Neutral Citation Number: [2010] IEHC 420

THE HIGH COURT

2010 750 JR

BETWEEN

DYLAN EVANS

APPLICANT

AND

UNIVERSITY COLLEGE CORK

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 8th day of November, 2010

1. The motion before the court raises, once again, the question of the ambit of discovery in judicial review proceedings. The applicant is a university lecturer in Behavioural Science in the School of Medicine, University College Cork. As a result of an encounter with a female colleague concerning a research article on November 2, 2009, a complaint was laid against him which was upheld. The University recommended as a result that his conduct be monitored and supervised for a two year period. In addition to this, the Head of School, Professor Kerins, recommended on April 29, 2010 against the applicant's establishment. Such a recommendation is, in effect, a recommendation against the grant of long-term tenure. These recommendations could plainly impact on the applicant's livelihood, as well, of course, as having implication for his constitutional right to a good name (Article 40.3.2).

2. The applicant has been granted leave to challenge these recommendations by way of judicial review. In both cases, the statement of grounds alleges a breach of fair procedures. So far as the recommendation concerning supervision and monitoring is concerned, the contention is made that the applicant was denied the opportunity to make submissions in mitigation or to effect an internal appeal. The applicant further contends that the recommendation on establishment was arrived at in breach of fair procedures on the ground that the University had not given him an adequate opportunity to be heard as to the proposed reason for recommending against establishment.

3. The statement of grounds also alleges - in admittedly very general and non-specific terms - that the University's actions were either taken in bad faith or gave rise to objective bias. No particulars at all of these allegations are provided. Quite independently of any considerations pertaining to discovery, it cannot be regarded as entirely satisfactory that an applicant would make such serious allegations, unsupported by any particulars whatsoever. Indeed, with one passing reference excepted, it is also striking that not even the applicant's own grounding affidavit of June 9, 2010 makes the charge of bad faith or animus in respect of either recommendation. In any event, so far as the passing reference in the affidavit is concerned, the question of possible animus was only mentioned by the applicant in his affidavit in the context of the circumstances in which the complaint was made and taken up by the University and has no direct bearing at all on the grounds of actual challenge.

4. It is against this background that the applicant now seeks discovery of two categories of documents, the details of which I will consider presently. At the hearing, the applicant did not press for discovery of the third category originally sought, namely, discovery of documents between the President of the University and the head of personnel, so this issue does not now arise for consideration.

5. Before considering the merits of this application, it is scarcely necessary to recall that discovery will only be ordered where the tests of both relevance and necessity are satisfied: see, e.g., *PJ Carroll & Co. Ltd. v. Minister for Health and Children (No.2)* [2006] IESC 36, [2006] 3 I.R. 431. In this context, relevance is determined by the pleadings: see, e.g., the comments of Murray J. in *Framus Ltd. v. CRH plc* [2004] 2 I.R. 20. The scope of discovery must thus accommodate itself to the parameters of the case as pleaded rather than the other way around. In this regard, I cannot accept that the argument advanced by Mr. Buckley for the applicant that the decision of the House of Lords in *Tweed v. Parades Commission for Northern Ireland* [2007] 1 AC 650 is of any material assistance to his case. Prior to that decision, the various courts in the UK had been reluctant to order discovery in judicial review save by reference to what Lord Carswell described in *Tweed* as the "restrictive rule" that effectively precluded any orders for discovery in judicial review proceedings save where there was a clear contradiction or inconsistency in the affidavits sworn by the respondent public body. That has never been the situation in this jurisdiction, either in theory or (just as importantly) in practice. It is equally clear that *Tweed* is now authority in the United Kingdom for the proposition that discovery can be more extensive in cases involving a challenge to the proportionality of any administrative decision. But that is equally an unexceptionable proposition so far as this jurisdiction is concerned.

6. A further consideration is that, in the words of Sir Thomas Bingham MR for the English Court of Appeal *in R. v. Health Secretary, ex p. Hackney LBC* (July 29, 1994) it is not open to an applicant to make "to make a series of bare unsubstantiated assertions and then call for discovery of documents by the other side in the hope that there may exist documents which will give colour to the assertion that the applicant, or the plaintiff, is otherwise unable to begin to substantiate." Added to this is the factor that while Order 84, r. 25(1) makes clear that the ordinary discovery rules apply in judicial review applications, this is tempered by the consideration that the essential facts are generally not in substantial dispute in judicial review applications. In addition, it should be noted that as judicial review is normally concerned with procedural matters rather than substance, this will inevitably limit the range of documents which are both relevant and necessary in judicial review matters: cf. the reasoning of Geoghegan J. in *Carlow Kilkenny Radio Ltd. v. Broadcasting Commission of Ireland* [2003] 3 I.R. 528.

7. The first category of documents sought essentially relates to general correspondence between the Vice President for Research and the University President dealing with the negative recommendation regarding the applicant's establishment. It is difficult to see how such correspondence would have any real relevance to the issues as defined in the statement of grounds, save, perhaps, the issue of bad faith. The only correspondence that would have relevance in the context of the allegations of breach of fair procedures contained in the statement of grounds would be that between the University (and its representatives) and the applicant himself so that, for example, it was obvious from that correspondence that a decision was taken without having giving him any meaningful opportunity to address any criticisms of his performance qua University lecturer. But the correspondence between third parties - even

if they are senior university academics and even if the correspondence did concern the applicant - would have no relevance to the breach of fair procedures argument, at least as presently advanced.

8. The allegation of bad faith is another matter. It is certainly striking that the allegation of bad faith here is entirely generalised. This is almost a textbook example of what Sir Thomas Bingham MR had in mind in *Hackmey LBC*, namely, an instance of an applicant making bare unsubstantiated allegations and then seeking wide-ranging discovery on the basis that the mere invocation of the talismanic words "bad faith" makes every document concerning the parties to the litigation relevant for discovery purposes, or at least potentially so For that reason, the courts cannot permit an applicant simply to make such a bare allegation - which, in any event and quite independently of any discovery considerations, ought to have been particularised - and then use it as the foundation for seeking extensive discovery of all possible documents which concern him. In these circumstances, I would decline for this reason to make the discovery sought in respect of the first category of documents at issue.

9. The second category of documents sought relates to material arising from a decision taken by the University to prevent the applicant giving a teaching module on research ethics, at least while the disciplinary investigation was in progress. This plainly has no relevance to the issue of fair procedures, since it could not be suggested that this documentation would be of relevance in circumstances where the applicant contends that he was not given a fair opportunity to be heard in respect of the reason given for the recommendation against establishment. Such documentation could only possibly relevant to an allegation of bad faith where it was contended that none of the decisions taken by the University in respect of his establishment were taken honestly and in good faith. Again, however, bare allegations of this kind cannot form the foundation of an application for wide ranging discovery of the kind now sought. For this reason, I equally would decline to order discovery on this ground.