

THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO. 2017 171 JR]

BETWEEN

DAMIEN BROUGHALL

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SIOCHANA

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO. 2017 170 JR]

BETWEEN

AVRIL DOYLE

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SIOCHANA

RESPONDENT

THE HIGH COURT

JUDICIAL REVIEW

[RECORD NO. 2017 166 JR]

BETWEEN

RONAN WALDRON

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SIOCHANA

RESPONDENT

JUDGMENT of Mr. Justice Coffey delivered on the 4th day of May, 2018

1. The applicants in these three related cases are all serving members of An Garda Síochána against whom allegations of serious breaches of discipline are made. The allegations arise from their handling and control of exhibits in the course of a murder investigation in 2007. On 10th October, 2014 the respondent ("the Commissioner"), pursuant to Regulation 25(1) of the Garda Síochána (Discipline) Regulations 2007 ("the Regulations"), established a Board of Inquiry ("the Board") to determine whether the applicants had committed the alleged breaches of discipline. For that purpose, the Commissioner "selected" Mr. Tony Williams, solicitor, to act as the Board's "presiding officer".

2. In the exercise of its power to regulate its own procedure under Regulation 29(5), the Board sat on the 11th December, 2014 and 23rd April, 2015 to hear and rule upon preliminary issues, including an unsuccessful objection to the inquiry itself which was based on an allegation of prejudicial delay and a further allegation that the Commissioner failed to comply with the requirements of Regulation 23. On the 23rd April, 2017 the Board further determined that one hearing would take place on an unspecified date at which time all of the allegations against each of the applicants would be heard.

3. By letter dated 7th December, 2016, the Commissioner informed the applicants that as he had ceased to be a practicing solicitor, Mr. Williams was no longer in a position to act as the presiding officer of the Board. The letter made it known to the applicants that it was proposed to replace Mr. Williams with Mr. Karl Carney, solicitor. On the 18th January, 2017 the Commissioner, pursuant to Regulation 25(4), purported to appoint Mr. Karl Carney to the Board as its presiding officer "in substitution for" Mr. Williams. By letter dated the 13th February, 2017, Mr. Carney, purporting to act as the Board's "presiding officer", wrote to the applicants to confirm his appointment and to further confirm that the Board would "resume" its hearing on the 13th February, 2017.

4. It is common case that Regulation 25(4) does not expressly confer on the Commissioner a power to reselect or to substitute a presiding officer, either in the circumstances that arose in these cases or at all. The applicants contend that the purported appointment of Mr. Carney was *ultra vires* and they seek orders of *certiorari* and other related declaratory reliefs to quash the appointment of Mr. Carney on the 18th January, 2017. Mr. Broughall further contends that the Commissioner failed to comply with the principles of natural and constitutional justice, basic fair procedures and Article 6 of the European Convention on Human Rights. The Commissioner opposes each of the applications on the basis that there was a derived or, if not, an implied power to make the appointment. It is contended that the power was exercised at such a time, and in such circumstances, that it did not offend fair procedures by reason of the fact that the appointment was made prior to the Board commencing its hearing of the substantive allegations against the applicants. At issue, therefore, is whether Regulation 25(4) provides for a derived or implied power to reselect or substitute a presiding officer in the circumstances which arose in these cases or at all.

5. The Regulations were made pursuant to s. 123 of the Garda Síochána Act 2005 and came into operation on 1st June, 2007. The Regulations provide for a self-contained regulatory scheme for dealing with allegations of breach of discipline by members of An Garda Síochána. The scheme makes a fundamental distinction between "Less serious breaches of discipline", which are dealt with under Part 2 of the Regulations, and "Serious breaches of discipline", to which Part 3 of the Regulations apply.

5. Part 3 at Regulation 23(1) provides that where it appears that a member may be in breach of discipline and subject to one of the disciplinary sanctions specified in Regulation 22, the Commissioner "shall" appoint an investigating official to investigate the alleged breach.

6. Regulation 24(5) requires the investigating officer to submit to the Commissioner a written report of the investigation, within 7 days, containing his or her "recommendation" as to whether the facts disclosed warrant the establishment of a board of inquiry, together with copies of any written statements made during the investigation and details of any information, document or thing which the investigating officer was made aware of during the investigation.

7. Regulation 25(1) provides that if it appears from the report of the investigation that the member concerned "may" have committed a serious breach of discipline, the Commissioner "shall" establish a board of inquiry in order to determine whether such a breach has been committed by the member concerned, and, if so, to recommend to the Commissioner the disciplinary action to be taken in relation to the member.

8. Regulation 25(2) *et seq.* provides for the composition of a board of inquiry as follows: -

"(2) The board shall consist of 3 persons appointed by the Commissioner.

(3) A person who has been involved in any capacity in relation to an earlier aspect of the case may not be so appointed.

(4) One member of the board (who shall preside and is referred to in this Part as the "presiding officer") shall be a person selected by the Commissioner from a panel nominated by the Minister.

(5) Each person on the panel shall be a judge of the District Court or a practising barrister, or practising solicitor, of not less than 10 years' standing.

(6) One of the other members of the board shall be a member of a rank not below that of chief superintendent and the other a member of a rank not below that of superintendent."

9. Regulation 26 gives to the member concerned a limited right of objection to the appointment of one of the Garda members of the board in the following terms: -

"(1) Not later than 7 days after being notified of the establishment of a board of inquiry, the member concerned may object in writing to one of the members of the board referred to in Regulation 25(6).

(2) Where such an objection is made, the Commissioner shall appoint another member to the board in place of the member to whom the objection relates."

10. Under Regulation 27(1) a presiding officer acting on behalf of a board of inquiry is mandated to comply with the following pre-hearing procedure: -

"(1) The presiding officer shall notify the member concerned in writing, or cause the member to be so notified, at least 15 days beforehand of -

(a) the time, date and place of the hearing,

(b) the names of the members of the board of inquiry,

And

(c) the provisions of section 123(7),

and shall supply the member, or cause him or her to be supplied, with particulars of the serious breach of discipline alleged."

11. The legal consequences of Regulation 27(1)(c) were described by O'Donnell J. in *Garda John Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47 as follows: -

"32. ...There is an inquisitorial element to this procedure. It is for the Board of Inquiry to formulate the breaches of discipline alleged and provide particulars thereof, and to provide notice of such allegations to the member concerned. It follows therefore that the Board of Inquiry will have had some degree of prior engagement with the facts, and importantly in the present context, will have made some assessment of their significance..."

13. Under the heading "*Procedure at hearing*", Regulation 29(5) provides that "[s]ubject to these regulations, a board may regulate its own procedure." Regulation 29 otherwise provides for the following mandatory procedures "at a hearing":-

"(1) At a hearing the board of inquiry -

(a) shall give the member concerned an opportunity to be heard and to respond to any matters raised,

(b) may -

(i) permit any person to give evidence orally or in writing, and

(ii) ask questions of any person who has given evidence,

and

(c) shall consider and decide on a request by any person to give evidence relevant to the proceedings orally or in writing.

(2) In its conduct of the proceedings, the board shall have regard to the right of the member concerned to challenge and test the evidence of any person.

(3) The board may adjourn a hearing if it appears to it to be expedient to do so.

(4) The board may proceed with a hearing in the absence of the member concerned

...

(6) Information at an inquiry shall be given on oath or affirmation, which the presiding officer may administer or take.

(7) A verbatim record of the proceedings shall be made by a stenographer or by electronic or other means.

(8) An inquiry shall be held in private."

14. Regulation 30 provides that within "21 days after the conclusion of the Inquiry, the presiding officer **shall** submit a written report to the Commissioner and forward a copy of the report to the member concerned (*Emphasis added*). Regulation 30(2) provides that the report "shall include":-

"(a) copies of any statements made, including any admission made by the member concerned and any other documents provided to the board, together with the verbatim record of the proceedings,

(b) the determination of the board as to whether the member concerned is in breach of discipline and, if so, as to the act or conduct constituting the breach, and

(c) its recommendation as to any disciplinary action to be taken in respect of the breach."

15. In *Kelly, infra*, the Supreme Court held, at para.36, that reasons must be given for any determination made by a board of inquiry unless it can be said that the issue is "so self-evident and narrow that the mere fact of the decision discloses the reason." O'Donnell J. gave the rationale for the decision of the court on this issue as follows:-

"35. ...It is difficult to see how a mere record of the fact of breach of discipline itself demonstrates that all relevant facts have been ascertained and considered in a reasonable manner. If it is proper to consider the manner in which facts were ascertained and considered and in particular the reasonableness of the consideration, it follows that the Appeal Board must have some method, most obviously in a narrative and reasoned decision, to determine what facts have been ascertained, how they have been considered, and whether indeed such consideration is reasonable. Again, in my view it is at least arguable that a consideration of whether a disciplinary action is disproportionate to the breach of discipline concerned suggests an analysis of something more than the factual conclusion of breach, and implies an assessment of the precise nature and character of the breach found, something that cannot be carried out from a statement of the fact of contravention alone."

16. Regulation 30(3) provides: -

"Where there is a difference of opinion among the members of the board regarding any matter dealt with in its report, only the opinion of the majority regarding that matter shall be included in the report."

17. Within fourteen days of receipt of the report, the Commissioner is required to decide on the appropriate disciplinary sanction. In the case of a member who has attained a rank above that of Inspector, where the Commissioner considers that the appropriate disciplinary action is dismissal or a requirement to resign or retire or a reduction in rank, the recommendation must be sent to the Minister for consideration by the government. In the case of any rank below that of Inspector, it is for the Commissioner to decide on the disciplinary action. Where the Commissioner proposes a more severe sanction than that which has been recommended by the Board, pursuant to Regulation 32, the member is to be given the opportunity to make representations in that regard.

18. Regulation 33 provides for an appeal against the determination of the Board in relation to the breach of discipline and/or the disciplinary action decided on or to be recommended by the Commissioner. Regulation 33(3) provides that an appeal may be brought on all or any of the following grounds: -

"(a) specified provisions of these regulations were not complied with;

(b) the determination is not justified, having regard to the evidence heard by the board of inquiry;

(c) all the relevant facts -

(i) were not ascertained,

(ii) were not considered, or

(iii) were not considered in a reasonable manner;

(d) the member was not given a reasonable opportunity to be heard and to respond to matters raised;

(e) the disciplinary action which the Commissioner has decided to take or recommend is disproportionate in relation to the breach of discipline concerned."

Relevant Law

19. The Commissioner is a statutory office holder and therefore has no inherent power and is strictly confined to such powers as are conferred on the office by primary and secondary legislation. The powers so conferred include both express powers and such powers as can be derived from the express powers by logical implication (see *G.E. v. the Chairperson of the Refugee Appeals Tribunal & Ors.* [2006] 2 I.R. 11) and powers that can be properly inferred by the application of the "reasonably incidental" principle and the principle of effectiveness whereby powers will be inferred if they may fairly be regarded as incidental to or consequential upon those things which the legislation has authorised or if they are necessarily and properly required for carrying into effect the purposes of the legislation.

20. The "reasonably incidental" principle can be traced to *Attorney General v. Great Eastern Railway Company* [1880] (5 App. Cas 473, 478) which was approved by Costello J. in *Howard v. Commissioners of Public Works* [1994] I.R. 101 in the following terms, at p. 112:-

"It has long been established as a general principle of the construction of the powers of statutory corporations that whatever may be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*."

21. In *Keane v. An Bord Pleanála* [1997] 1 I.R. 184, Hamilton C.J. appears to have combined the "reasonably incidental" principle and the principle of effectiveness in the following *dictum* at p.212: -

"The powers of the Commissioners, being a body created by statute, are limited by the statute which created it and extend no further than is expressly stated therein or is necessarily and properly required for carrying into effect the purposes of incorporation or may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised."

22. The modern law in respect of implied powers is now thought to be expressed in the three-tiered test adopted by Birmingham J. in *Magee v. Patrick Murray & Anor* [2008] IEHC 371, where he stated:-

"29. ...Such powers could only ever be implied where (1) that is justified by the statutory context, (2) the power contended for is not of such a nature that one would expect to see [it] set out specifically and (3) the power contended for is consistent with the statutory scheme..."

23. This test was most recently adopted and applied by Baker J. in *National Employee Development Training Centre Ltd. v. The Minister for Justice and Equality & Anor* [2015] IEHC 140.

Discussion

24. As stated by Kelly J. (as he then was) in *Director of Consumer Affairs v. Bank of Ireland* [2003] 2 I.R. 217, at pp.237-238: -

"The purpose of statutory interpretation is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. The intention, and therefore the meaning of the statute, is primarily to be sought in the words used in it."

25. The Regulations under scrutiny were made pursuant to s. 123(1) of the Garda Síochána Act 2005 which provides that: -

"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)*."

26. It must be taken therefore that the Regulations were made by the Minister following consultation with the Commissioner and with the approval of the Government.

27. It is common case that the Regulations do not expressly provide for the power now contended for and that the Commissioner has never sought to avail of such a power in the past. It is also the case that none of the parties have been able to identify any other regulatory or disciplinary statutory code which provides for an identical or similar power whereby a constituent member of an arbitral body can be removed and replaced during the currency of the arbitral process. Although counsel for the Commissioner argues that this assists her case, insofar as it may suggest that the power is axiomatic, she was nonetheless unable to identify even one instance where such a power has been exercised in respect of any such body in the past.

28. This is the context in which counsel for the Commissioner contends that the power to reselect or substitute a "presiding officer" can be derived from the Commissioner's power to select such an officer pursuant to Regulation 25(4) when establishing a board of inquiry. Relying on the *G.E.* case, *infra*, counsel for the Commissioner argues that the power arises by logical implication from the underlying power to establish a board of inquiry. She further argues that in accordance with the "derived power" principle, propounded by Fennelly J. in *G.E.*, the Commissioner's use of the power could not in any way be described as being capricious or unfair. It is further argued that the replacement of Mr. Williams prior to the commencement of the substantive oral hearing of the allegations has avoided any possible breach of fair procedures.

29. It is clear from its heading ("*Establishment of board of inquiry*") that Regulation 25 gives to the Commissioner a power to "establish a board of inquiry", subject to the limitations and requirements which are set out at Regulation 25(2) - (6).

30. After a board of inquiry is established, the Commissioner has no further express power to interfere with its composition other than an unqualified duty to appoint a further Garda member to a board of inquiry where an objection is made by the member concerned in accordance with the requirements of Regulation 26(1). Regulation 26(1) requires that the objection be made not later than seven days after the member concerned has been notified of the establishment of a board of inquiry, that it be made in writing and that it only be made in respect of one of the Garda members of the board. The clear intention of the Regulation is to give what is in effect a peremptory challenge to the member concerned in respect of one of the Garda members of a board of inquiry that is analogous to the right of challenge without cause that is given to a juror under s. 20 of the Juries Act 1976. Regulation 26 is thus designed to provide a limited but important measure of reciprocity as between the Commissioner and the member concerned in the formation of a board of inquiry. Significantly the right of objection is time limited in such a way as to ensure that the exercise of the right of objection does not affect the composition of the board during the currency of its work.

31. Counsel for the Commissioner accepts that her submission logically implies that, after the expiry of the seven day period provided for in Regulation 26, there is a derived or implied power by the Commissioner to replace all members of a board of enquiry provided it is done fairly and with due respect to the principles of natural and constitutional justice. This simply cannot be accommodated within the scheme of the Regulations which make no provision for the continuance of the right of objection either after the expiry of the seven day period or as to the number of peremptory challenges a member concerned is entitled to exercise in circumstances where a third or further Garda member has been appointed to a board of inquiry.

32. Even if one were to assume without deciding that the power of substitution arises solely in relation to a "presiding officer" (to which there is no right of objection), an unnecessarily anomalous situation would arise whereby the Commissioner would have a derived or implied power to substitute a "presiding officer" but not a Garda member of a board of inquiry.

34. It is important to note that at the commencement of its work, a board of inquiry is required to collectively formulate the breaches of discipline alleged. The significance and inquisitorial nature of this work, as already noted, was emphasised by O'Donnell J. in Kelly, *infra.*, where he said: -

"32. ...It follows therefore that the Board of Inquiry will have had some degree of prior engagement with the facts, and importantly in the present context, will have made some assessment of their significance."

35. Although under Regulation 29(5), a board of inquiry may regulate its own procedure "subject to these regulations", the entitlement thereby given is solely in relation to the procedure "at hearing" as is made clear by the heading appearing over Regulation 29 ("*Procedure at hearing*"). Whilst entitled to conduct a modular hearing, a board of inquiry, through its "presiding officer", is obliged to submit only one written report at the conclusion of the inquiry to the Commissioner which can only express a unitary determination and recommendation.

36. The mere fact that a board of inquiry can regulate its own procedure to divide up its work does not mean that the composition of the board is itself divisible or subject to interference in any way or for any reason by the Commissioner. Moreover, if the work of a board of inquiry was intended to be truly modular, this would logically imply that a new board of inquiry established by the Commissioner could simply resume where the board of inquiry presided over by Mr. Williams left off without discharging any of its mandatory inquisitorial pre-hearing duties and being bound by the rulings already made at the earlier inquiry. This in turn could potentially result in two different Appeal Boards hearing appeals from two different boards of inquiry in relation to two different modules of the same case.

37. Counsel for the Commissioner accepted that the purported appointment of Mr. Carney was such that he could only have been appointed to all of the duties required of a "presiding officer" under the Regulations. *Prima facie*, this would require Mr. Carney to discharge all of the mandatory duties that are imposed under the Regulations, including those already carried out by Mr. Williams. These duties include the formulation of the breaches of discipline alleged and the provision of particulars thereof and the provision of notice of such allegations to the member concerned notwithstanding the fact that this could potentially result in the formulation of different alleged breaches of discipline based on a potentially different assessment of their significance. It would also require him to submit a report to assist the Appeal Board in respect of all matters that are capable of being appealed pursuant to Regulation 33(3), including at Regulation 33(3)(a), the preliminary ruling of the board over which Mr. Williams presided in respect of the alleged failure of the Commissioner to comply with Regulation 23 in which Mr. Carney had no involvement and with which he could potentially disagree, thereby potentially depriving the ruling of majority consent (as required by Regulation 30(3)).

38. Counsel for the Commissioner accepts that the board to which Mr. Carney was purportedly appointed is not the same as the board over which Mr. Williams presided. This gives rise to a further difficulty. If it is not the same board, it can only be a new board to which the existing Garda members have not *prima facie* been appointed.

Decision

39. I am satisfied that when looked at as a whole and in their context, the Regulations are to be construed as providing for a board of inquiry that is intended to operate as a unitary body both in the discharge of its inquisitorial and decision making functions and duties. It follows that it is the board that is the inquisitor and the decision maker and not its constituent members. Accordingly, if a board of inquiry cannot for good reason complete its work, the Commissioner has by logical implication a derived power under Regulation 25(1) to establish a new board of inquiry with different members to deal with the matter *de novo*. This interpretation of the Regulations also accords with the ratio of the Supreme Court decision in *G.E. infra.* where it was held that a general power pursuant to para. 13 of the second schedule to the Refugee Act 1996 to assign a case to a member of the Refugee Appeals Tribunal logically implied a derived power to reassign cases from one decision maker to another where the circumstances warranted a removal of an appeal from one member in order to assign it to another subject, to the requirement that the power be exercised fairly and in accordance with the principles of natural and constitutional justice. The reassignment is therefore from one decision maker to another and not otherwise.

40. The Commissioner argues in the alternative that the power contended for is "implied" and satisfies the three-tiered test adopted by Birmingham J. in *Magee*. I am satisfied on the evidence before me that the power contended for is highly unusual, if not unprecedented. More importantly, I am satisfied for the reasons set out above, that the power to "substitute" a presiding officer to an already established board of inquiry cannot be read into the Regulations without producing incoherence, anomaly and confusion. I am therefore satisfied that the power in controversy is not justified by the statutory context or that it is of such a nature that one would not expect to see it set out specifically or that it is consistent with the statutory scheme. For the avoidance of any doubt, I am further therefore satisfied that the said power cannot be implied under the "reasonably incidental" principle or the principle of effectiveness.

Conclusion

For the foregoing reasons, I will grant the reliefs sought and make in each case an order of *certiorari* quashing the purported appointment by the Commissioner on the 18th January 2017 of Karl Carney, solicitor as presiding officer of the Board of Inquiry established on the 10th October, 2014 to inquire into the breaches of discipline alleged to have been committed by the applicants.