Neutral Citation: [2015] IEHC 38

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 283 JR]

BETWEEN

TEWFIK FASSI

APPLICANT

AND

DUBLIN CITY UNIVERSITY

RESPONDENT

JUDGMENT of Mr. Justice Noonan delivered the 29th day of January, 2015

Background

1. The applicant was a Ph.D. student at the respondent University during the academic year 2012/2013. In May 2013, his academic supervisors issued a report deeming him unsuitable to continue his studies as a result of poor academic performance and he was thus unable to progress further. He appealed this decision to the Graduate Research Studies Board ("the Board") which rejected his appeal on the 17th October, 2013. He brings the within judicial review proceedings seeking orders of *certiorari* quashing both the decision in May and that in October 2013.

2. Leave was granted by order of Peart J. on the 19th May, 2014.

Facts

3. In March 2012, the applicant applied for a Ph.D. project in "biotherapeutics for chronic pain" at the International Centre for Neurotherapeutics (ICNT) of the respondent under the supervision of Professor J. Oliver Dolly. This was a paid assignment for which the applicant received a stipend. He commenced working at the ICNT in July 2012 and was registered as a student in October of that year. The applicant had two academic supervisors tasked with monitoring his progress, his principal supervisor being Professor Dolly and the second supervisor Dr. Ahmed Al-Sabi.

4. The applicant appears to have encountered difficulty virtually from the outset. He alleged that there were various shortcomings in the training and supervision provided to him. In December 2012, he travelled to France in order to train in specific laboratory techniques which were felt to be lacking in his case and the cost of this was covered by the ICNT. In February 2013, the applicant made a formal complaint to the university again centring on the issues of supervision and training. This was rejected.

5. The applicant says that on the 12th April, 2013, Professor Dolly informed him of his decision to dismiss the applicant from the course. He says that Professor Dolly offered him the option of withdrawing voluntarily from the course in which event he would be provided with a reference. The applicant declined the offer. He made a further formal complaint to the college in April 2013 and later the same month submitted a complaint to the human resources Department suggesting he was the subject of victimisation.

6. On the 2nd May, 2013, a document described as a PGR2 and entitled "Dublin City University Postgraduate Research Studies Annual Progress Report" was signed by Professor Dolly and Dr. Al-Sabi. This document contains a detailed critique of the applicant's academic performance over the course of his 7 months as a research postgraduate student. The report states that the applicant's theoretical knowledge and experimental skills were inadequate leading to the requirement for the applicant to receive additional training from two post-doctoral researchers and in addition, at a laboratory in France. The supervisors said that great difficulties were encountered in getting him to actually perform experiments. He found some of the tasks assigned to him too challenging despite daily assistance from two senior researchers. His command of English appears to have been poor. He was advised to take some courses in English but did not do so. The supervisors stated that his unsatisfactory performance was accompanied by outspoken, repeated confrontations with several members of ICNT. The report states that during several months of being closely monitored, it became apparent that the applicant displayed unacceptable behaviour that proved disruptive, and thus incompatible with continuing research at ICNT.

7. The report went on to state:

> "After in-depth and careful consideration by the Supervisory panel and repeated consultation with senior members of ICNT, this postgraduate was deemed unsuitable to continue a Ph.D. degree in ICNT. This firm decision was not made lightly but based on several standard criteria: intellectual calibre reflected by substandard, trivial research presentations at group meetings, depth of background knowledge relevant to Ph.D. research, limited ability to successfully carry out experiments unaided; inadequate English for writing a Ph.D. thesis or scientific papers, poor/erratic timekeeping and, especially, personal friction he generated with those working in the group. Finally, he objected to having to abide by college/legal regulations. For example, he questioned the need to apply to the Research Ethics Committee for approval of animal work -- a legal requirement -- and had to be omitted from this application due to failing all four modules of a basic course on Animal Handling.
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> Several meetings of the supervisory panel were held with him this term to explain the unacceptable situation and offer remedial advice. As these efforts failed to correct any of the listed weaknesses, and cognisant of the numerous problems, a unanimous decision was reached on 12th of April 13 and communicated to him that discontinuation of Ph.D. studies in ICNT is being recommended to Registry, School of Biotechnology, Faculty of Science and Health, Fees and Graduate Studies Office. As it would be inappropriate for any more money from the SFI grant to be spent on this researcher who, in our opinion, is unsuitable, we recommend termination of payment of stipend and fees at the earliest possible date.
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> • I hereby certify that Tewfik Fassi has not maintained satisfactory progress during the academic year 2012/2013.

> • It is not recommended that his/her registration for research and study for the award of the degree of M.Sc./Ph.D. be renewed for the next academic year."

8. As well as being signed by the applicant's two supervisors on the 2nd May, 2013, the report was also signed by Rosaleen Devery on the 8th May, 2013. It would appear that although Dr. Devery was never formally a member of the supervisory panel, she was requested to review the recommendations contained in the PGR2 by the Head of Department.

9. The applicant appealed to the Board. The grounds of appeal, insofar as relevant to these proceedings, were that there was a failure to adhere to Article 1.1.6 of the respondent's regulations which requires that all doctoral candidates must have a supervisory panel comprising his supervisors plus one or more additional independent member of academic staff and such panel should be established within 3 months of the student's registration. The applicant also ticked the box on the appeal form which read:

> "There was a material administrative error or a material irregularity in how performance was assessed which has made a real and substantial difference to the supervisory panel's decision."

10. Under the heading "Other" on the form, the applicant stated:

> "I was dismissed on mid-April, forbidden to keep on my phd scholarship because I was asked to leave the lab, also because of a lack of fully supervisory panel & of terms of scholarship & by an evaluation made a short period (Feb to April) and not on a annual timeframe of (october to july)."

11. The Board gave its decision by letter of the 17th October, 2013 and said:

> "With respect to the first of the grounds that you adduced, i.e. failure to adhere to regulations, your comments about each of the regulations you mention were considered. With respect to Section 6.1.1 (*sic*) of *Academic Regulations for Postgraduate Degrees by Research and Thesis* (2012/12), the sub-committee noted that you did not have a properly constituted supervisory panel, but were of the view that this fact is not material to your appeal in so far as it did not cause or lead to the negative progression recommendation. The sub-committee did not consider that any of the other comments constituted grounds for upholding your appeal. It considered that the length of time mentioned as having constituted your period of research was adequate to allow for a decision as to your suitability in terms of continuing the research.
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> The sub-committee considered the second of the grounds that you adduced, i.e. that there was a material administrative error or material irregularity in how performance was assessed, to be factually incorrect.
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> With respect to the last of the grounds that you adduced, 'other', the sub-committee considered that no material was introduced here that had not already been covered in your comments relating to the first of the grounds."

12. Subsequent to the failure of his appeal, the applicant made a complaint to the Ombudsman in or around the 19th November, 2013 and further submitted a claim to the Employment Appeals Tribunal on the 8th January, 2014. Neither was successful.

The Pleadings

13. The applicant essentially relies on two grounds in his statement of grounds. First, he says that the PGR2 decision is invalid because the supervisory panel that took it was not properly constituted in accordance with the college's own regulations and the same infirmity affects the decision of the Board on appeal. Secondly he pleads that the decision is bad because it was premature having been taken significantly in advance of the completion of the full academic year. A third ground relating to the failure to provide an oral hearing was abandoned.

14. In its statement of opposition, the respondent pleads that the decisions under attack are not amenable to judicial review as the matters in issue are solely within the sphere of private law. They contend that the proceedings are out of time although when it emerged during the course of the hearing that the delay had been caused by the applicant having to await the outcome of an application for legal aid, this issue was effectively conceded by the respondent. The respondent further alleges that issues raised in these proceedings have already been agitated in the appeal before the Board and cannot be revisited. The respondent properly concedes that the supervisory panel was technically not correctly constituted but says that this had no material effect on and did not prejudice the applicant. Without prejudice to that contention, the respondent pleads that the issue of the materiality of the defective constitution of the panel was a matter within the jurisdiction of the Board to determine and its determination in that regard is unchallenged.

Submissions

15. Mr. Leonard BL on behalf of the applicant submitted that contrary to what the respondent contended, there was a sufficient public law element to the case to invest the court with jurisdiction. Whilst the respondent argued that the applicant's contract with the respondent was governed by private law, the burden of establishing that lay on the respondent and he relied on *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. 483 in that regard. He said that in fact the precise nature of the contract could not be determined because the applicant had never been provided with his Terms and Conditions.

16. He argued that the respondent is a public body having been established by the Dublin City University Act 1989 and he pointed to certain sections of the Universities Act 1997 as indicative of the public dimension to the activities of universities in the State. He said that s. 27 of the latter Act provided for the establishment of academic councils and their functions and referred to s. 33 which empowers universities to make regulations to regulate their affairs although he conceded that the academic regulations in issue here do not have the status of a statutory instrument. He contended that the respondent was an "organ of the state" within the meaning of s. 1(1) of the European Convention on Human Rights Act 2003 with corresponding duties and obligations.

17. He thus submitted that universities such as the respondent were established by statute, operated in the public domain and awarded degrees for the benefit of the community. Although he accepted that academic decisions were to be distinguished from disciplinary decisions on the authorities, he contended that such decisions were not immune from the court's judicial review jurisdiction and relied on *R v. Higher Education Funding Council, Ex Parte Institute of Dental Surgery* [1994] 1 All ER 651.

18. He submitted that the failure to constitute the supervisory panel was fatal to the PGR2. He said that the third member was required to be independent of the academic supervisors in order to provide a degree of objectivity to its findings. In fact, there was never any panel and the PGR2 was deliberately misleading in seeking to suggest that there was. The involvement of Dr. Devery after the event could not cure this defect. There was a denial of basic fairness of procedures.

19. Mr. McDonagh SC on behalf of the respondent submitted that the irregularity in the composition of the supervisory panel was not material to its findings which concerned academic progress. Furthermore, the Board held that it was not material, that was a finding within jurisdiction and the applicant could not now go behind it, nor was he seeking to do so. The same consideration applied to the Board's determination that the length of time constituting the applicant's period of research was adequate to allow for a decision as to the applicant's suitability to continue. The rationality of the Board's findings was not challenged in any way by the applicant and he was bound by them.

20. Mr. McDonagh further argued that the Board had made an academic judgment on the complaints of the applicant and this was not susceptible to judicial review. He said that the authorities established a clear dividing line between cases involving discipline, which may be amenable to supervision by the court, and those involving academic decisions which were not. He referred to *Rajah v. The Royal College of Surgeons* [1994] 1 I.R. 384, *Quinn v. The Honourable Society of King's Inns* [2004] 4 I.R. 344 and *Zhang v. Athlone Institute of Technology* [2013] IEHC 390. In effect, the applicant was in exactly the same position as a student who failed an exam. He said that the relief sought could not in fact benefit the applicant because even if the PGR2 was quashed, it was subsumed into the decision of the Board which had already decided that the defect in the supervisory panel was not material and that was unchallenged. Thus, if the applicant was ever entitled to challenge the PGR2, which was disputed, he ought to have done so before appealing to the Board.

The Law

21. In *Rajah*, the respondent was an educational institution established by Royal Charter at which the applicant attended. She failed an annual examination both at the first sitting and at the repeat. She had no automatic right to repeat the year but could do so if permitted by the Student Progress Committee. That committee refused to allow her repeat and she appealed to the Academic Board who affirmed the decision. She brought judicial review proceedings seeking to challenge this decision of various grounds. Keane J. (as he then was) said (at p. 393):

> "The test for determining whether judicial review is appropriate in a case of this nature was stated as follows by Barr J. in *Murphy v The Turf Club* [1989] I.R. 171 at page 173:-
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> > '*Certiorari* or prohibition will not issue to a body which derives its jurisdiction from contract or to a voluntary association or domestic tribunal which derives its jurisdiction solely from or with the consent of its members - see *R. v. National Joint Council for the Craft of Dental Technicians*, *ex p. Neate* [1953] 1 Q.B. 704 and *The State (Colquhoun) v. D'Arcy* [1936] I.R. 641.'
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> The approach adopted by Barr J. in that case was expressly approved by Finlay C.J. in *Beirne v. The Commissioner of An Garda Síochána* [1993] I.L.R.M. 1 and is the one which I adopt in the present case.
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> The jurisdiction of the Student Progress Committee and the Appeals Committee in the present case derive, not from public law, but from the contract which came into being when the applicant became a student in the College. The jurisdiction of the respondents is derived solely from her agreement, express or implied, to be bound by the regulations of the College, including the procedures under consideration in this case The case is entirely distinguishable from *Beirne* where it was held that the functions of the Commissioner in admitting persons as trainees in the Garda Siochana were
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> > 'matters of particular and immediate and public concern... directly relevant to the public question of the ordering of society and the regulation of discipline within society'.
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> No such considerations arise in the present case. The applicant is in the same position as a student in any other third level institution. The fact that the College, like others, derives its existence in law from a charter or Act of parliament is not a sufficient ground for bringing matters relating to the conduct and academic standing of its students within the ambit of judicial review."

22. In *Quinn*, the applicant sat the entrance examination for admission to the respondent, an educational institution established for the training of barristers and failed. She requested the education board to review her paper and sought to have an independent assessor appointed. This was refused and the board confirmed the result. She sought judicial review of the board's decision. Smyth J., in the course of his judgment, said (at p. 364):

> "In my judgment the instant case falls four square within the decision in *Rajah v. The College of Surgeons* [1994] 1 I.R. 384. The examination board's jurisdiction derives from the education rules of the respondent. The applicant was accepted as an applicant in the entrance examination on the basis of those rules. Accordingly, insofar as the decision involved in those proceedings is concerned, the applicant's rights are determined by a contract and the matter is essentially a private one relating to the rights of a student with respect to the respondent. The fact that the respondent's powers may initially derive from a charter is removed and indirect to the consideration of the instant case. As was made clear in *In re Malone's Application* [1988] N.I. 67, it is necessary to consider the nature of the power as well as its source. The examination board when deciding to fail the applicant was not exercising a disciplinary function and so is clearly distinguishable from *Geoghegan v. Institute of Chartered Accountants in Ireland* [1995] 3 I.R. 86.
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> In short, the applicant is not entitled to invoke a public law remedy for a private law right."

23. *O'Donnell* concerned a claim that the applicant, a fire station officer employed by the respondent county council, had made fraudulent pay claims. This allegation was investigated by the county manager following which the applicant was dismissed. The applicant sought to judicially review the decision of the respondent on grounds including a failure to provide a proper system of inquiry and appeal process. He failed in the High Court which held, *inter alia*, that the decision was a matter of private law and not amenable to review. On appeal, the Supreme Court upheld the decision of the High Court to refuse relief but on the ground that the applicant should have pursued his remedy before the Employment Appeals Tribunal. On the issue of jurisdiction, the Supreme Court took a different view.

24. The judgment of the court was delivered by Denham J. (as she then was) in the course of which she said (at p. 486):

> "8. The first relevant factor is the name of the position of the applicant, which was "station officer". Thus the title presumes a post as an officer rather than an employee.

> 9. Secondly, the post held by the applicant has a public element. The County Council is the fire authority. This is manifestly a public authority. The fact that the applicant's post is titled an "office" is not determinative, but considered in tandem with the public nature of the County Council's relevant fire protection functions, it is clear that the function of the station officer of a fire station contains a public element and that it is an office in the public domain."

25. Denham J. continued at p. 487:

> "12. In *Geoghegan v. Institute of Chartered Accountants in Ireland* [1995] 3 I.R. 86, factors relevant to the issue as to whether or not the decision was amenable to judicial review were analysed. A number of those factors are relevant to this case and I apply those principles. First, this case relates to the fire service and to a station officer of that service, a service of importance in the community for fighting fires and flooding, amongst other matters. Such a service is necessary within a state, either to be provided by the State or delegated by the State. Secondly, the sources of the general powers of the County Council are to be found in legislation. Thirdly, the functions of the County Council, the fire service, and the station officer come within the public domain of the State. Fourthly, the consequences of the County Council's decision may be very serious for the applicant. Amongst these factors, I lay emphasis on the functions of the County Council, the fire service, and the station officer as functions manifestly in the public domain of the State.
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> 13. In conclusion on this issue, I am satisfied that the employment of the station officer of a fire station is a matter within the public domain and amenable to judicial review. While there was a contract between the applicant and the County Council, it has a significant public element and the decision to terminate was amenable to judicial review."

26. In *Zhang*, the applicant sat her finals and was found after the exam to have been in breach of the regulations by having notes under her desk. A hearing was due to take place before the Registrar to determine if there was a *prima facie* case for the applicant to answer. When the hearing actually took place, the Registrar without notice proceeded to deal with the entire matter and impose a penalty. The applicant sought judicial review on the grounds of a failure to accord her fair procedures. The respondent argued that the matter was one of private law and judicial review did not lie.

27. Dunne J. reviewed the relevant authorities, including those mentioned above, and concluded (at p. 12):

> "34. The observation I would make having regard to that decision is that in this case, unlike the Quinn case, the respondent is exercising a disciplinary function and therefore, it seems to me that as its powers in relation to the making of regulations derive from statute as clearly set out in the Regional Technical Colleges Act 1992, the decision of the respondent in this case is amenable to judicial review. If this was a case in which what was at issue was not a disciplinary matter, then the decision in Quinn would have a bearing on my view of the matter. As it is, I am satisfied having regard to the authorities to which I have referred that this is a case in which the decision that was reached by the respondent and communicated in the letter of the 17th April 2013, is amenable to judicial review."

Analysis of the Issues

28. Three issues arise for consideration, first, whether the impugned decisions are amenable to judicial review, secondly, whether the constitution of the supervisory panel invalidates its conclusion and that of the Board and thirdly, whether the decision was premature.

29. Dealing with the first issue, the authorities suggest that in general, a body which derives its jurisdiction from contract or otherwise from the consent of its members will not be amenable to judicial review. Like every general rule, there are exceptions and it remains for the court to decide even where the relationship is based on contract if there is a sufficiently public element to confer jurisdiction. The fact that the body in question is established by statute will of itself not normally be sufficient.

30. Decisions of educational institutions will not be reviewable where they relate solely to matters of academic judgment. That is not to say that such a decision is automatically immune from review merely because it purports to be in the academic realm and one could conceive of situations where for example a decision might be shown to arise from entirely improper considerations or be motivated by *mala fides*. Absent that, the court will not intervene. The position may be different, however, where issues of discipline are concerned and the court may review decisions taken in breach of natural and constitutional justice.

31. In the present case, it does not appear to me that there is a sufficiently public element to the relationship between the applicant and respondent to warrant intervention by the court. The facts here appear to be much more analogous to those arising in *Rajah* and *Quinn* than in *O'Donnell*. Whilst the relationship between the parties in *Zhang* is similar to that here, what was under challenge was a clearly disciplinary decision and Dunne J. appears to indicate that had it not been such, she may well have taken a different view in the light of *Quinn*. Whilst it is true to say that the precise terms of the applicant's contract have not been established, it is nonetheless clear that his relationship with the respondent was governed by such contract whether express or implied. As such, I can see no material difference in the legal relationship arising in this case from that in *Rajah* and *Quinn*.

32. It also seems to me that the PGR2 challenged here was quintessentially an academic judgment and the defect in the composition of the panel was not material to that judgment, as the Board found. Issues of academic progress were for the applicant's supervisors and thus the Board found that this shortcoming did not cause or lead to the negative recommendation. The same reasoning must apply to the issue of the timing of the decision and it was entirely a matter for the panel, and the Board on appeal, to determine if in their academic judgment they had sufficient evidence of the applicant's ability and performance to come to a view.

33. Even if it were the case that I was of the opinion that the decisions under attack were reviewable, I am satisfied that the two issues raised by the applicant were dealt with by the Board, at his request, within jurisdiction. The applicant makes no criticism whatsoever of the Board's decision and I am driven to conclude that the applicant is simply seeking to appeal that decision to this court.

34. In the circumstances therefore, I will refuse this application.