Neutral Citation Number: [2007] IEHC 269

THE HIGH COURT

[2004 No. 451 J.R.]

JUDICIAL REVIEW

BETWEEN

ERNEST PRICE

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON AND THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM

RESPONDENTS

Judgment of Mr. Justice McGovern delivered on the 15th June, 2007.

1. This is an application for judicial review arising out of sanctions imposed on the applicant by the respondents pursuant to the Prison (Disciplinary Code for Officers) Rules 1996 (S.I. No. 289 of 1996) and his suspension under s. 13 of the Civil Service Regulation Act 1956. On 24th May, 2004 the applicant was granted leave to apply for judicial review in respect of the reliefs set forth at para. E (iii), (iv), (v) and (vi) in the Statement of Grounds. These are as follows:-

> "(iii) a declaration that the provisions of the Prison (Disciplinary Code for Officers) Rules 1996 insofar as they purport to empower the second named respondent to increase a disciplinary tariff imposed by the first named respondent and provide that the second named respondent should hear an appeal against his own decision are *ultra vires.*
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> (iv) without prejudice to the relief as sought aforesaid, an order of certiorari quashing the second named respondent's decision to apply an increased penalty to the applicant as communicated to him on 8th March, 2004;
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> (v) a declaration that the purported suspension imposed on the applicant by the respondent is without efficacy.
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> (vi) without prejudice to the generality of the foregoing, a declaration that the second named respondent acted in breach of the tenets of natural and constitutional justice in purporting, *ex parte*, to increase the disciplinary tariff imposed on the applicant by the first named respondent."

2. The grounds upon which the applicant was granted leave are those contained in para. F (i), (iii), (iv), (v) and (x) in the statement of grounds. These are as follows:-

> "(i) the second named respondent has misconstrued his powers under the Prison (Disciplinary Code for Officers) Rules 1996, and has acted *ultra vires*;
>
> (iii) any power vested in the second named respondent to increase a disciplinary sanction requires the second named respondent to notify a prison officer of his intention to increase the original tariff so that the prison officer may make representations before the decision is made in accordance with the dictates of natural and constitutional justice.
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> (iv) the applicant had a legitimate expectation that if he pleaded guilty to the offence as charged and a penalty was duly imposed by the first named respondent, there would be no further adverse consequences and in particular he would be treated in the same manner as two of his colleagues and would not be demoted.
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> (v) the purported decision of the second named respondent was manifestly unfair while it offends the common law principles that once a punishment has been imposed it should not subsequently be increased.
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> (x) the applicant was suspended from 3rd October, 2003 to 1st May, 2004 by the respondents which said suspension was excessive and unjust and was invalid having regard to the provisions of s. 13(1)(c) of the Civil Service Regulation Act 1956 in that a valid or lawful suspension can only be imposed for the express purpose stipulated in s. 13(1)(c) of the Civil Service Regulation Act 1956 and in the instant case such purported suspension has been expressed to be for the purpose of investigating allegations of misconduct against the applicant. The suspension has however been unlawfully perpetuated in circumstances where the investigation has concluded, a sanction has been imposed and increased and where the suspension is in effect a further sanction and therefore unlawful."

The Facts

3. At all material times the applicant was a Chief Prison Officer assigned to Mountjoy Gaol in the City of Dublin. On 3rd October, 2003 members of An Garda Síochána visited Mountjoy Prison in possession of a search warrant and searched a small store in the medical unit in the jail. Some equipment was found including video discs, a CD/Burner and a computer. On the same date the applicant was stopped by members of An Garda Síochána in the Dominick Street area of Dublin where he handed over a number of items including some compact discs, a compact disc label and a list of CDs.

4. An investigation took place into the incident on foot of which the applicant admitted his involvement in copying discs. He also admitted that he had requested the Chief Trades Officer to fit a telephone line to the store room in question when he was not entitled to do so.

5. The applicant was suspended from duty on 3rd October, 2003 without pay, pending an investigation. On the same date the applicant wrote to the first named respondent seeking the restoration of his salary on humanitarian grounds as he had a family to support. An officer was appointed to carry out an investigation and prepare a written report into the incident. By letter dated 6th October, 2003 he was informed that he was suspended without pay with effect from the 3rd October, 2003 in accordance with s. 13 of the Civil Service Regulation Act 1956 pending further investigation of the alleged breach of discipline.

6. Section 13 of the Civil Service Regulation Act 1956 entitles a suspending authority to suspend a civil servant if it appears that the civil servant has been guilty of "grave misconduct or of grave irregularity warranting disciplinary action" or if it appears " … that the public interest might be prejudiced by allowing the civil servant to remain on duty" or "a charge of grave misconduct or grave irregularity as made against the civil servant" and "… it appears to that suspending authority that the charge warrants investigation". Power was also given to the suspending authority to terminate the suspension made under the section.

7. Whatever view may ultimately have been taken by the first named respondent of the allegations, it appears that they were being

treated as a grave matter which does not seem unreasonable having regard to the fact that counterfeit material was being manufactured by a senior prison officer with two colleagues using premises and some equipment of the State and the material being copied included pornographic material although it has to be said that most of the material seemed to have been of a non pornographic nature.

8. On 30th October, 2003 the applicant was informed that 75% of his salary would be restored pending the outcome of the investigation. On 23rd December, 2003 the applicant was charged with three offences namely:-

> (a) discreditable conduct;
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> (b) loss or misuse of or damage to prison service or State property; and
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> (c) being an accessory to a breach of discipline.

9. It seems that the applicant was charged with two other colleagues and they were dealt with in a lenient fashion. It is not clear whether they pleaded guilty or not although it seems reasonable to infer that they probably did.

10. Having considered his position the applicant pleaded guilty to the offences and he says that he believed and was led to believe that he would be treated similarly to his two colleagues. The first named respondent duly submitted a report to the second named respondent and the applicant states in his affidavit grounding the application that "the first respondent also notes (correctly) that the breach of discipline was of a minor nature and that I was sincerely sorry for what had occurred". In his report to the second named respondent the first respondent states that the applicant through his representative at the hearing " … indicated to me on behalf of Chief Price that he was prepared to plead guilty to a minor breach of discipline under s. 14 of the First Schedule." At p. 2 of his report he sets out the points made on behalf of the applicant at the hearing including:-

> "4. The breach of discipline was of a minor nature and while he was sincerely sorry for what happened and he apologised for his poor judgment; there was no malice, corruption or devious intent in what he did". On the same page the first respondent says "I have decided to award him a reprimand with record and to recommend to the Minister for Justice, Equality and Law Reform that he should be reduced in pay by one increment for a period of 12 months".

11. The observations of the first respondent in his report are interesting because the applicant maintains that he was being dealt with as though it was a minor offence. There is no doubt that the case was presented on his behalf as being one of a minor offence but it is not clear that the first respondent dealt with it on that basis.

The Application of the Regulations

12. The disciplinary hearing was dealt with under the Prison (Disciplinary Code for Officers) Rules 1996. Rule 9 provides that at an oral hearing the Governor –

> "(b) may, if or he/she is satisfied that the commission by the accused officer of a breach of discipline alleged has been admitted or proved –
>
> (i) in case the breach is of a minor nature, deal with it under Rule 5, and
>
> (ii) in case the breach is not of a minor nature deal with it under para. (2)."

13. Rule 5 permits the Governor to deal with a matter informally "(whether by advice, caution or admonition as the circumstances may require)". However para. (2) of Rule 9 is the paragraph which deals with breaches which are not of a minor nature. This paragraph states that where the Governor deals with a breach of discipline under that paragraph he may do a number of things including "award a reprimand" and "recommend to the Minister that the officer concerned… suffer a reduction in pay by way of deferment of one or more than one increment for one month, three months, six months or twelve months or such longer period as he or she may specify".

14. In this case the Governor stated in his report to the Minister "I have decided to award him a reprimand with record and to recommend to the Minister for Justice, Equality and Law Reform that he should be reduced in pay by one increment for a period of twelve months". The sanction could not have been clearer. It is almost lifted directly from Rule 9 para (2). It seems clear to me therefore that despite the applicant's assertion that the Governor treated it as a minor matter, he in fact treated it as a breach which was not of a minor nature because he dealt with it under O. 9 para (2).

15. On the 8th March, 2004, a letter was sent from the Irish Prison Service to the first respondent and the applicant. It is useful to quote the text of this letter in full as a number of points arise from it. The letter states as follows:

> "I am directed by the Minister for Justice, Equality and Law Reform to refer to an alleged breach of discipline which was notified to you in the complaint form issued on the 22nd December, 2003 and to notify you in accordance with the Prison (Disciplinary Code for Officers) Rules 1996 (S.I. No. 289 of 1996) that the Minister intends to confirm the Governor's finding of guilt in this matter.
>
> The Minister further intends, in accordance with para. 10(1)(b) of the aforementioned Disciplinary Code to vary the Governor's recommended penalty of a reprimand and a deferment of one increment for a period of twelve months. Instead the Minister has decided that you be reduced in rank to the grade of Assistant Chief Officer.
>
> In accordance with para. 10(2) you now have the right to appeal to the Minister against one or more of the following, that is to say: the reprimand, the penalty, the severity of the penalty and/or the Governor's finding of guilt in relation to this charge of a breach of discipline. Should you decide to appeal, you must give to the Minister within 14 days of receipt of this notification, notice in writing of the appeal and shall include in the notice detailed particulars of the grounds of the appeal.
>
> The Minister has authorised, in accordance with para. 10(1)(c), that in the event of your not invoking the above right of appeal, the penalty as outlined above is to be implemented by the Governor. I am also to advise that you shall remain suspended pending resolution of this issue."

16. There is one clear error in this letter which is repeated twice namely the Governor's finding of guilt in relation to the charge against the applicant. It is not in dispute that the applicant pleaded guilty.

17. It is the second paragraph of the letter that involves the central point in this judicial review. In that paragraph the Minister stated that he "intends" to vary the Governor's recommended penalty and goes on to say that instead the Minister "has decided" that the applicant be reduced in rank.

18. Rule 10 of the 1996 Prison Rules permits the Minister, having considered the Governor's report to notify the accused officer that he intends to vary any penalty and notify the officer of his right to appeal. Rule 10(2) sets out the appeal procedure which, *inter alia,* requires that the accused officer gives notice in writing of the appeal within 14 days and the notice shall include detailed particulars of the grounds of the appeal.

19. The applicant is content to accept the penalty imposed by the first respondent (the Governor). However the applicant has not appealed the decision or stated intention of the second respondent and accordingly he has been reduced in rank to the grade of Assistant Chief Officer. This, coupled with the suspension had serious financial and career implications for the applicant. The applicant's principal complaint is that the Minister stated in his letter of the 8th March, 2004, that he had "decided" that the applicant be reduced in rank and then went on to state that the applicant had the right to appeal.

20. The applicant asserts that the second named respondent was unfair and that once a punishment has been imposed it should not subsequently be increased. He also refers to the memorandum of understanding appended to the Prison Rules. The memorandum sets out matters that had been the subject of discussion between the Department of Justice and the Prison Officers Association under the conciliation and arbitration scheme. In the course of the memorandum it states:

> "7. It is agreed that neither the Minister for Justice nor the disciplinary review committee have power under the rules to increase penalties, on appeal. References in the rules to variations of penalties mean variations that reduce or limit the penalties concerned."

The applicant states that the second respondent was not entitled therefore to increase the penalty.

The Law
21. In *Curley v. Governor of Arbour Hill Prison* [2005] 3 I.R. 308 the Supreme Court held that the Prison (Disciplinary Code for Officers) Rule 1996 was a statutory instrument and as such, regardless of its antecedents in industrial relations negotiations, was a legitimate piece of delegated legislation, the provisions of which could not be affected by any document not of a legislative nature. In the course of his judgment Hardiman J. stated at p. 317:

> "There is, in my opinion, no warrant whatever for regarding the Instrument or any part thereof as being "subject to" the Memorandum of Understanding. This is not a question of construction but a matter of principle."

Quite apart from the fact that I agree with that observation I am also bound by it so that disposes of the argument made by the applicant based on the memorandum of understanding. The Minister was quite entitled to vary the penalty imposed by the first named respondent provided he acted *intra vires* and in a manner which adhered to the principles of natural and constitutional justice.

22. As the hearing took place it became quite clear that the applicant has no quarrel with the first named respondent's decision on the disciplinary hearing and that there are really just two points on which he bases the challenge. The first is that the Minister effectively decided the issue of increased penalty before he heard submissions from the applicant and that in so doing he denied the applicant fair procedures. Having made his decision the applicant also argues that the Minister would then, in effect, be hearing an appeal against a decision he had already made thus offending the principle of *Nemo Iudex in Causa Sua.*

23. The respondent says that the applicant's failure to appeal under r. 10 is fatal to his application for judicial review as it provided an alternative remedy. The respondent also states that on a plain reading of the letter of the 3rd March, 2004, it is patent that the Minister is saying what he proposes doing and that the applicant can come before him and challenge it.

24. I am satisfied that while the applicant's failure to appeal the decision of the second named respondent is a matter I can take into account in deciding whether or not to grant judicial review. The failure of the applicant to appeal is not fatal if, as he contends, a decision has already been taken by the second named respondent. See *Stefan v. The Minister for Justice, Equality and Law Reform* (Unreported, Supreme Court, 13th November, 2001) and *The State (Abenglen Properties) v. Corporation of Dublin* [1984] I.R. 381.

25. In my view the applicant was justified in seeking judicial review rather than challenging the Minister's decision by way of appeal, in circumstances where the Minister had stated that he had decided to reduce the Applicant in Rank.

The Decision
26. The decision made by each of the respondents was one which had a significant impact on the applicant's career and his financial situation. Any administrative decision of that nature requires to be made with fairness. There is no doubt that the Prison Rules 1996 permit the Minister to vary the penalty imposed by the first named respondent. If the second named respondent intends to vary the penalty imposed by the first named respondent he is obliged to notify the accused officer and give him a right of appeal as provided for in Regulation 10(2).

27. In this particular case the second named respondent informed the applicant that he had decided to reduce him in rank to the grade of Assistant Chief Officer. This was a significant alteration in the sanction imposed by the first named respondent. It was significant both in terms of the applicant's status at work and also its financial implications. By informing the applicant that he had decided to take this course it clearly conveyed the impression that a decision was made and the appeal was going to take place in the light of a matter already decided. No one in the applicant's position could – in such circumstances – have confidence that the appeal would be anything other than a fiction. At the very least the applicant could only have felt that he was being treated unfairly and that the review by the second named respondent has been prejudged.

28. I hold that in making his decision to reduce the applicant in rank before hearing from the applicant as to why this should not be done, the second named respondent was not acting in accordance with the Rules and was acting *ultra vires*. He was also acting in breach of fair procedures or natural justice in as much as he did not give the applicant an opportunity to be heard in advance. I do not accept the argument made on behalf of the respondents that on a plain reading of the letter of the 8th March, 2004, the second named respondent was stating what he proposed to do. Whatever may have been the intention of the second named respondent the text of his letter is clear when he says:

> "Instead, the Minister has decided that you be reduced in rank to the grade of Assistant Chief Officer."

Once he had made the decision it would not be proper for him to hear the appeal as this would offend against the principle of *nemo iudex in causa sua*.

I therefore make an order quashing the decision of the second named respondent.

29. As the second named respondent was acting *ultra vires* and in breach of natural justice I also hold that the continuing suspension advised in the letter of the 8th March, 2004, was unlawful and I make an order quashing the suspension from that date.

30. As the applicant did not effectively challenge the sanction imposed by the first named respondent I make no order in respect of that decision.