

**THE HIGH COURT****[2013 No. 371 J.R.]****BETWEEN****PAUL McMAHON****APPLICANT****AND****THE IRISH AVIATION AUTHORITY****RESPONDENT****AND****THE IRISH PARACHUTE CLUB****NOTICE PARTY****JUDGMENT of Mr. Justice Hogan delivered on 9th day of September, 2014**

1. The applicant, Paul McMahon, held the position of Club Chief Instructor ("CCI") with the Irish Parachute Club ("IPC") at Clonbullogue Airfield, County Offaly prior to his suspension from that post by officials of the Irish Aviation Authority ("the Authority") in February 2013. It is this decision which has given rise to the present judicial review proceedings where the validity of the suspension is under challenge.

2. While parachuting may not be to everyone's taste, it must nonetheless be a thrilling adventure sport for those who have the skill and nerve so to participate. Certainly, for the applicant, Mr. McMahon, parachuting and aviation has been more than a sport: it has been a life's passion. More than anything else he coveted the position of CCI with the IPC. He was first appointed as acting CCI in August 2010 and he was confirmed in that position in June 2012. The CCI is the person primarily responsible for ensuring the general safety of both the participants in the sport of parachuting and the general public.

3. To put all of this in perspective it is important to emphasise that the position of CCI is the most prestigious and important post in parachuting in Ireland. One might draw a rough comparison between the holder of this post and, say, the President of the Gaelic Athletic Association or the President of the Irish Rugby Football Union, even if due allowance would also naturally have to be made for the fact that parachuting is very much a minority sport. Mr. McMahon devoted his energies and ambition to attaining that coveted post and his suspension from that post dashed a lifetime's ambition.

4. How, then, did this come about? The event which set these proceedings occurred on 15th July 2012 when an experienced parachutist, Mr. Edward de Khors, was injured following a hard landing after a parachute descent. Mr. de Khors subsequently made a complaint to the Authority in early January, 2013. It is, impossible, however, to explain the sequence of events without first describing further the various other protagonists to the litigation and chronicling certain key dates between July, 2012 and February, 2013.

**The Irish Parachute Club Ltd.**

5. The Irish Parachute Club Ltd. ("IPC") is a limited company which is authorised by the Authority to conduct parachute operations under the terms of the Irish Aviation Authority (Rules of the Air) Order 2004 (S.I. 72 of 2004) ("the 2004 Order"). The IPC is based at Clonbullogue, Co. Offaly where it has its own airfield. The IPC operates all year at Clonbullogue where it organises parachuting and training activities. The IPC is regulated by the Parachute Association of Ireland ("PAI").

6. As might be expected, the conditions attached to the licence deal with the position of post-holders and imposed a series of important safety and operational requirements. One of these conditions, clause 18, imposed important accident reporting obligations. It provides that:

"Any incident or accident involving injury to any party involved in a parachuting operation shall be reported to the Air Accident Investigation Unit (AAIU)[of the Department of Transport] and to the Flight Operations Department of the Irish Aviation Authority in the manner and form contained in the Operations Manual."

7. As we presently see, the Authority was not satisfied with the manner in which this condition was being complied with and this featured in the decision to suspend Mr. McMahon.

**The Irish Aviation Authority**

8. The Authority is the regulatory body established by statute (Irish Aviation Authority Act 1993) which is responsible for the management of Irish controlled airspace, the safety regulation of Irish civil aviation and the oversight of civil aviation security. The Authority regulates the aviation elements of parachuting (i.e., the airworthiness of aircraft and the licensing of pilots) in the ordinary way. So far as the parachuting itself, Article 7(1) of the 2004 Order prohibits descent by parachute (save in cases of emergency) without the appropriate permission from the Authority. Article 7(2) of the 2004 Order further provides that the Authority can either grant such permission or it can authorise an organisation to grant such permission, subject to appropriate conditions and limitations.

9. As one might expect, it is simply not practicable for the Authority to grant an individual permission in respect of each parachute jump. What happens instead is that the Authority grants permission to organisations such as the IPC to permit individuals to drop from aircraft in various forms of parachuting, although this is subject to strict conditions.

10. The investigation which led to the suspension of Mr. McMahon was carried out by two Flight Operations Inspectors of the Authority, Captain Lou Fine and Captain John Murray. While Mr. McMahon made the point in argument that neither inspector had experience of sport parachuting, yet the experience and expertise of these two inspectors was nonetheless most impressive.

11. Captain Fine has been a licensed pilot for 37 years and holds both US and European pilots' licences for both helicopter and aeroplane. He served on active duty as both a military combat pilot and as an instructor on the US Army Blackhawk helicopter. He has also acted as a pilot for parachute operations, both civil and military. He also has a degree in Aeronautical Science and holds a flight instructor rating.

12. Captain Murray holds an air transport pilot's licence and has 26 years experience as a professional pilot. He also has a private pilot's licence for helicopters.

### **The incident of 15th July, 2012, and the complaint of Mr. de Khors**

13. As we have already noted, the incident giving rise to these proceedings occurred on 15th July, 2012. It is not in dispute that Mr. de Khors was injured following a hard landing in the wake of a parachute drop and he thereby sustained a broken ankle and torn ligaments on his left leg. He required hospitalisation for some two days and had to undergo surgery as a result.

14. Mr. de Khors originally made a complaint on the 29th August, 2012, to the chairman of the Parachute Association of Ireland. The gist of the complaint was as follows: Mr. de Khors was due to jump with three other wing suit jumpers on the fifth load. Jumping was delayed due to bad weather conditions. After a little time jumping commenced, but it had to be stopped after the third load again due to bad weather conditions. After another delay the conditions improved and the fourth load took off. Mr. de Khors stated Mr. McMahon came to the jumpers as they left the hangar and told them that there was bad weather approaching. The rest of Mr. de Khors' narrative continued as follows:-

"I looked towards the run in spot and there was clear sky, so I and the other jumpers on load five boarded the plane and took off. The CCI did not stand down the load. After climbing to altitude (12,500 feet approx) the pilot lined up for the run in. I was sitting in the back seat in the aircraft on the long bench, looking out the small round window. I could see clearly to the south of the [drop zone] and I had visual on the ground (bog). The pilot called for the door to be opened and the other (non winged) jumpers exited the aircraft. As with normal practice with wing suit jumps at the Irish Parachute Club, we closed the door and continued on to be dropped further from the "spot" for normal free fall. Again the pilot called for the door to be opened and we exited the aircraft. I was the last to exit. The first 30 seconds or so of freefall was ok, but as we started to enter cloud, I began to get hit in the face with hail, as the jump progressed it got worse and I began to lose sight of the other wing suit jumpers I was jumping with. In fact it got so bad I could not see my altimeter on my hand. I was also using an audio altimeter which I had first set the first alarm to go at 5,000 [feet] and the second to sound at 3,000 [feet].

Shortly after 5,000 feet I came out of the cloud and found a small gap. I turned into the gap, waved off and deployed my main parachute. I was about 3,500 feet. It was still difficult to see my altimeter as it was raining heavily and my goggles were fogging up. I tried taking my goggles off, but had to replace them as the rain was hitting my face and I could not see much. I looked around me to try to figure out where I was, but there was a wall of cloud surrounding me. I looked straight down below me and saw forest. Knowing I had to clear this, I turned my canopy downwind and went on half breaks to maintain as much altitude as possible.

At about 1,500 feet I got to the bottom of cloud base and could see the drop zone in front of me. I was still over the forest at this stage. I turned slightly to the left as it was the shortest route to clear the forest. I just barely cleared the forest still of half breaks, the area I came to was small and had some trees in it. I judged I was too low to let the half breaks back up in time for the canopy to recover so as to get a full flare on landing, so I stayed on half breaks. Knowing the landing would be harder than normal, because of being on half breaks and getting turbulence in the trees it surrounded where I was landing I prepared to do a [parachute landing fall], the landing was hard and I went to do a PLF. I heard a snapping sound and felt pain in my left ankle, my foot sank into the mud on landing."

15. I should pause here to observe that a parachute landing fall is a safety technique used by a parachutist to cushion the effect of a hard landing by spreading the shock across the body. The rest of Mr. de Khors complaint was directed to the suggestion that the response time of some 45 to 55 minutes before an ambulance was called was too great. Mr. de Khors concluded his complaint by contending that Mr. McMahon "failed in his duties and was in breach of the operations manual of the Parachute Association of Ireland in a number of material respects". He added that "the response time was totally inadequate and review of the IPC safety procedures and emergency plan procedures needs to be addressed".

16. Mr. McMahon responded to that letter on the 19th September, 2012, by saying:

"There were wing suit jumpers manifested on load five. Conditions were good with light winds and approximately 50% scatter cloud. At the time of take off, the area to the south west over the spot was clear, as confirmed by Mr. de Khors. I was aware of a worsening forecast for the afternoon and conveyed this to the wing suiters before boarding to enable them to make a better decision as to how they wished to proceed with their intended jump. It has been a long standing rule that wing suiters are not permitted to exit over cloud due to a previously unacceptable level of wing suiters landing off the drop zone. However, on this occasion, the wing suiters decided to proceed and consciously chose to exit approximately 2.5 miles beyond the original spot and also chose, contrary to the above rule, to exit over cloud which at this time accumulated to the south west of the airfield as per the notified forecast. Mr. de Khors implies that I should have stood the load down. I fail to see where he might have come to this conclusion as by his own admission conditions were perfect over the running in spot. The wing suiters could have exited at any time after the other jumpers, but as a result of their decision to continue up wind, two of these wing suiters subsequently dropped and landed off the drop zone, one accessible by road to the west and the other into a bog area to the south west which is not accessible by road. A car was dispatched to recover the jumper to the west.

It has never been the policy of any CCI at the Irish Parachute Club not to recover sky divers who land off as Mr. de Khors would have you believe. As the area to the south west is not accessible by road, the practice is to have the aircraft fly over the area where the jumper has landed to ascertain the condition of the jumper. Information is then relayed to the CCI via radio. Mr. de Khors is seen clearly landing in the bog. As informed by Mr. Tony Donnelly, shortly after the landing, that Mr. de Khors is seen making his way back into the far end of the landing area which is also confirmed by the aircraft following the take off of load seven. At this time we were sending another aircraft up to locate the jumper and stood this aircraft down following confirmation by the [aircraft] pilot. As this is approximately 1km away it would have taken Mr. de Khors some time to walk back to the long grass which is waiting to be cut for silage and there is no immediate concern as he is making his own way back. Mr. de Khors is

rated as a Tandem Master, Instructor [and] wing suit coach..... There is a long standing policy at the Irish Parachute Club that jumpers landing off the drop zone who sustain an injury must stay where they are and use whatever means are available to make themselves as visible as possible to the aircraft in order that the pilot can notify the CCI that there is a problem.

As an instructor, there is no way that Mr. de Khors could not have known this, yet he chose to ignore the safety procedure in this case. He also claims as fact that the aircraft did not see him, yet he would have no way of knowing this unless he was monitoring the airband frequency in use at the field. A short time later I was informed that that an injured jumper at the far end of the landing area. This caused some confusion and including that Mr. de Khors making his way back, I had no jumpers unaccounted for. I immediately sent a team in the jeep to investigate with trained personnel and first aid kit. It was only at this time I was informed that Mr. de Khors was injured and that Mr. Padraic Browne called for an ambulance to the injury site. He had also removed the wing suit which is quite a complex task and posed for photos while waiting for the ambulance. Mr. de Khors' decision to ignore safety procedures caused confusion, may have exacerbated his injury and led to the delay in the ambulance being called. Following this incident, remedial action is being taken and it is now compulsory for all wing suit jumpers to carry a mobile phone to prevent a reoccurrence of this event."

17. For reasons which are not entirely clear this complaint does not appear to have been processed by the PAI. In an email sent to the Authority on 16th January, 2013, Mr. de Khors stated that the person originally nominated by the PAI to investigate the matter had withdrawn and that the matter was not to be investigated by a named Dutch parachuting safety specialist who frequently advised the PAI.

18. At all events, Mr. de Khors subsequently contacted the Authority in early 2013 and made a complaint regarding this incident. It is fair to say that while the focus of the complaint was directed at the response time of the CCI and the time it took for an ambulance to arrive following his injury, the Authority's investigators were ultimately more exercised by the operational and other features of Mr. McMahon's decision-making and judgment.

19. In that complaint Mr. de Khors attached his earlier correspondence with both the IPC and the PAI regarding the earlier complaint. However Mr. de Khors also drew attention to another incident - which he maintained was of a similar character - which had happened in August, 2012:

"Approximately two weeks after my serious incident the very same thing happened to another skydiver, Lukas Szymanski, where they were given permission to jump by the CCI, Paul McMahon, in bad weather conditions. Not [knowing] where he was flying to he landed off the drop zone and turned low to avoid power lines and slid across a road on his knees. He ended up with over 40 stitches and a number of days in hospital."

20. Following receipt of this correspondence, an aeronautical officer attached to the Authority, Mr. Tony Harkin, wrote to Mr. McMahon on 10th January, 2013, asking for his response to these two complaints. Mr. Harkin had also written at the same time on behalf of the Authority to Graham Nuttall, the Chairperson of the Safety and Training Committee of the PAI. Mr. Harkin drew attention to the incidents involving Mr. de Khors and Mr. Szymanski and inquired whether these matters were under investigation by the PAI. Attention was also drawn to condition 18 of the IPC operating licence (i.e., the reporting condition) and Mr. Harkin then stated:

"It is a concern to this Authority that the requirement of this condition was not met in either circumstances. Irrespective of any investigation being conducted or having been conducted by the PAI into these alleged incidents, I would advise you that the Authority will now be conducting a formal investigation into both incidents."

21. Mr. Harkin was evidently in contact with Mr. McMahon on this point at this time, because the latter sent him an email on 15th January, 2013, saying that he could "fully understand" the Authority's reaction to the failure of the IPC to report these incidents and that he would like to apologise for this omission. Mr McMahon maintained that this failure had come about by reason of a misunderstanding on his part. He had previously liaised with the Aircraft Incident Investigation Unit ("AIIU") of the Department of Transport regarding the reporting of incidents. They had stated that they were interested in receiving reports of life threatening incidents only.

22. Mr. McMahon stated that as the reporting obligation in clause 18 of the operating licence referred to both the AIIU and the Authority, he had (wrongly) assumed that he was entitled to take the same view with the Authority. He apologised for this misunderstanding and promised that this would not re-occur.

23. On the following day, 16th January, 2013, Mr. McMahon then responded so far as the Szymanski incident was concerned. He explained that some of the difficulties arose from the fact that wing-suited parachutists were more likely to land off the drop zone due to the fact that with wing-suits, parachutists can travel greater distances. Mr. McMahon explained that in the wake of the de Khors incident he had implemented a rule change where parachutists were required to carry mobile telephones and to identify their location if they landed off the drop zone. Mr. Szymanski had telephoned his location and a car was sent by Mr. McMahon to fetch him, his injuries notwithstanding.

24. Mr. McMahon concluded by stating that Mr. Nuttall would be in touch regarding the incident concerning Mr. de Khors. Mr. Tyrell, Mr. McMahon and Mr. Nuttall were all asked to attend a meeting at the Authority on 19th February, 2013. While they may have been wrong in their assumptions, all three appear to have been of opinion that the meeting was designed to be a forum whereby recent events might be informally discussed. It does not appear that the Authority ever gave formal notice that the meeting might have more serious consequences for the various post-holders or even that the meeting might follow some form of a formal agenda

### **The meeting of 19th February, 2013**

25. There are differing accounts of precisely what happened at the meetings with Messrs. Tyrell, McMahon and Nuttall, all three of which were held separately and in sequence. It seems clear that the Authority was particularly exercised by the issues raised by the de Khors complaint and by the reporting failures.

26. By then, however, the Authority had also received information a few days beforehand to the effect that there had been a low-flying incident at Clonbollogue on 1st January, 2013, together with a photograph of this incident. There appears to be little doubt but that sometime after 4pm on 1st January, 2013, an IPC aircraft performed a low flying manoeuvre over the clubhouse and carpark at Clonbollogue. The Authority considered that this incident amounted to flying an aircraft in a reckless manner, contrary to Article 2 of the 2004 Order. The IPC was later to deny that this was reckless, saying that the pilot was at all time in control of the aircraft.

27. This incident was put to the Mr. McMahon in the course of the meeting, although he had no previous notice of the complaint. His response was to the effect that he was unaware of it, even though he accepted that he was at the airfield on the day in question. He noted that as it happened on a winter's day at 4pm when the flying for the day was over, he was probably attending to administrative work in the hanger. The Authority was evidently dissatisfied with this response, as it was in respect of aspects of the de Khors complaints and the failure to following reporting protocol as set out in clause 18 of the operating licence.

28. Immediately following the decision to suspend both Mr. McMahon and Mr. Tyrell, Mr. McMahon requested a meeting with the directors of the IPC. At that meeting the directors were informed that Mr. McMahon had been suspended from his position as CCI. The practical effect of that suspension was – as Mr. McMahon pointed out – that the IPC could not operate parachuting operations with its existing permission from the Authority, as one of the conditions of that permission was that Mr. McMahon would act as CCI. The IPC also learnt for the first time that the Authority was investigating certain complaints concerning the way in which the IPC was conducting parachuting operations at Clonbollogue.

29. The directors of the IPC then convened an emergency meeting. They were very exercised by the manner in which the suspensions had been imposed, but, of course, the Club could not comply with the terms of its permission in the absence of its nominated chief pilot (Mr. Tyrell) and CCI (Mr. McMahon). A few days later the Club received a letter from the Authority which was dated 25th February, 2013, to the effect that it was now prohibited from conducting parachuting operations without appointing a Chief Pilot and a temporary CCI who were acceptable to the Authority.

30. This presented the IPC with a considerable dilemma. The Club held both Mr. Tyrell and Mr. McMahon in the highest regard and it gave serious consideration to the question of whether it should commence judicial review proceedings against the Authority. The IPC depended, however, on the revenue it generated from organising parachute drops. If that revenue stream was suspended there was a very high risk that this would result in the insolvency of the IPC itself. It therefore reluctantly yielded to the realities of the situation and a new chief pilot and a new CCI were then nominated by the IPC. These nominations were approved by the Authority on 13th March, 2013.

### **The decision to suspend**

31. So far as the decision to suspend is concerned, it must be recalled that the Authority was confronted with three separate incidents (the de Khors complaint, the Szymanski injury and the low flight incident) which, together with the reporting failures, all gave rise for concern. The actual permission which had been issued by the Authority provided that it was operative between 1st July, 2012, and 30th June, 2013 “unless previously varied, suspended or revoked.” The First Schedule to the permission designated Mr. McMahon as the CCI. Paragraph 4 of the Second Schedule provided that the Authority must be given at least 14 days’ notice of any proposed change of the identity of the person holding the position of CCI. Paragraph 15 provided that the Authority might be “suspended, varied or revoked at any time” by the Authority.

32. There is accordingly no doubt but that the Authority enjoyed the power of suspension in respect of the identity of the CCI post-holder. As with any statutory power of this kind, the discretion thereby conferred had to be exercised in a manner which respected the *East Donegal* principles (*East Donegal Co-Operatives Ltd. v. Attorney General* [1970] I.R. 317). This means that the Authority must generally respect fair procedures and ensure that its decisions are (i) *bona fide*, (ii) factually sustainable and (iii) not unreasonable: see, e.g., *The State (Lynch) v. Cooney* [1982] I.R. 337, 361 per O’Higgins C.J. and *Mallak v. Minister for Justice and Equality* [2012] IESC 59, [2013] 1 I.L.R.M. 73,91-99, per Fennelly J. to mention just two leading authorities in the considerable volume of case-law which attests to this point.

33. The extent to which a person is entitled to fair procedures prior to the imposition of a suspension will generally depend on the overall circumstances and the context in which the action has been taken. The necessity for urgent action, the nature of the suspension, its implications for the good name of the person concerned and, above all, its duration are critical factors. If the suspension is in the nature of a purely “holding” suspension which has been imposed to enable an urgent inquiry to take place, then any obligation to abide by fair procedures prior to its imposition may be attenuated or may even not apply at all: see, e.g., the comments of Keane C.J. in *Deegan v. Minister for Finance* [2000] E.L.R. 190. 198-199.

34. It is true that in some sporting situations a suspension might not be regarded as having particularly serious implications for the suspended person. Kearns J. touched on this point in *Morgan v. Trinity College, Dublin* [2003] IEHC 167, [2003] 3 I.R. 157, 169 when he observed that a “professional footballer might not regard a suspension, even a lengthy one, as being particularly detrimental or damaging to career or reputation.” In the present case, however, the suspension is of an altogether different character, even if it also concerned the operation of a sporting organisation. It was much more akin to a suspension imposed in an employment context than the type of routine, everyday suspensions in the sporting arena of the kind to which Kearns J. alluded in *Morgan*. The suspension meant that Mr. McMahon was obliged to stand down from a prestigious position which meant everything to him and now that that position has had to have been filled in the meantime, his prospects of being appointed again to that post cannot be regarded as high.

35. There is equally no doubt but that a suspension of this kind has considerable implications for the good name of the person affected. Many might reasonably think that the Authority imposed the suspension because of concerns that Mr. McMahon had taken a casual or even irresponsible attitude to the vital question of air safety or that he improperly yielded to commercial pressures in allowing flights to take off where the weather conditions for sport parachuting were doubtful or even hazardous. As I pointed out in *Wallace v. Irish Aviation Authority* [2012] IEHC 178, [2012] 2 I.L.R.M. 350, 351, often the “very fact of suspension is enough, in this valley of squinting windows, to expose the employee to the decidedly unpleasant prospect of calumny and detraction at the hands of the unforgiving and the uncharitable.” Here it must be recalled that Article 40.3.2 of the Constitution requires the State by its laws to protect that right to good name “as best it may from unjust attack” and in the case “of injustice done” to vindicate that right.

36. Yet it must also be acknowledged that the complaints placed the Authority in a difficult position. Parachuting is a hazardous sport where there can be little room for error. Indeed, the cover page of the operations manual of the Parachute Association of Ireland contains a stark warning which makes this point graphically:

### **“WARNING**

Sport parachuting is potentially dangerous activity and there is a risk of injury or death each time one makes a parachute jump. The onus is on the individual to ensure that he understands the risks. Individuals should not take part in sport parachuting if they do not fully understand and accept the risks inherent in the activity.”

37. Any consideration of the fair procedures question must be coloured by this general background. In the case of a hazardous activity such as parachuting, the regulatory authority must be allowed the widest possible degree of flexibility when it comes to taking urgent action in the interests of safety. The Authority was presented with three serious complaints and, if these complaints

were ultimately substantiated, then those who participated in parachute jumping at Clonbollogue might face unacceptable risks. This was, accordingly, a classic example of the situation disclosed in *The State (Lynch) v. Cooney* where, in the words of O'Higgins C.J. ([1982] I.R. 337,380 ):

"The time was short and a decision was urgent. There was no opportunity for debate or parley."

38. Put another way, it can be said that the perceived need to take urgent action to investigate these complaints and, above all, to ensure that air safety was not compromised, meant that the State's capacity fully to protect and vindicate Mr. McMahon's right to a good name was circumscribed *in the first instance*. It is probably sufficient to say that even if there was an obligation to hold a hearing prior to the imposition of the initial suspension, the Authority complied with that basic obligation having regard to the fact that it must be allowed to take urgent action in the first instance.

#### **The nature of the hearing and the reasons advanced for the suspension**

39. It is also true, however, that the hearing which took place on 19th February, 2013, was less than perfect. If action such as suspension was under consideration, fair procedures would normally have required that Mr. McMahon should have been given advance notice in writing of the specific grounds of complaint or concern so that he would know in broad terms the case which he had to meet. Specifically, if the low flying incident was of fundamental concern to the Authority – as, for understandable reasons, it clearly was – then fair procedures would normally dictate that advance notice should have been given of this rather than simply introduced about it for the first time at that meeting. If, moreover, the Authority considered that the evidence of either Mr. de Khors or Mr. Tyrell was inconsistent with that of Mr. McMahon on the weather warning issue, this critical issue should have been expressly put to Mr. McMahon.

40. In view, however, of the fact that the Authority must have the necessary freedom to take urgent action in the interests of public safety and having regard to the hazardous nature of the activities which it regulates, it was entitled in the first instance, in line with the comments of O'Higgins C.J. in *Lynch*, to take urgent action and to suspend the applicant in these circumstances.

41. This point is also illustrated in the general aviation context by *R. v. Transport Secretary, ex p. Pegasus Ltd.* [1988] 1 W.L.R. 990. In that case aircraft operated by the Romanian Airline, Tarom, had been chartered by the applicant company for the purposes of holiday flights from the United Kingdom. When it transpired that five of Tarom's pilots had failed examinations in air law, flight rules and procedure, the British Transport Secretary immediately took steps to suspend Tarom's flight permit pending further inquiry. This decision was upheld by Schiemann J. who had regard to the dangers of the inaction given the magnitude of the risk involved.

42. This brings us to the duration of the suspension. So far we have been discussing purely holding suspensions where, as in cases such as *Lynch* and *Pegasus*, immediate action was taken to address an urgent issue. If the suspension in the present case had lasted days or, perhaps, a matter of weeks then no objection could have been taken to the attenuated fashion in which fair procedures had been followed in this case. This, however, is not what occurred, as the suspension lasted from February, 2013 until the date of the hearing in June, 2014.

43. I do not overlook the many onerous burdens and responsibilities which the officers of the Authority must carry, not least in a time of austerity with doubtless considerably diminished resources. Viewed objectively, however, a suspension of that duration cannot realistically be regarded as a purely holding mechanism, not least given that the underlying facts were not – at least so far as the question of whether Mr. McMahon was fit to remain in his position as CCI is concerned – unduly complex.

44. There is clear authority to the effect that a lengthy suspension will be rendered invalid, especially if that delay is prejudicial to the applicant. Thus, 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 the point when the disciplinary investigation ought to have been ready to proceed, which that Court measured as being some four months after the date of the suspension. It was, of course, important to stress that the employee in that case had been suspected of theft and he had been suspended without pay.

45. One may agree that the prejudice to the plaintiff is not quite as severe as that. But the delay has been considerable, stretching well beyond any period necessary to get to the bottom of the basic facts of the matter so as to allay any possible safety concerns. It is also true that while the suspension has not had the same extensive financial implications for the applicant as it did for the plaintiff in *Flynn* (where the suspension had been without pay), it is plain nonetheless that the suspension has had some financial implications for the plaintiff. But most of all this long suspension has had the effect of seriously affecting Mr. McMahon's constitutional right to a good name and dashing a cherished ambition of his. These are matters which are prejudicial in themselves.

46. In addition, the reasons given for the suspension have to be factually sustainable. The Authority was clearly unwilling to accept Mr. McMahon's explanations regarding the failure to keep a proper documentary record of safety incidents or to report these to the Authority. It was likewise unimpressed by Mr. McMahon's explanations regarding the low flying incident. It cannot be said that these particular reasons are not factually sustainable *in the context of a holding suspension* pending a fuller hearing with adequate notice and an opportunity to call evidence.

#### **The reasons given for the suspension in relation to the de Khors complaint**

47. It must nevertheless be stated that one of the key reasons for the suspension is not factually sustainable, at least in its present form.

48. The Authority was clearly exercised by the fact that Mr. de Khors had jumped through cloud cover and it (quite understandably) concluded that this was a key reason why the accident had occurred in the first place. The Authority's note of the 19th February, 2013, interview stated:

"The CCI acknowledged that [Mr. de Khors] had departed the aircraft for the sky dive by his own decision. He had observed the [weather] coming from the southwest which would be unsuitable conditions for jumping and advised the jumpers prior to flight of his observations. This has not been substantiated by the complainant or the Chief Pilot who was [pilot in charge] for the incident flight."

49. Pausing at this point it will be seen that the question of whether the CCI gave the appropriate warning to the pilot and to the jumpers was of critical importance in the Authority's assessment of whether a suspension was necessary. Mr. McMahon's response was that (i) he had had given due warnings regarding the weather, (ii) that the weather was in principle not unsuitable for jumping, but (iii) that Mr. de Khors (who is an experienced parachutist) made an error of judgment in electing to be dropped further away from the drop zone and to drop through clouds.

50. The Authority nonetheless stated in its letter of 22nd February, 2013, to the Board of Directors of the IPC explaining the reasons for the decision to suspend Mr. McMahon that:

"The Chief Club Instructor failed to give [the Authority] a satisfactory explanation for operational decisions concerning weather and safety oversight which led [the Authority] to conclude that some of his decisions may have been based on a commercial rather than safety basis."

51. It may well be that the Authority could properly have concluded on the facts that Mr. McMahon should not have given clearance for this particular flight having regard to the anticipated weather conditions. I nonetheless find myself obliged to conclude that the Authority's reasoning and conclusions cannot stand - *at least in their present form* - for the following reasons.

52. First, it is implicit in the Authority's note and subsequent conclusions that it doubted whether Mr. McMahon had given the appropriate warnings regarding impending bad weather. It emphasised in the note that the Mr. McMahon's assertion that he had not given any such warnings was not substantiated by the complainant, Mr. de Khors. Yet this is not correct, as Mr. de Khors clearly stated in his complaint to the PAI (which accompanied the complaint to the Authority) that:

"As we left the hanger to meet the aircraft, the CCI on the day, Paul McMahon, told us that there was bad weather approaching. I looked towards the run-in spot and there was clear sky, so I and the other jumpers on load 5 boarded the plane and took off. The CCI did not stand down the load."

53. Second, Mr. de Khors acknowledged in that statement that at the initial drop of the non-wingsuited parachutists the weather was suitable in that there was no cloud cover over the drop zone which would impede the jumpers ("...I could see clearly to the south of the dropzone and I had visual on the ground (bog))" Mr. de Khors went on to say, however, that the wingsuited jumpers "continued on to be dropped further from the 'spot' for normal free fall." Indeed, in the affidavits filed in these proceedings, the Authority acknowledged that Mr. de Khors "had taken a decision that had caused or contributed to his accident (namely, to jump from the aircraft in weather conditions that were far from ideal)": see paragraph 51 of the second affidavit of Captain Lou Fine.

54. Third, there was accordingly no evidence which would justify the Authority's conclusion that Mr. McMahon's decision not to ground the de Khors flight may have been influenced by commercial considerations. The Authority could only have come to this conclusion if it was of the view that the weather conditions were unsuitable for jumping and that the flight should have been stood down before take-off or that Mr. McMahon did not take steps (by, e.g., radio communication with the pilot) to stop the jumping once the aircraft was in the air.

55. Yet none of these matters were put to Mr. McMahon or are factually sustainable in their present form. It may be, for example, that the weather conditions were so generally unsuitable that the Authority considered that the flight should not have been permitted to take off. The Authority has, however, never put the matter this way nor was this ever suggested to Mr. McMahon.

56. While I am prepared to excuse this non-compliance with the necessity to give reasons which are factually sustainable given the imperative need for urgency on the part of the Authority - so that it cannot be said that the suspension was *per se* invalid from the inception - the fact that one key reason given is not, having regard to the evidence presently available to me, factually sustainable is a further reason why the need for an early hearing which was procedurally completely fair and which produced conclusions which are factually sustainable was all the more imperative. This in turn is a further basis by which it can be said that an open ended suspension of this kind became invalid.

### **Conclusions on the validity of the suspension**

57. In my view, the Authority's decision to suspend cannot be impugned on the grounds that fair procedures were not perfectly observed. Given the obvious importance of aviation safety, the obligation to ensure fair procedures must often yield in the first instance to the Authority's necessary entitlement to take urgent action in aid of this fundamental objective.

58. Yet even if this so, this cannot justify a lengthy suspension such as has taken place here. 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. Viewed objectively, this cannot be said to have happened here, given that the reasons for the suspension so obviously affect the good name of the applicant and the suspension itself has lasted for well over one year.

59. One can put all of this another way: the Authority is entitled to act in a summary fashion in order to protect public safety, as indeed happened in this case. But if it so acts by, for example, suspending an individual, then it is obliged to ensure that there is a fuller hearing which complied with the requirements of fair procedures (including adequate notice to all concerned) within a relatively short space of time. The proper protection of the constitutional right to a good name will generally demand no less. This did not happen in the present case.

60. It is for that reason that I concluded that the suspension has become invalid and is no longer operative.