Neutral Citation: [2016] IEHC 225

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 617 JR]

BETWEEN

BRIAN CANAVAN

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 3rd day of May, 2016.

1. The applicant is a member of An Garda Síochána currently attached to Pearse Street Garda Station, Dublin. He seeks by way of judicial review, an order of prohibition to prevent the respondent from continuing a process of internal disciplinary investigation against him arising out of the matters I deal with below. He also seeks an order prohibiting the respondent from further suspending him from duty on foot of alleged breaches of discipline. He also seeks various declaratory orders arising from what is said to be the inordinate and inexcusable delay in the investigation of these alleged breaches of discipline.

2. Humphreys J. on the 9th November, 2015 granted leave to seek judicial review for 18 reliefs in total, one less than the number of reliefs in respect of which the ex parte application was brought, on all of the grounds set forth. More complete particulars of the nature of the relief sought and the grounds will appear in the body of the judgment.

Facts

3. On 9th May, 2014, the applicant returned to work following an extended period of sick leave which had commenced in December, 2013. On the 21st May, 2014 the applicant informed Inspector Liam Geraghty of Pearse Street Garda Station that he wished to initiate a grievance procedure against two of his superior officers, and that his preference was to initiate the grievance verbally and fill out the specific reasons and causes for complaint on a day which suited Inspector Geraghty. However, on the 23rd May the applicant was contacted by an Inspector Mooney and informed that he had been suspended from duty. Later that day a formal notice of suspension pursuant to Regulation 7 of the Garda Síochána (Discipline) Regulations 2007, ("the Regulations of 2007") was served, and the reason given was that he had failed to prosecute certain cases in the years 2012 and 2013.

4. The initial period of suspension was from the 23rd May, 2014 to the 2nd June, 2014 and this was followed by a series of notices of suspension for successive periods of three months from the 1st June, 2014 to date.

5. On the 29th May, 2014 the applicant was served with a notice of investigation pursuant to Regulation 24 of the Regulations of 2007 with respect to this alleged breach of discipline, stated in general terms as a failure "to prosecute various cases before the Courts on various dates in 2012 and 2013". On the 31st March, 2015 the applicant was served with a further notice of investigation in respect of three other alleged breaches of discipline. An intermediate notice of investigation was discontinued.

6. On the 25th August, 2014 the solicitors for the applicant wrote to the respondent complaining about the failure to give reasons for the suspension, and the delay in dealing with the disciplinary investigation. At that stage only one investigation was in train. That letter was not replied to until the 8th October, 2014 following a reminder from the solicitors for the applicant, albeit the respondent did send a holding letter on the 26th August, 2014. The letter of the 8th October, 2014 identified the alleged failure of duty but offered no reason as to why a suspension of the applicant was appropriate in the circumstances.

7. It was not until a letter of the 29th October, 2015 that a degree of clarity is found in relation to the reason alleged to justify the suspension. That letter identifies the reason for suspension as that he "failed to prosecute various cases before the Courts on various dates in 2012 and 2013" and also his failure "to progress a number of criminal investigations during 2012 and 2013, including that he failed to lodge with the courts charge sheets and bail bonds and also failed to transmit tracking forms and Court Schedules to the Court Presenters Office". On the 31st March, 2015 he was informed of further reasons, that he failed to "properly record items of public property, in line with the requirements of the Garda Code, that he failed to record substances believed to be illegal drugs and failed to properly investigate an incident contrary to s.49 of the Road Traffic Acts 1961 – 2006".

8. In the meantime certain alleged breaches of criminal law were being investigated and the applicant was called for a cautioned interview on the 29th May, 2015 at which he claims it became clear that the matters under investigation allegedly occurred when he was out on sick leave and when charge sheets were found outside his locker. A file was submitted to the DPP on the 21st October, 2015 who issued directions on the 7th January, 2016 that prosecution of the applicant was not warranted in respect of these allegations.

9. The respondent answers the argument of delay in part by stating that the disciplinary inquiry was stayed pending the conclusion of the criminal investigation. The applicant argues in response, that prior to the 29th May, 2015 he was not aware that any criminal investigation was under way, and that the period of 12 months between his initial suspension and the notification of such an investigation would suggest that it could not have been a justifying reason for the suspension.

A power to suspend

10. Regulation 7 of the Regulations of 2007 confers on the Commissioner the power to suspend a member from active duty. Such power arises in the context identified by the Regulations as follows:

> "7(1) 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."

11. The Regulation provides expressly that a suspension must be reviewed by the Commissioner every three months, albeit non-compliance with that provision does not of itself invalidate a suspension. A member who is suspended from duty may suffer varying degrees of financial or other penalty.

12. The Commissioner has adopted a policy document in the form of guidelines on the use of Regulation 7 for the purposes of the suspension of members. The relevant document at the time the applicant was originally suspended on the 25th May, 2014, was HQ Directive 159/08, replaced on the 9th September, 2015, by HQ Directive 75/15. This deals with a number of matters such as the level of suspension allowance payable to a member, whether other allowances are to be paid to such member and the list of prohibited spare time activities and hours in respect of which these are prohibited.

13. In the present case the applicant has been paid what is termed a "suspension allowance", lower that his ordinary remuneration. He is also, by virtue of his suspension, not permitted to engage in employment outside the Force between 9 am and 5 pm daily. The applicant asserts that suspension is to be characterised as a penalty in respect of which a particular degree of scrutiny must be exercised by the court, and which cannot be imposed arbitrarily.

14. In *Flynn v. An Post* [1987] I.R. 68 the Supreme Court held that a suspension of an employee for a three year period ceased to be valid after a point when the disciplinary investigation ought to have been ready to proceed, which in that case the court measured as four months after the date of suspension. At p.76 of the judgment, Henchy J. said as follows:

> *"In a bilateral situation, such as existed here between an employer and employee in regard to the right to suspend and dismiss for disciplinary reasons, justice cannot be treated as a one-way street. The rights of both parties must be taken into account for the purpose of determining which of the claimed rights should prevail so as to achieve a compliance with the fundamental requirements of justice. Where (as happened here) the employee has been suspended without pay, that suspension should in all fairness be disposed of, either by raising the suspension or by dismissing the employee, as soon as is reasonably practicable. But when it is reasonably practicable to do so is something that a court cannot decide without also taken into account the considerations put forward by the employer as being basic to his needs. It is only when the claims of both parties have been set against one another and duly balanced that a court can decide what is needed to satisfy the fundamental requirements of justice"*

15. That judgment has been applied by Kearns J. in *Allmann v. Minister for Justice Equality and Law Reform & Ors.* [2003] 14 E.L.R. 7 in which he accepted that the principles explained by Henchy J. could apply even when a person was suspended on reduced pay.

16. The authorities make a distinction between a suspension required to address an urgent issue, a summary or purely holding suspension, as identified in *McMahon v. Irish Aviation Authority & Anor.* [2014] IEHC 431, and a lengthy suspension when considerations of fair procedures and unwarranted prejudice come into play.

17. In that case, Hogan J. was dealing with a suspension of the applicant from his role in the Irish Aviation Authority and considered that the obvious importance of aviation safety could justify a holding or summary suspension. He went on to say the following:

> *"The law affords considerable latitude to a regulatory body such as the Authority to act speedily and decisively in the interests of public safety. It is nevertheless to be expected that the Authority will thereafter act with all due speed to ensure that the complaints against named individuals are investigated fully, fairly and promptly". para 68*

18. Guidance can be taken from the decision of the Supreme Court in *Gavin v. Minister for Finance* [2000] IESC 8, a decision made in the broader context of the suspension of a member of the Civil Service. Keane C.J., delivering the judgment of the Court made it clear that the principles of natural or constitutional justice or fair procedure cannot be imposed on a decision to invoke a holding suspension. With regard to whether such procedure do apply, he said as follows:-

> *"But they do not apply to suspensions which are made, as a holding operation, pending enquiries. Very often irregularities are disclosed in a Government department or in a business house; and a man may be suspended on full pay pending enquiries. Suspicion may rest on him; and so he is suspended until he is cleared of it. No one, so far as I know, has ever questioned such a suspension on the ground that it could not be done unless he is given notice of the charge and an opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once."*

19. That dicta shows the reason why the full panoply of natural or constitutional justice requirements cannot apply as a matter of good sense and logic to a decision by an employer to impose a holding suspension.

20. I turn now to consider whether the suspension of the applicant could be said to be a holding one in the circumstances of the present case.

A holding suspension?

21. The distinction between a holding or summary suspension on the one hand, and a lengthy suspension on the other hand, was made by Barr J. in the decision of *Quirke v. Bord Luthchleas na hÉireann* [1988] 1 I.R. 83 where he identified the latter type of suspension as follows:

> *"On the other hand, a suspension may be imposed not as a holding operation pending the outcome of an inquiry, but as a penalty by way of punishment of a member who has been found guilty of misconduct or breach of rules. The importance of the distinction is that where a suspension is imposed by way of punishment, it follows that the body in question has found its member guilty of significant misconduct or breach of rules."*

22. Kearns J. in *Morgan v. Trinity College Dublin & Ors.* [2003] IEHC 167; [2003] 3 I.R. 157 quoted that passage with approval and held that the open-ended suspension in that case had to be seen as a form of punishment "and a severe one at that". He identified a distinction in the approach that the court should take to the two types of suspension as follows:

> *"An open-ended suspension, particularly one without pay, can only be seen as a form of punishment, and a severe one at that. In contrast, a short period of suspension with pay against a clearly defined backdrop of consecutive steps to resolve the disciplinary issue is less likely to warrant the court's intervention on the basis that the procedures, or their application, is unfair to the person concerned."*

23. Henchy J. in *Flynn v. An Post* suggested that the right to suspend cannot be treated as a "one way street" and went on to say as follows:-

> *"Where (as happened here) the employee has been suspended without pay, that suspension should in all fairness be disposed of, either by raising the suspension or by dismissing the employee, as soon as is reasonably practicable. But when it is reasonably practicable to do so is something that a court cannot decide without also taken into account the considerations put forward by the employer as being basic to his needs. It is only when the claims of both parties have been set against one another and duly balanced that a court can decide what is needed to satisfy the fundamental requirements of justice." at p. 76*

24. I consider that this dicta of Henchy J. points me to a view, that while a holding suspension may be justified without giving the member the benefit of procedural fairness, the balance is tipped towards a requirement of such fairness when the suspension has been a lengthy one, and when no substantive progress has been made in the investigation.

25. The delay in the present case has been of almost two years. Some part of the delay is said to be justified on the grounds that a criminal investigation was underway and the decision of the DPP whether to prosecute was awaited. That accounts at best for three months. The suspension, in my view, had ceased to be a holding suspension long before this and the delay, in my view, is unwarranted.

26. The applicant has suffered prejudice, he had been suspended for eighteen months at the time the judicial review was commenced, and it now almost two years since the first suspension occurred. He has made representations to the Commissioner that the reduction in pay be no longer imposed, and notwithstanding this, he continues to be subjected to the onerous requirements of his suspension, including a reduction in pay and a limitation on his capacity to earn an additional income during ordinary working hours.

27. Even the updated affidavits, the last of which was sworn on 24th February, 2016, do not show any further progress with the investigation. I consider that the balance between the employer and the employee has now tilted, such that the requirements of justice require expedition in the conduct of the inquiry.

28. The length of time that it took to interview the applicant in this case, between the 23rd May, 2014 and the only interview which was conducted a year later on 29th May, 2015, shows, in my view, a lack of urgency. I do not accept the argument of the respondent that the fact that some members of the Force were engaged in an ongoing and difficult murder inquiry is a sufficient reason to have left this member without remedy and without his full salary and the right to engage in the day to day work of a garda. This is in circumstances where he has not had an opportunity to address the issues raised against him or to be informed in anything other than the most general way what the alleged breaches of discipline are.

29. I consider then that the suspension of the applicant from duty has ceased to be a holding suspension and that principles of fairness and due process come to be engaged.

30. I turn now to consider the matters said to vitiate the suspension.

The decision to suspend the applicant

31. The first ground on which the applicant seeks judicial review is that his continued suspension from active duty is unwarranted and/or made without due process. That argument must be seen in the context of the policy document contained in the relevant circular which provides for a suspension for a period of three months subject to review thereafter. The policy document does not envisage open-ended suspension, but creates a need to re-engage with the individual circumstances every three months, for the purposes of ascertaining whether those circumstances continue to provide a basis for suspension. It seems to me that the three month period must be seen as a timeframe within which the reasons for the imposition of the sanction itself should be considered. Thus, while there might be cases where three months is not sufficient for a full inquiry to be carried out, the three month framework is intended to impose a form of time limit within which it is expected that there would be some engagement with the facts, to ascertain whether they justify the continued suspension.

32. Four different members of the Force were involved in the decisions to suspend the applicant from active duty, namely Chief Superintendent O'Sullivan and Assistant Commissioners Fanning, Nolan, and O'Mahony. None of those persons has furnished an affidavit in respect of the suspension and the applicant argues that in those circumstances no evidence has been offered by the respondent to explain why his suspension from duty is considered necessary, and on what basis a view was formed by the relevant person or persons that suspension can justifiably be continued. No record of any meeting, or other note concerning the decision to suspend is exhibited.

33. The applicant asserts that there is no evidence before the court as to the reason for the suspension, and no evidence which would enable the court to form a view as to whether the decision to suspend was validly made. The applicant relies on the decision of O'Neill J. in *P.D.P. v. Board Of Management of The Patrician School & HSE* [2012] IEHC 591, a judicial review in which O'Neill J. noted the absence of any evidence to dispute or challenge the evidence of the applicant, or which offered an adequate explanation for the cessation of the investigation, the subject matter of the judicial review.

34. The applicant also relies on the decision in *McHugh v. Governor of Portlaoise Prison & Ors.* [2015] IEHC 641 where at para. 46, McDermott J. noted the requirement on a respondent to be:

> *"forthright and complete in their evidence as to how and why decisions were made or not, as the case may be. Judicial review of executive action, or inaction, is only effective if the court is furnished with an accurate history of the decision-making process. The facts should be readily ascertainable from the contents of the official files which are invariably in the possession of the decision-maker and were central to the issues in this case. It is not acceptable that such records should be presented in a piecemeal manner to the court.*

35. I agree with the submission of the respondent that there is no obligation imposed by the Regulations that the Commissioner is obliged to give reasons to a member of the Force before effecting a suspension. This is clear from the decision of the Supreme Court in *McHugh v. Commissioner of An Garda Síochána* [1987] I.L.R.M. 181, a decision under the then relevant Regulations of 1971, which do not differ materially from those of 2007. Finlay C.J. at p. 184 said the following with regard to the requirement that a member be informed of an intention or proposal to suspend:

> *"On this issue I agree with the view expressed by Costello J. in the High Court that the Commissioner was under no duty before making the decision to suspend the plaintiff to inform the plaintiff that he was contemplating so doing or to give*

the plaintiff an opportunity to make representation against his suspension. The decision to suspend was in no way a decision made by the Commissioner in any way adjudicating or reaching a decision of the guilt or innocence of the plaintiff and is, in my view, a necessary and obvious part to vest in the head of a disciplined force, pending the proper and fair investigation of an allegation of breach of discipline."

36. That dicta must however be seen as pertaining to the holding or summary suspension, and does not deal with the requirements of fairness shown by the authorities dealt with above in the case of a longer suspension which has ceased to have that character.

37. None of the notices of suspension prior to that of the 30th October, 2015 contained a reason for which the applicant was suspended, nor why continued suspension was considered necessary. There has been no interview or other form of engagement between the applicant and the disciplinary bodies. The delay of two years in progressing the investigation is not explained.

38. I consider that the continued suspension of the applicant has not been shown to be justified. The decision maker has not sworn an affidavit and there is no evidence before me that points me to a justifying feature.

39. For these reasons, it seems to me that the appropriate order that I should make is a declaration that the continued suspension of the applicant is not valid and that he should be reinstated to his employment on full pay and allowances. Like the position that prevailed in Flynn v. An Post, however, I am not convinced that the balance of justice is sufficiently weighed in favour of the applicant such that I should at this juncture declare that he is entitled to a declaration that he recover the lost income or other rights since his suspension. A decision on that point, it seems to me, must await the conclusion of the inquiry.

The application to prevent the inquiry

40. The applicant's second set of grounds are focused on the argument that the investigations ought to be prohibited by the court. Essentially, the argument is that the first and third investigations, the second investigation having been abandoned or suspended, were not conducted with due expedition having regard to the rights of fair procedure.

41. The courts have shown a reluctance to interfere with the course of a disciplinary inquiry under the Garda Regulations. The decision of the Supreme Court in *Gillen v. Commissioner of An Garda Síochána* [2012] 1 I.R. 574, remains authoritative, notwithstanding that it was decided under the Regulations of 1989, which did contain an express requirement for expedition in a disciplinary investigation. Even those express requirements were held by the Supreme Court in that case to be directory rather than mandatory and the Court stressed that a lack of expedition of itself would not nullify an investigation. The majority judgment was given by Finnegan J. who pointed to the requirement that:-

"…in each case regard must be had not just to the interests of the individual garda concerned, but also to the public interest in maintaining public confidence in An Garda Síochána."

42. The delay in Gillen was over five years, and was not regarded as unreasonable or excessive in the circumstances. It is also important to note that the delay in that case was in commencing the investigation and appointing an investigating officer, which the court regarded as "understandable and indeed excusable" having regard to the criminal matters which remained to be dealt with.

43. In *McGrath v. Minister for Justice* [2003] 1 I.R. 622, the plaintiff was suspended from duty on two thirds of his salary pending the determination of a criminal prosecution and an internal disciplinary inquiry. Judicial review proceedings resulted in an order of prohibition with regard to parts of the inquiry. While the decision was given in the context of a claim for damages for negligence and breach of duty, the principles stated by the Supreme Court are relevant in a broader sphere. In particular, the Court held that where an inquiry was delayed by reason of litigation, a suspension did not thereby become invalid by reason only of delay or lapse of time.

44. Regard had to be had to a number of factors, including the damage to the public confidence in An Garda Síochána where a member who was guilty of serious disciplinary breaches is entitled to remain working notwithstanding suspicion of wrongdoing, the need for discipline within the Force, and the interest of the victim.

45. A short window in the present case between October, 2015 and January, 2016, in my view can be justified, having regard to the fact that the decision of the DPP was awaited on a possible prosecution. If one removes from the picture that three month period, the delay is still, in my view, not such as to vitiate the inquiry. This is because a distinction can be drawn between circumstances where an investigation has commenced and is progressing slowly and where the investigation has not even commenced within a reasonable time. The evidence points me to the fact that a criminal investigation was commenced on the same day as the applicant was first suspended, the 23rd February, 2014 and while that investigation did not result in the file being sent to the DPP for what does seem to be quite a long time, the delay, in my view, is not sufficiently egregious to warrant an order that the inquiry be annulled.

46. For the applicant to succeed in an application that the inquiry be annulled merely on account of delay in the present case, where there has been moderate rather than extreme delay, and having regard to the fact that a criminal investigation was ongoing, he would require to show individual prejudice in the conduct of his defence of the disciplinary charges. While he has, in my view shown prejudice, in the sense of financial prejudice due to the suspension, and while he has on affidavit averred to the ongoing upset and personal distress that the delay is causing him, the kind of individual prejudice which, in my view, is necessary to warrant the court's interference with the disciplinary process at this stage is not present and a more general prejudice in the form of upset or stress is no more than one would expect and is not, of itself sufficient to warrant the court's interference. In that I adopt the dicta of Finnegan J. in *Gillen v. Commissioner of An Garda Síochána* at p. 14 of his judgment that:-

"…every complaint will lead to concern and anxiety and it is not something particular to the applicant in this case. Of itself this will not be a reason which will justify prohibition of disciplinary proceedings."

47. Therefore, I propose to refuse the relief sought that the inquiry be prohibited.