have to be perused. There are basic tenets to a fair hearing. Concisely put, people who have an immediate interest in the decision must be entitled to make representations. This may be done orally or in writing. No party before the tribunal can be given a stronger position than any other. Consequently, while it may be appropriate only in some circumstances to seek oral presentations, once one party is given an entitlement to make an oral presentation that facility cannot be denied to other parties. This ensures that the decision-making process is transparently fair. In some circumstances, questioning may be required to be allowed; see *Davey v Financial Services Ombudsman* [2010] IESC 30 (Unreported, Finnegan J, Supreme Court, 10 May 2010). Once the matter has been considered by the administrative body or tribunal by way of a hearing or a formal consideration of the relevant documents, or both, it cannot thereafter pursue it own inquiries or accept oral or written material from only one of the parties. To do so, would be to deprive the parties, or the party left out, of awareness of this material and thus to shut them out from making what might be an important point in reply. 11. A tribunal, such as the appeals committee in question, is a statutory creation. In consequence it can only do what the relevant statute allows it do. If it does more, then it risks falling into an excess of jurisdiction. That excess of jurisdiction can deprive its decision of validity.

12. Judicial and administrative tribunals should give reasons for their decisions. These need not be elaborate. The reasons must be such, however, that the parties who have participated in the hearing, with their background knowledge of what the issues were, will be aware as to why the tribunal made its decision in one way or another. A district judge, for instance, in hearing a criminal case in a summary manner in the District Court, does not have to give elaborate reasons in convicting or acquitting an accused in a summary trial. Instead, once the district judge makes it clear why the case for the prosecution is accepted, for instance that a particular witness is believed, or that the prosecution case is so strong as to establish proof beyond a reasonable doubt, or, when acquitting the accused state that the testimony of the accused has raised a reasonable doubt, or that the prosecution case was infirm on a particular point, a sufficiency of reasons is given. As well as construing any reasons given by a tribunal against the background of the issues which were before it, the entirety of the decision should be read on any subsequent judicial review. The High Court, in exercising its jurisdiction in supervision of judicial and administrative tribunals, is not entitled to take sentences in isolation from the entirety of a document recording the decision or to parse particular sections of a decision so as to distort its meaning. In *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R 39 at 76, Finlay C.J. put the test as to construing the decision of a tribunal in this way: "[w]hat an intelligent person who had taken part in the appeal or who had been appraised of the broad issues which had arisen in it would understand from this document, these conditions, and these reasons". The degree to which the reasons for a decision have to be elaborated on varies with the nature of the decision itself: *F.P. v. Minister for Justice* [2002] 1 I.R. 164 at 172 to 173 per Hardiman J. Sometimes, in straightforward matters, reasons may be terse. In difficult or technical matters, more than that may be needed. Reasons are to be stated there and then, not added later upon challenge. Where reasons stated within a written decision are shown to be manifestly flawed, these cannot be supplemented by better reasons, or correct reasons, at any stage after the decision is made. Sometimes evidence can be admitted to elucidate a reason which is laconically expressed or, exceptionally, where a mistake occurs, to correct a mistake. Elucidation may, in guarded circumstances, be accepted but not alteration; *R. v. Westminister City Council, ex parte Ermakov* [1996] 2 All ER 302.

13. Finally, a written decision may contain an error of law so as to undermine the record. This is an issue which has become far less important in modern judicial review proceedings.

14. In summary, the only function which the High Court has is to review the procedures of a tribunal and the exercise of its jurisdiction. This is not the exercise of a decision-making appellate role. Judicial review is not to be invoked so as to undermine the proper exercise of administrative powers: *Devlin v. Minister for Arts* [1999] 1 I.R. 47 at 58 per Murphy J.

Jurisdiction

15. The crucial issue is as to the jurisdiction of the appeals committee. In this regard I note that the High Court has not previously given guidance as to the exercise of this important function and it is hoped that this judgment will be of assistance in the future.

16. The function of a school board in deciding on the expulsion of a pupil is to consider what is relevant to that decision. This does not include whether other placements may be available in the immediate area should the expulsion take place. Instead, the decision focuses on the behaviour of the pupil and the context within which that behaviour occurred. The appeals committee is in precisely the same position. The issue before it, therefore, is whether the behaviour of the pupil, taken within the proper context, warrants the expulsion. In the course of this judicial review, an affidavit was sworn by a member of the appeals committee giving a reason for the decision to overturn the expulsion of Delta Beta, which was otherwise absent from the decision. This reason was that the behaviour of the pupil did not warrant expulsion. It is clear that the law on administrative and judicial tribunals does not encompass the addition of reasons beyond the document wherein the decision is officially set out. Were such a procedure to be allowed, afterthoughts would replace the reliability which the parties to a tribunal are entitled to expect that the decisions of any judicial or administrative tribunal will encompass.

17. As this is the first case of its kind to come before the High Court, it is therefore appropriate to indicate what factors can be taken into account by a board of management in considering an expulsion. These factors will be the same for the appeals committee. In considering whether to require a student to leave a school, it is appropriate to focus on the behaviour of the pupil and the effect of that behaviour on the school; the track record of the pupil up to the point of the precipitating issue or issues; the attempts by the school at diverting, correcting or checking the behaviour; the merits of whatever mitigation is offered for the behaviour (by which I mean contrition, any explanation that is offered for behaviour, and any response of the pupil to the school's efforts); and the demerits of mitigation (by which I mean a lack of contrition, wilfulness, spite or an unwillingness to accept help). What a school board, and thus what an appeals committee, cannot take into account are the alternatives which the education welfare officer may be in a position to offer; the resources of the school; and external resources. It is worth emphasising that on an appeal the appeals committee is concerned with whether or not the expulsion was warranted. This has nothing to do with whether there is an alternative place. The responsibility for that function is elsewhere. These are separate and distinct statutory functions. It would be wrong for an appeals committee not to grant an appeal where, in the first instance, the expulsion of the pupil was not warranted, simply because the pupil has an alternative place in education available to him or her and thus does not want to go back to the school. Equally, the appeals committee cannot grant an appeal because the pupil does not have an alternative place.

18. In summary, jurisdiction was exceeded by the appeals committee and the reasons given were not adequate.

19. I might comment, finally, that it is apparent that the appeals committee approached its task with diligence and with a sense of compassion and arrived at its decision through a transparently fair process. The appeals committee is not to be faulted for taking an incorrect view of the law which limits its jurisdiction. That, however, is what occurred. Whereas I take no side on this issue, it may be that returning a pupil to a school from which he or she has been unfairly expelled would be considered by many as an appropriate vindication of character. On the other hand, where an expulsion is warranted, a fresh start, either by way of home tuition, or by way of integration into a completely different atmosphere, a lesson perhaps having been learnt by the pupil, may be the best way to proceed. This, however, is not my decision. It will be the decision of a new appeals committee. Certain matters need, however, to be borne in mind. There has to be authority. There might be an unpleasant or an attractive decision open to the decision-making body. Whatever decision is arrived at, it must be pursued in fairness. Openness to information and a real willingness to hear both sides and to try and be objective are among the marks of fairness. Whereas the appeals committee exhibited all of these qualities, jurisdiction was exceeded and incorrect and inadequate reasons were given for its decision.

Result

20. In the result, the Court will quash the decision of the appeals committee advising the Secretary General of the Department of Education and Science in relation to Delta Beta which is dated the 15th December 2010. The matter will be remitted for a fresh hearing.