

THE HIGH COURT
JUDICIAL REVIEW

[2014 No. 525 JR]

BETWEEN

THOMAS MCKENNA

APPLICANT

AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 18th day of March, 2016.

1. The applicant is a garda stationed at Waterford Garda Station who has been suspended from operational duties on 90% pay for a period of more than four years prior to the commencement of these proceedings.
2. He seeks an order restraining further disciplinary proceedings against him and/or the holding or continuance of the Board of Inquiry established by the respondent under s. 25 of An Garda Síochána (Discipline) Regulations 2007, ("the Regulations").
3. The applicant also seeks an order of certiorari quashing his suspension from active duty, and a declaration that the respondent was not entitled to either initiate or continue the disciplinary proceedings against him under the Regulations after he was acquitted at Waterford Circuit Court on 10th April, 2013 of charges relating to the incidents in respect of which the disciplinary hearing is being conducted. In the alternative, he seeks a similar declaration that the respondent is not entitled to initiate and/or continue those proceedings following the outcome of an investigation carried out by An Garda Síochána Ombudsman Commissioner ("GSOC") which was communicated to him by letter of 24th April, 2013.
4. He also seeks a declaration that there was undue and/or unwarranted and/or prejudicial delay in the initiation and/or progression of the disciplinary proceedings. This ground of application was added following an order made by the Supreme Court on 29th September, 2014.
5. The respondent pleads in opposition that there is nothing in An Garda Síochána Act 2005 ("the Act of 2005") or the Regulations which precludes the initiating and/or continuing of the disciplinary investigations or proceedings. It is also pleaded that it was appropriate that the respondent would refrain from engaging in the relevant disciplinary investigations or enquiries pending the outcome of the relevant criminal prosecutions and the investigation by GSOC, and that there is no material delay that should prevent the initiation and/or the continuation of those investigations and enquiries.

The disciplinary matters

6. The applicant is accused of a breach of discipline, within the meaning of Regulation 5 of the Regulations, arising from an incident alleged to have occurred at Waterford Garda Station on the 20th June, 2010 when he is alleged to have used unprofessional and discriminatory language towards a person in custody.
7. He is also accused of acting in contravention of his obligations, and in neglect of duty and in breach of discipline under the Criminal Justice (Treatment of Persons in Custody) Regulations, 1987 arising from the same incident, in that he failed to respect and protect the human dignity, bodily integrity and human rights of a person detained at Waterford Garda Station, and used unreasonable force and unprofessional and discriminatory language to that person.

The Board of Inquiry

8. On 16th May, 2014 the applicant was notified that Macarten O'Gorman, solicitor had been appointed presiding officer of a Board of Inquiry established by the Commissioner of An Garda Síochána ("the Commissioner") pursuant to Regulation 27 of the Regulations of 2007 to investigate these alleged breaches of discipline arising from the incident.

The GSOC investigation

9. A referral had been made on the day of the alleged incident to GSOC pursuant to s. 102 of the Act of 2005. GSOC determined that the complaints against the applicant should be investigated, and pursuant to s. 98 of the Act submitted a file to the DPP with a recommendation that he should be prosecuted for assault pursuant to s. 2 of the Non-Fatal Offences Against the Person Act, 1997.
10. GSOC awaited the determination of the prosecution arising from the incident, which resulted in an acquittal on appeal before Waterford Circuit Court on the 10th April, 2013 and on the 24th April, 2013 the applicant was informed that the GSOC investigation had concluded, and that no further action would be taken by it.
11. The first argument made by the applicant was that the respondent was not entitled to initiate and/or continue the investigation of the Board of Inquiry having regard to the conclusion of its investigation by GSOC.
12. GSOC was established under the provisions of the Garda Síochána Act, 2005 as a body corporate to perform the functions assigned to it by that Act. Its statutory objectives, functions and powers are set out in s. 67 of the Act and include, inter alia, those identified in s. 67 (2), to receive complaints made by members of the public concerning the conduct of members of An Garda Síochána. Part 4 of the Act sets out the procedures for complaints and investigations before GSOC and this provides, inter alia, for the referral of a complaint to the Garda Commissioner to be dealt with in accordance with s. 94.

13. Section 94 of the Act requires the Garda Commissioner on referral of a complaint under s. 92 to appoint a member of An Garda Síochána to investigate the complaint under the Disciplinary Regulations and to submit a report under s. 94 (6) to GSOC as soon as practicable after completing an investigation of complaint.

14. Section 95 (5) is important in the context of this case and provides as follows:

"An investigation of a matter under this section does not preclude the subsequent investigation of the matter under section 98."

15. The applicant argues that, as GSOC has concluded its investigation, no power lies in the respondent to carry out a separate investigation under the Regulations, and that as GSOC is the statutory authority tasked with the investigation that no other investigation is permissible under the Act.

16. The legislation establishes GSOC as an independent third party charged with exercising an independent role in regard to matters involving serving members of An Garda Síochána, including disciplinary matters. The focus of GSOC relates to complaints which may legitimately concern the general public regarding members of the Gardaí. The Act also permits the Minister under s. 123 to enact regulations concerning disciplinary matters within the Force. There is some overlap between the matters within the remit of the two investigatory procedures. For example, conduct requiring investigation of disciplinary matters at the more serious end of the scale may also draw the attention of GSOC, as happened here.

17. On the other hand, the primary focus of the Regulations are matters of internal discipline, for example "matters relating to work performance" as found under s.123 (2)(g). Such matters may have a public interest element insofar as the public is interested in seeing a well-run and disciplined police force, but they are appropriately matters to be dealt with internally within the Force. Although commonality of subject matter may exist, the different mechanisms of oversight exist to fulfil different regulatory goals with different standards against which conduct might be scrutinised and different possible consequences for individuals under investigation.

Conclusion on role of GSOC

18. The legislation establishing GSOC makes express provision for matters referred to it that may constitute criminal liability. Section 101 of the Act of 2005 requires GSOC, if it is of the opinion that the conduct under investigation before it may constitute an offence, to send a copy of the report and of the investigation file to the DPP and provide to the DPP any information relating to the investigation that may be required by the DPP in performing her functions.

19. Section 101(5) deals with circumstances where a member of An Garda Síochána is convicted of an offence and this provides as follows:-

"If a member of the Garda Síochána is convicted of an offence in respect of a matter reported to the Director of Public Prosecutions under this section or if the Director decides not to institute a prosecution in relation to that matter, the Ombudsman Commission is not precluded from conducting or continuing an investigation into the matter under section 95 by reason only that the conduct under investigation is in substance the same as the conduct constituting the offence of which the member is convicted or in respect of which no prosecution is instituted."

20. Section 105 permits GSOC to investigate complaints that appear to involve an offence:

"(1) Nothing in this Act precludes a member of the Garda Síochána from charging another member with an offence, even though the conduct to which the offence relates could be the subject matter of a complaint or investigation under this Part.

(2) However, if a complaint has been made concerning the conduct of a member of the Garda Síochána, the member may not be charged with an offence relating to that conduct except by or with the consent of the Director of Public Prosecutions.

21. The statutory provision is that GSOC is not precluded from conducting or continuing an investigation under s. 95 by reason only of the fact that the matter under investigation is, in substance, the same as that in respect of which the member has been convicted or in respect of which no prosecution is initiated. The subsection is silent as to what is to occur if the member is acquitted. Having regard to the fact that GSOC did not continue its investigation following the acquittal, no question arises under the legislative scheme as to the power of GSOC in those circumstances.

22. I conclude that neither the conclusion of the GSOC investigation nor the acquittal preclude a disciplinary hearing. In those circumstances the different, albeit sometimes overlapping, roles of GSOC and procedures under the Regulations do not envisage exclusivity such that investigation under one procedure can of itself preclude one under the other. Separate and distinct procedure may be conducted for separate and distinct purpose. Further, the creation of the two classes of investigation or proceedings was envisaged by the legislation and permitted under its terms. There is nothing in the Act of 2005 that suggests that the completion of one enquiry precludes the continuation or commencement of an enquiry in a different forum nor that proceedings are mutually inconsistent.

23. By letter of 25th June, 2010, from the Chief Superintendent of An Garda Síochána to the Assistant Commissioner of the relevant region it was noted that:

"the managerial actions taken at Divisional level as on balance, insufficient to serve the public interest, protect the integrity and reputation of An Garda Síochána, maintain control and discipline and assure the proper continuance of the effective garda service locally".

24. That letter was sent in the context that the GSOC investigation had been initiated and was ongoing. It seems to me that the Chief Superintendent was of the view that the GSOC investigation would not sufficiently protect the interests and principles outlined, and that view is one to which the court must have regard in considering the choice to continue the investigative

Events after completion by GSOC of investigation.

25. Following on the closing by GSOC of its file, the Commissioner continued to consider whether disciplinary matters remained to be resolved in regard to the applicant. By a letter of 13th May, 2013 the applicant was informed of this, and that the Commissioner was considering the report of GSOC. On 20th June, 2013 after his acquittal on appeal, the applicant was notified that the matter had been referred to the Chief Superintendent in the Waterford division for his consideration as to whether a further enquiry under the

Regulations was warranted. The applicant remains suspended from duty pending this determination, although through his solicitor he expressed a view that no further action was warranted or permissible having regard to the fact that he had been, as it was put, "exonerated by the court".

26. It was made clear to the applicant by the letter of 30th June, 2013 that the Garda Síochána was of the view that the acquittal of the applicant on the criminal charges did not of itself mean that further enquiry was not warranted.

Coincidence of matters.

27. It is clear from the facts established by the investigation of the Superintendent appointed to carry out an investigation on 25th June, 2013, that the matters in respect of which the Board of Inquiry was established relate to the same or broadly the same elements of his alleged behaviour towards a person in custody on 20th June, 2010 as those in respect to which he was acquitted, and those the subject matter of the GSOC investigation, and the particulars were established mostly from statements made in the course of the GSOC investigation. The applicant argues that as the issues now to be investigated by the Board of Inquiry are so connected with the matters in respect of which he was acquitted, and which formed the subject matter of the GSOC enquiry, and as the evidence is either the same or significantly overlaps, that the matter proposed to be investigate have been determined such that the proposed disciplinary hearing is now not permitted.

The effect of the acquittal on the disciplinary investigation

28. The applicant argues that the Oireachtas intended a coherence in its legislative provisions dealing with disciplinary processes concerning members of the Force, and that the scheme of the Act of 2005 was intended to provide the entire scheme for dealing with such matters, and that the legislative provisions mean that no further enquiry by whatever body or person is permissible under the legislation once a member is acquitted.

29. There is a public interest in the processing of disciplinary matters against members of An Garda Síochána and this is clear for the long title of the Act of 2005, which identified "the purposes of ensuring openness, transparency and accountability in the process by which complaints against An Garda Síochána are investigated" as a reason for the establishment of GSOC, and for the establishment of An Garda Síochána Inspectorate. A further public interest, the achieving and maintenance of "the highest levels of efficiency and effectiveness in the operation and administration of An Garda Síochána", is also recited.

30. The Regulations made under s. 123 of the Act of 2005 provide for a disciplinary process which is distinct from that engaged in by GSOC, and in a criminal prosecution, and Regulation 8 provides as follows:-

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

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

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

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

31. The balance of Regulation 8 provides for and entitles a Board of Inquiry or an appeal board to treat as conclusive findings of fact in a criminal charge.

32. Regulation 8 therefore permits the commencement or continuation of disciplinary proceedings where a member has been acquitted even if those proceedings involve an inquiry into the same issues in respect of which the member was so acquitted but only if, in all the circumstances of the particular case, and their cumulative effects means that it would not be unfair and oppressive to continue the proceedings.

33. Thus, as Regulation 8 expressly provides for the circumstances that have arisen in the present case, I reject the argument of counsel for the applicant that there is no statutory or other basis on which the disciplinary inquiry may be continued, merely on account of the fact that he has been acquitted of criminal charges arising from the same or broadly the same set of facts and circumstances. The proceedings may be continued, unless fairness or injustice would result, but there is no absolute statutory or other provision that supports the argument of the applicant that the conduct of the enquiry is ultra vires the respondent.

34. The same set of facts can give rise to concerns of a criminal or disciplinary concern, and there is nothing intrinsically unfair or illogical in this. In matters not involving members of An Garda Síochána, a set of circumstances can give rise to civil liability and criminal prosecution. In either case the outcome of the criminal trial may well create an issue estoppel, but absent such argument there is no legal or evidential impediment to the prosecution of a civil and criminal trial out of the same factual nexus.

35. I turn now to consider whether the continuation of the enquiry would be unfair to the applicant.

Unfairness

36. The applicant argues that the continuation of the enquiry by the Board established for that purpose would be unfair and oppressive having regard to the delay since the incident on 20th June, 2010. It is not suggested, nor could it reasonably be so suggested, that an enquiry ought to have continued after the DPP determined to prefer charges, nor until the criminal proceedings concluded on 10th April, 2013. The relevant delay then has to be between the date of the acquittal on 10th April, 2013 and the appointment of a Board of Inquiry on 16th May, 2014, a period of thirteen months.

37. The applicant was aware since on 25th June, 2013 that an investigation had commenced under the Regulations and a Superintendent appointed as investigating officer to conduct an enquiry under Article 25 of the Regulations.

38. It seems to me that it may arguably be oppressive and unfair to the applicant to continue the disciplinary inquiry had nothing occurred between June, 2010, when the matters complained of are said to have occurred, and May, 2014, when the Board of Inquiry was established. Whether such unfairness arises will depend on the facts.

39. However, the applicant can be assumed to have been fully engaged with the facts up to 10th April, 2013, when he was acquitted in the Circuit Court. He might have hoped that following the communication on behalf of GSOC on 24th April, 2013, no further action

would be taken, but within two months he knew that the internal investigation was underway and that there was the possibility that a formal enquiry would be directed.

40. The applicant relies on the judgment of the Supreme Court in *McNeill v. Commissioner for An Garda Síochána & Ors* [1997] 1 I.R. 469. That decision was an appeal from a refusal by the High Court to prohibit the conduct of an enquiry under the then relevant An Garda Síochána (Discipline) Regulations 1989. The Supreme Court allowed the appeal having regard to the express provisions of the Regulations that required an enquiry to be commenced "as soon as practicable". The incident in respect of which the complaint arose took place in October 1999 and all relevant evidence was either known by or was immediately available to An Garda Síochána by October 1999. The Supreme Court regarded the delay of four years and seven months as a breach of the obligation of the expedition.

41. The applicant does not make the argument that the continuance of the disciplinary proceedings falls by virtue of the principles found in *McNeill v. Commissioner for An Garda Síochána & Ors*, namely that the enquiry was not commenced or continued with due expedition. That decision was reached on the basis of the express statutory requirement of expedition not found in the Regulations of 2007. He rather makes the point that the delay in the prosecution of the enquiry has caused him prejudice and that continuation would be unfair. No argument is made that there has been any loss of evidence or that the delay has been such that he has been prejudiced in the defence of the case. He argues, however, that he has been significantly prejudiced in his health and family life and house, sleeplessness, anxiety, stress and physical and psychological sequelae as a result of the investigation.

42. His argument must be seen in the context of the dicta of Finnegan J. in *Gillen v. Commissioner of An Garda Síochána* [2012] IESC 3, [2012] 1 I.R. 574 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."

43. I am not satisfied that the applicant has adduced evidence of anxiety or prejudice outside of that which would be normal in the circumstances, and consider that something more than the normal response of anxiety and concern would be required to establish unfairness on this ground.

44. Further, I consider that the applicant cannot make out the case that he was unaware of the grounds on which the disciplinary process was proposed to be held until August, 2014. He signed the document dated 8th July, 2013, sent by the Commissioner in which the details of the proposed investigation were set out. By letter dated 12th November, 2013, from his solicitor, it was indicated on his behalf that he was "anxious to cooperate" with the investigation. I consider in those circumstances that the applicant can show no prejudice to his conduct of the defence of the investigation, and that his argument that he was unaware of the grounds of the investigation until August, 2014, is not born out by the facts.

45. Having regard to the purpose of the legislation in the maintenance of public confidence in An Garda Síochána, the process I must engage is to weigh against the public interest the interests of the applicant in having the matter dealt with speedily and having his reputation vindicated and returning to his duties. I am not satisfied that any prejudice or unfairness arises to tip the balance in favour of the applicant such that the investigation must be prohibited.

The effect of the acquittal

46. The applicant was acquitted on criminal charges on appeal to the Circuit Court following his conviction at District Court level. The acquittal has a number of legal consequences, one of which is he may not now be charged again in respect of the same offences, and the acquittal raises that class of estoppel. However, the acquittal does not determine liability in respect of disciplinary matters, because the standard of proof is different. That the standard of proof in the disciplinary hearing is the civil standard is provided by Regulation 9.

47. That the findings and verdict in a criminal trial might prevent the holding of an enquiry by a disciplinary body has been considered in a number of recent and authoritative cases. The leading case is the decision of the Supreme Court in *McGrath v. The Commissioner of An Garda Síochána* [1991] 1 I.R. 69. The applicant in that case was acquitted by a jury on three charges of embezzlement and the High Court granted an order prohibiting the respondent from holding an inquiry into certain alleged breaches of discipline alleged to constitute corrupt or improper practice. The Supreme Court dismissed the appeal. A number of principles stated by the Supreme Court are of benefit for the purposes of the present case. Finlay C.J. emphasised that

"...[there is no] general principle that an acquittal of a criminal charge in respect of an offence, irrespective of the reason for such acquittal, or the basis on which it was achieved, could be inevitably an estoppel preventing a disciplinary investigation arising out of the same set of facts."

48. Finlay C.J. pointed to the fact that there was no suggestion that the verdict in the criminal trial arose as a result of any technicality or failure of attendance for particular witness. The verdict was on its merits after what he described as a "full and proper hearing", before a jury as Lynch J. in the High Court had noted and he described as encompassing "the findings and verdict of the jury".

49. McCarthy J., agreeing with that proposition, equally rejected one that an acquittal on a criminal charge "necessarily precludes a disciplinary investigation into the facts arising out of which criminal charge was brought". The matter he said was one of estoppel, and whether or not the issue was the same. He went on at p. 75 of his judgment to make the following observation:

"Acquitting a garda of assault would not preclude a garda investigation into a breach of discipline such as an abuse of authority in failing to behave with due courtesy towards a member of the public".

50. Kearns P. considered the question in *Walsh v. Commissioner of An Garda Síochána & Ors*. [2010] IEHC 257 and at p. 13 of his judgment, he noted the following:

"However, the Court was not of the view that no disciplinary inquiry could take place arising out of the alleged events. Matters of internal discipline in the Garda Síochána were not to be equated with the criminal charges of which the applicant had already been acquitted. Thus McCarthy J. in his judgment rejected any contention that an acquittal on a criminal charge precluded the disciplinary investigation into the facts from which a criminal charge was brought. To acquit a Gardai of assault would not preclude a Garda investigation into a breach of discipline such as abuse of authority in failing to behave with due courtesy towards a member of the public."

51. After reviewing the judgment of the Supreme Court in *McGrath v. The Commissioner of An Garda Síochána*, and the later judgment

of Geoghegan J. in *Garvey v. Minister for Justice Equality & Law Reform* [2006] 1 I.R. 548, Kearns P. went on to say at p. 15 the following:

"The critical question, it seems to me, is to consider whether it would be unfair or oppressive to continue the disciplinary proceedings in the particular circumstances. If the disciplinary inquiry crosses that threshold, the matter then becomes, as was emphasised by Hederman J. in *McGrath*, "a form of unfair and oppressive procedures which calls for the intervention of the court".

52. Equally, in *Garvey v. Minister for Justice Equality & Law Reform* the Supreme Court had to consider whether it would be unfair and oppressive to allow disciplinary proceedings, when the applicant had been acquitted after a long trial and lengthy deliberations by a jury. Geoghegan J. considered that the allegations proposed to be investigated in the internal enquiry were identical to those in the criminal charges and the same witnesses and evidence would be tendered. He pointed to the fact that it would be:

"... impossible to imagine that such a lengthy trial leading to an acquittal did not give rise to a flow of arguments and opinions throughout the prison. In this claustrophobic atmosphere, I believe that, to use the expression of Finlay C.J. in McGrath v. Commissioner of An Garda Síochána, it would be a "basically unfair procedure" to conduct a disciplinary inquiry on what in effect are identical allegations to the criminal charges based on essentially the same evidence and the same witnesses."

Conclusion on this argument

53. I consider that there is a difference in character, and one envisaged by the case law, between circumstances when a member of the Force is acquitted without a hearing and without a finding of fact on the merits, and the consequences for the conduct of the disciplinary hearing when the acquittal has resulted from a full criminal process. The applicant was acquitted in his appeal from the conviction in the District Court because the complainant did not offer any evidence and did not attend at the hearing before the Circuit Court. There has been no determination of fact which raises an estoppel. There is no sense in which the disciplinary inquiry might seek to go behind any findings of fact of a competent court, and the difference in character between the acquittal in this case and that which formed the basis of the decision of the High Court and the Supreme Court in *McGrath v. Commissioner of An Garda Síochána* is critical.

54. I consider too that the character of the criminal charges is different from those in respect of which the disciplinary proceedings were commenced. The District Court charges related to a criminal assault, but the disciplinary proceedings relate to the way in which the applicant performed his obligations as a member of the Force, in particular his conduct towards a person in custody in the garda station where he was at all material times a member in charge. The disciplinary charges relate to conduct towards a person not stated to amount to an assault but rather a failure to respect the dignity and person of the prisoner and his physical safety, the language that he used towards him, his failure to ensure the safe custody and care of the arrested person and his failure to respect and protect his human dignity, bodily integrity and human rights. To borrow from the judgement of Kearns P. in *Walsh v. Commissioner of An Garda Síochána & Ors.* [2010] IEHC 257, I consider that:

"The allegations in the disciplinary proceedings are not even the same as the charge before the District Court, let alone identical. Nor do the disciplinary proceedings involve any determination on the issue of possession or create the risk of unravelling the District Court verdict."

55. The particulars of the alleged misconduct introducing unprofessional and discriminatory language again are not capable of being characterised as a criminal assault.

56. In those circumstances I consider that the applicant has not made out an argument on this ground.

Legitimate expectation

57. The applicant also relies on the principles explained in *Glencar Exploration Plc. v. Mayo Co. Co.* [2001] IESC 64, [2002] 1 I.R. 84, [2002] 1 ILRM 481, and in particular pleads that he had a legitimate expectation that the respondent would not proceed to a disciplinary inquiry once it had opted to avail of the complaints procedure involving GSOC and that the respondent having elected to take a particular course it may not now seek to avail of what is argued to be an inconsistent approach. He argues that the correspondence received from GSOC which expressly indicated that its investigation had concluded and that "no further action will be taken" and which suggested an arrangement be made for the return to him of items of his uniform, gave him grounds to believe that the investigation had concluded and he would not be subjected to disciplinary proceedings.

58. The doctrine of legitimate expectation is well established in our law, and was definitively described by Fennelly J. in *Glencar Exploration Plc. v. Mayo Co. Co.*:

"...something in the nature of an undertaking or promise or representation, express or implied, addressed to or applicable to the applicants. I do not say that there must be a direct nexus. It may be sufficient that the claimant belongs to a class or group of persons affected by an act which is accompanied by or implies an intention to follow an identifiable course of conduct by the public authority. Every citizen can, however, assert an expectation that public authorities will act within the law, but that is clearly not enough."

59. While internal documentation discovered in the course of the litigation suggests no firm decision had been made internally even after the GSOC investigation whether the disciplinary proceedings under the Regulations would proceed, the only representation on which the applicant can rely is the letter from GSOC, which it sent at the conclusion of its investigation.

60. It seems to me that the applicant's argument is misplaced, and it omits to take account of the independence of GSOC which is in my view such that a representation by GSOC, if there was one, cannot create a legitimate expectation that An Garda Síochána will not activate an investigation under the Regulations. I consider that the applicant has not made out an argument that the respondent has created a legitimate expectation such that it may not now continue with the enquiry.

Conclusion

61. For the reasons outlined, I propose to refuse the relief sought.