THE SUPREME COURT

[Supreme Court Record No. S:AP:IE:2020:000044]

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

BETWEEN:

PATRICK J. KELLY

APPELLANT

-AND-

THE MINISTER FOR AGRICULTURE, FISHERIES & FOOD, THE MINISTER FOR FINANCE, THE GOVERNMENT OF IRELAND, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 30th day of March, 2021

1. For the purposes of this judgment I gratefully adopt the narrative of events contained in Dunne J.'s comprehensive and detailed judgment. I agree that the order of the Court of

Appeal on the issue of objective bias should be quashed, on the basis of the fact that the Minister attended the Cabinet meeting. Dunne J. correctly, in my view, holds that the Minister should not have participated in the Cabinet meeting at which the decision to dismiss Mr. Kelly was taken, bearing in mind, for objective bias, the clear evidence regarding her previously expressed views on the appellant. Applying the accepted test, she concludes that the hypothetical reasonable observer would have a reasonable apprehension as to the possibility that the decision taken by the government, by reason of the presence of the Minister who had expressed those strong views at the Cabinet meeting, was tainted by objective bias. When faced with such a comprehensive and detailed judgment, one would normally hesitate before differing. But, to my mind, the test applicable in relation to the Minister's attendance at the Cabinet meeting can also be applied to the beginning of the process, bearing in mind that Mr. Fitzpatrick was not only an investigator, but also had an adjudicative role whose views were binding on the Appeal Board.

2. As will be evident, the Minister made a complaint to the Assistant Secretary General of the Department of the Marine & Natural Resources, Dr. Beamish, on the 8th October, 2004. At one level, it could be said she was relaying a complaint she had received relating to harbour management at Killybegs. Dr. Beamish sent an email to Mr. Fitzpatrick and the Secretary General of the Department which recorded the general contents of his telephone call with the Minister. Dr. Beamish also made a note that the Minister had a concern that the appellant had employed his brother-in-law in the harbour, allegedly without following due process, and that the appellant was switching off the CCTV system there. No other complaints were specified in that email.

3. To my mind, what happened next was critical. The Minister took up Dr. Beamish's offer to meet Mr. Fitzpatrick, the investigator. The purpose for this it is now said to be to outline her "full range" of concerns in the matter. This meeting involving the Minister, Dr. Beamish

and Mr. Fitzpatrick took place on the 15th October, 2004. *Mr. Fitzpatrick,* the investigator, took notes at the meeting. Those notes recorded that the Minister had outlined a much wider range of complaints in relation to the appellant. The fact that the Minister had made these complaints was not made known to the appellant during much of the investigation.

4. For the purposes of this judgment, it is unnecessary to rehearse the jurisprudence which has been so comprehensively dealt with in Dunne J.'s judgment delivered today. I do not differ from her summary of the law or her conclusion as to the test which should be applied. But, in my view, logic requires that the same logical principle must be applied to the beginning of the process as to the end point, that is, the Cabinet meeting. The fact of her attendance does not raise an issue of Cabinet confidentiality. If she had been absent from the meeting or had absented herself for this part of the agenda of the Cabinet meeting, nothing would have prevented her from deposing to this effect by affidavit. There is no such evidence. But the first question that arises is a simple one. Why did the Minister meet Mr. Fitzgerald? There was absolutely no necessity for the meeting. The investigation could have simply commenced with a communication from Dr. Beamish to Mr. Fitzpatrick, asking him to commence an investigation, in fact, said to be one of a series.

5. The Minister's original complaints could have been passed on to Mr. Fitzpatrick. Mr. Fitzpatrick could then have commenced his investigation. The question then sub-divides itself as to the fact of the meeting and the content. I do not think that the fact of the meeting can be classed as irrelevant to the process. There was no evidence that, for some reason, there should be personal contact between the Minister and Mr. Fitzpatrick, who was to carry out the investigation. If there had been, the Court would have been informed. The second limb in the context of the meeting, that a number of the complaints made by the Minister and conveyed to Mr. Fitzpatrick, turned out to be irrelevant, is immaterial. What is relevant is that a meeting did take place between a senior cabinet Minister from another department and a departmental

official, where the Minister gave expression to what can only be seen as a series of highly prejudicial comments in relation to Mr. Kelly's character, conduct and personality.

6. Mr. Fitzpatrick recorded the following about the appellant, prior to embarking on the investigation:

- "Difficult man"
- "People apoplectic – not acceptable"
- "HM piloting boats, getting paid cash, not D Marine books"
- "No security system – PK doesn't want"
- "Anti-social behaviour (drinking) (college) xxx haunt"
- "Girl in office"
- "Nervous breakdown – not well"
- "PK bully boy"
- "PK money (beat wife)"
- "Doorman, nearly killed young fella"
- "Shot every dog in D'Gal Town"

7. The concern is, then, what inference an objective observer may draw, not only from the *fact* of the meeting, but from the content. Unavoidably, the evidence establishes that to an objective observer, the investigator, whose findings were to have binding effect, embarked on the investigation with this range of quite damning criticisms in his mind. As Dunne J. comments, in making the complaints the Minister used intemperate language. (para. 116 of her judgment). It may be that some of the complaints made by the Minister did not, ultimately, form part of the investigation. It may indeed be that the *particular* complaints were irrelevant to the investigation as it transpired. But, to my mind, the objective observer, possessed now of the relevant facts, would have to draw the inference that, seized of information from an authoritative and influential source, Mr. Fitzpatrick was going to carry out a process involving

adjudication regarding a person who was difficult, had engaged in unacceptable behaviour, was getting paid cash, who was refusing to utilise a security system, was engaging in anti-social behaviour, including drink involving a college, and what was called an "XXX" haunt; that a girl in the office had a nervous breakdown and was not well; that the person to be investigated was a bully boy; that there were issues about money; that he had assaulted his wife; and another young person, and that he had shot every dog in Donegal Town.

8. The objective bias test does not concern whether Mr. Fitzpatrick used this information or whether it formed part of his investigation; but, rather, that a meeting had taken place between himself and an extremely important person who had told him these things about the man who he was about to investigate, and that he, Mr. Fitzpatrick, had carefully noted them all down.

9. All these things must be seen in light of the investigator's ultimate role as a fact finder *and adjudicator*. The investigator's adjudicatory role is provided for in Clause 3 of the Circular 1/1992 on *Procedures for dealing with grievance and disciplinary problems*. The appeal board did not decide to hold a *de novo* hearing. Its jurisdiction to review was limited to the grounds specified in Clause 4.3 of Circular 1/1992. For completeness, the whole of clause 3 and 4 of the Circular 1/1992 is laid out below:

> *"3. Procedure*
>
> *Where an allegation of misconduct, irregularity, neglect or unsatisfactory behaviour warranting disciplinary action is made against an officer the following procedure shall apply:*
>
> *(1) The Personnel Officer shall cause an investigation or such further investigation as s/he considers necessary to be held to ascertain the facts of the case.*

(2) Where the Personnel Officer is satisfied, on the basis of the investigation, that the alleged conduct may have occurred and that such conduct, if it occurred, would warrant disciplinary action, s/he shall furnish the officer concerned with - a statement of the allegation(s) which s/he considers may be substantiated by the investigation; - a statement of all the evidence supporting the allegation(s) which s/he will take into account in arriving at a decision; - a statement of the penalty which, having regard to the breach(es) of discipline alleged and the evidence considered to date, s/he considers would be warranted if the allegation(s) were substantiated; - a copy of this disciplinary code.

(3) The officer concerned shall submit a response to the allegations in writing within 14 days of receipt of the material referred to at (2) above. However, the Personnel Officer may give effect to the procedure set out below notwithstanding non-compliance by the officer concerned with this requirement.

(4) The officer concerned may include in his/her response a request for a meeting with the Personnel Officer to consider the allegation(s). In the event of such a request the Personnel Officer shall arrange a meeting. The officer concerned may be accompanied at any such meeting by a serving civil servant of his/her choice and/or by a wholetime official of the union holding recognition for his/her grade.

(5) Having considered any response by the officer concerned and any written or oral representations made by or on behalf of the officer concerned, the Personnel Officer shall decide whether the allegations have been substantiated and, where s/he is satisfied that conduct warranting disciplinary action has been established, shall inform the officer concerned in writing - that it is

proposed to recommend to the relevant decision-making authority that specified disciplinary action be taken, and - that s/he may - make representations in writing to the decision making authority or - seek a review of the disciplinary proceedings by the Appeal Board (see paragraph 4 below).

(6) Where the Appeal Board has issued an opinion concerning a recommendation, the Personnel Officer shall, within 14 days of the issue of the opinion, inform the officer concerned of the action, if any, which s/he proposes to take in the light of the Appeal Board's opinion. Where no further action is to be taken the allegations will be deemed to have been withdrawn.

(7) Where, following the issue of an opinion by the Appeal Board, the Personnel Officer proposes to make a recommendation to the relevant decision-making authority that disciplinary action be taken, the officer concerned shall be given an opportunity to make representations to the decision-making authority within 14 days of the receipt of the notification referred to at (6) above.

(8) A recommendation submitted to a decision-making authority shall be accompanied by any representations made by the officer concerned and any opinion delivered by the Appeal Board.

4. The Appeal Board

4.1 The Board shall comprise - a Chairperson appointed by the Minister for Finance with the agreement of the General Council Staff Panel; - a serving civil servant nominated by the Minister for Finance; - a serving civil servant or whole-time official of a recognised trade union nominated by the General Council Staff Panel. No member shall be appointed to the board to consider a case referred to the Board who has had any prior interest in or dealings with that particular case.

4.2 An officer who has been notified by a Personnel Officer that it has been decided to recommend to the relevant decision making authority that disciplinary action be taken against him/her may, within 14 days of the Personnel Officer's notification, request in writing that the disciplinary proceedings be reviewed by the Board.

4.3 An officer may seek a review of disciplinary proceedings on one or more of the following grounds: - that the provisions of the disciplinary code were not adhered to; - that reasonable steps were not taken to ascertain the relevant facts; - that all the relevant evidence was not considered or was not considered in a careful and unbiased fashion; - that the officer concerned was not afforded reasonable facilities to answer the allegation(s); - that the officer concerned could not reasonably be expected to have understood that the behaviour alleged would attract disciplinary action; - that the sanction recommended is grossly disproportionate to the offence.

4.4 Where an officer requests that disciplinary proceedings be reviewed by the Board the following submissions shall be made (a) a written statement by the officer concerned of the grounds on which the review is being sought, to be furnished to the Board and the Personnel Officer within 14 days of the submission of the request referred to at paragraph 4.2 above; (b) a written counter statement by the Personnel Officer, to be submitted to the Board and the officer concerned within 14 days of receipt of the statement by the Personnel Officer; (c) any further or other submission which the Board may request from the officer concerned and/or the Personnel Officer, to be furnished in such form and within such time as the Board may specify in its request.

4.5 The Board may reject a request for a review of disciplinary proceedings where (a) the officer concerned fails to make a submission required under paragraph 4.4 above within the prescribed time limit, or (b) the Board, having considered any submissions made under paragraph 4.4 above, is of the opinion that the case made by the officer concerned is frivolous, vexatious or without substance or foundation. Where a request is rejected under the terms of this paragraph, the Personnel Officer may proceed in accordance with the terms of this code as though the request had not been made.

4.6 The Board may invite any person to give evidence orally or in writing at the request of either side or on its own initiative.

4.7 The officer concerned is entitled, if s/he so wishes, to make oral submissions to the Board either in person or through a serving civil servant of his/her choice, a whole-time official of the union holding recognition for his/her grade or such other person as the Board agrees may be present for that purpose.

4.8 Where the Board meets for the purpose of taking oral evidence or hearing oral submissions the following are entitled to be present: - the officer concerned, - any person who is entitled to make submiasions on behalf of the officer concerned, - the Personnel Officer, - a serving civil servant designated to assist the Personnel Officer, - any other person whom the Board agrees may be present.

4.9 Proceedings before the Board shall be informal.

4.10 Having made such enquiries as it considers necessary and having considered any submissions made or evidence given, the Board shall form an opinion as to whether or not a case has been established on one or more of the grounds set out in paragraph 4.3 above. Where the opinion is to the effect that

such a case has been established, it shall contain a recommendation that - no further action should be taken in the matter, or - the recommendation which the Personnel Officer proposes to submit to the relevant decision-making authority should be amended in a specified manner, or - the case should be referred back to the Personnel Officer to remedy any deficiency in the disciplinary proceedings (in which event the provisions of this Code shall continue to apply). 4.11 The Board's opinion shall be conveyed, in writing, to the Personnel Officer and the officer concerned. The matter shall be processed further in accordance with the provisions of this Code (see paragraphs 3(6) to 3(8) above)."

10. I do not think the issue is whether the evidence suggests that Mr. Fitzpatrick was *influenced*, either consciously or sub-consciously, by the meeting with the Minister. Nor do I think that the test can concern whether or not some of the Minister's complaints were found to be baseless. Ultimately, the allegations made in the investigative and adjudicative process were different from the matters which the Minister spoke of to Mr. Fitzpatrick. The fact that Mr. Fitzpatrick rejected some of *those* complaints does not act as a counter-balance to the fact that the same hypothetical objective observer would be aware that the investigator, *who also had an important adjudicative role*, had been apprised by a person of authority of profoundly damaging material about the bad character of the appellant and his unsuitableness to hold the post of Harbour Master.

11. As the evidence makes clear, Mr. Fitzpatrick's role went beyond mere fact-finding. It included an adjudicative function. He actually recommended *sanctions* to the Department, who adopted them. The role of the appeal board was circumscribed. It was debarred from conducting a *de novo* review of the appellant's conduct. Its jurisdiction for a review was limited by the governing regulations. The question, in this context, is whether an *objective* observer would infer that Mr. Fitzpatrick, a man with both an investigatory and adjudicative role would

have put out of his mind the fact that the person he was investigating was the man about whose fitness and character an important Minister had made very serious comments, such that he should not hold the post. The fact that Mr. Fitzpatrick found some allegations not proved is, to my mind, extraneous to the central question which must be posed throughout this process where the test is objective bias.

12. I offer an illustration. Would a court find there was objective bias if a prosecutor were to speak to a judge in chambers concerning the bad character of an accused? I think that allows only for one answer. Such a scenario would give rise to a reasonable apprehension of bias. If such a thing were to happen, we would expect a judge to recuse himself. In *O'Callaghan v. Mahon* [2008] 2 I.R. 514, Fennelly J., at page 672 of the judgment, referred back to the judgment of Denham J. in *Goode Concrete*. He summarised the principles to be applied in this way:

> *"(a) Objective bias is established, if a reasonable and fair-minded objective observer, who is not unduly sensitive, but who is in possession of all the relevant facts,* ***reasonably apprehends*** *that there is a* ***risk*** *that the decision-maker will not be fair and impartial;*
>
> *(b) The apprehensions of the actual affected party are not relevant;*
>
> *(c) Objective bias may not be inferred from legal or other errors made within the decision-making process; it is necessary to show the existence of something external to that process;*
>
> *(d) Objective bias may be established by showing that the decision-maker has made statements which, if applied to the case at issue, would effectively decide it, or which show prejudice, hostility or dislike towards one party or his witnesses."* (Emphasis added)

13. As Dunne J. points out, Fennelly J. returned to the issue of the hypothetical observer in *Kenny v. Trinity College Dublin* [2008] 2 I.R. 40, at page 45, reiterating that the hypothetical independent person should be not over-sensitive, but who had knowledge of the relevant facts. There the "relevant" facts must include the range of the evidence from the beginning to end of the process.

14. In *Reid v. I.D.A.* [2015] 4 I.R. 494, McKechnie J. reiterated that the test was reasonable suspicion, or reasonable apprehension. (*Bula Limited v. Tara Mines Limited (No.6)* [2000] 4 I.R. 412). But he went on to say:

> "*The test now to be applied is centrally rooted in the integrity of public administration generally. Thus, the prism through which the issue must be considered is that of a reasonable observer's perception of* ***what happened****. Therefore, as has been said on numerous occasions, what the parties, the witnesses* ***or even us judges think****, is not decisive. It is what the reasonable person's view is, albeit a person well informed of the essential background and particular circumstances, of the individual case."* (Emphasis added.)

15. Thus, the test remains the same "*right throughout the ambit of public administration: given that the underlying purpose of the test is confidence in the objectivity of all such persons and bodies*." The judge added "*it would be* ***invidious if the standard should differ as between one entity and another***." (Emphasis added.) In *Reid*, the decisions were taken by a multi-member Board, and the allegation of bias was against one member only; nonetheless, when sustained, the decision of the entire body was invalid: *O'Driscoll v. Law Society of Ireland* [2007] IEHC 352, (Unreported, High Court, McKechnie J., 27th July, 2007), para. 56, pages 51 and 52; *Connolly v. McConnell* [1983] I.R. 172.

16. It is instructive, I think, to apply those observations in the instant case. The test is to apply "*right throughout the ambit of public administration*". That same test is to apply even

though the relevant decisions were taken by a "*multi-member Board, and the allegation of bias was against one member only*". To my mind, therefore, the *same* test must apply to the meeting which took place between the Minister, Dr. Beamish and Mr. Fitzpatrick, as well as the Cabinet meeting which took place later, even years later. If that same test is applied, cumulatively, at both the beginning and end points, I do not think some different standard can be applied, on the basis of the fact that Mr. Fitzpatrick may not have found against Mr. Kelly on all the allegations. There is, to my mind, a disjunction between the test applicable at the end point, and that which should apply at the beginning. I think the same test must be applied throughout.

17. There is, too, one additional factor. I think an objective observer, properly informed and apprised of *all* the relevant facts, would also take into account *when* it ultimately came to light that the meeting had taken place. That objective observer would be entitled to take into account that, at no point *during* his own part of the investigatory/adjudicatory process did Mr. Fitzpatrick make known to Mr. Kelly that he had had a meeting with the Minister in which the Minister had cast aspersions on his character.

18. The objective observer would be entitled to take into account that the application for leave was made to the High Court on the 22nd March, 2010. Prior to this, the Department had provided the appellant with a copy of Dr. Beamish's email to Mr. Fitzpatrick on the 15th December, 2009. The appellant's case is that this was the first *clear* indication that the Minister had made damaging allegations against him, and it was only in an affidavit of discovery, sworn on the 23rd June, 2010, in the subsequent judicial review proceedings, that, for the first time, disclosure was made concerning the meeting between Mr. Fitzpatrick, Dr. Beamish and the Minister. An objective observer would, appropriately informed, bear in mind that requests for notes of the meeting were refused, and that the respondents refused to make voluntary discovery of them. The same observer might well take into account that what was provided first, thereafter was an illegible copy of handwritten notes of the meeting and a redacted typed

version. Such observer might also take into account, ultimately, that a typed version of the full handwritten notes was eventually provided to the appellant only by letter on the 13th July, 2011. The objective observer might also wish to contrast this with the fact that the explanation for failure to provide these notes was due to Mr. Fitzpatrick's unawareness that they were "on file". This is an unattractive explanation. It is hard to say that this conduct is consistent with the obligation of State authorities, that deal in judicial review proceedings, to deal the cards face up on the table.

19. Bearing in mind all these features, and applying the tests as identified by Fennelly J., and applied by this Court, (McKechnie J.), in *Reid*, I think it must logically follow that the entire process leading to the appellant's dismissal by the Cabinet was tainted by objective bias, applying a cumulative test to both the initiation, and conclusion, of the process. It is necessary to bear in mind throughout, that the test for objective bias is, itself, an objective one. As McKechnie J. said, it is not what we judges think, but rather the inference which an objective observer would draw as to the *process*, seen in its entirety. In my view, the order to be made must encompass the entire disciplinary process from the outset.