

THE HIGH COURT

2006 1312 JR

BETWEEN

JOHN KNEAFSEY

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of O'Neill J. delivered the 20th day of February, 2009

In this case, the applicant, who is a Sergeant in An Garda Síochána, stationed now in Tullamore, County Offaly, was given leave of this court (Peart J.) on 6th November, 2006, to seek *inter alia* an order of prohibition restraining the respondent from taking any further steps in a disciplinary enquiry initiated against the applicant and on which a hearing was arranged to take place on 7th November, 2006.

The facts relevant to this matter and as set out in the affidavits are as follows:

On 6th August, 2001, the applicant was then stationed at Clara in County Offaly. On that date, a Sean O'Brien called on him in the garda station and informed the applicant that his dog had been poisoned again. He had mentioned a similar complaint some time before. Mr. O'Brien also said that the dog would be okay and he indicated that the dog had bitten him and he showed the applicant what the applicant described as a "*slight mark*" on his hand. He said he had been to the doctor who told him he would be alright.

Later that day, the applicant was informed by Garda Pat Cleary that Mr. O'Brien had been taken to hospital and was seriously ill.

The applicant rushed to the hospital. Members of Mr. O'Brien's family suggested that he had been poisoned and indicated the person they suspected as the culprit.

The applicant and Garda Cleary went immediately to this person and told him of Mr. O'Brien's state of health and enquired, as a matter of urgency, as to the type of poison (if any) that had been laid. This person directed the gardaí to another individual to whom they went immediately and upon enquiry with this person, he immediately handed over a small container which he said contained strychnine, together with a sweetener.

The applicant brought these straight away to the hospital and told the doctor what they had discovered.

The following day, the applicant made enquiries of his brother, a research chemist, and with the Forensic Science Laboratory and the Poisons Unit of St. James's Hospital to ascertain how this poison would work. From these enquiries, he learned that it was not possible for Mr. O'Brien to be poisoned in the manner alleged and, secondly, if he was poisoned in this way, it would be detectable in his system through a blood test. The applicant was advised to seek a medical report on Mr. O'Brien as part of the investigation.

The applicant called on a number of times when Mr. O'Brien was in hospital but could not speak to him because he was sedated. He spoke at different stages with nursing staff and, in particular, was informed by Pamela O'Brien, who is in charge of nursing staff on night duty, that Mr. O'Brien was "*only acting*" and that she had seen him before.

The applicant informed Superintendent Wheeler of the incident on 7th August, 2001, who advised the applicant to be cautious in respect of Mr. O'Brien.

After Mr. O'Brien left hospital, he came to the garda station and made a written statement. When he had done that, the applicant asked him to provide a medical report. He said he would but did not do so and failed to respond to one or two further requests to produce a medical report. In fact, a medical report was never furnished by Mr. O'Brien.

The applicant was of the view that he needed a medical report to mount a prosecution against the persons alleged to have poisoned Mr. O'Brien. In light of the information which the applicant had gathered from his enquiries and from hospital staff, he was of the view that Mr. O'Brien's claim, or allegation, that he had been poisoned, was not genuine.

At one stage, he considered issuing summonses against all the parties involved, namely, against Mr. O'Brien for allowing his dogs to wander and against the other two persons for laying poison.

The applicant did, on 3rd May, 2002, cause summonses to issue against all three persons. Against Mr. O'Brien, the offence alleged was permitting his dog, being unaccompanied, not to be under effective control contrary to sections 9 and 27 of the Control of Dogs Act 1986. Against the other two, the offence alleged was wilfully and without any reasonable cause or excuse administering a poison, namely, strychnine, to a dog the property of Sean O'Brien, contrary to s. 1 of the Protection of Animals Act 1911. The applicant decided not to serve the summonses or to proceed further on them as he had decided to deal with the matter by cautioning each of the parties and he advised Mr. O'Brien of this accordingly.

Nothing at all happened thereafter until 25th March, 2005, when Mr. O'Brien called, by appointment, to see Superintendent Wheeler at Tullamore Garda Station and complained to him to the effect that his dog had been poisoned

and that he had received secondary poisoning and was hospitalised. He complained that the applicant had retrieved the poison and knew the identity of the culprits but had not initiated a prosecution. Mr. O'Brien was very upset at this outcome.

Superintendent Wheeler informed Mr. O'Brien that he would get the applicant to liaise with him and in the meantime, he would seek sight of the investigation file. At that stage, Mr. O'Brien did not want to make an official complaint against the applicant.

Superintendent Wheeler then wrote to the applicant asking for a copy of the investigation file and requesting the applicant to liaise with Mr. O'Brien. By 3rd May, 2005, Superintendent Wheeler had not received a reply from the applicant so he caused a reminder to be sent to the applicant. This reminder appears to have been generated or "activated" presumably by a computer. Further, similar reminders issued on 10th May, 2005, 17th May, 2005, 1st June, 2005, 8th June, 2005, 15th June, 2005, 22nd June, 2005, 27th June, 2005, 4th July, 2005, 11th July, 2005, 18th July, 2005, 25th July, 2005, 1st August, 2005, 9th August, 2005, 16th August, 2005 and 23rd August, 2005. No reply was received from the applicant.

The evidence of the applicant in these proceedings is that Superintendent Wheeler was at all times, namely, in August of 2001 and thereafter and later after March 2005, fully aware of the state of the investigation and of the reasons why the applicant had not continued to prosecute the matter, and of the state of the investigation file.

Superintendent Wheeler met Mr. O'Brien again on 16th June, 2005. At this meeting, Mr. O'Brien confirmed that he had met the applicant but that he was not satisfied with the outcome of that meeting. Superintendent Wheeler told Mr. O'Brien that he had not received the investigation file and that he advised Mr. O'Brien that he could make a complaint against the applicant under the Garda Complaints Act or under the Garda Disciplinary Regulations.

By letter of 12th August, 2005, addressed to Superintendent Wheeler, Mr. O'Brien made a formal complaint against the applicant. This letter was received by Superintendent Wheeler on 17th August, 2005.

On 18th August, 2005, Inspector Liam Delaney was appointed as Investigating Officer under Regulation 8(2) of the Garda Síochána (Discipline) Regulations 1989, S.I. No. 94 of 1989 (the Regulations) to investigate Mr. O'Brien's complaint. Inspector Delaney informed the applicant of the investigation by sending him Form B33A.

In September 2005, Inspector Delaney took a statement from Mr. O'Brien. In November 2005, he took statements from the other two parties. He took a statement from Superintendent Wheeler on 10th January, 2006, and, finally, took a statement from the applicant on 10th May, 2006.

On 22nd June, 2006, in Form B30, the applicant was notified that two charges for breach of discipline were laid against him, namely:

1. NEGLIGENCE OF DUTY, that is to say, that you received a complaint on 6th August, 2001, from Sean O'Brien of The Island, Ballycumber, County Offaly, that his dog had been poisoned. As a result of this, Sean O'Brien became hospitalised in Tullamore. You neglected to fully and properly investigate these complaints and submit your file to your District Officer for direction within six months which was your duty to do.
2. DISOBEDIENCE OF ORDER, that is to say, you wilfully disobeyed a lawful order from Superintendent Peter Wheeler, Tullamore, as your District Officer in writing to answer correspondence in relation to the complaint of Sean O'Brien, The Island, Ballycumber, County Offaly, about the poisoning of his dog, sent to you on 3rd May, 2005, and reminder sent to you on 10th May, 2005, 17th May, 2005, 25th May, 2005, 1st June, 2005, 8th June, 2005, 15th June, 2005, 22nd June, 2005, 27th June, 2005, 4th July, 2005, 11th July, 2005, 18th July, 2005, 25th July, 2005, 1st August, 2005, 2nd August, 2005, 9th August, 2005, 16th August, 2005 and 23rd August, 2005, as Sergeant in charge of Clara Garda Station.

On 8th September, 2006, the applicant was notified of a hearing of these charges for breach of discipline to take place on 7th November, 2006. On 6th November, 2006, the applicant obtained the leave of this court to commence these judicial review proceedings.

The ground upon which the applicant seeks relief in these proceedings is essentially that the investigation carried out by Inspector Delaney failed to comply with the standard of urgency and expedition which is a mandatory requirement of Regulation 8 of the Regulations and that the Regulations are to be strictly construed and applied, the necessary consequence of which is that the enquiry must be stopped. In addition, the applicant submits that the delay has caused him prejudice in that an important witness has died, namely, a member of the nursing staff in Tullamore Hospital, memories have faded and relevant papers and correspondence have been lost.

Regulation 8 reads as follows:

"Investigation

8. (1) Subject to Regulation 7, where it appears that there may have been a breach of discipline, the matter shall be investigated as soon as practical by a member not below the rank of Inspector (in these Regulations referred to as an Investigating Officer).

(2) An Investigating Officer shall be appointed by a member (in these Regulations referred to as an Appointing Officer) who is not below the rank of Chief Superintendent or who is a Superintendent assigned to discharge the duties of a Chief Superintendent.

9. (1) As soon as practicable after his appointment, an Investigating Officer shall inform the member concerned, in writing -

(a) that it appears that the member concerned may have been in breach of discipline and,

(b) that he is investigating the matter.

(2) Where it appears to an Investigating Officer that an alleged breach of discipline may constitute an offence, the law and practice applicable to the investigation of offences shall apply in relation to the investigation.

(3) An Investigating Officer shall carry out the investigation either as he thinks fit, alone or with the assistance of such other members as he may determine.

Report of Investigation

10. (1) Upon completion of an investigation under Regulation 8, the Investigating Officer shall, as soon as may be, submit to the Appointing Officer, written reports of the investigation, together with copies of any statements made.

(2) Upon receipt of a report under this Regulation, the Appointing Officer shall, without avoidable delay:

(a) decide whether or not to continue the proceedings under these Regulations, and

(b) if he decides to continue the proceedings, cause to be entered on a form (in these Regulations referred to as a Discipline Form) such particulars of the breach of discipline alleged as will leave the member concerned in no doubt as to the precise nature of it.

(3) A Discipline Form shall be in such form as the Commissioner shall, from time to time, approve . . .

14. After the return of the Discipline Form (or where the form is not returned), the expiry of the period of fourteen days referred to in Regulation 12(1)(d), the Appointing Officer shall, subject to Regulation 13, forward to the Commissioner without avoidable delay, all the documents in his possession relating to the breach of discipline alleged and the Commissioner (unless he decides not to continue the proceedings) calls an enquiry to be held on a date specified by him in relation to the breach of discipline alleged. . ."

In *McNeill v. the Commission of An Garda Síochána* [1997] 1 I.R. 4679 at p. 482, Hamilton C.J. had the following to say in respect of these Regulations:

"The use in the Regulations of the phrases 'as soon as practicable', 'as soon as may be' and 'without avoidable delay', clearly indicate the intention of the Minister for Justice, as expressed in the said Regulations, that the alleged breaches of discipline by a member of An Garda Síochána be dealt with expeditiously and as a matter of urgency . . ."

Further on in his judgment, Hamilton C.J. says the following at p.484:

"The fundamental question for this court is whether the procedures provided for in the said Regulations were complied with with regard to the investigation.

Was the investigation carried out by the Investigating Officer, in this case, as soon as practicable after it appeared there may have been a breach of discipline by the applicant . . .

The obligation placed on the garda authorities by Reg. 8(1) of the Discipline Regulations to investigate alleged breaches of discipline as soon as practicable is mandatory.

In view of the failure by the garda authorities to discharge this obligation, I am further satisfied that all steps taken since the presentation of the written report of the Investigating Officer are void and of no effect."

In the same case at p. 485, O'Flaherty J. said the following:

"I cannot believe that the preparation of the evidence to ground charges in this case would have been a very difficult task. Disciplinary regulations require that the matter should proceed with a degree of expedition at every stage and for good reason; members of the Garda Síochána have special privileges as well as special responsibilities not shared by the ordinary citizens: therefore, if suspicion descends on a member of the Garda Síochána it is important from a public policy point of view that the matter should be investigated and dealt with quickly. The air should be cleared one way or the other. I am talking of matters of substance, needless to say, not with every idle word that may be uttered in a locality from time to time. Similarly, from the perspective of members of the Garda Síochána, they are entitled to hold their heads up in the community in which they serve; they are entitled to expect that if a charge is contemplated that it should be brought forward with a degree of expedition and that they should be given a chance to meet it . . .

The matters in debate in this case date back to the summer 1989, seven years ago. This is too long a lapse of time and while I appreciate that the court proceedings have contributed to the delay, in particular, the initial lapse of time was unwarranted. A timetable that accords with the requirements of the Regulations would have to lay down a much shorter time span: ideally, a matter of weeks or months at the most."

In *Gibbons v. Commissioner of An Garda Síochána* [2007] IEHC 266, Edwards J. in his judgment delivered 30th July, 2007, said the following:

"It then falls to me to consider what the consequences of this delay in terms of whether or not I ought to grant

the applicant the relief that he seeks in these proceedings. While I was initially sympathetic to the arguments being advanced on behalf of the respondent, I cannot ignore the decision of the Supreme Court in the case of McNeill v. The Commissioner of An Garda Síochána. Even though the McNeill case predates the recent jurisprudence on prosecutorial delay, it is clear in its terms and it is directly in point. Moreover, it was stated expressly in McNeill by Hamilton C.J. that the court was not concerned with the principles established with regard to the effect of delay on either civil or criminal proceedings. The applicant has very strongly urged upon me that the Garda Síochána (Discipline) Regulations 1989, embrace a self-contained and discrete statutory quote and that it must be strictly interpreted. I have to agree with counsel for the applicant. In the circumstances, therefore, I find that the respondent did not comply with the Regulations and, in particular, that there was a breach of Article 8 of the Regulations . . ."

The following passage from the judgment of Geoghegan J. in *McCarthy and Denny v. An Garda Síochána Complaints Tribunal* [2002] 2 ILRM, has a relevance to the facts of this case even though the issue in that case was a complaint to the Garda Complaints Tribunal:

"First of all, the appellants argue in a general way that the Oireachtas envisaged that the investigation and prosecution of complaints members of An Garda Síochána were to be dealt with as expeditiously as possible. There is not doubt about that, but in interpreting the statutory provisions it must be borne in mind that the Oireachtas clearly intended expedition, both in the interests of the complainant and in the interests of members complained about. It could never have been intended that if there was some small delay in the procedures and possibly in the delay engineered by the garda authorities themselves, the matter could never be processed further as this would be grossly unfair to a complainant not in any way responsible for the delay. On the other hand, a disciplinary complaint against a member of the force is a serious matter and under any reasonable interpretation of the legislation, it would have been intended that the expedition was also in the interests of those members. Accordingly, a reasonable balance must be struck between what could be conflicting interests in determining whether, in any given circumstances, there was a delay which offended the time provisions in the Act, irrespective of whether the time provisions are to be regarded as mandatory or directory."

Finally, the following passage from the judgment of Budd J. in the matter of *The Equitable Insurance Company Ltd. and In the Matter of the Companies Acts 1908 to 1959 - John Butler, Applicant* [1970] 1 I.R. 45 at p. 55 is relevant to the meaning of concepts such as "as soon as is practicable":

"In accordance with the views I have just expressed, the words in the condition 'as soon as practicable' should be construed in the sense of 'capable of being . . . carried out in action . . . feasible' . . ."

Thus, it is apparent from the foregoing, that a very heavy obligation of expedition is placed on the respondent to ensure that the investigative procedures and thereafter the enquiry procedure provided for in the Regulations are carried out with expedition if not urgency. This, as was said by Hamilton C.J., is not directory it is a mandatory obligation, and because the Regulations are a self-contained statutory code, the failure to fulfil the obligation leads inevitably to an illegality which requires that the enquiry be halted.

Thus, the conduct of the investigation must be viewed against this demanding statutory background.

The first issue of fact to be confronted is when the procedures set out in the Regulations should have been activated thus commencing the process. Regulation 8(1) says simply, "where it appears there may have been a breach of discipline". In this case, matters were brought to the attention of Superintendent Wheeler on 25th March, 2003, which should have alerted him at that point that there may have been a breach of discipline. Needless to say, some reasonable time and opportunity had to be afforded to all concerned, namely, to Superintendent Wheeler to make enquiries of the applicant as to the subject matter of Mr. O'Brien's complaint and to the applicant to respond. Having regard to the proximity between Superintendent Wheeler and the applicant, I am inclined to the view that any time taken at this stage would be quite short and should not be more than a matter of a few weeks. Whilst it would appear that the response of Superintendent Wheeler when faced with the situation was to embark upon formal correspondence with the applicant, one would have thought that perhaps a less formal verbal approach might have been appropriate at that stage in order to attempt to get to the bottom of the matter. In any event, I am quite satisfied that only a very short period of time should have been permitted to elapse before the invocation of the procedures set out in the Regulations. Indeed, it could be observed it was the very formal approach adopted by Superintendent Wheeler that of itself generated the second allegation of breach of discipline. In the event, no action was taken to initiate the investigation procedure until 18th August, 2005. In my view, the elapse of time from the making of the complaint by Mr. O'Brien at the end of March to then was, in all the circumstances, grossly excessive and breached the mandatory obligation in Regulation 8(1).

Thereafter, the investigation proceeded at what may be described as a leisurely pace. In September 2005, a statement was taken from the complainant. Nothing happened until November 2005, when statements were taken from the other two parties. Then nothing happened until January 2006, when a statement was taken from Superintendent Wheeler. At this point, an attempt was made to take a statement from the applicant but because of a complaint of illness by him, that was not done. The statement was not taken from the applicant until May of 2006. The respondent submits that the blame for this delay lies with applicant. I cannot agree. The onus was on the respondent to ensure that the investigative process was conducted expeditiously and that was a mandatory obligation on him. The evidence in this case is that the applicant was only out of work for one day towards the end of January and in my view, the most elementary enquiry would have revealed that to the respondent. It was up to the respondent to pursue the investigation expeditiously and for that reason the delay between January and May and the taking of the applicant's statement must be laid at the respondent's door. Following the taking of the applicant's statement, there is then a gap until 22nd June, 2006, when the B30 alleging the two breaches of disciplines were sent to the applicant. The signed returned B30 form was not put in evidence in this case and there is no averment as to when the respondent received the completed B30 Form back from the applicant. As this was in the possession of the respondent and was not put in evidence, I have to conclude on the balance of probabilities that in carrying out this part of the process, there was no delay on the part of the applicant. There was a delay of nearly three months from the service of the B30 Form until 8th September, 2006, when there was notification of the holding of the hearing which was a further two months away, namely, on 7th November, 2006.

In my view, all of these periods of delay are excessive and demonstrate an approach to the investigation which wholly lacks the kind of expedition that is a mandatory requirement of the Regulations. Of particular note, is the amount of time

take to assemble the relevant statements in what was, by any standards, a very simple investigation. In my view, having regard to the mandatory obligation of expedition, I see absolutely no reason why, and, indeed, no reason is advanced on behalf of the respondent, as to why, that part of the process was not completed within a month, if not sooner.

In these circumstances, I feel propelled to the conclusion that there was a failure on the part of the respondent to comply with the mandatory obligation of expedition as imposed by the Regulations. Before reaching that conclusion, however, I must address the position of the complainant, Mr. O'Brien, in the light of the above quoted passage from the judgment of Geoghegan J. in the *McCarthy and Denny* case.

As observed by Geoghegan J. in that case which involved a complaint to the the Garda Síochána Complaints Tribunal and not a complaint made under the Regulations, as here, the Regulations should not be applied in such a way as to defeat a *bona fide* and timely complaint made by a member of the public.

In this case, however, it is absolutely clear that Mr. O'Brien's complaint was not a timely complaint. The evidence in the case establishes that Mr. O'Brien was told by the applicant that he was dealing with the matter by cautioning all of the parties. Notwithstanding this, Mr. O'Brien waited for at least three years before intimating any complaint or dissatisfaction. In light of this, I am satisfied that I cannot be deterred from a conclusion to the effect that there was a breach of the mandatory obligation of expedition required by the Regulations because of the interest of Mr. O'Brien in the pursuit of his complaint.

In my view, because of the long elapse of time from the incident in August of 2001 to the first intimation of a complaint by Mr. O'Brien on 25th March, 2005, there was imposed upon the respondent an added degree of urgency in pursuing the processes set out in the Regulations. As with civil litigation where there is a late start, greater expedition is enjoined thereafter.

I have come to the conclusion, therefore, that I must grant the relief sought in the proceedings.