Neutral Citation: [2013] IEHC 390

THE HIGH COURT

JUDICIAL REVIEW

[2013/339 J.R.]

BETWEEN

SHUTING ZHANG

APPLICANT

AND

ATHLONE INSTITUTE OF TECHNOLOGY

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 14th day of June 2013

The applicant in this case is in her third and final year as a student at the Athlone Institute of Technology. She attended the premises of the respondent on the 13th December, 2012, to sit her third year exam in Financial Management on the 13th December, 2012. The examination was scheduled to take place at 9.30. When the students arrived for the purpose of sitting their examination it was not possible to commence the exam at the appointed time as was explained by Ms. Valerie Ryan, the invigilator, because when she arrived there was no other invigilator and she, Ms. Ryan, had to go and get the exam papers and set out the exam hall. Consequently the exam started some 15 to 20 minutes after the time appointed.

It is common case that once the students were admitted to the exam hall, an announcement was made by Ms. Ryan, the invigilator, to the effect that all bags and notes were to be left at the top of the exam hall and all mobile phones were to be placed on the ground under the student's desks. It is the applicant's case that she did not hear this announcement correctly as a result of noise, confusion caused by the late commencement of the exam and her "somewhat limited English". There is no dispute between the parties that the applicant placed her notes and mobile phone under her desk. Following her completion of the exam she signalled to a second invigilator, a Mr. Shaw, and handed in her answer booklet to him. She got up, gathered her coat and other belongings, including the notes and mobile, from the ground beneath her desk. At that point Ms. Ryan approached her, took her notes and exam paper and demanded that the applicant stay in the exam hall. The applicant was informed that Ms. Ryan was of the view that there had been a breach of the examination regulations on the part of the applicant and gave her a form alleging such breach of examination regulations. The applicant completed part of that document setting out her explanation as to what had occurred. She explained:

> "At the beginning of the exam I take my notes and mobile phone on the floor and I never remove it and at 11.35 the Mr take my paper, so I take my phone and note, but the Mrs thinks I have copyed (sic) the note and I have to explain with her. But she doesn't believe me. I never copy and everybody saw I didn't remove the note to".

I should note at this point that the applicant is a Chinese national and English is not her first language. Nevertheless, the course she is attending at the Athlone Institute of Technology is a course taught through English.

Subsequently, Ms. Ryan completed the breach of the examination regulations form and the issue was dealt with by the respondent at a hearing on the 11th January by the Academic Registrar, Dr. Joseph Ryan. In a letter of the 14th January, 2013, he wrote to the applicant in the following terms:-

> "Thank you for attending the hearing which was held on Friday 11th January at 2.00 pm. I am to inform you officially that the finding in respect of your case is that the alleged breach of examination regulations is upheld. The sanction imposed is as follows:-
>
> > The cancellation of the candidate's marks in Financial Management. The candidate is to repeat this module no earlier than autumn 2013. This constitutes a second sitting...."

A letter was then written on behalf of the applicant by Barry and Company, Solicitors on the 23rd January, 2013. Mr. Barry in the course or that letter set out the position of the applicant in relation to the events that occurred in the course of the morning of the 13th December, 2012. More particularly, a complaint was made as to the determination by the respondent which was set out in the letter of the 14th January, 2013, principally on the basis that the inquiry carried out by the respondent, was carried out by Dr. Ryan, the Academic Registrar of the Athlone Institute of Technology who is the husband of Ms. Valerie Ryan, the invigilator making the allegations against the applicant. Consequently, the respondent agreed to set aside the decision of the 11th January, 2013, in respect of the applicant and it was notified to the applicant by letter dated the 28th January, 2013, addressed to her solicitors that a new hearing would be convened.

There was further correspondence between the solicitors for the applicant and the solicitors for the respondent, some of which has not been put before the court given that it was without prejudice correspondence. However, it is necessary to refer to correspondence in April. It was indicated prior to the first letter to which I will refer that a further inquiry was to be carried out by a Dr. Dermot Douglas, an independent person not connected with the respondent. It had been notified to the solicitors for the applicant that there was to be a further hearing on the 12th April, 2013. Some issue arose as to when the applicant's solicitor was notified of that hearing, but I am not concerned with that particular issue. In a letter of the 9th April, 2013, from the applicant's solicitor to the respondent's solicitor it was indicated as follows:

> "You might advise as to what is proposed to happen on Friday the 11th April, 2013, at 11.00 am.
>
> Kindly advise if this is a full appeal against the invigilator's decision.

> Kindly advise under what specific regulation this hearing is being dealt with. Kindly furnish a list of witnesses that you propose to call.
>
> Kindly furnish all correspondence with Mr. Douglas.
>
> Due to the very short nature of the notice given herein, we will advise by 1.00 pm tomorrow . . . if we are in a position to proceed with the matter on Friday the 12th April, 2013, at 11.00 am as we have to determine what witnesses are available to us and if same are available to attend."

On the 11th April, there was a reminder sent to the solicitors for the respondent reiterating that they were not in a position to proceed due to the short notice and without knowing the position with respect to witnesses. On that date a comprehensive letter was sent to the solicitors for the applicant by the solicitors for the respondent and it would be helpful to set out the full terms of that letter:-

> "Dear Sirs, Further to your fax of the 11th April, 2013, you might please note the following:
>
> 1. The scheduled meeting is not a full meeting at which evidence will be taken, rather it is part of the process undertaken to establish whether or not there is a *prima facie* for your client to answer. As part of that process it has been decided to allow your client make a contribution to that and also hear what the invigilator has to say.
>
> 2. Following the outcome of the adjudication by the acting College Registrar on whether or not a *prima facie* case is to be answered, a hearing may or may not be arranged at which all witnesses will be available to your client for cross examination.
>
> 3. We feel that you have either misunderstood the process or are jumping the gun and your client cannot be prejudiced in any way by the process now being undertaken by the acting Registrar. It is being designed to ensure that your client's case is being dealt with in the fairest manner possible.
>
> 4. We therefore do not accept that your client is in any way prejudiced due to any issue of short notice which is entirely of your own making having regard to the fax number supplied on the first correspondence that you issued to this office in this case.
>
> 5. The acting Registrar is entitled to proceed with the adjudication on whether or not a *prima facie* case is to be answered and thereafter, whether your client attends and participates or not, the Registrar will make a decision as to whether a hearing needs to take place."

Thus, it would appear that the clear intention of the respondent, as set out in the letter of the 11th April, 2013, was to conduct a hearing/inquiry as to whether or not there was a *prima facie* case for the applicant to answer in respect of the complaint of a breach of examination regulations. It also appears to be clear that in the event that there was a finding to the effect that there was a *prima facie* case to be answered that there would be a full meeting at which evidence would be taken.

It is common case that the relevant examination regulations and procedures of the Athlone Institute of Technology issued in March 2006, are relevant to the issues arising in this case. Regulation G3 deals with the receipt of an allegation of unfair practice. Regulation G3.3 is in the following terms:-

> "If a case is considered to exist, the Registrar shall report the case in writing to the Director. The Registrar's office informs the candidate and invites him/her to a formal meeting to discuss the alleged incident. The candidate is informed of the date, place and time of the meeting and that he/she shall have the right to have legal and/or other representation for the discussion of the matter, and to review all relevant material presented. This meeting of the Registrar with the candidate is minuted."

The regulations go on to provide that in certain cases the nature of the breach will lead the Registrar to refer the case directly to a Committee of Inquiry and some indication is given of the circumstances in which that will occur, for example, in the case of a second or subsequent alleged breach or where the breach is of an especially serious nature.

Without setting out the regulations in full I think it is fair to say having regard to the regulations that what is envisaged by the regulations is a two stage process. The first part of the process is to consider, whether or not, a *prima facie* case has been established. If it is the case that a *prima facie* case is established then a formal meeting takes place at which, in the event that it is a first offence and the matter is not a serious matter, the matter can be dealt with and disposed of by the Registrar. If the Registrar has decided that it is one of the matters covered by regulation G3.4, a Committee of Inquiry will be required to consider the matter.

I think it would also be relevant to just refer briefly to regulation 3.1 of the regulations which provide that:-

> "On receipt of a written report from the Head of Department or examination office concerning an allegation of unfair practice, the Registrar shall proceed as follows:
>
> > Obtain a written report of the circumstances from the candidate concerned;
> >
> > Discuss the matter with the head of Department/Examination Officer, as appropriate, to determine whether, in the light of all the circumstances, a *prima facie* case has been established."

The regulations of the respondent as I have said, suggest that a two stage process is involved, namely in the first instance the question is to determine whether or not a *prima facie* case has being established. In the event that a *prima facie* case is established, then it is for the Registrar to decide with the matter can be dealt with by the Registrar or whether it is one of the cases in which it is appropriate to refer the case directly to a Committee of Inquiry. It does not appear to be envisaged in the rules that there will be come kind of hearing involving the student, invigilator and Registrar for the purpose of determining the question as to whether or not a *prima facie* case has been established. What happened in this case is that some form of truncation of the process seems to have occurred. The applicant attended that meeting with her solicitor and with an interpreter. The invigilator was also in attendance at that meeting and despite the fact that it was clearly unambiguously and explicitly stated in the course of the letter of the 11th April 2013 that the process was for the purpose of establishing whether or not there was a *prima facie* case for the applicant to answer, it appears in the light of what occurred after the meeting that a final decision was taken by the Registrar adjudicating the applicant to

be guilty of the breach of regulations.

In the course of the affidavits sworn herein, I have been furnished with the minutes of the meeting that occurred on the 12th April, 2013. It is interesting to note that at the outset of the meeting Dr. Douglas, the acting Registrar who chaired the meeting explained that his role as acting Registrar was to ascertain if there was a case to answer under the disciplinary regulations. He referred to the student handbook in which item No. 6 stated on p. 74 as follows:-

> "Books, bags, or any other unauthorised material should be left away from the candidate's desk, in the designated area at the examination centre. Candidates should only have the writing (and drawing) implements required for the examination, together with the examination stationary specified in the question paper. Containers, such as pencil cases should be removed from the desk."

He explained then that the question to be answered was "as a prohibition exists in bringing unauthorised material into the exam, whether this case presents a material breach in exam procedures?" During the course of the meeting/hearing an issue arose as to whether the original report of the invigilator had been altered, but I am not concerned with that issue. It was stated by the applicant's solicitor "we are here to establish a *prima facie* case not to hear the evidence". This was in response to a suggestion by Dr. Douglas to the effect that the applicant might give evidence. In any event, the applicant explained what occurred in the course of the examination and the chairman also invited Ms. Ryan to give evidence.

Two other points from the minutes of that meeting might be noted. At a certain stage having heard from Ms. Ryan, the chair of the meeting, Dr. Douglas invited the applicant's solicitor to put further questions to Ms. Ryan. He declined stating "Not today. It adds to the confusion rather than clears it up". Subsequently he was asked if he was satisfied the explanation given by Ms. Ryan in respect of the filling out of the form by her and the applicant's solicitor replied "I don't want to comment at the moment". The chairman of the meeting persisted and explained that he wished to clear up this issue and asked the solicitor for the applicant if he was continuing with the allegation or not, because there was justice required for the invigilator as well, to which the solicitor for the applicant responded "this is not a hearing".

Somewhat surprisingly, given what was stated at the outset of the meeting, but more particularly, having regard to what was stated and set out in the letter of the 11th April, 2013, a letter was written by Dr. Douglas on behalf of the respondent dated the 17th April, 2013, which informed the applicant that following the consideration of evidence and the meeting of the 12th April, he had found as follows:-

> "Student Ms. Shuting Zhang, ... is found to have brought unauthorised material into the BA Accounting Year 3 Financial Management Examination held on the 13th December, 2012, contrary to Athlone Institute of Technology's examination regulations.
>
> The allegation of a breach of regulation is sustained.
>
> I conclude that the material, had it been used, would have been of benefit of the candidate and would have provided an unfair advantage over other candidates. From the evidence provided however, it is not possible to conclude that the student cheated by using this unauthorised material."

The letter went on to impose penalty. The applicant was advised that she had a right of appeal.

As one might expect, the letter of the 17th April, 2013, came as a surprise to the applicant and her solicitor. These proceedings for judicial review were commenced on the 7th May, 2013. In the proceedings the relief sought is as follows:

> 1. An order certiorari by way of judicial review quashing the determination of the acting Registrar of the respondent, notified to the applicant by letter of the 17th April, 2013, to the effect that the applicant had breached the respondent's examination regulations.
>
> 2. A declaration that the hearing of the allegation of a breach of the exam regulations against the applicant undertaken by the acting Registrar of the respondent was conducted in a manner which was contrary with the procedures established by the respondent and/or contrary to the procedures notified to the applicant and furthermore in breach of natural and constitutional justice.

This case, in the light of the consequences for the applicant, has been the subject of an accelerated hearing. As I have already indicated a series of affidavits have been exchanged between the parties and a statement of opposition was furnished on the 29th May, 2013.

I should mention that at the outset of the hearing before me, there were two applications made, one by counsel on behalf of the applicant to amend the statement of grounds to include the following "taking into account the information provided by Paul O'Meara, Mr. Brendan Doyle and Mr. Tao Cui without affording the applicant or her legal advisers the opportunity to challenge such information by cross examination, rebuttal or submission". This is a matter which arose as a consequence of an averment by Dr. Douglas in the course of his affidavit sworn herein on the 28th May, 2013, to the effect that he made certain inquiries of Mr. O'Meara as to the relevance of the material brought into the exam by the applicant and that he obtained written confirmation through Mr. Doyle from the Chinese tutor for the class Tao Cui to the effect that Tao Cui had explained the exam regulations and what materials should not be brought into exams to the applicant's class in English and Chinese. He exhibited written confirmations in that respect in his affidavit.

In addition, an application was made on behalf of the respondent to have the following amendment made to the statement of opposition namely:

> "The respondent will also argue that the determination of the acting Registrar notified to the applicant by letter dated the 17th April, 2013, and the hearing of the allegation against the application undertaken by the acting Registrar of the respondent are not amenable to judicial review on the basis that the applicant's rights derive from contact and the matter is one essentially of private law."

Notification in relation to that proposed amendment was furnished on the 6th June, 2013, a day before the hearing was first scheduled to take place.

At the hearing, I indicated that I was disposed to permitting those amendments for the purpose of ensuring that all matters that required to be considered were properly before the court. I was urged on behalf of the applicant to not amend the statement of opposition at that stage, but rather to hear the arguments *de bene esse* and then to consider the issue as to amendment.

Having heard all of the arguments including the arguments necessitated by the proposed amendments, it seems to me that the appropriate course is to permit the applicant to amend the statement of grounds to make reference to the matters as described above and to permit the respondent to amend their statement of opposition to include the reference to the question as to whether or not the decisions of the respondent are amenable to judicial review. Neither of the parties was in any way hampered in their ability to deal with the issues concerned and comprehensive arguments were put before the court in regard to those matters and I am satisfied that it is in the interest of justice that those amendments be permitted.

Right to fair procedures
It is contended on behalf of the applicant that there was a breach of the applicant's right to fair procedures. It was contended that the proceedings were of significance to the applicant given that they reflect on her reputation, honesty and her academic and professional future. I accept that this is so. Reference was made on behalf of the applicant to the well known decision in *Re. Haughey* [1971] I.R. 217 and to the principles outlined in the course of that decision and in particular the illumination by the Supreme Court in that case as to the aspects of the right to a fair hearing as including:

> "(a) That he should be furnished with a copy of the evidence which reflected on his good name;
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> (b) That he should be allowed to cross examine, by counsel, his accuser or accusers;
>
> (c) That he should be allowed to give rebutting evidence; and
>
> (d) That he should be permitted to address, again by counsel, the committee in his own defence".

Reference was also made to the decision in the case of Flanagan v. University College Dublin [1988] I.R. 724, in which there was a consideration of the fairness of procedures to be adopted by a third level institution in respect of an allegation of plagiarism. Barron J. in that case stated at p. 731:-

> "She should equally have been allowed to be represented by someone of her choice, and should have been informed, in sufficient time to enable her to prepare her defence, of such right and of any other rights given to her by the rules governing the procedure of the disciplinary tribunal. At the hearing itself, she should have been able to hear the evidence against her, to challenge that evidence on cross-examination, and to present her own evidence."

There is no dispute between the parties as to the principles of law applicable to the conduct of a hearing before a disciplinary Tribunal amenable to judicial review. However the approach of the respondent is to state that this is a case which is not amenable to judicial review and I will come back to that point later on in the course of this judgment. Thus, there is no dispute as to the legal principles, but there is a question as to whether or not those legal principles are applicable to the facts of this case.

In making that case on behalf of the respondent, the point forcibly made was that the factual matrix of this case was such that it was clear that there had been a breach of the examination regulations by the applicant in that the critical facts disclose that she had notes under her desk in the examination hall. That alone amounted to a breach of the regulations and it was clear that the applicant accepted that she had her notes with her. It was pointed out that at the hearing that took place before Dr. Douglas, the applicant was attended by her solicitor and gave evidence and had available to her a translator. In effect, she had admitted being in breach of the regulation. He relied on the fact that the applicant had signed the registration form for the academic year where she affirmed that she had read and agreed to be bound by the regulations of the respondent. In those circumstances it was submitted that her rights derived from the contract and are a matter for private law and not amenable to judicial review. I will come back to this issue.

I have no doubt having considered the evidence in this case that the manner which respondent communicated with the solicitor for the applicant in advance of the meeting on the 12th April, 2013, combined with what was stated by Dr. Douglas at the start of the meeting that what was to be considered by Dr. Douglas in his capacity as acting Registrar was whether or not there was a *prima facie* to be answered by the applicant. What is manifestly clear is that the applicant together with her legal adviser going into that meeting could not have anticipated that as a result of what occurred on that date, there would be a finding or adjudication that she had in fact breached the examination regulations and that a penalty would be imposed on her without having given her any opportunity at all to be heard in relation to the issue of penalty. It is undoubtedly the case that Mr. Barry in the course of the meeting on the 12th April, 2013, expressly reserved his position in relation to cross examination of Ms. Ryan pending a formal meeting. If a formal meeting had taken place, one might have expected to hear from the other invigilator who was present on the day, Mr. Tom Shaw; had a formal meeting taken place as envisaged under the rules, one might also have expected that the applicant herself might have presented witnesses as to what precisely was stated by Ms. Ryan at the commencement of the examination.

The other aspect of this matter which emerged in the affidavit of Dr. Douglas was his contact with other potential witnesses prior to the meeting on the 12th April, 2013, upon which he clearly relied to some extent in reaching the conclusion set out in the letter of the 17th April, 2013. All of these matters taken together, leave me in no doubt that the applicant was denied fair procedures in breach of the regulations of the respondent and in breach of the terms of the letter of the 11th April, 2013. In those circumstances, assuming that the decision of the respondent is amenable to judicial review I would have no hesitation in granting the appropriate relief to the applicant.

Is the respondent amenable to judicial review? The extent to which certain bodies are amenable to judicial review is a somewhat vexed question and has given rise to a considerable body of case law. Counsel on behalf of the respondent relied principally on the decisions in the case of *Rajah v. The Royal College of Surgeons* [1994] 11.R. 384 and *Quinn v. The Honourable Society of Kings Inns* [2004] 4 I.R. 344. Counsel on behalf of the applicant relied on a series of decisions including *Geoghegan v. Institute of Chartered Accountants* [1995] 3 I.R. 86, *Eagan v. University College Dublin* [1996] 11.R. 390*, McKenna v. O'Ciarain and Wicklow VEC* [2001] I.E.H.C. 215 and *O'Donnell v. Tipperary (South Riding) County Council* [2005] 2 I.R. That latter decision was a decision of the Supreme Court in which Denham J. (as she then was) adopted her previous analysis in *Geoghegan*. I will refer to para. 11 in the judgment in *O'Donnell* where Denham J. stated:-

> "The burden is on the County Council to show that the contract between the parties is one of private law. I adopt the approach taken by Finlay C.J. in *Beirne v. Commissioner of An Garda Siochana* [1993] I.L.R.M. 1 at p. 2, where he stated:-

> 'The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of private law by persons or tribunals whose authority derives from contract is ... confined to cases or instances where the duty being performed by the decision making authority is manifestly a private duty and where his right to make it derives solely from contract or solely from consent or the agreement of making authority ... is of a nature which might ordinarily be seen as coming within the public domain, that decision can only be excluded from the reach of the jurisdiction in judicial review if it can be shown that it solely and exclusively derived from an individual contract made in private law.'"

She concluded on the facts of that case that the employment of a station officer of a fire station is a matter within the public domain and amenable to judicial review. She did so whilst acknowledging that there was a contract between the applicant and the relevant County Council, but added that it had a significant public element and the decision to terminate was therefore amenable to judicial review. Mr. McDonagh S.C. on behalf of the applicant placed significant reliance on that decision and he contended that the respondent's officials are exercising powers given to them by statute. It was contended that the Institute was obliged to conform to principles of natural justice and fair procedures. A reference was made to the decision in the *Quinn* case and I think it is useful to make reference to a short passage from the judgment of Smyth J. where he noted 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 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."

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.

I want to make a number of other brief observations. The manner in which this matter was dealt with by the respondent does not stand up to scrutiny. The fact that there is an appeal from the decision does not preclude the applicant from seeking relief having regard to the nature of the breach of her right to fair procedures. As a general proposition, the Courts should not be the place in which to deal with questions of discipline arising in academic institutions but there may be cases in which the nature of a breach of the right to fair procedures is such that recourse to the Courts is unavoidable. This, in my view, is one such case.

I will therefore grant the relief sought by way of certiorari. I will hear the parties further on the question of remission.