



**THE COURT OF APPEAL**

Neutral Citation Number: [2019] IECA 244

**[2017 No. 597]**

**[2018 No. 50]**

**The President  
Peart J.  
Kennedy J.**

**BETWEEN**

**CATHERINE MCGOWAN**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA, MICHAEL FITZGIBBON, FRANCIS  
CLERKIN AND DERMOT MANN**

**RESPONDENTS**

**Judgment of Birmingham P. delivered on the 9th day of October 2019**

1. This is an appeal in judicial review proceedings concerning a member of An Garda Síochána, Ms. Catherine McGowan, who faces disciplinary proceedings pursuant to the Garda Síochána Disciplinary Code. For the sake of convenience, I shall refer to Ms. McGowan as the applicant throughout this judgment. Mr. Michael Fitzgibbon BL, Chief Superintendent Francis Clerkin, and Superintendent Dermot Mann constitute a Board of Inquiry established to determine whether the applicant had committed certain breaches of discipline alleged. I will be collectively referring to these individuals, and to the Commissioner of An Garda Síochána, as the respondents.
2. In the High Court, the applicant sought and was granted leave to challenge the decision of the first named respondent, the Garda Commissioner, to establish a Board of Inquiry, an order of prohibition restraining the respondents from taking any further steps with the Inquiry, along with other reliefs. The reliefs sought by the applicant were refused by the High Court (White J) in a judgment delivered on 16th November 2017. The applicant has now appealed the High Court's refusal of those reliefs. In the course of the judicial review proceedings before the High Court, the applicant sought and was granted leave to amend her statement of grounds. The respondents have appealed the decision to permit an extension of the statement of grounds.

**Background**

3. The background to the case is set out in some detail in the course of the judgment of 16th November 2017 and I gratefully draw upon it. What has now become a lengthy saga began in 2005, when Ms. MK made a complaint to the Roman Catholic Archdiocese of Dublin that she had been sexually abused in the 1980s by a priest of the Archdiocese. An Garda Síochána was notified of the making of the complaint and the matter was passed to Bray Garda Station for investigation. The applicant, a member of An Garda Síochána then stationed in Bray Garda Station, was assigned the task of investigating the complaint. It is alleged that she failed to properly investigate same.

4. On 14th July 2011, Chief Superintendent Aidan Glacken, was appointed pursuant to Regulation 23 of the Garda Síochána (Discipline) Regulations 2007, as amended, to investigate certain alleged breaches of discipline. On 19th July 2012, the applicant was put on notice that it appeared there may have been a breach of discipline and that Chief Superintendent Glacken had been appointed to investigate. Brief details of the misconduct alleged were set out in an accompanying notice.
5. A criminal investigation also commenced and the applicant was charged with certain offences on 10th May 2013. The matter proceeded by way of indictment and the applicant's trial commenced in the Circuit Criminal Court in Dublin on 23rd February 2015.
6. The Particulars of Offence which appeared on the indictment were as follows:

"Count 1: Catherine McGowan, within the State, on a date unknown between the 15th day of January 2009 and the 21st June 2011 (both dates inclusive) made a False Instrument, being ostensibly a photocopy of a letter dated the 14th of January 2009 from the Office of the Director of Public Prosecutions, issued by Henry Matthews, which purported to have been made in circumstances in which it was not in fact made, intending that it be used to induce officers of An Garda Síochána to accept it as genuine, and by reason of so accepting it, to act to their prejudice in connection with the performance of their duty.

Count 2: Catherine McGowan, on the 21st day of June 2011, in the County of Wicklow, used by showing to an officer of An Garda Síochána an Instrument was false and which she knew and believed to be a False Instrument, ostensibly a photocopy of a letter dated the 14th of January 2009, Reference Number 2007/1972 from the Office of the Director of Public Prosecutions to James Boyle, Solicitor, and appearing to be issued by Henry Matthews, purporting to have been made in circumstances in which it was not in fact made with the intention of inducing an officer of An Garda Síochána to accept it as genuine, and by reason of so accepting it, to act to its prejudice in connection with the performance of his duty.

Count 3: Catherine McGowan, at a time unknown, on the 21st or 22nd day of June 2011 within the State, used, by causing to be delivered to Gardaí at Garda Offices, Harcourt Square, Harcourt Street, an Instrument which was and which she knew or believed to be a False Instrument, being ostensibly a photocopy of a letter dated the 14th of January, from the Office of the Director of Public Prosecutions to James Boyle, Solicitor, under Sender's Reference 2007/1973 and appearing to be issued by Henry Matthews which purported to have been made in circumstances in which it was not in fact made, with the intention of inducing officers of An Garda Síochána to accept it as genuine, and by reasons of so accepting it, to act to their prejudice in connection with the performance of their duty."

7. On 12th March 2015, the jury returned "not guilty" verdicts on all charges before the Court. This was not, however, to be the end of the matter. Within An Garda Síochána, the view was taken that there were outstanding disciplinary issues arising from the report of

Chief Superintendent Glacken that had not been the subject of the criminal trial. On 8th June 2015, a Board of Inquiry was established pursuant to Regulation 25 of the Garda Síochána (Discipline) Regulations Act 2007, as amended, to determine whether the applicant had committed such a breach, or breaches, and if so, recommend to the Commissioner of An Garda Síochána an appropriate course of disciplinary action that should be taken.

#### **The Nature of the Alleged Breaches of Discipline**

8. The particulars of the serious breaches of discipline alleged were as follows:

“(i) Neglect of duty: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, without good and sufficient cause, failed to properly investigate an allegation of defilement of a child between the ages of 15 and 17 years which was made by MK and reported to you in February 2007, which was your duty to do.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 4 in the Schedule to the said Regulations.

(ii) Neglect of duty, that is to say, that you, Detective Garda Catherine McGowan, 00671H, Bray Garda station, in your capacity as a member of An Garda Síochána, without good and sufficient cause, failed to submit a complete investigation file in respect of an allegation of defilement of a child aged between 15 and 17 years which was made by MK and reported to you in February 2007, and in accordance with Garda instructions, in order to seek directions from the law officers, and in accordance with standard investigative practices which was your duty to do.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007 and is described at Reference No. 4 in the Schedule to the said Regulations.

(iii) Discreditable Conduct: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, conducted yourself in a manner which you knew, or ought to have known, would be reasonably likely to bring discredit on the Garda Síochána, in that you did wrongly inform the injured party, MK, that the Director of Public Prosecutions had given an instruction not to prosecute, knowing that this was not the case.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 1 in the Schedule to the said Regulations.

(iv) Discreditable Conduct: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, conducted yourself in a manner which you knew, or ought to have known, would be reasonably likely to bring discredit on the Garda Síochána, in that you did wrongly

inform Mr. Gerard Deegan of the Archdiocese of Dublin that the Director of Public Prosecutions had given an instruction not to prosecute, knowing that this was not the case.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 1 in the Schedule to the said Regulations.

- (v) Discreditable Conduct: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, conducted yourself in a manner which you knew, or ought to have known, would be reasonably likely to bring discredit on the Garda Síochána, in that you did wrongly inform the Murphy Report Inquiry Team that the Director of Public Prosecutions had given an instruction not to prosecute, knowing that this was not the case.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 1 in the Schedule to the said Regulations.

- (vi) Falsehood: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, without good and sufficient cause, made or procured to be made, a document purporting to be a minute dated the 25th of April 2009 headed 'DPP (Detective Garda Donna McGowan v. Patrick McGowan)' signed Noirin McBride, Inspector for Superintendent which, to your knowledge, was false or misleading.

The said prevarication is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 6 in the Schedule to the said Regulations.

- (vii) Falsehood: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, without good and sufficient cause, made or procured to be made, a document purporting to be a statement of Detective Sergeant Eamon O'Neill of Bray Garda Station which, to your knowledge, was false or misleading.

The said prevarication is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 6 in the Schedule to the said Regulations.

- (viii) Discreditable Conduct: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, conducted yourself in a manner which you knew, or ought to have known, would be reasonably likely to bring discredit on the Garda Síochána, in that you did produce to the Murphy Investigation Team at Harcourt Square, Dublin 2, a document

purporting to be a minute dated the 25th of April 2009 headed 'DPP (Detective Garda Donna McGowan v. Patrick McGowan) signed Inspector for Superintendent.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 1 in the Schedule to the said Regulations.

- (ix) Neglect of duty: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, without good and sufficient cause did fail to record on PULSE a report of an allegation of defilement of a child aged between 15 years and 17 years which was made by MK and reported to you in February 2007 which it was your duty to do.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 4 in the Schedule to the said Regulations.

- (x) Neglect of duty: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, without good and sufficient failed to attend to correspondence dated the 14th of June 2007 from McCartan & Burke, Solicitors, which it was your duty to do.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 4 in the Schedule to the said Regulations.

- (xi) Neglect of duty: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, without good and sufficient cause failed to attend to correspondence dated the 19th of July 2007 from McCartan & Burke, Solicitors, which it was your duty to do.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 4 in the Schedule to the said Regulations.

- (xii) Neglect of duty: that is to say that you, Detective Garda Catherine McGowan, 00671H, Bray Garda Station, in your capacity as a Member of An Garda Síochána, without good and sufficient cause failed to attend to correspondence dated the 16th of August 2007 from McCartan & Burke, Solicitors, which it was your duty to do.

The said neglect of duty is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007, and is described at Reference No. 4 in the Schedule to the said Regulations."

#### **The Judgment of the High Court**

9. In the High Court, White J. identified the core complaint of the applicant as being that the Disciplinary Inquiry was based on the same subject matter as her Circuit Court criminal

trial in February and March 2015. There was a subsidiary argument that the applicant should have been given reasons why Regulation 8(2) was not being applied in a manner favourable to her. Having reviewed a number of decisions of the Superior Courts in the area, White J commented at para.17-18 of judgment:

"17. A member of An Garda Síochána the subject of disciplinary procedure when a Board of Inquiry has been established receives detailed notice of the alleged breaches of discipline . . .

18. It is self-evident from the initial notice to the Applicant of the 19th July, 2012 and the notice served on her by way of form I.A. 33, that there are many issues in the allegations of neglect of duty and discreditable conduct that could never be the subject of a criminal allegation against the Applicant, but could be regarded as a serious failure to discharge her duties as a member of An Garda Síochána."

White J. pointed out that a recent decision of the High Court, *Naughton & Kenny v. The Commissioner of An Garda Síochána* [2017] IEHC 141, had reviewed the authorities in the area and had referred to the possibility of unfairness where the subject matter of the previous criminal trial closely resembles or mirrors the disciplinary allegation. The present case, he observed, was not the kind of situation envisaged in *Naughton & Kenny*. He added at paras.20-22:

"20 [t]here is a much wider allegation of breach of discipline against the Applicant alleging she did not do her job properly as a member of An Garda Síochána and neglected to properly pursue a complaint which was serious in nature and to overcome her failure to pursue the complaint, she attempted to deflect it by covering up her mismanagement of the file. Those issues go to the heart of responsible policing . . .

21. The Court accepts that the criminal trial and the attendant publicity was a severe ordeal for the Applicant. Ultimately, as is reflected in the legislation and the regulations, the conduct of individual members of An Garda Síochána can be scrutinised legally in a disciplinary hearing. In the Court's opinion there is no question of double jeopardy as the issues go much wider than the narrow focus of the criminal trial, when her innocence was established.

22. The disciplinary allegations are serious in this case and go way beyond the issues in the criminal trial."

10. Elsewhere, White J. addressed the question of the giving of reasons for the decision to proceed with disciplinary proceedings by saying that:

"19. It is essential that the procedures are fair and that a member of An Garda Síochána, the subject of disciplinary allegations, knows exactly what has been alleged. Once that is done, the Court does not consider it necessary that detailed

reasons are given why a decision was made to proceed notwithstanding regulation 8(2) ...

23. In summary, there was no obligation on the First Respondent in this case to explain why Section 8(2) did not apply. The Court finds that the Regulation did not apply. The reliefs are therefore refused."

### **Discussion**

11. The applicant has appealed the judgment of the High Court to this Court. There has also been a cross-appeal against the decision of White J. to allow additional grounds be argued. There has been one significant development before this Court which relates to concessions made by the applicant as to certain categories of alleged breaches which are accepted as proper to go before the Board of Inquiry.

### **The "Same Issues" Ground**

12. In the course of the written submissions of the applicant, the thirteen alleged breaches of discipline have been helpfully grouped as follows:

GROUP 1. 1. Discreditable conduct in informing parties that a decision had been taken by the Director of Public Prosecutions not to prosecute, knowing that this was not the case (Breaches 3-5)

2 Falsehood in forging two documents other than the letter from Mr. Henry Matthews (Breaches 6-7)

3 Discreditable conduct in the use of the forged documents (Breach 8)

GROUP 2. 4. Neglect of duty in failing to investigate the defilement allegation (Breaches 1 and 2)

5 Failure to create a record on PULSE (Breach 9)

6 Failure to engage in correspondence with relevant solicitors (Breaches 10-13)

In the course of the oral appeal hearing, there was a significant development. In opening the case, counsel for the applicant referred to the matters which, he said, should not go forward to a disciplinary hearing and also to those which "he cannot, on any principled basis object to". This realistic approach is consistent with the approach taken in the written submissions, and indeed, expands upon the written submissions in that regard. The written submissions had acknowledged that there would be difficulty in contending that disciplinary Breaches 9 to 13 could not be proceeded with. So far as Breaches 1 and 2 are concerned, the written submissions had proceeded on the basis that these related to the failure to investigate the alleged crime, which the prosecution in the Circuit Court trial had advanced as the motive behind the creation of the alleged forgeries. Accordingly, the written submissions had suggested that they ought not to be the subject of a Disciplinary Inquiry as they formed part of the same issues that were considered in the Circuit Court and to be further considered at a Disciplinary Inquiry would be oppressive and unfair. In his oral presentation, I understood counsel to accept that Breaches 1 and 2

could be considered at a Disciplinary Inquiry. In essence, therefore, the position taken by the applicant was that the matters referred to in Group 2 in the table above could be the subject of the Inquiry, but that those forming part of Group 1 could not.

13. The assessment by the High Court Judge that there were many issues within the allegations of neglect of duty and discreditable conduct that could never have been the subject of criminal allegations against the applicant, but which could otherwise be regarded as a serious failure to discharge the duties of a member of An Garda Síochána was a realistic one. One could imagine situations where the subject matter of the criminal trial was merely re-formulated or repackaged in the guise of allegations of breaches of discipline, and obviously, were that to happen, that would be a cause of concern. However, I am quite satisfied that is not what has happened here.
14. It will be recalled that the Circuit Court trial revolved primarily around the making of a False Instrument and included allegations of using that same False Instrument. The matters now alleged to constitute breaches of discipline are significantly different. Breaches 1 and 2 involve an alleged neglect of duty in failing to investigate allegations of defilement of a child. Breaches 3 to 5 concern allegations of discreditable conduct to the effect that various parties, the complainant, the representative of the Archdiocese of Dublin, and the Judge Yvonne Murphy Inquiry Team were informed that a decision had been taken by the DPP not to prosecute when that was, to the applicant's knowledge, not the case. Breaches 6, 7, and 8 relate to the creation of two false documents and the use of one. None of these allegations relate to the document that was at the centre of the Circuit Court trial, a letter purporting to emanate from Mr. Henry Matthews, a senior officer within the Office of the DPP, though one of the documents, the minute purportedly signed by Inspector O'Brien, was attached to the so-called "Matthews letter". Breach 9 relates to the failure to create a record on the PULSE system, while Breaches 10 to 13 relate to a failure to engage with correspondence from a firm of solicitors.
15. It will be immediately apparent that that the alleged breaches of discipline and discreditable conduct are not the same issues as occupied the Circuit Criminal Court and that there is no reference to the document purporting to be from Mr. Henry Matthews, which was at the heart of the Circuit Court proceedings. I regard this as significant. I agree with White J. that the alleged breaches could be regarded as a serious failure to discharge the duties of a member of An Garda Síochána. Certainly, they are matters of substance and that there would be a wish to enquire into them is, I believe, entirely understandable. To borrow the language of another area of jurisprudence, by no stretch of the imagination could the investigation of these alleged breaches be regarded as "colourable devices". In taking the view that the alleged breaches of discipline are matters of substance, and that it is understandable that there would be a desire to investigate them, I do not ignore the fact that there is a shared factual background with the charges before the Circuit Court; the shared background being the alleged failure to investigate an alleged crime that had been referred to her for investigation. I acknowledge that it can be said that all of the allegations made against the complainant, criminal charges and alleged breaches of discipline alike, all arise out of that same failure to conduct an investigation.



It does not follow that these concern the same issues simply because they shared a common place of origin.

16. In these circumstances, I would reject this Ground of Appeal. Naturally, I express no view whatever as to whether any or all of the allegations will be made out. I am merely saying that the Board of Enquiry should not, in my view, be prevented from considering them.

**The “Failure to Give Reasons for Proceeding with the Disciplinary Inquiry” Ground**

17. In relation to the “failure to give reasons” point, I agree with the High Court Judge that any Garda who is the subject of allegations of breach of discipline is entitled to a fair inquiry, part of which involves being given notice of the allegations being made. However, I do not believe that there is any obligation to provide reasons as to why the Board of Inquiry is being established. In truth, the reasons why the Board of Inquiry is being established must be obvious. It seems to me that there is an analogy here to a criminal prosecution. The person being prosecuted is entitled to a fair trial. Depending on the nature of the charge that entitlement may involve the service on the accused of a Book of Evidence and the making of disclosure. Normally, however, the accused would not be entitled to a statement as to why the Director had decided to prosecute or why the Director had decided to lay one charge rather than another. The reason why the Board of Inquiry is being established is in truth obvious, it is being established because the Garda Commissioner is not of the view that the Inquiry would be into the same issues in respect of which the member was acquitted and that in the circumstances of the case, that it would be unfair or oppressive to commence the Inquiry. However obvious that may have been in this case, it is confirmed by way of an affidavit from Superintendent Matthew Nyland of Internal Affairs at Garda Headquarters sworn in response to the request to amend and expand on the grounds.

**Cross-Appeal**

18. Having regard to the view I have taken of the applicant’s appeal, and that was the substantive issue before the Court, I do not need to address the cross-appeal at any great length. The respondents say that the explanation offered for the application to amend the pleadings was that a new legal team had come to the case shortly before the hearing and wished to recast the pleadings. They argue the fact that there is a new legal team that analysed the case in a different way to their predecessors does not provide a basis for an amendment. They also highlight that the application was made very late in the day and required the drafting, and subsequent filing, of an affidavit at short notice while the proceedings were already underway. It is said that in the circumstances, the trial judge erred in the manner in which he exercised his discretion.
19. The applicant points out that the application to vary or amend was a limited one: it was restricted to addressing the grounds on which relief was sought and there was no question of additional reliefs being sought. What was involved was that the amended grounds sought to particularise with greater specificity the case that had been made. The applicant says that this was clearly a case where the trial judge had a discretion to exercise, where he was being told that the respondents had acknowledged that even if

the pleadings were amended that they were in a position to continue with the case the next day and that the question of prejudice was not a concern.

20. For my part, I would not favour allowing amendments as “a matter of course”. I think that had I been hearing this case at first instance, I would not easily have been persuaded that what was sought was not an impermissible expansion very late in the day. However, I can see how the view might be taken that the validity of the decision was already under challenge and that allowing additional grounds to be argued did not represent any radical or fundamental departure from the underlying claim. It seems to me that this is an area where a considerable margin of appreciation should be afforded a trial judge. I have not been persuaded that his decision to permit the amendment was an impermissible one, and so, I would dismiss the cross appeal.
21. In summary, then, I would uphold the approach of the High Court and would dismiss the appeal and cross-appeal.