

THE HIGH COURT

Record No. 2012/687JR

Between/

JOHN WILSON

Applicant

AND

SUPERINTENDENT SEAN FARRELL, CHIEF SUPERINTENDENT PATRICK MCGEE, THE COMMISSIONER OF AN GARDA SÍOCHÁNA,
IRELAND AND THE ATTORNEY GENERAL

Respondents

Judgment of Ms. Justice Iseult O'Malley delivered the 11th April, 2014.

Introduction

1. The issue in this case is whether or not a failure by a member of An Garda Síochána to comply with an order to give an account of activity engaged in by him while off duty is susceptible to disciplinary proceedings.
2. The applicant is a now-retired Garda, who at the material time was stationed in Clones, County Monaghan in the Cavan/Monaghan Division of An Garda Síochána. The court has been told that the events dealt with in this judgment do not relate to his departure from the force.
3. The context in which the issue arose related to a long-running dispute between neighbours in an estate in Virginia, County Cavan. On the 1st January, 2012 four individuals, from both sides in the dispute, were prosecuted at a sitting of Virginia District Court in Cavan Courthouse on charges of harassment contrary to s.10 of the Non-Fatal Offences Against the Person Act, 1997. After hearing one witness, the District Judge dismissed all charges, with voluntary sworn undertakings being given by all of the accused and the spouse of one of them.
4. On the 19th January, 2012, the prosecuting officer, Inspector Aidan Farrelly, sent a report on the court proceedings to the Superintendent in Baillieboro.
5. According to the report, the neighbour dispute had begun in or around 2005. There had been over 90 complaints to local Gardaí since then, with numerous investigations and files sent to the Director of Public Prosecutions. The report concluded with the following paragraph:

"During the hearing of this case at Cavan Courthouse it was noted that Garda John Wilson attached to Clones Garda Station sat next to Walter and Genevieve Smith defendants in the case. Garda Wilson was not in uniform and was not a witness for prosecution in case. There were no other cases listed in this special sitting. "

Background to the inquiry

6. On the 31st January, 2012 the Chief Superintendent of the Division sent a note to the Superintendent in Monaghan, attaching the report of Inspector Farrelly and stating that an explanation was required in respect of the applicant's attendance at the case. The note was headed *"Re: Correspondence to Commissioner from Ms. Marie Byrne"* with the address of that person and the title of the District Court criminal proceedings. It may be noted that Marie Byrne had been one of the defendants in the District Court prosecution. The note and the attached report were forwarded to the applicant through his sergeant, with the instruction that he was to report to the Superintendent by the 9th February.
7. The applicant's reply, dated the 6th February, 2012 was as follows:

"Re: Correspondence from Chief Superintendent Sheridan, Divisional Officer, Cavan Monaghan Garda Division

In relation to above, what is Inspector Aiden Farrelly insinuating about me in his correspondence to the Divisional Officer Cavan Monaghan Garda Division dated 19th January, 2012?"
8. This reply was forwarded to the Superintendent, eliciting the response, on the 9th February, that

"Garda Wilson is directed to report in respect of the issue as set out in the Divisional Officer's minute.

For report without further delay. "
9. The applicant replied on the 12th February, saying

"In relation to the above, I will report when I establish what Inspector Aiden Farrelly is insinuating about me in his correspondence to the Divisional Officer Cavan Monaghan Garda Division dated 19th of January 2012. I requested this information in my report dated 06/02/2012."
10. The Superintendent's response, on the 15th February, was as follows:

"Garda Wilson should comply with directions issued in minute dated 9th February 2012. It should be noted that the member is duty bound to account for his presence on the occasion. "

11. The applicant did not accept this. In an undated note stamped by the sergeant on the 21st February, he referred to the statement that he was "duty bound" to account for his presence and asked that he be furnished "as a matter of urgency" with the Garda regulations governing this statement.

12. The next communication was from the Chief Superintendent to the Superintendent, on the 22nd February when he gave the following direction:

"Garda Wilson will report as previously directed in my correspondence dated 31st ult. Ensure compliance."

13. There appears to have been a report from the Superintendent to the Chief Superintendent, which is omitted from the exhibits but which was responded to as follows on the 6th March, 2012:

"Inspector Farrelly has merely reported the facts as observed by him whilst acting as prosecuting Officer before a special sitting of Virginia District court held at Cavan Courthouse on 12th January 2012.

My directions dated 31st January 2012 in which I sought a report from Garda Wilson have not been complied with; I will afford the member until the 20th March 2012 to submit the required report.

Inform the member accordingly and report further by 23rd March 2012."

14. According to the applicant, he responded on the 20th March by referring to the heading on the correspondence (set out in paragraph 6 above) in the following terms;

"In relation to the above, how does this correspondence relate to me? Please forward me this correspondence as a matter of urgency. "

15. On the 26th March, 2012 the Chief Superintendent initiated disciplinary procedures by appointing the first named respondent as Deciding Officer to investigate the matter pursuant to the relevant regulations.

16. The applicant has deposed that throughout this correspondence he was very concerned at both what he perceived as an insinuation of wrongdoing and the fact that he was being asked to account for his activities and whereabouts when he was on a day off. He considered that he was entitled to privacy when off duty.

17. In a replying affidavit the Chief Superintendent has deposed to the fact the dispute giving rise to the District Court proceedings had given rise to over 90 complaints to the Gardaí, had received considerable media attention over the years and had also resulted in complaints of bias against members of An Garda Síochána (not including the applicant). Having read Inspector Farrelly's report, he was concerned that the applicant's presence in the courthouse in circumstances connected with the administration of justice in a criminal case

"... could give rise to an apprehension of lack of impartiality on the part of An Garda Síochána with regard to the aforesaid criminal case, and might have amounted to a breach of discipline. "

The disciplinary inquiry

18. The first named respondent was appointed on the 26th March, 2012 to enquire as to whether or not the applicant had been in breach of discipline in not submitting the required report. On the 2nd May, 2012 he served upon the applicant a notice pursuant to the Garda Síochána (Discipline) Regulations, 2007, informing him that he would be interviewed in relation to the following alleged breaches of discipline:

"1. Neglect of Duty, that is to say that you did without good and sufficient cause did [sic] fail to promptly reply to the Divisional Officer, Cavan/Monaghan Division, in respect of correspondence dated 3rd of January 2012,

The said 'Neglect of Duty' is a breach of Discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007 and is described at Reference No. 4 of the said Regulations.

2. Neglect of Duty, that is to say that you did without good and sufficient cause did [sic] fail to promptly reply to the Divisional Officer, Cavan/Monaghan Division, in respect of correspondence dated 6th March 2012,

The said 'Neglect of Duty' is a breach of discipline within the meaning of Regulation 5 of the Garda Síochána (Discipline) Regulations 2007 and is described at Reference No. 4 of the said Regulations."

19. The interview was held on the 17th May, 2012. The applicant's account of the meeting is terse, recording merely that he made "a number of representations", "including a representation that the request was an unlawful intrusion into my private life."

20. The first named respondent avers that he outlined the alleged breaches of discipline to the applicant and gave him an opportunity to respond. The applicant "made a number of representations" including the following statement which was taken down in writing;

"I required [sic] for the relevant Garda Regulations that governs this request from me to account as to why I was in court on the 1th of January 2012 while off duty. I also want it recorded that I requested a copy of the actual correspondence to the Commissioner from Ms Marie Byrne and this correspondence is relevant to me and this investigation. I also believe that this is an unlawful intrusion into my private life. I also want to record that the order by Chief Superintendent Sheridan to instigate this discipline investigation was an unlawful order. "

21. The first named respondent says that he replied that although the applicant had been off duty he was still a serving member of An Garda Síochána when he attended Cavan courthouse in the company of two persons charged with criminal offences and consequently his divisional officer was entitled to enquire into the circumstances surrounding his presence there. The respondent's affidavit goes on:

"I say that in reply to the first alleged breach of discipline, namely his failure to reply to the divisional officer in respect of correspondence dated the 31st January, 2012, the applicant said:- "I did respond to the Divisional Officer on the 6th February, 2012 posing the question, what was Inspector Farrelly insinuating about me in his correspondence to the

Divisional Officer, Cavan/Monaghan Division, dated the 19th January, 2012?"

I say that in reply to the second alleged breach of discipline, namely his failure to reply to the divisional officer in respect of correspondence dated the 6th March, 2012, the applicant said:- "I did respond on the 20th March, 2012 and I posed the question based on the heading of the correspondence that the Divisional Officer forwarded to me on the 6th March 2012 and indeed the 3F 1 of January 2012. Inspector Farrelly's account as per his report of the 19th January 2012 in relation to the outcome of the court case is false. I was present in the courthouse on the 12th January 2012."

(It should be noted that the allegation of "falsity" relates only to one detail of the report which is not relevant here.)

22. The first named respondent avers that he then concluded that the applicant was in breach of discipline in failing to respond to the order given on the 31st January, 2012

"in that his response to the Chief Superintendent's order made no attempt to address the Divisional Officer's request for an explanation. "

23. The disciplinary sanction of "advice" was imposed. This is the lowest level of sanction available in Garda disciplinary proceedings.

24. The first named respondent also concluded that the applicant was in breach of discipline in failing to respond to the order given on the 6th March, 2012

"despite the fact that the Divisional Officer clarified the contents of the report as requested by the applicant. "

In this regard the sanction of "warning" was imposed. This is the third lowest sanction available.

25. On the 6th June, 2012 the applicant sought, in accordance with the provisions of the Regulations, a review of the decision of the first named respondent. The grounds for this review have not been exhibited or referred to by any of the parties and I therefore assume that there was nothing contained therein that added to the representations made by the applicant to the first named respondent.

26. The review was carried out by the second named respondent, who informed the applicant by letter dated the 22nd June, 2012 that he had decided to affirm the decision of the Deciding Officer.

The judicial review proceedings

27. Leave to apply for judicial review was granted by the High Court (McGovern J.) on the 30th July, 2012. The applicant seeks orders of *certiorari* in relation to the decisions of the first and second named respondents and a declaration that those decisions were *ultra vires* the Garda Síochána (Discipline) Regulations, 2007. Leave was also granted to argue the validity of the regulations themselves, the constitutionality of the Garda Síochána Act, 2005 and the compatibility of that Act with the European Convention on Human Rights but those issues were not pursued at the hearing. The question being dealt with by the court, therefore, is the proper interpretation of the Act and Regulations only.

The Garda Síochána Act, 2005

28. Section 39 of the Act, in full, reads as follows:

39.-(1) A member of the Garda Síochána shall, when directed to do so by a member of higher rank, account for any act done or omission made by the member while on duty.

(2) A failure to comply with a direction under subsection (1) shall be the subject of disciplinary action in accordance with the Disciplinary Regulations.

(3) The member concerned shall be informed by the member of higher rank that such failure may lead to dismissal from the Garda Síochána.

(4) Any information provided by a member of the Garda Síochána in accordance with a direction under subsection (1) is not admissible in any criminal proceedings against the member and this shall be explained to the member in ordinary language by the member of higher rank.

(5) For the purpose of subsection (4) "criminal proceedings" does not include disciplinary proceedings.

29. Section 123 deals with the power of the Minister for Justice, Equality and Law Reform to make regulations concerning disciplinary matters.

123.-(1) The Minister may, after consulting with the Garda Commissioner and with the approval of the Government, make regulations concerning the maintenance of discipline in the Garda Síochána, including, but not limited to, regulations relating to the matters provided for in subsections (2) to (5).

(2) The regulations may specify the acts or omissions that may be the subject of disciplinary action under the regulations, including-

(a) the matters specified in Schedule 5,

(b) failure to comply with specified provisions of the Code of Ethics established under section 17,

(c) ...,

(d) ...,

(e) failure to co-operate with an investigation conducted under this Act or the regulations or with a board established under the regulations to make determinations in relation to discipline,

(f) ..., and

(g) matters relating to work performance.

(Emphasis added.)

The rest of the section deals with procedural matters.

30. Schedule 5 of the Act lists a number of matters under the heading "*Breach of Discipline*". Paragraph 2 deals with neglect of duty as follows:

"Neglect of duty, that is to say, without good and sufficient cause –

(a) failing or neglecting–

(i) ..., or

(ii) promptly to do anything that it is his or her duty as a member of the Garda Síochána to do, or

(b) doing anything mentioned in subparagraph (a)(ii) in a negligent manner. "

31. The Schedule lists certain types of behaviour which may constitute a breach of discipline even if the member concerned is not on duty. Thus, for example, it is a breach of discipline for a member to place himself or herself under a pecuniary obligation to any person in a manner that might affect the member's ability to discharge the duties of a member. In a different vein, it is a breach of discipline for a member to be intoxicated in a public place either while on duty or while off duty but wearing uniform.

32. Paragraph 8 refers to "discreditable conduct"-

"...that is to say, conducting himself or herself in a manner that the member knows, or ought to know, would be reasonably likely to bring discredit on the Garda Síochána ".

This particular breach of discipline can, it is agreed, be committed while on or off duty.

33. The same Act established and regulates the office of the Garda Síochána Ombudsman Commission and it is relevant to note that, by virtue of s.87(3), a complaint to that body about the conduct of a member of the Garda Síochána while the member was not on duty is not admissible

"...unless the conduct alleged would, if proved, be likely to bring discredit on the Garda Síochána. "

The Garda Síochána (Discipline) Regulations, 2007

34. Regulation 5 provides that any act or conduct by a member which is mentioned in the Schedule to the regulations constitutes a breach of discipline.

35. "Neglect of duty" is defined in paragraph 4 of the Schedule as

"Neglect of duty, that is to say, without good and sufficient cause–

(a) failing or neglecting–

(i) ...,or

(ii) promptly to carry out any lawful order or to do any other thing which it is his or her duty to do,

or

(b) doing anything mentioned in subparagraph (a)(ii) in a negligent manner. "

36. It is also relevant to note that where disciplinary procedures are invoked in respect of a suspected breach of discipline, the member concerned is obliged by regulation 12 to answer fully and truthfully any question put during the proceedings.

Submissions on behalf of the applicant

37. On behalf of the applicant, Mr. Harty S.C. makes a carefully limited argument. It is not disputed that a member may commit, and may be disciplined for, various breaches of discipline while off duty. This includes conduct bringing the force into disrepute. Further, it is accepted that in principle a garda does not have a right to privacy in respect of such conduct.

38. It is also accepted that the responses given by the applicant cannot be described as answering the request.

39. However, it is submitted that the obligation placed on a member to account for himself or herself applies, under s.39 of the Act, only to actions or conduct while on duty. In this regard the maxim *expressio unius exclusio alterius* is invoked. It is contended that the Act does not envisage having to account for off-duty activity because to do so would be an invasion of privacy.

40. It is said that the request for an explanation of the applicant's actions was not in itself an unlawful request, but it could not be construed as a "lawful order" in that there was no lawful power of compulsion. It is also noted that the statutory phrasing of paragraph 2 of Schedule 5 of the Act ("promptly to do anything that it is his or her duty as a member of the Garda Síochána to do ") differs from the wording used in the regulations ("promptly to carry out any lawful order or to do any other thing which it is his or her

duty to do.") Insofar as there may be a conflict, the statutory provision must prevail.

41. Mr. Harty submits that if the respondents suspected that the applicant had, by his attendance in court on the day in question, been guilty of a breach of discipline, he should have been charged with that. He would then have been obliged to co-operate with the ensuing investigation. If no such suspicion was held - and, in the circumstances, that must be presumed to be the case - there was no entitlement under the Act or regulations to compel him to answer a question as to his off-duty activities. It is accepted that the question was not in itself unlawful or unreasonable (in the legal sense of that term), but the point made is that, unless it was based on suspicion, he cannot be disciplined for refusing to answer it.

Submissions on behalf of the respondents

42. On behalf of the respondents, Ms. Barrington S.C. submits that if it is accepted that a member can be disciplined for conduct engaged in while off duty, it follows that there can be no objection to asking for an account of off-duty activity.

43. In relation to the incident under question, it is suggested that a number of possible breaches of discipline could potentially have been involved and there could therefore be no impropriety in asking the applicant for an explanation. The initiation of disciplinary action from the outset, on the other hand, could have been disproportionate.

44. It is argued that s.39 cannot be interpreted as exhaustive. It deals with the circumstances of a refusal to account for conduct on duty, which is a serious breach of discipline that may result in dismissal. This case never came within that category.

45. In general terms, it is submitted that a member is obliged to do anything that it is his or her duty to do and the carrying out of a lawful order is certainly part of that duty.

Relevant caselaw

46. The leading authority on this aspect of garda disciplinary matters is the Supreme Court decision in *Straker v Doherty* [1991] 1 I.R. 23. In that case the applicant was a garda who had been found guilty on two charges of conduct prejudicial to discipline and likely to bring discredit on the force. The charges arose from the behaviour of the applicant and his wife in a public house on what appears to have been a social occasion. In particular, the applicant was found to have made lewd comments about his wife to an acquaintance and to have failed to assist her to leave the premises when she was asked to do so by the licensee.

47. In holding that the decision of the appeal board, upholding both the convictions and the recommendation that the applicant be dismissed, was not as a matter of law unreasonable, McCarthy J. considered that the test was that laid down in *Keegan v Stardust Victims' Compensation Tribunal* [1986] I.R. 642.

"Applying that test to the circumstances of this case, I am not prepared to hold that the conclusion of the appeal board involved a rejection of or disregard for, fundamental reason or common sense. There are, no doubt, many who would consider the incident in question as tasteless and offensive but irrelevant to An Garda Síochána as such, whatever about its relevance to the individual garda; there are some who would consider that what a garda says off duty and in plain clothes is strictly his own business; there are others who would consider that, in a small country community, Gardaí should be setting an example of decent conduct. Quat homines tot sententiae. "

48. In his concluding remarks McCarthy J observed:

"The consideration of such matters as to whether or not a particular incident amounts to conduct prejudicial to discipline or likely to bring discredit on the force is peculiarly appropriate for determination by the Gardaí themselves; so also is the assessment of the penalty appropriate to any such breach or breaches. In the regulation and enforcement of discipline where a decision depends upon the assessment made by the Commissioner or by an appeal board, in my view, the courts should be reluctant to interfere. "

Discussion and conclusions

49. In the first instance, I should say that I do not consider that there is any material difference between the meaning of the phrasing in the Act- "to do anything that it is his or her duty to do" and that of the regulations- "to carry out any lawful order or to do any other thing that it is his or her duty to do". It seems to me that the duties of a garda encompass a duty to carry out lawful orders - that is inherent in the nature of the force. The issue here is whether the direction given by the Chief Superintendent was lawful.

50. It is of course the case that a member of the Garda Síochána has, like every other person, a right to privacy and to a private life. However, it is also undoubtedly true that, because of the position in the public life of the community held by members of the force, that right must be considered to be somewhat more restricted than it is for people in many other occupations. It is a fact of life, reflected in the regulations, that the behaviour of a garda while off duty can have a damaging impact on the reputation of the force as a whole. The view of the courts, as established in *Straker v Doherty*, is that the assessment of such behaviour is, at least in the first instance, a matter for the garda authorities.

51. The argument made on behalf of the applicant is that, unless his conduct while off duty actually gave rise to a suspicion, such as would warrant the bringing of formal disciplinary proceedings against him, there was no right to demand of him that he answer questions about that conduct. However, that argument depends on an assumption that "off duty" is to be equated with "private". That does not necessarily follow, anymore than it does for any ordinary member of the public- "privacy" is a narrower concept than "not engaged in work". The problem of establishing the boundaries of the zone of privacy is more complex than that, and may not be amenable to hard and fast rules in all instances.

52. Some matters will more obviously belong in the sphere of privacy than others. The days are long gone when a garda could not marry without permission, and aspects of private, personal life should not be intruded upon without adequate, lawful cause. However, some things are, at least ostensibly, not protected by any privacy right. In general, attendance by a serving garda, even if off duty, in a public court at the hearing of a criminal prosecution is not something that is, on the face of it, private. The administration of justice in criminal cases is, for the most part, a public matter.

53. In that context I consider that it was not unlawful to ask the question "What were you doing there?" It follows, in my view, that the Garda authorities have a right to an answer, the extent of which will vary according to circumstance. This does not depend on there being a specific provision in the Act or regulations- no statutory scheme (and indeed no employment contract) covers every incident of the employment relationship. I do not consider that the statutory provision relating to the obligation to account for acts

done or omissions made while on duty excludes the existence of a duty to respond appropriately to inquiries as to off-duty conduct. The context here is that of a hierarchical, discipline-based police force and I think that it must follow therefrom that a lawful demand that a member account for himself has to be addressed. The fact that failure to answer in the case of activities while on duty may, under the Act, result in dismissal does not mean that questions may only be asked in relation to such activities.

54. It does not necessarily follow that the information requested must in all cases be given - it may be that the conduct in question does indeed fall within the member's private life. I consider that what should occur in that case is that the member must at least explain that his or her private life is in issue, and provide sufficient information for his or her superiors to decide whether or not they accept that the right to privacy applies.

55. In this case, the applicant never actually said, until the hearing before the deciding officer, that he considered his activities on the day to be private. He never gave any intimation, either to his superiors, to the deciding officer or to this court, that there might be any grounds for holding them to be private other than the fact that he was off duty. I do not know whether he was in the courthouse that day because of a family relationship, or to give character evidence out of personal friendship, or because he had been served with a subpoena. This does not exhaust the list of possible reasons for his presence - it is also possible, for example, that he was there because he was aware of the details of the dispute, knew the parties and wished to be seen to give his support to one side rather than to the other. Given that the case was being heard in the garda divisional area in which he worked, and was being heard by a judge before whom he would probably have had occasion to give evidence, that would be a matter capable of impinging upon his role as a garda and upon the public perception of the force as a whole. This is particularly so in the context of such a long-running neighbour dispute which had given rise to extensive garda involvement and to allegations of bias on the part of other garda officers.

56. This does not mean that attendance at a trial for the purpose of supporting a party concerned in it would necessarily mean that a serving garda would be guilty of a breach of discipline, but it is something that is likely, depending on the circumstances as they are known, to call for an explanation.

57. I therefore consider that the Chief Superintendent was entitled to ask for an explanation as to the presence of the applicant at the trial, and having directed that he give an explanation, was entitled to an adequate response. Instead, the first response of the applicant was to ask what the Inspector was "insinuating" about him. This was clearly suggestive of some degree of bad faith on the part of the Inspector but that suggestion was not elaborated upon in the course of the correspondence, at any stage of the disciplinary procedure or in these proceedings. Instead the applicant began to query the authority of his superiors and to demand chapter and verse from regulations and from correspondence. In my view, the respondents were entitled to consider that his failure to deal with the matter more promptly and appropriately amounted to neglect of duty. I will refuse the relief sought.