Neutral Citation [2016] IEHC 674

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 665JR]

BETWEEN:

PIERCE DILLON

APPLICANT

-AND-

BOARD OF MANAGEMENT OF CATHOLIC UNIVERSITY SCHOOL

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 23rd day of November, 2016

Introduction

1. This case involves a challenge to a finding by the Board of Management of the respondent school on the 24th February, 2015, that the applicant teacher had engaged in inappropriate behaviour towards a student (who, for the purposes of this judgment, is called AB). The finding which is the subject of these proceedings is the finding by the Board of Management of the school that the applicant teacher had engaged in inappropriate behaviour, namely by calling AB a *'little bitch'*. As a result of this finding, a disciplinary procedure was held by the principal of the school and a nominee of the Board of Management. This led to a meeting on the 27th March, 2015, between the principal, the nominee of the Board and the applicant to discuss disciplinary action. This meeting resulted in the issue of a final written warning from the school to the applicant dated 21st April, 2015.

2. The applicant seeks orders of *certiorari* quashing the original finding of the Board of Management dated 24th February, 2015, as well as *certiorari* of the issue of the final written warning on the 21st April, 2015. The applicant also seeks an order of *certiorari* of the decision of the respondent to refuse to permit him an appeal against the decision that he engaged in inappropriate behaviour.

3. For the reasons set out in this decision, this Court concludes that this is not a matter which should be dealt with by means of judicial review in the High Court.

Background

4. The final written warning was issued by a letter signed by the principal of the school and a nominee of the Board of Management on the 21st April, 2015, and insofar as relevant it states:-

> "The Board of Management had previously decided that the complaint of [AB's parents] was well founded. Our decision is that you should be given a final written warning. You are therefore warned that it is expected that there will be no further incidents of this nature involving you and pupils. It is expected that this will be the case henceforth. If there is a repetition of this or similar conduct in the future you will face further disciplinary action, up and including dismissal. […] The final written warning will be active for a period of twelve months and subject to satisfactory service will expire at the end of the twelve month period. You are entitled to appeal this decision."

5. It is relevant to note that under the express terms of this warning letter dated 21st April, 2015, it was to expire after 12 months and thus it seems that by 21st April, 2016, this final written warming letter would have *prima facie* expired.

6. On the 30th November, 2015, the applicant applied *ex parte* for, and was granted, leave by Humphreys J. to take these judicial review proceedings. The substantive proceedings opened before this Court on the 28th June, 2016, and, due to other court hearings scheduled during that period, had to be adjourned until the new law term, when they resumed on the 2nd November, 2016.

7. When the matter was in for mention on the 18th July, 2016, to fix a date for the resumption of the hearing, this Court suggested to the parties that, as this case was in essence a dispute about alleged 'name calling' and since the final written warning appeared to have *prima facie* expired, they might wish to consider whether it would be useful to mediate their dispute in the time-period between July 2016 and the resumption of the hearing in the new term.

8. On the 2nd November, 2016, the hearing resumed and the Court was advised that mediation had taken place with a senior counsel, but that this mediation had been unsuccessful. This was a particular disappointment, since it appeared to this Court that this was a case that was suitable for resolution with the help of an independent objective mediator.

9. During the resumed hearing, correspondence between the lawyers during the Court vacation was also disclosed to the Court. On the 27th July, 2016, solicitors for the applicant wrote to solicitors for the respondent in the following terms:-

> "..when this matter was before the Court on 18 July it was stated on behalf of your client that the 12 month final written warning period has expired. While it is, of course, the case that a period in excess of 12 months has now elapsed since the date our client's final written warning letter was imposed you will be aware that our client has never received confirmation that the warning imposed upon him has ceased to have effect. This is significant in the circumstances and we would therefore ask you to state, on behalf of your client, whether the warning has ceased to have effect and to confirm that our client's service has been satisfactory."

In reply, on the 2nd August, 2016, solicitors for the respondent stated:-

> "As regards your query in relation to the final written warning, the DES Circular No 60/2009 which contains the nationally agreed disciplinary procedures, under Stage 3: Final Written Warning, states:
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> > 'A copy of the final written warning will be retained on the personnel file by the Principal and a copy will be given to the teacher. The final written warning will be active for a period not exceeding 12 months and subject to satisfactory service will cease to have effect following the expiry of the 12 month period. The record will be removed from the file after the twelve month period subject to satisfactory improvement during the period.'

> We understand that the date of the final written warning was April 2015, and accordingly the said twelve month period expired in April, 2016. While at this time there is no finding that your client's service during the twelve month period was other than satisfactory, your client is aware that a further complaint against him was received in November/December 2015 and your client was furnished with a copy of same on 7th December 2015. Your client went on sick leave the following day and accordingly the school has not had an opportunity to investigate the complaint."

10. In referring to these letters, it is important to emphasise that this Court is not concerned with any further complaints made against the applicant in November/December of 2015, which are referred to in the letter of 2nd August, 2016, sent on behalf of the school. These are completely stand alone complaints and they may be with or without any substance and subsequent disciplinary procedures may or may not result from these complaints in the future. Accordingly, they do not form part of any of the pleadings in this case and have no relevance to the legality of the decision of the Board of Management on 24th February, 2015, or the legality of the final written warning dated 21st April, 2015, which are being challenged in this case. Rather this Court is concerned with the judicial review of the issue of the final written warning, which relates to an alleged incident of name calling, and which final written warning *prima facie* expired in April of 2016.

Preliminary questions regarding the availability of judicial review

11. These judicial review proceedings were first heard by this Court on the 28th June, 2016, which was some two months after the *prima facie* expiry of the final written warning. This means that the applicant's core complaint to this Court was that the final written warning, which had *prima facie* expired two months earlier, should nonetheless be rendered null and void by an order of *certiorari* from this Court.

12. This raised the preliminary question for this Court of whether judicial review of the final written warning might not be available on the grounds of mootness.

13. A related preliminary question for the Court also arose from the facts of this case, namely whether judicial review might not be available on the grounds of *de minimis non curat lex* (i.e. the law does not concern itself with small matters). The *de minimis* principle appeared to this Court to be relevant since, in essence, the applicant was being disciplined for the offence of name calling which he had allegedly committed. Relative to the truly shocking sexual and physical abuse that occurred in the State's schools, and which is to this day still the subject of litigation in these courts, it is clear that name calling by the applicant of AB is a minor matter. While this Court could not condone any teacher calling a pupil a *'little bitch'* (as alleged against the applicant), nonetheless it should also be borne in mind that the use of coarse language is something which would, regrettably, be used by pupils on a daily basis in our school yards.

14. In summary therefore, the High Court is being asked to intervene to quash a final written warning, even though it had already *prima facie* expired, where that final written warning had been given as a result of a finding that a teacher had engaged in one incident of name calling, which finding this Court is also being asked to quash.

15. It is this Court's view that judicial review should not be available in these circumstances and it does so on the following grounds.

(i) Mootness

16. The first ground relates to mootness. In this regard, the Court relies on the statement of Hedigan J. in *O'Donovan v. De La Salle College* [2009] IEHC 163, a case which involved the expulsion of a pupil from a school, which pupil then enrolled in another school, but who nonetheless sought an order of *certiorari* quashing his expulsion from his first school. At para. 41, Hedigan J. stated:-

> "On an application for a judicial review, the High Court will not exercise its supervisory jurisdiction in vain. This much is clear from decisions such as *Minister for Labour v. Grace* [1993] 2 IR 53 and *Barry v. Fitzpatrick* [1996] 1 ILRM 512. In the latter decision, the Supreme Court upheld the finding of Keane J. to the effect that "an order of *certiorari*, once it ceases to have any effect, is a pointless exercise and one which no court should undertake."
>
> It seems to me, however, that there are in fact consequences which will inevitably flow from the decision of this Court. The fact that the applicant in the present proceedings succeeded to a considerable extent in mitigating the effect of the respondents' decision to expel him should not be allowed to weigh against him in the Court's consideration of his case. The presence of such a serious disciplinary sanction on the record of the young man in the applicant's position will inevitably have consequences for his reputation and self-esteem. This contrasts with the situation in *Barry* for example, in which the applicant sought to impugn a series of spent remand orders based on technical flaws therein. I find myself unable, therefore, to agree with the respondents' contention that the issues in this case are effectively moot."

17. It is to be noted firstly that the *Barry* case to which Hedigan J. refers, concerned an application to quash remands in custody, which were spent, but were bad in law since the applicant had been held in custody beyond the statutory period. The Supreme Court held that the dispute in the *Barry* case, to which Hedigan J. referred, was moot and refused to quash the remands since they were spent. In the case before this Court, the disciplinary sanction was also apparently spent, like in the *Barry* case, when this matter was first heard, since the final written warning had *prima facie* expired. Secondly, it is to be noted that the student in the case before Hedigan J. was always going to have the school expulsion order on his record and this appears to have been a decisive factor for Hedigan J. in deciding that the dispute in that case was not moot. In contrast, the applicant teacher in the case before this Court will not have a serious disciplinary sanction on his record, since as already noted it is removed from his personnel file on the expiry of 12 months from its issue (unless of course, he is guilty of further indiscretions).

18. Accordingly, since in the case before this Court the applicant's final written warning was *prima facie* spent prior to this Court first hearing the matter, like the remands in custody in the *Barry* case, and since the nature of the final written warning was such that it did not remain on the applicant's personnel file, unlike the suspension in the *O'Donovan* case, this Court finds that judicial review of the decision of 24th February, 2015, and the final written warning of 27th March, 2015, should not be available to the applicant on the grounds of mootness.

(ii) De Minimis

19. The second ground for refusing judicial review to the applicant is based on the *de minimis* principle. In this regard, the Court also relies on the case of *Murtagh v. The Board of Management of St Emer's National School* [1991] 1 IR 482. In that case, the Supreme Court considered a case in which an 11 year old pupil was suspended from school for three days after writing on a piece of paper the words "*Noleen Bitch Rooney*" about a teacher in the school. The Supreme Court held that the suspension of a pupil for this indiscretion was not amenable to judicial review. At p. 488 of the judgment, Hederman J. stated:-

> "A three day suspension of a pupil from a national school either by the principal or the board of management of that school is not a matter for judicial review. It is not an adjudication on or determination of any rights, or the imposing of any liability. It is simply the application of ordinary disciplinary procedures inherent in the school authorities and granted to them by the parents who have entrusted the pupil to the school.
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> A three day suspension for an admitted breach of discipline would be no more reviewable by the High Court, than for example, the ordering of a pupil as a sanction to stay in school for an extra half hour to write out lines, or to write out lines while he is at home."

20. When this case commenced before this Court in June of this year, it was in essence an application by the applicant teacher to have the final written warning, that had *prima facie* expired, declared null and void. While the 12 month final written warning of the applicant might appear at first instance to be more serious than the three day suspension of a pupil in the *Murtagh* case purely on the basis of length of time, in fact the 12 month final written warning could be viewed in some ways as less serious than the three day suspension in the *Murtagh* case. This is because in the case before this Court, there has been no actual suspension or other punishment of the applicant (unlike the pupil in the *Murtagh* case who was forced to leave school for three days), since the written warning was simply that, a warning. Furthermore, by its express terms the final written warning was to be removed (and thus treated as if it had not existed) from the applicant's personnel file after 12 months. For this reason, this Court is of the view that despite its apparent length, the final written warning of the applicant teacher was *de minimis* in nature, on the grounds that it was simply a warning and was not, in the words of Hederman J., an imposition of any liability.

21. Therefore, applying the *de minimis* principle, this Court concludes that like the three day suspension of a pupil in the *Murtagh* case for a pupil calling a teacher a '*bitch*', the final written warning of a teacher who allegedly called a pupil a '*bitch*' is not a matter that is amenable to judicial review. It logically follows from this conclusion that the decision which led to the final written warning, namely the upholding by the Board of Management of the complaint of name calling against the applicant on the 24th February, 2015, is also not a matter amenable to judicial review, applying the same *de minimis* principle.

(iii) Scarce public resources being unnecessarily wasted

22. Finally, in considering this application for judicial review, this Court is cognisant of the Supreme Court's recent judgment in *Tracey v. Burton* [2016] IESC 16, where at para 45, MacMenamin J. observed that court time is a *'scarce public resource'* which should not be *'unnecessarily wasted'* and in particular that:-

> "Court time is not solely the concern of litigants, or their legal representatives. There is a strong public interest aspect to these issues."

23. In reliance on this statement of MacMenamin J. and in light of the fact that relief by way of judicial review is a discretionary remedy. This is clear from the statement of McCarthy J in *Murtagh v. St. Emer's National School* [1991] 1 IR 482 at p. 490:

> "In any event, the relief by way of judicial review is discretionary; I doubt if it is appropriate to a case such as this where the challenged decision is long spent, and cannot be reviewed."

For these reasons, this Court has formed the view that litigation such as this judicial review is not solely a concern of the litigants, since there is a public interest in discouraging the use of scarce High Court resources to deal with disputes that are moot and/or relate to minor matters. In the circumstances of this case therefore, this Court is of the view that as judicial review is a discretionary remedy it should exercise its discretion not to grant the remedy of judicial review to the applicant as it is not an appropriate use of scarce public resources.

Conclusion

24. This Court is not being personally critical of the applicant teacher for his subjective belief that he did not call the pupil a name, and his belief that he should not have received a warning for this alleged name calling. After all, if he genuinely believes that he did not call the pupil any name, he is always going to feel that an injustice was done to him, regardless of the fact that the punishment was simply a 'warning' or the fact that it had *prima facie* expired after 12 months.

25. However, it is this Court's job to consider whether judicial review is the appropriate remedy for the applicant's genuinely held complaints. In considering whether this is a case which is suitable for judicial review in the High Court, considerations, other than the applicant's subjective views of his treatment, have to be taken into account. These considerations are the doctrine of mootness, the de minimis principle and the use of scarce court resources, particularly in the High Court, where legal costs and the use of resources are so significant. In taking these considerations into account, this Court finds that the matters complained of are not amenable to judicial review and accordingly declines to grant the relief sought.