



THE COURT OF APPEAL

[2019 IECA 288]

[2019 No 398 JR]

**The President
Edwards J.
Baker J.**

BETWEEN

COLM O'FLAHERTY

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

APPELLANT

JUDGMENT of the President delivered on the 20th day of November 2019

1. This is an appeal from a decision of the High Court (Moriarty J.) of 22nd May 2017, quashing a decision of the then Garda Commissioner, Mr. Martin Callinan, made in the context of Garda disciplinary proceedings requiring the applicant, Garda O'Flaherty, to resign from An Garda Síochána as an alternative to being dismissed.
2. The background to the judicial review proceedings and to the present appeal is that at the time the judicial review proceedings were launched, the applicant was a 38-year old Garda, with 18 years of service, last stationed at Togher Street Garda Station in Cork. An allegation of sexual assault on a named female was made against him, as well as a number of related allegations of discreditable conduct relating to the same named female.
3. The allegations were brought to the attention of the Garda Síochána Ombudsman Commission ("GSOC") who commenced an investigation. At the conclusion of the initial investigation, a file was forwarded to the DPP who, in or about June 2012, directed that there should be no criminal prosecution. A further inquiry was conducted under the auspices of GSOC, addressing the question of whether there was evidence of breaches of the Garda Síochána (Discipline) Regulations 2007 (S.I. No. 214 of 2007) . In December 2012, a report was furnished to the Garda Commissioner under s. 97 of the Garda Síochána Act 2005, which recommended the initiation of disciplinary action. A notice furnished to the applicant, Garda O'Flaherty, referred to six matters stated to amount to discreditable conduct, corrupt or improper practices, abuse of authority and neglect of duty.

4. On 29th April 2013, a Board of Inquiry was established for the purposes of determining whether the applicant had committed a serious breach of discipline, and if so, to make a recommendation to the Garda Commissioner as to the disciplinary action to be taken. The Board, which would ultimately embark on the inquiry, consisted of Ms. Maureen Cronin, Barrister-at-Law, as Presiding Officer, Chief Superintendent Patrick Mangan, and Superintendent Dan Flavin.

5. The Board of Inquiry convened at Ballincollig Garda Station on 3rd September 2013. On that occasion, substantial legal arguments challenging the Board's jurisdiction were presented by the solicitor appearing for the applicant, Mr. Dan Murphy, solicitor of the firm of Carey Murphy Solicitors. The arguments advanced did not find favour with the members of the Board of Inquiry and they indicated that they would not be withdrawing from the matter, nor would they be recusing themselves. The further hearing of the inquiry was adjourned until the following day, and on that day, the applicant pleaded guilty to each of the eight charges that he faced. The eight charges before the Board of Inquiry broadly reflected the six allegations identified by the GSOC Investigating Officer. They were:
 - (i) Discreditable conduct, reasonably likely to bring discredit on An Garda Síochána, in that on various dates between August 2010 and November 2010, he sent numerous mobile phone text messages to a named female person to such an extent as to cause her to be in fear of him;
 - (ii) Neglect of duty, failing without good and sufficient cause, between August 2010 and November 2010, to execute, which it was his duty to do, arrest warrants which he knew existed for the same named female person;
 - (iii) Improper practice, that is to say that the applicant used his position as a member of An Garda Síochána for his private advantage, in that being aware that arrest warrants existed for the named female, used that information in order to maintain a sexual relationship with that named female;
 - (iv) Breach of confidence, making an unauthorised communication to the named female person in relation to information that came to his knowledge in the course of his duties, being information in relation to a named female person which had been obtained by accessing PULSE. This was information that was not available to members of the public;
 - (v) Discreditable conduct, accessing PULSE information relating to the above referred to female person for non-business purposes;
 - (vi) Discreditable conduct, accessing PULSE information relating to the named female person for non-business purposes;

- (vii) Disobedience of orders, purporting to recruit an informant, namely, the named female person without adhering to established Garda policy on the management and use of Covert Human Intelligence Sources; and
- (viii) Discreditable conduct, conducting himself in a manner which he ought to have known would be reasonably likely to bring discredit on An Garda Síochána, in that when the named female person requested him to stop performing sexual acts on her, he failed to do so, the named female person being a person that he had met through his work as a member of An Garda Síochána.

With characteristic understatement, Moriarty J. commented that the complaints could not realistically be viewed as being trivial and that they undoubtedly came within the ambit of the section of the Regulations involving serious breaches of discipline. Such breaches bring with them potential sanctions ranging from dismissal to substantial reductions in pay.

6. The circumstances arising from the second day of the inquiry in which Mr. O'Flaherty came to change his plea and enter pleas of guilty to the "charges" that he faced is central to these judicial review proceedings and to this appeal. However, at this stage, it is worth noting that following the entry of the pleas of guilty, the matter was adjourned until 9th September 2013, in order to allow a plea in mitigation to be advanced on behalf of the applicant. The Board, having heard those submissions, stated that it would recommend to the Commissioner sanctions in the form of reductions of either three weeks' or four weeks' pay in respect of each of the disciplinary charges, the total reduction amounting to €22,693.22.
7. It is clear that the change of pleas, and the entry of pleas of guilty to the disciplinary charges, came against a background of some form of interaction between Superintendent Flavin and Mr. Murphy. However, there is no agreement as to the nature of that interaction. Mr. Murphy characterised what happened as "negotiations", while Superintendent Flavin said that what occurred were mere "discussions". In a situation where there was a fundamental conflict on the affidavits as to what had transpired, the High Court heard oral evidence from Mr. Murphy, from Superintendent Flavin and also from Ms. Cronin, who it will be recalled was the Presiding Member of the Board of Inquiry.
8. Moriarty J, for his part, categorised the interaction between Mr. Murphy and Superintendent Flavin as "undoubtedly some form of plea bargaining". It will be necessary to review in greater detail the disputed evidence in relation to the interaction between these two gentlemen, but to put the dispute in context, it must be appreciated that both were very well-versed in the specifics of the Garda Disciplinary Code. There is one aspect of the Code which was highly relevant to the interaction, to continue to use that neutral word. While it is for the Board of Inquiry to recommend the appropriate level of sanction to the Commissioner, the Commissioner is not bound to accept the recommendation. He can reject the recommendation and consider a more severe sanction. If he is considering such a course of action, the Disciplinary Code requires that the relevant Member of the Force be informed of what is under contemplation and that he be provided with an

opportunity to address arguments as to why the Commissioner should not impose a sanction greater than that recommended by the Board. If, having considered the submissions made to him, the Commissioner is still minded to impose a more severe sanction, then the Member has a right of appeal to a Board of Appeal, comprising an independent, legally-qualified Chairman, a representative of the Commissioner, and a representative of the representative body to which the Member belonged. In this case, the Garda Commissioner, on 2nd October 2013, issued a letter to the applicant. That letter referred to the fact that the Board of Inquiry had recommended a total temporary reduction in pay of €22,693.23, but went on to say "having considered the report of the Board of Inquiry, I propose to impose a disciplinary action which is more severe than that recommended by the Board of Inquiry, namely, requirement to resign as an alternative to dismissal in respect of four breaches of discipline. The disciplinary action now proposed will apply in respect of breaches (iii), (iv), (vii) and (viii)". The letter also made reference to the entitlement to make observations within ten days in relation to the proposal for a more severe sanction and a further reference to the entitlement to appeal.

9. In response to the letter from the Commissioner, Mr. Murphy wrote, referring to his recollection of what had transpired on the second day of the Board hearing, the day on which there had been a change of plea, and also summarising the main matters that had been offered in mitigation. He urged that the Commissioner should not impose a sanction greater than that recommended by the Board of Inquiry. However, the Commissioner was not disposed to alter his position. In these circumstances, judicial review proceedings were initiated and leave to seek judicial review was obtained in the High Court (Hogan J.) on 24th April 2014. It should be noted that Mr. Murphy, in his capacity as solicitor for the applicant, invoked the right of appeal, but it was clear that the preferred option was that of judicial review.
10. The relevance of the fact that the Commissioner was not bound by the recommendation of the Board of Inquiry is that both the applicant and his solicitor say they were acutely conscious of the options available to the Commissioner and that, in entering into discussions with Superintendent Flavin, they took full account of this. As such, the only deal or arrangement which would be of any interest to them and which they could even consider was one where they knew that the ultimate sanction would be a monetary penalty. They say that all their interactions or discussions or negotiations, whatever term is to be applied, with Superintendent Flavin were informed by this consideration.
11. On behalf of the applicant, it is contended that in the course of the discussions, the Superintendent went away for a period of approximately twenty minutes, and on his return, informed Mr. Murphy that they were in a position to deal with the case in the manner suggested. Mr. Murphy contends that he received an assurance that contact had been made at the highest level, at which it had been sanctioned that a plea would be accepted and that the matter could be dealt with by way of fines. In the course of the grounding affidavit, the applicant says that he was advised and believed that Superintendent Flavin had assured Mr. Murphy that if a plea of guilty was entered to the alleged breaches, it was "guaranteed from the top" that a fine would be the ultimate

outcome of the disciplinary process. He says that to his mind, “guaranteed from the top” was open to only one interpretation, that the Commissioner had sanctioned the disposal of the proceedings in that manner and it was that understanding that guided his actions thereafter.

The High Court Judgment

12. In the High Court, the applicant relied upon two primary grounds to support his claim, the doctrine of legitimate expectation and an alleged failure on the part of the Commissioner to give adequate reasons. In delivering his judgment, the trial judge referred to the widely-diverging accounts advanced by Mr. Murphy and by Superintendent Flavin in their affidavits and in cross-examination. He saw the case as being one of a limited minority of judicial review claims in which a significant factual issue required to be determined in addition to the claim for relief on procedural grounds. He found Mr. Murphy’s detailed evidence, which accorded with a prompt initial affidavit, to be more persuasive and probable than the account provided by Superintendent Flavin. He found himself driven to conclude that the lengthy exchanges between the two men extended to what might transpire on the part of the Commissioner, an extension that was initiated by Mr. Murphy and from which Superintendent Flavin did not demur. He reviewed the legal issues that had been canvassed, addressing in particular detail the issue of the doctrine of legitimate expectation. In relation to the absence of reasons issue, he commented that at a minimum, a format whereby the Commissioner was enabled to indicate tersely that having considered the Board of Inquiry report, he was disposed to impose a vastly more serious sanction, jars somewhat in the light of all the recent authorities. However, he went on to say that the more he had deliberated on this troubling case, the more persuaded he was that what lies at the heart of it was the doctrine of a legitimate expectation and the infringement thereof.
13. The trial judge concluded his judgment by saying that in the light of the factual findings that he had felt constrained on the evidence to make, that he believed that the elements required to ground a successful claim based on failure to respect legitimate expectations as set forth by Fennelly J. in the case of *Glencar Explorations plc. v. Mayo County Council* (No. 2) [2002] 1 IR 84 had been established. He felt that the appropriate form of relief was to quash the decision of the Commissioner, substituting a sterner sanction for what had been recommended by the Board of Inquiry, and then remitting the matter to the present Commissioner for due consideration of appropriate sanction in the light of all that had transpired.

The Issues to be Decided

14. The applicant has identified five issues falling to be considered on the appeal, namely:
 - (i) Can and should the appeal Court interfere with the High Court’s finding of fact?
 - (ii) The scope of the doctrine of legitimate expectation.
 - (iii) Is the Commissioner’s decision otherwise void for want of the provision of reasons?
 - (iv) Is judicial review permissible?

- (v) Is the High Court order appropriate?

The High Court's Findings of Fact

15. As Moriarty J. pointed out, this was a case where there was a significant factual dispute. While that is undoubtedly correct, it is worth noting the significant areas on which there was agreement. Specifically, there was agreement about the fact that there was interaction between the solicitor, Mr. Murphy, and Superintendent Flavin, a member of the Board of Inquiry; that the objective for the applicant and Mr. Murphy was to achieve a situation where the matter was disposed of by way of a monetary penalty, as distinct from the more severe sanctions available, and that a degree of comfort was offered as to how the Board of Inquiry would deal with the matter in the event that pleas of guilty were entered i.e. that it would deal with it by way of a monetary penalty. So much is not in dispute; what is in dispute is whether such assurances as were offered went further and bound or purported to bind the Garda Commissioner to not go beyond a monetary fine.
16. In the course of his judgment, Moriarty J. summarised the respective contentions of the parties as to what has occurred in the Garda Station. The judge records that Mr. Murphy said before the inquiry resumed as scheduled at 10am that he approached Superintendent Flavin and asked to speak privately with him. Mr. Murphy refers to the fact that Superintendent Flavin told him that he had previously negotiated a similar deal with a Limerick solicitor. The relevant strengths and weaknesses of each side of the case were discussed and there was reference to the possibility of an application to have the inquiry halted by way of judicial review, and that such an application might succeed. According to Mr. Murphy, he was adamant that before a guilty plea could be proffered, he would have to be in a position to assure the applicant that a monetary fine would be the ultimate penalty. This explained the references to the need for any deal to be "approved at the highest level" and that approval would have to "come from the top down". According to Mr. Murphy, Superintendent Flavin left presumably for the purpose of conferring with the Board and making such other enquiries and contacts to secure approval as were necessary. He was away for a lengthy period, and upon his return, discussions were resumed. The Superintendent had stated that they were in a position to do the deal, but he indicated that it would have to be on the basis that the applicant pleaded guilty to all of the charges. Mr. Murphy made efforts to limit the number of pleas that would be required, but was unsuccessful, as Superintendent Flavin was adamant that a deal would have to be on the basis of a guilty plea to all of the charges. One matter on which there is agreement is that there was discussion of the fact that the applicant would be in a position to appeal the amount of any monetary fine. It was explained that this was because it was recognised that if the matters alleged against the applicant were to be dealt with by way of a monetary fine, then any such fine was likely to be a very substantial one.
17. The replying affidavit from Superintendent Flavin was received late. Apparently, the explanation for this was that the affidavit of Mr. Murphy had been misplaced or misfiled in Garda Headquarters. The affidavit referred to the fact that Mr. Murphy had sought permission to speak with the deponent, which was agreed, but it categorically stated that

no negotiations were entered into. Superintendent Flavin strongly disagreed with Mr. Murphy's claim that it had been emphasised that any deal would have to have prior approval at the highest level of An Garda Síochána if it were to be acceptable. The Board of Inquiry gave consideration to what their attitude would be, or would be likely to be, in the event of a plea of guilty and were of the view that if that course of action was taken, that the matter was capable of being dealt with by way of a monetary penalty. The High Court judgment refers in some detail to the cross-examinations of the deponents that took place, but makes the point that each gentleman largely maintained the position that he had taken when swearing his affidavit.

18. In addressing the conflict on the affidavits and on the oral evidence, the trial judge referred to the fact that the two men differed as to whether their exchanges could properly be described as "negotiations" or "talks", but the crux of the issue was more one of substance than nomenclature. The judge referred to the fact that Mr. Murphy was adamant that the Superintendent had left him for limited periods on a number of occasions, and not just when he went to confer with his Board colleagues in relation to whether some or all charges would have to be met by a guilty plea. He observed that, in what was undoubtedly some form of plea bargaining, the immediate concern of Mr. Murphy was to ensure that the Board would confine its sanctions to financial penalties, albeit substantial ones. The trial judge noted, however, that more than that was at stake. Both men had appreciable past experience of Garda disciplinary matters and were aware that even if substantial financial penalties were recommended that this would not be the end of the matter. Instead, in a process somewhat akin to undue leniency reviews in criminal law, the recommendation could be challenged by the Commissioner with a view to substituting the graver penalty of resignation as an alternative to dismissal from An Garda Síochána, albeit with the relevant Member having potential further recourse to a Board of Appeal. The judge said that it was in this context that Mr. Murphy made it clear, in his affidavits and in oral testimony, that any final resolution of differences had to encompass any such potential intervention by the Commissioner as opposed to extending on to a possible final decision of a Board of Appeal. The judge said that the most crucial averment in the affidavits sworn by Mr. Murphy was that he had fully adverted to these legal provisions in the course of his discussions with the Superintendent, emphasising the prerequisite of finality, and that the latter, on return from one of his absences, had unequivocally stated to him that he could do "the deal" and that it was guaranteed from "the top" that monetary penalties in this event would be the ultimate outcome of the entire disciplinary process.
19. The judge observed, as he had previously, that the relatively lengthy dialogue between Mr. Murphy and Superintendent Flavin was undoubtedly of the nature of plea bargaining, and although initiated by Mr. Murphy, involved the Superintendent combining an extended dialogue with Mr. Murphy while primarily engaged in a quasi-judicial role as one of the members of the Board. Once more, with characteristic understatement, Moriarty J. described this as "a situation requiring caution".

20. Moriarty J. focused on the timescale for the exchanges. He referred to the fact that Ms. Cronin had referenced the fact that the consultation between Board members in relation to financial sanctions occupied in the vicinity of one and a half hours, but was of the view that that left "a gaping hiatus" of two and a half hours between the intended commencement of the day at 10am and the actual resumption at 2pm. The judge said that given he was dealing with two intelligent and experienced professionals who knew the applicable procedures thoroughly, that it seemed to him virtually inconceivable that any discussions specifically limited to the outcome within the Board could conceivably have occupied such a timeframe. From his appraisal of the evidence and the inherent probabilities, he found himself driven to conclude that the lengthy exchanges between the two extended to what might transpire on the part of the Commissioner, that this enlargement was initiated by Mr. Murphy and that Superintendent Flavin did not demur. He felt that the prompt initial affidavit provided by Mr. Murphy was more persuasive and probable than the account provided by the Superintendent. He referred to what he felt was a changed dynamic at the sentence hearing when all three Board members addressed a number of questions directly to the applicant which, on their face, appeared designed to explore and enhance matters of mitigation that had already been touched upon.
21. In urging this Court to disagree with the findings of fact made in the High Court, the appellant Commissioner makes the point that there was, in fact, no finding of clear and unambiguous representation made to Mr. Murphy by Superintendent Flavin.
22. It is said that this is a case where there was an error by the judge in relation to his findings of fact and that it is open to this Court to review those findings. It is said that the Court is not precluded from doing so by the *Hay v. O'Grady* [1992] 1 IR 210 line of jurisprudence. In my view, this is a case where the *Hay v. O'Grady* line of authorities is applicable and where the findings of fact, depending upon oral evidence and the recollection of events as they are, are such that the Court should be very slow to intervene. I would not be prepared to do so. While conscious of the limitations of the pages of a transcript, I would add that having read the transcript of 12th and 13th July 2013, which embraces the three cross-examinations, had the decision been mine, I would have reached the same decision as the High Court judge. I would, though, probably have reached it by a slightly different route. I would not have placed the same emphasis as he did on the duration of the interaction on that morning in Ballincollig Garda Station. I would not find it easy to assign a timetable which would depend on whether the discussions were focused on the ultimate penalty that would be imposed, or whether the discussions were focused on what penalty would be recommended by the Board of Inquiry. Rather, I would have tended to approach matters from the perspective that both those engaged in the discussions were very conscious that the recommendation was simply that; a recommendation.
23. In those circumstances, it seems to me highly probable that Mr. Murphy would have sought assurance, or at least some comfort, that the ultimate penalty would accord with the recommendation. The combined effect of the affidavits sworn by the applicant and

those sworn by Mr. Murphy seems to me to put beyond doubt that the O'Flaherty team, comprising himself, his solicitor, Mr. Murphy, and the representative of the Garda Representative Association were acutely conscious that the Board of Inquiry could only make a recommendation, and that from their perspective, more than that was required. I am reinforced in my view that the trial judge was correct in his assessment of the facts by the response to the statement from the Commissioner that he was proposing a more severe penalty. There is reference to the communication being greeted with shock and there is the fact that Mr. Murphy immediately contacted Superintendent Flavin and spoke to him by phone. If the conversations in Ballincollig had been confined to addressing the question of what the Board of Inquiry would recommend, one would have expected that would have been said. Indeed, one might have expected that the suggestions that the conversations in Ballincollig bound the Commissioner would have been met with surprise and bemusement, if the question of the ultimate penalty was not under discussion.

24. I would therefore approach this appeal on the basis that insofar as the hearing in the High Court involved findings of fact, that those findings of fact cannot be disturbed.

Legitimate Expectation

25. In relation to the issue of legitimate expectation, the appellant Commissioner says that as a matter of law, a claim of legitimate expectation cannot succeed where the effect is to fetter a statutory discretion or to thwart the exercise of a statutory power or function. So, the appellant says that even if representations were made by Superintendent Flavin to Mr. Murphy and could theoretically constitute a representation that could be relied upon against the appellant, that in this case, the representations cannot have the legal effect contended for by the applicant for judicial review.
26. It is said that no legitimate expectation has been or can be established. The first fact that a claim in seeking to invoke the doctrine must establish is the existence of a clear and unambiguous representation. The appellant says that there was no such representation in this case and points to aspects of the evidence where Mr. Murphy accepted that Superintendent Flavin had not said that contact had been made at the highest level, had not said that the proposal had been sanctioned at that level, and that, moreover, Mr. Murphy accepted that he had not asked Superintendent Flavin whether he had rung the Commissioner's office, or the Commissioner himself, or, indeed, whether there had been any contact with Garda Headquarters in relation to the issue.
27. The respondent to this appeal categorises the Commissioner as someone who "went back on his side of the bargain". I am not convinced, however, that the state of the evidence justifies references to "going back on a bargain". Mr. Murphy may well have believed that Superintendent Flavin was indicating to him that the matter could be dealt with, both at Board of Inquiry level and Commissioner level on the basis of the imposition of a monetary penalty. However, the sense one has is that there was a degree of circumspection on the part of both parties to the exchanges. Given the sensitive nature of what was underway, which Moriarty J. referred to as giving rise to a need for caution, that circumspection is entirely understandable. However, it does not appear that Superintendent Flavin ever said in explicit terms that he had been in contact with the

Commissioner or in contact with Garda Headquarters. It equally seems to be the case that Mr. Murphy never put direct questions to Superintendent Flavin to that effect. It seems that the exchanges involved impressions and understandings being formed. It remains the situation that at the close of the evidence in the High Court, there was no evidence of any contact with Garda Headquarters and no evidence that the Commissioner, or any other figure of authority in An Garda Síochána, had committed to dealing with the matter by way of a monetary penalty. The respondent to this appeal might well make the point that if there was no contact with the Commissioner or with Garda Headquarters, and if it was the case that nobody at Commissioner level or very senior level in the Gardaí knew of what was being discussed in Ballincollig, that one might have expected clear and unequivocal evidence to that effect. Nonetheless, I am left in a situation where it seems to me that the evidence is too tenuous and too speculative to permit of the invocation of the doctrine of legitimate expectation.

Adequacy of the Commissioner's Reasons

28. I turn, now, to the question of the adequacy of reasons. I do so, notwithstanding the argument made on behalf of the appellant Commissioner that the judge in the High Court had decided that the case was, at its heart, a legitimate expectation case, and that that had to be seen as a rejection of the issue, and that for it to be considered by this Court, it would have been necessary for there to have been a cross-appeal. I do not believe that this objection is well-founded. Yes, it is true that the judge decided the case on legitimate expectation grounds, but far from rejecting the applicant's arguments in relation to reasons, he commented that the actions of the Commissioner, in indicating tersely that having considered the Board of Inquiry report he was disposed to impose a vastly more serious sanction, were at odds with the recent authorities. It seems to me that this remark indicates that, far from rejecting the arguments, the judge was, in fact, sympathetic to them, but preferred to decide the case on a different basis. For my part, where there is a detailed report of a Board of Inquiry and the Commissioner either accepts that report or departs from it, I would often be easily persuaded that the Commissioner's reasons are self-evident. In a case such as this, where a Board of Inquiry recommends a monetary penalty and the Commissioner takes the view that dismissal, or requiring the Member's resignation, is the appropriate sanction, I would need little persuading that it was self-evident that the Commissioner had formed the view that the misconduct in issue was too serious to be dealt with by way of a monetary penalty, and that it was not appropriate to retain the individual concerned as a serving member of An Garda Síochána.
29. In the present case, I would have no difficulty with the terms of the letter of 2nd October 2013. While it is the case that the letter merely notes that the Board of Inquiry had recommended a total temporary reduction in pay of €22,693.23, he went on to state "having considered the report of the Board of Inquiry, I propose to impose a disciplinary sanction which is more severe than that recommended by the Board of Inquiry, namely, a requirement to resign as an alternative to dismissal in respect of four breaches of discipline". It is true that the Commissioner does not state expressly how and why he came to that view, but I am convinced that on the facts of the case, that there can be no

real uncertainty about his approach. It is clear from this that he was of the view that what the Board of Inquiry was proposing did not meet the gravity of the situation.

30. However, I am of the view that the response to the observations and submissions submitted on behalf of the appellant by letter of 11th October 2013, was deficient, and deficient to a serious degree. That letter draws attention to what it is said to be a significant error in the report of the Board of Inquiry and goes on to say:

“[t]he fact is that the Board did not resume at 10am on Wednesday 4th September as is stated, rather it sat at 11am and adjourned until 2pm when the change of plea was formally communicated to the Board. The guilty plea reflected a major change of course as the proceedings had hitherto been contested and serious legal and procedural issues were vented, with serious implications for the jurisdiction of the Tribunal that might have had to be litigated in the High Court. Instead, Mr. Murphy of this office and Superintendent Flavin held discussions and on the understanding it was ‘guaranteed from the top’ that a fine would be the ultimate outcome of the disciplinary process, Garda O’Flaherty indicated a willingness to plead guilty. To that end, he was required to plead guilty to all the charges and he accepted that requirement. There was contact with Garda Headquarters during this process, and it is in that context and on his strict understanding and reasonable expectation that the Commissioner would not demur from the agreement that Garda O’Flaherty entered a plea to the charges. The Tribunal report does not address that at all, and when that is factored into the equation, we hope that the agreement will be honoured. The letter from Chief Superintendent McLoughlin merely states, having considered the submission made on behalf of your client in the letter of 11th October, the Commissioner is not prepared to alter his decision to increase the disciplinary action recommended by the Board of Inquiry in respect of the breaches of discipline numbered (iii), (iv), (vii) and (viii) as set out on the form dated 11th June 2013.”

31. In my view, the letter of 11th October demanded a specific response. At a minimum, it was necessary for the Commissioner to say whether he accepted that there had been interaction between Mr. Murphy and Superintendent Flavin, but that anything said between them did not bind the Commissioner, and to respond to the suggestion that there was contact with Garda Headquarters during the process and that Mr. Murphy had been led to believe that it was “guaranteed from the top” that a fine would be the ultimate outcome. In my view, what occurred in Ballincollig was sufficiently unorthodox that when it was brought to the attention of the Commissioner, it was incumbent on him to address specifically what was being said. His failure to do so must leave Garda O’Flaherty with a legitimate sense of grievance. I am of the view that the Commissioner’s failure to respond to the case that was being made to him means that the decision to require resignation as an alternative cannot stand.

The Remaining Issues

32. I agree with the High Court that the appropriate course of action now is that the matter should be remitted to the present holder of the Office of Commissioner for due consideration by him of what would be the appropriate sanction in the light of all that has transpired. In coming to that view, I do not ignore the arguments that have been

advanced in relation to the fact that there is an alternative remedy by way of an appeal under the 2007 Disciplinary Regulations, and that, indeed, an appeal has been lodged. I do not agree with any suggestion that the applicant for judicial review was estopped from pursuing judicial review proceedings by virtue of the fact that his solicitor filed a Notice of Appeal to the Appeal Board. Like the High Court, I am satisfied that that was a legitimate precaution or “belt and braces” approach taken by the solicitor to protect the position of his client.

33. Thus, while my reasoning diverges to some extent from that of the High Court judge, I would uphold his decision and dismiss the appeal.