Neutral Citation [2012] IEHC 558

THE HIGH COURT

[2010 No. 319 JR]

BETWEEN

Patrick J. Kelly

Applicant

And

Minister for Agriculture, Fisheries and Food, Minister for Finance, The Government of Ireland, Ireland and Attorney General.

Respondents

Judgment of Mr. Justice Hedigan delivered on the 21st day of December, 2012.

1. The applicant in this case seeks the following reliefs:-

> (1) An Order of Certiorari quashing the decision of the third named respondent taken on the 30th September, 2009, to dismiss him with effect from that date from the position of Harbour Master at Killybegs Fishery Harbour Centre, Co. Donegal, to which he was appointed in 1996 following an open competition conducted by the Civil Service Commission;
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> 2) An order directing that the third named respondent pay to the applicant his arrears of salary;
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> 3) An injunction restraining the third named respondent from reinvestigating the matter because of inordinate and inexcusable delay or in the alternative an order that any new investigation which the third named respondent might undertake should be conducted by an investigating officer other than the officer who conducted the investigation the subject of proceedings and such investigation should be carried out in accordance with the provisions of the Civil Service Regulation (Amendment Act) 2005 and Department of Finance Circular 14/2006;
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> 4) An order for damages for abuse of process and infringement of, or alternatively interference with, the applicant's right to earn a livelihood and to his good name;
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> 5) Damages for loss of earnings;
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> 6) Various declaratory reliefs;
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> 7) Further or other order;
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> 8) The costs of and incidental to these proceedings;

2. The applicant is a master mariner and resides at Drumrooske, Donegal Town, Co. Donegal.

Background Facts

3.1. On the basis of the evidence presented to the court I consider the following to be the factual background to this dispute.

3.2. The dispute the subject of this case relates to the applicant's suspension and subsequent dismissal from his position as harbour master of Killybegs Fisheries Harbour Centre, Co. Donegal (hereinafter "KFHC").

3.3. On the 11th August, 2004, an anonymous letter making allegations in relation to the applicant having private business interests in contravention of his paid employment in the Civil Service was received by the Department of Marine & Natural Resources.

3.4. In light of the above Mr. Tony Fitzpatrick a personnel officer of the first named respondent, initiated an investigation into the applicant's activities in Killybegs under the Civil Services Disciplinary Code Circular 1/92. The decision to do this was initially taken on the 61h September, 2004, and confirmed on the 18th October, 2004.The applicant was informed by letter of the same date that an investigation would be carried out.

3.5. On the 8th of October, 2004, Mr. Cecil Beamish an assistant secretary of the first named respondent with responsibility for Fishery Harbours had conveyed in an e-mail to Mr. Fitzpatrick, comments made by the then Minister for Agriculture, Minister Coughlan in a phone call with him, where she expressed concern in relation to the applicant's management of KFHC.At a meeting ofthe 14th October, 2004, with Mr. Fitzpatrick Minister Coughlan repeated issues of concern that had been brought to her attention.

3.6. In accordance with para. 3(2) of the circular Mr. Brian Bolger a retired civil servant was engaged by Mr. Fitzpatrick to carry out a preliminary investigation into the appropriateness of the applicant's business and financial activities, on the basis of which Mr. Fitzpatrick would determine if a prima facie case existed meriting a full disciplinary investigation. The applicant was suspended on full pay from the 18th October, 2004, pending the outcome of said investigation. The matters enquired into initially in the investigation were:

(i) that the applicant operated a private company providing marine services;

(ii) the imposition of compulsory pilotage by the applicant; (iii) the provision by the applicant of pilotage for reward;

(iv) that the applicant had kept large amounts of personal cash on the department's premises;

(v) The illegal disposal of a fishing vessel;

(vi) Requiring staff to convert punts to euro.

Matters (i)-(iii) were combined into one matter by the personnel officer.

On the 22nd December, 2004, Mr. Bolger presented the findings from his preliminary investigation and on the basis of the material therein Mr. Fitzpatrick concluded that there were sufficient grounds to pursue a full investigation. The applicant was notified of this by letter and informed thereby of the allegations against him.

3.7. Mr. Fitzpatrick interviewed the applicant in March 2005 and went through each of the allegations made against him and invited a response. On the 4th August, 2005, on completion of the investigative phase of the disciplinary process he produced his preliminary findings which were presented to the applicant by way of a letter of the same date. The applicant was invited to respond within the timeframe set out under Circular 1/92 which was subsequently extended at the applicant's request. On the 30th June, 2006, Mr. Fitzpatrick produced his second report with provisional conclusions and findings. On the 12th October, 2006, Mr. Fitzpatrick interviewed the applicant in Sligo with Mr. Matt Staunton of Impact Trade Union (who was representing the applicant from June 2005 onwards) also in attendance.

3.8. Mr. Fitzpatrick at an early stage in the investigation chose to furnish the applicant with only the extracts from certain witness statements that related to allegations made against him that were being investigated as part of the disciplinary process. Circular 1/92 stipulates this approach. However the applicant sought access to the witness statements in their entirety on the grounds that he required them to defend his position in the context of the disciplinary investigation.Mr. Fitzpatrick agreed to make unredacted statements available to him on condition that he give a written undertaking to use such documents only for those purposes. The applicant did not accept this offer.

3.9. In August 2007 Mr. Fitzpatrick's successor, Personnel Officer Mr. David Hanley, released full witness statements to the applicant without qualification as to his use of them.

3.10. Mr. Fitzpatrick produced his final report on the 2nd September, 2008, which was furnished to the applicant shortly thereafter in which he found six allegations had been established. He concluded that in respect of those six allegations the appropriate disciplinary action would be dismissal of the applicant from the Civil Service in accordance with s.5 of the Civil Services Regulation Act 1956.These allegations were:

i) that the applicant had operated a private company offering marine services;

ii) that the applicant had carried out pilotage at Killybegs;

iii) that the applicant had provided pilotage services for reward; iv) that the applicant had submitted a falsified tender document purportedly from Local Metals for the removal of the Finn Valley oil barge; that he certified in order for payment [of] an invoice purportedly from Local Metals for the removal ofthe Finn Valley Oil barge from Killybegs Harbour, knowing that the barge had not been removed in its entirety; and that the applicant arranged and paid for scuttling of the hull of the barge in Killybegs Harbour;

v)that in July 1999 the applicant carried out a clean-up of an oil spillage at Abbott Engineering for which he received payment in a personal capacity, while he was on duty as harbour master; that he did not inform his manager, as required by the annual leave regulations and policy that he intended taking annual leave; that he was not on annual leave; that he utilised some of the KFHC workforce in this operation while they were on duty and being paid by the department; that he did not instruct the said workforce to take annual leave during the operation;

vi) that the applicant used the department's resources in the deployment of a boom at Sligo Harbour for personal gain.

3.11. The applicant sought to have Mr. Fitzpatrick's findings and conclusions reviewed by the appeal board as was his right under Circular 1/92.The applicant was present and represented by his trade union representative at the appeal board hearing .This took place over three day days, the 1ih January, the 4th February and the 12th March, 2009.

3.12. The appeal board's decision issued on the 14th July, 2009 wherein Mr. Fitzpatrick's conclusions and recommendations in relation to the Finn Valley Barge matter were not upheld. All other findings were upheld. The decision was forwarded to the applicant and to Mr. Staunton, the applicant's trade union representative, on the 17th July, 2009, with a letter from Mr.Bert O'Reilly, personnel officer in the Department of Agriculture which stated that he intended to recommend dismissal of the applicant in light of the report. The appeal board formed the view that dismissal was unwarranted in three out of four of the allegations but that such a sanction was not "grossly disproportionate" in respect of the other allegations, being (i)-(iii) which were treated as one allegation. Those allegations related to the fact that the applicant carried out commercial pilotage at KFHC regularly for personal gain while on duty as harbour manager and that this represented a conflict of interest with his official duties.

3.13. The applicant was informed of his right to make representations to the decision making body (the third named respondent) which the applicant did via his staff association on the 31st July, 2009. However the applicant was dismissed from the Civil Service by decision of the third named respondent on the 30th September, 2009.

3.14. On the 22nd March, 2010, the applicant applied to the High Court for leave to apply for Judicial Review which leave was granted.

Applicant's Submissions

4.1. The applicant submits that there have been numerous and significant breaches of the applicant's constitutional and natural justice rights in the instant case, any one of which is of such seriousness as to justify the court in setting aside the decision to dismiss the applicant from the civil service. He refers the court to *Re Haughey* [1971] 1 IR.217 where the Supreme Court held at p. 263 that the minimum protections which the state must afford a person whose good name is under attack must include:

a) that he should be furnished with a copy of the evidence which reflected on his good name;

b) that he should be allowed to cross-examine by counsel his accuser;

c) that he should be allowed to give rebutting evidence;

d) that he should be permitted to address, again by counsel, (the committee) in his own defence.

He alleges that there was a breach of his constitutional rights and fair procedures in that the respondents failed to inform him of all and every allegation made against him. The respondents failed to furnish the applicant with crucial documentation in advance of formal disciplinary hearings, which was of the greatest materiality to the conduct of the investigation and to the issues arising and such failure amounted to concealment. The applicant in this regard relies on the English decision of *Kanda v. Government of Malaya* [1962] AC 322 where Denning L.J. stated at p.337:-

> "if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him....."

The applicant further relies on *Tierney v. An Post* [2000] 1 IR 536 where it was held that as the applicant was not furnished with reports containing evidence against him and the decision maker was furnished with those reports, an unfair procedure was used.

The applicant claims that the respondents failed to allow him to avail of legal representation at formal disciplinary hearings in a situation where there were allegations which were regarded as serious from the very outset and were acknowledged by the investigating officer to be of the utmost gravity and to have serious potential implications for the applicant's employment. The Applicant relies on the decision in *Gallagher v.Revenue Commissioners* (1995) 1 IR 55 where Hamilton CJ stated at p.68:-

> "... the trial judge Blaney J....declared that, having regard to the nature of the charges which would result in the applicant's dismissal in the event of an adverse decision he was entitled to legal representation at the hearing."

4.2. The applicant submits that the respondents failed to provide him with the full witnesses statements of some ofhis accusers until the autumn of2007 by which time the investigating official had made his decision on the culpability of the applicant as per his report of February 2007.Those statements relied on were extremely prejudicial to the applicant, and there was a well-grounded suspicion of bias in respect of same.

Consequently, the applicant was not in possession of the complete statements when the formal disciplinary hearing was heard and following which the investigating officer formed definitive conclusions as to the applicant's culpability. These conclusions in turn formed the basis of deliberations of the appeal board, resulting in a deeply flawed process from the outset. In this respect the applicant relies on *O'Callaghan v.Mahon & Others* [2006]2 IR 32 where Hardiman J. said at p. 60:-

> "A major issue in civil and criminal procedural law is the extent to which either side must make disclosure to the other. This had led to an impressive body of jurisprudence.....in particular through the concept of *'egalite des armes'* which might be regarded as the opposite of that state of imbalance and disadvantage described by O'Dalaigh C.J. as clocha ceangailte agus madrai scaoilte".

4.3. The applicant contends that the conclusions of the investigating official were tainted by reason of bias. The officer failed to disclose to the applicant that a minister of government, who was also the local Dail deputy, had made complaints in relation to the applicant. The applicant argues that such failure to disclose would lead any reasonable person against whom allegations were made to conclude that there was a predisposition on the part of the investigating officer to the outcome of the investigation.Nor did the officer make available to the applicant certain witness statements before deciding on the culpability of the applicant, which statements contained material highly prejudicial to the applicant. The investigating officer also failed to provide to the appeal board or to the government, or include in his reports, a copy of an account of an interview with Mr. Martin Connell, Assistant Harbour Master, KFHC on the 29th October, 2004, which interview was conducted as part of the investigative process.Mr. Connell supported the applicant's view that the complaints made against him were made by discontented employees.

Furthermore, the officer commented in his final report of the 2nd September, 2008, that he found a high degree of credibility in the evidence of staff whose credibility was questioned by the applicant, while at the same time commenting on the evasiveness of the applicant's responses.

4.4. The applicant submits that the then Minister Coughlan acted in contravention of the *nemo judex in causa sua* rule by participating in the decision making process, having already made a complaint against the applicant at the beginning of the disciplinary process. The Minister had previously made complaints in relation to the applicant directly to the investigating official some of which related to the matter under investigation. She had also made other allegations against the applicant of a scurrilous nature without foundation. She participated in the government decision to dismiss the applicant while there were arrangements in place to enable a government minister to abstain from participation in a particular decision.

In *O'Donoghue v. The Veterinary Council* (1975) IR 398 Kenny J.laid down the test for determining if a tribunal is impartial:-

> "the test to be applied...is that a member is not impartial if his own interest might be affected by the verdict, or he is so connected with the complainant a reasonable man would think that he would come to the case with prior knowledge of the facts or that he might not be impartial."

The applicant contends that there are no considerations in this case which would warrant a departure from this principle and no rule of necessity applies.

4.5. The applicant submits that there was excessive delay in completing the disciplinary process in circumstances where the applicant was only dismissed almost a full five years after the commencement of the disciplinary investigation. The applicant argues that this gave rise to an inordinate and inexcusable delay thus gravely prejudicing the applicant's position. It was recognized in *Mc Neill v. The Commissioner of an Garda Siochana* [1997] 1 IR 469 that delay itself could be so long as to be unreasonable and thus unjust and unconstitutional. The applicant also relies on the judgment of Hedigan J. in *Molloy v. The Garda Siochana Compliants Tribunal* [2009] IEHC 197 where he said at para.31:-

> "...I am satisfied that the delay in processing the complaint against the applicant has been so inordinate and inexcusable as to amount to a violation ofhis basic right to natural and constitutional justice."

4.6. The investigating official stated in various reports that he found the applicant culpable in respect of the allegations made against him on the balance of probabilities. In his judgment of the 14th August, 2012 in *Mc Manus v.The Fitness to Practice Committee of the Medical Council and The Medical Council* 2012 IEHC 350,Keams P. said at p 14:-

> "Although the standard of proof for both processes (a criminal trial and an inquiry) is that of proof beyond a reasonable doubt, it does not follow that the two processes are in all other respects identical."

While the facts of the instant case differ from *Mc Manus*, the applicant submits that the appropriate standard of proof for the case is that of proof beyond all reasonable doubt. Notwithstanding the foregoing, should the court decide that the civil standard of proof applies in this case the applicant submits the investigating official's failure to carry out a detailed analysis of the facts which might support his conclusions does not meet the standard set out in *Georgopoulus v.Beaumont Hospital* [1998] 3 IR 132 by Hamilton C.J. where he set out the standard, at p.150:-

"This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with 'on the balance of probabilities' bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated".

4.7. The respondents acted in excess of jurisdiction in that the respondents did not comply with the terms of Circular 1/92 under which the process was conducted and in that the officer conducting the investigation left the Department of the Marine in mid-2006 and continued to conduct the investigation when he was *functus officio*.Moreover, the authority purporting to authorise him to conduct a hearing on the 12th and 13th October, 2006, was invalid in that it was signed by the secretary general of the department and not by the minister who is head of the department as provided for in the Ministers and Secretaries Act 1924, as amended. Even ifthe purported authorisation was valid, it was limited to the conduct of the hearing set out therein and the investigating officer had no authority to continue with the disciplinary process after October, 2006.

Furthermore, having indicated in his report of the 4th August, 2005, that the investigative stage of the disciplinary process had been completed the officer reopened the investigative stage in June 2006 when this was not provided for in the prescribed procedure.

In addition there was no provision in the circular for the involvement of ministers of government in the investigative procedure therefore they should not have been involved. *Becker v. Duggan* [2009] 4 IR 1, *Reidy v. Minister for Agriculture and Food* [unreported 19th June 1989] and *Hughes v. The Commissioner of An Garda Siochana* [1998] IEHC 7 are authority for the proposition that circulars/regulations be followed faithfully. Therefore, the applicant argues the failure to follow prescribed procedure in this instance renders the process void.

4.8. The applicant further submits that the absence of an adequate appeal was fundamentally unfair and contrary to natural and constitutional justice in that the appeal procedures do not provide for a *de novo* hearing on the merits, allow only limited grounds of appeal requiring the applicant to establish one or more grounds to the satisfaction of the appeal board and place on the appellant the burden of establishing that a recommended sanction is "grossly disproportionate". The applicant in this regard relies on Article 40.3 of the constitution.

Article 40.3(1) states: "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

Article 40.3(2) states: "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

The applicant argues the above remains unfulfilled in the absence of an adjudication process with sufficient safeguards to ensure a fair and balanced outcome to a controversy involving those basic rights, such as in the present case. It behoves the State, as model employer, to ensure that such safeguards are available.

Carroll J. concluded in *Heneghan v.The Western Regional Fisheries Board* [1986} ILRM 225 that there was a lack of natural justice where the dismissal was carried out where the same person was witness, prosecutor, judge, jury and appeal court. This is what happened here argues the applicant. It is further submitted that it is inherent in the fair procedures requirement of Art 40.3 that a full appeal should lie where the fundamental personal rights of the citizen are at issue, more especially in the instant case.

Respondents' Submissions
5.1. The respondents argue that the applicant is estopped from raising his several objections in these proceedings in relation to fair procedures in respect of the investigative stage of the process.

The respondents argue that the investigation process followed the provisions of the Civil Services Disciplinary Code Circular 1/92 and was adhered to fully. At the investigative stage the applicant was represented by his trade union representative. When he was given the opportunity to engage the services of a legal representative at the appeal board hearing he declined or failed to do so. The applicant participated in the investigative and disciplinary process and acquiesced in it. He failed to challenge, or bring any court challenge to, all or any part of the process, during the currency of the process or at any time prior to

availing of the appeal process or after the appeal board decision. It was open to the applicant at any time to seek injunctive relief or judicial review. Under Order 84 he had six months from the date of any particular decision or event in which to apply for leave to bring judicial review proceedings. He did not do so. Therefore, the respondents herein submit that the applicant is estopped from raising objections in the current proceedings having failed to do so during the currency of the investigative and disciplinary process and before the decision of the third named respondent.

5.2. The respondents argue that the applicant knew from the outset that he was not permitted legal representation before the investigator. He was informed by the investigating officer that he was free to consult his solicitor at any time. Apart from protest he did nothing further, even when he had the benefit of advice and assistance from Mr. Staunton from June 2005 onwards. He did not see fit to engage legal representation before the appeal board where it was permitted.

The conduct of the investigating officer into the allegations made against the applicant and his appeal were entirely consistent with and in accordance with the applicant's *audi alteram partem* rights and with the well-known principle in *Re Haughey*.In *National Irish Bank* (No.I) [1999} 3 IR 145 Shanley J. held that there was no entitlement to the hearing requirements (otherwise known as "Haughey Rights") at the information gathering phase.

5.3. The respondents argue that full witness statements were made available to the applicant in August 2007 and he was given ample opportunity to make representations in relation to them.

5.4. At all times the investigating officer carried out his role in an impartial and fair manner. The investigation itself was carried out

thoroughly, fairly and in accordance with the principles of constitutional and natural justice.

The allegations which were investigated were made known to the applicant at the outset of the investigation and were discussed fully with him over the course of six meetings with him. The contents of the e-mail relating to concerns expressed by Minister Coughlan did not form part of or in any way influence the conduct of Mr. Fitzpatrick's investigation and he confined himself entirely to the specific allegations under investigation and thus the e-mail was not furnished to the applicant.

The test to be applied in relation to allegations of bias is well established. The court must ask itself whether a reasonable person in the circumstances would have a reasonable apprehension that the applicant would not have a fair hearing. Barron J. in *Orange Ltd. v. Director of Telecoms [2000*] 4 IR at p.228 addressed what might constitute bias:-

> "...the essence of bias is the existence of some factor.....from which a reasonable observer might conclude that there was a real possibility that such factor would cause the decision maker to seek a particular decision or which might inhibit him or her from making his or her decision impartially.....".

5.5. The respondents deny that the then Minister Coughlan breached the *nemo judex in causa sua* principle. She, as a public representative, was entitled to raise concerns in relation to a matter within her constituency. Her communication did not form part of, or in any way influence, the conduct of the investigation. Throughout the investigation Mr. Fitzpatrick confined himself solely to the stated allegations under investigation and the statements and evidence that related to them. The respondents submit that this claim is fundamentally misconceived and lacking in evidential and/or factual foundation.

Furthermore, it is emphasised by the respondents that at no time did the Minister have any engagement with the independent, impartial appeal board which considered the applicant's appeal.

The respondents also argue that in making its decisions the third named respondent acts as a collective authority. Under Article. 28.4.2 of the constitution "the government shall meet and act as a collective authority and shall be collectively responsible for the departments of state administered by members of the government." In its decision the third named respondent was not engaged in any fact finding or determining guilt or responsibility. It was presented with the recommendation to dismiss the applicant following a full and fair examination of the applicant's case and it was asked to confirm that decision. Hence, if Minister Coughlan was in attendance when the third named respondent made its decision any claim that said decision was tainted with objective bias and/or of no effect by reason of substantive bias is wholly misconceived as the third respondent was acting as a collective authority and moreover was not determining guilt.

5.6. The delays in bringing the matter to a conclusion were the responsibility of the applicant himself. The investigation was carried out thoroughly, fairly and in accordance with the principles of constitutional and natural justice. The applicant sought extensions to the deadlines imposed on several occasions which requests were acceded to in the interest of ensuring fair procedures. It is denied that the duration of the process gravely prejudiced the applicant's position, or at all.

5.7. The respondents submit that the civil standard of proof was applied to the case in accordance with Circular 1/92.The applicant participated in the investigative process and acquiesced in it. In his provisional report dated the 4th August, 2005, Mr. Fitzpatrick referred to his "provisional conclusions and findings...arrived at on the principle of the balance of probabilities" and the phrase "balance of probabilities" is used to preface all his provisional findings. The applicant was at all times aware of the standard being applied yet he did not challenge it prior to the current proceedings. Therefore he is estopped from raising such issues in the current proceedings.

5.8. The respondents rely on the provisions of s.4 of the Public Service Management Act. The Secretary General of the Department of Communications, Marine and Natural Resources had authority to authorise Mr. Fitzpatrick to continue his investigation into the applicant. The respondent denies that the

letter dated the 20th June, 2006, constituted a reopening of the investigative stage. A revised provisional report was necessary due to the large volume of correspondence submitted by the applicant. Para 3(1) of Circular 1/92 provides that *"the personnel officer shall cause an investigation or such further investigation as s/he considers necessary to he held .... "*

5.9. The appeal board as an independent and impartial body considered the applicant's appeal carefully, fairly and objectively. The applicant was accorded all his rights in accordance with the principles of fair procedures and natural and constitutional justice during his appeal before the appeal board. While circular 1/92 does not specifically provide for legal representation at the investigation stage para. 4.7 thereof states "The officer concerned is entitled if s/he so wishes, to make oral submissions to the Board either in person or through a serving civil servant of his/her choice, a whole-time official of the union holding recognition for his/her grade or such other person as the board may agree be present for that purpose." The applicant was at liberty to consult his advisors at any stage of the investigation. He was made aware of the position with respect to legal representation at an early stage, as evidenced by the minutes of a meeting held on the 21st October, 2004. In addition in a letter from Mr. Fitzpatrick to the applicant on the 25th November, 2004, he stated"... at no stage have I instructed you not to contact your lawyer....". By further correspondence from the Department of Finance, Personnel & Remuneration division on behalf of the appeal board the applicant was notified in an e-mail of the ih January, 2009, that the Department of Agriculture, Fisheries and Food would have legal counsel present at the appeal board hearing. The applicant still declined/failed to engage the services of a legal representative despite the fact that the hearing did not take place over consecutive days having commenced in January 2009 and finished in March of that year. Therefore he had ample opportunity in the lengthy period between hearings to instruct a legal representative but he did not do so.

Further evidencing concern that the applicant's rights in accordance with the principles of fair procedures and those of constitutional and natural justice should be vindicated, the appeal board acceded to the applicant's request that witness evidence be heard, although at no stage during the disciplinary investigation had he supplied a list of proposed witnesses to Mr.Fitzpatrick. The respondents argue that the flexible powers of the appeal board under Circular 1/92 and the informal procedures actually adopted by it allowed it to deal with matters of which the applicant now complains. He could have availed of legal representation; he could have addressed the issue of the correct standard of proof and he could have made an application to the Board to cross-examine other witnesses. Thus, if there were any procedural flaws in the investigation, which is denied, the applicant adopted a remedy, namely that of an effective appeal, which was an alternative to a court challenge, and he is now estopped from raising the procedural fairness arguments.

5.10. The applicant did not within six months of that decision and notification, seek judicial review. Instead he availed of the opportunity notified in that letter to make representations to the government which were made in writing dated the 31st July,2009,through his representative and by his own statement in writing. In doing so the applicant was implicitly accepting the

fairness of the procedures followed up to that point in time. He is now estopped from arguing to the contrary.

Decision of the Court
6.1 In this application the court is not concerned with the merits of the recommendations made and the decisions taken by the respondents. It is not the function of the High Court in judicial review to decide whether the respondents have made a correct decision, whether a better decision might have been made or whether the decision is justified on the merits of the claim *(Mc Carron v Kearney* [2008] I.E.H.C. 195). The Court is concerned only with the legality of the decision and the lawfulness of the process by which it has been reached.

The court must assess whether the material conclusions reached are tainted by any irrationality or unreasonableness having regard to the facts found or accepted and the evidence and information before it. (See *The State (Keegan) v Stardust Victims' Compensation Tribunal* [1986] I.R. 642.

The precise role of the court in judicial review was outlined in *O'Keeffe v. An Bard Pleanala* [1993] 1 IR 3, by Finlay C.J and more recently in the case of *Meadows v. Minister for Justice Equality and Law Reform,* [2010] IESC 3. where Denham J. articulated the core principles as follows:

> (i) In judicial review the decision-making process is reviewed; (ii) It is not an appeal on the merits;
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> (iii) The onus of proof rests upon the applicant at all times;
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> (iv) In considering the test for reasonableness, the basic issue to determine is whether the decision is fundamentally at variance with reason and common sense;
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> (v) The nature of the decision and the decision maker being reviewed is relevant to the application of the test.
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> (vi) Where the legislature has placed decisions requiring special knowledge, skill, or competence, for example as under the Planning Acts, with a skilled decision maker, the Court should be slow to intervene in the technical area.
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> (vii) The Court should have regard to what Henchy J. in *The State (Keegan) v. Stardust Victims Compensation Tribunal,* referred to as the "implied constitutional limitation of jurisdiction" in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate it would justify the court setting aside the decision."

In order to challenge a decision made with special competence in an area of special knowledge an applicant must satisfy the court that the decision was irrational. The test for irrationality is set out in *O'Keeffe* where Finlay C.J relied on the decision in *The State (Keegan) v. The Stardust Victims Compensation Tribunal* [1986] I.R. 642 as follows:-

> "In dealing with the circumstances under which the Court could intervene to quash the decision of an administrative officer or tribunal on the grounds of unreasonableness or irrationality, Henchy J., m that judgment set out a number of such circumstances in different terms. They are: - 1. It is fundamentally at variance with reason and common sense. 2. It is indefensible for being in the teeth of plain reason and common sense. 3. Because the Court is satisfied that the decision maker has breached his obligation whereby he must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision'....1 am satisfied that these three different methods of expressing the circumstances..... constitute not only a correct but a comprehensive description of the circumstances under which a court may, according to our law, intervene in such a decision on the basis of unreasonableness or irrationality."

From the foregoing decisions it is evident that there is limited scope to interfere with the exercise of discretion by an administrative body. As judicial review is not an appeal from an administrative decision but a review of the manner in which the decision was made the court cannot substitute its opinion for that of the decision maker merely because it may have reached a different conclusion to the decision maker. Moreover, the court must have regard to the implied constitutional limitation of jurisdiction in all decision-making which affects rights. Any effect on rights should be within constitutional limitations and should be proportionate to the objective to be achieved. If the effect is disproportionate this justifies the court setting aside the decision.

6.2 The first matter to be determined in this case is the issue of delay. It is most undesirable that this disciplinary process took as long as it did. The applicant was suspended on the 18th October, 2004 when he was told ofthe intention to investigate his conduct. The Government decision to dismiss him from his post was taken on the 30th September, 2009. This is a period of almost five years.

The first stage of the process was the investigation by Brian Bolger. This concluded with the submission of his report on the 22nd December, 2004. This part of the process was conducted with commendable expedition considering the complexity of the matters investigated. Following receipt of this report, Mr. Fitzpatrick notified the applicant of his intention to conduct a full inquiry under the disciplinary code. He was informed of the allegations that would be investigated. There followed extensive correspondence between the parties culminating in a meeting attended by the applicant, Mr. Fitzpatrick and two others. This was followed by further prolonged correspondence. From the 4th August, 2005, Mr. Fitzpatrick forwarded a copy of his preliminary report to the applicant including provisional findings. He requested a response within fourteen days. An extension of time to respond was sought and granted. Further extensions were sought and granted. In January 2006 a detailed response was furnished. This included a complaint about the delay in concluding the disciplinary process. At this stage it is clear no meaningful delay could be attributed to the respondents. The delay to this date appears to have been attributable to the applicant albeit perhaps for good reason as he tried to defend himself. On the 24th January, 2006 a meeting took place with Mr. Fitzpatrick, the applicant and Martin McAllister who accompanied the applicant. Further interviews were carried out from March to April 2006 by Mr. Fitzpatrick. Further extensive correspondence ensued. On the 20th June, 2006 Mr. Fitzpatrick sent a revised statement of allegations to the applicant together with his preliminary findings and setting out the evidence on which they were based.

In July 2006 Mr. Fitzpatrick transferred to the office of the Revenue Commissioners. On the lih October, 2006 a meeting was held in Sligo between Mr. Fitzpatrick, the applicant, Mr. Staunton of Impact Trade Union on his behalf, and Ms. Kissane ofthe Personnel Division. On the 16th October, 2006 Ms. Kissane received a written response to the meeting of the 12th October 2006. No specific responses were made to the allegations.

There follows again voluminous correspondence notably concerning the three witness statements served initially in a redacted form. The correspondence of the applicant did not seem to focus on the specific allegations being investigated. They ranged over

allegations of fraud against staff at KFHC to demands for sight of all documentation concerning anonymous letters and FOI requests in this regard. Adding to this delay was the ongoing transfer of the functions of the responsible department to the Department of Agriculture, Fish and Foods. On the 281h March, 2008, the applicant was still writing concerning certain documents he wanted before making his response. There followed further FOI requests by the applicant and appeals from refusals thereof. On the 2nd September, 2008, Mr. Fitzpatrick delivered his final investigation report. On the 15th September, 2008 the respondents wrote to the applicant notifying him that it was proposed to proceed as recommended by Mr. Fitzpatrick. On the 23rd September, 2008 the applicant's representative wrote requesting a review by the Disciplinary Code Appeals Board.

To that date the proceedings appear to have been dogged by a blizzard of correspondence and the administrative difficulties inherent in the moving of responsibility for the investigation from one department to another. Thus, the proceedings to that date do appear to have been delayed substantially. The complexity and number of issues that arose largely at the behest of the applicant seem mostly responsible for this delay. It would be hard to criticise the

applicant for this, bearing in mind the gravity of the situation. It would also be harsh to criticise the officials' conduct of the proceedings to this date bearing in mind the voluminous demands of the applicant together with the transfer of functions from one department to the other.

Three months after this final report, on the 12th January, 2009,the Appeal Board held its first sitting. It sat again on the 4th February and on the 12th March. It issued its decision on the 14th July, 2009. As it upheld the decision to dismiss him from the Public Service, the applicant was informed of his right to make submissions to the Government. This he did through his staff association on the 31st July, 2009. On the 30th September, 2009 the Government dismissed him. On the 22nd March, 2010, the applicant applied to the High Court for leave to seek judicial review.

From the date of presentation of the final report by Mr. Fitzpatrick and notification by the respondents on the 15th September, 2008 of the intention to proceed to apply to the Government, the respondents' disciplinary process moved at a brisk pace and cannot be faulted for delay. The only delay that does attract criticism at this stage was the applicant's failure to move promptly to seek leave for judicial review. He was obliged to move promptly and in any event within six months of the decision to dismiss dated the 30th September, 2009. His application for judicial review was not brought until the 22nd March, 2010, eight days short of the outer limit provided for in Order 84. No convincing reasons have been submitted by the applicant to explain his failure to move promptly to challenge the Government's decision. The level of promptitude required of an applicant for judicial review will always vary from case to case. In this case I would consider the application for leave should have been made within a matter of weeks of the decision challenged. Were it not for the fact that the whole process had taken the inordinate time it had by the 30th September, 2009, the application would be liable to be dismissed on grounds of delay in applying for leave. However, that inordinate delay, although probably more due to the applicant than the respondent would seem to indicate that it would be rather bizarre to refuse the applicant judicial review on the basis of his delay over the last few months prior to his application. It is for this reason that I consider the Court should proceed to consider the application herein.

6.3 The issues before the Court are;

> (a) The fairness of the disciplinary process set out in Circular 1/92 including the standard of proof and the alleged absence of a full appeal.
>
> (b) The involvement of the Minister and objective bias. This IS
>
> described by counsel as the main issue in the case.
>
> (c) The failure to provide the applicant with the full statements of certain witnesses until August 2007.
>
> (d) The conclusions of the investigating officer were tainted by bias.
>
> (e) Incorrect procedure - continuing Mr. Fitzpatrick as the investigating officer - the alleged re-opening of the investigation in 2006 - Mr. Fitzpatrick was witness, prosecutor, judge, jury and appeal court.

6.4 The fairness of the disciplinary process.
The procedure impugned is governed by the Department of Finance, Circular 1/92. This Circular sets out an agreed procedure for dealing with disciplinary problems. Appendix 2 thereof provides for the Disciplinary Code. Section 3 thereof provides for the kind of investigation that occurred herein. Section 4 provides for an appeal board. These two sections are central to this issue in the case. They are as follows;

Section 3 (procedure):

> Where an allegation of misconduct, irregularity, neglect or unsatisfactory behaviour warranting disciplinary action is made against an officer the following procedure shall apply.
>
> (1) The personnel officer shall cause an investigation or such further investigation as s/he considers necessary to be held to ascertain the facts of the case.
>
> (2) Where the personnel officer is satisfied, on the basis of the investigation that the alleged conduct may have occurred and that such conduct, if it occured,would warrant disciplinary action,s/he shall furnish the officer concerned with
>
> -a statement of the allegation (s) which s/he considers may be substantiated by the investigation;
>
> -a statement of all the evidence supporting the allegation(s) which s/he will take into account in arriving at a decision;
>
> -a statement of the penalty which, having regard to the breach(es) of discipline alleged and the evidence considered to date ,s/he considers would be warranted if the allegation(s) were substantiated;

-a copy of this disciplinary code.

(3) The officer concerned shall submit a response to the allegations in writing within 14 days of receipt of the material referred to at (2) above. However, the personnel officer may give effect to the procedure set out below notwithstanding non-compliance by the officer concerned with this requirement.

(4) The officer concerned may include in his/her response as request for a meeting with the personnel officer to consider the allegation(s).In the event of such a request the personnel officer shall arrange a meeting. The officer concerned may be accompanied at any such meeting by a serving civil servant of his/her choice and/or by a whole-time official of the union holding recognition for his/her grade.

(5) Having considered any response by the officer concerned and any written or oral representations made by or on behalf of the office concerned, the personnel officer shall decide whether the allegations have been substantiated and, where s/he is satisfied that conduct warranting disciplinary action has been established ,shall inform the officer concerned in writing

-that it is proposed to recommend to the relevant decision-making authority that specified disciplinary action be taken, and

-that s/he may

-make representations in writing to the decision-making authority

or

-seek a review of the disciplinary proceedings by the Appeal Board (see paragraph 4 below).

(6) Where the appeal board has issued an opmwn concerning a recommendation, the personnel officer shall, within 14 days of the issue of the opinion, inform the officer concerned of the action, if any, which s/he proposes to take in the light of the appeal board's opinion. Where no further action is to be taken the allegations will be deemed to have been withdrawn.

(7) Where following the issue of an opinion by the appeal board, the personnel officer proposes to make a recommendation to the relevant decision-making authority that disciplinary action be taken, the officer concerned shall be given an opportunity to make representations to the decision making authority with 14 days of receipt of the notification referred to at (6) above.

(8) A recommendation submitted to a decision-making authority shall be accompanied by any representations made by the officer concerned and any opinion delivered by the appeal board.

Section 4 (The Appeal Board):

4.1. The board shall comprise:

-a chairperson appointed by the Minister for Finance with the agreement of the General Council Staff Panel;

-a serving civil servant nominated by the Minister for Finance;

-a serving civil servant or whole-time official of a recognised trade union nominated by the General Council Staff Panel.

No member shall be appointed to the board to consider a case referred to the board who has had any prior interest in or dealings with that

particular case.

4.2 An officer who has been notified by a personnel officer that it has been decided to recommend to the relevant decision-making authority that disciplinary action be taken against him/her may, within 14 days of the personnel officer's notification, request in writing that the disciplinary proceedings be reviewed by the board.

4.3 An officer may seek a review of disciplinary proceedings on one or more ofthe following grounds:

-that the provisions of the disciplinary code were not adhered to;

-that reasonable steps were not taken to ascertain the relevant facts;

-that all the relevant evidence was not considered or was not considered in a careful and unbiased fashion;

-that the officer concerned was not afforded reasonable facilities to answer the allegation(s);

-that the officer concerned could not reasonably be expected to have understood that the behaviour alleged would attract disciplinary action;

-that the sanction recommended is grossly disproportionate to the offence.

4.4. Where an officer requests that disciplinary proceedings be reviewed by the board the following submissions shall be made:

(a) a written statement by the officer concerned of the grounds on which the review is being sought, to be furnished to the board and the personnel officer within 14 days of the submission of the request referred to at paragraph 4.2 above;

(b) a written counterstatement by the personnel officer, to be submitted to the board and the officer concerned within 14 days of receipt of the

statement by the personnel officer;

(c) any further or other submission which the board may request from the officer concerned and/or the personnel officer, to be furnished in such form and within such time as the board may specify in its request.

4.5. The board may reject a request for a review of disciplinary proceedings where

(a) the officer concerned fails to make a submission required under paragraph 4.4 above within the prescribed time limit, or

(b) the board, having considered any submissions made under para. 4.4 above, is of the opinion that the case made by the officer concerned is frivolous, vexatious or without substance or foundation.

Where a request is rejected under the terms of this paragraph, the personnel officer may proceed in accordance with the terms of this code as though the request had not been made.

4.6 The board may invite any person to give evidence orally or in writing at the request of either side or on its own initiative.

4.7.The officer concerned is entitled if s/he so wishes to make oral submissions to the board either in person or through a serving civil servant of his/her choice, a whole-time official of the union holding recognition for his/her grade or such other person as the board agrees may be present for that purpose.

4.8. Where the board meets for the purpose of taking oral evidence or hearing oral submissions the following are entitled to be present:

-the officer concerned,

-any person who is entitled to make submissions on behalf of the officer concerned,

-the personnel officer,

-a serving civil servant designated to assist the personnel officer,

-any other person whom the board agrees may be present.

4.9. Proceedings before the board shall be informal.

4.10. Having made such enquiries as it considers necessary and having considered any submissions made or evidence given, the board shall form an opinion as to whether or not a case has been established on one or more of the grounds set out in paragraph

4.3 above. Where the opinion is to the effect that such a case has been established, it shall contain a recommendation that

-no further action should be taken in the matter, or

-the recommendation which the personnel officer proposes to submit to the relevant decision-making authority should be amended in a specified manner, or

-the case should be referred back to the personnel officer to remedy any deficiency in the disciplinary proceedings (in which event the provisions of this code shall continue to apply).

4.11. The board's opinion shall be conveyed, in writing, to the personnel officer and the officer concerned. The matter shall be processed further in accordance with the provisions of this code (see-paragraphs 3(6) to 3(8) above).

6.5 The applicant claims that the investigating officer is the fact finder in any disciplinary proceeding. After him, it is claimed, only a review is contemplated. There is no rehearing. I do not think this claim is sustainable on any reading of s. 4 above. Section 4.3 provides a number of grounds upon which an officer may seek review including failure of the investigating office to adhere to the Disciplinary Code, that reasonable steps to ascertain the facts were not taken, that all the relevant evidence was not considered or not properly considered, that no reasonable opportunity was given to the officer to answer the allegations, the unpredictability of disciplinary action in relation to the allegations and the disproportionality of the sanction. This seems to afford the appeal board a very wide discretion to examine the factual matrix of the investigation. This is confirmed by the terms of s. 4 which give the appeal board power to request any "further or other submission" from the officer concerned or the personnel officer. The appeal board may receive evidence from any person it wishes. The appeal board may receive submissions from any person including a lawyer for the officer. The appeal board having heard all the evidence and the submissions shall form an opinion as to whether a case has been made out. Having done so, it may recommend no further action or may amend the personnel officer's recommendation or refer the case back to the personnel officer to remedy any deficiency found. On this analysis of s. 4 of the Code, the appeal board is very far removed from being just a review body limited to a consideration of the proportionality of the section.

6.6 There is no fixed model for fair procedures that is applicable to all circumstances. What is required in one instance may differ from another. In *National Irish Bank and the Companies Act* 1993, I.R. p. 145, Shanley J., subsequently upheld by the Supreme Court, dealt with an investigation by inspectors which was a two stage one. The first was an investigative stage, the second a hearing stage. In distinguishing in *Re Haughey* [1971] I.R. 217, Shanley J. at p. 168 held that at first stage, the inspectors could not be compelled to produce documents to the respondent nor was he entitled to any documents or to the facility of cross-examining any person at the initial stage.

> "I am satisfied that there is no entitlement to invoke the panoply of rights identified by the Supreme Court at the information gathering stage of the inspector's work. The procedures identified by the inspectors following the outcome of the first stage accord in my view with the requirements of fairness and justice and guarantee, where appropriate, the exercise of the rights identified in Re Haughey."

I gratefully adopt this dictum of the late Shanley J. It is fairness and justice which is to be sought in any investigative process and it is to the process as a whole that the Court must look to determine if those basic requirements were met. The requirement of fairness and justice will vary from case to case.

6.7 Examining the agreed process set out in Circular 1/92, it seems to me to accord in its structure with the requirements of fairness and justice. In this case following a series of complaints against the applicant and a review of staff morale at KHFC, a disciplinary investigation was launched pursuant to s. 3(1) of the above Code. The then personnel officer, Mr. Tony Fitzpatrick, engaged a retired civil servant, Brian Bolger, to conduct this investigation. The purpose of this investigation was to determine if grounds existed for disciplinary action as a result of alleged conduct. Mr. Bolger conducted an investigation into the six allegations set out at 3.1 above. The applicant was informed by letter dated the 18th October, 2004 of this investigation and the allegations in question. He was suspended on full pay. It is clear on the evidence that the parameters of this investigation were set before Mr. Fitzpatrick was informed of the involvement of Minister Coughlan who was then the local Dail Deputy. She was also then a Minister but not one with responsibility in the area of fisheries. On the 22nd December, 2004, Mr. Bolger reported in an extensive report. Having reviewed this report Mr. Fitzpatrick decided there were sufficient grounds for a full investigation. The applicant was informed of the allegations against him that were to be investigated. He was given the opportunity to respond by Mr. Fitzpatrick. He attended a hearing with that officer in March 2005. The transcript thereof sets out a full and detailed discussion of all allegations under investigation. It was a discussion in which the applicant, assisted by his trade union official, participated fully. Subsequent to this, Mr. Fitzpatrick presented his preliminary findings to the applicant by letter dated the 4th August, 2005. This letter, as is clear from its contents, sets out in full detail the allegations, the evidence, the possible sanctions and the preliminary findings. The applicant was invited to respond. The investigating officer received during the course of this investigation thirty three letters from the applicant. In his view none of them addressed the allegations.

6.8 The applicant claims that the standard of proof should be one beyond reasonable doubt. I do not think that that is a correct view of the law. In *Georgopoulus v. Beaumont Hospital* [1998] 3.I.R. 132, Hamilton C.J. (at p. 150) stated;

> "This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on 'the balance of probabilities' bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."

This standard may be somewhat more flexible depending on the gravity of the allegation. I note in this regard the comments of O'Flaherty J. in *0'Laoire v. The Medical Council [*1998] WJSC- SC 11507 at p. 11515;

> "The common law panorama at this time gives the impression that there is but one standard of proof in civil cases though, of necessity, it is a flexible one. This flexibility will ensure that the graver the allegation the higher will be the degree of probability that is required to bring home the case against the person whose conduct is impugned."

The gravity of the allegations herein is towards the top end of the scale. Thus while the test should still be on the civil side, a higher degree of probability was required. It is not for this Court to assess the evidence upon which the appeal board finally based its decision in any general sense. I do however think the Court may consider whether there was presented to the appeal board a level of proof that went beyond just a bare balancing of probability.

6.9 The appeal board in its decision dated the 14th July, 2009 considered the grounds of appeal as follows;

(1) That reasonable steps were not taken to ascertain the relevant facts. The appeal board rejected this and related points and in my view had ample evidence before it to do so.

(2) All relevant evidence was not considered or was not considered in a careful and unbiased fashion;

The appeal board seems to me to have had ample material before it in the evidence and the decisions of the investigating officer on the allegations to support their decision that the allegations were substantiated. There is nothing to suggest they did not consider this evidence in careful fashion. Moreover, in my view no convincing case of bias has been raised against the investigating officer (see 6.15 below) nor is any stateable case of bias raised against the Appeal Board.

(3) The officer was not afforded reasonable facilities to answer the allegations; it is clear from the evidence that every opportunity was afforded the applicant to respond to the allegations.

(4) The officer could not reasonably have been expected to have understood that the behaviour alleged would attract disciplinary action.

The consideration of this claim occupied most of the appeal board's attention. It found that each of the allegations were ones that could predictably result in disciplinary sanction. It accepted in relation to the two pollution incidents that the sanction of dismissal was disproportionate. It considered the imposition of dismissal in relation to the pilotage allegations was not disproportionate.

I do not believe that the Court can interfere with the appeal board's decisions as to disproportionality of the sanction save in the unlikely event that such a decision was not based on any relevant evidence before it and thus was irrational. I do think, however, that the Court can examine the appeal board's consideration of the evidence in order to determine if there was any failure on its part to properly consider the evidence with a view to exercising its powers under s. 4 of the Code to order any further submission, to receive any further evidence from any person or any further submission from any other person or to refer the matter back to the personnel officer to remedy any deficiency.

It seems to me that in this regard, bearing in mind the gravity of the allegation of pilotage made against Capt. Kelly that any conclusion reached should also be based on something more convincing than just the bare balance of probabilities.

6.10 In this regard a great deal of the concrete evidence is not in dispute. Capt. Kelly did continue piloting boats long after he was explicitly instructed not to do so. He claims he never received any payment for this service but is a one share owner and director of NWMS which did receive substantial sums in fees in respect of Capt. Kelly's pilotage. Capt. Tony McGowan is also a director of NWMS.

Between them they carried out all the pilotage in KFHC. Capt. Kelly did nearly all the piloting. Capt. Kelly's interest in NWMS was never declared by him to the Department. NWMS's accounts show substantial retained profits in 2003 and 2004. The appeal board's view was that Capt. Kelly, although an able and intelligent man, did not address the issues in a direct way but frequently managed to cloud rather than clarify. This complaint echoed the investigating officer's that in his thirty three letters to him during the investigation, Capt. Kelly never directly addressed the allegations under investigation and further that he was evasive. He never provided any explanation as to why he would carry out almost all piloting in the harbour with no benefit to himself but only to NWMS. On the basis of these facts, it seems to me that the appeal board had ample evidence well above the bare balance of probabilities to support their finding in this crucial issue that Capt. Kelly was well aware of the existence of a conflict of interest between his role as harbour master and his commercial activities. The appeal board's finding that it was a matter of his own discretion as to whether he drew any income from NWMS was an obvious one. It seems to me to be an eminently reasonable conclusion that the applicant could not have been unaware that his conduct in piloting boats in Killybegs harbour was conduct likely to attract disciplinary action.

Thus, in my view of the evidence, there was more than enough to satisfy a standard of proof well above the normal balance of probabilities. Indeed, the evidence in this regard was so strong as might well support findings such as those made even were the burden of proof one of "beyond any reasonable doubt".

6.11 Even were this not so, according to the evidence, the investigating officer, Mr. Fitzpatrick, made clear as early as his provisional report dated 4th August, 2005 that he had reached his conclusions on the balance of probabilities. No issue was ever taken by the applicant with this standard and no case was made to the appeal board on this basis. I consider the applicant is too late to raise the point at this stage.

6.12 The involvement of the Minister
This issue was described by counsel for the applicant as the main issue in the case. The applicant's claim in this regard is that the investigating officer never disclosed the fact of the Minister's complaint and this gives rise to a reasonable apprehension of bias on his part. He repeatedly described this non-disclosure as concealment. The applicant further argues that the Minister should not have participated in the Cabinet decision to dismiss him. The evidence is that a decision to initiate an investigation into the applicant's role as harbour master was taken following an anonymous letter dated the 11th August, 2004. This decision was made on the 6th September, 2004. Mr. Fitzpatrick was first made aware ofthe Minister's complaint in an e-mail dated the 8th October, 2004, from Cecil Beamish, Assistant Secretary of the Department of Agriculture at the time. Mr. Beamish stated therein that he had received a telephone call from the Minister expressing strong complaints about the applicant in his role as harbour master. At a meeting of 14th October, 2004, with the investigating officer, the Minister repeated these complaints. It is important to note that the evidence clearly shows that the decision to investigate and the parameters of that investigation were taken prior to the Minister's involvement. Moreover, the evidence also establishes that those parameters included the pilotage issue which is the issue central to this case. Thus no reasonable apprehension of bias on the part of Mr. Fitzpatrick can arise out of the Minister's original act in this train of events. It should also be noted that the Minister was not at the time the Minister with responsibility for fisheries. I do not accept that the investigating officer's non-disclosure of the Minister's complaint amounted to a form of concealment. Her involvement seems to have been of no significance to Mr. Fitzpatrick since the investigation was already in train. Moreover, the claim of concealment is entirely at odds with the fact that at the appeal board hearing, the respondents tried to introduce a time line document to assist the board. This document contained a reference to the Minister's original complaint. It was not allowed as the applicant himself objected to its admission. As a result the appeal board, contrary to the respondent's wish was unaware of the Minister's involvement. In my view there was nothing untoward in Mr Fitzpatrick not revealing the minister's complaint and subsequently there was no concealment of this fact from the appeal board by him.

6.13 The second question raised by the applicant concerning the Minister's involvement in the Government decision to dismiss him is as to whether it gives rise to a reasonable apprehension of bias.

The first thing to be considered in regard to this question is the role of the Government in this type of case. It is argued by the applicant that it has an adjudicatory role. If it does not have such a role, goes the argument, why is it furnished with so much of the evidence? It seems to me that this argument cannot be correct. The Government is asked just one question. Should it dismiss or should it not? It is dealing with sanction only. It can only exercise its discretion in favour of the officer concerned. In this case it was furnished with a memorandum that was extensive and included the applicant's submissions to Government. It was informed of the piloting carried out by Mr. Connell, the successor to Capt. Kelly. It cannot be said to have had any adjudicatory function. That process was complete with the appeal board's decision. The appeal board seems clearly to be the final fact finder. Its conclusion is what is transmitted to Government. The Government's role is to decide on the basis of the case set out in the memorandum together with the recommended sanction of dismissal whether to accept or reject the recommendation. If it rejects it, then the whole matter reverts to the personnel officer who will deal with the case in a manner other than dismissal.

6.14 Can there be bias, either objective or subjective where there is no adjudication? Can it arise where, as here, there is simply a duty to affirm a recommendation or exercise its discretion and refuse to dismiss? Should a Minister who has expressed previously a view on the complaint which finally ends up before her in Cabinet be precluded from participation in the decision whether to dismiss or not? If, for example, the Government or any member thereof stated publicly a determination to stamp out corruption in a particular area of the civil service, would it or the Minister in question be precluded from deciding to accept a recommendation to dismiss an officer in that area found to have acted corruptly following a fair investigation and after an appeal? The answer to all these questions seems to me to be "no". Is a Minister who has publicly expressed a view on an issue obliged to forgo participation in vital decisions concerning that issue? To preclude a Minister from participating in decisions on matters upon which they have expressed views, in my view, confuses the adjudicatory function with the executive process. Thus, in my view, the Minister's participation in Cabinet when the decision was made to dismiss the applicant is beyond challenge herein.

6.15 Concerning the edited statements of a number of witnesses furnished to the applicant;
These were statements made by certain individuals to Mr. Bolger of the Department of Communications, Marine and Natural Resources who had been engaged to assist in the investigation. The statements were made by Ms. Marie Meehan, clerical officer, Mr. Martin Barrett, general operative and Mr. Frankie Me Closkey, foreman. Initially these statements were only furnished in extracted form. The investigating officer says they contained a considerable degree of information extraneous to the allegations he was attempting to investigate. When pressed to release the full statements, Mr. Fitzpatrick offered to do so on condition they were not used for any purpose other than the investigation. This offer was refused. Ultimately, in August 2007, Mr. Hanley. who succeeded Mr. Fitzpatrick as personnel officer, did release the full statements. Although the applicant complained of the initial withholding of these statements, the fact he chose not to call any of the authors of these statements as witnesses at the appeal board hearing demonstrates that there was nothing of value in the unreleased parts of these statements to the applicant's defence of the allegations. Once the full witness statements were furnished to him, he appears to have had no further comment of any kind to make upon them.

6.16 The conclusions of the investigating officer were tainted by bias on the following grounds;

(a) It is argued by the applicant that Mr. Fitzpatrick was in effect a witness, the prosecutor, the investigator and judge.

(b) Because he received the initial complaint, Mr. Fitzpatrick should not have investigated.

(c) Mr. Fitzpatrick's failure to disclose the Minister's complaint.

(d) His refusal to furnish the full statements showed bias.

(e) He made conflicting statements about Capt. Kelly's co-operation.

(f) The appeal board did not uphold the recommendation in relation to the two pollution issues.

(a) and (b) are, in my view, unstateable. Mr. Fitzpatrick's participation in this disciplinary process was exactly as mandated in the agreed procedure of Circular 1192. These procedures are not challenged in this judicial review and thus these two grounds fail.

(c) - I have already dealt with this matter above. The non-disclosure cannot be considered as concealment. The Minister's complaint was unrelated to the decision to investigate nor did it cause any new allegations to be investigated.

(d)-I have also dealt with this above at 6.14. Mr. Fitzpatrick was prepared to release the statements in unredacted form upon conditions that appear reasonable. The applicant's failure following their unconditional release to him to engage with the contents of the statements confirms the view of Mr.Fitzpatrick that the redacted sections were of no relevance to the disciplinary process. This original decision thus was vindicated and cannot give rise to any reasonable apprehension of bias.

(e) - Making conflicting statements about the applicant.

The height of this complaint is that in his letter of February 2007, the investigating officer made no reference to the evasiveness of the applicant as he did in his September 2008 report. I do not see how this fact could support a claim of bias against Mr. Fitzpatrick. His February 2007 letter was written in the course of an ongoing investigation. Mr. Fitzpatrick had changed positions and would likely not continue in the role of investigating officer. In the event, he did in fact carry on his investigation. The fact he had changed his mind about the applicant's conduct during the investigation does not of itself give grounds to suggest he was biased and this ground too must fail.

(f) - The fact that the appeal board did not uphold his recommendation of dismissal in relation to the two pollution issues also does not, in my view, support a claim of bias against Mr. Fitzpatrick. It should be noted from its decision at page 5, the appeal board took a serious view of the applicant's conduct in those two incidents. It regarded his actions in both cases as "constituting inappropriate behaviour, irregularity and misconduct, warranting

disciplinary action". The fact they decided not to support a sanction of dismissal in respect of these two incidents does not support a claim of bias against the investigating officer any more than it would in any case where the board exercised its power to reduce the sanction.

6.17 Incorrect procedure - continuing Mr. Fitzpatrick as investigating officer and re-opening of the investigation 2006;
The involvement of the Minister has already been dealt with as has the issue of Mr. Fitzpatrick being witness, prosecutor, judge and appeal court.

I can find no way in which the procedure was incorrect in this case. It appears to have followed exactly the procedure laid down in Circular 1192. The continuation of Mr. Fitzpatrick's involvement by the Secretary General of the Department of Communications/Marine and Natural Resources was done in accordance with the provisions of s. 4(i) (I) of the Public Service Management Act 1997 whereby the Secretary General of a Department may assign responsibility for performance of his functions to other officers in order to ensure coherence of policy across the Department. As to the claim that the investigation was "re-opened" in 2006, this claim does not seem sustainable. The investigation was not closed at any time. It certainly was inordinately delayed, but no evidence was opened to convince the Court that it was ever closed. Quite the opposite appears to be the case. On 4th August, 2005 the personnel officer produced a report on the completion of the investigative stage of the disciplinary process. This report included provisional conclusions and findings. Following on that report there was a submission of further correspondence by the applicant. This in tum seemed to necessitate some further investigation by the personnel officer. Paragraph 3(1) of Circular 1/92 provides;

> "The personnel officer shall cause an investigation or such further investigation as he considers necessary to be held to ascertain the facts of the case."

This is what occurred. Following on the 2006 report, the process continued to a formal disciplinary hearing to allow the applicant respond to this second report. The provisions of the agreed disciplinary code contained in circular 1/92 appears to me to have been correctly followed.

6.18. For the reasons above it appears to me that the applicant has failed to sustain his case for the reliefs sought and they are therefore refused.