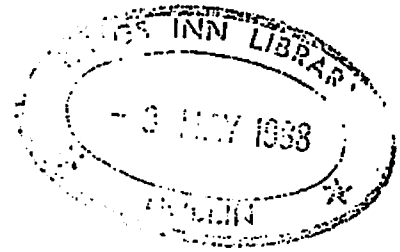
THE HIGH COURT



BETWEEN

JOHN MYERS

APPLICANT

AND

THE COMMISSIONER OF THE GARDA SIOCHANA AND OTHERS

RESPONDENTS

Judgment of Mr. Justice Costello delivered the 22nd January, 1988

Mary P. O'Brien Law Reporter

The facts:

Sergeant Myers (the applicant herein), a long-serving member of the Garda Siochana, had been stationed in Rathdrum, County Wicklow for some time when in January, 1984 his superiors became concerned at a number of unexecuted warrants issued in respect of District Court fines and held by him for collection. An investigation revealed that irregularities involving sums amounting to £2,664.77 had occurred and as the facts disclosed the possibility that breaches of the criminal law were involved the Garda authorities quite correctly sent the result of their investigations to the Director of Public Prosecutions. As a result, 43 summonses were issued against the applicant involving charges of embezzlement, false pretences, and forgery. These were due for hearing on 4 October, 1984.

A considerable delay occurred before these charges were in fact heard. On the 4th October the applicant through his solicitor applied for an adjournment on the grounds of his illness and shortly afterwards by letter of 11th October, a copy of which was sent to the applicant's superiors, the applicant's solicitor sent to the clerk of the District Court the sum of £1,873.77 in respect of sums due on warrants sent to the applicant, and it is now accepted that this payment discharged all sums then due on warrants issued to him for collection. On the 1st November, the 6th December and on subsequent days the proceedings were again adjourned because of the continued illness of the applicant. Eventually, and notwithstanding the applicant's agreement to a summary trial, the District Justice (as he was entitled to do) declined jurisdiction and sent the applicant forward for trial on 1st July, 1985 to the Wicklow Circuit Court. On that day the trial was fixed for hearing on 4th November 1985. A further delay occurred because on the

application of the State, the trial was transferred to the Dublin Circuit Court. The applicant was to be arraigned on the 30th May, 1986 but he applied for an adjournment to 4th July, 1986. After a further adjournment at the applicant's request the trial was fixed for 17th November 1986. On that day he was tried on six counts on the indictment He was found not guilty and on the 21st November the Director of Public Prosecutions entered a nolle prosequi in respect of all the remaining charges. In the event over two years elapsed before the criminal charges were finally disposed of.

After the summonses had been issued the Commissioner of the Garda Siochana had, pursuant to Regulation 31 of the Garda Siochana (Discipline) Regulations, 1971 (S.I. No. 316 of 1971), suspended the applicant for three months from 4th October, 1984. Since then he has continued to exercise his Regulation 31 powers at three-monthly intervals. On 1st November, 1984 authorisation had been given for the payment of a suspension allowance to the applicant at the rate of two-thirds of his pay effective from the date of the suspension and since then that has been done, so that during his suspension he has not been left without some means of livelihood.

After his acquittal and the entry of the nolle prosequi (and before he was aware of the probability of disciplinary proceedings) the applicant by letter of 10th December, 1986 submitted a notice of intention "to retire" from the force. By a decision of the 6th January, 1987 it was decided (and the applicant was so informed) that the applicant could "resign" from the force without entitlement to pension or gratuity, that otherwise he remained suspended from duty, and that the period of his suspension could not be regarded as "approved service" by virtue of the provisions of Rule 2 of the Second Schedule of the Garda Siochana Pensions Order, 1925. This

meant that the applicant had not served the required 30 years "approved service" entitling him to retire from the force on pension. Here lies the heart of what is at stake in this case. For if the applicant can establish that the various suspension orders were invalid (as he seeks now to do) then he would by now have completed the necessary "approved service" and he could retire on pension (a course, counsel has informed me, the applicant intends to follow should his challenge to the suspension orders be successful).

The alleged wrongdoing of a member of the Garda Siochana may involve a breach both of the criminal law and the Garda Disciplinary code. In this case no proceedings under the 1971 Disciplinary Regulations were commenced until 1987 because, as explained in the Respondents' "Grounds of Opposition", of the existence of the pending criminal proceedings. Once these were concluded an "Investigating Officer" was appointed (on 3rd December, 1987) who on 23rd December,1987 gave "Information in Writing" to the applicant in pursuance to Regulation 9 that an investigation into alleged breaches of discipline was taking place. Before the Investigating Officer had completed the necessary time consuming task of interviewing the many witnesses involved and taking their statements it was decided (as a result, I was told, of a recent Supreme Court decision) that the Regulation 9 "Information in Writing" may not have been detailed enough and so the disciplinary proceedings were discontinued and on the 29th June 1987 fresh disciplinary proceedings were instituted and a new Regulation 9 "Information" served on the applicant. This detailed 38 different cases in which it was alleged inter alia that the applicant failed to account for sums he had received in respect of fines, and had wrongfully cashed money orders payable to the Accountant of the Department of Justice. It is obvious that these

allegations would have involved the marshalling of a considerable amount of detailed evidence and the copies of the statements served on the applicant under Regulation II constituted a volume of documents of considerable dimensions. On the 28th September, 1987 the "Appointing Officer" forwarded to the Commissioner all the documents in the matter under Regulation 13 (the applicant having been deemed to have denied the charges) but before he could take a decision on them these proceedings were instituted.

The issues and conclusions thereon:

The applicant, having obtained leave to institute proceedings for judicial review, by Notice of Motion of 23rd September, 1987 applied for orders of certiorari, mandamus and prohibition. As a result of the helpful manner in which counsel have presented their arguments the issues are very net ones and can be dealt with as follows:

(a) Originally, the applicant sought to quash all the suspension orders on the ground that the first and subsequent orders were bad because the Regulations only empowered the making of one suspension order. This construction of the Regulation was rejected by me in McHugh .v. Commissioner of the Garda Siochana , not pursued on the appeal to the Supreme Court in that case (reported in (1987) I.L.R.M. p. 181), and not relied on herein in Counsel's oral submissions. Instead a different argument was advanced, namely, that the suspension orders breached the applicant's constitutional right to fair procedures. It was accepted that the first suspension order was a valid one but it was claimed that his continued suspension for over two years pending the outcome of the criminal prosecution was unconstitutionally

unfair, reliance for this submission being placed on the decision of the Supreme Court in Flynn .v. An Post (delivered 3rd April, 1987 and presently unreported). That case concerned a postman who was suspected of stealing five postal packets and who, confronted with the charges, made an exculpatory statement. He was suspended from duty without pay and remained suspended for over two-and-a-half years pending the outcome of a criminal prosecution directed by the Director of Public Prosecutions. Immediately on his suspension he had consulted a solicitor who demanded on his behalf that an immediate internal inquiry into the charges be held by An Post, a demand followed by High Court proceedings and an application for an interlocutory order directing that such an inquiry be held. Interlocutory relief was however refused and when the action came for trial (after the termination of the criminal prosecution in which the Plaintiff had been acquitted) the Plaintiff's claim failed in the High Court. On appeal, however, it was held that early in August, 1984 An Post should have been ready to proceed with a formal investigation of the charges against the Plaintiff, that the investigation should have been held and that as from that date his suspension became invalid. In delivering the majority judgment Mr. Justice McCarthy (at page 8) observed that there may be circumstances in which it would be proper to postpone an internal investigation pending the outcome of a criminal trial but not in a case where an employee suspended without pay wanted the investigation to proceed, and later he pointed out (at page 13) that where both parties acquisced in awaiting the outcome of a criminal prosecution before proceeding with an internal inquiry the court (that is, on an application for judicial review) would lean towards avoiding expense and causing prejudice to an accused person but that the situation was

different when the only party likely to be prejudiced wanted the internal inquiry to be held and that in such cases his right to have this done could not be denied.

The difference between the facts in Flynn and the instant case are obvious and I think crucial. In Flynn the suspended employee demanded that the internal inquiry be held notwithstanding the existence of the pending criminal prosecution; here no such demand was made. I think I can properly infer that the applicant must have been aware that it was very likely that he would have to face disciplinary charges and that he acquiesced in their postponement pending the outcome of the criminal prosecution. But even if acquiescence cannot be inferred, in the absence of a request that an immediate disciplinary inquiry be held the Garda authorities acted in my judgment fairly in postpoining the inquiry and suspending him on a suspension allowance, as to hold an inquiry (which would certainly have required him to give evidence so as to avoid dismissal) before the criminal charges were heard might well have been prejudicial to the applicant. Indeed, had they attempted to hold an inquiry in the absence of consent they might have been exposed to a claim that by so doing they infringed the applicant's constitutional right to a fair trial of the criminal charges. Furthermore, it is to be borne in mind that, unlike the Flynn case, the applicant herein was suspended on two-thirds of his basic salary and whilst the payment of the suspension allowance is not a decisive factor it nevertheless should be taken into account as tending to establish the fairness of the procedures actually adopted herein. It follows, in my judgment that the claim to quash the suspension orders on the grounds that it was procedurally unfair to postpone the disciplinary charges and suspend the applicant until the termination of the criminal prosecution fails.

(b) The applicant's second claim related to the disciplinary

proceedings under the 1971 Regulations and an order was sought prohibiting the holding of an inquiry under Regulation 13 and subsequent Regulations. Whilst not abandoning this claim the applicant's counsel has accepted that the Supreme Court decision in the Flynn Case places considerable difficulties in its way for the Supreme Court held that although the continued suspension of the Plaintiff in that case from August, 1984 was invalid as breaching the Plaintiff's constitutional rights to fair procedures this finding did not preclude his employers from instituting after the termination of the prosecution an internal inquiry and, if the circumstances so required, dismissing him Thus, a decision in this case in the applicant's favour on the suspension orders would not necessarily have entitled him to an order prohibiting the holding of a disciplinary inquiry. Whilst the Supreme Court in Flynn was not required to decide that the proposed internal inquiry should be prohibited on the ground of delay it is to be noted that notwithstanding the considerable time that had elapsed between the first suspension and the date on which the inquiry could have been held the Court contemplated that such an inquiry could with propriety take place. No arguments have been advanced to show that the delay in this case has caused such prejudice that a disciplina inquiry now would be unfair or to establish that to hold an inquiry after a three year delay would in itself amount to a breach of the applicant's constitutional right to fair procedures. Nor have any submissions been advanced to support the claim in the Notice of Motion that the proposed inquiry is invalid because it would amount "to double jeopardy" - for good reason, because the Flynn Case clearly shows that the dismissal of criminal charges against an employee is not in itself a bar to subsequent disciplinary proceedings arising out of the same set of facts, and no special circumstances creating such a bar

have been shown to exist in this case. Finally, the claim made in the Notice of Motion that the discontinuance and recommencement in 1987 of the disciplinary procedures amounted to a breach of the applicant's constitutional rights was not advanced at the hearing - again, I think, correctly, as the evidence established a reasonable explanation and justification for what had occurred.

(c) An order of certiorari was sought in the Notice of Motion to quash the order of the 6th January, 1987 refusing the applicant's application to "retire" (that is, a retirement on pension) from the Garda Siochana, but this was not proceded with at the hearing. In my view there are no grounds on which that order could successfully be impugned.

It follows, therefore, that all the applicant's claims in these proceedings fail and I will dismiss them.

Approved
JC
22-1-88