

## THE HIGH COURT

## JUDICIAL REVIEW

[2016 No. 383 J.R.]

BETWEEN

ALAN HYNES

APPLICANT

AND

THE APPEALS TRIBUNAL OF THE  
CHARTERED ACCOUNTANCY REGULATORY BOARD

RESPONDENT

**JUDGMENT of Mr. Justice Meenan delivered on the 13th day of March, 2018**

**Background**

1. The applicant qualified as a chartered accountant in 1995 and worked for a number of years with various accountancy firms. At the material time, the applicant was a member of the Institute of Chartered Accountants in Ireland and subject to its disciplinary bye laws and Regulations.

2. The respondent is the Appeals Tribunal of the Chartered Accountants Regulatory Board, the body established by the Institute of Chartered Accountants to develop and maintain standards of professional conduct and to supervise the compliance of members, member firms, affiliates and students with these standards and to ensure the implementation of disciplinary bye laws.

3. In January 2009 the applicant was the subject of a series of complaints relating to his conduct in respect of certain investment schemes and to a number of judgments for debts given against him.

4. The complaints were heard by the Disciplinary Tribunal over a period of some fourteen hearing days between 4th February, 2014 and 31st October, 2014. On 2nd March, 2015 the Disciplinary Tribunal issued a lengthy report of its findings. This report upheld a number of serious complaints against the applicant.

5. On 27th March, 2015, arising from its report, the Disciplinary Tribunal ordered that the applicant be excluded from membership of the Institute of Chartered Accountants in Ireland, that he be severely reprimanded and he was ordered to pay €500,000 towards the costs of the disciplinary hearing. In its letter of 7th April, 2015, to the then solicitors for the applicant, the Chartered Accountants Regulatory Board, having set out the findings and orders of the Disciplinary Tribunal stated as follows:-

"Impact of an exclusion order

An order of exclusion from membership means that all licences, authorisations, registrations or practising rights granted to your client by the Institute in the regulated areas of audit, investment, business and insolvency (N.I.) are now revoked upon the exclusion.

Your client may not describe himself as a chartered accountant and he is no longer entitled to the rights and privileges attaching to membership. Under bye law 5.3, your client is required to deliver up his membership certificate to the head of professional conduct..."

6. This letter also informed the applicant of his right of appeal.

7. By letter dated 27th April, 2015 the respondent was informed of the applicant's intention to appeal the findings and orders of the Disciplinary Tribunal on various grounds stated therein.

**Case Management Meeting – 26th January, 2016**

8. The complaints against the applicant are detailed and complex. It was anticipated that the hearing of the appeal would require case management to ensure that it could be dealt with as fairly and as expeditiously as possible. To this end, a case management hearing took place on 26th January, 2016.

9. The applicant and "the Complaints Committee" (who were conducting the case against the applicant) were legally represented at this hearing. Following lengthy submissions from both parties, it was agreed that the appeal would be divided up into various modules. The first of these modules, the TAM Module, was fixed for hearing on 8th, 9th and 10th March, 2016. Other issues and modules of the appeal were to be dealt with at a later date.

10. In the course of the hearing of the application before this Court, a transcript of this case management meeting was made available.

**Application for an Adjournment Prior to 8th March, 2016**

11. The applicant was represented by solicitor and counsel at the hearing before the Disciplinary Tribunal. However, on 18th February, 2016, some three weeks before the date fixed for the commencement of the appeal on the TAM Module, the applicant was informed by his solicitor that he would no longer be representing him.

12. On 25th February, 2016 the applicant contacted and sought advice from Mr. Mark Walsh, of Kenny Stephenson Chapman Solicitors. On the same day, Mr. Walsh wrote to Mr. Brian Farron, B.L, counsel for the Complaints Committee, stating that he had been consulted by the applicant and that:-

"I would hope to meet with Mr. Hynes at some stage early next week. Depending on his instructions it may, however, be the case that I would require some time to prepare for the appeal and possibly instruct counsel. I am simply 'flagging'

same at this point should this office decide to come on record for Mr. Hynes..."

13. Counsel for the Complaints Committee replied to the effect that until Mr. Walsh came on record he was instructed to continue to communicate with the applicant directly. In response, Mr. Walsh reiterated his position and stated that he understood that there was a considerable volume of documentation concerning the appeal and that until he had sight of same it would be "imprudent" to formally come on record for the applicant.

14. On 2nd March, 2016, there were a number of emails:-

(i) Ms. Margaret Penny, Registrar to the respondent, wrote to Mr. Walsh informing him that the relevant papers were ready for collection and that any application for an adjournment must be in writing.

In the event, Mr. Walsh did collect the papers, which consisted of some nineteen lever arch folders, and was informed that the transcripts of the original hearing were not then available.

(ii) In a letter, sent by email to Ms. Penny, Mr. Walsh stated:-

"I confirm that if I do come on record for Mr. Hynes, there is no prospect of my being ready for the appeal listed on 8th, 9th and 10th March. I have, in fact, two court commitments next week namely a High Court case in Dublin on Monday and a Circuit Court case in Kilkenny on Wednesday. I confirm that I would require at least one month to prepare for any appeal herein.

I understand that an application for an adjournment of this appeal can be made via email and you might please take this letter as my formal application for an adjournment of same. I am, as previously advised in Dublin today and would have been happy to make the adjournment application in person should you have required same.

If an adjournment cannot be granted, then I will not be coming on record for Mr. Hynes..."

(iii) On receiving the application for an adjournment, counsel for the Complaints Committee sent a detailed submission to the respondent resisting the application to adjourn the hearing of the TAM Module. At the conclusion of the submission counsel stated:-

"7. If, however, notwithstanding all of the foregoing, the Tribunal were nonetheless minded to grant an adjournment, it is respectfully submitted that it should be for a limited time (such time to be arranged between the Tribunal and the parties in consultation) and that such an adjournment should be peremptory in that no further adjournment would be granted to Mr. Hynes and the appeal would proceed on the adjourned date..."

15. The respondent refused the adjournment. By letter dated 4th March, 2016, sent by email, Mr. Walsh wrote:-

"I did not, until Wednesday of this week, have any paperwork relating to this matter. As you know, I specifically travelled to Dublin on Wednesday to collect papers which run to some nineteen lever arch files. Only this morning, I have received the transcripts from the original hearing. I have advised you previously that I have prior court commitments today, Monday and Wednesday of next week. I am, therefore, not in a position to deal with this matter on Tuesday.

No prejudice accrues to the Appeal Tribunal by facilitating a short adjournment whereas Mr. Hynes would be extremely prejudiced.

You may take this email as renewing an application for an adjournment and will further renew same next Tuesday.

If the Tribunal persists with the hearing herein, Mr. Hynes will be forced to consider his legal position herein..."

16. There was a further exchange of emails on 7th March, 2016. In an email to Ms. Penny, Mr. Walsh noted that the respondent was not minded to accede to the application for an adjournment and that it was proposed to proceed on 8th March, 2016. Mr. Walsh stated that he had instructed counsel to attend at the hearing and renew the application for an adjournment.

### **Hearing on 8th March, 2016**

17. The court was furnished with a transcript of the hearing that took place on 8th March, 2016.

18. Ms. Hannah Lowry O'Reilly, B.L., appeared on behalf of the applicant to make a further adjournment application. Counsel for the applicant outlined the reasons for the adjournment, referring to the large volume of documentation and the lack of time that they had had in which to consider it.

19. Counsel for the Complaints Committee opposed the application. In the course of his submissions, he informed the respondent of the relevant Regulations and, referring to an email from Mr. Walsh, he stated:-

"The third paragraph of that email reads as follows;

'I am not, as you know, formally on record for Mr. Hynes in relation to this appeal. Had I been granted an adjournment, I would certainly have come on record on his behalf.'

Now, in my respectful submission that seems to be a change in position on the part of Mr. Walsh insofar as he is saying that, if there were an adjournment he would come on record, and I think, I discussed this with Ms. Lowry O'Reilly and she has confirmed that. So the position now is that if there were an adjournment, Mr. Walsh has actually agreed to come on record. So it's not as it appeared to be the position last week that there was uncertainty as to whether Mr. Hynes would ever be represented by Mr. Walsh or not..."

20. In my view, the following excerpts from the transcript are of particular relevance:-

"Chairperson: It also was indicated, I think, by Mr. Walsh that he, oh, yes, I think it has been indicated that.

*"Neither Mr. Hynes or I will be present tomorrow. As a courtesy to the Appeal Tribunal I have instructed counsel... 'yourself'... to attend on my behalf tomorrow and renew this application for an adjournment. Counsel will indicate all foregoing to the Tribunal and then she will withdraw from proceedings if the Tribunal elects to proceed with the matters."*

I suppose, you may not have instructions in relation to this but I think we are intrigued as to whether obviously today's scheduled hearing for today, tomorrow, for the next three days was in relation to the TAM Module only, whereas it is indicated that you have been, I think you have been instructed to withdraw from the proceedings. Is this just in relation to the TAM Module or is this in relation to the entire appeal?

Ms. Lowry O'Reilly: No, its just in relation to these three days Mr. Chairman, the TAM Module.

Chairperson: So just the TAM Module?

Ms. Lowry O'Reilly: Yes, I believe so.

.....

Mr. Farron: Yes, my interpretation, this module of the appeal relates to the TAM matter. My interpretation of Mr. Walsh's email of last night is that he is coming on record in relation to the appeal in total and not just in relation to the TAM Module but that the application for the adjournment obviously is specific to the TAM Module.

Ms. Lowry O'Reilly: Yes, I believe that's correct, Mr. Chairman.

Chairperson: Do you wish to clarify that?

.....

*(Following a short adjournment)*

Chairperson: Ms. O'Reilly?

Ms. Lowry O'Reilly: Yes, Mr. Chairman, I have confirmed that Mr. Walsh proposes to come on record for the entirety of the appeal and that the adjournment is just sought for the purposes of this TAM Module.

Chairperson: OK, are there any comments or...

Mr. Farron: That's what I had understood and that has been confirmed so you are correct in that."

21. Having heard the submissions, the respondent then adjourned to consider its decision.

### **The Decision of the Respondent**

22. In its decision, the respondent detailed the relevant events and correspondence. It was noted that at the case management hearing it was decided that the appeal would be heard in a modular fashion, with the first module being heard on 8th, 9th and 10th March, 2016.

23. Having referred to the submissions made by both the applicant and the Complaints Committee the respondent decided as follows:-

"24. Upon consideration of all of the above matters, the Tribunal refuse the application for an adjournment and further is satisfied that notice of this hearing was given to the appellant and therefore, in its absolute discretion, dismisses the appeal pursuant to Disciplinary Regulations 35.13.2."

24. In a further hearing on 9th March, 2016 the respondent affirmed the finding of the Disciplinary Tribunal, set out in its report of 2nd March, 2015, and directed the applicant to pay the sum of €150,000 towards the costs of the appeal.

### **Disciplinary Regulations**

25. Regulation 35.13 provides as follows:-

"If the Respondent or, as the case may be, the Appellant, does not attend the hearing then the Tribunal may, in its absolute discretion, either:

35.13.1 Proceed to hear the case in respect of the Formal Application in his, her or its absence, provided the Disciplinary Tribunal is satisfied that notice of that hearing was given;

35.13.2 Dismiss an appeal provided the Appeal Tribunal is satisfied that notice of that hearing was given to the Appellant; or

35.13.3 Adjourn the hearing to such other date, venue and time as the Tribunal may in its absolute discretion determine, and a Tribunal shall give written notice of its decision to the Case Presenter and the Respondent or, as the case may be, the Appellant."

### **Judicial Review Proceedings**

26. By order of the High Court, dated 20th June, 2016, Humphreys J. granted leave to the applicant to apply by way of an application for judicial review for a number of reliefs including:-

- (i.) An order of *certiorari* quashing the determination of the respondent, dated 8th March, 2016, to dismiss in its entirety the applicant's appeal;
- (ii.) A declaration that the appeal remains valid and subsisting;
- (iii.) An order of mandamus directing the respondent to reconvene to determine the appeal.

### Legal Authorities

27. In the course of submissions, the court was referred to a number of authorities. On the issue of the respondent's obligations when considering the application such as one for an adjournment, I refer to *Kiely v. Minister for Social Welfare* [1977] IR 267, where Henchy J. stated at p. 281:-

"... This Court has held, in cases such as *In re Haughey*, that Article 40, s. 3, of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally—to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like—but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently-cited dictum of Tucker L.J. in *Russell v. Duke of Norfolk* 20, 'There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'"

28. In *C.G. v. the Appeal Commissioners* [2005] 2 IR 472, Finlay Geoghegan J. stated, at p. 477:-

"Counsel for the applicant drew the court's attention to the agreement expressed by Blayney J. in *Gallagher v. Revenue Commissioners* [1991] 2 I.R. 370 with Barron J. in *Flanagan v. U.C.D.* [1988] I.R. 724 where at p. 730 he stated:-

'Once a lay tribunal is required to act judicially, the procedures to be adopted by it must be reasonable having regard to this requirement and the consequences for the person concerned in the event of an adverse decision. Accordingly, procedures which might afford a sufficient protection to the person concerned in one case, and so be acceptable, might not be acceptable in a more serious case.'

The obligation to act judicially must similarly apply to any decision to be made as to the procedure to be followed. In this case the matter at issue was the procedure to be followed in the sense of the timing of the holding of the appeal. The assertion that the holding of an appeal at a particular time posed a serious risk of an unfair trial or of an interference with the applicant's privilege against self incrimination required consideration of that issue by the respondent before it could determine that it should proceed with the appeal.

I have concluded that the respondent did not consider the submissions made on behalf of the applicant on these issues in reaching its decision that the appeal should go ahead..."

29. In its decision refusing the applicant an adjournment, the respondent made specific reference to the Regulations, quoted above, wherein it states that the Tribunal, when dealing with an application, can reach its decision "in its absolute discretion". The exercise of "absolute discretion" was considered by the Supreme Court in *Mallak v. the Minister for Justice, Equality and Law Reform* [2012] 3 IR 297, Fennelly J. stated at p. 312:-

"[44] Where the decision being made is one which depends on the exercise of the 'absolute discretion', of the decision maker, according to the first argument, it follows automatically from the very language used that no reason need be given. As it was put by the High Court Judge in the present case, 'quite literally... the Minister does not need to have or to give any reason for refusing an application for a certificate'. But there is a difference between having a reason and disclosing it.

[45] It cannot be correct to say that the 'absolute discretion' conferred on the Minister necessarily implies or implies at all that he is not obliged to have a reason. That would be the very definition of an arbitrary power. Leaving aside entirely the question of the disclosure of reasons to an affected person, it seems to me axiomatic that the rule of law requires all decision makers to act fairly and rationally, meaning that they must not make decisions without reasons. As Henchy J. put it, in a celebrated passage in his judgment in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642, at p. 658, 'the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, *inter alia*, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.'"

### Application of Legal Principles

30. It is clear from these authorities that, notwithstanding that under Regulation 35.13 the Tribunal has the authority to make a decision in its "absolute discretion", the respondent was obliged to act judicially and not act "in such a way as to imperil a fair hearing or a fair result", as *per* Henchy J. in *Kiely*. In particular, in refusing the adjournment and dismissing the appeal the respondent ought to have had regard to the seriousness of the consequences that this decision would have for the applicant.

31. In dealing with the application for an adjournment the respondent should, in my view, have balanced the rights of the parties involved. The applicant sought to be legally represented, which necessarily entails the lawyers involved having sufficient time to familiarise themselves with the documentation and issues involved. As against this, the respondent was entitled to deal with the appeal expeditiously. This right has to be seen in the context of a duty on the part of the respondents to uphold the professional standards of, and maintain public confidence in, the profession.

32. There does not appear to have been any such balancing exercise carried out. Although the respondent was aware of the possibility of an adjournment being given on a preemptory basis it is not at all clear that this was considered to any extent.

33. Further, and surprisingly, the respondent not only refused to grant the adjournment but also decided to dismiss the appeal in its entirety, despite there being no such application before it. It is clear from the transcript set out at para. 20 above that the adjournment was only being sought for the TAM module. The other modules had not been listed for hearing at that stage. If, at the hearing, the respondent was minded to dismiss the appeal in its entirety then submissions should have been sought from the parties on this. This did not happen.

34. It was submitted by the respondent that Regulation 35.13 refers to "an appeal", so that as the applicant was not in attendance but on notice and the adjournment was refused it was entitled to dismiss the appeal in its entirety. Firstly, the applicant and the Complaints Committee had agreed to divide up the appeal into a number of modules to be dealt with separately. Secondly, it could hardly be suggested that if the appeal had proceeded and the applicant was successful in some modules but not others that it would follow that the entirety of the appeal would either be allowed or not allowed.

35. By reason of the forgoing, the applicant is entitled to an order quashing the decision of the respondent dismissing, in its entirety, the applicant's appeal. It should be noted that these are judicial review proceedings and thus concerned with the decision making process rather than the decision itself. It follows from this that it is not open to this Court to substitute its decision for that of the respondent.

36. I will hear the parties as to the various consequential orders that arise.