



THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 328

Record Number: 2021/122

High Court Record Number: 2020/235JR

**Noonan J.
Faherty J.
Ní Raifeartaigh J.**

BETWEEN/

RAYMOND HEGARTY

RESPONDENT/APPLICANT

-AND-

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

APPELLANT/RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered on the 7th day of December, 2021

1. The appellant ("the Commissioner") brings this appeal from the order of the High Court giving liberty to the respondent ("Garda Hegarty") to cross-examine Chief Superintendent Margaret Nugent, who has sworn a number of affidavits on behalf of the Commissioner in these proceedings.

Background Facts

2. The High Court delivered a written judgment on the 15th March, 2021 setting out the facts in detail which I propose to summarise. Garda Hegarty is alleged to have engaged in inappropriate conduct while on duty in Lismore Garda Station, County Waterford in March 2017 which constituted breaches of garda discipline. This gave rise to a complaint to the garda authorities. The behaviour complained of is not disputed by Garda Hegarty. As a result of this complaint, a disciplinary process was commenced under the provisions of the Garda Síochána (Discipline) Regulations 2007 S.I. 214 of 2007 ("the Regulations").
3. A Board of Inquiry was established to investigate the complaint, which it did in September 2018. The Board of Inquiry determined that Garda Hegarty should be required to retire or resign as an alternative to dismissal for the first alleged breach of discipline and that he be subjected to a deduction of two weeks' pay in respect of the second breach. On the 25th October, 2018, the Commissioner ordered that the sanction be imposed.

4. Garda Hegarty appealed on the 30th October, 2018, as he was entitled under the Regulations, and a Board of Appeal was established in mid-2019. It heard the appeal in September 2019 and gave its decision on the 9th January, 2020. It determined that the first penalty imposed by the Board of Inquiry was disproportionate and substituted a reduction in pay for four weeks. It left the second penalty unchanged.
5. This did not prove to be the end of the matter however, because on the 24th January, 2020, Garda Hegarty was suspended. The reason for the suspension was stated to be that the Commissioner was considering Garda Hegarty's position pursuant to s. 14 of the Garda Síochána Act, 2005 as amended. That section provides, in relevant part, as follows: -

"14(2) Notwithstanding anything in this Act or the regulations, the Garda Commissioner may dismiss from the Garda Síochána a member not above the rank of inspector if—

 - (a) the Commissioner is of the opinion that—
 - (i) by reason of the member's conduct (which includes any act or omission), his or her continued membership would undermine public confidence in the Garda Síochána, and
 - (ii) the dismissal of the member is necessary to maintain that confidence,
 - (b) the member has been informed of the basis for the Commissioner's opinion and has been given an opportunity to respond to the stated basis for that opinion and to advance reasons against the member's dismissal,
 - (c) the Commissioner has considered any response by the member and any reasons advanced by the member, but the Commissioner remains of his or her opinion, and
 - (d) the Authority consents to the member's dismissal. ..."
6. The initial suspension was renewed and subsequently continued.
7. On the 30th March, 2020, Garda Hegarty obtained leave to seek judicial review of the decision to suspend him but prior to service of those proceedings, on the following day, the 31st March, 2020, the Commissioner wrote to Garda Hegarty stating that he was of the opinion that by reason of Garda Hegarty's behaviour and conduct in March 2017, his continued membership would undermine public confidence in An Garda Síochána and his dismissal pursuant to s. 14 was necessary to maintain that confidence.
8. The letter stated that the Commissioner had considered the decision of the Appeal Board but notwithstanding same, he must take cognisance of his broader responsibilities and duties as Commissioner. Garda Hegarty was invited to submit a response by the 29th April, 2020. Thereafter, the judicial review proceedings were amended to challenge this letter as well as the suspension. The amended statement of grounds seeks, *inter alia*, the following reliefs: at (v) a declaration that the suspension is *ultra vires* the Commissioner and at (ix), an order of certiorari of the determination of the Commissioner as set out in the letter.
9. The pleaded grounds relied upon in support of relief (ix) include the following: -

- "31. [The letter of the 31st March] subverts the determination of the Appeal Board, made pursuant to Regulation 27 of the Garda Síochána (Discipline) Regulations, 2007 and is therefore:
- (i) *ultra vires* the Respondent;
 - (ii) irrational;
 - (iii) an abuse of process;
 - (iv) in breach of natural and constitutional justice; and
 - (v) a decision that cannot properly be made.
32. By ignoring and/or failing to implement the decision of the Appeal Board the Respondent is in breach of Regulation 37(5) of the Garda Síochána (Discipline) Regulations, 2007.
33. The failure of the Respondent to conduct an inquiry as to whether the Applicant's continued membership of An Garda Síochána would undermine public confidence in that body, before making this determination was in breach of the Applicant's right to fair procedures and natural justice.
34. The failure of the Respondent to advise the Applicant of his concerns, to appraise (*sic*) him of the basis upon which they arose, and to invite his response, before making this determination, was in breach of the Applicant's constitutional rights to fair procedures and natural justice."
10. It is important to point out that there appears to be no factual dispute between the parties concerning any of these pleas. The Commissioner does not contend that he conducted an inquiry of the kind mentioned prior to writing the letter of the 31st March, 2020. Further, it is not in dispute that the Commissioner did not communicate with Garda Hegarty prior to writing the letter to advise him of his concerns or invite a response.
11. In his statement of opposition, the Commissioner pleads, *inter alia*, at para. 19 that the s. 14 procedure was initiated by him *independently* from the procedure followed pursuant to Part 3 of the 2007 Regulations. There is a further plea at para. 23 that the process pursuant to s. 14 is a separate and distinct process from that obtaining under the Regulations and the Commissioner has lawfully operated the provisions of the section.
12. The statement of opposition is verified in an affidavit sworn on the 18th June, 2020 by Chief Superintendent Margaret Nugent, head of Garda Internal Affairs.
13. On the 6th January, 2021, Garda Hegarty issued a motion seeking an order pursuant to O. 40, r. 1 of the RSC directing the attendance of Chief Superintendent Nugent for cross-examination. The motion was grounded upon the affidavit of Garda Hegarty's solicitor, Elizabeth Hughes, sworn on the 16th December, 2020.
14. In her affidavit, Ms. Hughes draws attention to certain pleas in the statement of opposition which were verified by C.S. Nugent, including that the s. 14 procedure was initiated by the Commissioner independently from the procedure followed pursuant to the Regulations and

that the procedure, as required by both the Regulations and s. 14, had been fully adhered to throughout the process.

15. She refers to C.S. Nugent's affidavit and notes that it was not sworn by any decision maker who made the impugned decisions. At para. 6 of her affidavit, she avers that C.S. Nugent cannot give evidence as to the state of mind of the Commissioner in invoking s. 14 or to the matters considered by him in deciding to invoke those powers. At para. 7, she points to the fact that O. 40, r. 4 requires affidavits to be confined to facts within the knowledge of the deponent.
16. She refers to the fact that an application for interrogatories made by Garda Hegarty was refused by the High Court. She continues at para. 9: -

"The Applicant herein does not accept that 'the Section 14 procedure was initiated by the Respondent independently from the procedure followed pursuant to part 3 of the 2007 Regulations'. Furthermore, the Applicant does not accept that 'the procedures required by the Garda Síochána (Discipline) Regulations as amended and by section 14 of the Garda Síochána Act, 2005, as amended have been fully adhered to throughout this process'."

17. Ms. Hughes goes on to say in para. 10 of her affidavit that the applicant does not accept the facts contained in the statement of opposition and does not have the means of knowledge necessary to contest them, absent cross-examination of the deponent. She further avers that the court cannot be required to determine the issues arising on the basis of hearsay evidence and consequently, it is necessary for the applicant to establish that the matters contained in the statement of opposition are not facts upon which the court has evidence upon which it can rely.

18. Her conclusion is as follows (at para. 10): -

"In all the circumstances, where the Respondent seeks to rely on facts set out in the statement of opposition, it is necessary to cross-examine Chief Superintendent Nugent to establish on oath whether she had the requisite means of knowledge or not."

19. It is clear, therefore, that the primary basis upon which the motion seeking cross-examination was advanced was that it was necessary to determine whether C.S. Nugent was purporting to give hearsay evidence or not. Ms. Hughes also appears to suggest that Garda Hegarty should be permitted to cross-examine C.S. Nugent because he "does not accept" two matters in particular; first, that the s. 14 procedure was initiated independently from the procedure under the Regulations; and second, that the procedures under both the Regulations and s. 14 have been adhered to. Garda Hegarty does not however, posit any alternative facts to the "facts" that he does not accept.

Judgment of the High Court

20. In her judgment, the High Court judge set out the various matters to which I have referred in detail and considered a number of legal authorities to which I will refer further.

21. In relation to the alleged dispute on the facts giving rise to the need for cross-examination, the judge said the following (at para. 27): -

“Here, counsel for the applicant says that there are two factual disputes that require to be resolved. The first is whether the applicant was suspended from 1 February 2020 for the reasons set out in the February suspension notice or for other reasons. [This issue is no longer being pursued]. The second is whether the process followed in respect of the invocation of s. 14 was independent of the process under the Disciplinary Regulations and/or was a separate and distinct process.”

22. Although counsel for Garda Hegarty may well have made this submission in the High Court, it does not quite reflect what appears in the affidavit of Ms. Hughes to which I have referred. The first matter referred to by the judge, the suspension, is not identified in the grounding affidavit as giving rise to any factual dispute. The second matter referred to by the judge is however mentioned, as I have noted. The other factual dispute that Ms. Hughes appears to identify is whether there was adherence to the procedures required by the Regulations and s. 14.

23. The judge considered each of these issues in turn and concluded in relation to the February suspension that leave would be refused to cross-examine on this issue. She then turned to s. 14 and referred to paras. 9 and 10 of the affidavit of Ms. Hughes noted above. Having done so, she continued: -

“36. Contrary to what is submitted by the respondent, the matters not accepted by Ms. [Hughes] are not exclusively matters of law. As is clear from the extracts from the pleadings set out above, the applicant makes two distinct criticisms in relation to s. 14. Of course, these criticisms will only be addressed if the court rejects the respondent’s preliminary plea of prematurity.

37. The first is a jurisdictional one i.e. that s. 14 may not be employed at all where the process under the Disciplinary Regulations has been invoked and completed. The respondent argues that this is exclusively a question of law rather than fact, and accordingly no requirement for cross-examination arises. I agree that this question is very likely one of pure law that will not involve factual controversies. If the applicant is correct in that assertion, no further issues will require to be determined in the proceedings.

38. However, on the assumption that recourse to s. 14 is permissible, the applicant makes a separate argument that the way in which the s. 14 process and procedures were carried out in this case was unlawful. The Amended Statement of Grounds clearly puts this matter in issue in the proceedings. The determination of that question will require the court to have before it the relevant facts in relation to the making of the letter of 31 March 2020 and, specifically, the interaction between the procedures under the Disciplinary Regulations and those relied upon in the s. 14 process.”

24. The judge went on to say (at para. 39) that the process leading to the formation of the conclusions contained in the letter of 31 March 2020 is opaque. She observed that it is unclear how the Commissioner was aware of the matters that are set out in the letter and whether this was based solely on the conclusions of the Board of Inquiry and the Appeal Board together with the relevant documents, or from other sources such as interviews with persons involved in the disciplinary hearings.
25. The judge considered that as the Commissioner had explicitly pleaded that the s. 14 procedure was initiated independently from the disciplinary procedure, this issue was likely to require adjudication by the trial judge. Further, the judge considered that the answers to these issues are likely to involve mixed questions of law and fact, whereby the trial judge will have to, inter alia, identify the appropriate process to be followed by the Commissioner when invoking s. 14, including the necessity or otherwise for that process to be independent of the disciplinary process and then consider whether, as a matter of fact, those legal requirements were complied with.
26. The judge seemed to consider that the court ultimately hearing the case would be required to adjudicate as to whether the s. 14 procedure was initiated independently from the process under the Regulations. She noted that it is not clear how the Commissioner obtained the facts necessary to permit him to arrive at the conclusions in the letter but there was at least an implication that there was a link between the disciplinary process and the s. 14 investigation and this is a matter that may require to be addressed by the trial judge.
27. Her conclusion was as follows: -
 - "43. Accordingly, it appears to me, as identified by Kelly J. in *IBRC*, referred to above, that (a) there is an extant factual controversy between the parties relevant to the issues requiring to be determined i.e. whether as a matter of fact the s. 14 process was separate and distinct from the disciplinary process, and (b) that issue cannot justly be decided in the absence of cross-examination. Additionally, as identified in *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369, in the circumstances set out above, it seems that cross-examination is desirable to test the competing positions of the parties in respect of the issue identified above. I am accordingly satisfied that cross-examination is necessary to resolve this controversy."
28. The judge therefore directed (at para. 45) that C.S. Nugent be cross-examined on the sole issue of "the interaction between the s. 14 procedure and the procedure followed pursuant to the Disciplinary Regulations."
29. The judge declined to entertain the complaint about hearsay as a basis for allowing cross-examination and there is no cross-appeal by Garda Hegarty in relation to that refusal.
30. The essential ground of appeal advanced by the Commissioner is that there is, in reality, no factual dispute between the parties which could justify cross-examination of C.S. Nugent, because the sole issues arising are matters of law.

Legal Principles

31. A helpful summary of the legal position in relation to applications to cross-examine deponents of affidavits is set out in *Delany & McGrath on Civil Procedure* (4th edn, Roundhall 2018) at para. 21-104: -

"The general approach of the courts has been that leave to cross-examine will only be granted if there is a conflict of fact upon the affidavits that it is necessary to resolve in order to determine the proceedings or the application before the court. In order for the requisite conflict to arise, it will be necessary for the party seeking cross-examination to have filed an affidavit challenging the accuracy of the matters upon which cross-examination is sought. It follows that cross-examination will not be ordered so that the deponent can be cross-examined as to factual matters that are not addressed in his or her affidavit. Neither can cross-examination be used in an attempt to depose the deponent to obtain evidence for later use at trial."

32. This appears to me to be an accurate statement of the law. A similar analysis is to be found in *Irish Bank Resolution Corporation Ltd (in special liquidation) v Moran* [2013] IEHC 295, where Kelly J. said: -

"15. It is incumbent upon an applicant for such an order [*for cross-examination*] to demonstrate (1) the probable presence of some conflict on the affidavits relevant to the issue to be determined and (2) that such issue cannot be justly decided in the absence of cross-examination."

33. This passage was also cited by the trial judge.

34. Cross-examination in applications for judicial review is relatively rare. This is because judicial review is concerned with issues of pure law arising in the process under challenge, rather than the resolution of factual disputes between the parties. It is for that reason that cross-examination is unusual in such cases, rather than because special rules apply to judicial review. As in any adversarial litigation, it is for the claimant to allege facts which are said to give rise to an entitlement to the remedy sought.

35. To the extent that the public body concerned may dispute the facts alleged by an applicant for judicial review, if the court cannot adjudicate on the question of law raised without first resolving the dispute of fact, then cross-examination may not only be appropriate but essential. There must however be a genuine dispute of fact arising. It is not sufficient for the applicant to merely swear that he or she does not accept a particular state of affairs without putting alternative facts before the court which the applicant says are the true facts.

36. Mere denial or non-acceptance of facts deposed to by a respondent cannot, without more, give rise to a right to cross-examine. Were that to be the position, there would be cross-examination in virtually every case. Even if there is a genuine dispute on the facts in the sense of opposing versions of events being advanced by the parties, cross-examination will in general only be permitted where the resolution of that conflict is essential to the determination of the legal issues that arise.

37. Turning to the s. 14 issue, the process arising under this section was recently considered by the High Court (Heslin J.) in *Ivers v The Commissioner of An Garda Síochána* [2021] IEHC 574, a decision that post-dates the judgment under appeal (and that this court was informed by counsel for Garda Hegarty is itself under appeal). In his analysis of s. 14, Heslin J. said (at para. 31): -

"... It is clear that s. 14 sets out a particular process which includes that the respondent form an 'opinion' at two different and distinct stages in the process. The *first* arises pursuant to s. 14(2)(a). The *second* opinion is one pursuant to s. 24(2)(c) (sic). It is equally clear that the forming of a s. 14(2)(a) opinion initiates a process whereby the respondent is required to do certain things, including to: inform the member of the basis for the Commissioner's s. 14(2)(a) opinion; give the member an opportunity to respond to the stated basis for that opinion; give the member an opportunity to advance reasons against the member's dismissal; consider any responses by the member; consider any reasons advanced by the member. After all the foregoing has been done, the respondent is required to consider matters again and to form an opinion for a second time in light of the process mandated by s. 14(2)(b) and (c). This is where the s. 14(2)(c) opinion arises and it is plainly an opinion which must be formed at a *different* stage in the process and against the backdrop of all information then available to the respondent in the context of the process having been followed..." (*Emphasis in original*).

38. Accordingly the court in *Ivers* held that the forming of a s. 14(2)(a) opinion, which might be described as provisional, was the first step in the process initiated under the section. The formation of that opinion triggers certain rights and entitlements on the part of the member concerned, including the right to make submissions as to whether the initial opinion was correctly formed in the first place. After that process has been exhausted, it is only at that stage that the Commissioner forms the second, and operative, opinion under s. 14(2)(c).

Discussion and Conclusion

39. As noted by the High Court judge, one of the objections raised by the Commissioner to Garda Hegarty's claim is that it is premature on the basis that the s. 14 procedure has merely been initiated by the letter of the 31st March, 2020. Without purporting to express any view on that contention, it seems to me that as a matter of law, the Commissioner either was, or was not, entitled to arrive at a preliminary or provisional opinion such as to trigger the s. 14 procedure.
40. As I have already noted with regard to Garda Hegarty's amended statement of grounds, the Commissioner's entitlement to arrive at the opinion expressed in the letter of the 31st March, 2020 is squarely challenged on the basis that; the Commissioner ignored and failed to implement the decision of the Appeal Board; failed to conduct an inquiry in advance into whether Garda Hegarty's continued membership would undermine public confidence; and failed, before writing the letter, to apprise Garda Hegarty of the Commissioner's concerns and invite his response.

41. These matters, from a factual perspective, are not in dispute and Garda Hegarty is either right or wrong in law that they have the effect of invalidating the letter. It is thus not clear to me how the interaction between the s. 14 procedure and the procedure followed pursuant to the Regulations has a bearing on the lawfulness of the Commissioner's actions.
42. The Commissioner submits that the process leading to the formation of his conclusions contained in the letter is not relevant. Whether that is correct or not is a matter for the trial judge. However, it is not permissible for Garda Hegarty to seek to cross-examine C.S. Nugent with a view to exploring the factors considered by, and present in the mind of, the Commissioner when he wrote the letter. Further, it is not in dispute, as a matter of fact, that the Commissioner did not conduct a separate inquiry prior to writing the letter and therefore cross-examination is not necessary to explore whether this is so or not.
43. An applicant for judicial review is not entitled to seek to cross-examine the decision maker with a view to eliciting facts which might then be relied upon as grounds for challenging the decision in issue. That would, in my view, subvert the judicial review process. Garda Hegarty has pleaded facts which are undisputed and which, he claims, of themselves invalidate the s. 14 process initiated by the Commissioner. There is thus, in my judgment, no extant factual controversy between the parties, the resolution of which is essential to enable the court to determine the application.
44. Indeed, the manner in which the issue, upon which cross-examination was permitted by the High Court, is framed does not itself point to any alleged conflict of fact. Rather, it allows for an exploration of the interaction between the procedures followed under s. 14 and under the Regulations. It does not identify any fact requiring resolution, nor does it admit of an answer that resolves opposing contentions of fact. Rather, it seems to me to open the door to a potentially roving cross-examination designed to probe the rationale and mindset of the Commissioner in writing the letter, something which is impermissible. Further, it is not the basis upon which cross-examination was sought by Garda Hegarty.
45. In my view, the judge fell into error in considering that the fact that the process leading to the writing of the letter was opaque was something that should give rise to a right to cross-examine. While, as the judge points out, the Commissioner has pleaded that the s. 14 process was initiated independently from the disciplinary procedure, it is not clear to me how the correctness or otherwise of that plea ultimately bears on the issue the court has to decide. The onus is on Garda Hegarty to demonstrate that the resolution of that issue is essential to the determination of the application and in my judgment, he has failed to do so.
46. The judge noted at paragraph 42 of her judgment that the link between the s. 14 letter and the disciplinary process *may* be required to be addressed by the trial judge. Even were that so, it falls short of amounting to an issue of fact, the resolution of which is essential to determine the claim. At the end of the day, the trial court is faced with determining whether as a matter of law, the Commissioner was entitled to invoke s. 14 for the purpose of bringing about a result diametrically opposed to that arrived at by the Appeal Board. This court was told that this issue is novel and there is no doubt that the interaction between s. 14 and

the Regulations is front and centre in this application. It is, however, clearly an issue of pure law.

47. There are several recent decisions of this court, (e.g. *Betty Martin Financial Services Ltd v. EBS DAC* [2019] IECA 327 and *Clare County Council v McDonagh & Anor* [2020] IECA 307), which emphasise that in appeals from discretionary interlocutory orders, a significant margin of discretion will be afforded the High Court and where the order made is one within the range of judgment calls that may properly be made, this court will not interfere unless it is clearly demonstrated that a legal error is apparent or an injustice may result. In this case, I am satisfied that a clear legal error is evident in the judgment of the High Court and for that reason would allow this appeal.
48. For completeness, I should mention that the court's attention was drawn to an affidavit of Garda Hegarty's solicitor, delivered in this appeal, pointing to the fact that since the filing of the notice of appeal, an affidavit of discovery was sworn by the Commissioner. Counsel for Garda Hegarty informed the court that the documents discovered disclose that C.S. Nugent was centrally involved in the decision to write the letter of the 31st March, 2020 and had in fact drafted the letter. Counsel suggested that this removed the hearsay objection in relation to her affidavits.
49. With regard to the question of costs, my provisional view is that although the Commissioner has been successful in this appeal, the discovery now made may, to some extent, have rendered the original basis for the application moot. Although complaint was made by Garda Hegarty's counsel of delay by the Commissioner in making this discovery, I make no finding in that regard and consider that the justice of the case is best met by an order directing that the costs in the High Court and this court be costs in the cause. If either party wishes to contend for an alternative order, they will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on costs. If such hearing is sought and does not result in an order different from that proposed, the requesting party may be responsible for the additional costs of such hearing.
50. As this judgment is delivered electronically, Faherty and Ní Raifeartaigh JJ. have indicated their agreement with same.