Neutral Citation: [2015] IEHC 93

**THE HIGH COURT**

**JUDICIAL REVIEW**

**[2014 No. 580 JR]**

**BETWEEN**

**ROY MACKAREL**

**APPLICANT**

**AND**

**JUDGE JAMES O'DONOHOE, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**AND**

**CATHAL O'BRIEN AND MONAGHAN COUNTY COUNCIL**

**NOTICE PARTIES**

**JUDGMENT of Mr. Justice Noonan delivered the 18th day of February, 2015**

**Background Facts**

1. The applicant was formerly a part time fire-fighter employed by the second-named notice party ("the Council") at its fire station in Ballybay, County Monaghan. The first-named notice party ("Mr. O'Brien") was also a fireman at Ballybay at the material time until his retirement in 2012. For reasons that are not relevant to this application, it would appear that there were difficulties in the relationship between the applicant and Mr. O'Brien. An issue appears to have arisen regarding the applicant's conduct which ultimately resulted in the applicant's dismissal on the 10th December, 2007.

2. On the 3rd April, 2012, on the occasion of Mr. O'Brien's retirement, he presented a plaque to the fire station containing a list of all fire-fighters that had served at the station since 1922 with the exception of the applicant. The plaque was never erected and was left on a table in the fire station for a period of some three hours on the date in question when it was removed by order of the officer in charge. During that period it was seen by a maximum of seven firemen who were on duty that day.

3. On the 6th March, 2013, the applicant issued proceedings in the Circuit Court in County Monaghan claiming damages for defamation against Mr. O'Brien and the Council arising out of the fact that his name had been excluded from the plaque. The Council delivered its defence on the 2nd May, 2013. On the 11th April, 2014 the Council served notice of trial and called the matter on for hearing before the County Registrar on the 4th June, 2014. On the 5th June, 2014, the Council's solicitors notified the applicant's solicitors that the trial was listed for hearing at the sessions of Monaghan Circuit Court commencing on the 8th July, 2014. On the 19th June, 2014 Mr. O'Brien delivered his defence, the delay in doing so being attributed to the plaintiff's failure until shortly beforehand to comply with an order directing him to reply to Mr. O'Brien's notice for particulars.

4. On the 20th June, 2014, Mr. O'Brien's solicitors served notice of trial which, due to a typographical error, stated that the matter was returnable before Monaghan Circuit Court on the 18th July, 2014 rather than the 8th July, 2014. There were no sittings of Monaghan Circuit Court due to be held on the 18th July, 2014. This error was corrected by letter of the 25th June, 2014 from Mr. O'Brien's solicitors to the applicant's solicitors which the latter say was received on the 1st July, 2014.

5. On the 2nd July, 2014, Mr. O'Brien issued a motion pursuant to ss. 14 and 34 of the Defamation Act 2009 also returnable for the 8th July, 2014. On the 3rd July, 2014 the applicant's solicitors served witness summonses on a number of persons, including two employees of the Council, requiring them to attend at the trial on the 8th July. By letter of the 4th July, 2014, the applicant's solicitors wrote to Mr. O'Brien's solicitors seeking consent to an adjournment of the trial and motion on the grounds, *inter alia*, that they required time to deliver a replying affidavit and they required discovery for that purpose.

6. By further letter of the 7th July, 2014 sent by fax, the applicant's solicitors wrote to the Council's solicitors enclosing a copy of the letter of the 4th July, 2014 to Mr. O'Brien's solicitors and advising that they would be seeking an adjournment the next day for the purpose of preparing a replying affidavit and seeking discovery. In a second letter of the same date, the applicant's solicitors sought voluntary discovery from Mr. O'Brien and the Council of two categories of documents, first all documents, records, correspondence and memoranda in relation to the register of fire officers who have served in Ballybay fire station since 1922 and secondly, all documents, records, correspondence and memoranda in relation to the purchase, design and direction of the plaque and the subsequent investigation by the Council in relation to the purchase, design, erection and dispute on the 3rd April, 2012 at Ballybay fire station.

7. By return of fax the same day, the 7th July, 2014, the Council's solicitors responded that they would not consent to an adjournment. With regard to discovery, they went on to state that the Council had no documents in the second category which the applicant already knew as a result of a prior Freedom of Information request and would swear an affidavit to this effect if required. In respect of the first category, the Council's solicitors enclosed a list of the names of all fire fighters employed at Ballybay Fire Station since 1922. In a notable omission from the applicant's affidavit grounding his application for leave to seek judicial review, this latter correspondence is not referred to.

8. Both the trial of the action and the motion came on for hearing before the first-named respondent at Carrickmacross Circuit Court on the 8th July, 2014. All parties were present with their counsel and solicitors and witnesses. The applicant's counsel applied for an adjournment on the grounds that he was not ready to proceed as he required discovery. The application was opposed by the notice parties and the relevant correspondence opened to the court. On the discovery issue, counsel for Mr. O'Brien informed the court that his client had no documents to discover. The court refused the application for the adjournment and the trial proceeded. In those

circumstances the motion became moot and did not proceed. It was not suggested to the court that an adjournment was required because of the non-availability of any witness.

9. During the course of the applicant's cross-examination by counsel for the Council, an objection was made to the court by the applicant that the Council's counsel had previously represented the applicant in a matter related to his employment at Ballybay Fire Station and was thus conflicted. Counsel for the Council accepted that while he may have represented the applicant in the past, he had no recollection of it and in any event no conflict arose. Accordingly, he did not propose withdrawing from the case. The hearing proceeded and at the conclusion of the applicant's case, the defence applied for a non-suit. It would appear that the basis for this application was that there was no evidence from any of the applicant's witnesses which established that any of them thought any the less of the applicant as a result of the publication complained of. The court acceded to this application and dismissed the claim with costs to the notice parties.

10. On the 10th July, 2014, the applicant served a notice of appeal to the High Court.

**The Proceedings**
11. On the 7th October, 2014, the applicant brought the within application for leave to seek judicial review of the judgment of the first-named respondent. On the 13th October, 2014, the court directed that this application be heard on notice to the respondents and notice parties. Replying affidavits were sworn by the solicitors for Mr. O'Brien and the Council. These were in turn responded to by an affidavit of the applicant's solicitor.

12. In his statement of grounds dated the 6th October, 2014, the applicant seeks an order of *certiorari* quashing the judgment and remitting the matter to the Circuit Court for rehearing. The applicant's grounds in summary are that the first-named respondent's refusal to adjourn the matter and afford the applicant an opportunity to seek discovery amounted to a denial of fair procedures and natural and constitutional justice to the applicant. The applicant says further that the first-named respondent should not have allowed counsel for the Council to cross examine the applicant and counsel should have withdrawn. The applicant also says that his counsel was not afforded the opportunity to make submissions in support of the adjournment application or in support of the objection to counsel's participation in the trial and that his own counsel was unfairly interrupted in presenting his case. All of these allegations were vehemently denied in the replying affidavits.

13. When the leave application came on for hearing before me on 7th February, 2014, counsel for the applicant advised the court that he was essentially relying on two grounds and these were set out in paragraph 4 of the applicant's solicitor's affidavit sworn on the 6th February, 2015. The first is that the first-named respondent had no jurisdiction to embark on the trial because no valid notice of trial had been served. This does not appear in the applicant's statement of grounds. The second is that the applicant was denied fair procedures, natural and constitutional justice by virtue of the matters previously recited herein.

**Analysis**
14. Although not made ex parte, it seems to me that in considering the burden of proof to be satisfied by the applicant in this application, I should treat it as if it had. The classic statement of the law on this point is to be found in the judgment of Finlay C.J. in *G v. Director of Public Prosecutions* [1994] 1 I.R. 374 (at p. 377):

> "An applicant must satisfy the court in a prima facie manner by the facts set out in the affidavit and submissions made in support of his application of the following matters:
>
> (a) That he has a sufficient interest in the matter to which the application relates to comply with rule 20(4).
>
> (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by judicial review.
>
> (c) That on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks.
>
> (d) That the application has been made promptly and in any event within the three months or six months time limits provided for in Order 84, r.21 (1), or that the Court is satisfied that there is a good reason for extending this time limit...
>
> (e) That the only effective remedy, on the facts established by the applicant, which the applicant would obtain would be an order by way of judicial review, or if there be an alternate remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure."

15. Although the jurisdiction point does not feature in the applicant's statement of grounds and no application to amend was made, I propose to consider it on the basis that this is a leave application, an application to amend may yet be made and no objection was taken by the notice parties for this reason. The applicant alleges that the relevant rules regarding the service of notice of trial were not complied with and the court was thus deprived of jurisdiction to hear the matter. Order 67, rule 15 of the Rules of the Circuit Court provides as follows:

> "Non-compliance with any of these Rules, or with any practice for the time being in force in the Court, shall not render the proceedings void unless the Court shall so direct, but such proceedings may be set aside wholly or in part as irregular, or may be amended or otherwise dealt with in such manner or upon such terms, as the Court shall think fit."

16. "The Court" referred to in the rule is of course the Circuit Court. It is important to note that no objection appears to have been taken to the notice of trial before the first-named respondent nor was any application made to set it aside on grounds of irregularity. The notice of trial did not confer jurisdiction on the first-named respondent but rather is a procedural rule to be complied with and as the rule makes clear, non-compliance does not avoid the trial. Of course, it is entirely disputed that there was any technical infirmity in the notice of trial by the notice parties but even if there was, the applicant has been unable to point to any detriment suffered by him as a result. The first-named respondent established that the parties were present with their legal teams and witnesses and any defect in the notice of trial, even if raised, was *nihil ad rem*.

17. I am satisfied therefore that there is no substance in this point.

18. Turning now to the issue of discovery, the applicant makes his case on the perceived basis that he is entitled to discovery virtually as of right "in the normal way" as he puts it. If it ever existed, the time has long passed when the courts took such a view of discovery. There is a clear onus on a party seeking discovery to establish the necessity for it in any given case. Here, the applicant looked for discovery for the first time on the day before the trial. He had received the Council's defence some 14 months earlier and

could have sought discovery at any time thereafter. The purpose of the discovery sought is far from clear and the applicant has offered no explanation, even in a general sense, of how such discovery could have conceivably assisted his case. That is quite apart from the fact that the only document which either notice party had within the sought categories was a list of the names of all firemen who served at Ballybay since 1922 and the applicant was given this document as soon as he asked for it. How this document could have advanced his case is a mystery but the fact remains that he had it.

19. It seems to me therefore that on any view of the matter, it could not be said in the light of these facts that there was any unfairness in the first-named respondent's determination to refuse the application for an adjournment. Here again, the applicant has been unable to demonstrate any prejudice he has suffered by the alleged failure to be afforded an opportunity to seek discovery.

20. With regard to the point about counsel's alleged conflict of interest, I cannot see how the first-named respondent could have intervened in this matter. Even were it the case that such a conflict existed, that would be a matter for the professional body of the individual concerned and not a matter for the court. The point was raised and counsel indicated that as far as he was concerned he had no conflict. There was no possible basis upon which the first-named respondent could go behind this statement nor had the court power to in some way "dismiss" counsel from the case merely because a conflict was alleged. As before, the applicant appears to feel that it is sufficient for him to simply raise this as an issue without attempting to demonstrate how this actually resulted in some unfairness to him or prejudice to his interests.

21. The final issue raised by the applicant is that his counsel was not given an adequate opportunity to make submissions on the above matters and that his presentation of the case was interrupted by the first-named respondent. This suggestion is entirely refuted in the replying affidavits and despite the fact that the applicant has had access to the court's Digital Audio Recording system, passages from which are recited in his solicitor's affidavit, I can find nothing in them to support this contention.

22. On all of these issues therefore, I find that the applicant has not established any stateable grounds on the facts or any arguable case in law such as would justify the grant of leave to seek judicial review.

23. Even if I were wrong about all of the foregoing, it seems to me that the appeal to the High Court already initiated by the applicant provides him with a perfectly adequate remedy for all his complaints. He can apply afresh for discovery, bring whatever motions he sees fit regarding the other parties' legal representation and he will have the benefit of a full *de novo* hearing of his case. In those circumstances even if I felt there was any reality to the applicant's grounds, I would exercise my discretion against granting leave.

24. Accordingly I will refuse this application.