Neutral Citation: [2014] IEHC 457

THE HIGH COURT

[2014 No. 199JR]

BETWEEN

THE GARDA REPRESENTATIVE ASSOCIATION AND AMY BOURKE

APPLICANTS

AND

THE MINISTER FOR PUBLIC EXPENDITURE AND REFORM

RESPONDENT

JUDGMENT of Kearns P. delivered on the 17th day of October, 2014

The first named applicant is the Garda Representative Association ('GRA'), a body established pursuant to the provisions of the Garda Síochána Acts 1923 to 1977 and the Garda Síochána (Associations) Regulations 1978, as amended, as continued in force by virtue of s.128 of the Garda Síochána Act 2005. The GRA represents rank and file members of An Garda Síochána, presently some 10,700, in all matters affecting welfare, efficiency, and conditions of employment. The second named applicant is a member of An Garda Síochána. The respondent is the Minister for Public Expenditure and Reform in the Department of Public Expenditure and Reform ('DPER').

The applicant seeks a declaration that the provisions of the Public Service Management (Sick Leave) Regulations 2014 (S.I. 124 of 2014) ('the Regulations') should not at this stage apply to members of An Garda Síochána. The Regulations provide for the payment of remuneration during a period of sick leave on a basis or upon terms other than those effective, in place and in operation prior to the commencement date of the said Regulations in March, 2014. The applicant contends that the inclusion without differentiation of An Garda Síochána in the Regulations was in breach of fair procedures, the duty to consult, and the legitimate expectations of the applicant that certain procedural steps would be concluded before any question of including An Garda Síochána in the range of public service employees affected by the Regulations would occur. It is submitted that the respondent, in bringing forward the Regulations, considered irrelevant information and failed to have regard to relevant information when arriving at his decision to include An Garda Síochána in the Regulations. It is further submitted that the Regulations are legally incoherent.

BACKGROUND

The application is grounded on the affidavit of Mr. P.J. Stone, General Secretary of the applicant. Mr Stone states that, pursuant to the provisions of the Garda Síochána Acts, the GRA is prohibited from joining an umbrella organisation such as the Irish Congress of Trade Unions ('ICTU') and is therefore not party to any negotiations that ICTU conduct on behalf of their members in relation to matters such as salary and sick leave. It is submitted that the first named applicant is therefore the only body permitted by law to make and be recognised by the Minister for Justice and Equality and the Government as capable of making representations in respect of issues such as pay, pensions, or conditions of service of An Garda Síochána members with the rank of Garda.

On the 14th May, 2012 a briefing was held at the Department of Justice and Equality ('DOJE') with representatives of the applicant, the respondent, and the other Garda staff associations (namely the Association of Garda Sergeants and Inspectors, the Association of Garda Superintendents and the Association of Garda Chief Superintendents) in attendance. This meeting was said to be part of a consultative process with all staff associations in the public service in relation to proposals to change sick leave arrangements in the public sector. These proposals were apparently a response to the State's obligations to the Troika in relation to cost saving. Ms. Louise McGirr, Principal Officer in the Department of Public Expenditure and Reform, in her first replying affidavit states that costs to the State associated with public service sick leave amounted to an estimated €500m in 2011 while Garda sick leave alone cost €27m in 2012. Mr. Stone contends however that this figure constitutes a "*gross over-estimate*" and fails to have regard to the unique nature of police work as distinct from other sectors of the public service. Furthermore, this figure includes payments in relation to occupational injuries, which are likely to be higher for members of An Garda Síochána.

Mr. Stone states that Mr. Eugene Banks, an officer in DOJE assigned to the Garda HR division, stated at the meeting of 14th May, 2012 that it was simply the start of the negotiation process with the Garda organisation and that the matter would likely be dealt with through the 'Conciliation and Arbitration Scheme'. This formal non-statutory scheme was established on the 30th March, 2004 for the determination of claims and proposals relating to conditions of service of members of all ranks of An Garda Síochána. Part II of the scheme allows for the establishment of a Conciliation Council and sets out the matters appropriate for discussion by it. Mr. Banks accepts in his affidavit that he stated at the 14th May meeting that this was but the start of the negotiation process, but says it was also made clear to all present that the proposed changes would apply across the board in the public sector. Ms. McGirr also states that it was made clear at this meeting that any derogation for a particular sector would have to be justified by objective reasons and was ultimately a decision for the respondent Minister.

Around this time separate negotiations were ongoing at the Labour Relations Commission between ICTU and DPER, as a result of which a Labour Court recommendation in relation to new sick pay arrangements issued on the 19th July, 2012. Meanwhile, a meeting of the Conciliation Council took place on 28th June, 2012 and was attended by the various Garda associations and representatives from DOJE and the Department of Finance. Mr. Banks states that while he did express his belief that the issue of sick pay would be dealt with and agreed at the Conciliation Council, it was reiterated at this meeting that this was subject to the final decision by the Government.

A subsequent Conciliation Council meeting occurred on the 19th November, 2012 when the matter of including An Garda Síochána in the revised sick leave arrangements for the public service generally was discussed. A document entitled 'Proposals to Change Sick Leave Provisions for the Public Service' was circulated and Mr. Banks informed those present that it was the intention of the respondent Minister that the new sick leave regime would apply to all sectors of the public service, including the Gardaí. Mr Stone states that there was considerable discussion at this meeting regarding the Labour Court recommendations and the extent to which they should or could apply to An Garda Síochána as the Garda associations were not represented at the Labour Court or Labour Relations Commission. Ultimately, it was agreed that the matter would go to 'Partnership' for further discussion before returning to the Conciliation Council. Mr. Banks explains the 'Partnership' process to be "*a forum within An Garda Síochána whereby management and*

staff associations can work together for organisational success". Inspector Michael McNamara of the Garda Síochana Human Resources Department states that the Partnership committee comprises of the Assistant Commissioner, Human Resource Management, the President and General Secretary of each of the four Garda Staff Associations, and the Secretary of the Partnership Committee. He explains that a Working Group was established on the 8th January, 2013 and met a total of 17 times between that date and the 28th March, 2014.

In the meantime, in May 2013 the Haddington Road Agreement was arrived at and it was agreed that a review of An Garda Síochána would take place and would include a consideration of remuneration and conditions of service. This review was to take place no later than the 1st September, 2013 and conclude no later than the 1st June, 2014. Ms. McGirr states that there was ongoing communication at this time between DPER and DOJE and that by email dated the 13th June, 2013 DPER again informed DOJE that "*the revised arrangements will also apply to the Gardaí from 1 January 2014*."

By November 2013 the enabling legislation, the Public Service Management (Recruitment and Appointments) (Amendment) Bill, 2013, was going through the legislative stages in Dáil Éireann. The Conciliation Council met again on the 7th November, 2013 and was informed that a report from the Partnership Working Group of An Garda Síochána in relation to the proposed alteration to sick leave arrangements was due to be finalised the following day, the 8th November, 2013. Mr Banks states that at this meeting on the 7th November he stated that DOJE had no difficulty in supporting a request for a derogation from the new arrangements for An Garda Síochána, but that he also made clear that it was ultimately a decision for the respondent. The Working Group report was subsequently finalised and sent to DOJE by Assistant Commissioner Fanning, with the Commissioners approval, on the 11th November, 2013. This report made a number of submissions as to why it was believed that An Garda Síochána should receive a derogation from the proposed arrangements. The concluding recommendation of the report was that "*a derogation from the provisions of the legislation be made for An Garda Síochána pending a full review of the current sickness absence arrangements within An Garda Síochána under the terms of the Haddington Road Agreement*."

The Working Group report also referred to what is described as the "*dangerous and unpredictable nature of the daily duties engaged in by all members of An Garda Síochána*" and highlighted that in the period 2010 to the date of the report "*648 members were forced into sickness absence due to the violent and confrontational nature of the policing duties performed*". It was therefore argued that the draft regulations, which envisaged a standardised approach across the public service, were unworkable. Mr. Stone explains that, following the introduction of the Regulations, the present sick leave entitlement for members of An Garda Síochána is full-pay in respect of only 12 weeks absence in a four year period. Mr. Stone says that this basic sick leave entitlement amounts to the equivalent of only 3 weeks' fully-paid sick leave per year. Prior to the introduction of the Regulations, members of An Garda Síochána enjoyed 6 months full pay and 6 months half pay with a look-back period of only 12 months.

Lengthy submissions were made on affidavit and by counsel in the course of the hearing in relation to the disputed nature of the Garda occupational injuries scheme as set out in the Garda Code. According to Inspector Michael McNamara of Garda Headquarters, the procedures for dealing with sick absence due to an injury on duty are provided for in the Garda Code Volume I, Chapters 11.31-11.43 and Volume II, Chapter (F) 3.41, 4.2, 4.65, and 12.3 and HQ Directive 139/2010. Where it is determined that the injury suffered on duty was not due to wilful default or negligence on the part of the Garda member and where there is a reasonable probability that the member will be able to resume duty, the injury on duty will be certified in accordance with the procedure set out in the Code and the member in question will receive full pay during the period of non-effectiveness. Where this period exceeds 6 months, the member is entitled to half-pay for a further 6 months. If the member remains off work for any period thereafter they are placed on pension rate of pay where it is medically certified that they are likely to resume work. There is a 12 month 'look back' period for the purposes of this procedure. The benefit payable in this way does not overlap with benefit under the sick pay scheme. Members get one or the other. Ms. McGirr contends that these arrangements are extremely generous when compared with other public sector departments, but states that if the Garda staff associations considered that this injury on duty scheme is not as extensive as an occupational injury scheme should be, it remains open to An Garda Síochána to revise, amend, or expand the scheme as it sees fit. Separately, a sick leave entitlement arises where a member is off-duty through illness or where, without wilful default or negligence on their part, is maliciously injured because they are members of An Garda Síochána.

Ms. McGirr states that given the length of time it had taken to produce the Report of the Working Group and given that it did not propose an alternative sick leave scheme with potential for significant financial savings, the respondent formed the view that it would be highly inequitable to exclude An Garda Síochána from the new scheme. In addition, it was determined that Garda members rely on the existing injury at work scheme. Another serious consideration was the wider impact such a derogation would have on the rest of the public service.

On the 3rd December, 2013 an email was sent to the applicant and the other Garda Staff Associations from Sergeant Shane O'Carroll of Garda HR. It indicated that he had been directed by Assistant Commissioner Fanning to communicate that DPER had decided that An Garda Síochána would not be included in the first instance in the new sick leave regulations. The information from DPER passed on to Garda HR by DOJE stated as follows –

> *"In relation to the submission on the application of the revised sick leave measures to members of the Garda Síochána, we have been advised by the Department of public Expenditure and Reform that the regulations that will be drafted on foot of the enabling legislation will allow the Minister the flexibility to include any public sector organisation in the new Public Service Sick Leave Scheme. AGS will not be included in the first instance. However, any proposed amended sick leave scheme for AGS must demonstrate the potential for significant savings to be achieved in the cost of sick leave. In the absence of such potential being demonstrated the Minister will bring AGS under the terms of the new scheme by amending the regulations.*
>
> *In stressing the last sentence in the previous paragraph, the Department of Public Expenditure and Reform are very firmly of the view that the proposed amended sick leave scheme for An Garda Síochána must be developed, approved and implemented as a matter of urgency and certainly by the end of the first quarter of 2014." [Emphasis in original]*

Mr. Banks says An Garda Síochána was initially excluded on the strict condition that they, as a matter of urgency, develop their own new sick leave scheme with potential for significant savings. Ms. McGirr states that the email of the 2nd December (which was passed on to Justice and from there to the applicants the following day) stated that the Gardaí would not be included as the report of the Working Group was still under active consideration. However, after it was considered in totality and given that the introduction of the new regulations was to be delayed until March, the decision was taken on the 4th December, 2013 to include the Gardaí from inception. Ms. McGirr also stated that the Chief Medical Officer was consulted in relation to the Working Group report and that he replied on the 5th December. However, for reasons discussed in greater detail herein, the applicant contends that this consultation with the Chief Medical Officer occurred after the decision to include the Gardaí had already been made and in an attempt to justify a *volte face* by the respondent.

On the 12th December the respondent participated in a public debate on the regulations in Dáil Éireann and stated that An Garda Síochána would be included. On the 18th December similar remarks were made by the respondent when addressing Seanad Éireann. All public sector departments, including DOJE, were advised by email dated the 17th December that the scheme would not commence as planned on the 1st January, 2014 but would likely commence in early March, 2014. Ms. McGirr states that a number of emails in January and February 2014 from DEPR to DOJE indicated that the draft regulations which had been circulated to all public sector departments were well advanced and that An Garda Síochána would be included. She says that this position was "crystal clear" when the applicant met with the Consultative Council in February 2014.

In his grounding affidavit, Mr. Stone states that the Working Group continued to meet throughout January 2014 and the applicant prepared a position paper dated the 4th February, 2014 highlighting a number of inaccuracies and peculiarities in relation to the position of sick leave for Gardaí vis-à-vis other public service workers. The various Garda staff associations attended a meeting on the 11th February, 2014 chaired by the Secretary General of DOJE who Mr. Stone says undertook to meet with DEPR and discuss the issue of having Garda sick leave regulations addressed under the Haddington Road Agreement review which was due to report during the course of 2014. The Working Group continued to meet and to correspond with the Garda Commissioner in relation to concerns that the Gardaí would be included in the new regulations. On the 28th February, 2014 a meeting chaired by Mr. Kieran Mulvey between the Garda associations and DOJE officials took place at the Labour Relations Commission as part of the Haddington Road review, after which the Garda associations sought a meeting with DOJE officials in relation to the new public service regulations and the inappropriateness of An Garda Síochána being included. A meeting was subsequently arranged for the 7th March, 2014 with DPER officials also present. Mr. Stone says that moments after this meeting commenced an official from DPER informed those present that the respondent had already signed the Regulations and An Garda Síochána were to be included.

Legal proceedings were subsequently commenced by the applicant and leave to apply for judicial review was granted by Peart J. on the 31st March, 2014. An application for an interlocutory injunction to prevent the application of the regulations to An Garda Síochána was refused by Peart J. by judgment dated the 7th May, 2014.

FURTHER DISCOVERY
By letter dated the 6th May, 2014 the applicant sought discovery of all books, records, documents, correspondence and internal memoranda in relation to consideration given by the respondent to the position of An Garda Síochána in relation to the new regulations. This was refused by the respondent by letter dated the 15th May, 2014. The applicant subsequently issued a notice of motion on the 27th June seeking the same categories of discovery before an agreement for voluntary discovery was arrived at. Ms. Louise McGirr filed an affidavit of discovery on behalf of the respondent on the 15th July, 2014.

Following inspection of these discovery documents, Mr. Stone filed a further affidavit on the 18th August, 2014 in which he states that the discovery brought a large number of issues of grave concern to light and also illuminated the reason for what is described as the respondent's "*volte face*" following the email of the 3rd December, 2013 which stated that the Gardaí would not be included in the new regulations. Mr. Stone describes it as "extraordinary" that the only documentation in existence concerning the consideration given by the respondent Minister to the position of An Garda Síochána in the context of public service-wide reforms to the sick leave arrangements are emails between civil servants. He notes that throughout the entire process there were no notes, memoranda or briefing documents to the respondent and no detailed minutes or reference to any meetings having taken place. Mr. Stone asserts that while there is an "*attempt to portray a coherent decision making process leading to rational and justified conclusions*" the reality is that during November and December of 2013 DEPR "*was intent on avoiding having to give any serious consideration to the detailed representations made of behalf of An Garda Síochána*".

The discovery documents show that on the 2nd December, 2013 Ms. Ivana McGarr in DEPR sent an email to Mr. Banks in DOJE indicating that An Garda Síochána would not be included in the new public service sick leave scheme in the first instance but that any proposed amended scheme must demonstrate the potential for significant savings. This information was then communicated to the Garda associations by email from Sergeant Shane O'Carroll of Garda HR on the 3rd December, 2013, as outlined above.

An email of the 4th December, 2013 at 14.51 from Ms. McGirr to Mr. William Beausang (an official in DEPR) states that "*I spoke to Shay. He is saying he will ballot his members if we go ahead without the Gardaí.*" This is a reference to Mr. Shay Cody, the General Secretary of IMPACT. There is then an exchange of emails between Ms. McGirr and Mr. Beausang in relation to the intervention of Shay Cody in which Ms. McGirr, by email at 15.11 expresses her view that Mr. Beausang should brief the Minister in relation to Mr. Cody's threat to ballot his members and push for a delayed implementation of the statutory instrument. At 15.31 Mr. Beausang, having presumably briefed the Minister or an adviser, informed Ms. McGirr that "*M [Minister] wants 1 Jan implementation even if Garda delayed*". Mr. Stone contends that this series of emails, coupled with the 2nd December email, shows that as of 15.31 on the 4th December, it is clear that the respondent was not going to include the Gardaí in the regulations.

However, at 15.45 Ms. McGirr emailed Mr. Beausang to say "*Ronan [Ronan O'Brien, ministerial adviser] is now saying to include them?"* Mr. Stone questions why a political adviser should have the authority to direct an established civil servant and contends that this email was sent in the context of a "*highly inappropriate*" threat from the leader of IMPACT. At 15.54, apparently after speaking with Mr. Beausang, Ms. McGirr forwarded Ms. Ivana McGarr's email to DOJE of the 2nd December, describing it as "*the offending email*". She further stated "*If we have to bring them in from 1 Jan We need to write immediately"* [sic]. At 16.44 Ms. McGirr informed another DEPR staff member that Mr. Beausang was "*gone over to the Minister to clarify the situation*". At 18.16 Mr. Beausang emailed Ms. McGirr stating that "*I have spoken to SC [Shane Cody] and he is very strong on all this unravelling. Key issues are identical case that other groups can make and personal reputational impact for him in saying consistently that AGS would fall under this*." Mr. Stone claims that this email is evidence that the "key issues" in considering the reversing the 2nd December position not to include the Gardaí was the threat issued by Mr. Cody and the fear of damaging Mr. Cody's personal reputation. At 19.07 Mr. Beausang informed Ms. McGirr of a phonecall he had with Mr. Cody and says "*Shay won't live with any separate scheme or delay in applying arrangement for AGS."* The email also suggests delaying the implementation date until the 1st February to allow "*a couple of weeks to work through the issues with D/Justice and Garda"* and Ms. McGirr replied stating that she was in agreement with that approach.

At 19.25 on the 4th December Mr. Beausang forwarded the 2nd December so-called "offending email" to Mr. Ronan O'Brien. At 20.38, in a step described by Mr. Stone as "unusual", Mr. Beausang emailed Mr. Tom O'Connell, the Chief Medical Officer, enclosing a copy of the Working Group report and seeking his views "on the case made in the report on the medical issues justifying a differentiated approach for AGS". Mr. Stone alleges that it is now clear that the motivation for this email was to elicit a response from Mr. O'Connell to justify the "*volte face projected for the following morning when the Minister was going to succumb to the threat from Shay Cody*." Mr. Stone asserts that the initial failure of the respondent to refer to the involvement of Mr. Cody in the process on these dates while referring only to Dr. O'Connell's reply is "*wholly reprehensible and inconsistent with proper public administration*". By email at 20.36 Mr. Beausang informed Mr. Cody that he would be meeting the respondent Minister the following morning, while Mr. Cody replied at 20.41 advising that he would be happy to talk to the Minister if necessary.

The following morning, 5th December, at 08.31 Mr. O'Brien emailed Mr. Beausang to say "*Interestingly there does not appear to be a story in the paper's this morning but I'd say it is only a respite?".* At 08.46 Mr. Beausang emailed Ms. McGirr and a Mr. Robert Watts requesting their views on the steps to take "*if the Minister accepts a rescheduling to 1 Feb or so*". A record of a meeting between Mr. Beausang and the Minister at 09.00 until 09.15 is also exhibited. Mr. Stone contends that it can clearly be inferred that the main consideration in the meeting with the respondent was Mr. Cody's threat and the potential media coverage. In the meantime, Ms. McGirr replied to Mr. Beausang's earlier email at 09.11 and queried "*Are you saying that there is any room for manoeuvre with the shape of the AGS scheme if they make a case or are we saying it's our single scheme and that's it?"*

At 11.11 the Chief Medical Officer Mr. O'Connell responded to Mr. Beausang. He said that most of the arguments being made are non-medical and that he can only identify three medical/quasi-medical issues raised in the report. Mr. Beausang forwarded Mr. O'Connell's response to Mr. O'Brien and Ms. McGirr at 11.15 stating that "*CMO doesn't believe that any of the limited medical reasons in the submission stack up."* At 11.33 Ms. McGirr replied, stating "*This looks like a go ahead on 1 Jan with the AGS included*". Mr. Stone describes this activity as a blatant attempt by civil servants to justify a reversal of the decision of the 2nd December without having to highlight the "inappropriate" involvement of Mr. Cody. On the evening of the 5th December at 19.00, Mr. Beausang emailed Mr. Michael Flahive in DOJE stating that "*…our minister's clear direction is that the new scheme should come into effect for all sectors of the public service on the same date and has requested our views on whether this should be 1 Jan as planned or a somewhat later date a couple of weeks thereafter (e.g. 31 Jan)."* Mr. Flahive's response later that evening was that "*for us to understand the implications of the new scheme for the Garda Síochána we need to see not just the Bill…but the detail of the regulations… we need to understand how this will affect the Garda Síochána, including issues such as occupational injuries and illnesses related to such injuries*." He also sought "*absolute clarity*" that occupational injuries would not be covered by the new scheme. Mr. Stone submits that subsequent correspondence makes clear that DEPR had no idea as to the existence or operation of an occupational injury scheme in An Garda Síochána and it follows that the existence of such a scheme could not, as the respondent submits, have played any part in the decision making process.

Mr. Stone submits that email correspondence following the respondent's speech in the Dáil on the 12th December shows that there were reservations on Ms. McGirr's part as to the remarks of the respondent in relation to the position of the Gardaí in the context of the new sick leave regulations. He contends that it is therefore extraordinary that Ms. McGirr can now claim on affidavit that the Minister made the position "*perfectly clear*" during the parliamentary debate. Events then proceeded in the manner outlined above and the Regulations were signed by the respondent on the 6th March, 2014.

LEGISLATIVE FRAMEWORK

The Regulations at the centre of these proceedings are the Public Service Management (Sick Leave) Regulations which came into force on the 31st March, 2014. They were made by the respondent Minister in the exercise of the powers conferred on him by the Public Service Management (Recruitment and Appointments) Act 2004 ('the 2004 Act') as inserted by section 7 of the Public Service Management (Recruitment and Appointments) (Amendment) Act 2013 ('the 2013 Act').

Part 7 of the 2013 Act deals with sick leave remuneration and inserts sections 58A, 58B and 58C into the 2004 Act. Section 58A defines the term "public service body" as including, *inter alia*, the Civil Service, the Health Service Executive, and An Garda Síochána. Section 58B confers a power on the Minister to make regulations in relation to sick pay.

Section 58B (4) sets out the matters the Minister shall have regard to in making regulations as follows:

> *"(4) In making regulations under subsection (1), the Minister shall have regard to—*
>
> *(a) the need to limit the circumstances in which the public service bodies can undertake the commitment of financial resources in making payments in cases in which they are unable to receive the benefit of the services of their public servants,*
>
> *(b) the resources available, for the time being, to the Exchequer to pay the remuneration of public servants,*
>
> *(c) without prejudice to paragraph (b), the obligations of the State under the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union done at Brussels on 2 March 2012,*
>
> *(d) with respect to the specification of conditions for an entitlement to be paid remuneration during a period of sick leave, the desirability of having in place a satisfactory means of verifying that the public servant concerned is unable to attend to his or her duties due to illness or injury, and*
>
> *(e) the need to protect the health of public servants, whilst taking account of the desirability of there being a measure of provision, as appears to the Minister to be appropriate and just, for making payments to public servants who are unable to attend to their duties due to illness or injury."*

Section 58B (7) provides for transitional arrangements as follows –

> *"Where, before the commencement of section 7 of the Public Service Management (Recruitment and Appointments) (Amendment) Act 2013, a period of sick leave, on a relevant person's part, has begun and continues after the commencement of that section, the arrangements that were in existence before the commencement of that section in respect of the payment of remuneration to that person during his or her sick leave shall continue to apply in respect of so much of that period of sick leave as falls after that commencement and regulations under this section shall not apply to that person until such time as he or she is able again to attend to his or her duties."*

Section 58C was frequently referred to during the course of the hearing. It sets out as follows –

> *"This Part has effect notwithstanding—*
>
> *(a) any provision made by or under—*
>
> *(i) any other Act,*
>
> *(ii) any statute or other document to like effect of a university or other third level institution,*
>
> *(iii) any circular or instrument or other document,*

(iv) any written agreement or contractual arrangement,

or

(b) any verbal agreement, arrangement or understanding or any expectation."

Part 3 of the 2014 Regulations encompasses Regulations 7-10 and deals with "*Sick Leave Remuneration Generally".* Regulation 9 sets out the amounts and rates of sick leave remuneration and provides as follows–

"9. (1) This Regulation is subject to Regulation 10.

(2) Sick leave remuneration at the full rate may be paid in a given instance

if, in the 12 months preceding the first day of the relevant person's current period of sick leave (the "12 month reference period"), the period of sick leave, remunerated at the full rate, has not exceeded 92 days.

(3) Subject to paragraph (4), sick leave remuneration at the half rate may be paid in respect of any period of sick leave, in the 12 month reference period, following on, or occurring after, the period of 92 days sick leave referred to in paragraph (2).

(4) Payment of sick leave remuneration at the half rate shall be limited to 91 days of sick leave.

(5) Save as provided in the preceding paragraphs (and unless a decision to grant temporary rehabilitation remuneration is made or Part 4 or 6 applies), no sick leave remuneration shall be paid in the 12 month reference period."

Regulation 10 sets out the maximum period of paid sick leave with a four year 'look back' period –

"10. Notwithstanding anything in Regulation 9, but subject to Parts 4, 5 and 6, if, in the period of 4 years preceding the first day of the relevant person's current period of sick leave, there has occurred a period of sick leave that is in excess of 183 days (being a period of 183 days in respect of which remuneration at the full rate or the half rate has been paid) no sick leave remuneration shall be paid in respect of that part of that sick leave that exceeds 183 days.

GROUNDS OF THE CHALLENGE
The multiple arguments advanced on behalf of the applicants may be summarised under the heading of five grounds as follows:-

a) Legitimate expectation;

b) Failure to consult;

c) Taking into account an irrelevant consideration or failing to take into account a relevant consideration;

d) Was the Minister's decision to include the applicants warranted under Section 58(B) of the Act which obliged him to have regard to the considerations enumerated therein?

e) The Regulations are themselves incoherent.

While additional reliefs were sought on the basis that it was *ultra vires* the power of the Minister to make the Regulations, it was apparent during the course of the hearing that in reality, on the basis of some of the grounds advanced, the applicant's case in essence was one to defer the application of the Regulations to the applicants pending the completion of a process of consultation. Specifically, no challenge to the constitutionality of the Regulations was raised or suggested at any juncture.

The Court will consider each of these contentions in turn:-

(a) LEGITIMATE EXPECTATION
Mr. Feichin McDonagh, senior counsel for the applicants, relied on the doctrine of legitimate expectation to assert a right on the part of the applicants, not to a substantial benefit, but rather to one of procedural propriety. It was common case, he argued, that a process of consultation had been established and was in progress whereby the applicants were led to believe that either they would have a derogation from the Regulations or that they would receive differentiated treatment from other public servants, or at least that the consultation progress would continue to a conclusion before the Regulations were applied to the applicants.

By email dated the 2nd December, 2013, the applicants assert that they had been informed by officials in the Department of Justice that the respondent Minister would defer inclusion of An Garda Síochána in the new sick pay scheme. Nonetheless, on the 4th December, 2013, in circumstances which were far from clear, the Minister decided to reverse that decision and include An Garda Síochána. It is asserted that the Gardaí were not informed of this reversal and that the Working Group continued to meet in the early part of 2014, discovering only on the 7th March, 2014 that the Regulations, which had been signed the previous day, extended to include their members also.

In response, Eileen Barrington, senior counsel on behalf of the respondent, argued that any case based on legitimate expectation was unstateable. The applicants could not point in the first instance to any promise or representation to the specific effect that the gardaí would be excluded from the scope of the Regulations. The Working Group report belatedly submitted for consideration on the 22nd November, 2013 made no reference to any supposed representation that they would be excluded from the Regulations. Furthermore, the applicants had never acted to their detriment on foot of any supposed representation and no detriment could be shown.

In any event, any attempt to rely on the doctrine of legitimate expectation ran into the immediate difficulty that the doctrine could not be invoked to fetter the powers of the Minister. The email of the 2nd December, 2013 was not a representation. Even if it was, within two days the Minister had confirmed his intention to include An Garda Síochána in any reform and that such reform would take effect by the end of March. This was communicated with the Garda Commissioner on the 19th December, 2013. The applicants were provided with the draft regulations (which included An Garda Síochána) in January 2014.

Ms. Barrington further argued that a procedural expectation can not give rise to a substantive benefit. Furthermore, even if the applicant was entitled to have or hold an expectation as to the manner in which he would be consulted which went beyond consideration of the report of the Working Group, any such expectation could be disappointed in the public interest in view of the economic circumstances of the State. In this regard the respondents relied on the decision of Dunne J. in *Curran v. The Minister for Education* [2009] 4 I.R. 300 and *McCarthy v. Minister for Education and Skills* [2012] IEHC 200.

Finally, on this part of the case, Ms. Barrington placed what might be characterised as "backstop reliance" on the provisions of Part 7A of the Act in which s.58C provides, *inter alia*, that:-

> *"This part has effect notwithstanding –*
>
> *(a) … … …*
>
> *(b) any verbal agreement, arrangement or understanding or any expectation"*

The existence of this statutory provision was, Ms. Barrington argued, fatal with regard to any part of the applicant's claim that some nebulous form of legitimate expectation arose in this case.

Discussion

The essential pre-requisites for a claim for legitimate expectation were outlined by Fennelly J. in the landmark decision of the Supreme Court in *Glencar Explorations plc and Anor. v. The County Council of County Mayo* [2002] 1 I.R.84:-

> *"In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally, they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."*

It is clear from the foregoing that the first question to be addressed is whether or not a "promise or representation", has been made by a public authority, in this case the Minister, such as would warrant the granting of procedural relief. The answer to this question becomes immediately apparent when one endeavours to ascertain precisely what representation is supposed to have been made. At one time it was contended on behalf of the applicants that they were to be altogether excluded from the application of the Regulations, though this claim has not been pursued at the hearing before this Court. Then it was suggested that the nature of the consultation process, coupled with the contents of the email forwarded from the Department of Justice on the 3rd December, 2013 amounted to a representation that the Minister would at least defer inclusion of An Garda Síochána in the proposed sick pay scheme. It is also submitted that the process at this stage amounted to a promise or understanding – which necessarily must be an implied one as it was never given expressly – that the interests of An Garda Síochána would be approached on a differentiated basis before the consultation process concluded. It is further suggested that the Department of Justice, by agreeing to the matter going to Conciliation, conveyed the impression that no Regulations would be enacted by the respondent prior to the formal conclusion of the Conciliation process.

The Court cannot accept any of these contentions. The applicants were informed as far back as May 2012 of the respondent's intentions to adopt a sick pay scheme across the public sector which would include members of An Garda Síochána. I am satisfied that the email of the 3rd December, 2013 at most gave an indication that there might be some postponement in relation to the reform of An Garda Síochána sick pay until the end of March. However, within two days the Minister had confirmed his intention to include An Garda Síochána in any reform and that such reform would take effect by the end of March. This was communicated to the Garda Commissioner on the 19th December, 2013 and also in statements made in the Dáil and Seanad by the Minister at that time when it was specifically indicated that An Garda Síochána would be included in the application of the Regulations. The communication of December 19th was subsequently read out at a meeting of the Working Group, the report of which, it should be noted, lodged as it was with the respondent on the 22nd November, 2013, contained no reference to any representation that An Garda Síochána would be excluded from the Regulations. Thereafter the Regulations were circulated to all the Garda associations in January 2014, so that, apart from the single email of the 3rd December, 2013 the applicant's contentions are singularly lacking in support from the narrative of contemporaneous events. Still less can the applicants point to any documentation or meeting where a particular form of consultation was promised by or on behalf of the respondent. Nor can the applicants point to any detriment suffered by them or any action taken by them on foot of some supposed representation.

Even if I am mistaken in this regard, any expectation harboured by the applicants was liable to be disappointed in the public interest in view of the financial circumstances of the State, a backdrop against which all of these negotiations were taking place.

In *Curran v. The Minister for Education* [2009] 4I.R. 300, the applicant school teachers claimed that they had a legitimate expectation that an early retirement scheme which had been in operation since 1997 would continue to be available to them. It was further claimed that the applicants had acted to their detriment in reliance on that expectation. Dunne J. held that while the doctrine of legitimate expectation could be relied upon to obtain a substantive benefit, it could also be qualified by public interest considerations. She concluded that in light of the parlous state of public finances the overriding public interest in taking the decision to suspend the scheme outweighed any legitimate expectations that the applicants may have held of an entitlement to pursue their applications for early retirement.

Similarly in *McCarthy v. Minister for Education and Skills* [2012] IEHC 200, Hedigan J. held that even if the applicants in that case had a legitimate expectation that they would continue to qualify for certain grants during the currency of their third level studies, "overwhelming considerations of the public interest would outweigh it in the light of the dire financial circumstances facing this country at the time the decision was made".

Crucially, any expectation which the applicants may have had is expressly outruled by Part 7A of the Act of 2013 whereby s.58C expressly provides that that part of the Act: - "*… has effect notwithstanding … any verbal agreement, arrangement or understanding or any expectation*."

For these various reasons I am satisfied that the applicant's claim based on legitimate expectation must fail.

(b) FAIR PROCEDURES AND THE OBLIGATION TO CONSULT
It is I think fair to say that as this case progressed from inception to hearing, the applicant's claim has morphed almost entirely into a claim based on fair procedures. Essentially the kernel of the case made in this regard is that there was a failure on the part of the respondent to adequately consult with the applicants prior to the introduction of the Regulations which, in context, warrants injunctive relief being granted to postpone or defer the application of the Regulations to the applicants.

Before embarking on a consideration of the submissions made in that respect, it should be noted that any supposed *locus standi* deficit alleged to exist in the case of the applicants in this case was, as a belt and braces exercise, addressed by the addition of the second named applicant during the course of the proceedings. I am far from convinced that this was necessary having regard to the responsibility of the first applicants to act in the best interests of their members and, while the point was not relinquished at the hearing by the respondents, it was not argued to any degree and I am satisfied that both applicants have the requisite standing to maintain these proceedings, other than in respect of the ground of challenge at (e), in respect of which I do not believe – for reasons later stated – that the first applicants enjoy that status.

The applicant's submissions
It was contended on behalf of the applicants that the obligation to consult a defined class of persons who are affected by the adoption of a regime imposed by a public authority can arise in a number of different ways and may be regarded as a form of *audi alteram partem*. In the instant case it was contended that the duty to consult arose from the lengthy process of consultation and resolution which was still in progress when the Minister 'guillotined' the process by his decision of the 4th December, 2013. It is contended that, in the light of the further discovery made in this case, the decision was arrived at in a highly "inappropriate" way following an intervention by Mr. Shay Cody, General Secretary of IMPACT, an intervention to which I will later return, in circumstances where the applicants were completely unaware of threats issued by Mr. Cody until, quite late in the proceedings, further discovery revealed precisely what had happened.

In this context, the applicants placed reliance on the decision in *Burke v. The Minister for Labour* [1979] I.R. 354, a case where a joint labour committee had fixed minimum wages for persons working in the hotel industry by means of an order made under the Industrial Relations Act 1946. It was held that the order was invalid in circumstances where the order was made without regard to evidence by the employers of the real cost to the board and lodging provided to their employees. Reliance was also placed on the decision of Hedigan J. in *Teahan and Others v. Minister for Communications* [2009] IEHC 399 when Hedigan J. stressed the need for the fairness of administrative action and the obligation of decision making bodies, whose determinations are likely to impact heavily upon the livelihood of individual citizens, to afford a certain degree of consultation and to provide certain items of information. It was also argued that the decision of the Supreme Court in *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R.1 made clear that it can only be in rare and clearly defined circumstances that fair procedures could be excluded from a process of this type.

In making his submissions, Mr. McDonagh further sought to rely on the form of administrative law developed in the United Kingdom relying in particular on the case of *Bank Mellat v. H.M. Treasury (No.2)* [2013] UKSC 39, in which the U.K. Supreme Court considered a challenge to the Financial Restrictions (Iran) Order 2009 on the ground that, before making the order, the Treasury should have given the bank an opportunity to make representations.

Going even further, counsel invoked the authority of *R. v. North and East Devon Health Authority, exparte Coughlan* [2000] 2 WLR 622 to argue that not only must there be a consultation process, but that the consultation process must occur at a time when proposals are still at a formative stage, must include sufficient reasons for a particular proposal to allow those consulted to give intelligent consideration and an intelligent response, adequate time must be given for this purpose and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.

In the instant case, having decided that it was appropriate to consult with An Garda Síochána (and other sectors within the public service) prior to making any changes to the sick scheme the Minister nonetheless changed his mind "without affording the applicants the opportunity to address the putative reasons for the *volte face*" and thereby converted a fair and meaningful consultation process into one which was both unfair and spurious.

The respondent's submissions
In response on this aspect of the case Ms. Barrington argued that the applicants enjoyed no right to consultation such as would fetter the power of the Executive to legislate and certainly the applicants enjoyed no right to consultation in any particular form. This had been made clear in various passages in Hogan and Morgan's *Administrative Law in Ireland* (4th Ed) at paras. 2.87 and 14.217.

Heavy reliance was placed by Ms. Barrington on the decision of Carney J. in *Gorman v. Minister for the Environment* [2001] 2 I.R. 414, a case in which Carney J. stressed that the *audi alteram partem* rule or the duty to consult and hear submissions did not arise where decisions were being made to enact a particular piece of legislation by the Oireachtas. He had stressed in that case that the *audi alteram partem* rule was subject to the "exigencies of pragmatism. This is particularly so in the context of the legislative process.".

The decision of the Supreme Court in *Dellway Investments v. NAMA* [2011] 4I.R.1 could be distinguished as that decision turned on the nature of the decision-making under challenge in that case which was not a legislative decision, but was rather a decision of NAMA made under a power conferred by the legislature. In the legislative context, consultation was a matter of practice and political considerations rather than legal entitlements.

Even if wrong in all of these contentions, Ms. Barrington argued that the applicants had been afforded a more than fair opportunity of making their case. The Working Group had sent in its report and the same was considered by the Minister before any decision was arrived at.

She argued that the form of administrative law evolved in the United Kingdom did not necessarily apply in this jurisdiction. Furthermore, the U.K. Supreme Court in the *Bank Mellat* case was dealing with a case where just one bank had been targeted for the particular legislative measure, a markedly different situation from the instant case where 300,000 public service employees were liable to be affected by the introduction of the Regulations. In the dire financial circumstances then being experienced by the State, it was entirely understandable that a statutory power had been given to the Minister to do exactly what was done by the Regulations.

Discussion and Decision
The general principles with regard to the control by courts over legislative decisions is elaborated in Hogan and Morgan's *Administrative Law in Ireland* (4th Ed.) at para. 2.87 as follows:-

> "As stated already, the courts exercise control over delegated legislation in the same manner as other administrative actions and thus delegated legislation may be condemned as invalid on the grounds that it is unreasonable in law or disproportionate or has been made in bad faith or (possibly in special cases) in breach of principles of fair procedures. However, because of the legislative character of statutory instruments or other delegated legislation, it seems likely that the rules of constitutional justice will apply – if at all – only in an attenuated form."

Thus the authors, in recording that a claim and that a statutory instrument was invalid for breach of constitutional justice was unsuccessfully made in *Cross River Ferries Ltd. v. Port of Cork Company* (Unreported, High Court, O'Sullivan J., 6th May, 1999) noted that passage in the judgment of Sullivan J. when he stated:-

> "… the nature of legislation (including delegated legislation) remains the same whether it applies, in fact, to one or many. In the absence of arguments in relation to discrimination, jurisdiction, unreasonableness or unconstitutionality of the powers themselves there is no case in my opinion for holding that the respondent's schedule of charges are invalid for want of consultation with the applicant."

Later at paras. 14-216/7 the authors state:-

> "The fact that the principle type of legislation is in an Act of Parliament, made by a body where all interests are supposedly represented and which is traditionally not subject to control by the courts during the process of legislation, has traditionally encouraged courts to avoid this area even if it is delegated legislation which is at issue. (As a matter of practice rather than law, departments of State customarily consult interest groups about the content of draft bills.)
>
> The rationale usually given for excluding legislative decisions from the scope of the rules is that the *audi alteram partem* rule, at any rate, is more appropriate where a compact range of facts is in issue – for example, in a dismissal case, whether an employee was dishonest – and less appropriate when a broader range of acts and divergent considerations, for example, the economy or some other national interest, is concerned. Traditionally, legislative decisions were taken as being beyond the reach of the rules. This orthodoxy was confirmed by McMahon J. in the High Court in *Cassidy v. Minister for Industry and Commerce* [1978] I.R. 297 where he held, without discussion, that the rule did not apply to require consultation with the Vintners Association before the making of a statutory instrument fixing maximum prices for the sale of intoxicating liquor in the Dundalk area."

It is against this backdrop that the contentions of both sides must be considered, and in that context the seminal decision of the Irish courts is that of Carney J. in *Gorman v. Minister for the Environment* [2001] I.R. 414.

This case concerned the deregulation of the taxi industry in Dublin which was provided for by the Road Traffic (Public Service Vehicles) (Amendment) (No.3) Regulations 2000. One of the grounds of challenge was that there had been a lack of fairness in procedures. Carney J. held, *inter alia*, that while there was a constitutionally protected right provided for in Article 40.3 to fair procedures in decision making, it did not apply with equal force in every situation. Legislative decisions on the grounds, *inter alia*, of practicability did not attract the full rigours of constitutional and natural justice and the *audi alteram partem* rule did not arise. At pp. 436-7, Carney J. stated:-

> *"The citizen is not consulted in relation to increased taxation in the budget. There may of course be various practices in place to consult interested bodies or persons before legislative decisions are taken, but this is undertaken as a matter of practice, not of law. Thus, the requirements of constitutional justice are largely dictated by the circumstances and it must be emphasised that the right to fair procedures and, in particular the right to be consulted which must be regarded as an aspect of the audi alteram partem rule is subject to the exigencies of pragmatism. This is particularly so in the context of the legislative process."*

Carney J. proceeded to then enumerate a number of cases in which legislative decisions had been taken not to attract the rules of constitutional justice, including *Bates v. Lord Hailsham* [1972] 1 WLR 1373, *Essex County Council v. Ministry for Housing and Local Government* (1968) 66 L.G.R.23 and differentiated those cases from *Reg. v. Liverpool Corpn., exp Taxi Fleet* [1972] 2 Q.B., 299, on the basis that the last mentioned case concerned the discharge of an administrative function and not a legislative one. At p. 440 he stated:-

> *"The Minister of State, in exercising his powers under the Act of 1961 to make a statutory instrument was engaged in a legislative process and as such, his decision to deregulate the taxi industry does not attract the full rigours of natural and constitutional justice. Further, it would have been impractical to impose such an obligation in the circumstances. Accordingly, there was no duty to consult the holders of taxi drivers or their representative bodies prior to taking this decision.*
>
> *Furthermore, I am satisfied from the evidence and material adduced on behalf of the applicants that the respondents were at all times kept fully informed of the applicants' views on deregulation. This is a matter I am entitled to take account of in relation to the making or non-making of a discretionary order."*

Carney J. also had regard to the decision of the High Court (Costello J.) in *Tara Prospecting Ltd. v. Minister for Energy* [1993] I.L.R.M. 771, a case in which the High Court concluded that in cases involving the exercise of statutory powers the doctrine of legitimate expectation was limited to procedural matters. This brought him to consider the position which might arise where representations might have been made or assurances given to the applicants on foot of which they formed the belief that a previous policy would not be altered. In this regard Carney J. stated (at p.441):-

> *"However, even in the event that such assurances had in fact been given, even by high ranking members of the executive, the nature of such assurances is such that they could only have been regarded as being conditional. Where a public interest emerges to make another policy the appropriate one to follow in the altered circumstances, the expectation that the beneficiary of the previous policy can legitimately expect is a procedural rather than a substantive one. As was stated by Keane J. (as he then was) in Pesca Valentia Ltd. v. Minister for Fisheries (No.2) [1990] 2 I.R. 305 at p. 323:-*

> *'… while the plaintiff was undoubtedly encouraged in its project by the semi-state bodies, it was not given any assurance that the law regulating fishing would never be altered so as adversely to affect it nor, if such an assurance had been given, could any legal rights have flowed from it. No such "estoppel" could conceivably operate so as to prevent the Oireachtas from legislating or the executive from implementing the legislation when enacted.'*
>
> *A public body is entitled to resile from its previous practice or representation where there actually exists in the particular case objective reasons which justify this change of position. A person or groups of persons who have benefited from a previous policy can legitimately make representations as to why the policy should not be changed. They cannot, however, legitimately expect to fetter the body's statutory discretion to adopt a new policy in the public interest, as it is the public interest and not the private rights incidentally created that the public body must ultimately seek to vindicate."*

The legal position, as thus elaborated by Carney J., has withstood the test of time and remains the law in this jurisdiction. The decisions of the Supreme Court in *Burke v. Minister for Labour* [1979] I.R. 354 and in *Dellway Investments Ltd. v. NAMA* [2011] 4 I.R.1 p.25. can be easily distinguished. The decision in the latter case was not a legislative decision, but was instead a decision of NAMA made under a power conferred by the legislature. It was a case which concerned administrative decision-making and is thus altogether different from the present case which concerns the enactment of legislation. In the former case the class of persons affected was a very narrow one, and that was the basis for considering that rules of constitutional justice might arise in that case.

In reality, precisely the same considerations which concerned the Supreme Court in the *Burke* case underpin the decision of the U.K. Supreme Court in *Bank Mellat v. H.M. Treasury* [2013] U.K.S.C. 39. That case considered a challenge to the Financial Restrictions (Iran) Order 2009 on the ground that, before making the order, the Treasury should have given the bank an opportunity to make representations. The U.K. Supreme Court, in allowing the appeal, stated that "fairness" required that *Bank Mellat* should have had an opportunity to make representations before the order was made. At para. 29, Lord Sumption stated:-

> *"29. The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In Cooper v. Board of Works for the Wandsworth District (1863) 14 CB (NS) 180, the defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. 'I apprehend', said Willes J. at 190, 'that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application and founded upon the plainest principles of justice.'"*

Reference was then made in *Bank Mellat* to the case of *R. v. Secretary of State for the Home Department Ex p Doody* [1994] 1 AC 531, where Lord Mustill, with the agreement with the rest of the Committee of the House of Lords, summarised the case law as follows:-

> *"My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

However, Lord Sumption was careful to point out that the duty of prior consultation cannot be answered in wholly general terms, but rather depends on the particular circumstances of each case. At para. 32 he stated:-

> *"32. In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. … .. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay L.J. that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programme, but did not know the circumstances, which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J. ultimately found."*

However, the critical distinction between the *Bank Mellat* case and the instant case is that it cannot be said of An Garda Síochána that they were a single group of public service employees targeted for the legislative measure complained of. Indeed, they constitute something of the order of 5% only of that category. This distinction is a crucial one and one which was recognised by Lord Sumption when at para. 32 Lord Sumption acknowledged that fact when stating:-

> *"While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected*

by a proposed measure, the number of people to be consulted in this case was just one."

Again at para. 46 he stated:-

> *"The Treasury direction designating Bank Mellat under Schedule 7, paragraph 13, was not legislative in nature. There is a difference between the sovereign's legislation and his commands. The one speaks generally and impersonally, the other specifically and to nominate persons. As David Hume pointed out in his Treatise of Human Nature (Book III, Part ii, sec. 2-6), 'all civil laws are general, and regard alone some essential circumstances of the case, without taking into consideration the characters, situations and connexions of the person concerned.' The Treasury direction in this case was a command. The relevant legislation and the whole legislative policy on which it was based, were contained in the Act itself. The direction although made by statutory instrument, involved the application of a discretionary legislative power to Bank Mellat and IRISL and nothing else. It was as good an example as one could find of a measure targeted against identifiable individuals. Moreover, as I have pointed out in dealing with the Bank's substantive complaints, it singled out Bank Mellat from other Iranian banks on account of the Bank's conduct or, in Hume's words, its 'characteristics, situations and connexions'. It directly affected the Bank's property and business assets. If the direction had not been required to be made by statutory instrument, there would have been every reason in the absence of any practical difficulties to say that the Treasury had a duty to give prior notice to the Bank and to hear what they had to say. In a case like this, is the position any different because a statutory instrument was involved? I think not. That was simply the form which the specific application of this particular legislation was required to take."*

He then continued at paras. 47-48:-

> *"47. With a measure such as this one, targeted against 'designated persons', it is not possible to say that procedural fairness is sufficiently guaranteed by Parliamentary scrutiny or to suppose that Parliament in enacting the Counter-Terrorism Act ever thought it was. The justification for the direction depends on the particular character and conduct of the designated person, about which Parliament cannot have the same plenitude of information as it is assumed to have about matters of general legislative policy. Many of the essential facts about the particular target will be peculiarly within the designated person's knowledge, and even those known to the Treasury will not necessarily be publicly disclosed.*
>
> *48. In some cases, the procedure might be regarded as fair even in the case of a targeted measure, and even if the target did not have an opportunity to be heard before the order was made, if he was in a position to make effective representations in the course of the passage of the affirmative resolutions through Parliament."*

Thus, in the instant case, although legislation did not dispense with the notion of consultation, the fact nonetheless remains that it addressed, and was intended to address, the entire range of the public service at a time of national financial crisis. This was an over-arching consideration, as indeed is apparent from the enabling legislation. Accordingly, it is the Court's view that the decision in *Bank Mellat*, whilst it might be of great value in the context of a targeted decision which affects a relatively small category of persons, cannot be taken as offering a view of legal obligations different from that enunciated by Carney J. in the *Gorman* case. On the contrary, the underlying basic principle elaborated in the *Gorman* case is expressly acknowledged in the *Bank Mellat* case.

It follows a *fortiori*, that if a process of consultation is not mandated in the absence of that measure targeting a specific group, it can hardly be said that a particular form of consultation, such as that outlined by the United Kingdom Court of Appeal in *R. v. North and East Devon Health Authority, exparte Coughlan* [2000] 2 WLR 622, is imposed by way of restraint on the Minister.

Were that to be the case, a Minister or government, confronted with a national financial emergency, would in effect be tied hand and foot when trying to legislate in circumstances where disparate demands from different groups within the public service were being pursued – perhaps endlessly and without speedy conclusion – creating the kind of nightmare scenario which would have left the Government powerless to take the remedial action which the Government and its external masters of that time, the Troika, believed were necessary.

Nonetheless, does the fact that a consultation process was actually in train alter the situation in this case? The case advanced on behalf of the applicants has shifted and has now resolved itself into a contention that, once there was a process in being, as undoubtedly was the situation in the instant case, the applicants were entitled to expect that that process would continue to a conclusion, presumably one satisfactory to their members, before the Minister was free to introduce the regulations in question. I cannot accept this proposition when the views of the applicants had been articulated through various mediation and conciliation mechanisms from the summer of 2012 onwards and when the report of the Working Group dealing with the issue had been submitted to the respondent at the end of November, 2013. As already indicated, the report in itself was a means of consultation and communication and the evidence before the Court is that the Minister was briefed on its contents. If the applicants' submissions were to be correct, a process of consultation, which might have had the effect of unravelling the process across the entire public service, should have continued until the demands of the applicants, either to be altogether excluded from the process, or to receive special differentiated treatment, were realised. Such a fetter on the power of the Minister in the particular context and circumstances cannot, in the Courts view, be justified. Any such conclusion would be tantamount to fettering the Minister's power and duty to legislate in particularly difficult circumstances and could further be seen as a breach of the principles of separation of powers enumerated in Article 6 of the Constitution. I therefore hold against the applicants on this aspect of the case also.

(c) RELEVANT/IRRELEVANT CONSIDERATIONS

The further argument is advanced on behalf of the applicants that they are entitled to some form of relief because the respondent took irrelevant considerations into account on the one hand and failed to have regard to relevant considerations on the other.

The considerations stated to be irrelevant was the "intervention" by Mr. Shay Cody, who is the General Secretary of IMPACT and Chairman of the Public Services Committee of the ICTU. It is suggested on behalf of the applicants that his intervention was "highly inappropriate" and the Court was informed that the applicants took advice as to whether or not, by his communications to the respondent, Mr. Cody had been possibly guilty of a criminal offence. This allegation was not pursued, but nonetheless it was argued that the utterance of a threat by Mr. Cody that he would seek to ballot union members on industrial action if the applicants received special treatment was 'reprehensible and highly inappropriate' and not a consideration to which the Minister should have had regard. It emerged from the email discovery that Mr. Cody had also asserted that the whole process of negotiating the sick pay scheme across the public sector would "unravel" if An Garda Síochána were treated as a special case. It had also emerged that it would be highly embarrassing at a personal level for Mr. Cody - as he saw it - if such a course were to be adopted.

Discussion and Decision

In compliance with the request made by the applicants at the hearing the Court has conducted an exhaustive review of the emails which came to light on further discovery (as set out in the earlier part of this judgment). The applicants rely on these emails, particularly those created around the period from 3rd – 5th December, 2013 to suggest that something entirely improper, reprehensible and verging on the unlawful took place 'behind the backs' of the applicants such as to call into question the validity of any decision by the Minister either then or later to bring the applicants within the scope of the Regulations. It was even requested that Ms. McGirr be made available for a detailed cross-examination to elicit yet further information about the exact details of what happened over the days in question. The Court declined to grant this request, first, on the general principle that judicial review proceedings should not normally require oral evidence, but second, on the basis there was no true dispute of fact requiring to be resolved. The respondents do not deny that Mr. Cody did communicate these points of view and do not seek to challenge the historical narrative conveyed by the emails. Even taking the applicants case at its strongest, the Court is satisfied that the facts emerging from a study of those emails fails to have the implications suggested by the applicants. The Court is satisfied that in any democracy it is to be expected that a person such as Mr. Cody, charged as he is with obligations to represent the interests of his members, will communicate his concerns at a political level and the respondent is certainly entitled to take them into account, particularly if one consequence of treating An Garda Síochána differently would have been to unravel the entire process. Even if that was *the* most significant element going to the Minister's decision, the Court would still be of the view that any derogation or 'special treatment plan' which could have collapsed the negotiation process across the public unions was a very relevant and proper matter for the Minister to take into account. One can readily imagine the consequences if he had ignored these communications and ploughed on regardless when other public service groups were seeking similar preferential treatment.

Then it is alleged that the Minister failed to take into account relevant considerations. They included considerations that An Garda Síochána (a) engaged in shift work, (b) had no occupational injury scheme, and (c) the health concerns of those employed in An Garda Síochána.

However, I am satisfied that the first and last of these considerations were addressed by the Chief Medical Officer in his report furnished on the 5th December, 2013, and considered prior to the introduction of the Regulations. The Minister was also entitled to take into account the fact that An Garda Síochána, far from suffering from an inferior position with regard to sick pay, in fact enjoyed a regime which could be seen in the words of Peart J. on the making of the interlocutory application herein, as "more favourable" than that enjoyed by other public service employees. This will be more fully addressed under the next head of claim.

It is suggested that the respondents did not properly understand the Garda Síochána Sick Leave Scheme, but any mistakes or lack of clarity in this regard lay only in not realising that the Garda scheme was more favourable than others in that it contained only a twelve month look-back period during which prior absences would be taken into account, by comparison with the four year period applicable in the case of other public servants.

The Court fails to see any substance in this limb of the applicant's case which accordingly must also fail.

(d) WAS INCLUSION OF THE APPLICANTS WARRANTED BY REFERENCE TO THE CRITERIA ENUMERATED AT SECTION 58(B) OF THE ACT?

In this regard it is suggested on behalf of the applicants that the power and the exercise of that power entrusted to the Minister by the Regulations only arose on the 24th December, 2013. It was argued that the Minister failed to advert to the statutory factors in making the Regulations and thus acted *ultra vires* in making regulations which were in their substance a "fait accompli" well in advance of his statutory obligation to weigh particular and legislatively determined criteria.

In order to satisfy the requirements of the new section the Minister had a basic duty to acquaint himself with the information relevant to the task in hand. It was not suggested that the Minister was in possession of any material in addition to that in the possession of Ms. McGirr, and an extraordinary feature of the case appears to be that the Minister had no written material whatsoever before him when he made important decisions in relation to the inclusion of An Garda Síochána in the Regulations. Indeed, the Minister appears to have been unaware of the fact that the gardaí operated under a twelve month look-back scheme rather than a 48 month look-back period. Given the differing approaches to the estimates of how much money needed to be saved, the Minister should have made sufficient enquiries to resolve factual issues and should have carried out the necessary investigations in a thorough and balanced way. It is further suggested that the Minister failed to acknowledge or even appreciate the differentiation between the gardaí and other public servants regarding the fact that the gardaí work six days on, four days off. The Minister was further obliged to "consider the need to protect the health of public servants". The particular health difficulties which face members of An Garda Síochána were outlined in the Working Group report and it was of significance that the short email from the Chief Medical Officer came in after the Minister had made his decision to include An Garda Síochána in the application of the Regulations. He also failed to take into account that An Garda Síochána did not have an occupational injury scheme as such.

In response, it was argued that the new Regulations provide for a sick pay scheme for members of An Garda Síochána and thus by introducing the Regulations the Minister had regard to the need to protect the health of members of An Garda Síochána. Having reviewed the report of the Working Group, the Minister concluded that the Regulations provided an appropriate sick pay scheme for members of An Garda Síochána and in reaching that decision had regard to the fact that members of An Garda Síochána benefit from a sick scheme, a malicious injury scheme (under the Garda Síochána Compensation Acts) and from an injury on duty scheme (under the Garda Code). In this regard it should also be noted that the report of the Working Group was considered by the Chief Medical Officer as deposed to in the affidavit of Louise McGirr.

I am satisfied that there was no failure to have regard to the need to protect the health of members of An Garda Síochána as public servants. The discretion conferred upon the Minister is a particularly broad one. In essence, the Regulations themselves evidence the providing of protection of the health of public servants. Nothing in the legislation requires the Minister to provide that protection to a level demanded or asserted by An Garda Síochána.

I believe the applicants' submissions on this point are largely influenced by the fact that their representations were considered by the respondent prior to the date of enactment of the 2013 Act. An inference is thereby drawn that there has been a failure on the part of the respondent, when signing the Regulations on the 6th March, 2014, to have regard to the provisions of s.58B(4) of the 2004 Act, as amended.

However, it must be remembered at the time the Regulations were enacted in March 2014 the Minister was fully empowered by the 2004 Act as amended to enact regulations. Secondly, the obligation incumbent upon the Minister was, at the time of the making of the Regulations, to "have regard to" the factors set out at s.58B(4). There is no evidence that he failed to do so.

Further, there is no obligation imposed by s.58B(4) to consider or to have regard to representations made by public sector workers to be exempted from any envisaged scheme. The Oireachtas had already made the decision that An Garda Síochána could be covered by

any regulations enacted pursuant to the 2004 Act, as amended.

In this context, it is also alleged that any consideration given by the Minister under s.58B(4) was flawed or relied upon a material mistake of fact as to the true nature, substance and effect of the then existing sick-leave scheme.

However, it seems clear to the Court that the respondent did not consider that there was an objective justification to warrant permitting more favourable treatment for members of An Garda Síochána than other public workers. Insofar as shift work is concerned, it was pointed out by the CMO (who expressed his views on the 5th December, 2013) that shift work was not unique to the gardaí. Indeed it is common within the HSE (for example, nurses) and within the Civil Service (for example, prison officers).

Insofar as the applicants seek to place reliance on the fact that members of An Garda Síochána do not benefit from an occupational injuries scheme, it must first be noted that this issue was not relied upon by Mr. Stone in his affidavit grounding the proceedings. The Court is satisfied that, while members of An Garda Síochána do not benefit from a scheme strictly to be referred to as an occupational injury scheme, members of An Garda Síochána do benefit from an "injury on duty scheme" which, in essence, amounts to the same thing. The nature of this scheme has been fully addressed in the second affidavit of Michael McNamara sworn on the 23rd May, 2014. Inspector McNamara confirms that An Garda Síochána Code provides for a specific regime for dealing with sick absence due to an injury on duty, including accidents in the workplace. Where an injury is certified as an injury on duty pursuant to Ch. 11.37 of An Garda Síochána code, the member in question receives full pay during the period of non-effectiveness while there is a reasonable probability that the member will be able to resume duty. Periods of absence as a result of an injury on duty are treated separately from, and are not combined with, periods of ordinary illness for the purpose of calculating sick pay. Out of a total number of days sick leave in 2013 of 237,224, injury on duty days accounted for 38,249.

Insofar as there is any dispute as to the cost of sick leave to the Exchequer, the estimate offered by the respondent of €27 million in 2012 was extrapolated from the Garda Sick Absence Management System, an electronic recording system for capturing all periods of sickness within An Garda Síochána. Thus, the respondent was certainly entitled to take the view that a mechanism existed for providing benefits outside the ordinary sick pay regime.

In any event, the Court fails to see how any mistake of fact in this instance (such as the mistaken belief at one stage that An Garda Síochána were subject to a four year look-back, rather than a twelve month look-back) could be such as to render the Regulations irrational or capable of being set aside for that reason by the Court.

(e) INCOHERENCE OF THE REGULATIONS

Finally, it is suggested that Regulations 9 and/or 10 are legally incoherent, internally inconsistent and incapable of rational explanation. In this regard, the applicants claim that the proper interpretation of the Regulations leads to a result completely inconsistent with the respondent's replying affidavit and that the wording of the Regulations is a "legal nonsense". It is contended on behalf of the applicants that the Regulations do not achieve that which is set out in the explanatory note to the Regulations, but rather seem to permit an additional 183 days sick leave irrespective of whether a person has or has not had 183 days sick leave in the preceding four years. The Court was informed that the applicants' legal advisors had so concluded "after 40 readings of the Regulations".

Rather oddly, the second named applicant has sworn an affidavit expressing her concern based on the assumption that the Regulations in fact achieve that which the respondent intended. This is a rather strange state of affairs in that her contentions are at variance with those contended for by the first named applicants whose contention is that the Regulations confer eligibility to sick pay which is greatly in excess of that which the respondent intended.

In response, counsel for the respondent contends that the Regulations are not legally incoherent and that they do achieve their aim of reducing eligibility to absence due to sickness on full pay to a period of three months, followed by a further three month period on half pay. It is submitted that the Regulations clearly provide for a sick pay regime as set out in the explanatory note to the Regulations. Ms. Barrington points out that the applicants' interpretation of the Regulations (*i.e.*, one which is to the effect that the Regulations confer a far greater benefit on the applicants than that which the respondent intended) was never brought up by the GRA, or indeed any of the other public bodies who were consulted on the Regulations circulated in draft form in December, 2013 and January 2014 in advance of the proceedings.

Having carefully considered the Regulations and the arguments advanced on behalf of the applicants and the respondent, I am satisfied that the contentions of the respondent are correct and that their interpretation of the terms of the Regulations is the correct one. Such a view accords with basic principles of statutory construction which lean against absurdity and towards purposeful interpretation. That the applicants seek to advance a case of irrationality on the basis that the new Regulations provide greater benefits for the applicants than the respondent intended strikes me as being itself an irrational proposition. If successful, it would deprive Garda members of an entitlement which, however unintended, might be claimed arise under the Regulations as presently framed. I do not believe the first applicants enjoy *locus standi* to argue for a proposition which, if correct, would deprive individual members of the Garda Síochána of a benefit which, by accident or otherwise, they presently enjoy. The second applicant has at no stage sought to draw down any such disadvantage on herself

In any event it is not at all apparent to me how it could be contended that - even if the interpretation contended for by the applicants is correct - it could constitute a basis for invalidating the Regulation as a whole. It may, however, provide the basis for some different claim for an entitlement in different proceedings.

CONCLUSION

In conclusion, the Court must ask itself: what exactly was it hoped that these proceedings would achieve? It can no longer be tenable to say that what was sought was a total derogation from the Regulations (although that was the contention advanced by the Working Group). At the most, the applicants' case is for a limited form of procedural relief which would defer the application of the Regulations to one specific public service sector, namely An Garda Síochána, until a consultation process proceeded to a conclusion. But this in reality can only be taken as meaning that the applicants believe that the Minister's power to introduce Regulations, clearly mandated by statute, can be fettered indefinitely by the prolongation of a consultation process, designed solely to achieve an outcome satisfactory to the applicants. This basic proposition, in the view of the Court, is untenable and would be tantamount to the imposition of a serious limitation on the power to legislate.

While during the course of the hearing very considerable attention and emphasis was placed on the events around the 3rd – 5th December, 2013, the Court, as indicated in this judgment, does not believe that the information emerging from those emails, goes anywhere near supporting any contention that underhand or wrongful communications took place between the Secretary General of IMPACT and the respondent Minister. The reasons for forming that view have been fully elaborated in earlier parts of this judgment.

The Court however does view with considerable concern the lateness of the discovery of these email communications and will hear any application in respect of the costs of these proceedings which the applicants may wish to make following consideration of this decision and judgment.