



THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 301

[2015 No. 140]

[2014 No. 542 J.R.]

**The President
Peart J.
Edwards J.**

BETWEEN

PETER NOWAK

APPELLANT

AND

IRISH AUDITING AND ACCOUNTING SUPERVISORY AUTHORITY

RESPONDENT

JUDGMENT of the President delivered on 26th October 2016

1. This is an appeal by Mr. Peter Nowak against the refusal of the High Court (Noonan J.) of his application for judicial review in respect of a decision made by the respondent body. The Irish Auditing and Accounting Supervisory Authority was established by the Companies (Auditing and Accounting) Act 2003. Its principal objects are set out in s. 8 of the 2003 Act as being:

- "(a) to supervise how the prescribed accountancy bodies regulate and monitor their members;
- (b) to promote adherence to high professional standards in the auditing and accountancy profession;
- (c) to monitor whether the accounts of certain classes of companies and other undertakings comply with the Companies Acts, and (d) to act as a specialist source of advice to the Minister on auditing and accounting matters."

2. The Authority has power under s. 23(2)(a) of the 2003 Act to enquire into a decision by a prescribed body not to undertake an investigation into a possible breach of standards by one of its members. The purpose of such an inquiry is to determine whether the prescribed body has complied with the approved investigation and disciplinary procedures. This appeal is concerned with the response of the Authority to an application made by Mr. Nowak for an inquiry into a decision by the regulatory body of the Institute of Chartered Accountants in Ireland, the Chartered Accountants' Regulatory Board (CARB). CARB is a prescribed body so it is within the jurisdiction of the Authority under section 23.

3. In September 2011, Mr. Nowak made a complaint to CARB about his former employer and training firm, PwC, in respect of alleged non compliance with accounting and audit standards in respect of two audits. He subsequently furnished supporting documentation. The response came in October 2012 when Mr. Derek Dee, Senior Complaints Case Manager of CARB, wrote to Mr. Nowak informing him as follows:

"On reading the information you provided between June and August 2012, there were no facts evidencing that the member firm had breached professional or accounting standards and therefore it did not constitute a complaint as it appeared that the accounting was in accordance with the companies' accounting policies and complied with relevant accounting standards. A complaint file was therefore not opened and there was no preliminary investigation of the complaint as a complaint in accordance with the By-Laws did not exist."

4. Emails were then exchanged in which Mr. Nowak expressed dissatisfaction with the decision and sought an independent review. Mr. Dee replied that Mr. Nowak was not entitled to have an independent review because no formal complaint file had been opened and thus there was no actual complaint.

5. Mr. Nowak then turned to the Authority which is the respondent to this appeal. He sought an independent examination of the matter on a number of grounds which he outlined in a letter of 7th November 2012. They were, first, that the wrong person in CARB made the decision: it should have been the Head of Professional Conduct and not the Senior Complaints Case Manager. Second, CARB was wrong to form the view that there was no formal complaint in existence because of a number of circumstances, including the definition of a complaint and the procedure actually adopted. He cited extracts from the by-laws and his correspondence with the Board. Third, he was denied recourse to an independent review. Fourth, he complained that the Board did not make a fair and impartial judgment. Fifthly, he was not given a copy of the response of the member firm.

6. On 26th June 2014, the Authority informed Mr. Nowak that it had "concluded that there were no issues identified which would warrant further examination in the context of the Authority's function under Section 23 or 24 of the Companies (Auditing and Accounting) Act 2003".

7. Mr. Nowak obtained leave from the High Court to apply for judicial review on 15th September 2014 seeking:

- (a) a declaration that the decision of the Authority was unlawful, unreasonable and disproportionate;
- (b) an order of certiorari quashing the decision;

(c) an order of mandamus directing the Authority to conduct a statutory inquiry pursuant to section 23.

The grounds on which the reliefs were sought appear from the court order as follows:

(a) The decision was unreasonable and/or irrational when considered in the context of the evidence which was before the respondent. There was no reasonable, rational, lawful or evidential basis upon which the respondent could have reached the decision to the effect that there were no issues identified which would warrant examination in the context of the Authority's functions under s. 2324 of the Companies (Auditing and Accounting) Act 2003.

(b) The respondent erred in law in failing to give reasons in respect of the complaint or otherwise justify its failure to give such reasons.

8. The High Court, on hearing the full application, refused the reliefs sought by Mr. Nowak. In a judgment delivered on 17th February 2015, Noonan J. held that the decision whether or not to initiate an inquiry was a matter within the discretion of the Authority, which was not limited or circumscribed by the Act, and was accordingly "at the wider end of discretionary powers afforded to public bodies". While the High Court had the capacity to supervise the exercise of the Authority's functions, the court would have to be satisfied by clear evidence that the power in question had been exercised in an unreasonable or irrational manner, see *Garda Representative Association v. Minister for Finance* [2010] IEHC 323. This was particularly so in the case of a body with specialist knowledge, see *Ulster Bank Investment Funds Limited v. Financial Services Ombudsman* [2006] IEHC 323].

9. The court held that the threshold for the applicant was high, see *State (Keegan) v. Stardust Tribunal* [1986] 1 I.R. 642 and *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39. Mr. Nowak does not disagree with the tests as stated and cites these very authorities in his submissions, in addition to *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1KB 223.

10. Noonan J. said that there was:

"Absolutely no evidence of anything approaching unreasonableness or irrationality in the impugned decision, less still, evidence that would satisfy the heavy burden borne by the applicant. His contention that there was bad faith shown by the respondent is manifestly groundless quite apart from the fact that this was not a ground upon which leave was granted."

11. The judge said that the Authority's letter giving its decision explained clearly that its remit was not to mediate individual cases, but lay in oversight of the regulatory system. Mr. Nowak had been informed that his complaint was considered in detail and he was given the reason why the Authority was not going to initiate an inquiry under s. 23, namely, that he had not identified any issue which would warrant an inquiry. This was in the circumstances, although brief and succinct, a sufficient reason. The judge noted that Mr. Nowak did not seek any further elaboration of the reasons, which was particularly relevant because of the more detailed explanation contained in the replying affidavit on behalf of the Authority sworn by Ms. Hall.

12. Moreover, the court thought it questionable whether there was any duty on the Authority to furnish Mr. Nowak with reasons. In *H v. DPP* [2006] 3 I.R. 575, the Supreme Court upheld the refusal of the Director to give reasons for a decision not to prosecute. In this case, the decision could not have affected any rights or liabilities of Mr. Nowak.

13. Finally, the court turned to the question of standing and held that Mr. Nowak could not point to any detriment or disadvantage that he suffered by reason of the decision. On the other hand, if he were to succeed in this application and a s. 23 inquiry in due course ensued and resulted in a sanction, that would confer no benefit on him. This was another reason why the application failed.

14. Mr. Nowak listed many grounds of appeal which he expanded upon in written and oral submissions and argument. They are not easy to summarise and it may be that the most convenient way of dealing with them is to take them in turn, addressing each one individually and specifically. I endeavour to do that below. Before doing so, however, I make some observations addressing the case at a more general level.

15. My conclusion overall, notwithstanding the number and variety of Mr Nowak's challenges to the decision of the High Court, is that this appeal cannot succeed. In my view, Noonan J. was correct in refusing judicial review. For the reasons that I set out below, I consider that the appellant has not demonstrated any error in law on the part of the judge in his approach to the application. While I agree with the reasoning and conclusions of the High Court in its rejection of the application, I do not find it necessary to express a view on the issue of standing which it seems to me is essentially a subsidiary consideration in this case. That question may be decisive in some other challenge and I would prefer to leave that question over for determination on such an occasion.

16. It is worthwhile recalling the source of this litigation before considering what the appeal is about and what it is not about. Mr. Nowak's original complaint was that PwC had engaged in practices that were contrary to good accounting and auditing standards. He made that case to the specialist body that was appropriate to consider it. The Board's Senior Complaints Case Manager concluded that there was no evidence of breach of professional or accounting standards and therefore there was no complaint. If there had been a complaint, the next step, after admitting it, would have been a preliminary examination. If the Board decided at that stage not to proceed further, Mr. Nowak would have been able to invoke the independent review envisaged by the bylaws. The complaint however did not reach that stage.

17. Almost every disciplinary body applies an admissibility threshold. When a person makes a complaint, the matter has to be considered before it begins its journey along the procedural path towards resolution. In this case, there is confusion over the use of the word 'complaint'. It is clear that Mr. Nowak made a complaint to the Chartered Accountants' Regulatory Board. That did not mean that it was admissible, in the sense that it would now proceed without more to a preliminary examination in accordance with the by-laws. Mr. Dee made a decision that this complaint should proceed no further because there was no evidence of breach of professional or accounting standards. There was, accordingly, nothing to investigate or examine on that analysis and decision. It would have been clearer to everybody involved, including Mr. Nowak, if the distinction was made between his complaint and a complaint that was being processed in accordance with the disciplinary machinery, namely, an admissible complaint.

18. It is important to distinguish between complaints about CARB, which are not before the court, and against the Authority. The Senior Case official of CARB decided that the complaint was not suitable for investigation and rejected it. The High Court held that this was a decision on admissibility made upstream of the preliminary investigation which the procedure envisaged following admission. The Authority's function was not to rule on procedural correctness, but to decide whether to inquire into the decision by CARB not to undertake an investigation into a possible breach of standards by one of its members. In accordance with the legislation, that purpose of such an inquiry would be to determine whether CARB had complied with the approved investigation and disciplinary procedures. The

Authority was not hearing an appeal from the decision by CARB. It had its own separate function.

19. The functions of the Authority do not include hearing appeals from the decisions of the Board. The Authority has supervisory jurisdiction over the disciplinary process that Mr. Nowak complained about. The Authority was entitled and arguably obliged to look also at the factual basis on which Mr. Nowak's complaint was rejected. That was because the Board was of the view that the practices complained of by Mr. Nowak conformed with standard accounting and auditing procedures and so there was actually nothing to investigate. In those circumstances, it seems to me to have been quite reasonable of the Authority to decide not to proceed. The Authority was entitled to think that it would be wasting its time exploring an alleged departure from proper procedure in a case in which there was no basis for the complaint.

20. The central point Mr. Nowak makes is as stated in his complaint to the Authority. He relies on the by-laws of the Board and on a letter from Mr. Derek Dee in response to his email of complaint. The procedure that followed receipt of his email was that he was invited to furnish documentary back-up material for the complaint, which he did. The Board sent his complaint to PwC for their comments and then made the decision of which he complains. His point is that this means that the Board had received his complaint and proceeded to carry out a preliminary examination. In those circumstances, he maintains that he was entitled to have an independent review of the decision not to proceed to full investigation. If the Board had rejected his complaint when he made it initially or even after he submitted backing documents, it might have been able to say that his complaint did not properly comply with the definition or understanding of a complaint within the meaning of the by-law scheme. However, in my view, the fact that Mr. Dee invited a response from the member firm involved did not necessarily imply that the Board had embarked upon a preliminary examination pursuant to the by-laws. It was open to the Board to declare, in light of the responding material, that it was not treating the complaint made by Mr. Nowak as an admissible complaint within the meaning of the by-laws.

21. It seems to me that what has happened in the circumstances that led to this litigation and the current appeal is that Mr. Nowak sought to indict his former employers in respect of their auditing practices, of which he was critical. The specialist body to which he brought his criticisms – CARB – concluded at an early stage that the practices he condemned were not improper as suggested but were normal and routine methods of professional practice. That was a decision that the disciplinary body was entitled to make and was qualified to exercise that judgment in a manner that another Tribunal, such as a court, would not be able to do without the assistance of expert evidence. Mr. Nowak did not accept that evaluation and has proceeded to explore every avenue of challenge open to him.

22. The application to the Authority fell to be considered against the statutory purposes that that body was required to fulfil. If there was insufficient matter of concern for the Authority, there was no reason why it should undertake an inquiry. When the different functions of CARB and the Authority are understood, it is clear, in my view, that the trial judge was correct in holding that there was nothing in the case that came near *Keegan*, *O'Keeffe* or *Wednesbury* unreasonableness.

23. It would also have been open to the court to come to a conclusion that even if there were some technical merits that Mr. Nowak might be able to assemble, his application was in pursuit of relief by way of a new inquiry into something that the relevant Board's senior official has found to be not worthy of investigation because the matter complained about was standard accounting practice. In my view, the High Court and this court would be engaging in a useless technical revision with no ultimate point and at unnecessary cost.

24. On a separate matter, it is difficult to see how it would be justifiable to exercise the court's discretion in the circumstances of this case. This is because of the technical procedural nature of the claim; the conclusion by CARB that the impugned practices were standard accounting methods; the absence of benefit or detriment to Mr. Nowak and the decision of the Authority not to enquire.

25. On the question of standing, I am satisfied as appears below that Mr Nowak is in error in thinking that he has overcome this obstacle because he got leave and also because he was the person who made the complaint. I do not find it necessary however to reach a definite conclusion as to whether a person who makes a complaint to the Authority arising out of previous application to a body under the supervision of the Authority can have standing in judicial review to challenge the Authority's procedure or decisions. I do not propose therefore to express a view on this part of the trial judge's reasoning and to leave detailed consideration of the question to another occasion when it arises as a central and immediate issue that requires to be decided.

26. I now proceed to consider seriatim the detailed submissions made by Mr Nowak. Some of the issues he raises are dealt with above. In his enumerated paragraphs there is general comment and repetition as well as specific points. I endeavour to identify and consider them in turn insofar as they are relevant and significant. The first is a submission as noted above that he had *locus standi* because he was given leave by the High Court to seek the reliefs in the notice of motion. If he did not have sufficient interest in bringing the proceedings, leave would not be granted. Moreover, he had sufficient interest because he made the complaint by to the respondent. Mr. Nowak is simply incorrect to think that he had standing to bring the judicial review application because the High Court gave him leave. Neither did he have entitlement simply because he had made the complaint to the Authority. The threshold for leave is low and it is open to a respondent to challenge *locus standi* at the hearing. That is what happened in this case. This particular ground of challenge to the judgment accordingly fails.

27. In his judgment, the trial judge said that the decision whether or not to initiate an enquiry was a matter entirely within the discretion of the applicant whereas it is actually with the respondent. Mr. Nowak does not do justice to himself in making a ground of appeal an obvious and simple mistake when the judgment refers to applicant instead of respondent.

28. Mr Nowak takes issue with the judge's conclusion as to the nature of the Authority's discretion under s. 23 that it is "at the wider end of discretionary powers". Mr. Nowak submits that "the discretion ought to be a reasonable, well-informed and most importantly exercised in good faith". There is nothing wrong with that statement, but it will be noted that bad faith is not one of the grounds on which leave was granted. Besides, what the judge said is correct about the nature of the discretion.

29. Mr. Nowak submits that the judge erred in fact stating:-

(a) At para. 6 of the judgment, that the appellant sought a declaration that the decision was unlawful where the applicant/appellant sought a declaration that the decision was unlawful, unreasonable and disproportionate;

(b) at para. 14, that the comment "awaiting Board's s. 23 considerations" related to the ongoing review of the respondent s. 23 processes and not the complaint in issue in that there was no evidence which would prove the existence of such a review and

(c) that there have been five statutory enquiries whereas the respondent initiated eight enquiries comprising of five

completed and three ongoing.

This is in three parts. The first is a pedantic observation correcting the judgment which says that Mr. Nowak sought a declaration that the decision was unlawful, whereas his complaint was that it was unlawful, unreasonable and disproportionate. Comment is unnecessary. Similarly, the third point queries the correctness of the statement in the judgment of the number of enquiries initiated. The second point in this ground: item (b) refers to an observation at para. 14 of the judgment where the judge cited affidavit evidence from the Authority's deponent, Ms. Hall. Mr. Nowak simply complains that there was no evidence to prove that the statement was correct. However, it was a matter for Mr. Nowak to establish his case as to unreasonableness within the meaning of the leading cases on judicial review.

30. At ground 2.5 of his written submissions, Mr. Nowak proposes that the judge implicitly discounted the truthfulness of averments in Ms. Hall's affidavit that no complaint against PwC to CARB existed which "therefore highlighted the main aspect of unreasonableness and irrationality of the impugned decision". When the trial judge referred in his judgment to the existence of a complaint to CARB, he was thereby dismissing the truthfulness of Ms. Hall's averment that there was not a complaint against PwC, in the sense of a complaint admitted, accepted or acknowledged by CARB. Mr. Nowak says that this highlighted the main aspect of unreasonableness and irrationality of the decision under challenge. In reply, the Authority submits that the judge was referring to a complaint in the ordinary sense of the word and was not confirming the existence of a formal complaint in the technical sense in the by-laws. In my view, it is quite clear what the judge meant. The Authority's submission is correct. I think it is obvious from the context that the judge is using complaint in its ordinary meaning and sense. Mr. Nowak raises an issue as to whether the way the Authority dealt with his original application – I am avoiding the word 'complaint' – necessarily implied that it was treating it as a complaint within the meaning of the procedure laid down in the by-laws. By receiving it in the first place, and seeking a response from PwC, he contends that the Authority was at least implicitly treating Mr. Nowak's submission as an admissible complaint. If that had been the case *i.e.* if Mr. Nowak's presentation to the Authority was indeed an admissible complaint, there would have been a preliminary examination that involved communication with PwC and a decision then made as to whether to proceed further. In the event that the Authority decided not to go down that road of further investigation, Mr. Nowak would have been entitled to have an independent review of that decision. But all that depended on his complaint being treated as admissible and made the subject of preliminary examination. In fact, that did not happen and the Authority rejected Mr. Nowak's complaint, to use the word in its ordinary sense.

31. As I mentioned above when discussing the issues in more general terms, one of the complications of this case is the absence of precision in the meaning of complaint when it is used, a point mentioned by Ms. Hall in her affidavit. The Authority treated Mr. Nowak's paperwork presentation and backup material as something short of an accepted, admissible complaint that was the initiation of the s. 23 process. If it was in fact admitted as a complaint for the purpose of s. 23, it might have terminated at the preliminary investigation; if so, Mr. Nowak could have invoked the independent review. Alternatively, the matter might have proceeded to a full investigation. The significance, therefore, of a complaint is obvious. The problem is that it is not obvious what was meant when the word was used. The differences of interpretation and the disputes about meaning became evident when the Authority rejected Mr. Nowak's case to them *in limine*. The trial judge accepted the Authority's account of this issue.

32. Mr. Nowak claims that there was evidence that the decision was made in bad faith. This is a point he takes up again in his submissions when he says that the Authority was concealing the wrongdoing of the Institute of Chartered Accountants in Ireland, which in turn was covering up for PwC's alleged breaches of professional and accounting standards. All this is based on a disputed understanding that was rejected by the trial judge of a reference in the internal documents of the Authority. Bad faith is not a ground on which leave was granted. The Authority submits that Mr. Nowak has misunderstood the internal document entitled 'Complaints Summary'. The trial judge referred to Mr. Nowak's allegations and held that they could not be supported in circumstances where he was challenging the veracity of what was stated in affidavits, but had not sought to cross-examine the deponent. And that applied independent of the point that this was not an issue in the case. It is quite clear in my view that the charge against Ms. Hall cannot succeed and it was properly rejected by the trial judge and it is not even an issue that Mr. Nowak was entitled to raise.

33. Mr. Nowak submitted that he had identified defects in the decision made by CARB that he complained about to the Authority and which were, in the past, dealt with by way of a s. 23 inquiry and were regarded as breaches, but as the respondent's submissions point out this does not demonstrate that there was anything wrong with the decision not to proceed in this case.

34. There is a complaint that the Authority had no relevant material before it on which to make its decision. The respondent submits that Ms. Hall's first affidavit explains how the Authority considered the matter and made its decision. That is what it was required to do and the Authority is correct to say that Mr. Nowak has failed to establish his assertion; indeed, it would appear to me that the appellant's argument has been refuted.

35. Mr. Nowak challenges the observation of the trial judge that the Authority did not have a role in mediating individual cases, but had to consider matters put before it in light of its statutory purposes of regulatory supervision. This is an important distinction between an appeal from one body to another with a full rehearing and the circumstance that obtains in this case. The Authority has a different function to that of CARB, as the judge correctly held and which is discussed above. This ground is incorrect.

36. The appellant submits that the judge was incorrect in holding that he should have sought elaboration of the reasons for the decision made by the Authority. This is a series of grounds relating to the reasons for the Authority's decision. The trial judge held that the reasons given in the letter from the Authority of 26th June 2014 were adequate. There is nothing wrong with brief explanations of the reasons for a decision, but every case has to be considered in its own context and circumstances. The Authority explained its remit and that it had taken Mr. Nowak's materials fully into account and said that there was no basis for proceeding further to an inquiry under section 23. The judge went on to point out that Mr. Nowak had not sought any elaboration of the reasons, which is entirely correct. It is also relevant that the judgment the Authority had to make was whether the materials that Mr. Nowak had put before it required the instigation of an inquiry under section 23. The duty to give reasons for decisions is extensively canvassed in the written submissions. It seems to me that the trial judge was correct in deciding that the Authority had in fact given Mr. Nowak reasons, which were subsequently elaborated in the affidavits of Ms. Hall, although Mr. Nowak protests about the latter on the basis that they came too late and therefore ought not be taken into account in the judicial review application. I do not see a basis for overturning the decision of the High Court that the Authority did give reasons which if Mr. Nowak had considered inadequate he could have sought to be elaborated.

37. Mr. Nowak expressed disagreement with the observations of the trial judge on whether the Authority was obliged to give reasons at all. Noonan J. had cited authorities, including *H v. DPP* [1994] 1 I.R. 384. The respondent, in its submissions, argues that the duty to give reasons should be considered against the background of any requests by the applicant, maintaining that it is only when the applicant has sought reasons and been refused or given inadequate explanation that the matter may be challenged. I find it unnecessary to express a view on what might have been the situation if Mr. Nowak looked for further reasons than he had been given. In my view the authority gave its reason, which was that Mr. Nowak had not identified any issues that would warrant the

exercise by the Authority of its statutory functions. One must also remember that the Authority was expressing a negative response in a particular statutory context. There are occasions when it is sufficient for a body exercising a statutory function to say that the person seeking to invoke the jurisdiction has failed to provide any or any relevant material on which the power could be exercised. That is a reason. Whether it is sufficient as a matter of law obviously depends on the circumstances.

38. Mr. Nowak complains that the Authority had not established criteria governing the initiation of s. 23 inquiries. The body had to consider the application in light of its own statutory functions and powers. Mr. Nowak failed to satisfy the High Court that the Authority was in default in this respect and on this appeal he has not shown any error in the analysis by Noonan J.

39. Mr. Nowak emphasised in the course of his argument to the court that his concerns as to the accountancy and auditing matters which he originally raised with CARB were subsequently proven to be justified when one of the Investment Funds whose audit he complained about was delisted from the Irish Stock Exchange. This is a matter of ex post facto reasoning which does not undermine or invalidate the conclusion reached by the case officer that the particular auditing practice in question conformed with normal professional practices and standards.

40. My decision, accordingly, on this appeal is that Noonan J. was correct in the conclusions he came to and in his reasons in refusing judicial review.

41. I would dismiss the appeal.