THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 743

[Record No. 456 2022 JR]

BETWEEN

GEAROID JOHNSON

APPLICANT

AND

THE TEACHING COUNCIL

RESPONDENT

JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 31st day of December 2024

1. The applicant is a teacher registered with the respondent Teaching Council and has issued judicial review proceedings seeking to quash a decision dated 26 January 2022 of the respondent's Investigating Committee to refer a complaint against the applicant to their Disciplinary Committee. The applicant's judicial review proceedings, issued on 30 May 2022, challenges that decision as irrational and unreasonable, and accuses the respondent's Investigating Committee of having failed to comply with its statutory obligations pursuant to the Teaching Council Act 2001 (hereinafter referred to as "the Act").

2. This judgment relates to the applicant's interlocutory application brought by way of notice of motion dated 8 March 2024 in which the applicant seeks:

- Discovery of documentation, including briefing documents or other advices;
- An order directing replies to particulars the applicant sought in correspondence;
- An order striking out the statement of opposition or, alternatively, directing the respondent to submit a statement of opposition in compliance with O. 84, r. 22(5);
- Liberty to amend the statement of grounds to include additional pleas the applicant says only came to light since leave was granted.

Background

3. In January 2020, the applicant was informed by the Chief Executive of the City of Dublin Education and Training Board that he was to be dismissed from his position as a teacher at Ballyfermot College of Further Education. The Chief Executive then wrote to the respondent raising concerns about twelve social media posts alleged to have been made by the applicant prior to 2016. At their meeting of 26 April 2021, the respondent's Executive Committee decided to refer the complaint to the Investigating Committee and confirmed this to the applicant by letter dated 21 May 2021. The applicant was given a copy of the draft minutes of the April meeting and was advised that there are two parts to the initial consideration of a complaint depending on when the events occurred and whether the Committee was required to refuse the complaint. He was told that if the Investigating Committee proceeded to investigate the complaint, he would be given copies of the documentation received in relation to the complaint and would be invited to provide submissions and information to the Investigating Committee before it decided whether to refer the complaint to the Disciplinary Committee for an inquiry. The applicant made a submission to the Investigating Committee by email on 18 June 2021, which was described by the respondent's deponent in her affidavit verifying the respondent's statement of opposition, as not appearing "…*to address the issues which it had been indicated to the Applicant were to be considered by the Investigating Committee on a preliminary basis*".

4. The Investigating Committee met on 24 January 2022 and decided (1) ten of twelve of the social media posts amounted to conduct that would have constituted an offence contrary to s. 2 of the Prohibition of Incitement to Hatred Act 1989 and (2) the applicant's conduct was of such a nature as to reasonably give rise to a *bona fide* concern that the teacher may harm or cause harm to a child or vulnerable person, as required by s. 42(1B) of the Act. The Committee decided it would investigate the complaint. The applicant was invited to furnish submissions, which he did by email on 27 July 2021. Further correspondence, documentation and submissions were exchanged over the following months.

5. At its meeting on 24 January 2022 the Investigating Committee formed the opinion that there was a *prima facie* case to warrant further action and decided to refer the complaint to the Disciplinary Committee for an inquiry. The applicant was advised of this by letter dated 1 February 2022. The respondent did not hear from the applicant again until the

substantive judicial review proceedings were served in July 2022, following which further correspondence was exchanged between the parties. The within notice of motion was filed on 8 March 2024.

Statutory jurisdiction of the Investigating Committee

6. Section 42 of the Act sets out the inquiry process that is to be conducted by the respondent's Investigating Committee where a complaint has been made about a registered teacher that, *inter alia*, their behaviour constitutes professional misconduct. Section 42(1B) makes particular provision for where the conduct complained of occurred prior to the coming into operation of the relevant provisions of the Act, i.e. 25 July 2016. Section 42(1B) provides:

> *"(1B) The Investigating Committee may consider a complaint relating to the matter specified at paragraph (b) of subsection (1) notwithstanding that the conduct to which the complaint relates occurred prior to the coming into operation of this Part where that conduct—*
>
> *(a) would have constituted a criminal offence at the time that conduct occurred, and*
>
> *(b) is of such a nature as to reasonably give rise to a bona fide concern that the teacher may—*
>
> *(i) harm any child or vulnerable person,*
>
> *(ii) cause any child or vulnerable person to be harmed,*
>
> *(iii) put any child or vulnerable person at risk of harm,*
>
> *(iv) attempt to harm any child or vulnerable person, or*
>
> *(v) incite another person to harm any child or vulnerable person."*

7. The Investigating Committee decided at its meeting of 29 June 2021 that it did have jurisdiction pursuant to section 42(1B). The single substantive relief sought by the applicant in his judicial review proceedings, for which he has been given leave, is to quash the Investigating Committee's later decision of 24 January 2022 to refer the complaint to the Disciplinary Committee. The applicant has never sought to challenge the Investigating Committee's earlier decision of 29 June 2021. Therefore, if the applicant succeeds in his substantive judicial review proceedings, it is the decision of 24 January 2022 to refer the

complaint to the Disciplinary Committee that will be quashed and any other decision including that of 29 June 2021 will still stand.

8. The focus of the applicant's interlocutory application for discovery and particulars is on the earlier decision of 29 June 2021, rather than the decision of 24 January 2022. The applicant argues he is entitled to know what opinion the Investigating Committee formed in determining it had jurisdiction pursuant to s. 42(1B), the basis for that opinion and how it was formed, given that the matter will never be revisited, including by the Disciplinary Committee if or when the complaint is referred to them. The applicant moves on the respondent's duty of candour as a public body in judicial review proceedings (as per, for example, Cooke J. in *Saleem v. Minister for Justice* [2011] IEHC 55 and Barrett J. in *Murtagh v. Kilrane* [2017] IEHC 384). That duty of candour was more recently described by Clarke C.J. in *Student Transport Scheme Ltd v. Minister for Education and Skills* [2021] IESC 35 as "*the principle that public authorities should be transparent in litigation*" (at para. 6.12). It was described by Barrett J. in *Murtagh* as applying to "*the reasoning behind* ***the decision challenged*** *in the judicial review proceedings*", at para. 25(5) citing *Belize Alliance,* and at para. 25(8) to the "*full facts and reasoning* ***underlying the decision challenged***" [my emphasis].

9. Counsel for the applicant argued that they are entitled to challenge the basis for the Investigating Committee's earlier decision and to do that, they need to know what the Committee did. They condemn the approach adopted by the respondent in correspondence and in opposing this motion, as a refusal to say what happened on 29 June 2021 and they say the respondent is obliged to set out how they complied with the Act at that time.

10. Some of what the applicant seeks, especially in relation to the particulars sought**,** goes beyond documentation that would normally be involved in discovery or the provision of information in particulars as he seeks narrative type answers to the wide questions he has posed. Counsel for the applicant in oral argument suggested that the matter could be addressed by the court directing the respondent to file a new statement of opposition but fairly conceded the absence of authority of where this approach has been taken, endorsed or suggested by another court.

11. What the applicant seeks is similar to what was found to be an attempt to supplement a decision, and which was rejected by Hyland J. in *Jackson Way Properties Ltd & anor v. The Information Commissioner* [2020] IEHC 73 in reliance on the decision of the

Supreme Court in *The State (Crowley) v. The Irish Land Commission & ors* [1951] IR 250, where O'Brien J. said:-

> "*…the judgment and order of the Commissioners must speak for themselves and must be construed and interpreted by me in the words of the judgment and order… It is, however, sought to supplement the orders and written judgment by reference to the affidavit sworn by the Lay Commissioners. I do not consider that recourse can be had to the affidavit for this purpose. The determination of the Lay Commissioners appears in, and must be gathered from, the formal orders made by them and the affidavit cannot be utilised for the purpose of adding to, explaining, or contradicting their written orders."*

Hyland J. applied that to what she described, at para. 33 of her judgment, as the Information Commissioner's attempt to:-

> *"…supplement or vary the Decision by explaining what certain passages in the Decision meant, to what extent they were material to the Decision and their impact on the Decision as a whole. This seems to me an impermissible attempt to add to the Decision in the way criticised in Crowley. The Decision must stand or fall on its own terms and should not require to, or be permitted to, read in conjunction with a later explanation."*

12. Here, the respondent's deponent has sworn, in a supplemental affidavit dated 9 February 2023, that the respondent's entire documentary record of the applicant's disciplinary proceedings has been put before the court. That includes the minutes of the Investigating Committee 29 June 2021 meeting which make it clear what the Committee believed it was required by s. 42(1B) to do, i.e. assess if the conduct complained of would have constituted a criminal offence at the time it occurred and whether it was of such a nature as to reasonably give rise to a *bona fide* concern of the type set out in the section.

13. The applicant claims that the respondent did not have the correct statutory definition of "*harm*" in mind when it made its decision on 29 June 2021 and argues that the respondent should accept or deny this assertion and set out the factual basis for their position. The applicant seeks both discovery and an order directing particulars of the Investigating Committee's understanding of "*harm*". However, "*harm*" is given a clear statutory definition by s. 2 of the Act that the Investigating Committee was required to apply, which is set out at s. 2 of the National Vetting Bureau (Children and Vulnerable Persons) Act 2012. The

respondent should not be required to make discovery or furnish a narrative reply to a wide request for particulars about the meaning that was attributed by the Investigating Committee to a word that has a clear statutory meaning, of which it can be assumed (in the absence of evidence to the contrary) the Committee was aware.

14. For those reasons, I refuse the applicant's application for discovery and an order compelling replies to particulars.

Amending the statement of opposition

15. The statement of opposition runs to some nine pages and 23 paragraphs which identify the respondent's position on the legal issues the applicant has set out in his pleadings, primarily the correct statutory interpretation of s. 42 of the Act and the respondent's compliance or non-compliance with it. It does contain denials of the applicant's allegations (as might be expected) but it is not limited to bare denials as it also contains extensive pleas around what the respondent claims was done lawfully within its jurisdiction and in compliance with the Act. One example of that detailed pleading can be seen immediately following the respondent's preliminary pleas at paras. 1 and 2, following which a subheading of '*General grounds of Opposition'* is set out. Thereafter, paras. 4 to 8 inclusive set out in some detail what the respondent says the Investigating Committee is, what its powers and obligations are and why it says the Investigating Committee was lawfully entitled to do what it did. In setting out this detail of the respondent's pleading, I neither commend nor condemn the respondent's position as that will be for the judge hearing the substantive judicial review proceedings. I do rely on the detailed pleas contained there and elsewhere in the statement of opposition in rejecting the applicant's application to strike out the statement of opposition or direct the submission of a new statement of opposition in order to comply with Order 84, rule 22(5).

16. The statement of opposition as drafted allows the applicant to know the case the respondent is putting forward and complies with the respondent's obligations in this regard as set out by Cooke J. in *Saleem*.

17. For those reasons, I refuse the application to strike out the statement of opposition or direct the respondent to file an amended version.

Application to amend the statement of grounds

18. The applicant wishes to add to his statement of grounds as he says the relevant information only came into his knowledge after the granting of leave and exchange of

pleadings and correspondence. The applicant wishes to add the following three paragraphs to his statement of grounds:-

> *"31(b). The Respondent failed to take into account relevant information including the Applicant's submissions, submitted after 29 June 2021.*
>
> *31(c). The Respondent's Investigating Committee failed to consider, determine or apply the correct definition of "harm" and "professional misconduct" during the complaint process.*
>
> *31(e). The Respondent has failed in its public law duty to make full and fair disclosure of all relevant material, despite being called upon to do so."*

19. The respondent says the applicant had sufficient information prior to the application for leave to enable him to make the arguments he now wishes to add. The respondent did not cite any prejudice it would suffer if the amendment were to be allowed.

20. In relation to 31(b) the applicant relies on the averment made by the respondent's deponent at para. 14 of her affidavit, sworn on 18 November 2022, that the applicant's submission to the Investigating Committee prior to the decision of June 2021 did not appear to address the issues it had been indicated to the applicant were to be considered by the Investigating Committee on a preliminary basis. Counsel for the applicant described 31(c) as a '*belt and braces*' approach and asserts that 31(e) arises from correspondence between the parties following on the granting of leave.

21. There is merit to the applicant's case that Ms. O'Dwyer's affidavit advised him for the first time of the respondent's view of the relevance (or lack thereof) of his lengthy submissions to the Investigating Committee and that the correspondence post his application for leave alleged a lack of candour on the part of the respondent in how it was dealing with the litigation. In all the circumstances, the interests of justice are best served by allowing the applicant to add grounds 31(b), (c) and (e) to his statement of grounds, and it will be for the respondent to deal with those issues at the substantive judicial review hearing.

Conclusion

22. I refuse the applicant's application for discovery, particulars and a strike out of the statement of opposition and I refuse to direct the respondent to submit a new statement of opposition. I allow the applicant liberty to amend the statement of grounds to include 31(b), (c) and (e). I will hear the parties further on any necessary orders consequent on those amendments.

Indicative view on costs

23. The applicant has succeeded in one of his interlocutory applications and the respondent has succeeded in resisting the remainder, although the applicant's arguments in relation to the order which he has secured involved an overlap with his arguments on the matters on which he has not succeeded. My indicative view on costs in accordance with s. 169 of the Legal Services Regulation Act 2015 is that there should be no order for costs. I will hear the parties on costs and any further submissions on the final interlocutory orders to be made at 10.30am on 30 January 2025.

Counsel for the applicant: Brendan Hennessy BL, Feichín McDonagh SC

Counsel for the respondent: Eoghan O'Sullivan BL, Lorna Lynch SC