Neutral Citation Number: [2013] IEHC 220

THE HIGH COURT

[2012 No. 715 J.R.]

BETWEEN

ALAN HYNES

APPLICANT

AND

THE APPEAL TRIBUNAL OF THE CHARTERED ACCOUNTANCY REGULATORY BOARD

RESPONDENT

AND

THE DISCIPLINARY TRIBUNAL OF THE CHARTERED ACCOUNTANCY REGULATORY BOARD

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on 7th May, 2013

1. The applicant in these proceedings is a chartered accountant and a member of the Institute of Chartered Accountants in Ireland. In 2008 a number of complaints were made in respect of a series of investment schemes which Mr. Hynes had apparently promoted.

2. These complaints were originally investigated by the Complaints Committee of the Chartered Accountants Regulatory Board ("CARB"). This process was completed at some stage in 2011 and a conclusion was reached by the Complaints Committee of CARB that a *prima facie* had been made out against the applicant so that he was liable to disciplinary action under Disciplinary Byelaws of the Institute of Chartered Accountants in Ireland. Accordingly, Mr. Hynes was presented with seven complaints which were then referred to the Disciplinary Tribunal of CARB.

3. At the hearing of the Disciplinary Tribunal on 23rd January, 2012, four preliminary applications were made by Mr. Hynes. These were:-

> (i) To refer the matter back to the Complaints Committee for further consideration and, specifically, permit oral submissions;
>
> (ii) To adjourn the Disciplinary Tribunal hearing pending the outcome of certain investigations being conducted by An Garda Síochána;
>
> (iii) To adjourn the Tribunal to allow for two members to recuse themselves on the basis of a perceived conflict of interest;
>
> (iv) An application to have a direction issued to the Complaints Committee relating to the format of certain papers.

4. In the event, it was not necessary for the recusal application to be determined by the Disciplinary Tribunal as the two members in question agreed to withdraw. It was then proposed by the Chairman of the Tribunal to empanel a new Tribunal within a number of weeks. All other applications were, however, refused.

5. By notice of appeal dated 9th February, 2012, Mr. Hynes sought to appeal the outcome of this hearing and, specifically, the refusals of the applications in question to the Appeal Tribunal. This appeal was based on Bye-Law 29.1(a) which provides that:-

> "A respondent may appeal against a finding or order of a Disciplinary Tribunal…"

6. On 15th May, 2012, the Appeal Tribunal dismissed this appeal on the basis that no such appeal lay. Following further submissions as to costs, the Tribunal made an award of costs as against Mr. Hynes in the sum of €17,500.00.

Findings and orders of the Disciplinary Tribunal

7. At the heart, therefore, of this application for judicial review is the question as to whether the Disciplinary Tribunal made "findings" in relation to the preliminary issues which it was required to decide. This assumes significance because Bye-Law 29.1 expressly provides that the right of appeal is confined to an appeal "against a finding or order of a Disciplinary Tribunal." It may be observed at this juncture that as both the Disciplinary Tribunal and Appeals Tribunal are creatures of the Bye-Laws, they enjoy no inherent jurisdiction. Rather they only have such jurisdiction as has been either expressly or by necessary implication conferred by the Bye-Laws.

8. The word "finding" is not defined in the Bye-Laws. Clause 2 of the Bye Laws, however, ascribes a very definite meaning to the word "order", as it is defined as meaning:-

> "As the case may be, an order of a Disciplinary Tribunal made under Bye Law 25.4, an order of an Appeal Tribunal made under Bye Law 32 or a consent order made under Bye Law 17 or an order for costs under Bye Law 33 or an order for the waiver or repayment of fees or commission under Bye Law 26 or remedial order under Bye Law 27 or an order to pay a complainant's expenses under Bye Law 28."

9. Clause 25.1 of the Bye-Laws provides:-

> "if a Disciplinary Tribunal appointed to hear formal complaint finds that the formal complaint has been proven in whole or in part in accordance with the standard of proof applicable in accordance with Bye Law 25.2, it shall make a finding to that

effect, but if it finds that the formal complaint has not been proven in accordance with such applicable standard of proof, it shall dismiss the formal complaint. In either case the Disciplinary Tribunal shall give reasons for its finding. Written notice of any finding or order of the Disciplinary Tribunal (together with the reasons therefore) shall as soon as practicable be given to the respondent and to the Complaints Committee and, if there is one, to the complainant."

10. Clause 25.4 of the Bye-Laws then provides that:-

> "If a Disciplinary Tribunal makes a finding that a formal complaint has been proved in whole or in part, it may make any one or more of the following orders against the respondent as it considers appropriate having regard to the status of the respondent, the Tribunal's views as to the nature and seriousness of the formal complaint, any previous complaints with which a finding or a finding and an order having been made against the respondent in any other circumstances that the Tribunal consider relevant…"

11. The Bye-Laws then proceeds to set out a range of disciplinary sanctions including expulsion from membership, ineligibility from holding a practising certificate, a fine and a reprimand: these are all "orders" under Bye-Law 25.4 in the sense in which the word "order" has been defined by Bye-Law 2.

12. Turning, however, to the principal issue, the central question remains whether the Disciplinary Tribunal may be said to have made a "finding" for the purposes of Bye-Law 29(1)(a), since it is agreed that the existence of a "finding" or "order" in this sense is a precondition to the jurisdiction of the Appeal Tribunal. It is further agreed that no "order" was made by the Appeal Tribunal in this sense.

13. In the general legal context, the word "finding" connotes definite judicial determinations as to law and, perhaps more especially, fact. Thus, for example, a judge may make a "finding" as to the credibility of a witness or a "finding" as to the circumstances in which a particular event took place.

14. It must accordingly be allowed that, taking a broad interpretation of the word "finding", it could be said that a determination of the Appeal Tribunal, for example, not to postpone the investigation pending the outcome of further inquiries was a "finding" in this wider sense. It is true, therefore, as counsel for the applicant, Mr. Cormack submitted, that using the word in this wider sense, the Disciplinary Tribunal made "findings" against the applicant by, for example, rejecting the argument that the disciplinary hearing should stand adjourned pending the outcome of other investigations.

15. It is, nevertheless, clear that this is not the sense in which the word "finding" is to be understood in the context of this rules. Rather, the word "finding" must not only be understood in the special and narrower sense conveyed by the juxtaposition of that word with the word "order" in Bye-Law 29.1, but also by reference to the more restricted sense of the word "finding" necessarily conveyed by an interpretation of the Rules as a whole.

16. Thus, for example, the use of the term "finding" in Bye-Law 25.1 is clearly referable to the issue as to whether the disciplinary complaint has been established to the satisfaction of the Disciplinary Tribunal and this is the sense in which this word has been used in Bye-Law 29.1. The present case affords another illustration of the principle of *noscitur a sociis* ("known by its companions") where the particular meaning of a perfectly general word is to be determined by the statutory or other context in which the words appears.

17. This principle was famously expounded by Stamp J. in *Bourne v. Norwich Crematorium Ltd*. [1967] 1 W.L.R. 691, 696 when he said:-

> "English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which one has assigned to them as separate words."

18. This principle is also illustrated by the classic judgment of Henchy J. in *Dillon v. Minister for Posts and Telegraphs*, Supreme Court, 3rd June, 1981. In that case an election candidate sought to avail of the free postage facilities available to such candidates. Objection was, however, taken to his electoral literature on the ground that it was "grossly offensive" within the meaning of Inland Postal Warrant 1939 because it claimed that "Today's politicians are dishonest because they are being political and must please the largest number of people."

19. Henchy J. pointed out that the words "grossly offensive" did not appear in isolation, as the statutory prohibition was against "any words, marks or designs of an indecent, obscene or grossly offensive character." He continued:-

> "That assemblage of words gives a limited and special meaning to the expression 'grossly offensive' character...Applying the doctrine of *noscitur a sociis* ....the expression must be held to be infected in this context with something akin to the taint of indecency or obscenity. Much of what might be comprehended by the expression of it if it stood alone is excluded by its juxtaposition with the words 'indecent' and 'obscene'. This means that the Minister may not reject a passage as disqualified for free circulation through the post because it is apt to be thought displeasing or distasteful. To merit rejection it must be grossly offensive in the sense of being obnoxious or abhorrent in a way that brings it close to the realm of indecency or obscenity. The sentence objected to by the Minister, while many people would consider it to be denigratory of today's politicians, is far from being of a 'grossly offensive character' in the special sense in which that expression is used in the [Inland Postal Warrant]."

20. The principle thus expounded by Henchy J. in *Dillon* can be applied here. The Bye-Laws do not use the term "finding" in an abstract or very general sense, but rather it is one whose particular meaning is necessarily to be implied from the special context in which the word appears. Its juxtaposition besides the word "order" accordingly connotes a special and more limited meaning, namely, a "finding" in relation to a disciplinary complaint.

Conclusions on the jurisdictional issue

21. It follows, accordingly, that the Appeal Tribunal correctly adjudged that it had no jurisdiction to entertain this appeal since it did not relate to either a finding or order of the Disciplinary Tribunal.

The issue of costs

22. Quite independently of the issue pertaining to the jurisdiction of the Appeal Tribunal, Mr. Hynes seeks to quash the finding of the Appeal Tribunal as directed the payment of €17,500 in respect of costs on the grounds that the Tribunal had no jurisdiction to make such an order and, in any event, the amount so embraced by the order was excessive to the point of irrationality.

23. The jurisdiction to award costs is to be found in Bye-Law 32.1 and Bye-Law 33.1. Bye-Law 32.1 provides:

> "On any appeal, the Appeal Tribunal may affirm, vary, rescind any finding or order of the Disciplinary Tribunal in respect of which the appeal was brought, and may substitute any other finding or order…which the Disciplinary Tribunal might have made on the original formal complaint, or may, if the Appeal Tribunal, in its absolute discretion, considers it appropriate, order that the formal complaint which resulted in the finding or order of the Disciplinary Tribunal in respect of which the appeal was brought be heard *de novo* by a different Disciplinary Tribunal. An Appeal Tribunal may also made an order for costs under Bye-Law 33."

24. Bye-Law 33.1 provides:

> "In addition to such orders as may be made by a Disciplinary Tribunal or an Appeal Tribunal (including an order that no further action be taken) a Disciplinary Tribunal or an Appeal Tribunal may, in its absolute discretion, direct that the respondent or appellant, as the case may be, pay the Institute such sum for costs as the Disciplinary Tribunal or Appeal Tribunal may, in its absolute discretion, determine."

25. In my view, the entire context of these provisions is that it presupposes that an order for costs can only be made by the Appeal Tribunal as an ancillary order to any orders which that Tribunal could properly have been made in the course of a valid appeal. One could enumerate several reasons to justify this conclusion, but the following may suffice for the present purposes.

26. Thus, for example, Bye-Law 33.1 vests the Appeal Tribunal with power to direct an "appellant" to pay a sum of costs in addition "to such orders as may be made…by an Appeal Tribunal….". But for all the reasons given in the first part of the judgment, Mr. Hynes was not an "appellant" in this sense, since, *ex hypothesi*, there was no valid appeal in the first instance. If it were otherwise, it would mean, in effect, that Mr. Hynes was to be regarded as an "appellant" only for the purposes of an adverse order for costs, while he not be regarded as an appellant for the purposes of the substantive appeal. The opening words of Bye-Law 33.1 ("In addition to such other orders as may be made…by an Appeal Tribunal…") also presuppose that there was a valid appeal in existence prior to the making of an award of costs, because, of course, as we have already seen, the Appeal Tribunal would only have had jurisdiction to hear the appeal in the first place if there was an order or finding.

27. The location, moreover, of the power to award costs at the conclusion of Bye-Law 32.1 is a further indication that this power is predicated as an adjunct to the power to entertain an appeal from a "finding or order." Yet if the Appeal Tribunal cannot entertain a substantive appeal because there is no appeal from a finding or order, it equally follows that there is no power to award costs in such circumstances.

Conclusions on the power to award costs

28. Since the power to award costs is predicated on the existence of a valid appeal to the Appeal Tribunal and as I have already ruled that the Tribunal was correct in its conclusion that it had no jurisdiction to entertain Mr. Hynes' appeal (since it was not an appeal against a finding or order), it must therefore follow that the Appeal Tribunal had no jurisdiction to award costs.

29. I will accordingly quash the decision of the Appeal Tribunal of 15th May, 2012, insofar as it made an award of costs against Mr. Hynes.