



THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 68

Record No. 2016/186

Ryan P.  
Peart J.  
Hogan J.

BETWEEN/

JOSEPH HIGGINS

APPLICANT

- AND -

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 12th day of March 2018**

1. This is an appeal from a decision of the High Court (O'Regan J.) delivered *ex tempore* on the 16th March 2006 whereby she dismissed the applicant's application to restrain the holding of a Garda disciplinary investigation pursuant to the Garda Síochána (Discipline) Regulations 2007 (S.I. No. 241 of 2007) ("the 2007 Regulations"). The background to this application is as follows.

2. The applicant is a Detective Sergeant in An Garda Síochána, stationed at the Special Detective Unit in Dublin. On the 15th of June 2012 at about 2am at night Detective Sergeant Higgins was involved in a single vehicle road traffic accident at Exit 2 of the N2 northbound motorway in Finglas, Dublin. At the time of the accident, the applicant was on duty and he was driving a State-owned vehicle. Following an investigation by members of the Garda Traffic Unit, it was confirmed that the applicant's vehicle had rolled onto its side and impacted heavily with the central median barrier. The vehicle itself was written off as beyond repair.

3. Following this accident, the applicant was admitted to hospital and it was confirmed that he had sustained a brain injury causing a bleed to the surface of the brain. A CT scan conducted in Navan Hospital showed a small area of haemorrhage in the superior parietal lobe of the brain on the right side. This necessitated referral and admission to Our Lady of Lourdes' Hospital in Drogheda, Co. Louth where the applicant was kept under head injury observation for a further period of 6 days. It is clear that the applicant ultimately made a full recovery from his injuries.

4. Detective Sergeant Higgins maintains that he has no memory of the accident. His general practitioner, Dr. Ursula Keane, has confirmed that this is consistent with a brain injury, which can cause antecedent amnesia.

5. On the 7th of December 2012, criminal proceedings were commenced by the Director of Public Prosecutions against the applicant alleging two offences contrary to s. 106 of the Road Traffic Act 1961. These two charges were in the following terms:

"(i) That being the driver of vehicle registration 06D 82727 was involved in the occurrence of damage to the central median safety barrier on the N2 motorway and not having given appropriate information to a person entitled to demand it, did fail to report such occurrence as soon as possible to a member of An Garda Síochána, going for that purpose if necessary, to the nearest convenient Garda station, contrary to s.106 of the Road Traffic Act, 1961 as amended and,

(ii) that being the driver of vehicle registration number 06D 82727 was involved in the occurrence of damage to the central median safety barrier of the N2 motorway, did fail to keep the said vehicle at or near the place of the occurrence for a period that was reasonable in all the circumstances of the case, contrary to the provisions of s. 106(1)(b) and (iii) of the Road Traffic Act, 1961 as amended."

6. The two criminal charges were, therefore, failing to report the accident and failing to keep the vehicle at the place of the occurrence of the accident.

7. At his trial before the District Court on the 16th September 2013 the applicant put forward the defence that there was no element of criminal wrongdoing. He maintained that he had suffered a head injury in the accident, which resulted in an injury to his brain which affected his judgment; and that he had not been in full command of his faculties at the time of the accident. Medical evidence from the applicant's family physician, Dr. Keane, was called before the District Judge and this medical evidence was apparently accepted. Dr. Keane gave evidence by reference to a letter to her from Mr. Ahmed regarding the applicant and his condition.

8. Based on the note of the evidence and the ruling given by Judge Michael Coughlan which has been exhibited in these proceedings, it would appear that the District Judge accepted the evidence of Dr. Keane that the applicant was at the time suffering from a brain injury which affected his judgment and therefore he had not been in full command of his faculties at that time. On that basis, therefore, the two charges were accordingly dismissed. It is only proper to record that Inspector O'Sullivan of Lucan Garda Station attended the court hearing on behalf of Superintendent Mann.

9. Superintendent Mann had been appointed by Chief Superintendent Coburn to conduct an investigation under the 2007 Regulations. In his first letter to the applicant dated the 21st May 2013 it was indicated that four separate disciplinary allegations were under consideration. These were:

"(i) You did make unauthorized use of official vehicle 06D 82727 on the 15th of June 2012 at the N2;

(ii) That you did fail to report a road traffic collision involving official vehicle 06D 82727 on the 15th of June 2012 at the

N2 in which you were involved;

(iii) that you did fail to remain with official vehicle 06D82727 on the 15th of June 2012 following a road traffic collision at the N2 in which you were involved and

(iv) that you did fail to secure official property in official vehicle 06D 82727 on the 15th of June, 2012 following a road traffic collision at the N2 at which you were involved."

10. The prospective disciplinary proceedings were held in abeyance pending the outcome of the District Court prosecution. Following the applicant's acquittal, the Garda authorities nonetheless wrote to him to indicate that the disciplinary proceedings were continuing. The applicant's solicitor replied on the 24th October 2013 saying that the continued investigation would amount to a breach of Article 8 of the 2007 Regulations. I will presently address the content and implications of Article 8, but, returning to the narrative, there was a good deal of correspondence between the parties in the first seven months or so of 2014. On the 17th June 2014 Superintendent Mann indicated that he was proceeding to investigate the four breaches of discipline and asserted that he had taken account of Article 8.

11. On the 23rd July 2014 the applicant's solicitors replied by saying that the investigation should not proceed on the ground that it was oppressive in the light of the acquittal. A copy of the medical records were also enclosed. On the 29th October 2014 Superintendent Mann responded by saying:

On the 18th June 2012 I was appointed under the provisions of Part III of The Garda Síochána (Discipline Regulations) 2007 to investigate the issues arising from a traffic collision involving an official Garda vehicle, 06 D 82727, on the 15th June 2012. All criminal issues against you in respect of this incident have been dismissed. I have taken cognisance of Regulation 8 of The Garda Síochána (Discipline Regulations) 2007. I require to interview you in respect of number 4 of the grounds in which it appears you may have been in breach of discipline, as follows:-

"4. Did fail to secure official property in official vehicle 06 D 82727 following a road traffic collision on the 15th June 2012 on the N2 which you were involved in."

12. Following the receipt of Superintendent Mann's letter, it was clear that now only one disciplinary charge was under consideration. He nonetheless requested the applicant to attend for interview, but this was resisted on the ground that it would amount to a breach of Article 8 of the 2017 Regulations. Further inconclusive correspondence between the parties followed, but ultimately the applicant applied to the High Court and on the 28th January 2015 Noonan J. granted leave to apply for judicial review.

#### **Article 8 of the 2007 Regulations**

13. The proper construction of Article 8 of the 2007 Regulations accordingly lies at the heart of this appeal. Article 8 provides:

"(1) Disciplinary proceedings may be taken against a member under these regulations notwithstanding that proceedings for an offence have been or may be instituted against the member arising out of the same circumstances.

(2) Where a member has been acquitted on the merits of an offence, proceedings under these regulations for an alleged breach of discipline shall not be commenced or, if already commenced, continued if:

(a) the proceedings would involve conducting an inquiry into the same issues in respect of which the member was so acquitted, and

(b) in all the circumstances of the particular case and their cumulative effect, it would be unfair and oppressive to commence or continue the proceedings.

(3) Where the District Court, without proceeding to a conviction, finds the facts alleged in a criminal charge to have been proved against a member, the Government, the Commissioner, a board of inquiry or an Appeal Board is entitled to rely on the finding as conclusive.

(4) Any information, document or thing which the member concerned is required to provide or produce in disciplinary proceedings and which is related to and used for the purposes of such proceedings is not admissible in criminal proceedings, unless provided or produced by the member in those proceedings.

(5) The content of paragraph (4) shall be explained in ordinary language to the member concerned by the person or body conducting the disciplinary proceedings."

14. It will thus be seen that if the applicant can establish that if (i) the disciplinary inquiry involves an inquiry into the "same issues" as those in respect of which he had been acquitted *and* (ii) it would be unfair and oppressive to commence or continue the inquiry in the circumstances, the applicant would be entitled to an order restraining that inquiry having regard to the provisions of Article 8 of the 2007 Regulations.

#### **Whether the proceedings are premature**

15. But while the proper construction of Article 8 is of central importance, the first question which must be considered is whether the proceedings are premature. Counsel for the Commissioner, Ms. Meenan S.C., contended that the proceedings were premature as no final decisions had yet been taken to proceed with the disciplinary inquiry, at least in the sense of proceeding to a full hearing. At the moment, all that the Garda authorities wanted to do was to interview the applicant regarding the circumstances in which the vehicle was – they say – left unsecured in the wake of the crash.

16. While not unsympathetic to the predicament of the Commissioner, it is clear from the wording of the 2007 Regulations that this objection is not well founded. If the applicant is correct in his contention regarding the application of Article 8 to the circumstances of the present case, then this applies equally (as per Article 8(2)) to the commencement of the disciplinary proceedings. At the same time, however, it must be noted that the term "disciplinary proceedings" in Article 3(1) of the 2007 Regulations is defined as including "any....interview...conducted in accordance with these Regulations."

17. It follows, therefore, that if the applicant is correct regarding the scope of Article 8, this prohibition applies to the interview which

Superintendent Mann proposes to hold with the applicant. It equally follows that the applicant is entitled to apply for judicial review to restrain the holding of even an interview based on his contentions regarding Article 8. All of this means that the present proceedings cannot be regarded as premature.

### **Developments in the course of the second day of the hearing and the application to amend**

18. It is next necessary to record an important development which occurred on the second day of the hearing, as the Commissioner served a supplemental affidavit sworn by a Superintendent Matthew Nyland. This affidavit exhibited material which had not been previously seen by the applicant and his advisers.

19. This affidavit exhibited correspondence which had passed from Superintendent Dermot Mann dated the 28th February 2014 to Chief Superintendent Coburn. Superintendent Mann had decided that it *would* be unfair and oppressive to continue the discipline proceedings in light of the acquittal in the District Court. The correspondence also provided the rationale for Superintendent Mann's view, namely, that if the District Judge accepted that the applicant had a brain injury and that this impacted upon his judgment to the extent that he would not convict him of the road traffic offences, then by extension, it followed that the applicant could not be held responsible from a disciplinary perspective, *i.e.*, for failing to secure the State owned vehicle, as that failure had occurred in the same set of circumstances. Superintendent Mann concluded thus his assessment of the matter:

"In order to proceed with the discipline investigation, I would have had to conduct an inquiry into the same issues in respect of which the member was already acquitted."

20. It appears, however, that Chief Superintendent Coburn did not agree with this analysis:

"While I understand Superintendent Mann's contention that D/Sergeant Higgins would likely rely on the same medical evidence in any disciplinary proceedings in relation to his abandonment of his official vehicle and property, the fact remains that no such documentation has been provided and I feel in the absence of any such evidence that it may be prudent to explore these circumstances further from a disciplinary prospective".

21. While it is clear from the Supreme Court's decision in *Keegan v. Garda Síochána Complaints Board* [20012] IESC 29, [2012] 2 I.R. 570 that the power to amend judicial review proceedings should be exercised with at least some degree of liberality, the applicant seeking such an amendment "must [nonetheless] explain his failure to include the proposed new ground in his original application": see [2012] 2 I.R. 570, 582, *per* Fennelly J.

22. In the present case it appears that the applicant sought to apply to amend the proceedings in the light of the material contained in the affidavit of Superintendent Nyland. I cannot help thinking that the sequence of events before the High Court which led to this application was not entirely satisfactory.

23. The material exhibited in Superintendent Nyland's affidavit should, of course, have been supplied to the applicant well in advance of the date of the hearing. At the same time, however, the applicant should have explained the basis on which he now sought to amend the proceedings and provided a draft of any amendments to the proceedings being proposed. The application to amend appears to have been based on the fact that the Garda authorities did not have the relevant medical reports at the time the decision to proceed with the disciplinary investigation was itself taken. (Of course, it must be recalled that this was before Superintendent Mann subsequently decided in his letter of 29th October 2014 to confine the investigation to one single charge.) It is accepted, however, that the applicant had only formally supplied the respondents with these all important medical reports in July 2014, some ten months after they were originally requested.

24. If anything turned on this, I would have been inclined to allow the appeal from the decision of O'Regan J. and to have allowed the applicant to rely on this ground in the light of the supplemental affidavit which had just been tendered by the respondent, subject to seeing the precise terms of the proposed amendment. Since, however, for reasons I am about to explain, nothing turns on this, I do not find it necessary to rule on this issue.

### **The scope of the prohibition in Article 8(2)**

25. It is perhaps idle to deny that the question of whether a disciplinary body can proceed to discipline one of its members following the acquittal of that member on a criminal charge has heretofore proved troublesome and vexing. At one level it might be said that as the onus of proof is different and there is also a different prosecuting body, no question of *res judicata* ought to arise. One might also observe that in the case of a disciplined force such as An Garda Síochána or in a statutory profession such as medicine or law, the mere fact that the member has been absolved of criminal liability in respect of one particular incident should not *ipso facto* preclude a further investigation into incident since the standard to be expected from the member is normally somewhat higher than simply stating that he not been found not guilty by reference to the criminal law. On the other hand, there is, perhaps, something incongruous and unfair about the member in question facing a disciplinary charge in respect of precisely the same matter in respect of which he had been acquitted on the merits.

26. These dilemmas are reflected in a series of Supreme Court decisions involving this very issue: *McGrath v. Garda Commissioner* [1991] 1 I.R. 69, *Mooney v. An Post* [1998] 4 I.R. 288 and *Garvey v. Minister for Justice* [2006] IESC 3, [2006] 1 I.R. 548. In *McGrath* the Supreme Court held that a Garda disciplinary inquiry against a Garda in respect of embezzlement allegations of which he had been acquitted in a criminal trial should not be allowed to proceed. In *Mooney*, on the other hand, the Supreme Court held that An Post was entitled to proceed with an inquiry against a postman who was alleged to have stolen money from the mails and demand answers from him in respect of allegations which had been the subject matter of a criminal prosecution in which he had been acquitted. In *Garvey* the Supreme Court held that it was unfair that a prison officer should now face disciplinary proceedings alleging that he had assaulted a particular prisoner when he had been acquitted of precisely that offence following a lengthy jury trial.

27. It is perhaps its own indication of the difficulties in this area that in the latter case, Geoghegan J. acknowledged that although "it is almost impossible fully to reconcile the two decisions", it was nonetheless necessary "to do so as far as possible." Geoghegan J. then conducted a very full review of these decisions – which exercise it is unnecessary for me to repeat here – in which he stressed that the precise ratio of *McGrath* was that the fresh disciplinary charge constituted an unfair procedure in all the circumstances of the case. While Hederman J. had delivered the leading judgment, an analysis of the other two judgments (namely, Finlay C.J. and McCarthy J.) indicated the true scope of the decision. As Finlay C.J. observed ([1991] 1 I.R. 69, 71):

"I would emphasise, however, as is clear from that judgment, that there cannot, it would appear to me, be any general principle that an acquittal on a criminal charge in respect of an offence, irrespective of the reason for such acquittal, or the basis on which it was achieved, could be inevitably an estoppel preventing a disciplinary investigation arising out of the same set of facts."

28. Geoghegan J. then noted that Finlay C.J. then went on to point out that there was no suggestion contained in the case that the verdict in the criminal trial arose through any technicality or any failure of attendance by a particular witness who might be available at a subsequent disciplinary hearing or any other similar circumstance. It was accepted that the verdict was a verdict on the merits of the particular charge "after a full and proper hearing". The next sentence completes his judgment and reads as follows:

"In those circumstances, it seems to me that a disciplinary hearing now prosecuted, arising out of the identical facts and allegation of corruption, would be a basically unfair procedure."

29. Geoghegan J. then summarised the effect of *McGrath* ([2006] 1 I.R. 548, 556):

"In summary, my view is that *McGrath v. The Commissioner of An Garda Síochána* is authority for the proposition that it may in any given circumstances be unfair and oppressive to conduct a disciplinary inquiry into the same issues in respect of which there has been an acquittal on the merits at a criminal trial but this will depend on the particular surrounding circumstances and in particular their cumulative effect. There is no necessary preclusion per se of such a double process."

30. Geoghegan J. then went to consider the circumstances of *Mooney* where the key issue was whether the applicant could rely on his acquittal on criminal charges to defeat an oral inquiry against him in An Post. While Geoghegan J. agreed that *Mooney* could not be fully reconciled with *McGrath*, he nonetheless drew distinctions between them ([2006] 1 I.R. 548, 557):

"Fundamentally, the two cases were different in my view. In *Mooney's* case the employer, An Post, had some confidential information against the applicant from a person who could not be called at the trial. Effectively, An Post laid a trap for the applicant which in their belief he had fallen into and the criminal charges were based on that. They were not based on the original complaint. In those circumstances, the acquittal necessarily gave rise to a reasonable requirement on the part of the employer that the employee answer certain questions. There was a simple issue of whether he was suitable to be retained as a postman. It was an obvious example, in my opinion, where an acquittal could not *per se* prevent further inquiries."

31. Geoghegan J. then went on to say ([2006] 1 I.R. 548, 557-558):

"I take the view, however, that this particular case is much closer to *McGrath* than it is to *Mooney*. There was a simple issue of credibility in this case namely, whether the appellant had kicked the prisoner in the face and inflicted the injuries. Whilst the issue was simple, its resolution was clearly anything but simple. As already mentioned, the trial lasted five weeks and the jury took sixteen hours to deliberate. The jury then found in favour of the appellant. It is true, of course, that it is possible that a jury merely had a reasonable doubt but I do not think that that speculative possibility, by itself, justifies a rejection of the contention by the appellant that given the nature of the criminal trial he faced, the issues involved and the fact that essentially it is all a matter of internal dispute between prison officers, it would be oppressive and an unfair procedure now to unravel the verdict of the jury by way of disciplinary inquiry."

32. The requirements of Article 8(2) of the 2007 Regulations must, I think, be viewed against the background of this case-law. I propose now to consider the proper construction of Article 8(2).

**The first limb of the Article 8(2)(a) prohibition: "...the same issues in respect of which the member was acquitted."**

33. The first limb of the prohibition contained in Article 8(2)(a) is that the inquiry must be into "the same issues in respect of which the member was acquitted." The proposed disciplinary investigation concerns the applicant's alleged failure to secure "official property in official vehicle 06D 82727 on the 15th of June 2012 following a road traffic collision at the N2 at which you were involved." It is, of course, true that the applicant was acquitted of the criminal charges of failing to report the accident and failing to keep the vehicle at the scene of the accident. But none of these charges necessarily involve the same issues as the remaining disciplinary charge.

34. The charge of failing to secure the vehicle would involve ensuring that public property belonging to the employer which was contained in the vehicle was not either stolen or otherwise compromised. The Commissioner would, of course, have a strong interest in ensuring, for example, that radio equipment was not stolen from the vehicle or that official documents were not comprised and that any firearms contained in the vehicle were secured. While it is not, as such, a criminal offence to leave a Garda car unsecured, the apparent failure by a member of the force to secure such a vehicle following an accident is obviously a matter that, in principle, at least, could attract disciplinary sanctions.

35. To that extent, therefore, the present case is rather different from cases such as *McGrath* or *Garvey* where the subsequent disciplinary charge replicated either exactly or in substance the precise criminal charge of which the applicant had earlier been acquitted on the merits. In these circumstances, as the applicant cannot satisfy the first limb of Article 8(2)(a), it is unnecessary to consider whether he could have satisfied the second test of oppressiveness as it is agreed that both conditions contained in Article 8 must be satisfied for this prohibition to apply.

36. The disciplinary proceedings are not yet, however, at that particular point and I refrain from expressing any view of any such evidence which might be supplied by the applicant. It is sufficient to say that as the requirement of Article 8(2)(a) is not satisfied, the applicant is not entitled to any order restraining the commencement of the proceedings, since both of these conditions in (a) and (b) must be satisfied. I stress, however, that, depending on an assessment of any such evidence, the Garda authorities would be entitled to discontinue any such investigation if it were concluded that to continue them would be oppressive in the circumstances.

**Whether it was necessary for the Garda authorities to have formed a prior opinion regarding the scope of Article 8 of the 2007 Regulations**

37. In arriving at these conclusions, I have not overlooked the submission of Mr. O'Higgins S.C. to the effect that it was necessary for the Garda authorities to have formed a view on the issue of whether Article 8 applied in the circumstances of Detective Sergeant Higgins' case and that they could not have done this in the absence of the relevant medical evidence. This, after all, was the substance of the amendment which the applicant had sought to canvass in the High Court following the filing of the supplemental affidavit from Superintendent Nyland.

38. For my part, I do not think that this construction of Article 8 is correct. Article 8 contains an objective prohibition whose application is not dependent on the prior formation of any opinion or belief of the Commissioner or the Garda officer to whom the disciplinary task has been properly delegated. This is in contrast to the language of other provisions of the 2007 Regulations. An example here is the preceding Article, Article 7(1), which provides that where "in the opinion of the Commissioner", the circumstances "render such a course desirable in the interests of the Garda Síochána, he or she may suspend a member from duty." The crucial

words - "in the opinion of the Commissioner" – are missing from Article 8.

39. It follows, therefore, that the application of the prohibition in Article 8 is an objective one which is not in any sense pre-conditioned or contingent on the prior formation of any belief or opinion by the Commissioner or his appointed officers. Even if, therefore, it were to be said that no proper view of the application of Article 8 to the present case had been formed by the Commissioner that is irrelevant as a matter of law.

#### **The delegation issue**

40. The applicant's contention under this heading is that Superintendent Mann had not been validly appointed by Chief Superintendent Coburn to conduct an investigation into the breach of discipline alleged against Detective Sergeant Higgins.

41. While the disciplinary functions provided for by the 2007 Regulations are vested in the Garda Commissioner, it is clear from Article 3(1) that these functions may be delegated to any officer not below the rank of Chief Superintendent and it is not disputed that these functions were delegated to Chief Superintendent Declan M. Coburn. Article 23(1) of the 2007 Regulations permits an investigating officer to be appointed by the Commissioner to investigate disciplinary matters.

42. It is true that in the present case Chief Superintendent Coburn (as opposed to the Commissioner personally) appointed Superintendent Dermot Mann to investigate the matter. But this is irrelevant, because it is clear that given the delegation of the Commissioner's functions to the Chief Superintendent, the latter was entitled to exercise the functions of the Commissioner in disciplinary matters. One of those functions was, as specified by Article 23 of the 2007 Regulations, to appoint an investigating officer to investigate these disciplinary allegations.

43. In these circumstances, it is clear that the objection to the appointment of Superintendent Mann by Chief Superintendent Coburn on the ground that the latter had no *vires* to appoint the former under the 2007 Regulations is not well founded.

#### **Conclusions**

44. In summary, therefore, I am of the view that:

45. First, Article 8 of the 2007 Regulations contains an objective prohibition on disciplinary proceedings where *both* of the two conditions specified therein are satisfied. The views of the Garda authorities as to whether these conditions are satisfied are not dispositive, since the assessment of this is ultimately a matter for the court.

46. Second, the proposed investigation would not breach the first limb of Article 8(2). It is, of course, true that the applicant was acquitted of the criminal charges of failing to report the accident and failing to keep the vehicle at the scene of the accident. But none of these charges involve the same issues as the remaining disciplinary charge, namely, that of failing to secure the vehicle thus ensuring that public property belonging to the employer which was contained in the vehicle was not either stolen or otherwise compromised. In these circumstances, the prohibition contained in Article 8(2) does not prevent the commencement of this investigation.

47. Third, it should be stressed, however, that, depending on an assessment of any such evidence, the Garda authorities would be entitled to discontinue any such investigation if it were concluded that to continue them would be oppressive in the circumstances.

48. Fourth, the objection to the appointment of Superintendent Mann on grounds of non-delegation is not well founded.

49. In the circumstances I would accordingly dismiss the appeal and affirm the decision of the High Court.