

SMYTH v. McLAUGHLIN

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THE HIGH COURT  
CIRCUIT NO. 11739/80 COUNTY OF THE CITY OF DUBLIN

BETWEEN:

JOSEPH SMYTH

Plaintiff

and

PATRICK J. McLAUGHLIN  
AND THE MINISTER FOR JUSTICE

Defendants

Judgment of Mr. Justice Francis Murphy delivered the 10<sup>th</sup> day of July 1984

This matter comes before me by way of appeal from the judgment and order of Circuit Court Judge Clarke delivered on the 18th December, 1981.

The plaintiff's claim is for a declaration that he is entitled to be paid by the defendants certain sums of money by way of subsistence allowance in accordance with the provisions of the Garda Síochána Allowances (Consolidation) Order 1965 (S.I. No. 218 of 1965). Rule 5 of that Order which confers, without defining, the right on members of the Garda Síochána to be paid a subsistence allowance expressly provides that the entitlement would be subject to the provisions of (among other things) Clause 10 of that Rule which provides as follows:-

"(10) Subsistence allowance shall not be paid to a member of the Force in respect of a period during which he is at either his home or his normal place of residence".

All of the relevant facts having been agreed the argument before me was limited to the proper construction of Clause 10 aforesaid and its application to the facts so agreed.

The agreed facts may be summarised as follows:-

1. The plaintiff was at all material times a member of the Garda Síochána.
2. During the period from the 22nd August, 1975 to the 15th August, 1977 the plaintiff was permanently stationed at Crumlin Garda Station.
3. For the duration of the period aforesaid the plaintiff had been temporarily transferred to the Central Detective Unit at Dublin Castle, Dublin 2.
4. For the duration of his transfer as aforesaid the plaintiff carried on his duties as a member of the Gardaí from Dublin Castle and did not return to Crumlin Garda Station.
5. Prior to the transfer of the plaintiff to the Central Detective Unit and at all times during the continuance of the period of the transfer the plaintiff lived at Crockaunadreenagh Rathcoole, County Dublin, which was the home or normal place of residence of the plaintiff.

6. That the plaintiff has computed the hours which he worked at or from the Central Detective Unit during the period of his temporary transfer and that, in the event of the plaintiff being entitled to subsistence allowance on the basis claimed, the total amount of his claim falling within the period of twelve months next proceeding the date thereof is £335.90p.

On behalf of the plaintiff it was contended simply that Clause 10 aforesaid should not be interpreted so as to disentitle a member of the Force to subsistence allowance in respect of what I may describe as "day rates" and that the Clause was only appropriate to deal with cases where overnight allowances were being claimed. However, more particularly counsel drew attention to the fact that the clause merely prohibited the payment of subsistence allowances in respect of the period during which the member of the Force was at his home or normal place of residence. It did not, counsel argued, preclude the claimant from claiming subsistence allowance for the period during which he was on duty in the Central Detective Unit but only during the period when he was at home. On behalf of the defendants it was urged that the entitlement to any

form of subsistence allowance was conditional upon or subject to Clause 10 aforesaid and that there was no distinction to be drawn between what in the Order is described as the night rate of subsistence and what, by contrast, I describe as the day rate of subsistence. In either case, the defendants argue, the claimant is disentitled to compensation if within the period in respect of which subsistence is claimed the claimant resides at his home.

I confess to having considerable difficulty in construing the statutory instrument on which this claim is based. As may be gathered from its title and the earlier instruments which it revoked the particular order consolidates provisions dealing with some ten different forms of allowances available to members of the Garda Síochána. The provisions with regard to subsistence allowance are contained in the ten clauses and four tables comprised in Rule 5 thereof. The right to subsistence allowance is conferred in the following terms:-

" - - - members of the Force employed on duty away from their permanent stations shall be paid subsistence allowance at the rates set out in the following paragraphs of this article".

The rule then goes on (in Clause 2) to draw the first important

distinction, namely, whether being away involves or does not involve a night's absence from the permanent station. Within the category not involving a night's absence there are sub-divisions based first upon the rank of the officer involved and secondly upon the duration of the absence from the permanent station. The periods of time are expressed in three classes. First, absences of five hours or more and less than eight hours. Secondly, absences of eight hours or more and less than twelve hours and, thirdly, absences in excess of twelve hours. These constitute the category which I have taken the liberty of describing as "the day rates of subsistence".

The other major category is where the absence of one or more nights is involved and this category, in addition to being sub-divided by reference to the rank of the officer involved and the duration expressed by reference to the number of nights involved, is further sub-divided by reference to the following considerations:-

1. Whether sleeping accommodation and/or messing facilities are available.
2. Whether the absence is on duty other than temporary transfer.
3. Whether the member of the Force is married and not already separated from his family.

It seems to me that the clauses dealing with the subsistence

allowance assume that Garda Stations or at any rate permanent stations afford considerable facilities for the members of the Force. I would infer from the relevant provisions that these facilities range from some type of common room, to a canteen or mess type of facility up to and including appropriate residential accommodation. Moreover it seems to me implicit in the relevant regulations not merely are these facilities available but that the members of the Force enjoy them in the sense that they are expected to be present at the permanent station to which they are attached. As I say this seems to be the concept on which the regulations are based. It seems to me clear beyond debate that the subsistence allowance is expressed as a compensation to the member of the Force concerned for his absence, be it for a period of hours or for a night or series of nights, from his permanent station and the facilities which would be available to him there. Counsel on behalf of the plaintiff drew attention to the fact that subsistence allowance is payable only as long as the member of the Force is "employed on duty". However that phrase in Clause 1 of Rule 5 must of course be read with the immediately following words which make it clear that the subsistence allowance is payable when a member of the Force is "employed on duty away from the permanent station". The emphasis is on the absence

from the permanent station not the employment on duty. That this is so, is further confirmed by Rule 17 which expressly provides that no allowance of any description payable under that order is available during any period in respect of which the member of the Force is absent from duty. It seems to me, therefore, clear that the claim for subsistence in a case of this nature cannot be computed by reference to the hours worked by the officer at or from the station to which he is temporarily transferred. No doubt the hours so worked constitute periods during which he was absent from his permanent station but certainly they are not necessarily the only hours of absence. Indeed in the present case the agreed facts establish that the plaintiff was absent from his permanent station for a period of nearly two years. Neither can I find in the relevant statutory instruments any justification for computing hours of absence by reference to a day or indeed any other period of time. The day rate of subsistence is, in accordance with the relevant regulations, to be computed simply by reference to hours of absence. Obviously the assumption is, as I have already pointed out, that the officer will return to his permanent station and that absence continues until the member does return. It would follow, in my view, that the basis on which the day subsistence allowance of the plaintiff falls to be

computed is as if he was absent from his permanent station for a period of twelve hours or more. Indeed a great deal longer was involved. But once the period of twelve hours is exceeded there is no other scale applicable until that absence is concluded by a return to the permanent station and a further period of absence subsequently occurs.

Approached in this way it seems to me that Clause 10 which I have quoted above is more readily understood and applied. It compliments Clause 1 which basis the allowance on absence from the permanent station and provides for compensation in respect of certain periods of absence therefrom but provides that no such allowance will be paid in respect of a period during which the member is at his home or residence. In this sense it seems to me that the word "at" should be read as equivalent to the word "present". Thus if a member of the Force was absent from his permanent station for four hours and present in his home for one hour he would not establish the minimum qualification for subsistence at the day rate.

It seems to me that this approach to the relevant rule is more consistent with the wording of the regulation and the scheme which it envisages than the arguments which were based on interpreting



Clause 10 as referring to periods of time within which the officer concerned slept at his home. Grammatically Clause 10 makes no reference to the officer sleeping or taking up his lodgings at his home and indeed there seems to me no reason in logic why day subsistence allowances which are paid to compensate an officer for long hours of absence from his permanent station should be affected by the fact that, having completed those particular duties and returned to his station, he subsequently retires to his normal residence. The same proposition may be stated in another way: if it had been intended that an officer should forfeit or be precluded from claiming an allowance which on the face of it accrued to him because at all times he was residing at or sleeping in his own home the clause would have so provided rather than stating as it does that he was "at" his home or normal place of residence.

Again, it is significant that in interpreting Clause 10 in this way it has a meaningful application to both day rates of subsistence and night rates of subsistence. In either case presence at the home or normal residence simply will not qualify as a period of absence from the permanent station.

As I read the regulations it necessarily follows that a member of the Force transferred temporarily from his permanent station

will receive only the sum payable in respect of the period appropriate to an absence of twelve hours or more relating to the particular rank which he holds (together with any night subsistence rates which may be appropriate). There does not appear to be any provisions within the regulations providing for subsistence allowance in respect of absence from the temporary station. On the face of it this would seem to me to operate as an injustice and I refer to this matter as counsel on behalf of the defendants specifically drew my attention to Rule 16 (2) of the order in question which provides as follows:-

"In case of duty of an exceptional character or in any special circumstances not provided for in this order the Minister may, with the sanction of the Minister for Finance, authorise the payment of such allowance as he considers to be appropriate".

As counsel has raised the matter I think it would not be inappropriate for me to say that there does not appear to be any valid distinction to be drawn between the need to provide for subsistence during protracted absence from a temporary station and similar absence from a permanent station. It may be that this is the type of case where an injustice will arise if not corrected by a special authorisation by the Minister for Defence made with the

sanction for the Minister for Finance under Rule 16 (2) aforesaid.

However with regard to the legal rights of the parties it seems to me that the judgment of the learned Circuit Court Judge must be set aside in that in lieu of the figure awarded by him that there should be substituted the figure of the sum of 64p (or the amount to which it was subsequently increased) as being the sum prescribed for an absence by a member of the Force from his permanent station for a period of twelve hours or more. Clearly the figure itself is of little significance but no doubt there is a matter of principle involved and, further, an award however small may have some relevance upon the question of costs.

*Francis D. Welch*