THE HIGH COURT

[2023] IEHC 262

[Record No. 2021/910JR]

BETWEEN

H

APPLICANT

AND

GOVERNOR OF A PRISON AND THE IRISH PRISON SERVICE

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered on the 19th day of May, 2023.

Introduction.

1. The applicant is a serving prison officer.

2. This is a challenge to a decision of the first respondent not to permit the applicant to have legal representation at a disciplinary meeting under step 4 of the Civil Service Disciplinary Code (hereinafter 'the code') into whether he breached the code of conduct in relation to his position of employment, by having inappropriate contact with the wife of a prisoner.

3. The core issue before the court concerns the right to legal representation before an employment disciplinary hearing.

Background

4. The applicant has been a prison officer since 1988. He has stated that he has had an unblemished employment record to date.

5. On 17th December, 2020, the wife of a prisoner, who was an inmate in the prison where the applicant worked (hereinafter 'the first complainant'), sent an email to the prison governor. That email, subject to necessary redactions to preserve the anonymity of the parties, was in the following terms:

> *"Its [name of first complainant]. Did you know that one of your ACO's there has been harassing me via messages on my phone which I have and will be showing to the papers on Wednesday when I have an interview with them. This guy bringing in drink, phones and doing bets for prisoners on the working landing. I have every message stored as proof. [Name of prisoner, the husband of the complainant] should not be where he is for starters. I am not wanting an argument. I'm really not. I'm not able for it anymore. I would love to sort this out via a telephone call. I*

could meet with you to show you what officers messages u have working in your prison. I don't tell lies. And messages don't lie either. Could you deal with [name of prisoner] P19 please. I will tell you everything regarding this officer whenever you could call me. I could, as I said, meet you in person, or send them to you via email. This officer I had him blocked, I unblocked him and he sent me silly messages again, so I blocked him, but his number is there for you to see. I am sick of the corruption going on in there with officers etc. I look forward to hearing from you. If I don't hear from you, I will be giving details of the officer to the newspaper, if you can't help me regarding your staff. Regards [first complainant]."

6. Contact was made with the first complainant by phone by an assistant governor in the prison. The first complainant identified to him that the officer to whom she was referring, was the applicant. She stated that she had WhatsApp messages from that officer. The first complainant forwarded screenshots of the WhatsApp messages to the assistant governor.

7. The sender of the messages to the first complainant, was recorded in the phone under the moniker "Liffey Valley". The first complainant told the assistant governor that that was the name that she used for the applicant. She was asked to remove that moniker from her phone. When that was done, the telephone number from where the messages had emanated, was shown. The messages with this number were forwarded to the assistant governor. The telephone number was known to the assistant governor, as being one that was used by the applicant. It was the number which the assistant governor used to contact the applicant.

8. On some of the WhatsApp messages, there was a profile photograph, which appeared to be the applicant. In addition, the first complainant had forwarded photographs that were sent along with the WhatsApp messages, which appeared to be selfies taken by the applicant showing in one case, him sitting in a car and in other photographs, him standing with another woman and a child.

9. By email dated 11th December, 2020, the applicant was informed that the wife of a prisoner had made serious allegations of wrongdoing against him. The nature of the allegations was summarised in the email. He was informed that it was intended to establish a number of investigations to examine the issues, as follows: a category A investigation; certain matters would be referred to An Garda Síochána; and certain

matters would be the subject of an internal IPS investigation pursuant to the code. The applicant was informed that pending the outcome of those investigations consideration was being given to the possibility of suspending him from duty. He was invited to make any submissions that he wished on the issue of suspension.

10. By email dated 15th December, 2020, the applicant was informed that having considered all relevant matters, including his submission on the issue of suspension, a decision had been reached to suspend him from duty, pending the conclusion of the relevant investigations.

11. By email dated 24th February, 2021, the applicant was informed that a category A investigation had been commenced in relation to the allegations that had been made by the first complainant. In the events which transpired, that investigation was concluded without reaching a result on 21st July, 2021, due to the fact that the officer carrying out that investigation, had not been able to interview the first complainant or the applicant.

12. In the interim, on 7th March, 2021, a prisoner at the prison, who was a brother-in-law of the first complainant, attended the governor's parade and claimed that some of his property was missing following his being moved from one part of the prison to another. He stated that there would be no record of this property having come through reception, as it had been brought into the prison by the applicant.

13. In a statement made on 9th March, 2021, that prisoner (hereinafter 'the second complainant') made a statement in which he made a number of allegations against the applicant. He stated that the first complainant had originated from the same area as the applicant. He stated that they were friends on Facebook and were communicating. He stated that the applicant had brought articles into the prison and had passed them to the husband of the first complainant. He alleged that these articles had been passed through the kitchen in the prison. He stated that the articles included a baby Nokia phone, with a SIM card and charger. He also alleged that drugs and alcohol had been smuggled into the prison. He alleged that the husband of the first complainant had overdosed on the drugs. He claimed that the first complainant had been paying the applicant to bring these articles to her husband, but he speculated that the applicant may have been doing these acts because he fancied the first complainant. He alleged that the applicant had passed on information as to his location within the prison, to the first complainant and that that had put him in danger, because he had had a row with her husband.

14. The second complainant further stated that the applicant had been bringing in articles to other prisoners and had placed bets for them outside the prison. He stated that the applicant had also been contacting his partner and had offered to bring articles into the prison for her. He alleged that when he had been caught in the prison with a mobile phone, the applicant had got word to him through the first complainant and her husband, that he should say that he had received the mobile phone from another named prisoner, because that prisoner had been talking about what the applicant was up to and the applicant wanted him away from the area in which he worked.

15. The second complainant stated that his partner had blocked the applicant on Facebook, but she still had all his messages. He stated that his partner was annoyed, because he was not able to get temporary release, while the applicant was able to text her; so, she wanted to go to the newspapers with that information. He stated that when the first complainant said that she would arrange clothes for her husband, the first complainant told his partner that she was meeting the applicant at the Liffey Valley Shopping Centre at lunchtime. His partner drove the first complainant to meet the applicant. She stayed in the car. He stated that another named prisoner brought the clothes from the kitchen area to him. He stated that both he and the first complainant's husband had received the clothes the same day.

16. On 4th May, 2021, the applicant was notified that a complaint had been made by the second complainant. He was provided with a copy of his statement. The applicant was advised that the allegations contained therein were going to be investigated.

17. The WhatsApp messages which were provided by the first complainant, are quite numerous, although it is not possible to say over what period of time they were exchanged. From the messages it would appear that the parties were on reasonably cordial terms. At one stage the sender of the messages to the first complainant, apologised for sending so many messages to her. He told her that she was a "beautiful girl". However, he stated that it was best if he did not contact her anymore. Earlier in the conversation, the first complainant had asked the other party not to text her while he was drinking. As previously noted, there appeared to be a number of photographs accompanying some of the messages.

18. At one point in the conversation, the first complainant made a complaint about another prisoner in another prison. She stated that he had threatened to burn her house

down, while she and her children were in it. The sender of the WhatsApp messages, stated that he would "poison the bastard" and would "stab him in the neck". He stated at a later point that he would "kill him". Later he said that he would "strangle" the man.

19. By letter dated 20th August, 2021, the applicant was informed that a formal investigation would be carried out under the provisions of the code in relation to the following matters: That he brought contraband into the prison; that he arranged to place bets for prisoners; that he arranged to have a prisoner assaulted; that he threatened to have a prisoner killed or seriously assaulted; that he made inappropriate contact with the wife of a prisoner; that he had acted in breach of trust and confidence by contacting a member of a prisoner's family without a business need; and that he had engaged in inappropriate use of social media. The applicant was informed that a fact-gathering process would be conducted in respect of the concerns that were to be investigated. The material giving rise to the concerns, was included for his attention; including copies of the email and texts supplied by the first complainant and a copy of the statement made by the second complainant.

20. An investigating officer was appointed to carry out that investigation under step 2 of the code. He made contact with the first complainant, who supplied further photographs that she said had accompanied the WhatsApp messages. She confirmed the information that she had already given to the assistant governor. However, she refused to attend an interview with the investigating officer.

21. It is not clear whether the investigating officer attempted to have an interview with the second complainant. However, it is clear from his report, that he did not have any such interview.

22. The investigating officer sought to have an interview with the applicant. The applicant attended for interview on 28th September, 2021. On the advice of his solicitor, who was not present at that interview, the applicant refused to answer any questions put to him. This was due to the fact that he had been informed by the assistant governor, in December 2020, that the allegations made by the first complainant had been referred to An Garda Síochána.

23. On 8th October, 2021, the investigating officer issued his report. In that report, having summarised the investigations that had been carried out by him, he came to the conclusion that the WhatsApp messages that had been sent to the first complainant, had

emanated from a prison officer working in the prison. This was due to the fact that in those messages, reference had been made to the movements of certain prisoners at various locations within the prison, which information had been confirmed by reference to internal prison records. This was information which could only have been known to prisoner officers. On this basis, the investigating officer reached the conclusion that the sender of the WhatsApp messages to the first complainant was an officer employed in the prison.

24. He reached the further conclusion that on the balance of probabilities, that officer was likely to be the applicant, due to the fact that the investigating officer had discovered from a review of the computer records held in the prison, that the applicant had accessed the Prison Information Management System (PIMS) in relation to certain named prisoners, who had been named in the text messages. These records would have shown their movements at the relevant time. Based on that, and in addition, on the information provided by the assistant governor, that the telephone number revealed once the moniker "Liffey Valley" was removed, was that belonging to the applicant; the investigating officer came to the conclusion that the sender of the WhatsApp messages had been the applicant.

25. In relation to the specific matters under investigation, in relation to the first matter, which alleged that the applicant had brought contraband into the prison; the investigating officer held that as the first complainant was unlikely to provide evidence and as certain other prisoners named therein were not available for interview, the substance of that allegation could not be shown to have occurred and therefore no breach of the code could be shown. In relation to the second allegation, that the applicant had arranged to place bets for prisoners; he held that given the evidence that had been gathered it could not be shown that this conduct occurred and therefore no breach of the code could be shown.

26. In relation to the third matter, that the applicant had arranged to have a prisoner assaulted; the investigating officer noted that the WhatsApp message stated that on a particular evening, a particular prisoner had "got the slaps". However, a review of prison records failed to show confirmation of any assault on the named prisoner. Accordingly it could not be said that the applicant had arranged to have that prisoner assaulted. Therefore this matter was ruled out.

27. In relation to the fourth area of concern, that the applicant had threatened in the WhatsApp messages to have a prisoner killed or seriously assaulted; the investigating

officer noted that "Liffey Valley" had made various statements in the WhatsApp messages supplied by the first complainant, where he threatened to harm or kill a particular prisoner. As already noted, he had threatened to poison the prisoner, or to stab him in the neck, or to strangle him. He had also stated that he would kill the prisoner. The investigating officer ruled that based on the evidence gathered, he was satisfied that on the balance of probabilities, it could be shown that the applicant had threatened to have a prisoner killed or seriously assaulted; which would be classified as serious misconduct under the code, with particular reference to breach of prison rule 85, a breach of trust and confidence and potentially bringing the Irish Prison Service into disrepute.

28. In relation to the fifth concern, that the applicant had made inappropriate contact with the wife of a prisoner; the investigating officer was satisfied from the material before him and, in particular, from the content of the WhatsApp messages that had been supplied by the first complainant, that this matter could be shown to have occurred and was a breach of the code under the serious misconduct category and was in contravention of rule 97 of the Prison Rules.

29. In relation to the sixth matter of concern, that there had been a breach of trust and confidence by the applicant in contacting a member of a prisoner's family without a business need; the investigating officer held that on the evidence before him and, in particular, based on the content of the WhatsApp messages, that that conduct had been shown to have occurred and was a breach of the code and a breach of rules 51 and 97 of the prison rules. Finally, the investigating officer found that the last area of concern, being the inappropriate use of social media by the applicant, had been established on the evidence before him.

30. Arising out of the investigating officer's report, the first respondent decided to hold a disciplinary meeting pursuant to step 4 of the code. By letter dated 19th October, 2021, the applicant was informed that concerns had arisen in relation to the following matters: That he had threatened to have a prisoner killed or seriously assaulted; that he had made inappropriate contact with the wife of a prisoner; that there had been a breach of trust and confidence by the applicant in contacting a member of a prisoner's family without a business need; and that he had engaged in inappropriate use of social media.

31. In that letter, the applicant was requested to attend a disciplinary meeting under step 4 of the code on 2nd November, 2021 at 14.30 hours in the boardroom of the prison.

He was informed that the purpose of the meeting was to afford him an opportunity to reply to the concerns, to enable the governor to establish the facts and to determine what (if any) disciplinary action should be taken. The applicant was informed that he had a right to be represented at the disciplinary meeting by a serving prison officer, or by an official from the Prison Officer's Association. He was informed that the role of the representative at the meeting, was to provide support. If they chose, they could make representations on the applicant's behalf, but they could not provide answers or explanations on the applicant's behalf. The applicant was furnished with a copy of the investigating officer's report.

32. In advance of that meeting, a request was made by solicitors acting on behalf of the applicant for permission to represent the applicant at the disciplinary meeting. There was an exchange of correspondence in this regard. By email dated 27th October, 2021, the applicant was informed that he was not entitled to legal representation at the disciplinary meeting. The letter stated that while there were potentially serious consequences for the applicant if the concerns expressed in the allegations levelled were deemed to have been confirmed, the applicant would have the right to defend himself at the hearing. The letter went on to refer to the decision in *McKelvey v. Irish Rail* [2020] 1 IR 573. The letter stated that that decision reaffirmed that employees were not entitled to legal representation, unless it was a very complex case, with very serious potential consequences and particularly difficult matters of law. The letter stated that as established in the case of *Burns & Hartigan v. Governor of Castlerea Prison* [2009] 3 IR 682, the situation needed to be "exceptional" for a right to have legal representation, to arise. The letter stated that in the applicant's case, while the allegations were serious, the case was not very complex, nor was it "exceptional". The letter went on to state that the first respondent was refusing the request made by the solicitors to represent the applicant at the scheduled disciplinary meeting. It was reiterated that the applicant could be represented by a trade union representative if he wished.

33. It is that decision of 27th October, 2021, that is challenged in these proceedings.

Further Developments.

34. At the hearing of this application before the High Court on 4th and 5th May, 2023, the applicant made the case that he was not able to be represented by the POA, because

they had refused to provide representation for him, because the matter was the subject of a criminal investigation by An Garda Síochána.

35. By email sent on 4th May, 2023 at 22.07 hours, Mr. Kevin Cooke of the Irish Prison Service, enquired of Supt. Mullen, whether there was any ongoing garda investigation in relation to the referral to the gardaí, that had been made by the prison service in December 2020, of the allegations made by the first complainant.

36. By email dated 5th May, 2023, sent at 10.43 hours, Supt. Steven Mullen responded to the query that had been posed by the IPS. He confirmed that in December 2020, a referral had been made to the gardaí by the IPS in respect of suspicion of inappropriate contact between the applicant and a female relative of an inmate in the prison. As part of that referral, the female concerned had been contacted and visited. She had made no criminal complaint against the applicant. He stated that as there was no criminal complaint in the matter, a garda investigation had not been commenced. He concluded his email in the following way: "*I can confirm that in the absence of a criminal complaint there was no garda investigation into this matter, additionally there is no pending or ongoing investigation in respect of this matter*".

Submissions of the Parties.

37. On behalf of the applicant, Mr. Power SC, submitted that notwithstanding that the ground had shifted considerably by the information provided by An Garda Síochána, to the effect that no criminal investigation was ongoing at present arising out of the allegations made by the first complainant, it remained a matter in which a right to legal representation arose.

38. It was submitted that the essential legal test was that set down in the *Burns & Hartigan* and *McKelvey* cases, which was whether legal representation was necessary to ensure a fair hearing.

39. It was submitted that where neither complainant had cooperated with the investigating officer, and where the first complainant had not cooperated with the gardaí, it was highly unlikely that they would attend any disciplinary hearing. This meant that the first respondent would have to consider the admission of hearsay evidence, in the form of evidence given by the investigating officer and the assistant governor, as to what the first complainant had said to them, in their telephone conversations with her. He would also to

have to consider whether he would admit secondary evidence without formal proof, being the WhatsApp messages and photographs, that had allegedly been provided by the first complainant. It was submitted that these were complex legal issues concerning the admissibility of evidence. It was submitted that it would be beyond the capability of a fellow serving prison officer, or a representative from the POA, to adequately address the legal issues concerning the admissibility of evidence, at the disciplinary hearing. It was submitted that it was necessary to ensure a fair hearing, that the applicant be allowed to have legal representation for the disciplinary meeting and for any hearing that may follow thereafter.

40. It was submitted that there were other factors which also supported the applicant being allowed legal representation at the disciplinary meeting. First, in respect of the allegations which remained "live" following the report issued by the investigating officer, it was noteworthy that he had described each of those allegations as coming within the classification of "serious misconduct" under the code. It was submitted that the allegation that the applicant had made a threat to kill or harm a prisoner, was self-evidently a very serious allegation.

41. Secondly, it was submitted that the consequences of a finding that there had been a breach of the code in respect of any of the allegations that were going to be considered by the first respondent at the disciplinary meeting, were very serious for the applicant, as there was a wide range of penalties, up to dismissal, which could be imposed under the code.

42. It was submitted that the complexity of the legal issues that arose in the case, the seriousness of the allegations which were faced by the applicant and the consequences of an adverse finding against him on any of these allegations, brought the case within the class of cases where a right to legal representation arose.

43. It was submitted that, while the decision in *Rowland v. An Post* [2017] 1 IR 355, was support for the proposition that in general a disciplinary process should be allowed to continue to a conclusion before a court would interfere, that did not apply when the disciplinary process had gone irremediably wrong, or was likely to do so. It was submitted that in this case, it was appropriate for the court to intervene at this juncture, as the applicant was not trying to stop the disciplinary process, but rather to prevent it going irremediably wrong, by allowing it to proceed without his having legal representation. It

was submitted that what he was trying to do in this application, was to prevent the procedure going irremediably wrong at the next stage. It was submitted that having regard to all these factors, the court should set aside the impugned decision.

44. On behalf of the respondents, Mr. Fitzpatrick SC submitted that the decision in *Rowland v. An Post*, was against the court interfering in the process at this stage. He submitted that the respondents had followed the procedure set down in the code to the letter. The applicant had been informed all along of the allegations and of the evidence supporting them. He had been provided with all relevant documentation. He had been given every opportunity to state his side of the story. Thus, it was submitted that there had been no breach of fair procedures to date. The court should not assume that the first respondent was likely to act in breach of fair procedures in the next stages of the disciplinary process. Accordingly, it was submitted that the court should not interfere in the disciplinary process which was ongoing.

45. It was submitted that the affidavit of the first respondent showed that he was very experienced in both appearing at, and conducting, disciplinary investigations. There was no reason to suspect that he would act unfairly in relation to any question concerning the admission of evidence, or in relation to giving the applicant every opportunity to test that evidence and to put his side of the story.

46. It was submitted that the case law provides that disciplinary procedures were not to become akin to a criminal trial. There was considerable latitude given to those conducting such investigations, both as to the admission of evidence and as to the nature of the hearing, or investigation that would be conducted. The essential requirement was that the procedure adopted, was one that was fair to the person under investigation. It was submitted that the procedure provided for in the code, which had been followed meticulously by the respondents, afforded him fair procedures at every stage of the process.

47. It was submitted that the case law also provided that the right to legal representation, only arose in exceptional cases, where there were very complex issues of fact or law involved. It was submitted that there were no such issues involved in this case. The investigation concerned a simple issue of fact: did the applicant send WhatsApp messages and photographs to the first complainant; and, if found to have done so, was that a breach of the code. It was submitted that there was no reason why the applicant,

with the help of either a fellow prison officer, or an experienced representative from the POA, could not answer these allegations.

48. It was pointed out that, to date, the applicant had not made any statement setting out any contrary version in relation to the allegations made by the first or second complainant. He had never actually denied that he sent any, or all, of the WhatsApp messages, or photographs, to the first complainant. All he had done, was to adopt a very legalistic approach, while not denying having sent the messages, he seemed to be insisting on a right to carry out a forensic examination of the first complainant's mobile phone. It was submitted that if that was something that the applicant wanted, he could apply for that at the disciplinary meeting and the first respondent would rule on it at that stage.

49. It was submitted that having regard to the nature of the allegations that remained live in the investigation at this point, there was no reason why the applicant needed legal representation to adequately defend himself at the next stage of the disciplinary process.

The Law.

50. The issue as to when a party, who is facing a disciplinary investigation, would be entitled to have legal representation in the conduct of that investigation, was considered by the Supreme Court in *Burns and Hartigan v. Governor of Castlerea Prison* [2009] 3 IR 682. In that case, the two applicants, who were prison officers, had taken a prisoner to hospital for treatment. The allegation against them was that they had claimed an excessive amount of a relevant allowance, due to the fact that the prisoner's treatment had ended at or about lunchtime, but they had remained away from the prison until much later in the day, without any apparent reason for so doing. The issue arose as to whether the prison officers were entitled to have legal representation in the disciplinary investigation that followed. Geoghegan J., delivering the judgment of the court, stated that the cases for which the respondent would be obliged to exercise a discretion in favour of permitting legal representation would be exceptional.

51. In setting out the factors that should be taken into account when considering whether a right to legal representation arose, the learned judge accepted the test set down in *R v. Home Secretary*, *Ex p. Tarrant* [1985] 1 QB 251, where the relevant factors were enumerated as follows: The seriousness of the charge and of the potential penalty; whether any points of law were likely to arise; the capacity of a particular prisoner to represent his own case; procedural difficulties; the need for reasonable speed in making

the adjudication, that being an important consideration; and the need for fairness as between prisoners and as between prisoners and prison officers.

52. Geoghegan J. approved that test, but noted that it was merely a list of the kind of factors that might be relevant in the consideration of whether legal representation was desirable in the interests of a fair hearing. He stated that ultimately, the essential point which the relevant governor had to consider, was whether from the accused's point of view legal representation was needed in the particular circumstances of the case. He reiterated that legal representation should be the exception, rather than the rule.

53. The issue in relation to the right to legal representation arose before the Supreme Court ten years later, in *McKelvey v. Irish Rail*, in a judgment handed down on 11th November, 2019, reported at [2020] 1 IR 573. In that case, the allegations against the applicant concerned the alleged misuse of a company fuel card. It was noted that as a result of an investigative process, the respondent proposed to commence disciplinary proceedings alleging, in substance, misuse of the card, amounting to what might reasonably be called theft of fuel. The applicant alleged that he had a right to be legally represented in the disciplinary proceedings.

54. Delivering the majority judgment of the court, Clarke C.J. noted that it had been accepted by the parties that the principles identified in *Rowland v. An Post*, provided that the court should only intervene if it was clear that legal representation was required. He stated that that appeared to be the correct approach. He stated that if it was clear that legal representation was required in a disciplinary process, then a denial of such representation would undoubtedly meet the criteria identified in *Rowland*, for it would be equally clear that it would be highly unlikely that any decision made at the end of such process would be sustainable. He went on to state that, on the other hand, if it was not clear that legal representation was necessarily required, then it would follow that it would be premature for the court to intervene, for the court should not assume that legal representation would be wrongfully refused in circumstances where it had subsequently become clear that the process necessitated such representation in order that it be fair (see para. 36).

55. Clarke C.J. went on to endorse the principles that had been set down by the Supreme Court in the *Burns and Hartigan* case, based on the principles set down in the *Tarrant* case. He elaborated that it was clear that the overarching principle identified by

Geoghegan J. in the *Burns and Hartigan* was to be found at p.688 of his judgment, which he quoted at para. 39 and further elaborated on that at paras. 40 *et seq*:

> *"[39] It follows that I accept, at least for the purposes of this case, that there may be circumstances in which, in line with the reasoning in Burns v. Governor of Castlerea Prison [2009] IESC 33, [2009] 3 I.R. 682, Mr. McKelvey might be entitled to legal representation in the context of the type of disciplinary process which he faces. Before going on to consider the various factors which might be relevant in an assessment of whether an entitlement to legal representation exists, which were identified in Burns v. Governor of Castlerea Prison by reference to the judgment of Webster J. in the United Kingdom in R. v. Secretary of State for the Home Department, Ex p. Tarrant [1985] Q.B. 251, it does seem to me to be clear that the overarching principle identified by Geoghegan J. is to be found at p. 688 of his judgment, where he states:*
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> > *"13. …The cases for which the respondent would be obliged to exercise a discretion in favour of permitting legal representation would be exceptional … In any organisation where there are disciplinary procedures, it is wholly undesirable to involve legal representation unless in all the circumstances it would be required by the principles of constitutional justice."*
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> *[40] It is, of course, clear that a regime (whether contractual or statutory) that provides for a disciplinary process will contain an implied term (if there is no express term to the same effect) that the relevant process will be fair. However, it is also clear that precisely what is required to ensure that a process is fair in that sense will depend on a variety of factors and may well vary from case to case. The statement of Geoghegan J. to the effect that legal involvement may be necessary in some limited circumstances but ordinarily will not be necessary involves a finding that it is only in those cases where legal representation is necessary to achieve a fair hearing that any implied entitlement to such representation can be said to exist.*
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> *[41] In passing, it should be observed that a disciplinary scheme can, of course, make express provision for an entitlement to legal representation and, if it does, an employee will undoubtedly be entitled to be represented by a lawyer if such comes within the scope of whatever the scheme provides. Likewise, an employer*

will always be entitled to allow someone to be represented by a lawyer even if the person concerned may not have a legal entitlement in that regard. However, these proceedings are concerned with a disciplinary scheme which does not confer an express entitlement to a lawyer and where the employer does not wish to allow representation. It follows that the ultimate issue which any court has to determine in a case such as this is as to whether disciplinary proceedings continuing without legal representation would amount to unfair proceedings and thus be in breach of the implied term as to fairness. It follows, in turn, that such a breach could only be established where it can be shown that legal representation is "necessary" to ensure a fair process.

[42] It seems to me that the criteria of "necessity", as thus identified, requires further explanation. There may be many cases where the forensic skills of an experienced advocate with a legal qualification may enable the presentation of a case in a more favourable light. But it seems to me that to say that a case might be somewhat better presented by a lawyer falls a long way short of saying that the presence of a lawyer is necessitated in order for the process to be fair."

56. In the course of his judgment, Clarke C.J. noted that an internal disciplinary process such as the one that the court was considering in that case, was not a criminal trial. He stated that while the process must be fair, the formal rules of evidence, or the procedures which govern either criminal or civil proceedings, do not necessarily apply (see para. 55).

57. Clarke C.J. also had regard to the fact that the matter that was the subject of the disciplinary investigation, being alleged theft of fuel, may also be a criminal offence. However, he found that that was of marginal relevance and was of limited weight, having regard to the fact that any result of the disciplinary process could have no bearing on a criminal trial, where the guilt of an accused would need to be established beyond reasonable doubt. He stated that if, coupled with the seriousness of the allegation and of the potential consequences, there were particularly difficult issues of law or extremely complex facts, then the cumulative effect of each of these matters, might lead in an exceptional case, to the view that legal representation was required. However, he did not think that the matter before the court, was such a case (see para. 56).

58. In a concurring judgment, Charleton J. concentrated on the contract of employment between the applicant and the company and noted that nothing in that contract required that criminal trial rights of representation by lawyers and a right to cross-examine, should intrude into the issue of his conduct as an employee (see para. 65).

59. On the facts of the case before them, the Supreme Court held that they were not satisfied that it had been established that the case before them was one where it could be said that a fair process could not ensue without legal representation. Accordingly, the applicant was denied the right to legal representation at that stage of the process.

60. The court is satisfied that these two decisions represent the legal principles that must be applied by the court in the consideration of the within application. I would perhaps add one further factor that ought to be taken into consideration: being that in cases where there is an ongoing criminal investigation into the same matter as in the disciplinary investigation, or where a prosecution has actually been commenced by service of a book of evidence; if the disciplinary hearing is proceeding in the interim, it is arguable that the person under investigation may require legal representation to advise him or her on when they could invoke the privilege against self-incrimination, when answering questions in the course of the disciplinary investigation. It seems to me that, given the sometimes complex issue of the nature of both *actus reus* and *mens rea* in certain criminal offences, it may well be beyond the knowledge of an ordinary employee, or his trade union representative, as to when he should invoke the privilege against self-incrimination when certain questions are put to him. However, as it has been confirmed that there is no ongoing criminal investigation in relation to the applicant in this case, it is not necessary to consider this factor further.

Conclusions.

61. While the allegations initially made by the first and second complainants, were serious, things have moved on considerably since they were made. First, neither complainant has cooperated with the investigating officer, who was appointed to investigate the disciplinary aspects of the matter on behalf of the IPS. Nor has the first complainant cooperated with the investigation carried out by An Garda Síochána. Due to the lack of cooperation received by him, the investigating officer ruled that the first three matters of concern, which effectively concerned the allegation that the applicant had brought contraband material into the prison, should not proceed.

62. Secondly, An Garda Síochána have confirmed that there is no ongoing criminal investigation into any matter arising out of the allegations made by the first complainant. While there is no mention of the allegations made by the second complainant in his statement, it is not clear that those allegations were ever forwarded to An Garda Síochána. Given the nature of the request for information made by Mr. Cooke in his email of 4th May, 2023, and the unequivocal nature of the response given by Supt. Mullen, I am satisfied that there is no ongoing criminal investigation concerning any conduct engaged in by the applicant.

63. That being the case, any perceived obstacle to the involvement of the POA on behalf of the applicant, has been removed. At one stage, the applicant said that they would not represent him because he had engaged a solicitor to do so. That may well be the case. However, at present, as there is no ongoing criminal investigation, the applicant has the option to retain a representative of the POA to represent him at the disciplinary meeting.

64. If the applicant wishes to retain his solicitor and/or counsel at that meeting, that raises the issue as to whether he has a right to legal representation to defend himself against the allegations that are extant against him. Those allegations fall under two broad headings: that he made a threat to kill, or injure a prisoner; and that he had inappropriate contact, *via* WhatsApp messages, with the wife of a prisoner.

65. In relation to the alleged threat to kill or injure a prisoner, it is correct that in the WhatsApp messages, the person who sent the WhatsApp messages to the first complainant, made statements that if a particular prisoner should be transferred to his prison, he would kill the prisoner either by poisoning, strangulation, or stabbing in the neck. However, when one examines those statements more closely, it is clear that that was not a threat made against the first complainant.

66. One has to look at the whole thread of the WhatsApp messages to understand the context in which the words were used. The first complainant had told the person, whom she alleged to be the applicant, that she was very frightened of a particular prisoner, because he had threatened to burn her house down, while she and her children were in it. It was in that context that the prison officer said that he would kill or harm the prisoner who had made that threat, if he should be transferred to the prison. Thus, it was never a threat against the first complainant. In fact it was the very opposite. It was a promise to

do something, which was designed to satisfy her desire for revenge against the man who had allegedly threatened her.

67. That was not a threat. A threat is when A threatens B, that if B does not do something, or desist from doing something, A will harm B, or his property, or someone close to him. In fact, an example of a threat, was the email sent by the first complainant. In it, she clearly threatened that if a disciplinary charge against her husband, known as a P.19, was not 'sorted out', she would go to the newspapers with her allegations of harassment by a prison officer.

68. Indeed, there was also a threat in the statement made by the second complainant. He threatened that if his request for temporary release was not looked upon favourably, his partner would go public with her allegations that she too had received numerous text messages from the applicant. So, both complainants had clear motives for bringing their concerns to the attention of the prison authorities.

69. Returning to the WhatsApp messages actually sent, when one looks at them as a whole, the nature of the statements of an intention to kill the prisoner, becomes clear. It was bravado on the part of the prison officer. He was attempting to impress this woman, by showing that he would protect her by harming or killing the man who had threatened her, if he should be transferred to his prison.

70. When looks when one what he actually said, the utter lack of credibility in his statements is plain to see. First, he threatened to poison the man. That is a means of killing, more suited to an Agatha Christie novel, than to reality. It is very difficult to obtain poison; even more difficult to administer it in a sufficient dose to kill someone; and if a person did die of poisoning, it would be detected by a post-mortem; probably resulting in fairly rapid detection of the culprit by An Garda Síochána, particularly when the deceased was a prisoner in jail.

71. While the other methods of murdering the prisoner as stated in the WhatsApp messages, may have been more feasible; given that the murder would occur within a prison, the number of possible suspects would be fairly small. Leaving that aside, it is farcical in the extreme to think that anyone actually intending to murder another person, would state that intention in a permanent form by including a statement of their intention in a WhatsApp message.

72. The lack of credibility of these statements is borne out by the fact that An Garda Síochána are not pursuing any further investigation into the allegations made by the first complainant. In addition, one has to note that in the course of the WhatsApp messages, the first complainant told the sender of the messages, not to send messages to her when he was drunk.

73. While ultimately a matter for the first respondent, it seems to this Court that it is hard to see that these statements, which were made by some prison officer to the first complainant, could be seen as more than empty bravado on the part of the prison officer.

74. That leaves the charges that the applicant brought the prison service into disrepute by having inappropriate contact with the wife of a prisoner. There are two issues here: (i) were the WhatsApp messages sent by the applicant; and (ii) if so, did they constitute inappropriate contact with the wife of a prisoner. The issue which this Court has to determine is whether, as a matter of justice, the applicant requires the help of a solicitor and/or counsel to deal with these issues.

75. On behalf of the applicant, it was submitted that if the first complainant refuses to appear at the disciplinary meeting, which is likely, given her refusal to cooperate with the investigation thus far; that would raise the issue as to whether the first respondent could admit into evidence the copies of the text messages, which the first complainant sent *via* email to the prison authorities. It was submitted that that raises legal issues in relation to the best evidence rule; the admissibility of secondary evidence; and breach of the hearsay rule; as well as requiring submissions on the requirements of a fair hearing. It was submitted that that would be beyond the capacity of either a trade union official, or a fellow serving prison officer, as these were complex legal issues.

76. It was submitted that the applicant, or his trade union representative, would have to make submissions on the right of the applicant to have the first complainant's phone produced for forensic examination, in order to properly defend himself. It was submitted that the making of these submissions would require the input of a solicitor. It was submitted that given these issues of legal complexity, the case satisfied the factors that had been set down for consideration in the *Burns and Hartigan* case and in the *McKelvey* case.

77. I do not think that these submissions are well founded. The judgments in the *McKelvey* case make it clear that while disciplinary investigations in an employment

context, must always adhere to the requirements of a fair hearing, they are not to be saddled with the rigorous requirements of a criminal trial.

78. Clarke C.J. in his judgment, made it clear that in an employment context, where one was dealing with a breach of discipline, or a breach of contract, it was not appropriate for the employee to adopt what he termed the "Bart Simpson" defence, of saying nothing and effectively just saying "You cannot prove anything against me".

79. In a disciplinary inquiry in an employment context, there is an obligation on the employee to be proactive in putting forward his or her answer, to the allegations made against him or her. While it may have been appropriate for the applicant to have adopted the approach that he did in his interview with the investigating officer, given his belief that there was an extant garda investigation into the allegations against him at that time; that has now dropped away, so it is time for him to put forward whatever answer he wishes, to the allegations that are extant against him.

80. I am satisfied that, given the nature of the remaining allegations that are extant against the applicant, and given that there is no longer any obstacle to his being represented by an experienced trade union official from the POA, it will be possible for him to adequately defend himself against the allegations that remain against him, without the need for legal representation.

81. The court accepts the submission that was made on behalf of the respondents, that the evidence before the court suggests that the first respondent has considerable experience in carrying out disciplinary investigations within the prison service. The court also accepts the submission that the procedure that is provided for under the code, has been scrupulously adhered to, to date. In other words, there has been no breach of fair procedures in the conduct of the investigation to date. The court sees no reason to suspect that there will be a breach of fair procedures in the future conduct of the investigation. If there is, the applicant will have appropriate remedies in that regard, in the form of further judicial review proceedings.

82. At the end of the day, when one strips the issue back to its essentials, the applicant has to face three issues at the disciplinary meeting. First, whether he sent the WhatsApp messages to the first complainant. It is not yet known whether the applicant denies that he sent some, or all of the messages to her.

83. There is substantial evidence, including photographs, profile pictures of the sender of some of the WhatsApp messages and the sender's telephone number; the content of the WhatsApp messages and the cross-referencing of certain statements made by him to his accessing the PIMS of a particular prisoner, which suggests that the applicant was the sender of the messages. That is a factual issue. The applicant will be able to give his trade union representative full instructions to enable him, or her, to put forward his answer to that allegation, should he wish to deny that he was the sender of some, or all, of the WhatsApp messages to the first complainant.

84. The second issue concerns the making of threats in the course of the exchange of WhatsApp messages. The court has already dealt with the credibility of those threats.

85. The third issue which arises, is whether, assuming that the first respondent comes to the conclusion that the messages were sent by the applicant to the first complainant, these constituted inappropriate contact with a prisoner's wife. The applicant will be able to instruct his trade union official to make whatever submissions he feels are relevant, either in denial of the assertion that they constitute inappropriate contact; or in mitigation, if it is accepted that the messages constitute inappropriate contact with the prisoner's wife.

86. None of these issues require an in-depth grasp of either legal or factual complexities. The court is satisfied that the services of a legal representative are not necessary to ensure that the applicant will obtain a fair hearing in the remainder of the disciplinary process. Accordingly, the court refuses the reliefs sought by the applicant in his notice of motion.

87. As this judgment is being delivered electronically, the parties will have three weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.

88. The matter will be listed for mention at 10.30 hours on 14th June, 2023 for the making of final orders.

89. The court will continue the order previously made, restricting the publication of any information that would tend to identify the applicant, or the complainants, or the prison where the applicant worked at the material time.