AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2020:000044

Clarke C.J.
O'Donnell J.
MacMenamin J.
Dunne J.
Charleton J.

Patrick J. Kelly

Applicant/Appellant

- AND –

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

Respondents

Judgment of Mr. Justice O'Donnell, delivered the 15th day of September, 2021.

1. The underlying dispute in this case has given rise to protracted litigation resulting in a decision of this Court of the 30th March, 2021 ([2021] IESC 23), where a majority of the Court (O'Donnell, McKechnie, Dunne JJ.) held, for differing reasons, that the involvement of a Minister in the decision of the Government of the 30th September, 2009, to dismiss the appellant from his position as the Harbour Master of Killybegs had the effect that the decision was tainted by objective bias. MacMenamin J., concurring, held that the entire process of investigation, appellate review and governmental decision was tainted by objective bias. Charleton J., for his part, held that there was no defect in the investigative or appellate process, and that it was not possible to establish that

participation by the Minister in the meeting such as to give rise to any such objective bias, and would accordingly have refused relief.

2. On the 15th April, 2021 ([2021] IESC 28), this Court made a limited declaration that the decision of the Government of the 30th September, 2009, to dismiss the appellant was tainted by objective bias by reason of the attendance of the Minister and ordered that the appellant recover 50% of his costs, but directed further submissions on further orders, if any, which should be made consequence on the decision of the Court.

3. The essential facts relevant to the issue which now must be decided appear to be the following. The applicant had been appointed Harbour Master of Killybegs in 1996, and was therefore an established civil servant under the terms of s. 1 of the Civil Service Regulation Act 1956 ("the Act of 1956"), rendering established service in accordance with that section. In 2004, an investigation was commenced into his conduct, and he was suspended from duty. At that time, the disciplinary procedures for established civil servants was regulated by Departmental Circular 1/92, which provided for an investigation by an investigation officer and review, where appropriate, by an appeal board. At the time of the commencement of the investigation an established civil servant could only be dismissed by decision of the Government under s. 6 of the Act of 1956. While that position and the particular investigative procedures followed at the time have been long since superseded, it has been accepted at all times that the procedure in relation to the appellant is, and continues to be, governed by Circular 1/92.

4. A very detailed, indeed meticulous, investigation took place, resulting in a report that the appellant had been guilty of misconduct as Harbour Master, meriting his dismissal from the Civil Service. The appeal board allowed the appellant's appeal in part but, and crucially, upheld the finding of misconduct meriting dismissal. On the 30th September, 2009, the Government decided to dismiss the appellant from his position. These proceedings were commenced, with a very broad-based challenge to the entirety of the

process, challenging the conduct of the investigation, the behaviour of the investigating officer, the procedure of the appeal board, the circular itself, and the constitutionality of the Act. Only one of the more than approximately 25 grounds of challenge related to the involvement of the relevant Minister. The appellant's claim failed entirely in the High Court (by judgment delivered in 2012) and in the Court of Appeal in 2019. In the meantime, the appellant had, it appears, reached the age of 65 on the 17th July, 2016. The effect of the decision of this Court is that the appellant's challenge to the conclusion of the investigating officer, as reviewed by the appellate board, that the appellant was guilty of misconduct meriting dismissal, has been rejected and that conclusion, serious as it is, stands. The decision of the Government to dismiss the appellant on foot of the report, as reviewed by the Appeal Board, has been found to be tainted by objective bias. What, if anything, follows from this outcome?

5. As discussed in the ruling of the Court of the 15th April, 2021, the parties have taken up diametrically opposed positions, and have deviated little from those positions in the subsequent submissions to this Court. The appellant claims that he is entitled to an order of *certiorari* quashing the dismissal decision of the 30th September, 2009. It is said that if such an order is made, then the consequence is that the appellant's:-

> "employment status logically reverts to what it was as of 30 September 2009, before the now-impugned Government decision was taken. At that point in time, he was an established civil servant who had been suspended pending the outcome of an investigation and disciplinary process conducted in accordance with Circular 1/92".

It is further submitted that the logical conclusion if an order of *certiorari* were made is that the matter would be remitted to the Government pursuant to O. 84 r. 27(4) to permit it to make a decision on the position of the appellant in the light of the investigation as reviewed by the Appeal Board, which I suggested in my judgment on the substantive

issue. It is argued that this is no longer possible as it is said the appellant is no longer an established civil servant "rendering established service". In such circumstances, the appellant contends that he is entitled to be treated as a civil servant suspended on full pay and recover arrears of salary and pension. In his proceedings, the appellant had claimed a declaration that the appellant continued to be the lawful incumbent of the office of Harbour Master at Killybegs, and a consequential order directing payment of arrears of salary as sought at paras. (d)(v) and (vi), respectively, of the statement of grounds. The respondents contend that the Court should make no further order than that already made in these proceedings, or, and in the alternative, if an order for *certiorari* is made quashing the decision of dismissal, the matter should be remitted to the Government to take a decision as to the employment status of the appellant but as of the 30th September, 2009 and to take effect from that date.

6. Some of the difficult issues raised by this sequence of events are readily apparent, but others are less so but nonetheless important. One issue concerns the question of pleadings and evidence. Prior to 1986, an applicant could seek one or more of the prerogative writs in proceedings commenced for that purpose, but could not seek, in the same proceeding, other remedies which had become important in the field of public law, such as declarations and injunctions, or indeed damages. Since 1986, it is now possible to include all such claims in a proceeding for judicial review. However, that change was procedural and did not create any new cause of action or allow reliefs to be granted unless an entitlement to such reliefs had been established on the evidence. In the case of damages, it remained the case that damages were not awarded merely because of an invalidity in administrative action. Rather, if the facts of the case as established could give rise to a claim for damages at common law, it was now possible to maintain that claim in a single set of judicial review proceedings and without commencing separate proceedings. It follows, however, that where any such claim is made in proceedings and is sought to be

advanced, it requires to be pleaded and proved with the same specificity, accuracy and comprehensiveness as would apply if the claim was commenced in separate proceedings.

7. Here, while the claim is pleaded in a fashion which can be described as expansive, the applicant only succeeded on one claim, and a question arises as to what reliefs claimed in the proceedings can be said, even potentially, to flow from the finding made by this Court. Second, there is here an almost total absence of pleadings as to how damages are alleged to arise and how they are to be quantified, and the grounding affidavit is entirely silent on the issue. This is particularly important in the present context, since even if the claim is to be treated as a claim for damages for wrongful dismissal (and that involves assuming a number of steps in favour of the applicant), any claim for damages would have to seek to establish a loss by reference to anticipated salary (and pension) less any alternative employment income. None of these matters are, however, set out in the grounding affidavit or statement of grounds and no attempt was made to introduce further evidence either at the trial stage, or on appeal. Indeed, it was only after judgment had been delivered in this matter and argument directed in relation to the appropriate orders that the appellant during case management belatedly and unilaterally sought to adduce evidence on, it appears, these matters in this Court without the leave of the Court, and the case management judge refused to permit such a step to be taken. Indeed, an important piece of evidence in the context of this appellant – the date upon which it is said the appellant reached retirement age and should therefore be deemed to have retired from the post of Harbour Master – is advanced only by way of correspondence after the judgment, and included in the appellant's written submissions. There is, therefore, an absence of pleadings and/or evidence upon which the Court could make any assessment of damages even if it considered that such an award was claimed in the proceedings and was appropriate. Nor would I consider it appropriate to remit the case to the High Court to allow the appellant to take steps now at this late stage in the proceedings, which have

already been unduly protracted, to amend pleadings, seek discovery and seek to adduce evidence in the High Court, with the real possibility of further disputes and appeals. The investigation was commenced 17 years ago and these judicial review proceedings – designed to provide a speedy remedy for any breach of proper administration – have been in existence for 12 years. As Irvine J. (as she then was) observed in *Diesel SPA v. Controller of Patents, Designs and Trademarks & Ors.* [2020] IESC 7 (Unreported, Supreme Court, Irvine J., March 19th, 2020), quoting Lewison L.J. in *Fage UK v. Chobani UK* [2014] EWCA Civ. 5, a trial is not a rehearsal – it is the first and last night of the show. It would, in my view, be quite wrong to permit the appellant to make a whole new case at this stage.

8. It is perhaps in recognition of the difficulties involved in advancing a claim for damages that the appellant now presents his contention as one which does not require remittal to the High Court, discovery, amended pleadings and evidence, but rather is one said to flow logically from the conclusions of the Court and lead not, it appears now, to any declaration that the appellant has remained the Harbour Master of Killybegs until he should have been deemed to retire and is therefore entitled to arrears of salary, but rather to a conclusion that the effect of an order of *certiorari* is that between the date of dismissal in September 2009, and the 17th July, 2016, the appellant was in fact, or must be deemed to be, a suspended civil servant entitled to salary, be deemed to have retired on the later date and be deemed to be entitled to a pension (and arrears) on the basis of service from 1996 until 2016. The appellant expresses an "understanding", however, that as, on this argument, he must be deemed to be suspended from 2009 to 2016 (and was actually suspended between 2004 and 2009), he cannot claim any increments which would otherwise have accrued during that period. Again, there is an absence of evidence and detail, but the appellant's arguments seek to avoid, or at least minimise, that difficulty by limiting the claim to seeking an order of *certiorari* quashing the dismissal decision and

contending that the claim to salary and pension follows as a matter of logic and, insofar as the respondents contest such entitlement, the appellant seeks orders from this Court directing the respondents to make such payments.

9. The respondents, for their part, argue that both *certiorari* and declarations are remedies which are discretionary and that, in the circumstances of this case, the Court should not grant any further relief, and should limit the appellant to the declaration already made that the dismissal decision was tainted by objective bias. In the alternative, if the Court were to make an order of *certiorari*, it should not make any declaration as to the appellant's status but rather should remit the matter to the Government for a further decision, to take effect it is argued, from the date of purported dismissal in 2009.

10. The starting point (which I think is agreed by both parties) must be that, in the ordinary course of events if this case had been decided in close proximity to the dismissal decision, a court would normally grant *certiorari* of that decision and remit the matter to the Government to permit it to make a lawful decision, untainted by the objective bias. It would be particularly appropriate in this case where the investigation and appellate process have been determined to be lawful, with the consequent findings of misconduct meriting dismissal upheld, and now beyond challenge. However, the appellant says that this course is no longer possible and that consequently the Court must grant an order of *certiorari* quashing the dismissal and further determining that the appellant's status from 2009 to 2016 was that of a civil servant suspended on full pay, or go further and declare that the appellant is the lawful Harbour Master or was such until 2016 when he is to be deemed to have reached retirement age. As already observed, the respondents argue that the inappropriateness of any such relief should leave the Court to refuse *certiorari* in the exercise of discretion, or, if necessary, order *certiorari* but remit the matter to the Government to take a decision as of the date of purported dismissal.

11. It is useful to consider in the first place whether the Court would grant the declaration originally sought by the appellant that, in consequence of an order quashing the dismissal of the appellant, he must be declared to be – or perhaps in light of the passage of time – to have been between 2009 and 2016, the lawful incumbent of the post of the office of Harbour Master of Killybegs. I have read the draft of the judgment Charleton J. delivers today, and I agree with much of what he says in relation to discretion. The fact that the remedies involved are discretionary does not, however, mean that a court is at large, or is free to take into account its views on the underlying merits. Any discretion must be exercised judicially, and it must be explained why it is considered that in the particular case the Court is justified in withholding relief which would otherwise be ordered. The position was well explained by Clarke J. (as he then was) in *Sister Mary Christian & Ors. v. Dublin City Council (No. 1)* [2012] IEHC 163, [2012] 2 I.R. 506:-

> "[T]he term 'discretion' can perhaps be misleading in this context. It is not that the Court can decide simply to decline to make an order. Rather, the term 'discretion' is designed to convey that the existence of the set of circumstances necessary to allow the Court to reach the conclusion that an order may be made does not, of itself, necessarily give rise to an obligation on the part of the Court to make the relevant order. … [t]here may, for example, be aspects of the conduct of the applicant concerned which would render it an abuse of process to permit the order to be made."

Other examples of circumstances in which an order may be withheld are delay, acquiescence and knowing submission to the jurisdiction.

12. The discretion can apply with particular force in cases related to employment and appointments to positions subject to public law. Thus, in *State (Cussen) v. Brennan* [1981] I.R. 181, Henchy J. held that while the Local Appointments Commissioners had wrongly introduced a standard requirement of proficiency in Irish as a condition of appointment,

nevertheless the Court would not grant *certiorari* of the decision to appoint another candidate by reason of a delay of only four months in seeking the relief during which the successful candidate had taken up the position. In those circumstances, Henchy J. considered a situation had been allowed to develop to a point "when it would be unfair and not in the public interest to set aside the Commissioner's recommendation". In *Minister for Education v. Letterkenny Regional Technical College* [1997] 1 I.R. 433, the High Court had held that the appointment to the position of secretary or financial controller of an individual was invalid by reason that he lacked the necessary qualifications, and ministerial approval had not been obtained. However, the Supreme Court reversed the decision, holding that ministerial approval was not a requirement, but that, in any event, and notwithstanding the fact that the candidate did not have the requisite qualifications, it would be inappropriate to quash the appointment. Hamilton C.J. held that even if it were open to the applicant to challenge the validity of the appointment, the order was discretionary and in the circumstances of that case, citing *State (Cussen) v. Brennan*, he was not satisfied that it would be just or proper to grant the order sought by the applicant quashing the appointment of the individual as secretary/financial controller. The individual had resigned his position and if the appointment were to be quashed, he would be without employment. In those circumstances, the Chief Justice considered it would not be just or proper to make the order sought and allowed the appeal on this ground also. This passage was, in turn, cited with approval in *FÁS v. Minster for Social Welfare and Abbott* (Supreme Court, Egan J., Hamilton C.J. and O'Flaherty J. concurring; Unreported, 23rd May, 1995) in holding that an appointment made *ultra vires* was not automatically void.

13. I think the approach of the Court to remedies in the field of public law is best explained in the judgment of Clarke J. (as he then was) in *Tristor Ltd v. Minister for the Environment and ors* [2010] IEHC 454 ("*Tristor*"):-

"However, it seems to me that the overriding principle ought to be that the court should do its best to ensure that parties do not inappropriately suffer or, indeed gain, by reason of invalid decision making and that, insofar as it may be possible so to do both on the facts and within the relevant statutory framework, the situation should be returned to where it would have been had the invalid decision not taken place. The extent to which it may be possible to achieve that overall principle is likely to vary significantly from case to case."

14. Later in the same case, Clarke J. stated:-

"The overriding principle behind any remedy in civil proceedings should be to attempt, in as clinical a way as is possible, to undo the consequences of any wrongful or invalid act. The court should not seek to do more than that, but equally the court should not seek to do less than that."

15. Applying these principles to the present case, it seems to me that for this Court to declare that the appellant was and must be treated as the lawful incumbent of the post of Harbour Master of Killybegs between September 2009 until the 17th July, 2016, and must thereafter be deemed to have retired from that post, with a consequent entitlement to arrears of salary and pension, would, in the words of Clarke J. in *Tristor*, be to allow the appellant to gain by reason of invalid decision-making and to go far beyond undoing the consequences of the wrongful or invalid act. In this case, it must be recalled that the protracted decision-making process involved a determination after an investigation and appeal process, which had found that the appellant was guilty of misconduct meriting dismissal, and that those findings though challenged had been upheld. In circumstances where it is accepted that the applicant would have been entitled to have the case promptly dealt with, there would have been an order of *certiorari* and a remittal to the Government, and any such declaration of continued entitlement to the post of Harbour Master and its salary and pension rights would be to do much more than simply undoing the

consequences of a wrongful or invalid act. Furthermore, it would be an exercise in fiction. The appellant did not render established (or any) service between 2009 and 2016, and did not hold himself available to do so. Instead, it appears (and there is, once again, an absence of evidence in this regard) that he pursued alternative means of employment and remuneration. He did not retire from his position: he was dismissed from it and contended such dismissal was unlawful. Any declaration that the appellant was at all times the lawful Harbour Master of Killybegs and retired from that role in 2016 would be dramatically at odds with reality. Any declaration that the appellant was the lawful incumbent would, moreover, cast doubt on the lawfulness of the position of the appellant's successor, who is, however, not a party to these proceedings. Even if it had been held that the entire process of investigation, appeal and dismissal was conducted invalidly, to hold that the appellant would be entitled to arrears of salary between 2009 and 2016, and an entitlement to full pension thereafter, as if he had discharged the duties of Harbour Master during that period, would necessarily be to confer an undeserved windfall upon him, which in circumstances where the findings of the investigation upheld by the Appeal Board are still standing, and beyond challenge, would bear no relation to the invalidity identified. As the case law shows, it is particularly important that proceedings concerning alleged invalidity of appointment to, or dismissal from, office should be pursued in a focussed manner and determined expeditiously with, if necessary, applications for injunctions and early hearings. The whole process since initial investigation to determination by this Court has been extraordinarily and unacceptably protracted. Part of this is a consequence of the manner in which the appellant met the investigation, and thereafter framed and pursued these proceedings, although it must be acknowledged too that part of the passage of time involved has been a product of the amount of time it has taken within the Court system at a time when appellate resources, in particular, were utterly inadequate. That, however, imposes an obligation on the Court system to seek to ensure that such delays do

not give rise to disproportionate and unjust relief. However, the position has been long since reached in these proceedings where I consider that a Court would consider that it would be both unfair and not in the public interest to grant any declaration that the appellant is or was the lawful incumbent of the office of Harbour Master, and that the appellant was accordingly correct not to seek such an order at this stage.

16. However, that conclusion has implications for the argument which the appellant does advance. The appellant argues that the consequence of the Court's finding on the single ground upon which he succeeded is that the order must be quashed and thereafter he must be deemed to have reverted to the status of a civil servant suspended on full pay and who must further be deemed to have retired in 2016 and to be entitled to a pension on the basis of service up until that date. The fact that this state of affairs requires to be "deemed" is instructive. It is an acknowledgement that this is not what actually occurred. The appellant was suspended on full pay in 2004 but that suspension came to an end on his dismissal. He did not retire in 2016 because he could not have done so: he was a dismissed civil servant. The appellant contends that that reality must be ignored for one part of his argument and he must be deemed to be a suspended civil servant, but at the same time argues that the same reality that he is no longer a civil servant prevents the matter being remitted to the Government for further decision. The power of quashing a decision with remittal to a decision-maker recognised in O.84 r.27(4) may allow a Court to limit the effects of an order of *certiorari* by returning the matter to a point in the process before any invalidity arose, and in such circumstances it might be said that the disciplinary process remains intact, and the clock, as it were, is reset at a certain point, in which case it might be said that the procedure can be continued from the point immediately prior to decision but if, as the appellant contends, that is now impossible, then an order quashing the dismissal would not by itself ordinarily operate to revive a suspension – instead, if there was no intervening considerations making it unjust to do so, it would have the effect

of restoring him to his position and, in an appropriate case, on the basis that he had always held it (as indeed the appellant had pleaded in this case), but something which would be inappropriate in this case for the reasons already discussed. The appellant here was not in a position to render service as a civil servant during that period and indeed appears to have engaged in employment making it impossible to do so and inconsistent with an obligation to serve as a civil servant, and to hold that he was entitled to be paid as if he was would be to provide him with a windfall gain. In other cases and in other circumstances, the obligation to match the remedy to the wrong might require the Court to consider further orders, but in this case, which is unusual if not unique, I would certainly not be prepared to "deem" the appellant to be a civil servant suspended on full pay and entitled to a pension as if he had either served in office or been available to do so during the relevant years (2009 to 2016) and I would refuse to make any order as sought by the appellant directing payment of either salary for those years or pension calculated on the basis that he had served as a civil servant (or was to be deemed to have done so) during that period.

17. I consider, however, that the approach set out in *Tristor* requires the Court to consider if it is appropriate to make an order of *certiorari* quashing the Government decision even if it does not have the consequences claimed by the appellant. Where an invalidity in a decision such as the presence of objective bias is identified in judicial review proceedings, the normal course is to quash the impugned decision unless there are factors justifying withholding that remedy. If the order of *certiorari* does not have the consequences logical or otherwise contended for by the applicant, as I would hold it does not, then I consider that, in the light of the judgment of the majority of the Court, the appellant is entitled to have the dismissal quashed, albeit that the findings of the investigation also stand undisturbed.

18. In this regard, the submissions of the parties have touched on the position of the entitlement of the appellant to a pension on the basis of his service up until the date of the dismissal in 2009. The appellant asserted that this had been withheld by the respondents because of the respondents' claim for costs against the appellant (presumably on the basis of the orders of the High Court and Court of Appeal now set aside). The respondents have denied any pension was withheld on the basis of a costs claim or otherwise and assert that no pension to which the appellant is entitled has been withheld and the reason that he has not received any pension is that he had not applied for it. It is clear that this issue does not arise directly in this appeal. It is, however, highly desirable that the differences between the parties, if any, should be resolved without further litigation. These proceedings have occupied an inordinate amount of court time and have taken much too long to be determined. I would, therefore, express the view, which is, of course, not binding on the parties, that in the light of the approach of the respondents, and, if necessary, the fact that the dismissal of the appellant is now quashed, that the appellant would appear entitled to recover his pension for the period of actual service prior to the dismissal challenged in this case. In that regard, he would be in the position of a person who had left the service with any accrued rights without being dismissed.

19. If it were the case that the making of an order of *certiorari* would quash the decision, and with the effect that the appellant could contend that he remained a civil servant suspended or otherwise and was entitled in these proceedings to recompense as such, then I would consider that it is arguable the appellant should be left to the declaration already made without any consequential relief, as concluded by Charleton J. However, in this case I consider that it is possible, in the language of *Tristor*, to approach this in a clinical way and return the situation to where it would have been had the invalid decision not taken place, without requiring one party to inappropriately suffer or gain by reason of the invalid decision-making. In those circumstances, I do not consider that it is necessary to

determine the question of whether, in the circumstances of this case, it would be possible to quash the decision of the Government of the 30th September, 2009, and remit the matter to the Government on the basis that it could, if it thought fit, ratify the decision made in the same way as it is possible to ratify the acts of an agent taken in excess of authority, which ratification relates back to the original act and anything done in consequence of it. As was said in *Koenigsblatt v. Sweet* [1923] 2 Ch. 314, 325:-

> "I think it is settled law now, that once you get a ratification it relates back; it is equivalent to an antecedent authority: *mandato priori aequiparatur*; and when there has been a ratification the act that is done is put in the same position as if it had been antecedently authorised."

The question of whether ratification would be available on the unusual facts of this case raises a number of issues. In the circumstances, I express no view on this and would consider that a just conclusion to this saga would be to make an order of *certiorari* quashing the Government's decision to dismiss the appellant under s. 5 of the Act of 1956, but refusing to make the orders sought by the appellant directing payment of salary and consequential pension entitlement, as claimed by him.