AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2020:000044

O'Donnell J.
McKechnie J.
MacMenamin J.
Charleton J.
Dunne J.

Patrick J Kelly

Appellant

- AND –

The Minister for Agriculture, Fisheries and Food,
The Minister for Finance, The Government of Ireland,
Ireland, and The Attorney General

Respondents

Ruling of the Court delivered on the 15th day of April, 2021.

1. On the 30th of March, 2021, this Court delivered judgment in this appeal and, in the principal judgment of Dunne J., allowed the appellant's appeal against the decision of the Court of Appeal which had upheld the High Court's decision to refuse relief to the appellant. The case concerned the dismissal of the appellant from his post as Harbour Master in Killybegs, which dismissal was effected by a government decision of the 30th of September, 2009. That decision had been made after a disciplinary process which had been commenced in October, 2004, at which point the appellant had been suspended from duty on full pay. The investigation was conducted in accordance with the Civil Service Disciplinary Code, Circular 1/92, and resulted in a report of September, 2008, finding that the appellant was guilty of gross misconduct and recommending his dismissal from the Civil Service. In accordance with the disciplinary procedures, this was appealed to the Civil Service Appeal Board

("the Appeal Board") — which was chaired by a Senior Counsel — which reviewed the findings of the investigation, and upheld two of those findings and, in respect of one of them, upheld the recommendation of dismissal.

2. Under the then-applicable provisions of s. 5 of the Civil Service Regulation Act 1956, an established civil servant held office at the will and pleasure of the government and, accordingly, the appellant was informed that the respondent Department intended to recommend dismissal to the government and that he could submit representations to the government within 14 days of such notice. Submissions were made on the 31st of July, 2009, and, on the 30th of September, 2009, the government met and decided to accept the recommendation of the Appeal Board and the appellant was dismissed.

3. These proceedings challenged the process, the investigation, and the decision of the government. Ultimately, two members of the Court (Dunne and McKechnie JJ.) held that the involvement of a government minister who had expressed strong views about the appellant, in the government decision of the 30th of September, 2009, meant that that decision was tainted by objective bias. O'Donnell J. held that the cumulative effect of the process was such as to taint the decision, but expressed the view that the case could be remitted to the government for decision. MacMenamin J. held that the involvement of the Minister tainted the entire process. Charleton J., for his part, rejected the challenge to the investigation and the appellate procedure and held that there was no evidence that the procedure before the government had been tainted by bias.

4. The matter was put in for submissions on the 13th of April, 2020, and the parties exchanged correspondence setting out, in limited form, their contentions. It is apparent that the parties have adopted positions which were extremely — indeed, dramatically — opposed. The appellant maintains that the Court should proceed to

make an order of *certiorari* quashing the government decision, and that it would be impermissible thereafter to remit the matter to the government pursuant to O. 84 of the Rules of the Superior Courts as it is contended that the appellant is no longer an established civil servant rendering service within the meaning of s. 1 of the Civil Service Regulation Act 1956. It is argued that the consequence is that, on the quashing of the decision, the appellant becomes a civil servant suspended from duty who would either have retired or be deemed to have retired on the 17th of July, 2016 (on reaching his assumed retirement age), and that he becomes entitled, accordingly, to arrears of pay from the date of the government decision together with any increments that would have been accrued until that date, and to a pension from July, 2016, and that the Court should so order and declare. The respondent, for its part, maintains that the appellant's challenge to the investigative process has failed and, accordingly, that the finding of gross misconduct stands and that the only order the Court should make is a declaration that the decision of the government of the 30th of September, 2009, was tainted by objective bias by the attendance of the Minister; it would be a matter for the parties thereafter to address what, if anything, flowed from that finding. Alternatively, it was suggested that, if the Court proceeded to make an order of *certiorari*, it then had power to remit the matter to the government and should do so. It was suggested that anything else would be an affront to justice.

5. It is apparent that the issues canvassed by the parties are extensive and complex, had not been the subject of argument in the appeal proper, and have not been the subject of detailed legal submissions either written or oral. The Court indicated its view that, in the normal course, it would propose to make such order in the case as was not in dispute, and dispose of the question of costs, and then direct a further hearing on the questions of appropriate remedy, remittal, and consequential orders (if any). However, in view of the impending retirement of one member of the panel, that

would mean that the same panel could not be assembled to hear any such further argument and, accordingly, the Court would only take that course if the parties were agreeable. If either party had reservations concerning this course, the Court would proceed to determine the issues on the limited argument and material advanced. After consideration, both parties indicated that they were agreeable to the matter being listed for separate hearing, albeit that the issues raised would not, perforce, be determined by precisely the same panel which had heard and determined the appeal proper.

6. Accordingly, the Court will make a declaration that the decision of the government of the 30th of September, 2009, to dismiss the appellant was tainted by objective bias by reason of the attendance of Minister Coughlan at the meeting and will further direct that the parties provide written submissions not exceeding 5,000 words on the following issues:

(i) Whether, in the light of the Court's findings, the Court can refrain from making an order of *certiorari* quashing the government decision and, if so, the considerations which are applicable;

(ii) Whether, if the Court makes an order of *certiorari* quashing the government decision, the Court may remit the matter to the government and, if so, the considerations relevant to that decision;

(iii) The effect of the declaration already made on the validity of the government decision and/or the appellant's status;

(iv) Whether, and in any event, the Court could make declarations as to the status of the appellant, his entitlement to: (a) salary; (b) increments; and (c) pension, and, if so, the considerations relevant to any such orders.

These issues may be refined or adjusted at case management. The appellants should deliver such written submissions within two weeks of the date hereof (the 29th of

April, 2021) and the respondents will have a further two weeks to respond (the 13th of May, 2021) and the matter will be put in for case management one week thereafter (the 20th of May, 2021).

Costs

7. This case was for hearing before the High Court for ten days, albeit that it is said that two days were not full hearing days. The respondent accepts that the appellant succeeded in the appeal, but argues that the appellant's challenge was extremely broad-based and impugned the investigation and the appellate process, and that it is significant that the appellant's challenge failed on these grounds, with the consequence that the conclusion of the investigation and the Appeal Board that the appellant was guilty of gross misconduct stands. While, in theory, it might be possible to distinguish between the proceedings in the High Court, the Court of Appeal, and the Supreme Court, it was, the respondent submitted, more appropriate to take an overall approach and, on that basis, the respondent contended that the appellant should recover 33% of its costs in each court.

8. The appellant, for his part, argued that he had succeeded in the appeal and that the substantial costs incurred would have been avoided if the respondent had simply taken the course of conceding that the decision was invalid at the outset. It was also argued that the respondent bore considerable responsibility for the length of the hearing and, in this regard, the appellant pointed to the fact that the respondent had submitted documentation to the High Court running to 1,709 pages, whereas the appellant had submitted 700 pages. Similarly, the respondent had submitted 706 pages in respect of the appeal, whereas the appellant had submitted 287.

9. The Court considers that the starting point must be that the appellant succeeded in this appeal. It follows that he has a *prima facie* entitlement to recover the costs

involved in coming to court to achieve that outcome. However, it must be recognised that the challenge launched by the appellant was extremely far-reaching and impugned the entirety of the investigative process, and that the appellant's success was on a relatively narrow, though undoubtedly important, point. This has the significant consequence that the finding of the investigation and the Appeal Board of gross misconduct meriting dismissal remains in place and valid. Even allowing for the latitude involved in litigation and the clarity of hindsight, it is impossible to consider that, if this case had been reduced to the point upon which the appellant had succeeded, the evidence would have been as extensive, or the hearing in any way as protracted. It does not seem realistic to attempt to measure the relative responsibility of the parties by references to the pages submitted. In the first place, the documentation submitted by the respondent was in response to the challenge made by the appellant to the investigative process. Moreover, it is apparent from the evidence that the appellant took a very combative stance in relation to that process and delivered what was described in the principal judgment as a "blizzard of correspondence" which, in turn, forms part of the documentation submitted by the respondent and now relied upon by the appellant as suggesting that the respondent is responsible for the length of the proceedings.

10. Judicial review is meant to be a speedy and focussed remedy addressed essentially to the question of the legality of administrative decisions. This case has been anything but focussed and, regrettably, the process both through the investigation, and through the Courts, has been slow with the result that difficulties have been multiplied rather than reduced. The suggestion that the respondent ought to have conceded the claim at the outset is not persuasive given the breadth of the challenge brought and the fact that it was sufficiently contestable in that the claim failed in both the High Court and

Court of Appeal. It would be, at least, as plausible to observe that the appellant ought to have confined his claim to that limited issue upon which he succeeded.

11. In the circumstances, it is apparent that both parties consider that it is not possible to distinguish between the hearings in the respective courts, or to measure with any degree of accuracy the time involved in determining respective issues. The Court accepts that an overall approach is appropriate in this case and considers that the merits of the case will be met if the appellant recovers 50% of his costs in each Court up to and including the costs of the hearing on the 13th inst . The costs of the further proceedings and any hearing will be dealt with separately and will be determined in the light of those proceedings .