

**THE HIGH COURT
JUDICIAL REVIEW**

[2004 No. 1144 J.R.]

BETWEEN**DENIS KENNY****APPLICANT**

**AND
THE GARDA SÍOCHÁNA COMPLAINTS BOARD
AND THE GARDA SÍOCHÁNA COMPLAINTS TRIBUNAL**

RESPONDENTS**Judgment of Mr. Justice Roderick Murphy dated 31st July, 2006.****1. The applicant's case**

On 24th March, 2000, a complaint was made by Denise Bohan, a bus driver, against the applicant regarding an incident which had occurred on 15th March, 2000, when the bus which the complainant was driving pulled out of a bus stop in front of the applicant's car on a bend at the bus stop before Clonsilla railway crossing. The applicant followed the complainant to the terminus which was one stop later and a conversation took place between the applicant and the complainant regarding the manner in which the complainant and the applicant had driven their respective vehicles.

The complaint was made on form GSC1 and was deemed admissible by the Deputy Chief Executive of the Tribunal on 4th April, 2000. On 29th May, 2000, Inspector Madigan was appointed to investigate the complaint. On 2nd July, 2000, the applicant was notified that a complaint had been made. Statements were taken up to 30th September, 2000.

The Garda Complaints Board decided on 9th April, 2001, to defer the matter until after 30th May, 2001. Neither the applicant nor his solicitor heard anything further in relation to the matter until 20th January, 2004, when they were advised that a hearing had been scheduled for 5th March, 2004, which was again adjourned until 24th September, 2004, which was not suitable to the applicant having regard to prior holiday arrangements.

The applicant said that he believed that up to 20th January, 2004, when no correspondence of any kind was received relating to the matter, he believed that the matter had come to an end and that he was not going to be pursued in relation thereto.

By letter of 6th October, 2004, he was informed that a Tribunal hearing would take place on 26th November, 2004, which he attended. Submissions were made on his behalf in relation to the delay at that hearing and the Tribunal determined that there had been a delay but that the reasons for the delay were acceptable and they were prepared to go ahead with the hearing.

The applicant's solicitor informed the Tribunal that he wished to withdraw and challenge its decision. The High court (McKechnie J.) gave leave to apply for judicial review on 13th December, 2004.

2. Periods of delay

There was a delay in the preparing of the investigation of the investigating officer's report from 29th May, 2000, to 22nd February, 2001. There was a further delay from the receipt of the report by the Board from 22nd February, 2001, to 9th April, 2001.

There followed a very significant delay of over two years from 9th April, 2001, until the Board next considered the matter on 14th April, 2003. There was a further delay from the time the matter was referred to the Tribunal on 14th April, 2003, to the date on which the Tribunal proposed to hold an inquiry for the first time on 24th April, 2004.

From the time of the appointment of the investigating officer on 29th May, 2000 to the date proposed for the inquiry there was a delay of almost four years.

3. Judicial Review Proceedings

The applicant has applied for prohibition restraining the Tribunal from holding a full hearing in respect of complaint made by Denise Bohan on 24th March, 2000, against the applicant, which hearing was listed for January, 2004 (*sic*) and for a declaration that the failure to process the complaint expeditiously breached basic fairness of procedures; a declaration that the Board and the Tribunal had been guilty of culpable delay and an order staying the further proceedings.

The grounds on which such relief was sought were that the delay was inordinate and inexcusable and breached the applicant's right to natural and constitutional justice and fair procedures and breached his legitimate expectation that the matter would be dealt with expeditiously. The Board had failed to comply with its statutory duty set out in s. 7(5) of the Garda Síochána Complaints Act, 1986, in a timely manner.

The Tribunal in purporting to hold a hearing on 24th September, 2004 and 26th November, 2004, some 54 to 56 months after the alleged incident on 15th March, 2000 had breached the applicant's legitimate expectation that serious allegations of misconduct alleged against him would be dealt with expeditiously.

The grounding affidavit of the applicant was filed on 13th December, 2004 and verified the matters referred to above in paras. 1 and 2.

4. Statement of opposition

When the complaint of 24th March, 2000 was ruled admissible under s. 4(3)(a) of the Act on 4th April, 2000 an informal resolution was recommended.

On 9th August, 2000, the applicant declined to have the complaint resolved on an informal basis pursuant to s. 5 of the Act and following on that refusal the Commissioner confirmed the appointment of Inspector Madigan, the investigating officer, on 19th February, 2001. He had been originally appointed on 29th March, 2000, eleven months earlier.

The report of the investigating officer was forwarded to the Board on 23rd February, 2001. At its meeting the Board decided to defer consideration of the matter until after 30th May, 2001, as there had been pending before the High Court a challenge to the appointment of an inspector as investigating officer (the *Quigley* decision which commenced in August, 2000, was heard in July, 2001

and decided upon by Ó Caoimh J. on 9th July, 2002). The decision related to a challenge by separate applicant to the appointment of an inspector as investigating officer which was not successful.

The matter was considered by the Board on 14th April, 2003, before the approved judgment was made available.

On that day the Tribunal was of the opinion that breaches of discipline might be disclosed and, accordingly, the matter was referred to the Tribunal pursuant to s. 7(5) of the Act. A statement of the breaches of discipline alleged were furnished to the applicant by letter dated 26th November, 2003, and were denied by the applicant on 9th December, 2003.

On 20th January, 2004, the Tribunal informed the applicant that a hearing was scheduled for 5th March. As a witness for the Board was not available on that day the hearing was postponed. On 23rd August, 2004, the Tribunal informed the applicant it proposed holding a hearing in September which date was rescheduled at the applicant's request for 26th November, 2004.

The respondents denied that the alleged delay was either inordinate or inexcusable and pleaded that the applicant was not prejudiced as a result of the alleged delay and that the balance of justice was in favour of the tribunal proceeding to consider the alleged breaches of discipline. The applicant's entitlement to a fair trial had not been adversely affected.

5. Affidavit of Anthony Duggan

The statement of opposition was grounded on the affidavit of Anthony Duggan, the Chief Executive of the Garda Síochána Complaints Board who outlined the reasons for the delay between the complaint on 24th March, 2000 and the deferring of the consideration of the complaint on 9th April, 2001, because of the challenge in the High Court in the Quigley case. A further two years passed from the decision to defer on 9th April, 2001, to the decision of the Board on 14th April, 2003, that breaches of discipline on the part of the applicant might be disclosed and the appointment of a tribunal on 9th May, 2003. Mr. Duggan said that on 26th November, 2003, the Board furnished to the applicant a statement of the breaches of discipline including particulars, the names of witnesses and a copy of the statements of those witnesses. The applicant was notified of a hearing on 5th March, 2004, which, as indicated in the statement of opposition, was ultimately adjourned to 26th November, 2004, when, on application by the applicant's solicitor, the Tribunal ruled that the delays were acceptable and that the matter should proceed before the Tribunal. The Tribunal acceded to the matter being adjourned to enable this application to be made to the High Court.

Mr. Duggan says that the applicant in effect complains about four periods of delay on the part of the respondents.

First, the alleged delay between the date of receipt of the complaint in March, 2000 and the date on which the report of the investigating officer was received by the Board in February, 2001. Some period was clearly explicable on the basis that an attempt was made to resolve the complaint on an informal basis in accordance with the provisions of the Act. The applicant did not consent to the resolution of the complaint on that basis and it was necessary, accordingly, for the investigating officer to prepare a report and furnish that to the Board.

6. Decision of the Court

6.1 Apart from the lengthy delay over what appeared to be a relatively trivial matter, there seems to be no specific prejudice in terms of memory, availability of witnesses or indeed of documentation.

6.2 The court has also to consider the interests of the public and/or of the complainant. The court has been informed that a summons for dangerous driving was issued as against the complainant. Neither counsel for the applicant nor of the respondents was in a position to say whether this matter had proceeded, and if so, what the outcome of the proceedings were.

6.3 In *McNeil v. Commissioner of An Garda Síochána* [1997] 1 I.R. 469 the applicant had allegedly made false entries concerning hours worked. This led to the D.P.P. directing charges and to the applicant's suspension which continued even after the charges were withdrawn.

The judicial review application was based on the charges being withdrawn. A period of some four years elapsed between the applicant being informed that an investigation would take place into allegations against him and the fixing of a date for the hearing of a formal inquiry. The Supreme Court (Hamilton C.J., O'Flaherty J.: Denham J. dissenting) in allowing the appeal against the refusal of the High Court to prohibit the hearing held that the court was not concerned with the principles established with regard to the effect of delay on either civil or criminal proceedings because the proceedings had to be dealt with in accordance with the regulations of 1989. The regulations indicated that it was the intention of the Minister that any alleged breaches of discipline would be dealt with expeditiously and as a matter of urgency.

The majority of the Supreme Court held that the respondents had been in breach of the obligations imposed on them by regulation 8 to investigate the alleged breaches of discipline as soon as practicable after they became aware of them. The reference of the matter to the Director of Public Prosecutions and the making of a regulation 40 notice in relation to the applicant's dismissal did not relieve the respondents of the obligation to investigate the alleged breaches of discipline as soon as practicable.

In the present case the respondents had delayed to await the decision in the *Quigley* case. They delayed, indeed, to await the approved judgment, though, in fact, they decided to proceed before the approved judgment became available.

Notwithstanding that delay, there were further periods of delay.

6.4.1 The court considers that the possibility of an informal resolution of the complaint was entertained by the applicant and accounted for four months of the eleven month delay. The remaining period was not inordinate and even if it were, was excusable by reason of the preparation of the report for the Board.

6.4.2 The second significant period of delay was between April, 2001 when the complaint of the applicant and the report of the investigating officer was considered by the Board and deferred until April, 2003 when the matter was again considered by the Board following the judgment in the Quigley case. The Board says that this was necessary to avoid an anticipated challenge by the applicant regarding the appointment of an inspector as investigating officer. The applicant says that such a challenge was never contemplated.

The court believes that if *Quigley* were considered relevant the Board should have moved once the draft judgment on 9th July, 2002 notwithstanding that the case might be appealed. The respondents could have asked the applicant whether he intended to rely on *Quigley*. The court, on the basis of the *McNeil* decision believes that this two-year delay was inordinate and, it seems to the court, to that extent unreasonable.

6.4.3 The third period of delay between April, 2003 when the Board decided to refer the matter to the Tribunal and November, 2003 when the detailed statement and particulars of the alleged breaches of discipline and copies of statements were furnished to the applicant. This period of seven months was to enable the respondents to assemble, collate and furnish the applicant with those particulars and statements. If this had been the only period of delay the court might indeed agree. However, given the previous delays the court has to consider this delay as dilatory.

6.4.4 The final alleged period of delay occurred from the date on which the documents were furnished on 26th November, 2003, to the date of the hearing of the Tribunal on 26th November, 2004. This delay arose because of the difficulty of witnesses, the logistics of assembling the Tribunal and the clash in dates previously arranged by the applicant appears to have been acquiesced by the applicant. It is clear that some two months were attributable to the applicant. However, in respect of the other delays it does seem to point to tasks being executed in series rather than in parallel. Notwithstanding, it seems to me that this period is, as I indicated, excusable.

In *McNeil* the delay occasioned by the direction of the D.P.P. did not relieve the respondents of the obligation to investigate the alleged breach of discipline as soon as practicable. In the present case the same principle applies in relation to the delay to consider an unrelated case.

In the circumstance I will allow the application.