Neutral Citation Number: [2005] IEHC 373

THE HIGH COURT
JUDICIAL REVIEW

1999 No. 196 J.R.

BETWEEN

CIARAN SHEEHAN

APPLICANT

AND
THE GARDA SÍOCHÁNA COMPLAINTS TRIBUNAL
AND THE GARDA SÍOCHÁNA COMPLAINTS BOARD

RESPONDENTS

Judgment of Mr. Justice Roderick Murphy dated the 11th day of November, 2005.

1. Background
1.1 The applicant had been a sergeant in the Garda Síochána. A complaint was made by a member of the public in respect of events alleged to have occurred on 12th September, 1995. The alleged breaches of discipline related to alleged abuse of authority, that is to say oppressive conduct towards a member of the public in relation to five separate incidents on that day. A hearing before the Tribunal (the first named respondent) on 8th June, 1998 found the applicant to be in breach of discipline under the Garda Síochána (Complaints) Act, 1986. The Tribunal decided that the applicant be required to resign as a result of the said finding.

2 Pleadings
2.1 In a hearing before this Court on 13th, 14th and 18th October last the applicant sought:

> (a) an order of *certiorari* quashing the decision and a further order restraining any further action;
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> (b) a declaration that the decision of the Board (the second named respondent) and/or its Chief Executive and/or the Tribunal to postpone and/or to delay the Tribunal from conducting the hearing into the complaint until after the conclusion of an internal sworn Inquiry under the Garda Síochána (Discipline) Regulations, 1989 regarding matters occurring later in March, 1996 was *ultra vires* and void under the Act of 1986 Act and in breach of the applicant's rights to natural and constitutional justice and fairness of procedures and his right to due expedition of process;
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> (c) the applicant also sought a declaration that the hearing by the Tribunal into the complaint was not carried out as soon as practicable and/or with due expedition of process and was carried out in the wrong.

2.2 Leave was granted on 20th May, 1999, by the High Court (Mr. Justice O'Higgins) on the following grounds:

> 1. by their actions the respondents have acted unreasonably, *ultra vires* and in breach of the applicant's rights to natural and constitutional justice and fairness of procedures and in breach of the mandatory requirements of the Garda Síochána Complaints Act, 1986 and the Garda Síochána (Complaints Tribunal Procedures) Rules, 1988, by:
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> > (a) failing to comply with the mandatory requirements and procedures of the said Act and Rules in relation to hearings before Tribunals,
> >
> > (b) postponing the Tribunal hearing without lawful entitlement or jurisdiction,Applications in respect of three grounds were adjourned with liberty to re-enter but were not, in fact re-entered; eight grounds were disallowed and a further seven grounds were not proceeded with at the hearing before this Court. The grounds disallowed related to an appeal to the Garda Complaints Appeals Board which was adjudicated to be out of time. The Appeals Board was not a party to these proceedings.

2.3 Statements of opposition
The statement of opposition of the Garda Complaints Board said that the claim was not brought promptly or within the time prescribed. Moreover, it was an abuse of process to appeal the merits of a decision.

The second named respondent had no involvement in determining any action taken in relation to the Board of Inquiry. The first time Mr. Hurley, the Chief Executive of the Board, became aware of the transcripts of the Ennis Inquiry was at the Garda Síochána Complaints Appeal Board on 1st March, 1999, when an extract from the transcript was given to him. The book of evidence for the Ennis Disciplinary Inquiry held by the Board of Inquiry had not been given by the applicant to the Tribunal.

The Statement of Opposition of the first named respondent, the Garda Síochána Complaints Tribunal, filed 12th November, 1999, also raised a preliminary objection as to the promptness and timing of the application and objects to the Court dealing with the matter by way of appeal. The Tribunal denied the allegations made and pleaded that, having regard to the evidence adduced to it, it was entitled to make the findings it did and, having regard to that evidence and the findings made by the Tribunal, the Tribunal was entitled to require the applicant to retire or resign from the Garda Síochána. The said determination was made within the lawful jurisdiction of the Tribunal.

3. Grounding Affidavit
3.1 The applicant, by affidavit sworn 14th May, 1999, said that he was then a 38 year old garda, having joined the Gardaí in 1982 and graduated as top recruit in the 90-member class. He had been the recipient of a Commissioner's medal. He was promoted to sergeant in 1990 and had served, since 1992, in Scariff. He said that since early 1995 he had been the subject of what he regarded as a personal vendetta by the complainant in that town.

3.2 Following the alleged incidents of 12th September, 1995, the applicant received a verbal warning from his Chief Superintendent who told him that if he approached the complainant or any other witness in the disciplinary proceedings he would be suspended from duty. He said he obeyed that warning. Between 3rd November, 1995 and 15th March, 1996, two months after the complaint he was off duty on sick leave undergoing treatment for an affective disorder. On his return over 14 weeks later he was suspended and told that such suspension was for the alleged intimidation of a witness.

A separate complaint was made by the same complainant on 15th March, 1996. Between November, 1997 and January, 1998 he was the subject to a subsequent and separate investigation in relation to that complaint. That was a separate inquiry held under the

internal Garda Síochána (Discipline) Regulations, 1989. It was referred to as the 'Ennis Board of Inquiry'. This Inquiry heard ten days of sworn evidence regarding that complaint.

3.3 This application concerns the inquiry heard on 8th June, 1998 by the Tribunal of Inquiry held under the Garda Síochána (Complaints) Act, 1986. This heard evidence of the same complainant concerning the earlier events of 12th September, 1995. The Tribunal found the applicant to be in breach of discipline and decided that, given the gravity of the charge, they had no option but to require him to resign.

3.4 On 7th March, 1996, the applicant received notification that the matter had been referred by the Board to the Tribunal under s. 7(5) of the Garda Síochána Complaints Act, 1986.

On or about the 13th May, 1996 a file was sent to the DPP for directions as to whether or not there should be a prosecution. By letter of 14th September, 1996, the DPP informed the State Solicitor that there was no legal basis for a prosecution.

3.5 The applicant outlined the details leading up to the Ennis Board of Inquiry which, he said, included the September, 1995 matters in addition to those alleged in respect of March, 1996.

The Tribunal hearing on 8th June, 1998 was subsequent to the conclusion of the Ennis Board of Inquiry on 20th January, 1998 and before the appeal of that decision of the Board to the Internal Garda Appeals Board on 20th July, 1998.

3.6 The applicant said that his participation was limited to matters relating to objections to the jurisdiction of the Tribunal to proceed on the grounds of delay, lapse of time, duplication and double jeopardy. He said that he did not call evidence nor conduct cross-examination on matters other than objections to jurisdiction which had been raised by his solicitor prior to that hearing. A number of adjournments had been granted.

On 18th December, 1997, the applicant said that the Tribunal first met to fix a date for the hearing of his solicitor's submission objection to its jurisdiction to proceed, which submissions were made on 26th January, 1998 and were rejected by the Tribunal. Notwithstanding, on 7th May, 1998, his solicitor again referred subsequently to the submissions and, he said, the Tribunal then decided to adjourn the hearing until 8th June, 1998, when it concluded its hearing.

3.7 He believed that, despite the fact that the Board had already referred the matter for a hearing before the Tribunal on 26th February, 1996, the Chief Executive of the Board, Mr. Sean Hurley, conferred with the investigating officer in the Ennis Board of Inquiry, and intervened and delayed the Tribunal of Inquiry hearing about the matters of September, 1995 to await the outcome of the Ennis Board of Inquiry into the complaints of 15th March, 1996. He believed that this was an improper step taken by the Chief Executive and by the Tribunal itself. It was without any jurisdiction or legal entitlement and greatly and unnecessarily delayed the Tribunal hearing of the matters of September, 1995 the investigation of which had been completed around December, 1995.

The applicant said that the Tribunal of Inquiry, despite having so decided to postpone its hearing into matters of September, 1995 to await the outcome of the Ennis Board of Inquiry, and despite the availability of substantial transcripts, failed fully and properly to consider the entirety of the evidence and, in doing so, failed to properly protect and vindicate his good name.

3.8 The applicant said he was totally dissatisfied with the manner in which the Tribunal was conducted and with its decision. By letter dated 26th June, 1998 (within three weeks from the date of the decision of the Tribunal of Inquiry) his solicitors wrote to the secretary of the Tribunal saying that he had instructed them to proceed by way of judicial review to set aside the decision. He was not prepared to resign. He said that he felt mentally and emotionally exhausted.

Meanwhile, he had appealed the decision of the Ennis Board of Inquiry to the Appeals Board rather than suffer further emotional and financial cost of taking judicial review proceedings.

3.9 By letter of 31st July, 1998, (some seven weeks after the 8th June decision) his solicitors gave formal notice to the Commissioner and to the Secretary of the Appeals Board. The appeal was heard on 1st March, 1999. The Chief Executive of the Board, (Mr. Hurley) sought a ruling from the Board as to whether they would entertain his appeal as it had been lodged beyond the 21 days after 8th June, 1998. He said that at no stage did Mr. Hurley inform his solicitors that he would be making such a submission.

The Appeals Board ruled that they could not consider the letter dated 26th June, 1996, from his solicitors as tantamount to a notice of appeal under Regulation 3(1) of the Third Schedule of the Garda Síochána Complaints Act, 1986. The Appeals Board did not have jurisdiction to consider the appeal lodged after the date of the Tribunal decision of 8th June, 1998. He said he was then left in an impossible position in relation to judicial review. He referred to his service as a garda, the stress of the "delayed and stagnant" inquiries and personal and family prejudice.

4. Mr. Hegarty's evidence

4.1 Mr. Michael Hegarty, solicitor for the applicant, had intervened in the Tribunal of Inquiry to state that the Tribunal did not have jurisdiction to proceed because of the delay in hearing the complaint. The particular matter should have been adjudicated on before another Inquiry in a subsequent complaint by the complainant. He said that Mr. Hurley had admitted that there had been contact between himself and the presiding officer of the Ennis Board of Inquiry and that it had been agreed that that Inquiry would go ahead first.

4.2 At an earlier sitting of the Tribunal of Inquiry on Monday, 26th January, 1998, Mr. Hegarty had made a detailed submission in relation to the Board of Inquiry decision delivered on 20th January, 1998. The complaint before the Board of Inquiry in Ennis related to a complaint which was made on 15th March, 1996, six months after the Inquiry concerning the alleged incidents of 13th September, 1995, the subject matter of that present hearing.

5. Mr. Hurley's affidavit

5.1 Mr. Hurley said that it was an incorrect interpretation to say he had agreed that the Ennis Board of Inquiry would precede the Tribunal hearing. He had contacted the investigating officer to find out what state that investigation was at and was informed by him that it was at Mr. Hegarty's suggestion that the present Tribunal of Inquiry matter should proceed first.

The Chairman, having taken advice, believed it was clear that the instructions and the advice was that the Tribunal had full jurisdiction.

Mr. Hurley had submitted that the Board had an interest in the outcome of an allegation which had been made by its complainant in

relation to the Tribunal hearing. The delay which arose was explainable and reasonable in the circumstances. He said that the second investigation took place in May/June /July, 1997. On 20th October, 1997, the book of evidence issued. He further said that the Board had to have regard for other inquiries which were going on at that particular time and that it was reasonable to take the action that they did. It was totally wrong to say that there was some kind of vacuum in the middle where the Board had been operating, deciding to stop the Inquiry going ahead because they had learnt of another Inquiry.

The hearing resumed on 7th May, 1998 and was adjourned for three weeks at the request of Mr. Hegarty, the applicant's solicitor.

On 8th June the Tribunal found against the applicant. He was told he was entitled to appeal within 21 days.

5.2 Mr. Hurley explained that at the end of 1996 there were eight complaints awaiting hearings of the Tribunal, including the complaint in the present matter. No Tribunal hearings were held from January, 1997 to April, 1997 as a new Board was being appointed and, once appointed, dealt with the present case to commence on 26th November, 1997. At that date the applicant's solicitor sought an adjournment which was granted. A new hearing date was granted for 26th January, 1998, which is already referred to above. The applicant could have commenced his hearing on 3rd December, 1997, but sought an adjournment to 26th January, 1998. The Ennis Disciplinary Board of Inquiry concluded four days later on 30th January, 1998. Mr. Hurley said that there was no unreasonable delay in bringing it to a conclusion. The matter was then in the hands of the Board.

He said that the transcript of the evidence sworn in this Inquiry was a matter wholly within the control and understanding and knowledge of the applicant and his advisers. He confirmed that he did not see the transcript until 1st March, 1999.

In his supplemental affidavit he stated that he was aware that an internal Garda Inquiry, involving the complainant and the applicant, had taken place but was at all material times a stranger to the detail of that Inquiry.

Mr. Hurley had spoken with the applicant's solicitor before and after the lodging of his appeal and informed him that in his opinion the applicant might experience difficulties in pursuing appeal beyond the 21-day period. Had the Appeal Board ruled that it had jurisdiction in the matter he would not have contested that ruling.

6. Affidavit of Breda Purcell
6.1 The affidavit of Breda Purcell, Secretary of the Garda Complaint s Tribunal, referred to the submissions of Mr. Hegarty and the decision to proceed on 19th February and 7th May, 1998.

Much of the content of the applicant's affidavit did not fall within the knowledge of the Tribunal. The Ennis Board of Inquiry was not held under the Garda Síochána (Complaints) Act, 1986 and the Tribunal was unaware of its detail. While the subject matter had a common source in the complaints the matters were, nonetheless, entirely distinct and there was no overlap between the allegations considered by the Tribunal and those the subject of the Ennis Inquiry.

Mr. Hegarty had expressly acknowledged that the allegations were "totally different". He was asked "So they are totally different allegations as to what we are dealing with."; to which Mr. Hegarty replied: "Exactly, they are totally different but as part of this point I am trying [to] get part of the book of evidence." (p.6 of transcript of Tribunal Hearing 26th January, 1996.)

6.2 Miss Purcell said that the applicant's complaints were fully considered by the Tribunal. The Tribunal was only entitled to determine the complaints before it on the evidence it heard. If any evidence given to the Ennis Board of Inquiry had any material bearing on the proceedings before the Tribunal it was difficult, if not impossible, to understand why the Tribunal was not referred to the same in the course of the proceedings by the applicant.

The transcript of the proceedings before the Tribunal clearly established that the Tribunal did, in fact, consider carefully the motivation of the complainant and was concerned by the possibility that the complaint was maliciously made. At pp. 39 to 41 of the transcript of 8th June, 1998, the chairman, Terence Cosgrave stated:

> "… really it comes down to whether … you perceive the complainant's evidence to be adroit, not to be motivated by previous historical baggage … the Tribunal would have to be very well satisfied that the complainant was motivated by the highest degree of rectitude in the making of these complaints, because the ramification for the member concerned as a young member of the force, are quite severe, so it is something the Tribunal has to take very seriously and very solicitously and that's basically like you to give the court some impression as to whether [the complainant] is beyond, I mean I have to say this, is that both parties, is beyond reproach in giving, in making the statement, making those statements against the member, so what's your feeling on that general feeling?"

At this stage Superintendent Gerard Kelly referred to his feelings, gave a background report on the complainant, whom he said that he would not describe as an absolute angel. He said

> "[the complainant] is a man who, has spoken to a lot of people there in relation to it and he'd be looking upon as a, his perception of things may not be always dead right but he would, I feel from what my dealings with him that, I felt that he was honest with me what I tested and tried it before the Board, my view of things and his view may differ, not that he was to deliberately mislead anybody, but his sense of perception may be different from other people on certain issues. … but the storyline from beginning to end he did not change his story with me."

6.3 Superintendent Kelly was asked a question by Mr. Hegarty as to whether in the course of the investigation he was in contact with Mr. Hurley during the criminal investigation from March 1996 to September, 1996. Superintendent Kelly replied:

> "Not the only matter, my matter with the Complaints Board was when I submitted the file. That was the end of it as far as I was concerned. I heard nothing about it afterwards and when the matter arose. The statement was provided to me by (the complainant). Where he did not want to withdraw the complaint, indeed I omitted to mention that. It's a fine line statement and that would have been sent to the Complaints Board by me, but that was the only involvement I would have had with it."

A statement was provided to him by the complainant which stated that the complainant did not want to withdraw his complaint. There was a five-line statement sent to the Complaints Board by him but that was his only involvement.

Finally, Miss Purcell said that the points raised (the validity of which the Tribunal must not have been taken as accepting) would have been carefully examined by the Tribunal if the applicant had chosen to make them do it. The Tribunal did not accept the validity of

the points. Having elected not to do so she was advised by the Tribunal's legal advisers that the applicant was not entitled to allow the applicant to have a second bite of the cherry.

7. Replying affidavit of Mr. Hegarty
7.1 By affidavit dated 27th March, 2000, Mr. Hegarty replied to Mr. Hurley's and Miss Purcell's affidavit. Mr. Hegarty had believed that Mr. Hurley would not take issue with a 21-day limit for appeal dated 31st July, 1998, where the time had expired on 29th June previously. On 20th July, 1998, the applicant had learned the outcome of his appeal against the Commissioner's decision on foot of the January, 1998 findings of the Ennis Board of Inquiry. Rather than embark on judicial review proceedings he believed he should take an appeal to the Appeals Board on the issue of severity. Had he known that Mr. Hurley was seeking a ruling on the 21-day limit he would have advised the applicant to go to the High Court with his original intended judicial review proceedings.

7.2 Mr Hegarty referred to the transcripts where he said that Mr. Hurley admitted that he personally decided to do something which he conceded was not catered for by the Act of1986 by delaying the sitting of the Tribunal.

Mr. Hegarty asked if Mr. Hurley had delayed the Tribunal to find out about the new complaint which was subject to the Ennis Board of Inquiry. Hegarty: "… but you are just sort of saying that when they learned of this new allegation they were interested in finding out what the result of that be before proceeding further?"

> Hurley: "Not sitting a Board (sic). The matter did not come back to the Board."
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> Hegarty: "Then on what basis did they decide to sit on this?"
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> Hurley: "I decided."
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> Hegarty: "Where under the Act have you got the power to make that decision?"
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> Hurley: "I think it is reasonable for me to know what the outcome of an allegation being made, that our complainant being interfered with.")

(paras. 12 to 14 of the transcript of 26th January, 1998)

7.3 Later on, Mr. Hegarty said that once the Board had referred the matter to a hearing to the Tribunal under s. 7(5) of the Act of 1986, as it did on 26th February, 1996, the complaint was validly withdrawn is a matter for the Tribunal, contrary to the suggestion of Mr. Hurley and the Board. (para. 28 of his affidavit)

Mr. Hegarty said that Mr. Hurley had not provided any lawful explanation for the long gaps and consequent lapses in time in the action being taken. He instanced those dates as follows:

> 12th September, 1995: complaints relating to previous evening;
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> 4th December, 1995: investigating officer's report received by Board;
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> 26th February, 1996: Board referred; 13th March, 1996: complaint purportedly withdrawn but reinstated eight days later;
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> 21st March, 1996: statement of complaint;
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> 21st March, 1996: Board made aware of reinstatement of complaint;
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> 3rd December, 1997: first Tribunal hearing scheduled.

7.4 Later, Mr. Hegarty referred to Mr. Hurley's leading of detailed evidence before the Tribunal which had already been considered by the Ennis Board of Inquiry and which were outside the five charges of the Tribunal which, he believed, clearly prejudiced the applicant in the eyes of the Tribunal.

In relation to Miss Purcell's affidavit, Mr. Hegarty said that no account was furnished by her of the Tribunal's acquiescence in postponing and delaying the Tribunal hearing.

Mr. Hegarty said that Miss Purcell was incorrect to state that the Tribunal was not referred to the Ennis transcripts.

8. Supplemental affidavit of Mr. Hurley
Mr. Hurley accepted that he was aware that an internal Garda Inquiry involving the complainant and the applicant had taken place but was a stranger to the detail of that Inquiry. Mr Hegarty had been present at the Inquiry and was in possession of the transcript and had every opportunity to present the evidence which might have advanced his client's case. Mr. Hurley said that it was Mr. Hegarty who sought an adjournment of his client's hearing before the Tribunal. He could not understand how it could be contended that he (Mr. Hurley) had decided to delay the Tribunal until after the Ennis Board of Inquiry. Full responsibility for the adjournment of the Tribunal hearing until the Ennis Board of Inquiry concluded rested with Mr. Hegarty, who was responsible for the tactical legal strategy adopted.

9. Affidavit of Terence Cosgrave
Mr. Cosgrave, a member of the Garda Síochána Complaints Board, had been Chairman of the Tribunal. He was advised that Miss Purcell was the appropriate person and that the Tribunal should not "enter into the ring directly".

He confirmed that the affidavit of Miss Purcell fully and accurately reflected the position of the Tribunal which had been sworn on detailed instructions of the Tribunal. He accepted that she had been inaccurate in believing that a witness had died.

He said it was inaccurate to suggest that the Tribunal acquiesced in the alleged decision of Mr. Hurley to postpone the Tribunal until after the holding of the Ennis Board of Inquiry. He rejected as unfounded the suggestion that the Tribunal was aware of the details of the Ennis Board of Inquiry. The applicant was free to call such witnesses to establish matters as was considered appropriate and was also free to put any such matters to the complainants in the cross-examination. In the event, neither of those steps was taken by or on behalf of the applicant.

Miss Purcell had not suggested that the Tribunal was not referred to the Ennis transcripts. She stated, correctly, that the Tribunal was not referred to the extracts from the evidence given to the Ennis Board of Inquiry on which the applicant relied in his affidavit.

Finally, Mr. Cosgrave averred that the case against the applicant was not treated in a dismissive manner. It did everything in its proper power to ensure a fair hearing for the applicant in relation to complaints which, by any measure, were serious.

10. Submissions of the applicant
The applicant submitted that the respondents, both the Tribunal and the Board, had acted unreasonably, *ultra vires*, and in breach of the applicant's rights to natural and constitutional justice and fairness of procedures and in breach of the mandatory requirements of the Garda Síochána Complaints Act, 1986 and the Garda Síochána (Complaints Tribunal Procedure) Rules, 1988, by failing to comply with the mandatory requirements and procedures of the Act and the Rules in relation to hearings before the Tribunal and, in particular, in postponing the Tribunal hearing without lawful entitlement or jurisdiction.

It was submitted that the Board and/or its Chief Executive, Mr. Sean Hurley, in conjunction with the Tribunal, intervened and decided to delay the Tribunal hearing regarding the matters of September, 1995 to await the outcome of a sworn Inquiry under the internal Garda Síochána Discipline Regulations, 1989 until later matters in time between the said complainant and the applicant. This intervention was without any jurisdiction or legal entitlement and greatly and unnecessarily delayed the Tribunal hearing into the matters of September, 1995.

11. Submissions of the respondents
The respondents submitted that the grounds in respect of which leave was given related to alleged unlawful delay and postponement of the Tribunal hearing. It was submitted that the applicant's allegation with regard to the delay was founded entirely on conjecture and was comprehensively rebutted in both Mr. Hurley's affidavits. Mr. Hurley explained that he did not contact Superintendent Kelly in relation to either the complainant or the applicant. He had, however, been contacted by Superintendent Kelly who explained that the complainant had withdrawn the complaint made against the applicant. The Board was subsequently kept informed of an investigation into this development. This represented the extent of the communications between the Board and Superintendent Kelly. Mr. Hurley explicitly stated: "I did not use any information obtained from Superintendent Kelly to delay or defer the applicant's hearing in the matter in which he alleges in these proceedings".

Miss Purcell stated in her affidavit that the Tribunal was not aware of the details of the Ennis Inquiry. This was substantiated by the evidence of the Tribunal Chairman, Mr. Cosgrave. Accordingly, there is no reason why they would have sought to postpone the Tribunal hearing until the Ennis Inquiry had concluded.

It was the applicant's solicitor who had successfully sought the adjournment of the Tribunal hearing from 3rd December, 1997.

The occasions where the Tribunal adjourned the hearing of the matter was done so pursuant to the Rules and was made either at the request of the applicant's solicitor or took account of the developments participated by the applicant's solicitor as on 7th May, 1998.

The respondents also submitted that delay was a separate element. The applicant had not identified any specific prejudice to him as a result of the lapse of time. The Tribunal's procedures were not operated in a manner which caused injustice to the applicant.

Having been appointed in July, 1997 the Tribunal was in a position to hear the complaint five months later, in December, 1997 and the matter was adjourned for the benefit of the applicant until June, 1998.

The respondent submitted that the type of hearing had to be taken into account. The court should be reluctant to intervene except to prevent injustice. The court had also to take into account the nature of the complaint involving five incidents of oppressive conduct on the part of a member of the force. There was no surprise as the applicant was, at all times, aware of the case he had to meet.

The respondents further submitted that the matter before the Tribunal was not *res judicata* on the basis of having been decided by the Ennis Inquiry.

Even if the Tribunal had erred in the manner in which it assessed the complainant's credibility, a matter which was not pressed by the applicant, the Tribunal erred within jurisdiction.

12. Decision of the Court
12.1 On 12th September, 1995, over ten years before the eventual hearing of this action, a complaint had been made and was formalised two years later on 20th October, 1997, by formal notification of five breaches of discipline being abuse of authority, that is to say, oppressive conduct towards a member of the public as detailed in a letter to the applicant on that date.

The applicant was on sick leave by reason of affective disorder from 3rd November, 1995, to 15th March, 1996, – a period of over fourteen months.

The dates referred to by Mr. Hegarty, solicitor for the applicant (section 7.3 above) omit reference to this sick leave. He instances the matter being referred to the Board on 26th February, 1996, and being purportedly withdrawn but subsequently reinstated on 13th March, 1996, before the applicant returned from sick leave.

It is clear that a statement of complaint was made on 21st March, 1996.

The applicant averred that he was involved in the Ennis Inquiry which arose out of a separate subsequent complaint on 15th March, 1996, and a separate sworn inquiry held pursuant to the Garda Síochána (Discipline) Regulations, 1989. The hearing of that inquiry extended from November, 1997 to January, 1998. No complaint is made in relation to the timing of that inquiry.

Some months beforehand, on 28th July, 1997, following the expiry of the term of office of the previous Garda Síochána Complaints Board, a new Board met and formally appointed tribunals to handle cases referred by the previous Board. The Chairman of the Tribunal set up a hearing date of 3rd December, 1997.

On that date the solicitor for the applicant sought an adjournment of the hearing scheduled for that date. That adjournment was granted and the case was listed for mention on 18th December, 1997, when a date for the hearing was set for 26th January, 1998, in relation to a submission by the applicant's solicitor that the Tribunal should not proceed on the ground of what was alleged to be a lapse of time occurring since the events of 12th September, 1995. It was further alleged that the Tribunal should not proceed owing

to the hearing of the separate Ennis Inquiry. The Ennis Inquiry concluded with a finding that the applicant be reduced in rank.

12.2 The Tribunal heard the submissions in relation to delay and ruled that the hearing should proceed on 7th May, 1998. On that occasion the applicant's solicitor informed the Tribunal that neither he nor his client would take part in the proceedings whilst reserving the right to put questions in relation to what was referred to as the "jurisdiction" matter. The Tribunal further adjourned the hearing until 8th June, 1998, on which date the hearing took place. The Chief Executive of the Board presented the case against the applicant. Six witnesses were called. The applicant did not present his own version of events nor did he cross-examine the complainant. His solicitor engaged some of the other witnesses in limited cross-examination.

12.3 The Tribunal, having heard the evidence and submissions made by the solicitor for the applicant, held that the breaches of discipline had been established and that the applicant should be required to resign from the Garda Síochána. The applicant was informed that he had 21 days within which to appeal this decision to the Garda Síochána Complaints Appeals Board.

The applicant's solicitor wrote to the secretary of the first named respondent on 26th June, 1998, some eighteen days later, informing the secretary that he had been instructed to institute judicial review proceedings to set aside the decision. This was not, however, done. The applicant appealed to the Garda Síochána Complaints Appeals Board but did so outside the statutory 21-day limitation period laid down by Rule 3(1) in the Third Schedule to the Act of 1986.

The Appeals Board ruled that it did not have jurisdiction to deal with the appeal given the delay.

12.4 The applicant then applied for leave for judicial review on 20th May, 1999, over eleven months after the decision of 8th June, 1998.

Leave was partly granted and limited to the following grounds:

> 1. by their actions the respondents have acted unreasonably, ultra vires and in breach of the applicant's right to natural and constitutional justice and fairness of procedures and in breach of the mandatory requirements of the Garda Síochána Complaints Act, 1986 and the Garda Síochána (Complaints Tribunal Procedure) Rules, 1988 by
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> > (a) failing to comply with the mandatory requirements and procedures of (the said Act and Rules) in relation to hearings before [the] Tribunal [and]
> >
> > (b) postponing the Tribunal hearing without lawful entitlement to jurisdiction.
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> 2. The Board and/or its Chief Executive, Mr. Sean Hurley, in conjunction with the Tribunal intervened and decided to delay the Tribunal hearing about matters of September, 1995 to await the outcome of a sworn inquiry under the internal Garda Síochána Discipline Regulations, 1989 into latter matters in time viz. in March, 1996 between the same complainant and the applicant which intervention was without any jurisdiction or legal entitlement and which greatly and unnecessarily delayed the Tribunal hearing into the matters of September, 1995.
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> 3. Issues of credibility of the complainant, in respect of which leave was granted, were not proceeded with.
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> 6. The finding of breach of discipline and also the severity of the penalty meted out by the Tribunal failed to address or take into account:
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> > (a) the content of the actual evidence heard before the Tribunal,
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> > (b) the credibility of the actual evidence heard,
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> > (c) the applicant's record with the Gardaí.Three further grounds were adjourned with liberty to apply. Eight further grounds were refused.

12.5 The judicial review matters appeared to have moved slowly. Opposition papers were filed by the first and second named respondents in November, 1999. On 27th March, 2000, the applicant filed a replying affidavit and further affidavits from the respondents were filed in May and June. The applicant sought voluntary discovery on 24th July, 2000. Certain clarification was sought by the respondents on 11th November, 1999 together with reminders in December, January, and May, 2000.

It appears that what little happened over the following two years was moved by the respondents. By motions dated 23rd August and 8th October, 2002, the respondents sought dismissal of proceedings for want of prosecution but these motions were adjourned. On 8th November, 2004, a letter was sent from the respondents' solicitor querying progress. No response was received. A further motion to dismiss for want of prosecution was issued on 6th April, 2005. This came on for hearing on 4th July, 2005 but the relief sought was not granted by Quirke J. In accordance with an undertaking given on that day, the applicant agreed to limit his applications to grounds 1(a) and (b), 2, 3 and 6 as detailed above.

12.6 Before considering those grounds the court should consider the delay in applying for judicial review. The notification of an intention to institute judicial review proceedings was not proceeded with. However it is clear to this Court that, having been advised of the 21 days within which to appeal, the applicant failed and neglected to do so within that time.

Unfortunately, further time elapsed before the Appeal Board decided against the applicant. Thereupon, the applicant sought to proceed by way of judicial review well out of time.

The Court has considered the submissions in relation to the delay in these judicial review proceedings. The Court is not satisfied that the applicant has proceeded promptly. Given the length of time from the original complaint in September 1995, the further delay from the decision of 8th June 1998 to the grant of leave on 20th May, 1999 is neither prompt nor excusable. For this reason alone the Court should refuse the reliefs sought.

12.7 If I were wrong in coming to this conclusion I should consider the grounds in respect of which leave was granted as follows:

Grounds 1(a) and 1(b) and (2)

The applicant alleges that the hearing before the Tribunal breached the requirements of the Act, the Rules and the tenets of natural and constitutional justice. It is useful to consider the legislative provisions.

The Board constituted by the Act has power to receive complaints from the public concerning members of the Garda Síochána. If, following an investigation of complaint, the Board is of the opinion that a breach of discipline on the part of a member concerned may be disclosed it must refer the matter to the Tribunal pursuant to s. 7(5) of the Act of 1986.

The Schedule to the Act makes provision for sittings or hearings of the Tribunal, of the taking of evidence and receiving submissions by or on behalf of the persons concerned (para. 4(1)).

Where a matter is referred to the Tribunal the Chief Executive presents the case against the member concerned (para. 5).

The Tribunal fixes the date for the sitting of the Tribunal and notifies that date to the complainant and the member concerned who, together with the Chief Executive and the other members of the Board staff as may be necessary and such other persons as the Tribunal may agree should attend.

Rule 21 deals with adjournments and provides that:

> "Where, because of the absence of the member concerned or of a witness, or for any other reason, the Tribunal is satisfied that a sitting of the Tribunal should be adjourned, the Chairman of the Tribunal may adjourn the sitting to a specified date and, in a case where the member concerned or a witness is absent, shall, if practicable, cause the member or witness to be duly notified of the adjournment."

Having heard the evidence and submissions the Tribunal makes its decision. The Chairman has to inform the member concerned that he may appeal to the Appeals Board from a decision of the Tribunal finding him to be in breach of discipline, or the decision of the Tribunal that disciplinary action should be taken against him, or both.

12.8 The central issue, that of delay from 12th September, 1995 to the fixing of a date for the hearing on 3rd December, 1997, a period of over two years, requires some analysis. Once the date of hearing was fixed the applicant and his solicitor applied for and were granted adjournment to argue what they termed the jurisdictional point. Clearly delay had benefited the applicant in terms of prolonging his suspension with pay. No doubt it also prejudiced the applicant in relation to the quantity of remuneration and in relation to his standing.

I have no doubt that the delays due to the applicant's illness at the beginning (to March 1996) and after the date of hearing was fixed in mid 1997 to June 1998 were due to the applicant. Delay is explainable, to some extent in between because of the changeover from the 1996 to the 1997 Board.

Moreover, while not decisive, it does not seem to this Court that the unexplained delay prejudiced the applicant.

12.9 The extent of alleged interference between the Tribunal and the Board was minimal and was explained. It is merely speculative to base impropriety on the remarks Mr. Hurley referred to at 7.2 above, in the replying affidavit of Mr. Hegarty.

The evidence of Superintendent Gerard Kelly referred to in Ms. Purcell's affidavit (see 6.2 above) refers to a limited and understandable contact.

It seems to the Court that, while there was no urgency apparent in getting the matter to an expeditious conclusion, the applicant requested and benefited from the delays. It appears to the Court that the adjournments were taken by the Tribunal and not influenced by its Chief Executive who, in any event, did not have power to adjourn the matters.

No issue was taken by the applicant in relation thereto until the fixing of the date for hearing for 3rd December, 1997, before the conclusion of the Ennis Inquiry.

The evidence in relation to the Chief Executive's intervention does not establish that the Tribunal delayed the matter nor that the Chief Executive usurped the functions of the Tribunal with regard to adjournments. Some delay occurred before the matter was placed in the hands of the Tribunal.

The applicant's allegation that the Tribunal Inquiry was postponed until after the Ennis Inquiry in an improper manner is not substantiated. He himself acknowledged that he had been involved with the Ennis Inquiry.

The affidavits of Mr. Sean Hurley, of Ms. Breda Purcell and of Mr. Terence Cosgrave, gave evidence of their lack of knowledge of the detail of the Ennis Inquiry and, more particularly, of the transcripts of that inquiry. The applicant also makes the case that the Tribunal sought to await the outcome of the Ennis Inquiry but did not take all of the evidence of that inquiry into account. Indeed, it is curious that, had the applicant wished some or all of the evidence of the Ennis Inquiry to be presented to the Tribunal, he could have done so but did not. The Court accepts the averments of Mr. Hurley, Ms. Purcell and Mr. Cosgrave in that regard.

Had the applicant wished to have the hearing of the Tribunal dealt with before the Ennis Inquiry, he could have done so on 3rd December, 1997. He chose rather to adjourn the matter for mention on 18th December and, on that date to agree to a hearing on the "jurisdictional" point on 26th January, 1998, which application was renewed and, indeed, reheard and refused on 7th May, 1998 without offering evidence at a full hearing.

An applicant may, of course, proceed on a narrow jurisdictional point but, if unsuccessful, cannot request a rehearing. The Tribunal was entitled to take the evidence adduced and to arrive at a decision. It does not seem to this Court that the decision arrived at was inconsistent with the evidence nor, indeed, to have followed unfair or unconstitutional procedures. The applicant did participate and cross-examined witnesses.

In the event the Court dismisses the applicant's claim and refuses the relief sought.

The matter was not proceeded with against the second named respondent. The grounds alleged against the Appeals Board were not allowed at the leave stage.

The Court refuses the applicant's claim for relief as against the first named respondent.