THE HIGH COURT
JUDICIAL REVIEW

[2020] IEHC 711
[2019 No. 938 JR]

BETWEEN

OSAL STEPHEN KELLY

APPLICANT

AND

EUGENE GARGAN, EOIN RONAYNE, MARGARET COUGHLAN, THOMAS MURTAGH, SEAN REID, RHONA MCELENEY, MARTIN WALSH AND FÓRSA TRADE UNION

RESPONDENTS

AND

YVETTE KELLY

NOTICE PARTY

JUDGMENT of Mr. Justice Meenan delivered on the 18th day of December, 2020

Introduction

1. These judicial review proceedings are brought by the applicant, a civil servant, arising from his involvement in Fórsa Trade Union (the Union) Youth Wing following his election as its chairperson in June, 2018. Even these basic facts are in dispute. In an affidavit of Mr. Eoin Ronayne, deputy general secretary of the Union, it is stated that at the relevant time there was no formal youth wing to the Union and that the position which the applicant refers to as "chairperson" was an ad hoc position within an informal group known as the Fórsa Youth Network.

2. However, what is not in dispute is that there was a serious falling out between the applicant and the notice party who was then, apparently, an official within the Youth Wing or Network. This resulted in a written complaint being made by the notice party to the Union head office on or about 7 December 2018. The complaint was processed under the Union's disciplinary procedures.

The Complaint

3. There was clearly a breakdown in relations between the applicant and the notice party. The letter of complaint ran to some thirteen pages. The complaint arose from the applicant's dealings with the notice party and were based on correspondence received from the applicant regarding the Youth Network. The notice party complained that various matters stated in the correspondence "*have been injurious to my character and his threats were an effort to intimidate me".* The following passages from the correspondence were, *inter alia,* referred to by the notice party: -

> "Yvette,
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> …
>
> Should any of the Union's staff or officers, of any level of seniority, undermine the Union's own rules in the way suggested, or in any other way seek to overthrow me from my democratically elected position, I can guarantee you that they will very, very severely regret it.

> Your employer, Yvette, the Department of Justice, is a far more powerful institution than Fórsa and when they sought to terminate my employment two years ago, not only did I defeat them but I made them seriously regret it.
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> I have already highlighted the possibility of referring a complaint to the Ombudsman over the way things are being handled. Among the other steps I and others would take should any such moves take place include referring a complaint against Fórsa to ICTU under paragraph 48(b) of the ICTU Constitution; Furthermore, the operations of our group are of public importance, given that Fórsa Youth is the largest youth wing of any union in the State and has a public profile and therefore I would consider it appropriate to inform the national media were this to happen.
>
> It would give me no joy to contact the Sunday Independent and give them a story but there is no doubt they would pounce on any such story with headlines such as 'Fórsa Union Crushes Youth Wing' or 'Trotskyist Takeover of Public Sector Union Youth Wing'. But that is what I will do if I am forced to. The public have a right to know.
>
> I have been an exceptional chairperson of this organisation, leading an inspired, well-managed and professional campaign for pay justice that was part of the pressure that brought about the historic pay equality deal for young workers…"

There was further correspondence but the above passages exemplify its nature and tone. In response, the notice party expressed the view that the correspondence "*was not only inappropriate but also intimidating and threatening…".*

4. There were also issues concerning what persons were going to be invited to speak at meetings of the Youth Network. The applicant maintained that the choice of speakers was influenced by the political beliefs of the notice party. In summary, the notice party stated in the complaint: -

> "Osal has been consistently attacking my character, trying to intimidate me and he has become threatening. As he stated that he already contacted news agencies about the social media accounts being compromised, I take his above statements and intentions very seriously. As members and activists in a union, I feel there should be zero tolerance for this threatening behaviour and that his actions are taken seriously with the strictest consequences."

Disciplinary Process

5. The complaint was made under rule 27 of the Union Rulebook and was passed to the applicant, who responded to it on 12 December 2018.

6. On 10 January 2019, Mr. Ronayne contacted the applicant and the notice party to inform them that he had formed the opinion, in line with clause 1.10 of the Disciplinary Procedure, that an informal resolution of the complaint was not feasible. As a result, a subgroup of the Disciplinary Committee was proposed to meet, as is provided for in the

rules, to review material and consider whether there was a *prima facie* basis for the complaint which could constitute a breach of the rules of the Union.

7. Also on 10 January 2019, the notice party notified Mr. Ronayne that she would be sending a further submission in respect of her complaint in which she alleged the applicant had provided the Phoenix magazine with information which was injurious to her name.

8. On 18 January 2019, the applicant contacted the Union and the Registrar of Friendly Societies as he believed that the Disciplinary Rules, under which the complaint was being dealt with, had been in some manner unlawfully amended by the Union. Subsequently, Mr. Ronayne wrote to the Registrar of Friendly Societies setting out the position. I will refer to this correspondence later in the judgment.

9. By email of 25 January 2019, Mr. Ronayne wrote to the applicant informing him that the subgroup of the Disciplinary Committee had reviewed the complaint together with the related papers and had decided that there was a *prima facie* case against him. In line with the Disciplinary Procedure, the applicant was informed that an investigating official from outside the Civil Service Division of the Union would contact him. Subsequently, Mr. Billy Hannagan agreed to investigate the complaint.

10. Mr. Hannagan, by letter dated 5 March 2019 both to the applicant and the notice party, informed them of his appointment and set out the investigation procedure that would be followed. The investigation concluded by way of a written report of 25 July 2019. This report set out the facts established in the course of the investigation.

11. By letters dated 29 July 2019, both the applicant and the notice party were furnished with a copy of the investigator's report and their comments were sought.

12. The next stage in the disciplinary process was the establishment of a "*Deliberative Disciplinary Committee".* This was held on 20 September 2019. The applicant was informed that he could make oral submissions to this committee if he so wished. The applicant responded stating that he had nothing to add to his position which was set out in two submissions amounting to some 36,000 words. The applicant stated that if the Disciplinary Committee "*does not find the arguments set out across my 36,000 word submissions to be sufficiently persuasive and opts to uphold Ms. Kelly's purported complaints, then this will be dealt with on appeal, either to an independent party in line with paras. 1.34 and 1.35 of the Disciplinary Procedure or to a court of appropriate jurisdiction…".*

13. The meeting of the Deliberative Disciplinary Committee took place on 20 September 2019. By a letter dated 25 September 2019, the applicant was informed that the committee had upheld the complaint and imposed "*the following penalty: that you are debarred from participating in any way in branch of Union administration for a period of two years with effect from the date of this ruling or from the date of any potential appeal should this decision be upheld".*

14. Under the rules for the disciplinary process, an appeal lay from this decision. Mr. Ronayne informed the applicant that the Union proposed to appoint Mr. Pat Brady, an expert in industrial relations and adjudicator within the Workplace Relations Commission, as the external person to conduct the appeal. The applicant objected and Mr. Kevin Duffy BL, former Chairperson of the Labour Court, was appointed instead of Mr. Brady.

15. Mr. Duffy BL subsequently held an oral hearing in respect of the appeal on 2 December 2019. The decision of the appeal was: -

> "Having regard to all of submissions and arguments advanced in this appeal, I cannot find any error in the findings and decisions of the Disciplinary Subcommittee. I am further satisfied that the disciplinary sanction imposed on the appellant was warranted on the facts established or admitted. In these circumstances the appeal cannot succeed. I find accordingly."

Application for Judicial Review

16. On 16 December 2019, the Court granted the applicant leave to apply by way of judicial review for, *inter alia*: -

    (a) An order of *certiorari* in respect of an adverse ruling by the respondents; and

    (b) Damages for reputational damage, breach of contract and stress.

17. In his Statement of Grounds, the applicant maintained that there was no "*complaint*" under the rules of the Union and referred to rule 27, para. 1.8, which states: -

> "From time to time disagreements and disputes will take place between members within branches, committees etc. These may be brought to the attention of senior elected representatives and fulltime officials to deal with but they do not constitute complaints within the meaning of rule 27 and the Disciplinary Procedure."

18. The Statement of Grounds also placed emphasis on what the applicant considered to be the "*public law*" aspect of the Union and its Disciplinary Procedures. The applicant also made the case that the "*deliberative meeting*" was held outside the relevant time limits and claimed that "*…the charges that the case was apparently decided upon were radically different in nature and scope to the ones that had previously been put to me…".*

19. The Statement of Opposition made a preliminary objection in that it was maintained that the case being made by the applicant was not amenable to judicial review. Without prejudice to this, the respondents stated that there had been no procedural deficiencies and if there had been any departures from the relevant rules, such were immaterial.

Justiciability

20. The first matter which I have to decide is whether the decision made by the respondents which the applicant seeks to impugn is amendable to judicial review or whether the issues raised by the applicant are matters of private law arising from a contract with the Union. When considering this, I will, firstly, refer to what are often termed the "*Geoghegan principles*". These arise from *Geoghegan v. Institute of Chartered Accountants in Ireland*

[1995] 3 I.R. 86. In this case, the applicant was a member of the respondent. All members agreed to abide by the provisions of the respondent's Charter and By-Laws. In 1992, the disciplinary procedures established under the By-Laws and approved by the Government were invoked against the applicant. The applicant contended that the By-Laws had no validity. Amongst the issues considered was whether the applicant had raised issues of public law which were amenable to judicial review. I refer to the following passage from Denham J. (as she then was) in the Supreme Court: -

> "In view of the public nature of the source of the Institute, the functions of the Institute, and the nature of the contract between the applicant and the Institute, the subject of judicial review becomes part of the question of constitutional justice of the relationship. There are a number of important factors:—
>
> (1) This case relates to a major profession, important in the community, with a special connection to the judicial organ of Government in the courts in areas such as receivership, liquidation, examinership, as well as having special auditing responsibilities.
> (2) The original source of the powers of the Institute is the Charter: through that and legislation and the procedure to alter and amend the bye-laws, the Institute has a nexus with two branches of the Government of the State.
> (3) The functions of the Institute and its members come within the public domain of the State.
> (4) The method by which the contractual relationship between the Institute and the Applicant was created is an important factor as it was necessary for the individual to agree in a 'form' contract to the disciplinary process to gain entrance to membership of the Institute.
> (5) The consequences of the domestic tribunal's decision may be very serious for a member.
> (6) The proceedings before the Disciplinary Committee must be fair and in accordance with the principles of natural justice, it must act judicially.
>
> In these circumstances, I am satisfied that a decision of the Disciplinary Committee may be the subject of judicial review pursuant to O. 84 of the Rules of the Superior Courts, 1986."

21. *Eogan v. University College Dublin* [1996] 1 I.R. 390 concerned a challenge by the applicant to a decision of the Governing Body of the respondent not to recommend his continuance in office after the age of sixty-five. The respondent raised the issue of justiciability. Shanley J., having considered previous authorities including *Geoghegan v. The Institute of Chartered Accountants*, stated (p. 398): -

> "From the foregoing it appears that in considering whether a decision is subject to judicial review the following are among the matters which may be taken into account:—
>
> (a) whether the decision challenged has been made pursuant to a statute;

(b) whether the decision maker by his decision is performing a duty relating to a matter of particular and immediate public concern and therefore falling within the public domain;

(c) where the decision affects a contract of employment, whether that employment has any statutory protection so as to afford the employee any 'public rights' upon which he may rely;

(d) whether the decision is being made by a decision maker whose powers, though not directly based on statute, depend on approval by the legislature or the Government for their continued exercise."

Thus, it is necessary for the Court to examine the connection or nexus, if any, between: on the one side, the decision being challenged, and the organization, or unit of the organization, that made the decision; and, on the other side, the State or an emanation of the State.

22. This was considered by Peart J. in *Becker v. Board of Management of St. Dominic's Secondary Schoo*l [2005] IEHC 169. In this case, the applicant sought to judicially review a disciplinary decision of the board of management of the school in which she worked. Peart J. firstly distinguished an earlier decision of *Beirne v. Commissioner of An Garda Síochána* [1993] I.L.R.M. 1 which concerned an application by a trainee Garda in respect of a decision terminating his assignment as a trainee: -

> "… It is a situation distinguishable from cases such as *Beirne v. Commissioner of An Garda Síochána,* where a public law element was identified arising from the nature of the decision under review and function of An Garda Síochána in the community."

Peart J. continued: -

> "I have set out these matters in some detail in order to highlight the extensive public nature of education. However, it is not sufficient for the applicant simply to show that the nature of the job she performs is of such importance to the advancement and development of society as a whole in order to bring her present claim within the reach of judicial review. There is a distinction to be drawn between the wider aspects of education, and the statutory provisions, such as those to which I have referred, and the narrower aspects of this particular case, such as the employer/employee relationship between her and the respondent which is based, as has been pointed out, solely on a contract of employment entered into between the parties. The decision sought to be impugned in this case, namely one to give her a written warning, is one made by her employer as part of a disciplinary procedure applicable in the school. The applicant has a grievance in relation to that decision to issue a warning letter. The merits of that dispute are not in issue in this case at this stage. What is at issue is simply whether the applicant is confined to a purely private law remedy, rather than remedy by way of judicial review. Let us suppose that she had been dismissed, and not simply warned in writing. In such a situation, would the decision to dismiss her be amenable to judicial review or must she rely on her private law remedy? The answer must be that the dispute is not

amenable to judicial review, as lacking that public law element which is essential to judicial review relief."

Application of Principles

23. The applicant sought to rely on the "*Geoghegan principles*", emphasising the statutory control of trade unions and the fact that many members of the Union work in the Department of Justice and the Courts Service.

24. The respondent submitted that the issues raised by the applicant were matters of private law arising out of a contract between the applicant and the Union and, thus, lacked the public law element essential for judicial review relief.

25. The applicant relied on the judgment of Denham J. in *Geoghegan* (cited at para. 20 above) in which she referred to members of the Institute of Chartered Accountants acting as receivers, liquidators or examiners and, thus, having a special connection to the judicial organ of Government. He then sought to draw an analogy with members of the Union who work for the Courts Service. I do not accept that analogy. It may well be the case that members of the Union have very senior and important positions within the Courts Service which carry a heavy responsibility. However, their position is different to that of a receiver, liquidator or examiner as those persons are appointed by a court to positions created by statute, have to perform their duties in accordance with the relevant legislation and are subject to the supervision of the court. That also may include chartered accountants "*having special auditing responsibilities*", as referred to by Denham J. The applicant did not place before the Court any evidence that his membership of the Union had any "*statutory protection so as to afford the employee any 'public rights' upon which he may rely…*" as per (c) of Shanley J. in *Eogan v. University College Dublin*.

26. It is correct that the Union, like other trade unions, is regulated by statute. However, this regulation does not extend to the membership rights of the applicant so as to give him public law rights over and above the private law rights which he enjoys as a member. Further, the disciplinary rules and procedures are not either based on statute or dependent upon approval by the legislature or Government. Support for this conclusion comes from one of the steps which the applicant took himself in the course of the investigation of the complaint. As referred to at para. 8 above, the applicant, in a letter to the Registrar of Friendly Societies, maintained that any amendments to the rules of the Trade Union, including disciplinary rules, must be reported to the Registry of Friendly Societies under s. 16 of the Trade Union Act 1871 and also referred to Statutory Instrument 364/2018 which concerns an application for the registration of *"a partial alteration of the rules".* In response, the respondent wrote that some technical changes to the disciplinary procedure were sanctioned by the executive committee of the Union in November, 2018 but that these amendments "*do not constitute amendments to the rules of the Union and consequently do not require registration with the Registry of Friendly Societies*". This statement was not contested by the Registrar of Friendly Societies.

27. In my view, the applicant has failed to establish that either the "*Geoghegan principles*" or the matters set out by Shanley J. in *Eogan v. University College Dublin* have application

to him. I also am of the view that the analysis which was carried out by Peart J. in *Becker v. Board of Management of St. Dominic's Secondary School* is applicable here with similar results. Thus, I conclude that the issues raised by the applicant are not ones of public law but are, rather, matters of private law arising from his membership of the Union. It therefore follows that this application is not amenable to judicial review and, thus, not justiciable by the Court.

Conclusion

28. By reason of the foregoing, I refuse the applicant the reliefs sought herein. As this judgment is being delivered electronically, I will allow the parties up until 15 January 2021 to make written submissions on consequential orders.