

THE HIGH COURT

[2012 No. 885JR]

BETWEEN/

PATRICK WALSH

APPLICANT

AND

JOSEPH REVINGTON, ANTHONY NOLAN AND GARDA PATRICK O'SULLIVAN AND THE GARDA COMMISSIONER

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 25th July, 2013

1. Certain disputed events which are said to have taken place on the fringes of a popular music concert at Stradbally, Co. Laois on Sunday, 2nd September, 2007, have given rise to a complex series of disciplinary proceedings and judicial review proceedings, of which this judgment is but the latest. The matter arises in the following way.

2. The applicant is a member of An Garda Síochána who at the time of the incident in question was attached to the information technology unit of the force. According to his version of events, he had attended the three day music festival and had camped at the site for the weekend. On the afternoon of 2nd September he left the concert venue to watch the All-Ireland Hurling final in a licensed premises. After the match was finished he returned to concert site at around 6pm.

3. The concert promoters had employed a specialist security company to carry out searches for offensive weapons and controlled drugs. These searches had just been stepped up because of a drugs-related death at the concert on the previous day. At all events, it is not disputed but that as Garda Walsh sought to re-enter the concert venue an altercation took place between him and one of the security staff. Garda Walsh's version of events is that he reacted angrily to a stranger putting his hand in his (Garda Walsh's) pocket. The security staff maintained that Garda Walsh was asked to submit to a search, but that when one of the staff felt something in Garda Walsh's pocket he squirmed and struggled and endeavoured to avoid the search. There is a further suggestion that the material in the pocket was thrown away before Garda Walsh could in fact be searched.

4. At that point three other uniformed Gardaí led by a Sergeant Sylvester Murphy went to the scene. It seems that it took several minutes before calm was restored. Garda Walsh was then brought to a designated search tent where a search under s. 23 of the Misuse of Drugs Acts 1977-1984, then took place. This search had with negative results. It was further alleged that Garda Walsh used abusive language to a superior officer and that he informed Sergeant Murphy that he was a Garda with a view to avoiding the search.

5. As a result of these events Garda Walsh faced both disciplinary proceedings and a criminal charge. So far as the latter is concerned, Garda Walsh was charged under s. 3 of the Misuse of Drugs Act 1977 ("the 1977 Act") with possession of a controlled drug, namely, amphetamine. That charge was dismissed by the District Court following a full hearing on 26th November, 2008.

6. The Garda Commissioner had already however established a Board of Inquiry under Article 24 of the Garda Síochána (Discipline) Regulations 2007 (S.I. No. 214 of 2007) ("the 2007 Regulations") to investigate four separate charges of breach of discipline. The Board was originally charged with investigating four separate charges, namely:-

- (i) discreditable conduct, namely, possession of a controlled drug;
- (ii) discreditable conduct, namely, failure to submit to a legal drugs search;
- (iii) improper practice, in that Garda Walsh identified himself as an off-duty member of An Garda Síochána when required to submit to a drugs search for the purposes of private advantage;
- (iv) misconduct towards a superior officer in that Garda Walsh used abusive and insulting language to Sergeant Murphy.

7. Following the dismissal of the criminal prosecution the Garda Commissioner directed that the Board of Inquiry should not now consider the first charge of misconduct. The applicant then sought an order of prohibition restraining the hearing of the remaining disciplinary charges on the ground that their continuation would in effect be to duplicate the criminal charge and would be oppressive. These contentions were rejected by Kearns P. in a judgment delivered on 5th July, 2010: see *Walsh v. Garda Commissioner* [2010] IEHC 257.

8. In the wake of this decision the Board of Inquiry which had then been convened subsequently sat to investigate the three outstanding disciplinary charges. By decision dated the 30th September, 2010, the Board concluded that he was guilty of discreditable conduct in that he had failed to submit to a legal drugs search. In this regard the Board concluded that Garda Walsh had submitted to the test administered by the Gardaí only having struggled with Sergeant Murphy and having been overpowered by him. The Board did not find it necessary to determine whether the search organised by the security guards assigned by the concert promoters constituted a legal search for this purpose.

9. The Board also found that the fact that Garda Walsh had identified himself as an off-duty member of An Garda Síochána when required to submit himself to a drugs search under s. 23 of the 1977 Act amounted to improper practice, in that it amounted to an endeavour to use his status as a member of the force for private advantage. The Board did not, however, accept that Garda Walsh had used insulting or abusive language in his dealings with Sergeant Murphy. In respect, however, of the two counts on which Garda Walsh had been found guilty, the Board recommended that he be required to retire or resign as an alternative to dismissal.

10. Garda Walsh successfully appealed these findings to the Appeals Board established pursuant to Article 34 of the 2007 Regulations.

That Board recommended that these adverse findings be set aside and that the matter be determined afresh by a differently constituted Board of Inquiry.

11. A new Board of Inquiry was then established on 2nd December, 2011. The new Board determined that Garda Walsh was guilty of two breaches of discipline, namely, discreditable conduct and improper conduct, but rejected the third count. The Board recommended that Garda Walsh be dismissed in respect of breach No. 1 (discreditable conduct) and breach No.2 (improper practice). The Garda Commissioner decided to accept this recommendation and by decision dated 26th March, 2012, it was ordered that the applicant be dismissed from the force with effect from 16th April, 2012.

12. Garda Walsh appealed against this decision by a notice of appeal dated 18th April, 2012. It is at this point that we come to the heart of the issues at stake in these proceedings, since the present judicial review proceedings are essentially directed at the legality of the decision of the Appeals Board and the response of the Garda authorities to that decision.

The decision of the Appeals Board

13. In its decision of 31st July, 2012, the Appeals Board affirmed the conclusion in respect of the discreditable conduct, but allowed the appeal in respect of the count of improper practice. The reasons given by the Board were in the following terms:-

"The Appeals Board affirms the decision of the Board of Inquiry in respect of

(1) Discreditable Conduct on the grounds that the evidence before the Board of Inquiry was credible and consistent.

The Appeals Board quashes the decision of the Board of Inquiry in respect of

(2) Improper Practice on the grounds that while Garda Walsh did identify himself as a Garda there was no evidence before the Board of Inquiry to indicate that he improperly used his position as a member of An Garda Síochána for his private advantage.

The Appeals Board recommends to the Commissioner that the member be dismissed in respect of the breach at (1) Discreditable Conduct on the grounds that such a penalty is fair and proportionate in all the circumstances."

14. I should note at this juncture that Garda Walsh has also challenged the adequacy of the reasons given by the Appeals Board. In view, however, of the conclusions I am about to reach in relation to the vires of the Board's decision it is unnecessary to express any views in relation to this question.

The Vires of the Appeals Board's decision

15. Where there is (as here) an appeal against the determination of a Board of Inquiry, Article 37 of the 2007 Regulations provides for four possible options. It may thus:

"(a) affirm the determination and either –

(i) affirm the decision of the Commissioner in relation to the disciplinary action to be taken or recommended, or

(ii) substitute another disciplinary action of a less serious nature;

(b) quash the determination and the Commissioner's decision;

(c) if –

(i) it decides that the member concerned has not committed the breach of discipline alleged but has committed another less serious breach of discipline,

(ii) if it is satisfied that such a decision would not be unfair to the member concerned having regard to the fact that the other breach is not the breach alleged, quash the determination and decision and substitute another disciplinary action in respect of that breach, or

(d) quash the determination and decision and decide that in the circumstances of the particular case another Board of Inquiry should be established by the Commissioner to determine whether the member committed a breach of discipline."

16. The 2007 Regulations do not provide for any special definition of the word "determination". In the absence of any such definition I would interpret this word as referring simply to the decision of the Board of Inquiry which was under appeal. What, then, was that decision? It is hard to avoid the conclusion that the particular decision in question was a composite one consisting of two individual adverse findings of discreditable conduct and improper practice and which had recommended dismissal in respect of each individual breach of discipline. After all, the formal order of the Board of Inquiry (which was headed "Result of Inquiry") was in the following terms:-

"Recommendation of Board of Inquiry;

Having heard on oath the facts adduced the Board of Inquiry has determined:

...That the member concerned is in breach of the following breaches of discipline as alleged:

Breach No. 1 – Discreditable Conduct

Breach No. 2 – Improper Practice."

17. All of this coerces one to the conclusion that there was *one single determination* of the Board of Inquiry in respect of *two separate breaches* of discipline. A central feature of Garda Walsh's case was that the Board had acted *ultra vires* in purporting

partially to allow the appeal while also recommending his dismissal in respect of the discreditable conduct ground.

18. The Board is, of course, a creature of statute (or, perhaps, more strictly, a creature of statutory instrument). It thus enjoys only those powers with which it has been expressly vested or powers which are necessarily to be implied from those powers which have been expressly granted: see, *e.g.*, the Supreme Court's decision in *Keane v. An Bord Pleanála* [1997] 1 I.R. 184. Here the specific and individual powers of the Board have been delineated by Article 34 of the 2007 Regulations. The very fact that these powers have been so carefully enumerated in this fashion must be taken tacitly to exclude the possibility of any new substantive powers of this nature being judicially implied.

19. Yet it must also be acknowledged that in at least two specific respects the Appeals Board purported to take action which was not expressly authorised by Article 34. Given that the decision under appeal was a "determination" of the Board of Inquiry, the Appeals Board could have either affirmed or quashed the determination in question. The Appeals Board has, however, been given no power to affirm one part of the determination on the one hand and to quash another part of that determination on the other. Nor has the Appeals Board been given the power to recommend that the applicant be dismissed in respect of that part of the determination (*i.e.*, the discreditable conduct charge) which the Board purported to affirm.

Conclusions

20. In my view, these infirmities, relating as they do to central features of the Appeal Board's decision, are fatal to its validity. Perhaps the real problem which the very specific facts of this case have served to highlight is that the 2007 Regulations do not contemplate or otherwise make provision for the specific problem which arose in the present case, namely, where two separate breaches of discipline are contained in one single determination and where it is proposed to allow an appeal in respect of one those single breaches of discipline, whether the Appeals Board should have express power to address this issue. Be this as it may, my role is simply directly to apply the law as I currently find it.

21. On that basis, accordingly, it is plain that the decision of the Appeals Board cannot stand. For the reasons already stated, it is equally plain that the Board fell into error and acted *ultra vires* in these two crucial respects.

22. While the applicant is obviously entitled to an order of certiorari quashing the decision of the Board, the matter will now be re-entered for further argument on the question of whether it would also be appropriate to make an order remitting the matter to the Appeals Board in accordance with O. 84, r. 27(4).