Neutral Citation Number: [2007] IEHC 111

THE HIGH COURT
JUDICIAL REVIEW

2004 No. 422 JR]

BETWEEN

SINÉAD SHERIDAN

APPLICANT

AND
THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

Judgment of Mr. Brian McGovern delivered on the 21st day of March, 2007

1. The applicant was attached to the National Surveillance Unit of An Garda Síochána when she was injured in a car accident on the 25th September, 1998 while acting in the course of duty. She received relatively serious injuries in the accident which rendered her unfit for duty for some time. She was absent on leave for approximately six months and her medical condition was reviewed on a number of occasions by the Chief Medical Officer of An Garda Síochána. On the 14th October, 2003 he suggested that the applicant was fit for light duties but the applicant continued to submit medical certificates from her General Practitioner certifying her as unfit for duty. Eventually the Chief Medical Officer arranged for the applicant to be examined by Dr. Frank Chambers a Consultant in anaesthesia and pain management and by Dr. John Tobin a Consultant Psychiatrist with a view to assessing her fitness to continue at work. On the 4th February, 2004 the Chief Medical Officer met with the applicant and advised her that he had considered her medical file in its entirety and that he was of the opinion that she should be medically retired from An Garda Síochána. He advised the applicant that if she or any of her treating doctors were opposed to this recommendation she should bring further medical reports to his attention within a six week period. The Chief Medical Officer met with the applicant on the 12th March, 2004 but the applicant did not submit medical reports. Thereafter the Chief Medical Officer completed a D33 Form medical certificate in which he certified the applicant was medically unfit for further service on the grounds that she was suffering from "chronic reactive depression".

2. Following the issuing of the certificate the respondent made a "Retirement Order (mental or psychical incapacity) dated the 23rd April, 2004" based on the certificate and ordered the retirement of the applicant with effect from the 17th May, 2004.

3. On the 17th May, 2004 the applicant was granted leave to apply for judicial review by way of an order of *certiorari* quashing the Retirement (Mental or Physical Incapacity) Order purportedly made by the respondent on the 23rd April, 2004 and for other ancillary relief.

4. Regulation 6 of the Garda Síochána (Retirement) Regulations provides:-

> "Whenever the surgeon of the Garda Síochána certifies in writing that any member of the Garda Síochána is so incapacitated by infirmity of mind or body that such member is unable to perform his duties as such member and that such incapacity is or is likely to be permanent, the following provisions shall have affect, that is to say:-
>
> (a) Where such certificate relates to a member of the Garda Síochána who is an officer, the Executive Counsel may order the retirement of such member, and
>
> (b) Where such certificate relates to a member of the Garda Síochána who is not an officer, the Commissioner may order the retirement of such member."

5. The regulation was amended by the Garda Síochána (Retirement) (Amendment) Regulations, 2000. The words "the surgeon of the Garda Síochána" in the 1934 Regulations were replaced by the following words "a registered medical practitioner (within the meaning of the Medical Practitioners Act, 1978 (No. 4 of 1978)), nominated by the Commissioner after a consultation with the Minister."

6. The respondent does not assess the medical status of the applicant. He relies on the certification of the Chief Medical Officer. He says that the Chief Medical Officer's certificate is a clinical judgment made by the medical practitioner designated by the regulations. Once this judgment has been reached the respondent is constrained by the provisions of the regulations.

7. The main thrust of the applicant's complaint is that she was not furnished with copies of reports and recommendations on foot of which the retirement order was made. On the 6th February, 2004 the applicant's solicitors wrote to the Assistant Commissioner of An Garda Síochána in relation to her personal injuries action arising out of the road traffic accident of 25th. September 1998. The letter said that following on their client's attendance before the Chief Medical Officer on the 4th February they were writing to the Assistant Commissioner to confirm a number of matters in writing. The third item sought was copies of the medical reports of both Dr. Collins and Dr. Tobin (the Chief Medical Officer and the Psychiatrist who examined the applicant on behalf of the respondent). The letter stated "these reports are required in order for our client to properly prepare her case in relation to her personal injuries action". It seems that at the time that was the purpose for which these documents were sought. I have been furnished with a copy of the statement of claim in the road traffic accident proceedings and two medical reports from Dr. Michael P. Bourke a Consultant Psychiatrist issued in relation those proceedings. It is clear from the proceedings and the medical reports that the plaintiff was diagnosed in December, 1999 as suffering from "…a major depressive illness requiring treatment". In the second of two medical reports given in November, 2001 Dr. Bourke said that it was the applicant's "…opinion that she was not sufficiently well enough to cope with regular duties". At that time he found she was no longer clinically depressed but it was clear that the statement of claim was based on the fact that she had suffered physical and psychiatric injury. This was never disclosed to the court on the application for leave to apply for judicial review. In my view it should have been. Applications for judicial review require the utmost good faith and full disclosure of all material facts by the applicant. See *Cork Corporation v. O'Connell* [1982] I.L.R.M. 505.

8. In any event the thrust of the applicant's complaint is that she should have been furnished with the reports and information on which the retirement order was made and in the written submissions furnished on behalf of the applicant it is stated:

> "The first obligation on the Commissioner before exercising his discretion under Article 6 was to ensure that the applicant knew what case it was that she had to meet".

9. It seems to me that this is a misunderstanding of the position. The certificate issued by the Chief Medical Officer does not amount to an accusation made against her or a "case she has to meet". It is an assessment of her health. Undoubtedly the assessment has great implications for the applicant and to that extent it is judicially reviewable if it does not stand the test of rationality or if there is

some manifest want of fairness in the procedures.

10. In this case the decision cannot have come as a major surprise to the applicant in view of the medical reports she had already received in her road traffic accident case. In any event she was given the opportunity to personally examine her medical records and by letter of the 12th March, 2004 her solicitors were informed:

> "The Chief Medical Officer also advised Garda Sheridan that if she or any of her treating doctors were opposed to his recommendation she should bring further medical reports to his attention within a six week period."

11. The applicant and her solicitors claim that they never received a letter of the 24th March, 2004 informing her that she could personally examine her medical records but even if that is the case I do not believe it to be crucial in view of the fact that she was clearly aware that she could produce medical evidence if she was opposed to the recommendation of the Chief Medical Officer. The applicant failed to avail of this step which would have given her an opportunity to present medical evidence on her behalf which might ultimately have affected her position since the retirement order was not made until the 23rd April, 2004. It seems to me that I am entitled to take into account the failure of the applicant to engage with the process in this way in determining whether or not she is entitled to the discretionary relief of judicial review. I also take into account the fact that the applicant has not challenged the evidence contained in the medical report of Dr. Tobin or the Chief Medical Officer on the grounds or irrationality or that they fly in the face of common sense or are unfounded. I have been referred to the case of *Garvey v. Ireland* [1981] 1I.R. 75 and *Dooner v. Garda Síochána (Complaints) Board and Another* judgment of Finnegan J. 2nd June, 2000. These cases both concern inquiries into the conduct of members of An Garda Síochána and in my view different considerations apply than in this case. The conduct of the applicant is not an issue in this case. I have been referred to the case of *O'Brien v. The Commissioner of An Garda Síochána* [1996] (Judgment of Kelly J. 19th August, 1996). This was a case in which the applicant was a trainee member of An Garda Síochána and suffered a blow to the head in a football match which required him to be admitted to hospital. There was evidence that he suffered a psychotic episode while in hospital and following a medical review the applicant was served with a notice signed by the Commissioner of An Garda Síochána dispensing with his services as a probationer garda in accordance with Regulation 16 of the Garda Síochána (Admissions and Appointments) Regulations, 1988 on the grounds that he considered the applicant was not fit mentally to perform his duties as a member of An Garda Síochána. In the course of his judgment Kelly J. refers to the fact that there was a report from a Consultant Neurologist and a Psychiatrist and a further affidavit from another Psychiatrist which went to the merits of the applicant's case in seeking to suggest that it was unlikely that he suffered from an acute psychotic episode and that he was fully fit for duty. But none of these documents were before the Commissioner and the learned judge said:

> "It is not open to this court to give consideration to this evidence since it was not before the Commissioner and this is not a court of appeal from the Commissioner's decision on the merits. In any event even if they were admissible, there is still the opinion of the Garda Surgeon. He is not resiled from it but on the contrary have sworn an affidavit in support of it. Insofar as there was any difference between the various medical opinions expressed, the Commissioner was entitled to choose between them without being guilty of either irrational or unreasonable behaviour."

12. The learned judge held that the Commissioner was entitled to reply upon the views and opinions of the Garda Surgeon. Although an order of *certiorari* was made quashing the decision of the Commissioner in that case the matter was remitted back to the Commissioner for further consideration. The reason why the decision was quashed was because it emerged that although the notice issued to the applicant dealt exclusively with an alleged mental unfitness because of circumstances surrounding his hospitalisation in May, 1993 the Commissioner considered other reports from superior officers of the applicant and the applicant had not been informed of these reports and had no opportunity to deal with them.

13. In the circumstances it seems to me that the *O'Brien* case is not of benefit to the applicant in this case. In the first place it was dealing with a different regulation. Secondly the learned trial judge appeared to respect the entitlement of the Commissioner to rely on the medical reports of the Garda Surgeon (in this case the Chief Medical Officer) albeit in the context of different Regulations.

14. It is of significance that in this case that applicant has not challenged the decision or view of the Chief Medical Officer but only the order of the respondent. The Chief Medical Officer examined the applicant on a number of occasions and also arranged for her to be examined by different specialists. His own examinations of the applicant and the examinations and reports of the specialists led him to conclude that the applicant was unfit for service and no challenge has been made to these medical reports nor have any reports been furnished by the applicant in opposition to these reports. In those circumstances it was not unreasonable of the respondent to act on the certificate of the Chief Medical Officer and discharge the applicant from the force. Certainly it cannot be said that his decision was irrational or flew in the face of common sense. The applicant was given an opportunity to make medical representations which she declined.

15. At the time when the applicant swore the affidavit grounding her application for leave to apply for judicial review she was aware that some years earlier she had been found to be suffering from "a major depressive illness requiring treatment" this formed part of her claim arising out of the road traffic accident of the 5th September, 1998. (See statement of claim delivered 9th January, 2001). Yet she never engaged with this issue in her affidavit sworn on the 14th May, 2004. In my view she lacked the good faith and candour required of applicants making an ex-parte application for judicial review in failing to address these issues in her affidavit. This is a matter I take into account in arriving at my decision.

16. But, when all is said and done, her principal complaint is that if she was not given an opportunity to meet the case being made against her. I do not accept that an unchallenged certificate from the Chief Medical Officer on foot of which the respondent has acted, amounts to a case being made against the applicant. It is no more than an assessment being made of her health in the context of her fitness to continue as a member of An Garda Síochána. There are good operational reasons why the members of An Garda Síochána should have certain minimum standards of physical and mental health and it is in the public interest that these standards are maintained. I find no evidence of irrationality or failure to afford the applicant a reasonable opportunity to present her medical case. In fact the applicant has declined to submit medical evidence within the time allowed. In my view the period allowed was reasonable particularly having regard to the fact that the application had accumulated medical reports in connection with her injuries arising out of the road traffic accidence.

17. No argument was pursued at the hearing on the Convention on Human Rights. For the avoidance of doubt I am satisfied that the procedures adopted by the Respondent were not incompatible with any provisions of the Convention.

18. In the circumstances I refuse the relief sought by the applicant.