



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 299

Record No. 2014/745

**McGovern J.
Baker J.
Costello J.**

BETWEEN/

PATRICK J. KELLY

APPLICANT/APELLANT

- AND-

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

RESPONDENTS

JUDGMENT of Ms. Justice Costello delivered on the 17th day of December 2019

1. This is an appeal against the judgment of Hedigan J. in the High Court on 21 December 2012, [2012] IEHC 558, where he refused the applicant leave to seek judicial review of a decision of the third named respondent taken on 30 September 2009 to dismiss him, with effect from that date, from the position of harbour master at Killybegs Fishery Harbour Centre, County Donegal.

Background facts

2. The appellant was appointed to the established Civil Service position of harbour master at Killybegs Fishery Harbour Centre ("KFHC") in 1996. The position was full-time, twenty-four hours a day, seven days a week. It was a condition of the post that the appellant "may not be connected with any outside business which would interfere with the performance of his official duties."
3. While acting as harbour master of KFHC the appellant provided pilotage services to vessels using the harbour. He was a director and 1% shareholder of North West Marines Services Limited ("NWMS") which company provided commercial pilotage services for reward to vessels using the harbour. The appellant carried out the vast majority of pilotage services at Killybegs on behalf of NWMS. As appears below, the critical issue between the appellant and the respondents was whether he was entitled to carry out these activities, and whether he did so for personal gain.
4. In 2004, following on from various complaints and allegations concerning matters at KFHC, the Department of the Marine and Natural Resources ("the department") decided to conduct a broad management review around the practices and procedures at fishery harbour centres, commencing at Killybegs. On 23 August 2004 an anonymous complaint

was received by the department alleging that the appellant was engaged in commercial pilotage at KFHC for a number of years. On 6 September 2004 it was decided to investigate the appellant in relation to allegations of financial improprieties and to conduct an investigation under the Civil Service Disciplinary Code, Circular 1/92. Mr. Tony Fitzpatrick, the personnel officer of the department, was appointed to carry out the investigation.

5. The appellant was formally notified of this decision on 18 October 2004 and, pending completion of the investigation, was suspended with immediate effect in accordance with s.13 of the Civil Service Regulation Act, 1956. Prior to this, Minister Mary Coughlan, who was not the minister of the department, made complaints to the Assistant General Secretary of the department, Mr. Beamish, regarding serious concerns she had in relation to harbour management related matters and the appellant. Mr. Beamish sent an email to Mr. Fitzpatrick and the Secretary General of the Department, Mr. Brendan Tuohy, recording this telephone call with Minister Coughlan on 8 October 2004. He noted that she had a concern that the appellant had employed his brother-in-law in the harbour without allegedly following due process and that he was switching off the CCTV system in the harbour. No other complaints were specified in the email. Minister Coughlan took up an offer of Mr. Beamish that she should meet the relevant official, Mr. Fitzpatrick, to "outline her full range of concerns in the matter"; this meeting took place on 15 October 2004. His personal notes of the meeting record that she outlined a whole range of complaints in relation to the appellant. The details and implications of this meeting will be considered in more detail below.
6. The letter of 18 October 2004 informed the appellant that Mr. Fitzpatrick would be investigating whether he had engaged in financial and business activities which would not be appropriate to his official position as harbour master at KFHC. Six items of specific concern were identified. He was informed that the investigation would be under the Civil Service Disciplinary Code, Circular 1/92, and that in the event that the alleged activities in question were substantiated they may be deemed to constitute gross misconduct, irregularity or unsatisfactory behaviour and a range of possible sanctions might be applied, including dismissal from the Civil Service. He was told that he would be given ample opportunity to make representations on his own behalf and would be entitled to be accompanied at any meetings by a friend, colleague or union representative.
7. Mr. Fitzpatrick appointed Mr. Brian Bolger, a retired civil servant, to assist him in the investigation. He required Mr. Bolger to carry out a preliminary investigation to establish and present relevant facts in relation to the complaints made against the appellant. Upon receipt of Mr. Bolger's report, Mr. Fitzpatrick would then decide whether a prima facie case existed meriting a full disciplinary investigation.
8. Mr. Bolger engaged in his preliminary investigation from October to December 2004, interviewing witnesses and compiling relevant documentation. On 22 December 2004 he presented his preliminary report to Mr. Fitzpatrick who subsequently determined that a full investigation into the activities of the appellant was warranted.

9. The appellant sought a preliminary meeting with Mr. Fitzpatrick which was held on 21 October 2004. The appellant was informed that, under the Disciplinary Code, he was not entitled to be legally represented at the investigation stage. He was informed that he could make representations himself or appeal any recommended disciplinary sanction to the Civil Service Disciplinary Board ("the appeal board") and that he may be legally represented at that stage in the process.
10. On 8 March 2005 Mr. Fitzpatrick interviewed the appellant in relation to specific matters under investigation which he identified in a letter of 21 February 2005. These were: -
 - operating a private company offering marine services;
 - imposition of compulsory pilotage at Killybegs;
 - carrying out pilotage functions;
 - providing pilotage services for reward;
 - holding large sums of personal cash on the Department's property;
 - requesting employees of the Department under his supervision to convert Irish Punts to Euro;
 - disposal of the Finn Valley Oil barge in 1997;
 - clean-up operation following oil spillage at Abbott Ireland in 1999;
 - deployment of departmental boom at Sligo in 2001;
 - abuse/obstruction of an employee of Finn Valley Oil in 1999/2000;
 - use of Department's heating oil for non-official purposes;
 - acquisition of and payment for curtains from A&S Fabrics in 2000/2001; and
 - waiving of syncrolift charges for certain vessels.
11. At the meeting of 8 March 2005, the appellant was afforded the opportunity to comment on each of the allegations identified in the letter of 21 February. He stated that it was his understanding that he could receive payment for pilotage in his own time.
12. On 4 August 2005, Mr. Fitzpatrick produced his provisional conclusions and findings which had been arrived at on the principle of the balance of probabilities. In relation to each allegation, he identified all of the evidence he had taken into account and copies of this evidence was enclosed with the letter.
13. Mr. Fitzpatrick concluded that, on the balance of probabilities, some of the alleged conduct may have occurred, in particular; that the appellant operated a private company offering marine services, that he carried out pilotage at Killybegs, that he provided

pilotage services for reward, that he imposed compulsory pilotage at Killybegs, that he requested employees of the department under his supervision to convert Irish Punts into Euro, that in July 1999 he carried out a clean-up operation of an oil spillage at Abbott Engineering, for which he received a payment in a personal capacity while he was on duty as harbour master and that he utilised some of the KFHC work force in the operation while they were on duty and being paid by the department, that he used the department's resources in deployment of a boom at Sligo Harbour for personal gain, and that he certified payment by the department in respect of the purported hire of fish crates but the payment was re-directed to pay for curtains. He held that three allegations were not substantiated by the evidence and that the holding of large amounts of personal cash on the department's premises did not constitute a breach of the disciplinary code.

14. The appellant was requested to respond to the letter within fourteen days in accordance with the terms of the Circular. He was assured that, given the gravity and complexity of the allegations and the potential implications, any request to extend the time limits would be regarded favourably. He was informed that he could request a meeting with Mr. Fitzpatrick and that he could be accompanied at the meeting by a serving civil servant of his choice or by a whole-time official of his union.
15. Following receipt of the report, the appellant sought, and obtained, a number of extensions of time in which to respond to the matters set out in the report. The appellant's trade union representative, Mr. Matt Staunton, Assistant General Secretary of IMPACT, wrote to Mr. Fitzpatrick on 13 September 2005 requesting that the appellant be provided with a substantial amount of documentation, in particular, he sought unredacted statements of staff of KFHC. Redacted statements from these witnesses had been included with the letter of 4 August 2005. Mr. Fitzpatrick had redacted sections of the statements which did not relate to the allegations under investigation. Mr. Fitzpatrick offered to provide the unredacted statements to the appellant if he gave a written undertaking that he would use them solely to defend his position in the disciplinary process and to defend himself in respect of criminal charges pending before the Circuit Court. The appellant declined to give the undertaking and Mr. Fitzpatrick refused to furnish him with the witness statements in an unredacted form.
16. The appellant submitted evidence to Mr. Fitzpatrick in defence of his claim. Captain McGowan of NWMS swore an affidavit stating that he had operated as a harbour pilot at Killybegs harbour for the last ten years approximately. He said that up until 2004 he was occasionally assisted by the appellant and after this date, and until Autumn 2008, by Martin Connell, the present harbour master. He said that the appellant was a director of NWMS so that in case of an accident causing damage to a vessel or the harbour he would be covered by limited liability. NWMS' accountant stated that the appellant was a director of the company but he did not receive any remuneration from the company and that he had drawn no salary in his capacity as a director, or any other capacity during any period since its incorporation. The appellant also submitted documentation which he said showed that the department was both aware of his pilotage activities and acquiesced to his activities.

17. Mr. Fitzpatrick conducted further meetings with KFHC staff and the appellant between February and April 2006. On 20 June 2006 he furnished a revised statement of allegations having regard to the additional information, and enclosed all of the underlying documents relied upon. The appellant was again invited to respond to the provisional findings and informed of his entitlement to meet again with Mr. Fitzpatrick. The letter noted that in view of the seriousness and number of the allegations which were deemed may have occurred, should they be substantiated, Mr. Fitzpatrick considered that the appropriate sanction would be the dismissal of the appellant from the Civil Service. He informed the appellant that he proposed to recommend accordingly to the Minister.
18. Developments unrelated to the investigation were occurring on the official side. Mr. Fitzpatrick left the department and moved to the Revenue Commissioners. He thus ceased to be the personnel officer for the department. Separately, the department was being reorganised and the functions in relation to the Marine were to be transferred to a new department. This resulted in some delay in progressing the investigation on the official side.
19. Despite the fact that Mr. Fitzpatrick had left the department, it was deemed appropriate that he continue to conduct the investigation. Paragraph 5.3 of the Circular provides that any functions assigned to the personnel officer may be performed by another officer nominated for that purpose by the head of the department or the personnel officer. Mr. Brendan Tuohy, as Secretary General of the department, on 10 October 2006 authorised Mr. Fitzpatrick to conduct a hearing under disciplinary procedures on 12 and 13 October as part of the department's investigation.
20. Meetings were held with the appellant on 12 and 13 October 2006. It is not clear precisely what occurred after those meetings other than what the trial judge described as a "blizzard of correspondence" from the appellant. Mr. Fitzpatrick was succeeded by Mr. David Hanley as personnel officer of the department. On 1 February 2007, Mr. Fitzpatrick wrote to Mr. Hanley setting out the outcome of his investigation. The letter closely mirrors the body of the revised report of June 2006, save that the evidence relied upon by Mr. Fitzpatrick was considerably expanded by further interviews and information provided by the appellant. The letter did not deal with the possibility of sanction or request the appellant to respond to the allegations as the letter was not addressed to the appellant. The concluding section of the letter set out the various issues raised by the appellant by way of defence during the course of the investigation and Mr Fitzpatrick's response to those issues.
21. In August 2007 Mr. Hanley furnished the appellant with the unredacted witness statements of the allegations made against him on an unconditional basis. No submissions based upon the unredacted witness statements were made either to Mr. Fitzpatrick, or later to the appeal board. On 2 September 2008 a final report was issued to Mr. Hanley's successor as personnel officer of the department, Mr. O'Reilly.
22. On 1 October 2008 the appellant's trade union representative, Mr. Staunton, wrote to Mr. O'Reilly to appeal the case to the appeal board and requested that the appeal board

should take a de novo approach to the case. In the submission to the appeal board, Mr. Staunton stated that *"[the appellant] has never denied doing most of the activities he is accused of as was (sic) instructed to do them by his superior and by other agencies in the same Department i.e. the Coast Guard."* He requested that he and the appellant be allowed give oral evidence and make oral submissions to the appeal board, and asked that twelve witnesses give evidence to the appeal board.

23. The independent appeal board was chaired by a senior counsel. It sat on 12 January 2009, 4 February 2009 and 12 March 2009. The appellant did not seek to be represented by a solicitor, or counsel, but was represented by Mr. Staunton. The appellant pressed the appeal board to hear the evidence of four of his witnesses, not twelve as originally indicated. In the event, the appeal board heard from two witnesses.
24. On 14 July 2009 the appellant and Mr. Staunton were notified of the decision of the appeal board. The appeal board addressed the specific grounds of appeal raised by the appellant. This decision is discussed in greater detail below, however, the central findings of the appeal board are as follows. They rejected the argument that there was an obligation on Mr. Bolger to interview the appellant, or that there was a requirement that the report of Mr. Bolger be put to the appellant for his response. They were satisfied that Mr. Fitzpatrick considered the relevant evidence in a careful and fair fashion and held that he had conducted a thorough investigation which involved interviewing a substantial number of people, and that he had a number of lengthy meetings with the appellant, other staff members and witnesses. The appellant had argued that he was not afforded reasonable facilities to answer the allegations. The appeal board rejected this and noted that a number of extensions of time were provided to him and that he had written very extensive letters to the department.
25. The appellant argued that he could not reasonably be expected to have understood that the behaviour alleged would attract disciplinary action. The appeal board said that this issue was given considerable attention in the course of the hearing and also in the documentation that was submitted. They recorded the appellant's explanation as to how and why he became involved in commercial pilotage services. Between 1996 and 1999 he worked as a pilot on vessels without receiving any remuneration; these duties were over and above his duties as harbour master. In 1999 the appellant and his colleague, Captain McGowan set up NWMS Limited wherein the appellant was a director and 1% shareholder. Captain McGowan was the other director and 50% shareholder, his wife holding the balance of 49% of the shares. NWMS was paid for the commercial pilotage work carried out in Killybegs harbour by the appellant on its behalf, but the appellant received no payment from the company. He said he was involved in the company to secure insurance cover for commercial pilotage work and to provide cover for the department. The appeal board said that it was difficult to understand his motivation in working as a commercial pilot in circumstances where he never received any benefit from so doing and where, on his own case, he was entitled to engage in such activity. They did not accept his suggestion that his involvement with NWMS was primarily to provide insurance cover for the department. They noted that the accounts of NWMS showed that it retained

significant profits in 2003 and 2004. On the basis of the above, they did not accept that the appellant would not derive any benefit from his commercial pilotage work. The company was paid for the work he carried out and whether he determined not to draw any income from the company was clearly a matter within his own discretion.

26. The appeal board was of the view that the appellant was aware that there was a serious conflict of interest between his duties as harbour master and his activities in carrying out commercial pilotage work at the same time. Furthermore, they were of the view that, in his correspondence with the department, he sought to deal with this matter in an ambiguous fashion and significantly downplay his role as a commercial pilot. They were not satisfied that dismissal was grossly disproportionate in respect of these activities.
27. In relation to the allegations concerning the oil spillage at Abbott Engineering and the deployment of a boom at Sligo harbour, the appeal board upheld the findings of Mr. Fitzpatrick that they amounted to misconduct and conduct inappropriate to his official position as harbour master warranting disciplinary action but disagreed with him as to the appropriate sanction. They held that these two incidents were sufficiently serious to justify the imposition of substantial penalties, but not dismissal from the service.
28. On 17 July 2009 Mr. O'Reilly wrote informing the appellant that he intended to recommend his dismissal from his post as harbour master to the government. He informed the appellant that he could submit representations within fourteen days and that they would be included in the papers to be sent to the cabinet for consideration and decision. On 31 July 2009 Mr. Staunton made a submission on behalf of the appellant and enclosed a statement from the appellant for transmission to cabinet. These documents were included along with the letter of suspension and the opinion of the appeal board, together with accompanying documentation, with the memorandum to government.
29. On 30 September 2009 the cabinet, including Minister Coughlan, met inter alia to take a decision pursuant to s.5 of the Civil Service Regulation Act, 1956 whether to dismiss the appellant. The government decided to dismiss the appellant from his post in accordance with the provisions of s.5, with effect from that date. On 2 October 2009 the appellant was so informed.
30. By letter dated 28 January 2010, for the first time, solicitors acting for the appellant wrote to the personnel officer of the department requesting copies of all instruments authorising Mr. Fitzpatrick to continue with the investigation into the appellant subsequent to his transfer from the department and the date of his transfer. The request was reiterated on 15 February 2010. On 22 March 2010 the appellant applied for and was granted leave to seek judicial review by way of *certiorari* to quash the decision of 30 September 2009.

Circular 1/1992

31. The Circular of the Department of Finance governed the disciplinary procedure applicable to the facts in this case. The code defines disciplinary action as including dismissal from the Civil Service in accordance with the terms of s.5 of the Civil Service Regulation Act,

1956. The procedure is set out in paragraph 3. It applies where an allegation of misconduct, irregularity, neglect or unsatisfactory behaviour warranting disciplinary action is made against an officer. Paragraph 3(1) provides that 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. Subparagraph (2) provides: -

“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.”*

32. The paragraph continues that the officer concerned shall submit a response to the allegations in writing within fourteen days of receipt of the material referred to in paragraph 3.2. Paragraphs 4-8 provide: -

“(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 such meeting by a serving civil servant of his/her choice and/or by a whole time 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 light of the Appeal Board's opinion. When 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."*

33. From the above it is clear that a personnel officer is required to investigate the allegations. If he is satisfied that the conduct may have occurred and that it is such that, if it occurred, it would warrant disciplinary action, he then requests the officer under investigation to submit a response to the material he furnishes to him. The documents which must be provided to the officer under investigation are listed in paragraph 3.2. The officer is entitled to request a meeting with the personnel officer to consider the allegations under investigation. He is entitled to be represented by a trade union official, but not a lawyer. The personnel officer then considers the response of the officer under investigation and any written or oral representation by, or on behalf of, the officer and decides whether the allegations have been substantiated.
34. If the personnel officer is satisfied that they have, and that the conduct warrants disciplinary action, he is required to advise the relevant decision-making authority of the specific disciplinary action he recommends should be taken. If it is proposed to recommend dismissal from the Civil Service, then the decision-making authority is the government.
35. The officer has the option to make representations in writing to the decision-making authority, or to seek a review of the disciplinary proceedings by the appeal board. I deal with the detail of the proceedings before the appeal board later in this judgment. Where the appeal board issues an opinion concerning a recommendation, this is furnished to the personnel officer. The personnel officer must then decide the action, if any, he will take in light of the appeal board's opinion. If he proposes to make a recommendation that disciplinary action be taken, he must inform the officer concerned and give the officer concerned an opportunity to make representations to the decision-making authority, in this case the government. The code requires that the decision-making authority be furnished with the recommendation of the personnel officer, representations made by the officer concerned and any opinion delivered by the appeal board. The decision-making authority decides whether disciplinary action should be taken in light of the recommendation and other information furnished. For the purposes of the code,

disciplinary action includes dismissal from the Civil Service. The decision maker is required only to make a decision in relation to disciplinary action i.e. sanction. In the case of a recommendation that an officer be dismissed, the government is required to decide whether to dismiss the officer from the Civil Service or refer the matter to another decision maker to decide on lesser disciplinary action provided for under the code.

Decision of the High Court

36. The High Court refused to quash the decision to dismiss the appellant after a lengthy hearing heard over 10 days and the appellant appealed that decision to this court. I shall consider the details of the decision when discussing the individual grounds of appeal.

Grounds of appeal

Fair Procedures

37. In his statement of grounds, the appellant alleges that the decision of the third named respondent was based on an investigation process which was unfair and which did not have regard to the appellant's right to constitutional/natural justice, did not have regard to the appellant's good name and his right to earn a livelihood, and was carried out in excess of, or without, jurisdiction and breached his rights guaranteed by the European Convention on Human Rights, in particular Article 6 thereof.
38. In written submissions filed in support of his appeal he identifies six bases upon which he alleges that there was a fundamental breach of his right to fair procedures. These are:-
- that he was not furnished with unredacted witness statements of the KFHC staff until late 2007 by which time Mr. Fitzpatrick had already reached a conclusion concerning his purported culpability;
 - that he was not given the opportunity to test the strength of the evidence of the witnesses by way of cross-examination;
 - that there is no evidence that the complaints made by the KFHC staff were tested in depth by Mr. Fitzpatrick;
 - that he was not provided with the record of the scandalous complaints made against him by the Minister;
 - that he was specifically denied the opportunity of availing of legal representation at the disciplinary hearing; and
 - that the memorandum that went before the government recommending his dismissal was misleading.
39. He relied upon the decisions in *Re Haughey* [1971] I.R. 217; *Garvey v. Ireland* [1981] 1 I.R. 75; *Gallagher v. The Revenue Commissioners* [1995] 1 I.R. 55; *Kanda v. Government of Malaya* [1962] 1 Appeal Cases 322; *Murphy v. Flood* [2010] 3 I.R. 136 and in *Tierney v. An Post* [2000] 1 I.R. 536. The third and sixth points were not pursued at the hearing of the appeal.

40. On the basis of these authorities he says that he was entitled to legal representation during the investigative phase of the disciplinary procedure provided under Circular 1/92, that he was entitled to disclosure of the full and unredacted witness statements and that he had a right to test the witness statements by cross-examination.
41. *Tierney v. An Post* concerned a contract of service. A disciplinary hearing was held notwithstanding the fact that the appellant was not furnished with the reports containing the evidence against him, while the decision maker was furnished with those materials. The Supreme Court held that an unfair procedure was used and quashed the decision. In *Gallagher v. The Revenue Commissioners* the applicant faced dismissal from his position as an officer of Customs and Excise on the grounds that he had deliberately undervalued the market value of cars irregularly imported into the State resulting in an undercharge to duty. The respondent relied upon valuations of cars obtained from third parties to substantiate the allegation. At an oral hearing the applicant sought, but was denied, the opportunity to challenge this evidence by cross-examination. The Supreme Court held that having regard to the seriousness of the charges and the consequences for the applicant, this was contrary to the requirements of natural justice and fair procedures.
42. The respondents referred to *Mooney v. An Post* [1998] 4 I.R. 288 and *Rowland v. An Post* [2017] IESC 20 . At paras. 2.4 and 2.5 in *Rowland* Clarke J. held: -

"2.4...In many cases the proper approach of a court when called on to consider the validity of a disciplinary-like process is to look at the entirety of the procedure and determine whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice. Many errors of procedure can be corrected by appropriate measures being taken before the process comes to an end. Decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted (subject to any specific rules applying by reason of the contractual or legal terms governing the process concerned). Thus the exact point at which parties may become entitled to exercise rights such as the entitlement to know in sufficient detail the case against them, the entitlement in appropriate cases to challenge the credibility of evidence and the right to make submissions are, at least to a material extent, matters of detail to be decided by the decision maker in question provided that the procedures adopted do not, to an impermissible extent, impair the effectiveness of the exercise of the rights concerned.

2.5 Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a court to reach any conclusion on the process until it has concluded."

43. At para. 3.3 he stated: -

"...it is, of course, important to emphasise that the precise application of the rules of constitutional justice in respect of any particular process can be quite case

specific even though the general principles, being that a person who may be adversely affected is entitled to know the basis on which it is said that they may suffer to their detriment and that they must be given an opportunity which, in all the circumstances of the particular case, affords them a reasonable opportunity to test and address the basis on which it might be said that an adverse result can arise."

44. And at para. 5.6: -

*"Furthermore, there is no reason in principle why there has to be an oral hearing unless there is a legitimate basis for determining that there is a factual issue which needs to be resolved in order for appropriate conclusions to be reached. There is no reason in principle, therefore, why procedures cannot be put in place to ascertain whether there is such a factual dispute before deciding whether a right to cross examine may be necessary to comply with the rules of constitutional justice. It follows that there is no reason in principle why the process may not evolve from an initial request for information through the formulation of points of concern but importantly provided that, before the process reaches a stage where an adverse decision can be made, the person concerned becomes entitled to any materials which might be relied upon for making an adverse decision and provided the person is given an opportunity to test any evidence (by cross-examination if necessary) **where the process to date has established that there is a conflict or issue on the facts requiring to be resolved.**" [emphasis added]*

45. A number of points emerge from these decisions:

- (1) the precise application of the rules of constitutional justice in respect of any particular process can be quite case specific;
- (2) the court looks at the entirety of the procedure and determines whether, taken as a whole, the ultimate conclusion can be sustained having regard to the principles of constitutional justice;
- (3) errors of procedure can be corrected by appropriate measures being taken before the process comes to an end;
- (4) decision makers in such a process have a significant margin of appreciation as to how the process is to be conducted, subject to the contractual or legal terms governing the process;
- (5) before the process reaches a stage where an adverse decision can be made, the person concerned is entitled to any material which might be relied upon for making an adverse decision;
- (6) before the process reaches a stage where an adverse decision can be made the person must be given an opportunity to test any evidence (by cross-examination if

necessary) where the process to date has established that there is a conflict or issue on the facts requiring to be resolved;

- (7) if there is no such conflict or issue on the facts requiring to be resolved there is no entitlement to test the evidence by cross-examination, *a fortiori*, where the person concerned admits those facts; and
 - (8) before the process reaches a stage where an adverse decision can be made the person concerned is entitled to make submissions to the decision maker.
46. Applying these principles to the facts in this case, the first argument was that the appellant was denied the opportunity of availing of legal representation at “the disciplinary hearing.” He was told at the commencement of the investigation by Mr. Fitzpatrick that he was not entitled to legal representation during that phase of the process; however, he was specifically told that he could be legally represented later. This is in line with the decisions in *National Irish Bank* and *Rowland*. Furthermore, he had the assistance of an experienced trade union official at meetings with Mr. Fitzpatrick and, thereafter, before the appeal board. He availed of that right and was represented by Mr. Staunton. He cannot now complain that there was a lack of fairness.
47. Even if this had been an error, such error could have been rectified, if necessary, by the appellant instructing counsel to represent him before the appeal board. He chose not to avail of this opportunity even though he was aware of the fact that the Minister was to be represented by counsel. In those circumstances, he cannot now raise this as a ground upon which to seek judicial review of the decision of the third named respondent.
48. Further, it is clear that legal representation in disciplinary proceedings is exceptional. See *Burns v. Governor of Castlereagh Prison* [2009] 3 I.R. 682 and *Rowland v. An Post*. In *Burns*, the Supreme Court (Geoghegan J.) suggested that whether or not the principles of constitutional justice demanded that the employee be permitted to be legally represented during the disciplinary process included:-
- the seriousness of the charge and the potential penalties;
 - whether any points of law are likely to arise;
 - the capacity of an individual to present his own case;
 - any procedural difficulty; and
 - the need for speed in making an adjudication.

The appellant, to my mind, has not established that his case was exceptional and that he was, therefore, denied fair procedures when he was refused legal representation at the investigative phase of the disciplinary procedure provided under the Circular.

49. Secondly, the appellant alleges that he was not given the opportunity to test the strength of the evidence of witnesses by way of cross-examination and, therefore, was not afforded fair procedures. The right to cross-examination is not a free-standing right applicable to all procedures. It arises where there is a conflict on the facts which a decision maker is required to resolve; absent of such a conflict and requirement, it is not necessary to afford a party a free-standing opportunity to cross-examine witnesses. Furthermore, as is clear from Rowland, the exact point at which parties may become entitled to challenge the credibility of evidence is a matter to be decided by the decision maker in question, provided the procedures adopted do not, to an impermissible extent, impair the effectiveness of the exercise of the right concerned. It was, therefore, not necessary to allow the appellant to cross-examine all of the witnesses during the investigative phase of the disciplinary process.
50. The appellant has not established that this was required in the circumstances of this case. While he contested the motives of the witnesses in giving evidence to Mr. Fitzpatrick, he did not contest the facts underlying the charges under investigation in respect of which they gave evidence, that is as to pilotage by the appellant in KFHC on behalf of NWFS. His notice of appeal accepted that this occurred. He admitted the activity, he admitted that it was done on behalf of NWFS and he admitted that he was a director and a 1% shareholder of NWFS. He admitted that NWFS was paid for these services and his defence was that he received no payment for the services and that, therefore, the activity was not prohibited. He said he was entitled to do what he did and, furthermore, that other harbour masters did it, in particular his successor at KFHC. The individuals who gave evidence to Mr. Fitzpatrick in relation to the appellant's pilotage at the harbour did not give evidence as to whether the appellant personally received payments in respect of the pilotage services provided. So, in fact, there was no conflict on the facts in respect of which these individuals gave evidence which required to be resolved by either Mr. Fitzpatrick or the appeal board. Therefore, there was no requirement that the appellant cross-examine the witnesses as a matter of fair procedures.
51. Furthermore, the appellant had the opportunity to challenge the evidence of the witness statements before the appeal board but chose not to. The appeal board has the power to hear testimony. The appellant had been furnished with the witness statements which were presented to the appeal board and he never sought leave to cross-examine these particular witnesses, despite the fact that he sought leave to call or cross-examine other witnesses. There was never any suggestion that the witnesses were required to be cross-examined in order to test their credibility in the circumstances. This means that his reliance upon authorities such as *re Haughey, Garvey, Gallagher, Murphy and Tierney* is misplaced. The resolution of conflicts of facts was central to these cases and the credibility of witnesses was a vital aspect of the resolution of those conflicts. In this case, it was not. No issue of fact in respect of which the witnesses gave evidence was contested or challenged by the appellant.
52. On the basis of the above, I am not satisfied that the appellant has established this ground of appeal.

53. Thirdly, the appellant complains that he was not furnished with unredacted witness statements of the KFHC staff until late 2007 by which time he says Mr. Fitzpatrick had already reached a conclusion concerning his purported culpability. He sought copies of the unredacted witness statements on 13 September 2005. He was refused this request on 7 October 2005 and again on 20 December 2005. On the 7 March 2006 he was offered them on terms that he gave an undertaking that he would use the witness statements solely in connection with the disciplinary process and in respect of his defence to a charge of assault, which was then pending before the Circuit Court. He refused to accept the unredacted witness statements upon those conditions on the 21 April 2006. Subsequently, in June 2006, Mr. Fitzpatrick refused to furnish him with the unredacted witness statements. The appellant has never explained why he refused these terms, which seem to me eminently reasonable. They are broadly the terms on which discovery of documents would be ordered in a court process. In those circumstances, it seems to me that he cannot now complain that there was an absence of fairness as the unredacted statements were not made available to him prior to his interview with Mr. Fitzpatrick in October 2006.
54. Furthermore, in August 2007 he was given the unredacted statements without condition by a successor to Mr. Fitzpatrick in the role of personnel officer. Once he received the unredacted witness statements, he appears to have made no representations based upon the unredacted portions of these statements either to Mr. Fitzpatrick or the appeal board. He raised no issue as to the credibility of the witnesses based upon the contents of the full statements, in contrast to the situation in *Murphy v. Flood*. In my judgment, there was no breach of fair procedures; he was not given the witness statements too late and he cannot show that there was any issue which he could have raised had he received them sooner. Even if there had been a breach in this regard, of his entitlement to fair procedures prior to August 2007, which I do not accept, this alleged failing was rectified and, looking at the entire procedure, the ultimate conclusion cannot be overturned based upon this ground. This ground of appeal fails also.
55. Fourthly, he says that he was denied fair procedures because the hearing before the appeal board was not a *de novo* hearing. There is no requirement that an appeal be heard *de novo* in the sense that all evidence be re-heard in full by the appellate decision maker. The issue is whether he was afforded the opportunities identified in *Rowland*. This is a test of substance, not of form. I am quite satisfied, for reasons I discuss later in this judgment, that the absence of a *de novo* hearing in this sense did not constitute the denial of his entitlement to fair procedures.
56. Fifthly, the appellant claims that he was denied the opportunity to know and to make submissions on the charges against him. At the commencement of the investigation Mr. Fitzpatrick wrote to the appellant on 18 October 2004 and indicated that his specific concerns related to his possible involvement in: -

- “• *Operating a private company offering marine services*
- *The imposition of compulsory pilotage at Killybegs*

- *Provision of pilotage services for reward*
- *Holding of large amounts of your personal cash on Departmental property*
- *Illegal disposal of a fishing vessel*
- *Requiring employees of the Department to convert large amounts of Irish Punts to Euros."*

At the appellant's request, he met Mr. Fitzpatrick the following day at the Abbey Court Hotel in Donegal Town and Mr. Fitzpatrick read the anonymous letter of August 2004 to the appellant. By letter dated 21 February 2005 Mr. Fitzpatrick wrote to the appellant to arrange to interview him in relation to specific matters under investigation, which he set out in the letter. There were now thirteen matters identified. At a lengthy meeting on 8 March 2005 the appellant addressed each of these issues.

57. On 4 August 2005 Mr. Fitzpatrick wrote to the appellant setting out his provisional conclusions in respect of the thirteen allegations. In relation to each allegation, the evidence taken into account by Mr. Fitzpatrick was expressly identified. All of the evidence relied upon was enclosed with the letter of 4 August 2005. The letter requested the appellant to respond to each of the allegations which, if they were sustained, would constitute misconduct. He was told that he could request a meeting with the personnel officer to consider the allegations and that he could be accompanied at the meeting by a serving civil servant of his choice or by a whole-time official of his union. The material enclosed with the letter was furnished in two large lever arch files.
58. The appellant responded in full to the letter of 4 August 2005 and had a further meeting with Mr. Fitzpatrick; in light of the responses, Mr. Fitzpatrick prepared a revised statement of the allegations, his preliminary findings and the evidence upon which they were based and the proposed sanction which he deemed appropriate. This was furnished to the appellant and by letter dated 20 June 2006. This letter was likewise accompanied by two large lever arch files comprising the evidence relied upon by Mr. Fitzpatrick, in support of his preliminary conclusions. Ultimately, the final outcome of the investigation conducted by Mr. Fitzpatrick was sent to the appellant under cover of a letter dated 2 September 2008, again enclosing a note of all of the material relied upon by Mr. Fitzpatrick, including voluminous material supplied by the appellant to Mr. Fitzpatrick.
59. As Mr. Fitzpatrick had, by September 2008, finally concluded his investigation into the allegations against the appellant and the appellant had been afforded the opportunity to respond to Mr. Fitzpatrick's preliminary findings, the appellant, through his trade union representative, Mr. Staunton, Assistant General Secretary of IMPACT, appealed the matter to the appeal board. In his letter of 1 October 2008 Mr. Staunton outlined five grounds which he wished to submit to the appeal board on behalf of the appellant. As regards the complaint that the appellant was not afforded a fair opportunity to make his submissions on the charges against him, Mr. Staunton made a complaint regarding the scoping report conducted by Mr. Brian Bolger. Mr. Staunton complained that the appellant

was never interviewed by Mr. Bolger and he was never afforded the opportunity to rebut any of the statements made to Mr. Bolger. He also complained that Mr. Bolger seized the appellant's files which were never furnished to the appellant. Notably, he made no complaint that Mr. Fitzpatrick did not afford the appellant the opportunity to comment fully upon the evidence which Mr. Fitzpatrick was considering for the purposes of his report.

60. In view of the fact that Mr. Bolger was simply conducting a scoping exercise, and that it was Mr. Fitzpatrick who conducted the actual investigation, I am satisfied that no case whatsoever has been advanced, much less made out, by the appellant that he was not afforded an opportunity to know and make submissions on the charges against him.

61. In the penultimate paragraph of his submissions to the appeal board, Mr. Staunton stated: -

"Finally, I cannot stress enough my own suspicion that Mr. Fitzpatrick based his decision upon more than the documentation mentioned in his report. [The appellant] has since the meeting in Sligo in 2016 unearthed through the Office of the Information Commissioner considerable documentation including a Private Investigator's report statements by staff and their relatives which were never put to him for comment by Mr. Fitzpatrick, this is grossly unfair to him. Indeed some are clearly discredited by the subsequent convictions against them. I'd strongly suggest that the Board ask the Department to make available to them all documentation released to [the appellant] since 2006."

62. Mr. Staunton does not clarify what statements Mr. Fitzpatrick failed to put to the appellant for comment, or why this is unfair to the appellant. He does not identify the content of the statements or suggest that the statements, as to fact, were untrue or were contested by the appellant. In the preceding paragraph he had requested that twelve witnesses might appear before the board on behalf of the appellant but there is no suggestion that any of these are the witnesses referred to in the paragraph I have quoted above. In the event, Mr. Staunton, on behalf of the appellant, sought to call only four witnesses, two of whom the appeal board permitted and two of whom they did not permit on the basis that there was no conflict of evidence which required to be resolved. In the circumstances, this generalised paragraph setting out the suspicion of Mr. Staunton falls considerably short of what is required to establish that the appellant was not afforded fair procedures throughout the proceedings.

The right to know of the allegations of Minister Coughlan

63. Finally, it was alleged that, by reason of the intervention of Minister Coughlan at the commencement of the investigation, the appellant was not afforded fair procedures. The appellant only became aware of the email from Mr. Beamish during the course of the appeal as part of the disciplinary process, and he became aware of the meeting between Mr. Fitzpatrick and Minister Coughlan upon receipt of the replying affidavit of Mr. Fitzpatrick in these judicial review proceedings. It was submitted that the appellant was not provided with a record of the complaints made against him by the Minister and,

therefore, was not afforded the opportunity to respond to same. The email from Mr. Beamish to Mr. Tuohy and Mr. Fitzpatrick records that the Minister outlined to Mr. Beamish "a range of serious concerns" that she had in relation to harbour management related matters. Her initial concern related to her view that the harbour master had employed his brother-in-law in the harbour without allegedly following due process. He also recorded that she had expressed concerns in relation to the switching off of the CCTV system in the harbour and the fact that this may be facilitating irregular activity. No further detail of any concerns were specified in that email. Neither of these complaints formed the subject matter of Mr. Fitzpatrick's investigation into the conduct of the appellant.

64. Mr. Fitzpatrick met Minister Coughlan on 15 October 2004. He made notes of the meeting. The notes were personal and were not written up into a memorandum. There were references to matters which were not the subject of Mr. Fitzpatrick's investigation and references to the appellant's personal behaviour. The note undoubtedly records pejorative and prejudicial descriptions of the appellant. In his written submissions, the appellant identifies the following matters in Mr. Fitzpatrick's notes: -

"Difficult man

People apoplectic – not acceptable

HM piloting boats, getting paid cash, not DMarine books

No security system – PK doesn't want

Anti-social behaviour (drinking) (college) XXX haunt

Girl in office. Nervous breakdown – not well

PK bullyboy

PK Money (beat wife) doorman nearly killed youngfella

Shot every dog in D'gal town"

65. Counsel for the appellant strongly urged that the appellant was denied fair procedures as both the fact and the details of the meeting were concealed from him until the exchange of affidavits in the judicial review proceedings. The appellant was never afforded an opportunity to know and to respond to the allegations by the Minister to Mr. Fitzpatrick and as a result there has been a clear breach of his right, recognised in *Mooney*, to know and make submissions on the charges against him.
66. In my judgment, the appellant is incorrect in these submissions. In the first place, most of the complaints raised by the Minister with Mr. Fitzpatrick did not, in fact, form part of his investigation. His investigation concerned the matters identified initially on 18 October 2004 and, thereafter, in the letter of 4 August 2005. In that latter letter, he clearly set

out the grounds and the evidence upon which he based his preliminary findings of fact. He made no reference whatsoever to anything stated by the Minister in the meeting of October, 2004. Other than the issue of piloting boats for remuneration, none of the complaints raised by the Minister were, in fact, the subject of Mr. Fitzpatrick's investigation. Therefore, he was entitled to form the view that issues raised by the Minister, which he did not investigate, did not require an answer by the appellant. It follows that if those complaints did not form any part of his investigation, the appellant was not required to be informed of the fact and the substance of her complaints. No authority was opened to the Court to the effect that a party under investigation is entitled to be informed of, and must be given an opportunity to respond to, allegations which do not form part of the investigation. The appellant was not required to answer the Minister's complaints as they did not form any part of the charges raised against him. Insofar, therefore, as the appellant's appeal regarding the intervention of the Minister, and the failure to disclose same to him during the process, is based upon an alleged want of fair procedures, this ground also fails.

The adequacy of the procedures on appeal

67. The appellant argued that in the absence of an adequate appeal he was not afforded fair procedures. He said that the appeal provided for under Circular 1/92 was only a review of Mr. Fitzpatrick's report and that the board was neither a finder of fact nor a decision maker. Paragraph 4 of Circular 1/92 provides as follows: -

"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 Panels;*
- *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 ...

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 submissions 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 the 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)."

68. Under these provisions, the appellant was entitled to make written submissions concerning the grounds upon which the review was sought. He was entitled to make oral submissions to the appeal board, either himself or through his trade union officer, or such other person as the appeal board agrees may be present for that purpose *i.e.* a solicitor or counsel. He was entitled to request the appeal board to invite any person to give evidence, either orally or in writing. The appeal board is required to form an opinion on the case *"having made such enquiries as it considers necessary and having considered any submissions made or evidence given."* In my opinion, the trial judge was correct in saying that this was far wider than a mere review of the procedure before the personnel officer. If the procedure were simply a review, there could be no question of the appeal board taking oral evidence or forming an opinion on the case in substance in the light of the evidence or submissions. It must be emphasised that the appellant availed of this opportunity and, in fact, the appeal took place over three days and the appeal board heard oral evidence.
69. The appeal board is required to form an opinion as to whether or not the appellant has made out a case on one or more of the grounds set out in paragraph 4.3 of the Circular. So, for example, an officer could request the appeal board to hear oral evidence from a witness and the appeal board might then conclude that the personnel officer had not considered all the relevant evidence, or had not considered it in a careful and unbiased fashion. In those circumstances, the appeal board could conclude that no further action should be taken in the matter. This must be seen to be a decision on the merits of the allegation and not simply a review of the processes. It is also possible for the appeal board to refer the matter back to the personnel officer to remedy any deficiency in the disciplinary proceedings. So, for example, the appeal board might direct the personnel officer to consider the submissions which were made to the appeal board and which may not have been made to him or her, or consider the evidence which may not have been taken by the personnel officer. This power permits the appeal board to ensure that all the evidence taken, which an officer concerned wishes to have considered, will be fully

considered and examined on its merits before a final recommendation, pursuant to the code, is made.

70. It is quite clear that the appeal board carefully considered the written and oral submissions advanced on behalf of the appellant. The appellant sought but was refused a *de novo* hearing of his case but nonetheless he availed of his opportunities under the provisions of Circular 1/92 to seek to adduce new evidence and to make submissions before the appeal board. He applied to have evidence taken in respect of twelve witnesses and ultimately decided to proceed with four of the potential witnesses. The appeal board chose to hear the evidence of two out of the four witnesses remaining.
71. The opinion of the appeal board dated 14 July 2009, stated that they had carefully considered the written submissions received, as well as the oral evidence presented at the hearings and the submissions made on behalf of both sides. In relation to allegation number (vii), the appeal board considered that this allegation should not be taken into account in coming to its conclusions in light of the time that had elapsed since the incident took place in 1997 and *"as some of the key witnesses might be viewed as being biased in the statements they provided."* The appeal board rejected the allegations relating to the involvement of Mr. Bolger on the basis that his report was provided to the personnel officer as a preliminary step to satisfy the personnel officer that the alleged conduct might warrant disciplinary action. It was not necessary that Mr. Bolger interview the appellant, nor that Mr. Bolger put his report to the appellant to rebut.
72. In relation to the second ground of appeal the appeal board stated: -
- "The Board is satisfied that the Personnel Officer considered the relevant evidence in a careful and fair fashion. He conducted a thorough investigation which involved interviewing a substantial number of people and he had a number of lengthy meetings with [the appellant], with other staff members and witnesses. He put together a very substantial amount of documentation, most of which was relevant. The Board is not satisfied that a case has been substantiated under this heading."*
73. In relation to the third ground of appeal, that the appellant was not afforded reasonable facilities to answer the allegations of the personnel officer, the appeal board held that he was afforded reasonable facilities to answer the allegations. It noted that a number of extensions of time were provided to him and that he wrote very extensive letters to the department. In relation to files which had been removed from his office in KFHC the appeal board noted: -
- "[The appellant] was unable to identify any particular document that would have been [of] assistance to him in these matters and that would be relevant to the specific issues before the board."*
74. The appeal board assessed whether the appellant could not reasonably have understood that the behaviour alleged would attract disciplinary action in considerable and careful detail over four pages. The appeal board noted that the appellant presented as an able

and intelligent man, both from his evidence and from the submissions he made before them in the course of the oral hearings. The appeal board noted his experience as a director of two companies and his involvement in a number of charities. They noted that *“while being an astute person, he appeared most reluctant to address any issue in a direct fashion and frequently managed to cloud the issue rather than clarify it.”* The appeal board noted his assertion that he never received any payment from NWMS for the work that he carried out on its behalf and that no money was paid to him in respect of it. He said the reason for his involvement in the setting up of the company was to secure insurance cover for the commercial pilotage work in which he was involved and to provide cover to the department. The appeal board held that it was difficult to understand his motivation in working as a commercial pilot in circumstances where he insisted that he never received any benefit from so doing. The evidence of the appellant’s own witness, Mr. Jim Parkinson, who ran a business as a ships agent in Letterkenny, stated that he acted for approximately 95% of all commercial ships and boats that availed of the services of KFHC. Mr. Parkinson said that the appellant carried out the vast majority of all commercial pilotage in his own harbour and the balance was carried out by his co-director, Captain McGowan. This situation prevailed up until the suspension of the appellant in 2004. It was also established on foot of the accounts of NWMS that the company had significant retained profits in the years 2003 and 2004. On this basis the appeal board did not accept that the appellant would not derive any benefit from this commercial pilotage work. The company was paid for the work he carried out and in circumstances where he determined not to draw any income from the company, this was clearly a matter within his own discretion. The appeal board also could not understand why the appellant did not derive any income from his own company if he believed that he was entitled to carry out commercial pilotage activity in his harbour. The appeal board, therefore, concluded that the appellant was aware that there was a conflict of interest between his duties as harbour master in KFHC and his activities in carrying out commercial pilotage work at the same time. The appeal board said that a harbour master has a significant level of responsibility in operating his harbour and in making important and immediate decisions on a day-to-day basis. In that regard, the department must, of necessity, be in a position to rely upon the integrity and responsibility of its harbour master to whom it must delegate significant powers, and rely upon his advices and decisions in relation to many issues. For this reason, the appeal board concluded that the appellant had failed in his appeal and that it was not satisfied that the sanction recommended was grossly disproportionate in relation to the issue of pilotage at KFHC.

75. This was an approach that involved the appeal board in a consideration of the merits and was not a mere review of process.
76. It is significant to note that the board considered that the sanction recommended by Mr. Fitzpatrick was grossly disproportionate in relation to two pollution incidents at Abbott Engineering and in Sligo Bay. It held that the incidents and the misconduct that occurred were sufficiently serious to justify the imposition of substantial penalties but not a dismissal. In respect of these two incidents, the board recommended a penalty of the

deduction of four increments in respect of each of the incidents, rather than dismissal from post, as recommended by Mr. Fitzpatrick.

77. It is thus clear from the actual conduct of the appeal and the outcome of the appeal board's deliberations, that the appeal was not simply a review of the investigation carried out by Mr. Fitzpatrick, as alleged by the appellant. The arguments of the appellant were considered in full and the appeal board reached their own independent conclusions in light of the evidence and arguments. The appeal board had the jurisdiction to alter the findings and recommendations, and it did so. In my opinion, applying the approach set out by Clarke J. in *Rowland*, the ultimate conclusion in this case can be sustained having regard to the principles of constitutional justice.

Should the decision be quashed on the grounds of bias?

78. The appellant argued that the decision should be quashed on the basis of actual, or in the alternative, object bias on the part of Mr. Fitzpatrick which contaminated everything that flowed from his report of 2 September 2008.

79. In *Orange Limited v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159 Barron and Geoghegan JJ. each considered the nature of actual bias. Barron J. held at p. 221:-

"In law it is any relationship, interest or attitude which actually did influence or might be perceived to have influenced a decision or judgment already given or which might be perceived would influence a decision or judgment yet to be given. The general nature of the relationship, interest or attitude is not capable of precise definition. The relationship may be family, social or business. The interest may be financial or proprietary. The attitude may be one of good will or ill will."

80. At p. 222 of the report he continued:-

"Bias can be of two types: conscious - which in the cases has also been referred to as actual or subjective; and perceived - also referred to as objective or unconscious. The reason why the decision is not allowed to stand in the case of conscious bias is the perception that the decision was influenced by some existing relationship, interest or attitude (which I shall refer to as a factor) and would have been different, if it had been absent."

He emphasised that the relevant factor must be shown to pre-date the decision making process and be external to the process. The manner in which proceedings were conducted could not, in itself, create a reasonable suspicion of bias.

81. Geoghegan J. at p. 252 was of the view that the authorities established that there were, in effect, three different situations where bias may arise:-

"(1) The rare case of proved actual bias. For such bias to be established it would be necessary actually to prove that the judge or the tribunal or the adjudicator or whoever the person might be, was deliberately setting out to mark or hold against a particular party irrespective of the evidence."

- (2) *A situation of apparent bias where the adjudicator has a proprietary or some other definite personal interest in the outcome of the proceeding competition or other matter on which he is adjudicating. In that case there is a presumption of bias without further proof.*
- (3) *Even in cases where there is no evidence of actual bias and no evidence of the adjudicator having any proprietary or other interest in the outcome of the matter, there will still be held to be apparent bias if a reasonable person might have apprehended that there might be bias because of some particular proven circumstance external to the matters to be decided in the case such as for instance a family relationship in circumstances where objection may be taken O'Reilly v. Cassidy [1995] 1 I.L.R.M. 306, or the judge having been involved in a different capacity in matters which were contentious in Dublin Well Woman Centre Limited v. Ireland [1995] 1 I.L.R.M. 408, or where there was evidence of prejudgment by a person adjudicating O'Neill v. Beaumont Hospital Board [1990] I.L.R.M. 419."*

82. Thus, to establish actual bias it is necessary for a party to prove that the decision maker was deliberately setting out to hold against a particular party, irrespective of the evidence before the decision maker. Barron J. held that the party asserting that the decision was tainted by actual bias on the part of the decision maker must show that the result would have been different but for the presence of the relevant factor. Importantly, neither the egregious conduct of a decision maker at a hearing nor the perversity of the decision maker's decision may be taken as evidencing bias.
83. In *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412, Denham J. considered the test for objective bias. She said at p. 441 that:-

"...the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues...It is an objective test - it invokes the apprehension of the reasonable person."

In *Kenny v. Trinity College* [2008] 2 I.R. 40 at p. 45 Fennelly J. observed, in the light of the decision of Denham J.: -

"The hypothetical reasonable person is an independent observer, who is not over sensitive, and who has knowledge of the facts. He would know both those which tended in favour and against the possible apprehension of a risk of bias."

Recently, in the Supreme Court in *Reid v. Industrial Development Agency* [2015] IESC 82 McKechnie J. expanded further on the test for objective bias in para. 72:-

"The test for this class of objection is now well established: in short, it is the reasonable suspicion or the reasonable apprehension test: whilst the latter description has been preferred in Bula Limited v. Tara Mines Limited (No.6) [2004] I.R. 412 ('Bula (No.6)'), both terms continue to be used interchangeably. No longer

is there any real suggestion that the once alternative approach, namely a real likelihood of bias, should be considered. The test now to be applied is centrally rooted on the necessity of establishing and maintaining the confidence of the public 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."

84. The issue of whether a judge ought to recuse him or herself from hearing a case based upon prior pronouncements by the judge was considered by Kelly J. in *Ryanair Limited v. Terravision London Finance Limited* [2011] 3 I.R. 192. At p. 206 of the report he quoted with approval from the decision of the Court of Appeal in England and Wales in *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* [2000] Q.B. 451:-

"Everything will depend on the facts, which may include the nature of the issue to be decided..."

By contrast, a real danger of bias might well be thought to arise if...in a case where the credibility of any individual were at issue to be decided by the judge, he had, in a previous case, rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if, on any question at issue in the proceedings before him, the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind... The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

85. The trial judge dealt with the issue of bias arising from the involvement of the Minister and Mr. Fitzpatrick at para. 6.12 of his judgment as follows:-

"This issue was described by counsel for the applicant as the main issue in the case. The applicant's claim in this regard is that the investigating officer never disclosed the fact of the Minister's complaint and this gives rise to a reasonable apprehension of bias on his part. He repeatedly described this non-disclosure as concealment. The applicant further argues that the Minister should not have participated in the Cabinet decision to dismiss him. The evidence is that a decision to initiate an investigation into the applicant's role as harbour master was taken following an anonymous letter dated the 11th August, 2004. This decision was made on the 6th September, 2004. Mr. Fitzpatrick was first made aware of the Minister's complaint in an e-mail dated the 8th October, 2004, from Cecil Beamish,

Assistant Secretary of the Department of Agriculture at the time. Mr. Beamish stated therein that he had received a telephone call from the Minister expressing strong complaints about the applicant in his role as harbour master. At a meeting of 14th October, 2004, with the investigating officer, the Minister repeated these complaints. It is important to note that the evidence clearly shows that the decision to investigate and the parameters of that investigation were taken prior to the Minister's involvement. Moreover, the evidence also establishes that those parameters included the pilotage issue which is the issue central to this case. Thus no reasonable apprehension of bias on the part of Mr. Fitzpatrick can arise out of the Minister's original act in this train of events. It should also be noted that the Minister was not at the time the Minister with responsibility for fisheries. I do not accept that the investigating officer's non-disclosure of the Minister's complaint amounted to a form of concealment. Her involvement seems to have been of no significance to Mr. Fitzpatrick since the investigation was already in train. Moreover, the claim of concealment is entirely at odds with the fact that at the appeal board hearing, the respondents tried to introduce a time line document to assist the board. This document contained a reference to the Minister's original complaint. It was not allowed as the applicant himself objected to its admission. As a result the appeal board, contrary to the respondent's wish was unaware of the Minister's involvement. In my view there was nothing untoward in Mr Fitzpatrick not revealing the minister's complaint and subsequently there was no concealment of this fact from the appeal board by him."

86. As is clear from the decision in Orange, insofar as the appellant seeks to establish actual bias on the part of Mr. Fitzpatrick the onus rests on him to prove that Mr. Fitzpatrick's decision was influenced by the email from Mr. Beamish, and/or the meeting between Mr. Fitzpatrick and Minister Coughlan. That is a difficult hurdle he has not met.
87. The appellant pointed to the failure of Mr. Fitzpatrick to disclose the involvement of the Minister, which he characterised as concealment, as evidence sufficient to satisfy this test. He said the court was entitled to infer actual bias on the part of Mr. Fitzpatrick on the basis that no civil servant could avoid actually being influenced by a Minister who expressed herself in such strong terms. Thereafter, he could not properly have conducted the investigation once the meeting had taken place and ought to have recused himself. Counsel pointed to decisions Mr. Fitzpatrick took during the course of his investigation which he said pointed to actual bias against the appellant. In particular, he referred to Mr. Fitzpatrick's refusal to furnish the appellant the unredacted statements of witnesses unless the appellant gave an undertaking as to the use he would make of the documents. It was argued that this bias could not be "cleansed" by the appeal process because the appeal board was not a fact finder, nor a decision maker. Finally, it was said that because the appeal board did not uphold Mr. Fitzpatrick's recommended sanctions in relation to two findings of misconduct that this was evidence of actual bias on the part of Mr. Fitzpatrick.

88. In my judgment, the appellant has not shown that the trial judge erred in law in his approach to this argument. It is established law that the conduct of the decision maker during the process cannot establish bias. The evidence for bias must arise from a factor outside the process impugned. Likewise, any alleged perversity of the decision maker's decision cannot be taken as evidencing bias. Furthermore, *Orange* is authority for the proposition that one cannot infer bias from a series of decisions made by the decision maker during the decision-making process, such as the decision to furnish unredacted documents on a conditional basis. Still less could one infer bias from the mere fact that a civil servant had a meeting with a minister from another department at the commencement of the investigation.
89. Any such possible inference must be set against the proven fact of an extraordinarily careful and thorough forensic investigation which took place over a period of four years. It is important to note that Mr. Fitzpatrick did not uphold a number of allegations made against the appellant. He stopped inappropriate searching of the appellant's office immediately when it came to his notice. He conducted six meetings with the appellant in respect of which the appellant was furnished with all of the materials upon which Mr. Fitzpatrick relied. He was afforded more than a year to respond to the allegations and the detailed material supporting the allegations. To a large extent the conclusions of Mr. Fitzpatrick in relation to the pilotage allegations were based upon documents, invoices and diary entries of the appellant which were not challenged.
90. In light of all of this evidence, and in light of the ample opportunity afforded to the appellant to reply to the allegations made against him, the failure of Mr. Fitzpatrick to notify the appellant of the fact of the email from Mr. Beamish, of his meeting with Minister Coughlan on 15 October 2004 and of complaints she made, which he did not investigate, to my mind falls very far short of establishing that the report of Mr. Fitzpatrick was tainted by actual bias against the appellant.
91. Furthermore, even had the investigation conducted by Mr. Fitzpatrick been tainted by actual bias, by reason of the involvement of the Minister, to my mind the conduct of the appeal by the appeal board rectified any flaw that may have existed in the process. It is common case that the appeal board knew nothing of the involvement of Minister Coughlan in the investigation in October 2004. The appellant was afforded, and availed of, the opportunity to call witnesses and, thus, to challenge any finding of fact made by Mr. Fitzpatrick in his report of September 2008. Critically, he chose not to dispute – and indeed admitted to – all but two of the critical facts in relation to the central issue of pilotage by the appellant at KFHC. He denied that he received any reward for the pilotage he carried out on behalf of the company, of which he was a director and 1% shareholder, and he denied that it was contrary to the terms of his appointment, or involved a conflict of interest, and asserted that his successor as harbour master likewise engaged in piloting vessels without objection by the department. These matters were fully explored by the appeal board over a three-day hearing. I have already held that the appeal board is not bound by the findings of fact made by the personnel officer, as it is free itself to find facts based upon evidence adduced before it. While the Circular refers to the report prepared

by the appeal board as an "opinion", it must be emphasised that it is this opinion which was sent to the third named respondent, not the report of Mr. Fitzpatrick. On the facts in this case, it was the opinion of the appeal board, which recommended lesser sanctions in respect of two charges, rather than the recommendations of Mr. Fitzpatrick, which were sent to the third named respondent by the then personnel officer of the department for a decision. That opinion was based upon facts which were either accepted by the appellant or which were upheld by the appeal board who heard full submissions and fresh evidence in relation to the disputed issues.

92. Two things flow from these facts. First, the appellant has not met the test set out by Barron J. in *Orange*. He has not shown that the outcome of the disciplinary process would have been different if the Minister had not intervened as she did. Secondly, even if there could have been a question of actual bias arising out of the meeting between Mr. Fitzpatrick and the Minister in October 2004, that meeting could have had no impact whatsoever on the opinion of the appeal board and it was that opinion which was furnished to the third named respondent for its decision. Thus, applying the principle in *Rowland*, any error that might have been perceived to have occurred in the early stages of the process had been corrected by appropriate measures taken before the process came to an end.
93. I shall come back to whether Mr. Fitzpatrick could not properly conduct the investigation once the meeting had taken place in the context of the allegation of objective bias. In my judgment, the trial judge was correct to hold that the appellant had failed to establish actual bias on the part of Mr. Fitzpatrick and I reject this ground of appeal.
94. In the alternative, the appellant argued, on the same facts, that he had established that the decision was tainted by objective bias on the part of Mr. Fitzpatrick. Whether this is so, is an objective test. Would a hypothetical reasonable person, who is an independent observer of this entire process and who is not overly sensitive and who has knowledge of the facts, have a reasonable apprehension that the appellant did not have a fair hearing from an impartial judge on the issues?
95. That reasonable independent observer would be aware of the following facts:
 - the allegations which resulted in the decision to investigate the activities of the appellant and the fact that the decision was initiated in response to an anonymous letter received in August 2004;
 - the decision to investigate the activities of the appellant was taken on 6 September 2004;
 - Mr. Fitzpatrick was asked to undertake the investigation as he was the personnel officer of the department;
 - the scope of the matters to be investigated and the matters which were excluded from the investigation;

- the meeting between Minister Coughlan and Mr. Fitzpatrick;
- the allegations against the appellant made by Minister Coughlan in October 2004;
- the fact that the appellant was not informed of either the fact of the meeting or the details of her complaints concerning the appellant;
- the investigation took place over four years;
- the appellant was furnished with all of the documents upon which Mr. Fitzpatrick relied in reaching his preliminary, and then final, conclusions;
- the appellant was afforded the opportunity to respond to all of the allegations made against him and to make submissions orally and in writing;
- that much of the material consisted of invoices and the appellant's own diary entries;
- that this evidence was not disputed by the appellant;
- the appellant defended the allegations on the basis that (a) he was entitled to engage in pilotage, (b) this activity did not give rise to a conflict of interest with his position as harbour master and, (c) he received no remuneration for his pilotage;
- Mr. Fitzpatrick rejected some of the allegations against the appellant;
- while not legally represented, the appellant had the benefit of legal advice throughout the process;
- the appellant was represented by a very experienced trade union official throughout the process;
- the appellant had the possibility of being legally represented at the appeal before the appeal board;
- that the appellant was afforded the opportunity to call witnesses before the appeal board;
- the appellant chose not to call any witnesses relevant to the essential ingredients of the charges laid against him;
- the appellant called two witnesses who addressed the issue whether he received remuneration for his services as a pilot and whether the admitted activity was prohibited or condoned by the department;
- the independent appeal board reached its own conclusion as to whether the complained of activity was permitted or constituted a conflict of interest justifying the dismissal of the appellant from the post of harbour master;

- the appeal board was unaware of any involvement of Minister Coughlan in the process;
- the government was furnished with the report of the appeal board but not Mr. Fitzpatrick's report;
- they received a memorandum setting out the background, some background documentation, the reasons for the memorandum and the representations made by, and on behalf, of the appellant;
- the role of, and the options open to, the government; and
- Minister Coughlan was a member of government and present in cabinet when the government took the decision to dismiss the appellant.

96. In my judgment, in light of all of the above, the hypothetical reasonable and independent observer could have no reasonable apprehension of bias in relation to the ultimate decision to dismiss the appellant from his post as harbour master at KFHC. I find there is no error on the part of the trial judge in his conclusion that no reasonable apprehension of bias on the part of Mr. Fitzpatrick can arise out of the Minister's original act in the process.

97. Additionally, and separately, it was argued that the decision was tainted by objective bias by reason of the fact that Minister Coughlan was in the cabinet when the government took the decision to dismiss the appellant and that this gives rise to a reasonable apprehension of bias. The trial judge dealt with this issue as follows: -

"6.13 The second question raised by the applicant concerning the Minister's involvement in the Government decision to dismiss him is as to whether it gives rise to a reasonable apprehension of bias.

The first thing to be considered in regard to this question is the role of the Government in this type of case. It is argued by the applicant that it has an adjudicatory role. If it does not have such a role, goes the argument, why is it furnished with so much of the evidence? It seems to me that this argument cannot be correct. The Government is asked just one question. Should it dismiss or should it not? It is dealing with sanction only. It can only exercise its discretion in favour of the officer concerned. In this case it was furnished with a memorandum that was extensive and included the applicant's submissions to Government. It was informed of the piloting carried out by Mr. Connell, the successor to Capt. Kelly. It cannot be said to have had any adjudicatory function. That process was complete with the appeal board's decision. The appeal board seems clearly to be the final fact finder. Its conclusion is what is transmitted to Government. The Government's role is to decide on the basis of the case set out in the memorandum together with the recommended sanction of dismissal whether to accept or reject the

recommendation. If it rejects it, then the whole matter reverts to the personnel officer who will deal with the case in a manner other than dismissal.

6.14 *Can there be bias, either objective or subjective where there is no adjudication? Can it arise where, as here, there is simply a duty to affirm a recommendation or exercise its discretion and refuse to dismiss? Should a Minister who has expressed previously a view on the complaint which finally ends up before her in Cabinet be precluded from participation in the decision whether to dismiss or not? If, for example, the Government or any member thereof stated publicly a determination to stamp out corruption in a particular area of the civil service, would it or the Minister in question be precluded from deciding to accept a recommendation to dismiss an officer in that area found to have acted corruptly following a fair investigation and after an appeal? The answer to all these questions seems to me to be "no". Is a Minister who has publicly expressed a view on an issue obliged to forgo participation in vital decisions concerning that issue? To preclude a Minister from participating in decisions on matters upon which they have expressed views, in my view, confuses the adjudicatory function with the executive process. Thus, in my view, the Minister's participation in Cabinet when the decision was made to dismiss the applicant is beyond challenge herein."*

98. Any assessment of whether a decision is tainted by bias must be fact specific and must depend on the nature of the issue to be decided. Section 5 of the Civil Service Regulation Act, 1956 provides that *"every established civil servant shall hold office at the will and pleasure of the government."* The decision to dismiss the appellant was a decision which could only be made by the government. The government was asked to either affirm the recommended sanction and dismiss the appellant, or to refer the appellant to the appropriate decision maker for a lesser sanction for the serious misconduct the appeal board found had been established. It was no function of the government to review the opinion of the appeal board on the finding of misconduct, much less review the facts and substitute its own view for that of the appeal board.
99. Appended to the memorandum was the letter of suspension of 18 October 2004, the finding of the appeal board of 14 July 2009, representation made on behalf of the appellant by Mr. Staunton and by the appellant, supporting documentation from 1996 onwards between the department and the appellant concerning his provision of commercial pilotage services at KFHC, the transcript of a meeting with Mr. Fitzpatrick on 8 March 2005, an extract from the meeting on 12 October 2006, statements from Mr. Martin Connell, acting harbour master at KFHC, and an affidavit of Captain McGowan regarding the involvement of the appellant and Captain Connell in pilotage at KFHC. This information was provided so each member of the government would have sufficient information to enable them to take a decision whether or not to dismiss the appellant, not so they could review the findings of the appeal board.
100. The appellant accepted that, in accordance with Article 28.4.3 of the Constitution, the discussions of cabinet are confidential. He makes no argument that he is entitled to go

behind this provision. The court may not speculate as to the role, if any, played by Minister Coughlan in the government decision of 30 September 2009. Thus, he can advance no case of actual bias. The case is confined to an allegation of objective bias. In these circumstances, has the appellant made out his case that the decision is tainted by reason of the participation of Minister Coughlan in the decision?

101. It is accepted that where a decision is taken by more than one person and objective bias is established in respect of one of the decision makers, this taints the decision taken by the body. So, if the appellant has made out his case in relation to Minister Coughlan, then it follows that he must succeed in respect of the decision of the government to dismiss him.
102. In answering this question, the court must have regard to the observations of McKechnie J. in *Reid*. The test for objective bias is rooted in the necessity of establishing and maintaining the confidence of the public in the integrity of public administration generally. The prism through which this must be assessed is that of the reasonable observer's perception of what happened. It is not a test of perfection. The apprehension of bias must be reasonable.
103. It also has regard to the decision in *Locabail*. The mere fact that in 2004 Minister Coughlan had commented adversely on the appellant would not, without more, found a sustainable objection to her participating in the government decision.
104. The nature of the decision maker in this case is also relevant. Judges are required generally to abstain from expressing views or opinions outside of court, other than in relation to the administration of justice generally, or on legal issues at which they may be speaking at conferences, for example. It is quite different for members of the government, who are mostly elected representatives. The role of an elected representative is to express opinions, to represent the interests of their constituents and to make representations on their behalf. Members of the Dáil are expected to raise issues of concern in their constituency with the relevant government departments. We live in a representative democracy. This means that the jurisprudence as regards bias as it applies to judges cannot be applied simpliciter to a decision of the government. Of necessity, a greater margin of appreciation must be granted to public representatives than may be appropriate to grant to judges in relation to their pronouncements or representations. Public representatives ought not to be constrained from expressing their views or representing their constituents, lest they be prevented at a future date from participating in decisions of government, save in the most exceptional or extreme circumstances.
105. In this case, in October 2004, Minister Coughlan, a local representative, raised concerns in trenchant terms about the conduct of the appellant, both in his capacity as harbour master and in his personal capacity, to the personnel officer who was about to commence an investigation into certain allegations made against the appellant. Nearly five years later, after the exhaustive process previously outlined, she participated in cabinet when the government was asked to confirm, or reject, the sanction recommended at the conclusion of this process. She had no involvement of any kind in the process between

October 2004 and September 2009. She was not charged with investigating, much less deciding, the substantive allegations which were investigated. Most of the concerns she raised were not in fact the subject of the investigation. Insofar as she had raised concerns at the meeting in relation to issues which were subsequently investigated by Mr. Fitzpatrick, she had not been instrumental in procuring the investigation into the activities of the appellant. The independent appeal board, which was entirely unaware of her interest or involvement, reached its own conclusions in relation to those allegations and found that the most significant of the allegations of serious misconduct alleged against the appellant were established. The decision of the government was based upon the report of the appeal board, which independently and comprehensively established the case against the appellant. The Minister was not in any sense a decision maker prior to 30 September 2009 so it cannot be said that she prejudged the decision of the government before she participated in reaching the decision. Objectively, there was evidence before the government sufficient to justify the decision reached.

106. In my judgment, the reasonable observer of what happened prior to the meeting of the government could have had no reasonable apprehension regarding the fairness or impartiality of the process. That assessment would not reasonably be changed by reason of the fact Minister Coughlan did not withdraw from the cabinet deliberations on the appellant's case. There can, in the circumstances, be no lack of confidence in the integrity of public administration generally and in relation to the decision of 30 September 2009, in particular. The reasonable observer could have no reasonable apprehension that the decision taken in relation to the appellant was not taken following a fair hearing by an impartial decision maker, the government. For these reasons, I am not satisfied that the appellant has shown that the decision to dismiss him was tainted by bias and should be quashed on this ground. This ground of appeal is rejected.

Other grounds of appeal

107. The appellant argued that Mr. Fitzpatrick erred in applying the balance of probabilities standard to his assessment of the case and argued that in accordance with the decision in *Georgopoulos v. Beaumont Hospital* [1998] 3 I.R. 132 he ought to have applied a higher standard of proof. In *Georgopoulos* Hamilton C.J. stated at p.150: -

"This does not, however, require that the facts upon which the allegations are based should be established beyond all reasonable doubt. They can be dealt with on "balance of probabilities" bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."

108. The first paragraph of Mr. Fitzpatrick's first report of his provisional conclusions of his investigative phase dated 4 August 2005 stated that his provisional conclusions and findings had been arrived at on the principle of the balance of probabilities. This was reaffirmed in the revised statement of allegations of 20 June 2006 and in the final outcome of the investigation in the letter of 2 September 2008. At no stage was it alleged that this was an inappropriate standard to be applied in establishing the facts in this case. The appellant had the benefit of legal advice throughout the investigative process, even

though his solicitor was not permitted to attend at meetings held by Mr. Fitzpatrick. His union representative, Mr. Staunton, acted for the appellant and corresponded with Mr. Fitzpatrick from 11 November 2005. He submitted the appellant's grounds of appeal to the appeal board, on behalf of the appellant, on 1 October 2008. At no stage was it suggested, either to the appeal board or Mr. Fitzpatrick, that the standard of proof adopted was unlawful in the circumstances. In my judgment, this is precisely a point which ought to have been raised and, if necessary, taken, prior to the conclusion of the disciplinary process. The time for seeking judicial review on this ground expired well before the order of the High Court of 22 March 2010 granted him leave to seek judicial review in respect of the decision to dismiss him from the Civil Service. I consider that the trial judge was correct to hold that the appellant was too late to raise the point at this stage.

109. Under Circular 1/92 the investigation is to be conducted by the personnel officer of the department, though another person may be appointed to act under paragraph 5 of the Circular. Mr. Fitzpatrick was appointed to carry out the investigation into the conduct of the appellant as he was the personnel officer of the department at the time. In the Spring of 2006, Mr. Fitzpatrick ceased to occupy this position. Under paragraph 5.3 of the Circular any functions assigned to the personnel officer under the provisions of the code could be performed by another officer nominated for the purpose by the head of the department or the personnel officer. On 10 October 2006 Mr. Tuohy, Secretary General of the Department of Communications, Marine and Natural Resources authorised Mr. Fitzpatrick, the former personnel officer with the department: -

"[T]o conduct a hearing under disciplinary procedures as set out in Department of Finance Circular 1/1992, on Thursday 12th and Friday 13th October 2006, as part of this Departments' disciplinary investigation being undertaken into allegations made against [the appellant] Harbour Master, Killybegs."

110. Two matters emerge from this written authorisation which was furnished to the appellant; firstly, that it expressly dealt with the proceedings on 12 and 13 October 2006 and nothing else and, secondly, that the appellant was aware of the fact that Mr. Fitzpatrick was no longer the personnel officer and that, in accordance with the terms of the Circular, the Secretary General of the Department had nominated Mr. Fitzpatrick in writing to continue the investigation on those two dates.
111. At this stage the appellant had the benefit of legal advice and advice from a most experienced trade union official. At no point thereafter did he raise an issue that Mr. Fitzpatrick was allegedly *functus officio* after 13 October 2006 until 2010 when his solicitors started seeking evidence of Mr. Fitzpatrick's authorisation to continue to act after October 2006. It did not form part of his response to Mr. Fitzpatrick's final report of 2 September 2008, nor of his appeal to the appeal board. In my judgment, the appellant acquiesced in Mr. Fitzpatrick continuing the investigation and bringing it to a conclusion and he may not now raise this ground to seek to quash the decision of the third named respondent of 30 September 2009.

112. Finally, the appellant argued that the trial judge erred in refusing to grant an order of certiorari quashing the decision of 30 September 2009 on the grounds of delay. The trial judge held that it was most undesirable that the disciplinary process took as long as it did, given that the appellant was suspended on 18 October 2004, and the decision to dismiss him from his post was taken on 30 September 2009. He held that the first stage of the process was the investigation by Mr. Bolger to ascertain whether there were sufficient grounds to warrant a full investigation. This was concluded on 22 December 2004 as the trial judge said *"with commendable expedition considering the complexity of the matters investigated."* The appellant was informed of the allegations that would be investigated under the disciplinary code. The trial judge outlined how the investigation proceeded in 2005 up until 2006. There was extensive correspondence between the parties and meetings between Mr. Fitzpatrick and the appellant. The appellant was furnished with Mr. Fitzpatrick's preliminary report dated 4 August 2005 and in January 2006 a detailed response was furnished. There were further meetings and extensive correspondence and on 20 June 2006 Mr. Fitzpatrick sent a revised statement of allegations to the appellant together with his preliminary findings and the evidence upon which they were based. In July 2006 Mr. Fitzpatrick transferred to the Office of the Revenue Commissioners and on 12 October 2006 there was a meeting between Mr. Fitzpatrick and the appellant in relation to the revised report of 20 June 2006. The trial judge noted that there was delay between 2006 and the delivery of Mr. Fitzpatrick's final investigation report dated 2 September 2008. This was attributed to the ongoing transfer of the functions of the responsible department to the Department of Agriculture, Fish and Foods and to voluminous correspondence from the appellant; at para. 6.2 of his judgment the trial judge said: -

"To that date the proceedings appear to have been dogged by a blizzard of correspondence and the administrative difficulties inherent in the moving of responsibility for the investigation from one department to another. Thus, the proceedings to that date do appear to have been delayed substantially. The complexity and number of issues that arose largely at the behest of the [appellant] seem mostly responsible for this delay. It would be hard to criticise the [appellant] for this, bearing in mind the gravity of the situation. It would also be harsh to criticise the officials' conduct of the proceedings to this date bearing in mind the voluminous demands of the [appellant] together with the transfer of functions from one department to the other."

It is to be noted elsewhere that the trial judge refers to the fact that the appellant wrote thirty-three letters raising numerous issues during the investigative phase of the process.

113. On 23 September 2008 Mr. Staunton wrote requesting a review by the appeal board. The appeal board had its first sitting three months later on 12 January 2009 and it sat again on 4 February and 12 March 2009 and issued its decision on 14 July 2009. The appellant was informed that the appeal board upheld the recommendation to dismiss him from the Civil Service and he was informed of his right to make submissions to the government. He did this on 31 July 2009 and the decision of the government was taken on 30 September

2009. The trial judge concluded that from the date of presentation of the final report by Mr. Fitzpatrick and notification by the respondents on 15 September 2008 of the intention to proceed to apply to the government for his dismissal, the disciplinary process moved at a brisk pace and cannot be faulted for delay.

114. The appellant submits that the delay in the process was so long as to be unreasonable, unjust and unconstitutional in the circumstances, and relied upon the decision in *McNeill v. The Commission of An Garda Síochána* [1997] 1 I.R. 469 and *Molloy v. Garda Síochána Complaints Tribunal* [2009] IEHC 197. The appellant argued that the trial judge was wrong to accept that the delay in the process was attributable to the appellant as he was fully entitled to unredacted copies of witness statements at the outset of the process. The appellant argued that the respondents ultimately accepted this fact as he was subsequently provided with the unredacted statements in August 2007. He argued that responsibility for the failure to provide the appellant with the unredacted witness statements in a timely manner, and the delay it engendered, lay solely with the respondents.
115. I am not satisfied that the respondent is solely responsible for the delay which occurred in this case, or that the delay was so egregious that the decision must be quashed. The appellant fails to address the fact that Mr. Fitzpatrick offered to furnish the unredacted witness statements to him on his undertaking to use them solely for the purposes of the disciplinary proceedings and for his defence of criminal proceedings pending before the Circuit Court. No valid explanation for his refusal to give this undertaking has ever been forthcoming. In the event, when he was furnished with the witness statement without conditions, he used them as the basis to sue the witnesses concerned for defamation but not for the purposes of defending himself in the disciplinary process. To my mind, this underscores both the reasonableness and legitimacy of the stance adopted by Mr. Fitzpatrick and undermines the appellant's attempts to blame the respondents for the delay arising from his insistence on receiving the witness statements without giving the unexceptional undertaking requested by Mr. Fitzpatrick.
116. It is worth observing that despite receiving the unredacted witness statements in August 2007 the appellant was still corresponding in relation to the documentation in March 2008. I also note the fact that Mr. Fitzpatrick received thirty-three letters from the appellant and, as the trial judge said, none of the letters dealt with the substance of the allegations made against the appellant. Finally, it is relevant to note that the appellant did not advance any case that he was prejudiced in dealing with the allegations by reason of the delay in concluding the investigation; though it is accepted that prejudice may exist from the very fact of being subject to a disciplinary process of prolonged duration.
117. I am not satisfied that the appellant has, in the circumstances, made out this ground of appeal.

Conclusions

118. The appellant was afforded fair procedures throughout the conduct of the disciplinary process leading to his dismissal from the Civil Service. He was not entitled to be legally

represented during the investigative phase of the process as he has not established that his was an exceptional case which might give rise to such a right. At a stage in the process when he was entitled to be so represented, he chose not to avail of the opportunity. There is no free-standing right to cross-examine witnesses in a disciplinary process. If there is a conflict of evidence, or the party wishes to test the evidence, such a right may arise, but, on the facts of this case, no such conflict or need to test any evidence arose. Thus, there was no breach of his entitlement to fair procedures based on a failure to afford him the opportunity to cross-examine witnesses, or a right to be legally represented.

119. At all times the appellant was informed in writing of the allegations against him which were under investigation. He was furnished with a letter setting out the initial matters under investigation and informed of additional matters as they arose. He was furnished with comprehensive reports setting out the provisional findings in respect of each allegation together with all the supporting documents relied upon by Mr. Fitzpatrick. He was afforded the opportunity to respond fully to each of the reports. He was afforded an opportunity to respond to and rebut all of the allegations. His right to know the charges against him was respected.
120. He was not deprived of fair procedures arising from the fact that unredacted witness statements were only furnished to him in 2007, late in the investigative phase of the process. He previously was furnished with statements with the irrelevant portions redacted. Once he received the statements, the appellant made no use of the unredacted statements in the conduct of his defence to the disciplinary proceedings.
121. The delay in the procedure from start to finish, for which each party was partly responsible, was in all the circumstances neither so egregious nor prejudicial as would justify quashing the decision on grounds of delay.
122. Circular 1/92 provides that the investigation shall be conducted by the personnel officer of the department unless another person is so authorised. Mr. Fitzpatrick ceased to be the personnel officer of the relevant department during the course of the investigation. He was expressly authorised in writing to conduct the investigation for two days in October, 2006. The appellant did not object to Mr. Fitzpatrick continuing the investigation thereafter and, therefore, he waived his entitlement to argue after the event that he was *functus officio*.
123. At all times the appellant was aware that Mr. Fitzpatrick was applying the balance of probabilities as the standard of proof in respect of the allegations under investigation. No issue was taken with this standard at the time, and so the appellant is deemed to have acquiesced to same. In any event, the standard applied was the correct standard. Neither Mr. Fitzpatrick nor the appeal board were required to establish the allegations against the appellant beyond a reasonable doubt.
124. The appellant has not established that Mr. Fitzpatrick showed actual bias towards him in the conduct of his investigation. Nor has he established that the decision is tainted by

objective bias arising out of the involvement of Minister Coughlan in October 2004. Mr. Fitzpatrick was not precluded from conducting the investigation following the meeting with Minister Coughlan. The decision of the government to dismiss the appellant was not tainted by objective bias by reason of the fact that Minister Coughlan participated in the cabinet meeting which took the decision. Viewing the entire process, a reasonable independent observer with knowledge of the facts could have no reasonable apprehension that the decision reached was not one reached by an impartial decision maker.

125. The appellant has not established that the trial judge erred on any of the grounds alleged. For these reasons, I would dismiss this appeal.