



Fifth Interim Report of the

Tribunal of Inquiry

into protected disclosures made under the Protected Disclosures Act 2014
and certain other matters.

Established by the Minister for Justice and Equality
under the Tribunals of Inquiry (Evidence) Acts 1921 to 2004,
on 17th February 2017, and by Instrument on 7th December 2018.

Chair: Mr Justice Sean Ryan, former President of the Court of Appeal

Term of Reference [p]

Garda Whistleblowers

The case of Mr Paul Barry





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The case of Mr Paul Barry

Chair: Mr Justice Sean Ryan, former President of the Court of Appeal

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**Tribunal of Inquiry into protected disclosures made under the
Protected Disclosures Act 2014 and certain other matters**

Established under the Tribunals of Inquiry (Evidence) Act 1921, as amended.

The Hon Mr Justice Sean Ryan

Aberdeen Suite
Dublin Castle
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Ireland

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23rd March 2023

**Re: Tribunal of Inquiry into protected disclosures made under the Protected
Disclosures Act 2014 and certain other matters - term of reference (p)**

Dear Mr. Finnegan,

I enclose with this letter two (2) copies of the Tribunal's report into the complaint made by Retired Sergeant Paul Barry under Term of Reference [p] of the Disclosures Tribunal. This is the 5th Interim Report of the Tribunal. A copy of this has also been sent to you by e-mail, at your request.

As required by the terms of my appointment I provided my report to the Chairperson of the Tribunal, Mr Justice Peter Charleton, and the report then became the report of the tribunal. He did not of course have any involvement in the investigation of the complaint or the compilation of the report, for which I alone have full responsibility.

I now submit this report of the tribunal with the consent and authority of the chairperson.

Another legal requirement is to confirm to you that no criminal proceedings are pending in respect of the matters in the report and you will find attached copy correspondence to the tribunal from An Garda Síochána and the Director of Public Prosecutions establishing the position.

Yours sincerely,

Sean Ryan
Chairperson of division [p] of the Disclosures Tribunal

Mr Peter Finnegan
Clerk of the Dáil
Dáil Éireann
Leinster House
Kildare Street
Dublin 2



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Aberdeen Suite
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Our ref: DT-1/P
Your ref:

14th December 2022

Detective Superintendent Sé McCormack
Tribunal Co-ordination Office
Garda Headquarters
Phoenix Park
Dublin 8

**Re: Tribunal of Inquiry into protected disclosures made under the Protected
Disclosures Act 2014 and certain other matters - term of reference (p)**

Dear Detective Superintendent McCormack,

I refer to the tribunal hearings concerning matters relating to Retired Sergeant Paul Barry pursuant to term of reference [p] of the tribunals terms of reference. A copy of the tribunal's terms of reference is enclosed.

The tribunal will shortly be delivering a report on term of reference [p] to the Clerk of the Dáil.

I refer you to the Tribunals of Inquiry (Evidence) (Amendment), Act, 2002. Under Section 3 (1) there are circumstances in which the recipient of the report may have to seek the directions of the High Court regarding its publication because of criminal proceedings. The relevant part of the section is as follows:

'3. (1) If, on receipt by the person to whom a tribunal is required, by the instrument by which it is appointed or any instrument amending it, to report of an interim or the final report of the tribunal, that person considers that the publication of the report might prejudice any criminal proceedings, that person may apply to the Court for directions regarding the publication of the report.

(2) Before the Court determines an application under subsection (1), it shall direct that notice of it be given to—

- (a) the Attorney General,*
- (b) the Director of Public Prosecutions, and*
- (c) a person who is a defendant in criminal proceedings relating to an act or omission that—*
 - (i) is described or mentioned in the report concerned, or*

(ii) is related to any matter into which the tribunal concerned inquired and which is so described or mentioned, and the Court may receive submissions, and evidence tendered, by or on behalf of any such person here,

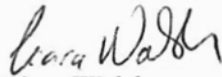
(3) On an application under subsection (1) the Court may, if it considers that the publication of the report concerned might prejudice any criminal proceedings, direct that the report or a specified part of it be not published—

(a) for a specified period, or

(b) until the Court otherwise directs..'

To assist the Tribunal in its reporting to the Clerk of Dáil Éireann could you confirm that there are no criminal proceedings in being to which section 3(1) above could apply and in particular, that there are no defendants in any criminal proceedings to which section 3 (2)(c) above could be applicable. The tribunal would be grateful if you could revert with such confirmation within 14 days of the date of this letter.

Yours sincerely,



Ciara Walsh

Solicitor to the Tribunal

83341

An Garda Síochána

Ceanncheathrú An Gharda Síochána
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Dáta/Date: 12th January, 2023

Your ref: DT-1/P

**Ciara Walsh,
Solicitor to the Protected Disclosures Tribunal,**

Re: Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters – term of reference (p).

Dear Ms. Walsh,

With reference to your letter dated 14th December, 2022 regarding retired Sergeant Paul Barry and pursuant to part (p) of the Tribunal's terms of reference, I wish to inform you of the following.

Based on enquiries made within An Garda Síochána, I can confirm that there are no outstanding prosecutions at this time in the context of Retired Sergeant Paul Barry's allegations under term of reference (p) and relevant to Section 3(1) of the Tribunal of Inquiry (Evidence) (Amendment) Act 2002.

I can further confirm that there are no criminal proceedings in being to which Section 3(1) could apply and that there are no defendants in any criminal proceedings to which Section 3(2)(c) could be applicable.

Yours sincerely,

Date: 12th January 2023

**Sé McCormack, Detective Superintendent,
Garda Liaison Officer,
Garda Headquarters,
Phoenix Park,
Dublin 8.**

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CHAPTER 1

INTRODUCTION

The Tribunal and Term of Reference [p]

On 16th February 2017, following approval by the Government of draft resolutions to that effect, the Houses of the Oireachtas each resolved that it was expedient that a tribunal be established under the Tribunals of Inquiry (Evidence) Acts, 1921 to 2004.

The tribunal was chaired by Mr Justice Peter Charleton, Judge of the Supreme Court, and requested to inquire urgently into definite matters of urgent public importance set out in terms of reference from [a] to [p].

The first module, concerning Sergeant Maurice McCabe and terms of reference [a] to [o], was completed by Mr Justice Charleton, who submitted reports dated 19th May 2017, 30th November 2017 and 11th October 2018.

By further resolutions of the Houses of the Oireachtas in November 2018 and Ministerial Orders following them, Mr Justice Sean Ryan, former President of the Court of Appeal, was appointed as a member of the tribunal, and by subsequent direction of Mr Justice Charleton, became Chairperson of term of reference [p] of the tribunal, which states that the tribunal is:

To consider any other complaints by a member of the Garda Síochána who has made a protected disclosure prior to 16th February, 2017 alleging wrong-doing within the Garda Síochána where, following the making of the Protected Disclosure, the Garda making the said Protected Disclosure was targeted or discredited with the knowledge or acquiescence of senior members of the Garda Síochána.

Section 5 (1) of the Protected Disclosures Act, 2014 defines a protected disclosure as a disclosure by a worker of ‘*relevant information*’ in a particular or specified manner.

Information is ‘*relevant information*’ if two conditions are satisfied under section 5 (2):

- (a) *in the reasonable belief of the worker, it tends to show one or more relevant wrongdoings, and*
- (b) *it came to the attention of the worker in connection with the worker’s employment.*

Section 5 (3) of the Protected Disclosures Act, 2014 defines ‘*relevant wrongdoings*’ as including subsection (d) ‘*that the health or safety of any individual has been, is being or is likely to be endangered*’.

Section 5 (8) provides that ‘*in proceedings involving an issue as to whether a disclosure is a protected disclosure it shall be presumed, until the contrary is proved, that it is*’.

The Act has retrospective application. Section 5 (1) provides that ‘*[f]or the purposes of this Act “protected disclosure” means, subject to subsection (6) and sections 17 and 18, a disclosure of relevant information (whether before or after the date of the passing of this Act) made by a worker in the manner specified in section 6, 7, 8, 9 or 10.*’

The tribunal has no inherent or independent jurisdiction: its only authority is to perform the task in the relevant term of reference. The addition of this provision was to enable the tribunal to investigate cases where whistleblowers alleged that they had been victimised – targeted or

discredited – by senior officers of An Garda Síochána or with their acquiescence after they made protected disclosures and by implication because they had done so, i.e. exposed wrongdoing in the force. Term of reference [p] reflects the concern of the Oireachtas to protect whistleblowers.

Persons accused of targeting or discrediting have to be senior officers of An Garda Síochána. For a finding of targeting or discrediting by senior officers, the tribunal has to be satisfied that those who allegedly victimised the whistleblower (engaged in the acts alleged to be targeting or discrediting) did so in response to the reported wrongdoing.

In chapter 1 of the Fourth Interim Report (Volume 1), the tribunal addressed the mandate under term of reference [p] as follows:

The tribunal noted the context of paragraph [p] in relation to the other terms of reference of the tribunal, the majority of which directed an investigation into grave allegations of misconduct against senior garda management in relation to Sgt McCabe. The Oireachtas was concerned to ascertain whether there were other gardai in a similar situation to Sgt McCabe who maintained that they were victimised because they spoke out about wrongdoing in the force and that senior officers knew about it and condoned it. So members who made protected disclosures reporting serious malpractices and were subsequently targeted or discredited with official or senior condonation were intended to be covered.

The essence of term of reference [p] is that the tribunal is to consider complaints made by persons who, as members of An Garda Síochána, made protected disclosures before the relevant date and who allege that they were thereafter targeted or discredited with the knowledge or acquiescence of officers of superintendent rank or higher.

The conditions of admissibility of a complaint under term of reference [p] were also outlined in the report as follows:

An essential condition of admissibility under term of reference [p] is that the garda concerned made a protected disclosure prior to the date when the tribunal was established. Any later disclosures are excluded from consideration by this body as a matter of jurisdiction.

A protected disclosure includes a report to an appropriate person or body, by a garda, of wrongdoing in the force that constitutes an offence in law or a failure to comply with a general (not merely a contractual) legal obligation and that came to the garda's attention in the course of their work.

Another essential jurisdictional requirement under term of reference [p] is that the targeting or discrediting directed towards the whistleblower, after the disclosure, was condoned or tolerated or known about by senior members of An Garda Síochána. Mr Justice Charleton defined 'senior officers of the Garda Síochána' as being officers of the rank of superintendent and above, as well as anybody acting within those capacities and the tribunal adopts this definition.

It was emphasised by the tribunal that:

An important limitation on any consideration by the tribunal is that the focus of the mandate, and therefore the tribunal, is not on the wrongdoing reported in the disclosure, no matter how serious the allegations, but rather on the conduct towards the reporting garda subsequent to the disclosure. While these matters may not, in particular circumstances, be sealed off in discrete compartments and there may be some elements of overlap, the focus of any inquiry is clearly defined in term of reference [p].

The tribunal published its interpretation of term of reference [p] and this is available on the tribunal website.

The tribunal is not engaged in a review of police methods in any particular circumstances, so it is not a question whether it agrees that the conduct was appropriate or correct but rather whether the circumstances are evidence of targeting or discrediting because of a protected disclosure.

It is also important to note that the scope of the Inquiry's function does not extend to any examination of the underlying allegations of wrongdoing in the protected disclosure itself and/or the validity or correctness of the findings made by each investigation discussed in this report.

Procedure

The tribunal published a Memorandum of Procedures on 8th March 2019 that it adopted in respect of term of reference [p]. This document is also available on the tribunal website.

Complaint made to the Tribunal

This is the report of the Inquiry into the complaint made by Mr Paul Barry pursuant to term of reference [p] that he was targeted and discredited by senior officers of An Garda Síochána because he made a protected disclosure.

Mr Barry first contacted the tribunal on 24th January 2019 and enclosed a report that he had sent to Garda Commissioner Drew Harris concerning, *inter alia*, allegations in respect of an investigation carried out in Mitchelstown Garda Station in 2012.¹ He provided further material to the tribunal on 22nd February 2019 and 4th April 2019.²

The tribunal investigator subsequently interviewed Mr Barry in the presence of his solicitor and counsel over the course of four days between 16th July 2019 and 8th August 2019.³ During his interview Mr Barry outlined what he said were seven protected disclosures made between 2nd October 2012 and 20th January 2016.⁴ He further outlined alleged instances of targeting or discrediting by senior officers of An Garda Síochána after the making of these protected disclosures.⁵ These instances are reflected in the Schedule of Issues referenced below and attached as Appendix 2 to this report.

Discovery

Following Mr Barry's complaint, the tribunal requested and received extensive discovery over a number of months in 2019, 2020 and 2021, with approximately 40,000 documents being provided. The tribunal is grateful for this co-operation with its work.

Following the analysis of the disclosure material, documentation was circulated to the relevant persons identified in Mr Barry's complaint and witness statements were requested. This material was circulated on a strictly confidential basis and redacted where appropriate or where necessary to protect the rights of privacy or confidentiality of any party or person.

A large number of witness statements was subsequently provided to the tribunal during 2020 and 2021.

¹ Tribunal Documents, p. 63

² Tribunal Documents, pp. 264-332

³ Tribunal Documents, pp. 1-62

⁴ Tribunal Documents, pp. 98-103, 105, 109-110, 113-117 and 298-301

⁵ Tribunal Documents, pp. 316-332

The Interview Process

Tribunal investigators conducted interviews with relevant witnesses under section 6 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 2002. Following the interview of Mr Barry, the tribunal investigator interviewed three further witnesses and issued a Memorandum of Questions to eight witnesses during 2022.

Schedule of Issues

The tribunal conducted a case management hearing in private session on 20th December 2021 and 25th April 2022. The purpose of the session was to hear submissions, if any, in respect of the proposed Schedule of Issues for this module, which had been circulated by letter dated 21st October 2021.

The Schedule of Issues was agreed upon by all the parties and primarily concerns allegations made by Mr Barry against Supt Comyns (former district officer Fermoy Garda District) and retired C/Supt Dillane (former divisional officer Cork North Division).

Public Hearings

This is the third complaint to be considered under term of reference [p] in a public hearing.

In advance of public hearings, the tribunal prepared an electronic brief of material relevant to the matters into which it was obliged to inquire in respect of Mr Barry. This brief, or where appropriate, the relevant sections of it, was served on the relevant parties in advance of the commencement of public hearings.

The tribunal commenced public sittings in respect of Mr Barry's complaint under term of reference [p] on 17th May 2022. The tribunal heard fifteen days of oral evidence and a list of all witnesses called to give evidence is Appendix 5 to this report. All transcripts are available on the tribunal website.

The tribunal has admitted into evidence a number of written statements in circumstances where the parties agreed that it was not necessary to call such a witness *viva voce*.

At the close of the public sittings, the legal representatives of the participating parties were afforded an opportunity to make both oral and written closing submissions dealing with any evidence affecting his or her client.

Legal Representation

The tribunal received applications for legal representation by interested parties and these applications, in the main, were dealt with in writing. The entitlement to be represented was afforded to all parties and persons whose reputation could potentially be adversely affected in any manner by the report of the tribunal. The list of parties afforded legal representation and their representatives under this module appears in Appendix 4 to this report.

Tribunal Personnel

The tribunal expresses its gratitude to the legal teams appearing for the various parties who were accorded representation. A special word of thanks is due to all tribunal counsel, tribunal solicitor, investigators, registrar, tribunal researcher, office staff and tribunal manager. The names of the members of the tribunal team are noted in Appendix 3 to this report.

CHAPTER 2

ISSUE 1, ISSUE 2 AND ISSUE 4.G: MR BARRY'S COMPLAINT TO THE TRIBUNAL AND THE MAKING OF A PROTECTED DISCLOSURE

Mr Paul Barry

Retired Sergeant Paul Barry was attested as a member of An Garda Síochána on 8th October 1986 and assigned to Rathmines Garda Station on 16th April 1987. During his career he served at Rathmines Garda Station for fourteen years. He was promoted to the rank of sergeant on 8th December 1999 and stationed at Mitchelstown Garda Station from 4th January 2000 until his retirement on 19th June 2016.

Mr Barry retired as a sergeant, which is the rank he held at the time of the matters that he complained about, but he now prefers to be addressed by his civilian title rather than as Sergeant Barry. The tribunal respects his wish in this regard but obviously when events are being discussed in which he was involved while serving as a member of An Garda Síochána it is appropriate to give him the title associated with his rank. This point was clarified at the tribunal hearings and Mr Barry was satisfied with it.

Mitchelstown Garda Station is within the Cork North Division of An Garda Síochána. The divisional officer between 2012 and 2018 was Chief Superintendent Gerard Dillane and he was based in Fermoy Garda Station, the divisional headquarters.

The Cork North Division of An Garda Síochána consists of the Fermoy, Midleton and Mallow Garda Districts. Mitchelstown Garda Station, where Sgt Barry was stationed, is within the Fermoy Garda District.

Superintendent Michael Comyns was appointed district officer for the Fermoy District on 1st July 2010. Inspector Anthony O'Sullivan, who had been promoted to the rank of inspector in the Fermoy District in 1997, was the acting district officer when Supt Comyns was unavailable. Like C/Supt Dillane, both Supt Comyns and Insp O'Sullivan were based in Fermoy Garda Station, the district headquarters.

In respect of Mitchelstown Garda Station, and during the period under consideration by the tribunal, both Sgt Barry and Sergeant Jerry Quinn were the sergeants in Mitchelstown Garda Station on regular duties with Sergeant Aidan Dunne as the sergeant in charge.

In his statement to the tribunal, Supt Comyns stated that he attended Mitchelstown Garda Station on many occasions while he was district officer and conducted inspections as required. He also said that he was in contact with the sergeant in charge on an almost daily basis.⁶

Supt Comyns referred to the new roster implemented in April 2012, which directed all members based in Mitchelstown who were on duty at the relevant time to attend a briefing in Fermoy Garda Station at 07:30 hrs and again at 21:30 hrs.⁷ He also outlined that the weekly Performance Accountability Framework (PAF) meetings in Fermoy Garda Station were attended by the sergeant in charge, the detective sergeant and the sergeants from the units on duty at the time

⁶ Tribunal Documents, p. 544

⁷ Tribunal Documents, p. 544

the PAF meeting was being held.⁸ In his evidence to the tribunal Supt Comyns explained that he would normally expect Sgt Barry to be in attendance at these PAF meetings once a month, although this varied.⁹ He also carried out audits at Mitchelstown Garda Station once every three months. Outside these occasions he said that he had limited interaction with Sgt Barry.¹⁰

Mr Barry told the tribunal that he had never met Supt Comyns before he moved to the Fermoy District in 2010.¹¹ During his interview with tribunal investigators, Mr Barry was asked to describe his working relationship with the superintendent and said that ever since Supt Comyns had come to the Fermoy District, they would have had differences of opinion on various matters. Mr Barry said that this did not affect their working relationship, although he would not take it lying down if he felt he was wronged.¹² He went on to say that:

I can say that I never had as much difficulty with a Superintendent as I did with Superintendent Comyns. From day one, I felt he had something against me. The reason I thought this was because there was a previous Chief Superintendent [Redacted] and when he was in Fermoy District, he tried to transfer me from Mitchelstown. I successfully appealed, but [that] Chief Superintendent [Redacted] and Superintendent Comyns were very good friends. They had a professional and private friendship and I believe because of that, Superintendent Comyns singled me out for different treatment to other Gardai in the District.¹³

In a reply to the Memorandum of Questions posed by the tribunal investigator, Supt Comyns described his relationship with Sgt Barry as a '*normal professional relationship*' between a district superintendent and a sergeant. He said that they did not always agree on what was to be done, but that was to be expected in the normal discharge of their duties.¹⁴ He said that his level of contact with Sgt Barry would depend on what was going on and that he did not treat him differently to any other sergeant.¹⁵

Events in 2012

During his time as a member of An Garda Síochána, Sgt Barry reported non-effective for duty at Mitchelstown Garda Station on a limited number of occasions. However, on 6th August 2012 he reported non-effective for duty and was absent on sick leave for a total of 235 days.¹⁶

The background to this period of absence involved a complaint of alleged sexual assault of a minor that was received at Mitchelstown Garda Station on 2nd February 2012. Sgt Barry was the supervisor of the investigation and filed a report with Supt Comyns on 30th July 2012.¹⁷ Mr Barry later told counsel for the tribunal during his evidence that Supt Comyns had been involved in what he classified as a '*perversion of the course of justice*' in relation to this investigation.¹⁸

Mr Barry gave his account of what happened after he filed his report on 30th July 2012. He said that he was disciplined on 2nd August 2012 in the following circumstances:

⁸ Tribunal Documents, p. 543

⁹ Tribunal Transcripts, Day 182, p. 11

¹⁰ Tribunal Transcripts, Day 182, p. 13

¹¹ Tribunal Transcripts, Day 175, p. 127

¹² Tribunal Documents, p. 33

¹³ Tribunal Documents, p. 35

¹⁴ Tribunal Documents, p. 5390

¹⁵ Tribunal Documents, p. 5391

¹⁶ Tribunal Documents, p. 3998

¹⁷ Tribunal Documents, p. 93

¹⁸ Tribunal Transcripts, Day 175, p. 133

I was preparing to do a drug search with the dog unit from Cork City and members attached to Mitchelstown station, when Superintendent Comyns arrived at the Garda station with a copy of the investigation file which I had submitted on the 30th. He [had] that in one hand and he had a discipline notice in the other hand, a Regulation 10 discipline notice, which he served on me, and he served another one on Garda Wall, my colleague. And as he did so, he sneered at me and said he'd be watching me. And I then left, I left the discipline notice in the office and I went out and did the drug search.¹⁹

The Notice under Regulation 10 of the Garda Síochána (Discipline) Regulations, 2007 recorded that Sgt Barry had *'without good and sufficient cause failed to report for duty at Mitchelstown Garda Station at 12midday on the 11th June 2012 and 12midday on 1st August 2012, you further failed to detail members of Unit B at Mitchelstown Garda Station on both 11th June 2012 and 1st August 2012 as directed by Superintendent Comyns on report dated 15th May 2012 ...'*²⁰

In his evidence to the tribunal, Mr Barry said that he was not late for duty on 11th June 2012, as alleged, and that he was in the yard of the garda station answering a question from a member of the public.²¹ He also said that on 1st August 2012, he was delayed as Garda JJ Wall, who was giving him a lift, had to take his car to the garage.²² Mr Barry told the tribunal that *'I considered both of those matters to be manufactured as a reason to discipline me'*.²³

In his interview with tribunal investigators, Mr Barry said that he had never been subject to discipline proceedings prior to this date.²⁴

In his statement to the tribunal, Supt Comyns stated that it was unsatisfactory for a sergeant to report late for duty as it was a bad example, and it also meant that the members on his unit were on duty without being briefed or detailed by the working sergeant over the unit. Supt Comyns also said that the issuing of the Regulation 10 Notice on 2nd August 2012 had no connection to the submission of the file on the sexual assault of a minor or the investigation in respect of same.²⁵ He told the tribunal that:

This was an occasion where I was in the station, a unit was due to commence duty at 12 o'clock, all the people due to work, except maybe one, were late for duty and then the sergeant was even later. So I felt it was my duty to issue the warning to Sergeant Barry and Garda Wall, because it was the second time that I had found both of them late for work.²⁶

Shortly after this incident, Sgt Barry reported non-effective for duty on 6th August 2012, citing work-related stress.

The following month, on 28th September 2012, Sgt Barry made a complaint under the Garda Síochána policy and procedures for dealing with harassment, sexual harassment and bullying: *'Working Together To Create A Positive Working Environment'*, outlining allegations of bullying and harassment against his district officer, Supt Comyns. Sgt Barry alleged, *inter alia*, that Supt Comyns had manipulated the nature of the sexual assault investigation,²⁷ and that he, Sgt Barry, was being punished for *'not [toeing] the line'*.²⁸

¹⁹ Tribunal Transcripts, Day 175, p. 135

²⁰ Tribunal Documents, p. 642

²¹ Tribunal Transcripts, Day 175, p. 136

²² Tribunal Transcripts, Day 175, p. 136

²³ Tribunal Transcripts, Day 175, pp. 136-137

²⁴ Tribunal Documents, p. 36

²⁵ Tribunal Documents, p. 548

²⁶ Tribunal Transcripts, Day 182, pp. 20-21

²⁷ Tribunal Documents, p. 90

²⁸ Tribunal Documents, p. 95

These allegations were subject to a series of investigations conducted by Chief Superintendent Catherine Kehoe, Thurles Division, between 2013 and 2016.

Sgt Barry returned to work on the evening of 29th March 2013 and remained working at Mitchelstown Garda Station during C/Supt Kehoe's investigations. He retired from An Garda Síochána on 19th June 2016.

The tribunal received evidence of *'tensions'* between Sgt Barry and his district officer after he returned to work. Garda Gerard Murphy said in his statement to the tribunal that there were tensions between Sgt Barry and Supt Comyns that *'cast a shadow over the station'*.²⁹ In her statement to the tribunal, Garda Marie McCarthy said that she was *'aware that Paul and Supt Comyns were after a disagreement in relation to a sexual incident that occurred which Paul's unit were investigating. I was aware that Paul was not happy with the way the incident was dealt with. I do feel that there was a sour atmosphere in the station when this happened.'*³⁰ Garda Rosemarie O'Connell said in her statement that a tension was evident between Sgt Paul Barry and Supt Comyns, which made things difficult in the station.³¹

In answer to the Memorandum of Questions posed by the tribunal investigator, Supt Comyns said that there were no tensions in the district as a whole and that he did not experience tensions or have a difficult working relationship with any of the other members under his supervision and control in the district.³² He said that *'significant issues'* did arise with Sgt Barry after he returned to work in 2013.³³

While describing their relationship as *'purely professional'*, C/Supt Dillane outlined his interactions with Sgt Barry during this period in his Memorandum of Questions, stating that he detected *'a very cold attitude'* from Sgt Barry. He said that *'I tried my best to assist Paul Barry and his family. Unfortunately I felt that my efforts were totally disrespected by his attitude and actions'*.³⁴

The Bullying and Harassment Complaint

Sgt Barry submitted his bullying and harassment complaint directly to Human Resource Management (HRM) by post on 28th September 2012.³⁵ He also sent his complaint by email to Chief Superintendent John Grogan, HRM, on 2nd October 2012.

On 9th October 2012, Assistant Commissioner Jack Nolan, South Eastern Region, was directed by the Assistant Commissioner, HRM to appoint someone to investigate the complaint if the assistant commissioner determined that the complaint was admissible under the Garda Síochána policy and procedures for dealing with harassment, sexual harassment and bullying: *'Working Together To Create A Positive Working Environment'* document.³⁶

A/C Nolan appointed Superintendent Patrick Lordan to assist him and take a statement from Sgt Barry. On 21st November 2012, Sgt Barry made a detailed statement to Supt Lordan outlining nine allegations of bullying and harassment against Supt Comyns.³⁷ The following is a brief summary of these allegations:

²⁹ Tribunal Documents, p. 1456

³⁰ Tribunal Documents, p. 1454

³¹ Tribunal Documents, p. 1751

³² Tribunal Documents, p. 5393

³³ Tribunal Documents, p. 5393

³⁴ Tribunal Documents, p. 5615

³⁵ Tribunal Documents, pp. 298-301

³⁶ Tribunal Documents, p. 5159

³⁷ Tribunal Documents, pp. 86-95

Allegation 1: That Supt Comyns refused to pay Sgt Barry's expenses relating to a Cork Circuit Court attendance on 10th December 2010.

Allegation 2: That Supt Comyns refused to grant Sgt Barry annual leave on 23rd and 24th March 2011 even though another sergeant was available to work.

Allegation 3: That Supt Comyns refused to pay Sgt Barry three hours overtime in the course of his duties on 19th January 2012.

Allegation 4: This concerned the investigation of an alleged sexual assault reported on 13th February 2012 to Mitchelstown Garda Station and an alleged delay in the conduct of the investigation.

Allegation 5: That Supt Comyns refused Sgt Barry's application for leave following the rollout and implementation of the new roster.

Allegation 6: That Supt Comyns directed Sgt Barry to certify that members attached to Fermoy Garda Station terminated duty at 07:00 hrs when Sgt Barry could not do so.

Allegation 7: That Supt Comyns refused to pay subsistence allowance for Sgt Barry's attendance at two PAF meetings in May 2012.

Allegation 8: That Supt Comyns singled him out as being the only sergeant who did not prepare a briefing document as per the superintendent's audit.

Allegation 9: That Supt Comyns interfered with the investigation into a complaint of alleged sexual abuse, which was reported to Mitchelstown Garda Station on 2nd February 2012.

As outlined later in this report, following correspondence with HRM in respect of the remit of the allegations made by Sgt Barry, A/C Nolan was instructed on 16th January 2013 to appoint a chief superintendent to carry out an investigation under the bullying and harassment policy document and to identify '*any criminal offence*'. He was also instructed to consider whether a chief superintendent should be appointed under the Garda Síochána (Discipline) Regulations, 2007. These appointments were made on 11th February 2013, when C/Supt Kehoe was appointed to conduct the investigations.

Issue 1 of the Schedule of Issues

Is there an issue as to whether retired Sergeant Paul Barry made a protected disclosure on any one or more of the following dates?

- a. 2nd October 2012 (Bullying and Harassment complaint)*
- b. 16th February 2015 (Transfer appeal)*
- c. 17th February 2015 (Minister for Justice)*
- d. 24th June 2015 (Complaint to Superintendent, Fermoy)*
- e. 24th June 2015 (Minister for Justice)*
- f. 11th October 2015 (Transfer appeal)*
- g. 20th January 2016 (Minister for Justice).*

Term of reference [p] addresses conduct alleged to be targeting or discrediting that happens after the making of a protected disclosure. It is important therefore for the tribunal to establish the date when the member made a protected disclosure.

In this case, Mr Barry set out seven separate dates on which he maintained that he had made protected disclosures beginning on 2nd October 2012 and ending on 20th January 2016. The tribunal is satisfied that the complaint dated 2nd October 2012 in respect of allegation number 9 constituted the first protected disclosure and represented the commencement date for the purposes of term of reference [p].

Conclusion on Issue 1

Since the tribunal has accepted that the first suggested complaint is a protected disclosure it is not relevant for the purposes of jurisdiction whether the member made subsequent protected disclosures.

Issue 2 of the Schedule of Issues

Are complaints in respect of events prior to 2nd October 2012 excluded from consideration by the tribunal because they are inadmissible?

As outlined earlier in this chapter, Mr Barry told tribunal investigators that ‘... *I never had as much difficulty with a Superintendent as I did with Superintendent Comyns. From day one, I felt he had something against me*’.³⁸

Sgt Barry outlined instances of these ‘difficulties’ prior to 2nd October 2012, both in his bullying and harassment complaint and in the material he provided to the tribunal. In particular, in his statement to Supt Lordan on 21st November 2012, he referred to the service of the Regulation 10 Notice on 2nd August 2012. He told the superintendent that:

*I want to further add that when I was served with the Section 10 Notice I applied for leave on all my day shifts up till December so as to avoid any contact with Supt Comyns. This has effectively cost me 25 days of my annual leave because I simply want to avoid being bullied anymore.*³⁹

Sgt Barry subsequently reported non-effective for duty on 6th August 2012, citing work-related stress. As outlined in more detail in chapters 3 and 4, Sgt Barry alleged that he was targeted and discredited by senior management due to a failure to investigate his work-related stress and further because his absence was classified as an ordinary illness.

Conclusion on Issue 2

These issues predate Sgt Barry’s bullying and harassment complaint dated 2nd October 2012, albeit the sick leave issue continued until he returned to work on 29th March 2013. However, evidence of relevant matters that occurred prior to the events giving rise to the claims of targeting or discrediting is material and admissible. This position is in accordance with general law and it did not arise for any substantial consideration during the hearings.

³⁸ Tribunal Documents, p. 35

³⁹ Tribunal Documents, p. 95

Issue 4.g of the Schedule of Issues

Did C/Supt Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

(g) by writing to Sgt Barry while he was on sick leave, requesting submission of Sgt Barry's protected disclosure directly to him?

On 1st October 2012, Sgt Barry contacted the office of C/Supt Dillane and informed him that he would be submitting his statement directly to HRM at Garda Headquarters.⁴⁰ On the same date, C/Supt Dillane wrote to Sgt Barry in the following terms:

I refer to above and to your current period of non-effectiveness which I am investigating in accordance with Garda Code Regulations.

As you are aware, I have sought a written statement from you outlining your complaint in relation to this matter. On Friday 21st September 2012 you gave an undertaking to submit a written statement to my office the following week, outlining your complaint but this was not received.

On this date, 1st October 2012, I am aware that you informed my office that following legal advice you would be submitting the said statement directly to Human Resource Management, Garda Headquarters. I have no objection to this course of action but I do require that you submit your statement outlining your full complaint within seven days in order that I can conclude my investigation.

I also wish to inform you of the services of the Garda Employee Assistance Service should you wish to avail of same ...⁴¹

Sgt Barry replied to the chief superintendent on 4th October 2012 stating that he did not believe that his statement should be submitted to the Divisional Office in Fermoy until the Assistant Commissioner, HRM had seen it. He said that *I have no objection to your office receiving my statement after his perusal*.⁴²

In his statement to tribunal investigators, Mr Barry stated that C/Supt Dillane wrote to him at his home address requesting him to submit his allegation of wrongdoing, which he had forwarded to HRM, to C/Supt Dillane in Fermoy. Mr Barry said that he declined this request and told the chief superintendent that he was free to get a copy of the report from HRM if they deemed it appropriate.⁴³

In his statement to the tribunal, C/Supt Dillane stated that he did not ask Sgt Barry to send his statement to him but to ensure it was submitted to HRM within seven days. He said that *[t]his allowed me to close my investigation for his alleged work related stress and switched the responsibility for the investigation to HRM*.⁴⁴

In his evidence to the tribunal, Mr Barry told counsel for the tribunal that he did not accept this explanation *[b]ecause there was nobody appointed to investigate my work related stress at that stage*.⁴⁵ Mr Barry also told the tribunal that he did not want the chief superintendent to have sight of the

⁴⁰ Tribunal Documents, p. 334

⁴¹ Tribunal Documents, p. 372

⁴² Tribunal Documents, p. 1623

⁴³ Tribunal Documents, p. 9

⁴⁴ Tribunal Documents, p. 354

⁴⁵ Tribunal Transcripts, Day 175, p. 159

criminal aspect of the bullying and harassment complaint.⁴⁶ However, he accepted that there was no evidence that the complaint was ever sent to C/Supt Dillane.⁴⁷

In his evidence to the tribunal, C/Supt Dillane did not accept that he had requested a copy of Sgt Barry's statement of complaint.⁴⁸ He told the tribunal that:

... my intention here was: I had an open investigation, I now had the investigation transferred to whoever was going to investigate it and I could, as I say, close my file in my office, it was transferred to somebody else.⁴⁹

In his legal submissions to the tribunal, Mr Barry submitted that it was a matter for the tribunal to interpret the meaning of C/Supt Dillane's letter of 1st October 2012. It was submitted that it was reasonably open to the tribunal to accept the interpretation put forward by Mr Barry in his evidence given that the letter made a reference in one paragraph to the undertaking on 21st September 2012 'to submit a statement to my office' and, in the next paragraph, requested Mr Barry to submit his complaint in seven days. It was submitted that this amounted to targeting by attempting to impose improper pressure on Sgt Barry to reveal a protected disclosure he had made.

Conclusion on Issue 4.g

The question to be answered on this matter is whether C/Supt Dillane requested or directed Sgt Barry to submit his complaint directly to him. Sgt Barry had informed the chief superintendent's office that he would be submitting his statement directly to HRM at Garda Headquarters. C/Supt Dillane responded and, referring to Sgt Barry's intention as stated, said that *'I have no objection to this course of action but I do require that you submit your statement outlining your full complaint within seven days in order that I can conclude my investigation'*. This was not a request or an order to Sgt Barry to make his complaint directly to the chief superintendent.

This issue was determined by reading the letter and deciding what it means. It is not a matter of what Sgt Barry thought the letter said but what it actually declared.

The tribunal has no desire to be critical of Mr Barry for misunderstanding the letter at the time but it is difficult to understand how he was unable to accept the meaning of this paragraph in the letter when it was pointed out to him.

⁴⁶ Tribunal Transcripts, Day 175, p. 160

⁴⁷ Tribunal Transcripts, Day 175, pp. 160-161

⁴⁸ Tribunal Transcripts, Day 183, pp. 162-163

⁴⁹ Tribunal Transcripts, Day 183, p. 163

CHAPTER 3

ISSUE 3.c: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE ALLEGED FAILURE TO INVESTIGATE HIS REPORTED WORK-RELATED STRESS

Issue 3.c of the Schedule of Issues

Did Supt Michael Comyns and/or C/Supt Gerard Dillane target or discredit Sgt Barry as he alleges ... because he had made a protected disclosure –

(c) *by failing to carry out an investigation into his work-related stress?*

Background

Sergeant Paul Barry reported non-effective for duty on 6th August 2012 and remained on sick leave until 29th March 2013. He was absent on sick leave for a total of 235 days.⁵⁰

The procedure for a member reporting his/her absence from duty on medical grounds is set out in HQ Directive 139/10 as follows:

*Members will report sickness absence to their first line supervisor as soon as possible and at least 3 hours prior to the scheduled starting time. If it is not possible to make contact with the first line supervisor, the member will report to the supervisor working at the time of the report.*⁵¹

In practice this reporting requirement is satisfied by the member phoning their garda station and advising the garda in the Public Office that they are unable to attend work due to illness. Whoever is so advised is required to complete and sign a sickness absence report, known as an SR1 form.⁵²

Sgt Barry's absence on 6th August 2012 was recorded on the SR1 form in the station as absence due to ordinary illness and the nature of his illness was specified as being work-related stress.⁵³

Further, during his sick leave, Sgt Barry submitted sick certificates that were issued by his general practitioner, a number of which recorded that he was medically unfit for work due to work-related illness.⁵⁴

The reference to work-related stress or work-related illness had the consequence that an investigation by local management was required in accordance with HQ Directive 139/10. The Directive states that, where the reason for the member's absence is due to work-related stress, a thorough investigation should be carried out immediately by local management and the outcome reported to the Assistant Commissioner, Human Resource Management (HRM) for the attention of the Chief Medical Officer (CMO) of An Garda Síochána.⁵⁵

⁵⁰ Tribunal Documents, p. 3998

⁵¹ Tribunal Documents, p. 992

⁵² Tribunal Documents, p. 3923

⁵³ Tribunal Documents, p. 367

⁵⁴ Tribunal Documents, p. 3794 and p. 3999

⁵⁵ Tribunal Documents, p. 3311

The Work-Related Stress Investigation

On 9th August 2012, Superintendent Michael Comyns appointed Inspector Anthony O’Sullivan to investigate Sgt Barry’s work-related stress and Insp O’Sullivan was directed to submit a full file to the Assistant Commissioner, HRM for the attention of the CMO.⁵⁶

Supt Comyns told the tribunal that he made a phone call to Sgt Barry on 3rd September 2012 in line with the sickness absence policy, which was unanswered.⁵⁷ He said that he left a message enquiring as to Sgt Barry’s welfare.⁵⁸

Insp O’Sullivan met with Sgt Barry by appointment on 4th September 2012. In his report to Supt Comyns, dated 10th September 2012, Insp O’Sullivan stated that Sgt Barry declined to discuss any issues in relation to his non-effectiveness and that:

He informed me he had some issue with Superintendent Comyns but declined to discuss the matter further. Sergeant Barry requested file to be forwarded to Officer outside Fermoy Garda District.⁵⁹

On the same day, 10th September 2012, Supt Comyns reported the matter to Chief Superintendent Gerard Dillane. He outlined that Sgt Barry alleged he had an issue with him and that an officer outside the Fermoy District should investigate the matter.⁶⁰

On 11th September 2012, C/Supt Dillane wrote to the Assistant Commissioner, HRM stating that Sgt Barry remained non-effective for duty, reporting work-related stress. He requested an urgent appointment for the sergeant with the Garda Occupational Health Service. He stated that Sgt Barry had been disciplined by Supt Comyns under Regulation 10 and further that Sgt Barry had requested that an officer from outside the district should be appointed to investigate his absence.⁶¹

C/Supt Dillane also wrote to the Assistant Commissioner, Southern Region on the same date stating that *‘[a]s Sergeant Barry’s issue is with an officer of Superintendent rank I would request that a Chief Superintendent from another Division be appointed to investigate this matter’*.⁶² No such appointment under HQ Directive 139/10 ever appears to have been made.

Later that day, on 11th September 2012, Assistant Commissioner Fintan Fanning, HRM referred the matter to the CMO and requested that Sgt Barry be facilitated with an appointment. He stated that he was requesting an appointment as Sgt Barry had exceeded 28 days sickness absence, citing work-related stress.⁶³

On 13th September 2012, C/Supt Dillane met with Sgt Barry at Watergrasshill to discuss his absence from duty. In a report to the Assistant Commissioner, Southern Region dated 17th September 2012, the chief superintendent stated that:

⁵⁶ Tribunal Documents, p. 365

⁵⁷ Tribunal Transcripts, Day 182, p. 22

⁵⁸ Tribunal Transcripts, Day 182, p. 22 and Tribunal Documents, p. 644

⁵⁹ Tribunal Documents, p. 5368

⁶⁰ Tribunal Documents, p. 366

⁶¹ Tribunal Documents, p. 369

⁶² Tribunal Documents, p. 368

⁶³ Tribunal Documents, p. 1582

*Sergeant Barry left me in no uncertain terms that he would not discuss the matter with me and again reiterated that he wished to have an officer from outside Cork North Division deal with the matter.*⁶⁴

C/Supt Dillane said in his statement to the tribunal that Sgt Barry cancelled the arrangement to meet again on 21st September 2012 saying he had received legal advice.⁶⁵

By letter dated 18th September 2012, Dr Oghenovo Oghuvbu, Specialist Occupational Physician at the Garda Occupational Health Service, scheduled Sgt Barry for an appointment on 11th October 2012. In the same letter it was stated that, as Sgt Barry was reported as absent due to work-related stress, a full report of local management intervention to assess this assertion and the agreed measures to address the issue was requested as a matter of priority.⁶⁶

C/Supt Dillane was advised by HRM of this request on 25th September 2012.⁶⁷ In a response dated 2nd October 2012, C/Supt Dillane said that Sgt Barry did not want to discuss his absence with him and that Sgt Barry would submit his statement directly to HRM.⁶⁸

C/Supt Dillane wrote to Sgt Barry on 1st October 2012 referring to his '*current period of non-effectiveness which I am investigating in accordance with Garda Code Regulations*'. He said that he had sought a written statement from Sgt Barry outlining his complaint. He said that he was aware that Sgt Barry would be submitting that complaint to HRM and that '*I have no objection to this course of action but I do require that you submit your statement outlining your full complaint within seven days in order that I can conclude my investigation*'.⁶⁹

On 8th October 2012, the Assistant Commissioner, HRM informed the CMO that local management had reported that the member was making a formal complaint to the Assistant Commissioner, HRM regarding the issue with his local management. He also stated that '*[with] regard to the member's sickness absence, the member has not submitted a report to his local Management as requested*'.⁷⁰

Sgt Barry met with C/Supt Dillane several days later, on 13th October 2012, and the issue of a possible transfer was discussed; this will be dealt with later in this report.

On 23rd November 2012, the Assistant Commissioner, HRM wrote to C/Supt Dillane referring to his report dated 2nd October 2012 and requesting '*a report detailing the progress of the investigation into the member's stress related absence*'.⁷¹ C/Supt Dillane contacted Insp O'Sullivan, who confirmed in a report dated 4th December 2012 that Sgt Barry had declined to discuss any issues on 4th September 2012.⁷²

C/Supt Dillane replied to HRM by letter dated 5th December 2012. He referred to the appointment of Insp O'Sullivan to investigate Sgt Barry's work-related stress. He also stated that a file had been forwarded to the Assistant Commissioner, Southern Region requesting that an officer from outside the division be appointed to investigate the matter. He concluded by stating that '*I understand Assistant Commissioner Jack Nolan has been appointed to investigate the matter*'.⁷³

⁶⁴ Tribunal Documents, p. 370

⁶⁵ Tribunal Documents, p. 334

⁶⁶ Tribunal Documents, p. 3738

⁶⁷ Tribunal Documents, p. 1584

⁶⁸ Tribunal Documents, pp. 1586-1587

⁶⁹ Tribunal Documents, p. 372

⁷⁰ Tribunal Documents, p. 1585

⁷¹ Tribunal Documents, p. 1610

⁷² Tribunal Documents, p. 1609

⁷³ Tribunal Documents, p. 1608

Complaint made by Mr Barry

In respect of the appointment of Insp O’Sullivan on 9th August 2012, Mr Barry conceded when giving his evidence to the tribunal that the correct procedure had been triggered in a timely way.⁷⁴

However, in his interview with tribunal investigators Mr Barry claimed that Supt Comyns had sent Insp O’Sullivan *‘to find out what complaint I had made against him and the reason for my sickness’*.⁷⁵ In his evidence to the tribunal Mr Barry said that Insp O’Sullivan asked him about the allegation he was making against Supt Comyns and that he replied that he had not yet submitted it and *‘I’m not telling you’*.⁷⁶

He was referred to Insp O’Sullivan’s report to Supt Comyns on 10th September 2012 by counsel for the tribunal and he accepted that this was a *‘fair representation’* of the meeting.⁷⁷

Counsel for the tribunal asked Mr Barry if he accepted that Insp O’Sullivan had explained that the purpose of the meeting was to enquire into the cause of his work-related stress:

No. I think the purpose of his meeting was to find out what exactly was the complaint I was about to make or why I was out sick with work related stress, what was the reason for it.

Q. But he had been appointed by the superintendent, expressly ordered to find out the source of the work related stress and investigate it, and did he not explain that that was what he had been tasked with doing?

*A. Oh he did, yes, but the superintendent was the cause of my work related stress, so I wasn’t going telling Inspector O’Sullivan what exact interaction I had with the superintendent or what I intended to report.*⁷⁸

In respect of the report of Supt Comyns to C/Supt Dillane on 10th September 2012, Mr Barry told the tribunal that he had no objection to his request being conveyed *‘up the line’*.⁷⁹ When C/Supt Dillane in turn contacted the Assistant Commissioner, HRM and requested that an officer from outside the division be appointed to carry out the investigation, Mr Barry told counsel for the tribunal that he agreed that this action by C/Supt Dillane was an *‘appropriate step’* in the matter.⁸⁰

However, Mr Barry told the tribunal that, when making his complaint of bullying and harassment in late September/early October 2012, there was nobody appointed to investigate his work-related stress at that stage. He said that he had requested someone from outside the district to investigate and that no such person had spoken to him.⁸¹

He further gave evidence in respect of the subsequent referral to the Garda Occupational Health Service and said that he expected this to happen.⁸²

⁷⁴ Tribunal Transcripts, Day 175, p. 142

⁷⁵ Tribunal Documents, p. 58

⁷⁶ Tribunal Transcripts, Day 175, p. 143

⁷⁷ Tribunal Transcripts, Day 175, p. 143

⁷⁸ Tribunal Transcripts, Day 175, pp. 144-145

⁷⁹ Tribunal Transcripts, Day 175, p. 146

⁸⁰ Tribunal Transcripts, Day 175, p. 147

⁸¹ Tribunal Transcripts, Day 175, pp. 159-160

⁸² Tribunal Transcripts, Day 175, p. 147

Mr Barry told the tribunal that he did not recall meeting C/Supt Dillane on 13th September 2012.⁸³ He later recalled in his evidence that this was a phone call where C/Supt Dillane wanted to discuss his welfare but that he, Sgt Barry, did not want to discuss anything with him.⁸⁴ Referring to his meeting with C/Supt Dillane on 13th October 2012, he said that *'I would have asked him why my complaint wasn't being investigated'*.⁸⁵

As outlined above, Sgt Barry met with the CMO, who subsequently stated in a letter dated 22nd October 2012 that he did not have sight of documentation objectively establishing the presence of workplace stressors or otherwise in the case.⁸⁶ In relation to a subsequent request for material from his treating physicians, Mr Barry was asked the following by counsel for the tribunal:

- Q. ... would you agree that there seems to be a fairly consistent effort to try and progress matters at a reasonable pace in relation to the CMO and what he might need for his enquiries?
- A. That's correct. But this – I was asked to submit the report from my doctor, Dr. Denny and Dr. Kiely, but I believe the CMO was looking for a full investigation into my sickness and that is what I was given as a report from my doctor and from Dr. Denny.
- Q. Yes. I mean, on one view they are covering here the medical side, but did you pick up, as it were, whether there was a gap or not, about whether they were really enquiring into the stress at all or the causes of the stress?
- A. I didn't see any investigation going.
- Q. But is that something that you appreciated at the time or who did you think was enquiring into it?
- A. I didn't think anyone was enquiring into it.
- Q. Okay. Well, did you think it would follow on from the investigation into the others that, for example, if it had been found that you were being bullied, that would then – and bullied in the workplace, that would then be obviously found to be a cause of the stress? Was it not dependent upon the outcome of the bullying and harassment?
- A. It possibly was, that is what Garda management would have relied upon for their conclusion.
- Q. Yes. I suppose looking at it the other way, could your work related stress have been enquired into without enquiring into the bullying and harassment or was there some other extra element?
- A. I think the ninth element was the element that caused my work related stress.
- ...
- Q. And if that was causing your stress, the outcome of that could well be identified or the behaviour believed to have been engaged in could have been identified as a cause of stress?
- A. Yes.

⁸³ Tribunal Transcripts, Day 175, pp. 165-166

⁸⁴ Tribunal Transcripts, Day 176, p. 32

⁸⁵ Tribunal Transcripts, Day 175, p. 173

⁸⁶ Tribunal Documents, p. 1576

Q. *Depending on the outcome?*

A. *Yes, of course.*

Q. *Was there room then, I mean were you thinking about it in these terms, was there room for some other separate investigation into your work related stress? Is that something you considered with your AGSI advisers or your solicitors?*

A. *It wasn't really, no, I didn't know what format they were going to – what they were going to do in relation to my work related stress. All I know is that I requested somebody other than somebody from Fermoy would investigate it ... But I never thought that Chief Superintendent Kehoe was investigating it.⁸⁷*

Responding Statements and Evidence on the Issue

Superintendent Michael Comyns

In his statement to the tribunal, Supt Comyns recalled that he appointed Insp O'Sullivan to investigate the work-related stress as he was obliged to do in accordance with HQ Directive 139/10. With regard to the allegation that he had sent Insp O'Sullivan to find out what complaint Sgt Barry had made against him, he said that this was not true or factual.⁸⁸ He also said that he was not aware that Sgt Barry had made a complaint against him at that time. He pointed out that from a review of the papers, Sgt Barry did not make a complaint against him until late September 2012.⁸⁹

In a response to a Memorandum of Questions issued by the tribunal investigator, Supt Comyns stated that he appointed Insp O'Sullivan to carry out an investigation, that the matter was 'escalated' to C/Supt Dillane and that he had no involvement in the investigation.⁹⁰

Supt Comyns told the tribunal that he understood the issue mentioned by Sgt Barry to be a reference to the Regulation 10 Notice that had recently been served on Sgt Barry.⁹¹ He told counsel for Mr Barry that Insp O'Sullivan would have known about the service of this disciplinary Notice.⁹²

He also stated in his response to the Memorandum of Questions that Sgt Barry's welfare was raised as part of an agenda item, which dealt with members who were absent, at each daily and weekly district Performance Accountability Framework (PAF) meeting. He said that there would be further enquiry at the weekly district PAF meetings and that he, Supt Comyns, would have enquired with Sergeant Aidan Dunne, the sergeant in charge, whether or not contact was being maintained with Sgt Barry and whether there were welfare issues that he should be aware of.⁹³

Retired Chief Superintendent Gerard Dillane

In his statement to the tribunal, C/Supt Dillane recalled that he met with Sgt Barry on 13th September 2012 and enquired into his welfare. He said that at the start of the meeting Sgt Barry

⁸⁷ Tribunal Transcripts, Day 175, pp. 185-187

⁸⁸ Tribunal Documents, p. 549

⁸⁹ Tribunal Documents, p. 549

⁹⁰ Tribunal Documents, pp. 5396-5397

⁹¹ Tribunal Transcripts, Day 182, p. 23

⁹² Tribunal Transcripts, Day 183, p. 22

⁹³ Tribunal Documents, pp. 5395-5396

said he was suffering from work-related stress. Sgt Barry told him that he did not want to discuss the details of his absence as C/Supt Dillane was stationed in the same garda station as Supt Comyns. He said he wanted an officer from outside the Cork North Garda Division to investigate the matter. C/Supt Dillane said that he told Sgt Barry that a request had been made for a chief superintendent from outside the division to be appointed to look into his complaint.⁹⁴

In his evidence to the tribunal, C/Supt Dillane told the tribunal that he wanted to address two things at this meeting: to inform Sgt Barry that he had applied for someone outside the division to investigate his complaint and to see how he was as he had a wife and children and was on basic pay.⁹⁵

In respect of Insp O’Sullivan’s report that Sgt Barry had an issue with Supt Comyns, C/Supt Dillane was asked whether he linked the Regulation 10 Notice with this issue. He told the tribunal that this was the only thing he could think of at the time.⁹⁶

In relation to his letter to HRM on 11th September 2012, C/Supt Dillane told the tribunal that he was looking for an appointment with the Garda Occupational Health Service to have Sgt Barry examined to see what the work-related stress issue was.⁹⁷

He told counsel for the tribunal that he had ‘*an obligation to have it investigated, his work related stress, so it was now transferred to another person of chief superintendent or higher*’.⁹⁸ He told counsel for Mr Barry that:

*... here was a person who had work related stress, he indicated that he had an issue with the superintendent and that I had applied to get the matter investigated by a chief superintendent outside the division, and it was in my interest to make sure that he made his statement as soon as he could to the person who was going to investigate it, because there was an obligation on me to have that investigated. And when it was transferred to somebody else then, that obligation was off me.*⁹⁹

In respect of his letter to Sgt Barry on 1st October 2012, concerning the submission of the bullying and harassment complaint, he said in his statement to the tribunal that ‘*[i]his allowed me to close my investigation for his alleged work related stress and switched the responsibility for the investigation to HRM*’.¹⁰⁰ He reiterated in his evidence that:

*... my intention here was: I had an open investigation, I now had the investigation transferred to whoever was going to investigate it and I could, as I say, close my file in my office, it was transferred to somebody else.*¹⁰¹

Inspector Anthony O’Sullivan

In his statement to the tribunal investigator, Insp O’Sullivan referred to his meeting on 4th September 2012 with Sgt Barry and said that Sgt Barry understood his role in investigating the

⁹⁴ Tribunal Documents, pp. 333-334

⁹⁵ Tribunal Transcripts, Day 183, p. 160

⁹⁶ Tribunal Transcripts, Day 183, p. 157

⁹⁷ Tribunal Transcripts, Day 183, p. 159

⁹⁸ Tribunal Transcripts, Day 183, p. 163

⁹⁹ Tribunal Transcripts, Day 184, pp. 114-115

¹⁰⁰ Tribunal Documents, p. 354

¹⁰¹ Tribunal Transcripts, Day 183, p. 163

work-related stress. He said that he explained his role to Sgt Barry, *'but he just wished for someone outside the Fermoy district to investigate it'*.¹⁰² Insp O'Sullivan denied in his evidence to the tribunal that he asked Sgt Barry about the substance of his complaint during this meeting.¹⁰³

In relation to the work-related stress investigation, Insp O'Sullivan told the tribunal that he could not do any more in the circumstances. He said that he received no further instructions from Supt Comyns or C/Supt Dillane with regard to progressing the investigation and that:

... I went to meet him on the 4th September 2012, he said he didn't want me to have anything to do with it, he wanted to discuss it with somebody else outside of Fermoy Garda Station. So I didn't expect to be doing any more with it.

Q. *So in relation to the HQ Directive 139/10, that's where it stopped, is that right, as far as you were concerned, is that your evidence?*

A. *As far as I am concerned, yes. But I complied with HQ 139/10. I met [the] man in Watergrasshill. And again I say to the tribunal, he said he didn't want anything to do – he didn't disclose his issue. He said he had some issue with Superintendent Comyns. He wanted somebody outside of Fermoy district Garda to investigate it because all three of us were in the one building, the chief super and the inspector.*¹⁰⁴

Legal Submissions

Mr Paul Barry submitted as follows:¹⁰⁵

- that the obligation was on C/Supt Dillane to ensure that the work-related stress investigation took place and for him or Supt Comyns to ensure the appointment of an investigator from outside the Fermoy District. No one was appointed.
- that the failure to appoint an investigator to investigate Sgt Barry's work-related stress amounted to an instance of targeting by Supt Comyns and C/Supt Dillane in relation to Sgt Barry's protected disclosure.

An Garda Síochána submitted as follows:¹⁰⁶

- that once C/Supt Dillane was aware that Sgt Barry's absence arose from work-related stress, an investigation was set up in accordance with the Garda Code. Insp O'Sullivan was appointed to investigate. Sgt Barry refused to talk to Insp O'Sullivan and told his doctor that this was on legal advice. Sgt Barry also refused to discuss it with C/Supt Dillane at their meeting on 13th September 2012.
- that Sgt Barry's superiors followed the correct procedure in attempting to investigate his absence but this was frustrated by Sgt Barry's refusal to cooperate.

¹⁰² Tribunal Documents, p. 5333

¹⁰³ Tribunal Transcripts, Day 186, p. 150

¹⁰⁴ Tribunal Transcripts, Day 186, pp. 154-155

¹⁰⁵ The tribunal has considered all of Mr Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

¹⁰⁶ The tribunal has considered all of An Garda Síochána's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

Superintendent Michael Comyns submitted as follows:¹⁰⁷

- that Supt Comyns appointed Insp O’Sullivan to investigate the cause of the work-related stress in accordance with the provisions of HQ Directive 139/10.
- that Supt Comyns complied with his duties and initiated an investigation under HQ Directive 139/10 but was precluded from completing the investigation as Sgt Barry requested the matter to be investigated by a member from outside the district.
- that there was no evidence of Sgt Barry being targeted or discredited and no evidence of Supt Comyns targeting or discrediting, or being a party to any targeting or discrediting, of Sgt Barry by An Garda Síochána.

Conclusion

The provisions in the Garda Síochána Code as to injury on duty are more fully considered in the next chapter. In regard to the allegation by Mr Barry that Supt Comyns and/or C/Supt Dillane targeted or discredited him by failing to carry out an investigation into his work-related stress the position is as follows.

This was an important matter for Sgt Barry because if his non-effectiveness for duty was ascribed to an injury on duty he would have been entitled to full pay and allowances during the period of his absence. Without such injury status his absence was treated as ordinary illness, with a result that severe reductions in pay came to be applied after specified numbers of days’ absence.

HQ Directive 139/10 provided that an injury was treated as an ordinary illness unless and until it was confirmed as an injury on duty.¹⁰⁸ Under the Code where a member suffers personal injury and is rendered non-effective, a full report of the circumstances ‘*should be submitted immediately to the member’s Divisional Officer*’, who in this case was C/Supt Dillane.

The Directive also covers the situation where members report non-effective for duty as a result of an injury on duty or work-related stress, in which case ‘*a thorough investigation should be carried out immediately and the outcome reported to Assistant Commissioner HRM for the attention of the CMO*’.¹⁰⁹

The situation that arose in this case with Sgt Barry’s report of absence due to work-related stress required a thorough investigation.

In normal circumstances the question of injury on duty was decided by the divisional officer except in cases of doubt or difficulty, when it became a matter for HRM.

Supt Comyns dealt with Sgt Barry’s sick leave in accordance with the Garda Síochána Code. He directed Insp O’Sullivan to investigate the matter of Sgt Barry’s medically certified work-related stress but the latter would not discuss the condition with him because he said the inspector was stationed at Fermoy Garda Station and was too close to the superintendent and chief superintendent. Instead, he wanted to have an independent officer to investigate the matter.

¹⁰⁷ The tribunal has considered all of Superintendent Michael Comyns’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

¹⁰⁸ Tribunal Documents, p. 993

¹⁰⁹ Tribunal Documents, p. 3314

The superintendent reported the situation to C/Supt Dillane, who communicated the sergeant's position to HRM, but nothing ultimately came of that reference other than a referral to the CMO. As outlined in the following chapter, central management maintained that the matter could not be determined until the sergeant's bullying and harassment complaint had been investigated.

Sgt Barry excluded local management from the investigation of work-related stress that was the reason for his absence from work. The chief superintendent reported this to the Assistant Commissioner, HRM and requested the appointment of an outside officer to investigate in accordance with Sgt Barry's wishes. The matter moved to Garda Headquarters for attention and out of the hands of C/Supt Dillane.

The way the matter was dealt with was not the fault of either officer and in the circumstances it is impossible to condemn C/Supt Dillane or Supt Comyns for any targeting or discrediting under this issue.

CHAPTER 4

ISSUE 3.A: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE ALLEGED FAILURE TO CLASSIFY HIS SICKNESS ABSENCE AS AN INJURY ON DUTY

Issue 3.a of the Schedule of Issues

Did Supt Michael Comyns and/or C/Supt Gerard Dillane target or discredit Sgt Barry as he alleges ... because he had made a protected disclosure –

- (a) *by treating his sick leave as ordinary illness and not work related illness, resulting in loss of pay to which Sgt Barry was entitled?*

Background

As stated earlier in this report, when reporting his absence to his garda station on 6th August 2012 it was recorded on the SR1 form that Sergeant Paul Barry was absent due to ordinary illness and the nature of his illness was specified as ‘*work related stress*’.¹¹⁰

The SR1 form sets out a number of categories under which an illness can be recorded. The first category is *ordinary illness*. The second category covers *occupational injury/illness arising from duty*. The third category covers *critical illness*. How injuries are to be categorised by the member recording the details is included in an instruction on the SR1 form, which states that:

*An absence must be categorised as ‘Ordinary Illness’ until such time as a Certificate, in accordance with Code 11.37, has been issued by the Chief Superintendent.*¹¹¹

Code 11.37 of the Garda Síochána Code provides as follows:

If a member suffers personal injury, and is rendered non-effective or otherwise, a full report of the circumstances should be submitted immediately to the member’s Divisional Officer. When non-effectiveness as a result of an injury exceeds 60 days in any period of 90 days the report will be forwarded to Assistant Commissioner, Human Resource Management. A decision regarding culpability will be made locally by the Divisional Officer except in cases where:

- (a) *The Divisional Officer is of the opinion that the injuries were due to wilful default or negligence on the part of the member.*
- (b) *The Divisional Officer has a doubt about the matter. In such cases the file will be forwarded to the Assistant Commissioner, Human Resource Management for directions.*¹¹²

¹¹⁰ Tribunal Documents, p. 367

¹¹¹ Tribunal Documents, p. 3923

¹¹² Tribunal Documents, p. 3276

The completed SR1 form is forwarded to the local district clerk who records the absence due to illness on the garda Sickness Absence Management System (SAMS). There is no instruction or guidance as to how work-related stress is to be recorded where so certified by the member's medical practitioner.¹¹³

There is, however, a presumption in favour of classifying work-related stress as ordinary illness created by HQ Directive 139/10 which states:

Where there is any doubt that an injury on duty occurred, Divisional Officers should refer the matter to Assistant Commissioner, H.R.M., who will seek the advices of the C.M.O. The C.M.O. will take into account all relevant information in arriving at his/her advices.

A decision regarding injury on duty will be based on:

- *A complete investigation file into the incident;*
- *Management views and recommendations;*
- *The assessment and opinion of the C.M.O.*

...

Where there is a doubt as to whether the member's sickness absence is due to ordinary illness or an injury on duty the member's absence will be treated as ordinary illness pending a decision on the classification of the injury and in particular the C.M.O.'s advice. If it is determined that the absence does relate to an injury on duty, the member's pay will be retrospectively adjusted as soon as practicable.¹¹⁴

Sergeant Paul Barry's Sick Leave

In the years 1994-2015, Sgt Barry's sick leave absences were recorded on SAMS under the category ordinary illness/illness save for one absence recorded as an injury on duty (2001) and two absences recorded as injury off duty (2002 and 2004).¹¹⁵

As outlined, on 6th August 2012, it was recorded on the relevant SR1 form that Sgt Barry was absent due to ordinary illness and the nature of his illness was specified as work-related stress.¹¹⁶

Sgt Barry provided a medical certificate dated 10th August 2012, which was issued by Dr Margaret Anne Kiely, his general practitioner, certifying that he was unable to attend work due to 'medical illness'.¹¹⁷ The subsequent medical certificates provided by Sgt Barry also certified that he was suffering from a medical illness or medical condition.¹¹⁸ His absence was recorded at the time between August 2012 and 4th February 2013 on SAMS simply as 'illness'.¹¹⁹

On 8th November 2012, Dr Kiely provided a medical certificate in respect of Sgt Barry certifying that he was unable to attend work as he was suffering from 'work related medical illness'.¹²⁰ Despite this change, his absence continued to be recorded by An Garda Síochána on SAMS under the illness category and specified as 'flu/viral'.¹²¹

¹¹³ Tribunal Documents, p. 3720

¹¹⁴ Tribunal Documents, p. 993

¹¹⁵ Tribunal Documents, p. 3998

¹¹⁶ Tribunal Documents, p. 367

¹¹⁷ Tribunal Documents, p. 3762

¹¹⁸ Tribunal Documents, pp. 3763-3765

¹¹⁹ Tribunal Documents, pp. 3788-3791

¹²⁰ Tribunal Documents, p. 3766

¹²¹ Tribunal Documents, p. 3998

This classification affected Sgt Barry as on 4th February 2013, his sick leave pay was reduced to the half rate of pay.¹²² Had his divisional officer, Chief Superintendent Gerard Dillane, certified that Sgt Barry's medical condition was the result of an injury on duty, none of the reductions would have applied to him and he would have been entitled to full pay and allowances pending recovery.

The Classification of Sergeant Paul Barry's Sick Leave

As outlined in chapter 3 Assistant Commissioner Fintan Fanning, Human Resource Management (HRM) referred Sgt Barry's absence to the Chief Medical Officer (CMO) at the Garda Occupational Health Service on 11th September 2012 and requested that Sgt Barry be facilitated with an appointment. He stated that he was requesting an appointment as Sgt Barry had exceeded 28 days sickness absence, citing work-related stress.¹²³

On 11th October 2012, Sgt Barry was assessed by Dr Oghenovo Oghuvbu, Specialist Occupational Physician at the Garda Occupational Health Service.¹²⁴ It was the first of three consultations that Dr Oghuvbu was to have with Sgt Barry.

In a report to the Assistant Commissioner, HRM dated 12th October 2012, Dr Oghuvbu noted that *'[t]he member's absence is attributed to the development of a clinical condition for which he is now in receipt of clinical management by an appropriate specialist'*. This was a reference to Dr John Dennehy, Consultant Psychiatrist, whom Sgt Barry had been attending. Dr Oghuvbu recommended that Sgt Barry was *'temporarily medically unfit to attend regularly and render effective service undertaking policing duties'*. It was noted in the report that *'[t]his service is aware of certain reported workplace-related issues that arose prior to this absence'* and it was directed that Sgt Barry was to be informed of the confidential supports available to him within An Garda Síochána.¹²⁵

C/Supt Dillane met with Sgt Barry on 13th October 2012 by appointment in a car park in Glanmire. In his statement to the tribunal, C/Supt Dillane said that during this meeting Sgt Barry asked him to issue an injury on duty certificate under Code 11.37. C/Supt Dillane stated that he told Sgt Barry that he could not issue the certificate as he had no knowledge of the alleged injury Sgt Barry was suffering from. He told Sgt Barry that, in such circumstances, it was only the CMO who could sign off on such a certificate.¹²⁶

On 18th October 2012, Sgt Barry contacted HRM by telephone and indicated that his absence should be classified as an injury on duty. By letter dated 22nd October 2012, the Assistant Commissioner, HRM wrote to the CMO and sought his advice from a medical perspective *'to assist in making a decision on the classification of this current sickness absence from 6th August 2012 – present'*.¹²⁷

On the same date, the Assistant Commissioner, HRM wrote to the Chief Superintendent, Fermoy, stating that the CMO was aware of *'certain reported workplace-related issues'* that arose prior to Sgt Barry's absence and that Sgt Barry was to be notified of the confidential supports available to garda members. It was stated that *'[y]ou should ensure the provisions of Code 11.39 are strictly*

¹²² Tribunal Documents, p. 3795

¹²³ Tribunal Documents, p. 1582

¹²⁴ Tribunal Documents, p. 1504

¹²⁵ Tribunal Documents, p. 1513

¹²⁶ Tribunal Documents, p. 335

¹²⁷ Tribunal Documents, p. 1595

adhered to.¹²⁸ Code 11.39 requires visits by a supervisor to the home of a member who reports continuously non-effective for duty for fourteen days.¹²⁹

Subsequently, on 5th November 2012, Sgt Barry's legal advisers wrote to the Assistant Commissioner, HRM in relation to the classification of Sgt Barry's absence stating that he was on sick leave due to '*stress and depression*'.¹³⁰ It was stated that Sgt Barry's injuries '*clearly occurred while on duty however when he requested confirmation of this from a member of your staff he was advised to request the said information from the Chief Medical Officer. In turn the Chief Medical Officer advised that this was a matter for Human Resource Management*'. This correspondence was forwarded to the CMO by A/C Fanning.¹³¹

Sgt Barry met with Inspector Anthony O'Sullivan on 7th November 2012, who kept him informed of where matters then stood between HRM and the CMO.¹³²

On 19th November 2012, the CMO replied to A/C Fanning stating, *inter alia*, that:

2. *The member asserts that the onset of his clinical condition and the resulting absence is consequent of certain interactions and events that occurred in his workplace. Your previous correspondence of 08/10/2012 and that of 22/10/2012 indicate that Garda management are aware of the circumstances and that the matter is being dealt with by the appropriate offices.*
3. *While a clinical condition such as the member's reported condition can arise in the presence of certain stressors including workplace stressors, I do not have sight of documentation that objectively establishes the presence of workplace stressors or otherwise in this case.*
4. *Provision of the documentation alluded to in point (3) on a priority basis by means of an appropriate process will greatly facilitate the provision of the required advice.*¹³³

A/C Fanning wrote to C/Supt Dillane on 23rd November 2012 stating that Sgt Barry's file had been reviewed by the CMO, who advised that he did not have sight of any documentation that would objectively establish the presence of workplace stressors or otherwise in the case. A/C Fanning stated that Sgt Barry was requested to forward all medical/clinical case records from his treating doctor to the Garda Occupational Health Service.¹³⁴

Insp O'Sullivan met with Sgt Barry on 5th December 2012 and Sgt Barry confirmed that all medical records from his treating doctor had been submitted.¹³⁵

The CMO received an update from Sgt Barry's general practitioner on 12th December 2012 stating, *inter alia*, that Sgt Barry was '*suffering from symptoms secondary to a stressful life event which occurred at work and also alleged bullying at work ... I feel his current mental health illness has been triggered by work related events and he is suffering from a work related condition*'.¹³⁶

¹²⁸ Tribunal Documents, p. 375

¹²⁹ Tribunal Documents, p. 3277

¹³⁰ Tribunal Documents, p. 1605

¹³¹ Tribunal Documents, p. 1603

¹³² Tribunal Transcripts, Day 175, p. 179

¹³³ Tribunal Documents, p. 1598

¹³⁴ Tribunal Documents, p. 1597

¹³⁵ Tribunal Documents, p. 1627

¹³⁶ Tribunal Documents, p. 1517

The opinion of the doctor was based on consultations with Sgt Barry during which he discussed his concerns surrounding the investigation of an offence and his perception that his superintendent had unlawfully interfered with the investigation. Dr Kiely was also aware that Sgt Barry had made a complaint of bullying and harassment to his authorities against the same superintendent. As Dr Kiely had concerns about Sgt Barry's mental health she had referred him to Dr Dennehy for his expert opinion and treatment.¹³⁷

On 18th December 2012, Dr Dennehy wrote to Dr Oghuvbu and stated, *inter alia*, that '*[i]n my opinion he [Sgt Barry] is experiencing a depressive adjustment disorder predominantly, and in my view this is clearly related to his work experiences*'.¹³⁸

Sgt Barry was then scheduled for his second appointment with the Garda Occupational Health Service on 25th January 2013.¹³⁹

In the interim, Sgt Barry wrote to Ms Claire Egan at the Sickness Absence Section, HRM, on 4th January 2013 outlining the financial implications of his sick leave for his family as his injury was not classified as work related. He requested that this issue would be raised at the case conference due to take place on 22nd January 2013.¹⁴⁰

On 8th January 2013, Sgt Barry met with Insp O'Sullivan. In a report to C/Supt Dillane dated the following day, Insp O'Sullivan said that Sgt Barry had requested him to include that the delay in the bullying and harassment investigation and the prospect of half pay from February 2013 was causing him considerable stress and anxiety. He said that his illness was still not classified despite his '*full co-operation with [the] Chief Medical Officer, Human Resource Management and the Investigation Team*'.¹⁴¹

Assistant Commissioner Jack Nolan, who had initially been appointed in respect of the bullying and harassment complaint, had sought agreement in respect of an extension of time for the investigation from both Sgt Barry and Superintendent Michael Comyns.¹⁴² By email dated 14th January 2013, Sgt Barry informed A/C Nolan that he was objecting to the request,¹⁴³ and in an email to the Assistant Commissioner, HRM on 16th January 2013, Sgt Barry complained that he was '*... suffering severe anxiety and stress due to this delay and as of today's date my illness has not been designated as work related. I face the prospect of having my pay reduced to half if this matter is not resolved by early February 2013*'.¹⁴⁴

On 22nd January 2013, at a case conference held at the Garda Occupational Health Service in respect of Sgt Barry, the classification of his absence was discussed. It was recorded in the notes of the meeting that Sgt Barry was '*seeking IOD classification for absence*'. It was also recorded under the heading 'Management Actions' that '*[n]othing can be done in relation to IOD classification until official investigation complete; AC wrote to member extending investigation until March 2013*'.¹⁴⁵

On 25th January 2013, Sgt Barry had his second assessment with Dr Oghuvbu. By report to the Assistant Commissioner, HRM dated 31st January 2013, Dr Oghuvbu stated that:

¹³⁷ Tribunal Transcripts, Day 188, pp. 38-40

¹³⁸ Tribunal Documents, p. 4784

¹³⁹ Tribunal Documents, p. 1636

¹⁴⁰ Tribunal Documents, pp. 1640-1641

¹⁴¹ Tribunal Documents, p. 1643

¹⁴² Tribunal Documents, p. 2489 and p. 2492

¹⁴³ Tribunal Documents, pp. 957-958

¹⁴⁴ Tribunal Documents, p. 955

¹⁴⁵ Tribunal Documents, p. 1515

1. *The member continues to present with features of disrupted health and sense of wellbeing for which he is in receipt of treatment and follow up by an appropriate specialist. Recent updates from his treating doctors have been noted.*
2. *The member's clinical state is significantly impacted by grievances which relate to certain events he reported as occurring in the workplace and which I understand are currently the subject of an official investigation.*
3. *In relation to the official investigation, the member expressed his grievance with what he described as the "slow pace" of the investigation to date. It is a matter for Garda management to progress such processes in a timely and appropriate manner to diminish negative impact on wellbeing and to expedite objective and constructive resolution which benefits recovery in such circumstances.*
4. *Based on the information available to me, while some progress in recovery is being made, the member is recommended as temporarily unfit to attend regularly and render effective service.*
5. *As the member is due review by his treating specialist in early February 2013, it may be that a return to work could be recommended at that time. In that context, a return to work in a safe and supportive workplace environment facilitated by local management is recommended.¹⁴⁶*

On 4th February 2013, in an email to the Assistant Commissioner, HRM, Sgt Barry referred to his meeting with the CMO and stated that:

Doctor Oghuvbu stated that the sole reason he wanted to see me was to discuss the medical reports submitted by Doctor Kiely and Doctor Dennehy. The C.M.O. was upset because both Dr. Kiely and Dr. Dennehy expressed the opinion that my medical condition was work related. He did not believe that they could do so without first conducting an investigation. Dr. Oghuvbu stated that he could not give an opinion on my illness until H.R.M concluded their investigation ...¹⁴⁷

Sgt Barry later spoke with C/Supt Dillane on 14th February 2013. Sgt Barry recorded in his diaries that they had a phone call and that he 'offered me [a] transfer out of concern that I was going on half pay'.¹⁴⁸ In his statement to the tribunal, C/Supt Dillane referred to this phone call and said that he stressed that this offer was made for the well-being of Sgt Barry's family as he felt that there was no need for Sgt Barry to be on half pay when he could be facilitated in a station much closer to his home.¹⁴⁹

By letter dated 8th March 2013, Dr Oghuvbu requested an independent specialist medical adviser, Dr John Tobin, Consultant Psychiatrist, to review Sgt Barry. Dr Oghuvbu requested Dr Tobin's 'assessment and opinion' on a number of matters including '[w]hat specific clinical considerations are present that preclude him from a return to work and to policing duties at this time'.¹⁵⁰

¹⁴⁶ Tribunal Documents, p. 1527

¹⁴⁷ Tribunal Documents, p. 1528

¹⁴⁸ Tribunal Documents, p. 4845

¹⁴⁹ Tribunal Documents, p. 336

¹⁵⁰ Tribunal Documents, p. 1532

Dr Tobin issued his report following a review of Sgt Barry on 11th March 2013 and stated at the conclusion of his report that:

*From the mental health point of view it appears that Sergeant Barry has developed a mixed anxiety/depressive reaction secondary to events that occurred at work. These events are to be the subject of a formal investigation. In the meantime, without prejudice to the findings of the enquiry, I would recommend that Sergeant Barry returns to work when a mutually agreed safe supportive working environment is available for him.*¹⁵¹

Sgt Barry attended an appointment with Dr Oghuvbu on 11th March 2013. Dr Oghuvbu requested a case conference in respect of Sgt Barry, to take place on 8th April 2013, involving the HRM Sickness Absence Section, senior local management and the Garda Occupational Health Service.¹⁵²

During the month of March 2013, Sgt Barry continued to submit medical certificates issued by Dr Kiely. By certificate dated 7th March 2013, Dr Kiely certified that he was unable to attend work due to 'work related illness' from 1st March 2013 to 31st March 2013.¹⁵³ By certificate dated 15th March 2013, Dr Kiely certified that he was unable to attend work as he was 'suffering from a medical condition' from 1st April 2013 to 1st May 2013.¹⁵⁴

However, Sgt Barry resumed duty at 21:00 hrs on 29th March 2013. It is recorded in a note made by his general practitioner dated 28th March 2013 that:

*[Patient] brought letter from assistant commissioner. Same scanned. Feels he has no option but to return to work. Has spoken with a colleague who is awaiting High Court date for the last 5 years as Garda will not agree that his sick leave is work related. Says they have still not admitted that it is work related. He was sent to consultant psychiatrist by garda ... dr Tobin on 25/2/2013. Due to see Dr Dennehy 14/4/2013. Under severe financial pressure had not been able to pay mortgage. Has to return to work for financial reasons. Doesn't feel able but feels he has no choice. Tearful during consult ... sleep broken currently. Plans to use annual leave so will only work nights for as long as possible so will avoid superintendent.*¹⁵⁵

An issue immediately arose as regards the medical certificate subsequently submitted by Sgt Barry stating that he was not to come into contact with Supt Comyns and advices were sought from the CMO. This will be discussed in more detail later in this report.

By report dated 9th April 2013, Dr Oghuvbu recommended that '[t]here are no compelling medical impairments to debar the member returning to work and policing duties'. However, he stated that '[c]ertain circumstances which are currently subject of Garda management processes are regarded as plausible stressors for the member at this time and this would impact on the member's sustained wellbeing and effectiveness. On this basis, facilitation with certain workplace accommodations has been recommended'. Accordingly, Dr Oghuvbu recommended that Sgt Barry was medically fit for normal policing duties if facilitated with temporary workplace accommodations.¹⁵⁶

¹⁵¹ Tribunal Documents, pp. 1534-1535

¹⁵² Tribunal Documents, p. 1541

¹⁵³ Tribunal Documents, p. 3999

¹⁵⁴ Tribunal Documents, p. 4000

¹⁵⁵ Tribunal Documents, p. 4773

¹⁵⁶ Tribunal Documents, p. 1541

Sgt Barry continued with efforts to have his illness reclassified. He wrote to the CMO on 10th April 2016 and requested that his sick leave from August 2012 to March 2013 be classified as work related and that his pay and allowances for this period be restored as it was affecting his gratuity pension.¹⁵⁷ Dr Oghuvbu replied to Sgt Barry stating that the service was not aware of or notified of the initiation or conclusion of investigations.¹⁵⁸ In a letter to Ms Monica Carr, Head of the HR Directorate, dated 15th April 2016, Dr Oghuvbu advised that *'[t]he issue of re-classification of absence would be a matter for HRPD in conjunction with local management following consideration of all relevant information'*.¹⁵⁹

In June 2016 Sgt Barry contacted the Sickness Absence Section at the HR Directorate in respect of the issue, and on 22nd August 2016 Ms Carr replied to Mr Barry outlining that his complaints under the bullying and harassment policy were not upheld and further that the Director of Public Prosecutions had directed no prosecution in the matter. She stated that *'[a]ccordingly please be advised that your absence on sick leave from 06 August 2012 to 29 March 2013 while you served as a member of An Garda Síochána remains appropriately recorded as ordinary illness'*.¹⁶⁰

In November 2018 Mr Barry again emailed the HR Directorate and requested a reclassification of his sickness absence.¹⁶¹ Ms Carr determined that *'[to] be fair and reasonable'*, this most recent application for a Code 11.37 certificate should be forwarded to the chief superintendent of the Cork North Division.¹⁶² By report dated 4th April 2019 Chief Superintendent Thomas Myers decided that a Code 11.37 was not applicable in this case.¹⁶³

On 10th May 2019, Ms Niamh Concannon at the Garda Sick Leave Section reported to Ms Carr stating that:

In the case of Former Sgt Barry, it would appear that his work related stress emanated as a result of issues in the workplace including allegations of bullying and unfair treatment as opposed to a particular incident which occurred in the course of his duties. The investigation under the Harassment, Sexual Harassment and Bullying policy didn't uphold Former Sgt Barry's complaint.

Recommendation

*Having considered the legal advice in relation to the definition of 'injury on duty', the views and recommendations of the divisional officer, both at the time of the absence and the review undertaken by the current divisional officer dated 04 April 2019. Having regard to the fact the members formal complaint under the provisions of the organisation's bullying & harassment policy was not upheld and having regard to the advices of the Chief Medical Officer, I recommend that this absence should remain treated as an ordinary illness and that no Certificate in accordance with Code 11.37 should be issued in these circumstances.*¹⁶⁴

¹⁵⁷ Tribunal Documents, p. 1692

¹⁵⁸ Tribunal Documents, p. 1690

¹⁵⁹ Tribunal Documents, p. 1689

¹⁶⁰ Tribunal Documents, pp. 525-526

¹⁶¹ Tribunal Documents, p. 1698

¹⁶² Tribunal Documents, p. 3945 and p. 1706

¹⁶³ Tribunal Documents, p. 1705

¹⁶⁴ Tribunal Documents, pp. 3948-3950

Ms Carr noted her agreement with this recommendation on 7th June 2019.¹⁶⁵ Mr Barry appealed this decision to the Acting Executive Director, Human Resources and People Development (HRPD), Mr Alan Mulligan on 7th June 2019. This appeal was refused on 22nd July 2019.¹⁶⁶

Complaint made by Mr Barry

In his statement to the tribunal, Mr Barry said that:

*In August 2012, I went on sick leave as a result of a workplace incident caused by Superintendent Comyns ... As my illness is classified by the Divisional Officer, Fermoy, I believe I was deliberately targeted by Chief Superintendent Dillane as he classified my illness as ordinary illness and not work-related illness. My doctor and my psychiatrist had notes stating that my illness was work-related as did the Department of Social Protection ... and yet to this day, they still refuse to classify my illness as work-related. I believe they did this to punish me financially as I was eight months without allowances and two months on half-pay.*¹⁶⁷

In his interview with tribunal investigators, Mr Barry said that he was forced back to work for financial reasons.¹⁶⁸

In his evidence to the tribunal, Mr Barry asserted that he did not consider it necessary for the bullying and harassment investigation to be completed before the issue of injury on duty could be addressed. He told the tribunal that he had provided reports from his doctor and his psychiatrist, both of which stated that his illness was work related. He said that he assumed that the CMO requested those reports to conclude whether or not his illness was work related.¹⁶⁹

In respect of his meeting with Dr Oghuvbu on 25th January 2013, Mr Barry gave evidence to the tribunal that the doctor *'seemed frustrated that he couldn't decide, his hands were tied basically, that he would have to let the internal investigation continue'*.¹⁷⁰ Mr Barry said that he was told by the doctor that he could not sign off on the classification of his absence until HRM had concluded their investigation.¹⁷¹

During cross-examination by counsel for An Garda Síochána, Mr Barry accepted that Dr Oghuvbu did explain to him that the system required an investigation, the fruits of which were to be made known to him, and that he could not act unilaterally.¹⁷²

Mr Barry told the tribunal that he returned to work on 29th March 2013 *'for financial reasons'* as he was restored to full pay and allowances.¹⁷³ He told the tribunal that had his absence been classified as an injury on duty at an earlier stage he would not have been forced into returning to work:

¹⁶⁵ Tribunal Documents, p. 3950

¹⁶⁶ Tribunal Documents, p. 1721

¹⁶⁷ Tribunal Documents, pp. 45-46

¹⁶⁸ Tribunal Documents, p. 46

¹⁶⁹ Tribunal Transcripts, Day 176, pp. 10-11

¹⁷⁰ Tribunal Transcripts, Day 176, p. 15

¹⁷¹ Tribunal Transcripts, Day 176, p. 13

¹⁷² Tribunal Transcripts, Day 178, pp. 93-94

¹⁷³ Tribunal Transcripts, Day 176, pp. 54-55

... There was also the option of classifying my sick leave as what it should be, in which case I would never have been back at work.

Q. Classifying your sick leave as ...?

A. As what it should have been classified as, work-related, in which event I would never have returned to work.

Q. In the sense that if it had been certified as injury on duty at some earlier stage, you simply just wouldn't have gone back to work?

A. No.

Q. You would have considered yourself based upon such certification as being permanently injured?

A. I would have been able to support my family without having to return to work. I wouldn't have been forced into returning.¹⁷⁴

When cross-examined by counsel for Supt Comyns, Mr Barry accepted that Supt Comyns had no role in determining this issue.¹⁷⁵

Responding Statements and Evidence on the Issue

Retired Chief Superintendent Gerard Dillane

In his statement to the tribunal, C/Supt Dillane referred to his meeting with Sgt Barry on 13th October 2012 and said that Sgt Barry asked him for an injury on duty certificate in accordance with Code 11.37. He said that he told Sgt Barry that he could not issue the certificate as he had no knowledge of the alleged injury Sgt Barry was suffering from and in such circumstances it was only the CMO who could sign off on such a certificate.¹⁷⁶ When asked about this in his evidence to the tribunal, C/Supt Dillane said that:

I indicated the first day I met him I had no knowledge of his issue with Superintendent Comyns. He said he did not want to discuss his issue with me. And therefore I was not in a position to do it.¹⁷⁷

In his statement to the tribunal, C/Supt Dillane said that:

... Paul Barry claims that I deliberately targeted him as I classified his absence as ordinary illness and not as work-related illness as he had requested. The classification of absence from work is covered in the Garda Code, section 11.37 ... At my first meetings with Paul Barry in 2012 he requested me to issue the Code 11.37 certificate for his absence. He was not willing to tell me about the allegation he was making to substantiate his absence from work, yet he expected me to issue a certificate under Garda Code 11.37 in the blind. I refuse[d] to issue the certificate to him and explained the reason why. At my first case conference in relation to Paul Barry at Garda Headquarters on 22nd January 2013 the matter of his application for

¹⁷⁴ Tribunal Transcripts, Day 176, pp. 123-124

¹⁷⁵ Tribunal Transcripts, Day 180, p. 81

¹⁷⁶ Tribunal Documents, p. 335

¹⁷⁷ Tribunal Transcripts, Day 184, p. 109

*a Code 11.37 was discussed. Doctor Oghuvbu said that this certificate could not be decided until the outcome of the investigation was known. It was HRM and not I that on 22nd August 2016 ... categorised that Paul Barry's absence was to be certified as ordinary illness and not injury on duty.*¹⁷⁸

Dr Oghenov Oghuvbu, Chief Medical Officer

In his statement to the tribunal, Dr Oghuvbu said that his primary role was to offer medical advice on Sgt Barry's fitness for work and to make a recommendation in that regard to the management of An Garda Síochána.¹⁷⁹ In relation to the classification of Sgt Barry's absence, he said in his statement that:

Sergeant Barry gives his account of the consultation for review with me on 25 January 2013 in a referenced email to Assistant Commissioner, HRM, dated 4 February 2013 ... He describes me as "upset because both Dr Kiely and Dr Dennehy expressed the opinion that my medical condition was work related". While I cannot recollect the specific details of the consultation other than what is recorded in my consultation notes, I would have reservations about the member's assertion that the opinion of his doctors about the basis of his absence caused me to be "upset"; my notes do not record any communication of concern in the manner described ...

It is my position and practice that I am unable to objectively advise on work-related stress as being present or otherwise and a cause of a defined medical condition and ill-health without first having the circumstances of an employee's assertions examined or investigated.

*This process would require the presentation of a report by relevant Garda management consequent to an investigation or examination of the facts to validate the circumstances or otherwise of the presence of factors that can be objectively deemed as workplace or work-related stressors. It would appear that my attempts to explain this position and approach may have been construed as me being 'upset' and not being able to express an opinion until HRM give it (an opinion) to me.*¹⁸⁰

In his evidence to the tribunal, Dr Oghuvbu said that the case conference on 22nd January 2013 took place as Sgt Barry had told him of 'his own perception of the difficulties with his line management' and that the objective of the case conference was to explore the issues and to alert local management to initiate the processes to explore the issues and address them.¹⁸¹ Dr Oghuvbu referred to the notes of the case conference and said that the issues recorded as affecting the member were brought to the meeting by management.¹⁸² He was asked by counsel for the tribunal whether he would have had prior knowledge of the injury on duty issue and he said that he would not until it came up from management.¹⁸³ He said that:

... if management was seeking clarification from me in relation to whether the absence, the medical circumstances could be classed as work related, the causation, causality is really what that is about, and the circumstances would be such that if those circumstances were not there,

¹⁷⁸ Tribunal Documents, pp. 361-362

¹⁷⁹ Tribunal Documents, p. 1480

¹⁸⁰ Tribunal Documents, pp. 1482-1483

¹⁸¹ Tribunal Transcripts, Day 189, pp. 49-50

¹⁸² Tribunal Documents, p. 1515

¹⁸³ Tribunal Transcripts, Day 189, pp. 51-52

*he would not have developed the medical condition that resulted in his absence, I would not be able to offer any opinion on that until they had completed their investigation.*¹⁸⁴

He was asked whether he considered that there was an active investigation into the work-related stress under HQ Directive 139/10:

*I was told that an investigation was ongoing and that was all I needed to know, because if they were going to be seeking clarification on injury on duty, it was important that that investigation was conducted and a finding made available to me to assist me in determination as to whether the absence could be classified from a medical point of view as injury on duty.*¹⁸⁵

In respect of the consultation with Sgt Barry on 25th January 2013 and Sgt Barry's reference to him being upset, he told the tribunal that:

... I think I was just trying to put a clarification on my approach. When the issue of work related attributions or assertions had been made, I take on board the assertion that had been made by the individual but that doesn't [translate] into a definitive position because I did not have sufficient information as to what may or may not be going on. That is why I tend to use language that says the member asserts, or the individual is asserting, rather than this is. What I think might have happened and, like I said, I can't say beyond what I have written in my notes, was that his doctors were taking a definitive stance in their communication.

...

*He took that view that that was the definitive position and I was saying that I couldn't take that position until the investigation by management had been completed, so that I got a fuller picture of what exactly ... was happening before I made a definitive decision.*¹⁸⁶

In respect of Sgt Barry's letter to the CMO dated 10th April 2016 requesting that his sickness absence be reclassified, Dr Oghuvbu told the tribunal that his last communication in relation to Sgt Barry was in November 2015 and he was not aware of the issues raised in this correspondence.¹⁸⁷ When writing to Ms Carr in relation to this correspondence, Dr Oghuvbu told the tribunal that:

It's normal practice that the determination as to whether causality is going to be ascribed to an absence lies usually with the chief superintendent, local management and HR. If they need clarification from the office of the CMO, they write formally to the office of the CMO seeking that opinion.

*... And so, basically I was leaving it open to them to make the decision if they wanted to seek that clarification. Because they hadn't sought the clarification, so I wasn't going to be offering any advice in that regard.*¹⁸⁸

¹⁸⁴ Tribunal Transcripts, Day 189, p. 53

¹⁸⁵ Tribunal Transcripts, Day 189, p. 54

¹⁸⁶ Tribunal Transcripts, Day 189, p. 58

¹⁸⁷ Tribunal Transcripts, Day 189, p. 109

¹⁸⁸ Tribunal Transcripts, Day 189, p. 112

Ms Monica Carr

In her statement to the tribunal, Ms Monica Carr, Head of the HR Directorate at the relevant time, outlined the correspondence and reports concerning the classification of Sgt Barry's absence. She stated that:

It should be noted that it is standard practice where a member lodges a complaint under the Dignity at Work Policy, the result of the investigation under that policy would be considered in the determination of the classification of the sick absence.¹⁸⁹

Legal Submissions

Mr Paul Barry submitted as follows:¹⁹⁰

- that the evidence established that Supt Comyns knew the full details of Sgt Barry's first protected disclosure from 4th January 2013.
- that the evidence established that C/Supt Dillane was aware in January 2013 that Sgt Barry had made multiple bullying and harassment complaints against Supt Comyns and shortly thereafter he became aware of Sgt Barry's criminal allegations. In January or February 2013 he became aware that a complaint was submitted to HRM and that Sgt Barry had given a statement.
- that C/Supt Dillane said he was not aware of the details. This was not supported by the evidence of reports furnished to C/Supt Dillane and his attendance at meetings in 2017 regarding Mr Barry's personal injuries proceedings. It was not plausible to suggest that C/Supt Dillane was not given the details contained in the civil proceedings, which set out the allegations Sgt Barry made against Supt Comyns.
- that it was also not credible to suggest that C/Supt Dillane would not make enquiries or discuss matters with Supt Comyns, which Supt Comyns in evidence said they did discuss. However, C/Supt Dillane said he has no recollection of such discussions.
- that, even if it was accepted that C/Supt Dillane did not know the precise nature of the allegations made by Sgt Barry, the evidence suggested that he knew of the substance, and this was sufficient to ground a finding of targeting or discrediting against C/Supt Dillane.
- that shortly after Supt Comyns and C/Supt Dillane became aware of the protected disclosure made by Sgt Barry, they took actions to target or discredit Sgt Barry in numerous incidents of unfair, unreasonable and unusual treatment and that, in the absence of a tenable justification, it was suggested that this behaviour was connected to the protected disclosures.
- that from 6th August 2012 to 29th March 2013 Sgt Barry was on sick leave, which was recorded on SAMS as absent due to illness, flu/viral. C/Supt Dillane as divisional officer was in a position to certify an injury on duty but failed to do so. His initial position was that he could not certify an injury on duty until a full investigation was carried out. He never revisited the issue, even after the investigations had concluded. Dr

¹⁸⁹ Tribunal Documents, p. 1577

¹⁹⁰ The tribunal has considered all of Mr Paul Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 90, pp. 6-36

Oghuvbu gave evidence that the result of the investigation was never communicated to him and that he was not required to produce a further opinion on whether Sgt Barry's absence was due to an injury on duty.

- that in failing to give proper consideration to Sgt Barry's absence being due to injury on duty, C/Supt Dillane targeted Sgt Barry by treating him unfairly by keeping him in a position where he did not receive full pay. The inference can be drawn that this treatment arose from Sgt Barry making a protected disclosure.

An Garda Síochána submitted as follows:¹⁹¹

- that Sgt Barry reported sick on 2nd August 2012, before his first protected disclosure on 2nd October 2012 so the classification on SAMS could not constitute targeting or discrediting in response to the disclosure. Whilst it was accepted that the classification continued after the first protected disclosure, the evidence illustrated that the allegation was entirely without foundation.
- that ordinary illness was the default classification on SAMS and the occupational injury/illness arising from duty classification could not arise until such time as it was reclassified under Code 11.37. An investigation at local level was required before the classification could change and therefore it was not within the power of C/Supt Dillane to change the classification until the outcome of the investigation was known.
- that once C/Supt Dillane was aware that Sgt Barry's absence arose from work-related stress, an investigation was set up in accordance with the Garda Síochána Code. Insp O'Sullivan was appointed to investigate. Sgt Barry refused to talk to Insp O'Sullivan and told his doctor that this was on legal advice. Sgt Barry also refused to discuss the matter with C/Supt Dillane at a meeting on 13th September 2012.
- that regarding the limited extent to which Sgt Barry's complaint might be admissible due to a subsequent failure to reclassify his absence following his protected disclosure, Sgt Barry's superiors followed the correct procedure in attempting to investigate, but this was frustrated by Sgt Barry's refusal to cooperate.

Superintendent Michael Comyns submitted as follows:¹⁹²

- that this was not an issue that related to Supt Comyns, as he had no role in the classification of illness. This was clear from the evidence of C/Supt Dillane and the statement of Ms Carr.
- That HQ Directive 139/10 explicitly confirmed that it was the divisional officer who had the primary role in classifying the illness and Sgt Barry was aware that this was not a matter for Supt Comyns.
- that there was no evidence of Supt Comyns targeting or discrediting or being a party to any targeting or discrediting of Sgt Barry by An Garda Síochána and Mr Barry had accepted this. The tribunal must make a finding accordingly in respect of Supt Comyns.

¹⁹¹ The tribunal has considered all of An Garda Síochána's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

¹⁹² The tribunal has considered all of Superintendent Michael Comyns's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

Conclusion

At the relevant time in 2012/2013 a member's entitlement to paid sick leave was governed by HQ Directive 139/10 (issued on 1st December 2012).¹⁹³ This provided for the payment to a member of the full rate of pay for the first six months of a certified period of illness. Thereafter, any certified sick leave was paid at half pay for a further period of six months. This regime was altered by the Public Service Management (Sick Leave) Regulations 2014 which came into effect on 31st March 2014.¹⁹⁴

A garda on sick leave is paid his or her full rate, which is less than the member would receive if working because certain allowances can accrue to the working garda. That level of pay continues until the member has been off work for a total of 92 days in any given year, after which the payment reduces to half pay for up to 91 days, subject to a maximum of 183 days' sick leave in a rolling four-year period.¹⁹⁵

These rules do not apply in the case of an injury on duty that is certified by the chief superintendent under Code 11.37. In such a case, the member is paid his or her full rate plus all allowances for as long as the absence continues.¹⁹⁶

Under the Directive the CMO advises the Commissioner on a member's medical fitness for policing duties, taking into account all medical information available at the time.

The Directive provides that where there is any doubt that an injury on duty occurred the divisional officer is to refer the matter to the Assistant Commissioner, HRM who will consult the CMO, who will give appropriate advice. It also specifies that a decision regarding injury on duty will be based on:

- *A complete investigation file into the incident*
- *Management views and recommendations*
- *The assessment and opinion of the CMO*

Where there is a doubt as to ordinary illness or injury on duty the illness is treated as ordinary illness unless and until injury on duty is decided.

As mentioned in the previous chapter in the case of absence due to work-related stress, a thorough investigation is to be carried out immediately and the outcome reported to the Assistant Commissioner, HRM for the attention of the CMO. The system in An Garda Síochána provides for illness to be treated as ordinary illness unless it comes to be categorised as injury on duty. Neither C/Supt Dillane nor Supt Comyns made a decision to treat Sgt Barry's sick leave as being due to ordinary illness and not injury on duty.

The fact that Sgt Barry's illness was not classified as injury on duty was the result of processes at Assistant Commissioner, HRM level. Ms Carr in her statement described how the bullying and harassment investigation was taken into account but it is clear that the district officer and the divisional officer did not have any input in the categorisation of the illness.

¹⁹³ Tribunal Documents, pp. 3311- 3317

¹⁹⁴ Tribunal Documents, p. 3322

¹⁹⁵ Tribunal Documents, p. 3322

¹⁹⁶ Tribunal Documents, p. 3276 and p. 3302

Supt Comyns's submission is correct in saying that this was not an issue that related to him as he had no role in the classification of illness, that HQ Directive 139/10 provided that the divisional officer had the primary role and that there was no evidence of Supt Comyns's targeting or discrediting Sgt Barry in this respect *'and Mr Barry had accepted this'*.

C/Supt Dillane had passed this case to the Assistant Commissioner, HRM and did not have a further function.

Accordingly, neither officer can be faulted under this issue as it proceeded in accordance with the Garda Code.

CHAPTER 5

ISSUE 3.E: THE COMPLAINT MADE BY MR BARRY IN RELATION TO HIS RETURN TO WORK ON 29TH MARCH 2013

Issue 3.e of the Schedule of Issues

Did Supt Michael Comyns and/or C/Supt Gerard Dillane target or discredit Sgt Barry as he alleges because he had made a protected disclosure –

- (e) *by causing Inspector O’Sullivan to attend at Mitchelstown Garda Station in full uniform at approximately 9pm on a date between 29th March 2013 and 9th April 2013 and request Sgt Barry to provide a return to work certificate?*

Background

As has been seen earlier, Sergeant Paul Barry was on certified sick leave with full pay from the first week in August 2012.¹⁹⁷ At the beginning of February 2013 Sgt Barry was duly notified that his sick pay would be reduced to half pay from then on.¹⁹⁸ He had attended an appointment with Dr Oghenovo Oghuvbu on 11th March 2013, following which he was immediately assessed by Dr John Tobin, Consultant Psychiatrist, an independent medical assessor, on the same date.¹⁹⁹ Dr Tobin’s conclusion, as reported to Dr Oghuvbu, was that from a mental health point of view it appeared that Sgt Barry had developed a mixed anxiety/depressive reaction secondary to events that occurred at work.²⁰⁰ These events were to be the subject of a formal investigation.²⁰¹ In the meantime, and without prejudice to the findings of the inquiry, he recommended that Sgt Barry should return to work when a mutually agreed safe supportive working environment was available for him.²⁰²

Subsequent to this, Sgt Barry had reluctantly consented to an extension of the time within which Chief Superintendent Catherine Kehoe could continue with her investigation of his bullying and harassment complaint and he subsequently corresponded with her on 20th March 2013 in connection with the pace of her investigations.²⁰³ It also appears that by late March Sgt Barry felt himself to be under considerable stress, including severe financial pressure, and in order to alleviate that he was prepared to return to work.²⁰⁴

Complaint made by Mr Barry

Mr Barry supplied the tribunal with a letter that he sent to the Garda Commissioner, dated 28th November 2018, in which he said at paragraph 7 that:

¹⁹⁷ Tribunal Documents, p. 4004

¹⁹⁸ Tribunal Documents, p. 3787

¹⁹⁹ Tribunal Documents, p. 1534

²⁰⁰ Tribunal Documents, p. 1535

²⁰¹ Tribunal Documents, p. 1535

²⁰² Tribunal Documents, p. 1541

²⁰³ Tribunal Documents, p. 1207

²⁰⁴ Tribunal Transcripts, Day 176, pp. 54-55

When I returned to work on Good Friday 2013 against my doctor's advice I handed in a medical certificate. Chief Superintendent Dillane sent Inspector O'Sullivan to interrogate my Doctor and ask whether it was she or I who had written the certificate.²⁰⁵

In his complaint to the tribunal under the heading 'Return to Work 29/03/2013, Inspections and non-compliance with Chief Medical Officers Recommendations', he stated that:

I returned to work on the 29/03/2013 contrary to the advice of my Doctor, Margaret Kiely. I did not want to return but I had no option as I was on half pay. Inspector O'Sullivan told me I would have to submit a Doctors certificate if I was to have my pay restored. I informed him of the fact that my Doctor would not issue a cert before I returned as she did not think I should return. I made an appointment with my Doctor and I explained to her that I required a certificate if I was to have my pay restored. She said she would only issue a cert if certain conditions were adhered to. I submitted my certificate and it was received at Fermoy Garda Station by Inspector O'Sullivan on the 04/04/2013. On Friday the 05/04/2013 Inspector O'Sullivan called to my Doctor at her practice in Glanmire. My Doctor stated that she was asked by Inspector O'Sullivan whether it was she or me who wrote the certificate. I was very upset by this visit to my Doctor and felt intimidated by it.²⁰⁶

In Mr Barry's interview with tribunal investigators, he stated that:

I also wish to add that Inspector O'Sullivan appeared in full uniform at Mitchelstown Garda Station on a date between the 29th of March 2013 and 9th of April 2013. I am unable to recollect the exact date. On the night that he inspected me he requested that I provide a return-to-work certificate, a sick cert. I found it unusual that he would appear at 9pm at night in full uniform as he works day shifts. I believe he was directed to do so by either Superintendent Comyns or Chief Superintendent Dillane.²⁰⁷

Sergeant Paul Barry's Visit to Dr Margaret Anne Kiely on 28th March 2013

Sgt Barry went to see Dr Margaret Anne Kiely on 28th March 2013. In his evidence to the tribunal he stated that Dr Kiely had found him unfit to return to work and therefore did not provide him with a return to work medical certificate:

Q. You had been to your doctor on the 28th and she hadn't given you a certificate on the 28th?

A. No, she said I wasn't fit to return.

...

Q. You saw your doctor. Did she refuse you a certificate on the 28th?

A. Yes. She didn't want me to return.²⁰⁸

²⁰⁵ Tribunal Documents, p. 67

²⁰⁶ Tribunal Documents, p. 194

²⁰⁷ Tribunal Documents, pp. 38-39

²⁰⁸ Tribunal Transcripts, Day 176 pp. 54-55

Dr Kiely recorded in her notes of this consultation that:

[Patient] brought letter from assistant commissioner. Same scanned. Feels he has no option but to return to work. Has spoken with a colleague who is awaiting high court date for last 5 years as Garda will not agree that his sick leave is work related. Says they have still not [admitted] that it is work related. He was sent to consultant psychiatrist by garda ... dr. Tobin on 25/02/2013. Due to see Dr Dennehy 14/4/2013. Under severe financial pressure. had not been able to pay mortgage. Has to return to work for financial reasons. Doesn't feel able but feels he has no choice. Tearful during consult ... sleep broken currently. plans to use annual leave so will only work nights for as long as possible so will avoid superintendent.

*PLAN: rv (review) any deterioration in mood any thoughts self harm.*²⁰⁹

The note does not record that Dr Kiely was asked or refused to give a certificate to enable Sgt Barry to return to work. In her evidence to the tribunal, Dr Kiely said that from the notes that she recorded, and her recollection, Sgt Barry did not actually feel able to return to the same position he had been in, but he felt he did not have any choice.²¹⁰ He described to her how he was under severe financial pressure and had not been able to pay his mortgage, and said that the only reason he was returning to work was for financial reasons. He was quite tearful during the consultation, as she recorded, and his sleep had become disturbed again. He told her that he intended to use annual leave to only work nights for as long as possible to avoid coming in contact with the superintendent.²¹¹

In re-examination, Dr Kiely confirmed that Sgt Barry was arguing his case for going back to work, and she was resisting that:

Q. ... if we look at your entry for 28th March of 2013. It's apparent from the note there that during the course of that consultation that you had with Mr. Barry, that Mr. Barry appeared to you to be emotionally upset, is that right?

A. Yes, that's correct.

Q. And it appears from the note that he outlined severe financial pressure and that he hadn't been able to pay a debt that he had, isn't that right?

A. Yes, that's correct.

Q. I am getting the impression, maybe I am wrong in relation to this, that he was arguing his case for going back to work, were you resisting that in some way?

...

A. Yes, I was. I didn't feel it was appropriate for him to go back to work to the same conditions, as he had presented to me very unwell, so unwell in the past that I had referred him to consultant psychiatry, Dr. Dennehy, for urgent expert input, back in, I believe it was 2012. And Mr. Barry had improved on medication and also from not being in the situation. So, I didn't feel it was appropriate for him to go back into the exact same situation again. So yes, I wasn't in agreement with him going back to the same situation and the same position again.²¹²

²⁰⁹ Tribunal Documents, p. 4773

²¹⁰ Tribunal Transcripts, Day 188, pp. 41-43

²¹¹ Tribunal Transcripts, Day 188, p. 42

²¹² Tribunal Transcripts, Day 188, pp. 73-74

Dr Kiely further explained how Sgt Barry did not to her recollection seek a return to work medical certificate during the consultation on the 28th March 2013:

- Q. *I mean, we're all familiar with a doctor giving a certificate that somebody is not fit to attend work, it is perhaps more unusual that a doctor is required to give a certificate saying that somebody is fit to attend to work. But that issue does not appear to have arisen during the course of that consultation that you had, is that right?*
- A. *Yeah, I can't remember if he asked me for a note, but if he did I would have told him that I wasn't happy to provide one for him.*²¹³

In Dr Kiely's note of a consultation with Sgt Barry on 4th April 2013, Dr Kiely recorded, *inter alia*, that:

*Was told by inspector today that he cannot return without a letter from me stating he is fit for work. Mr Barry told inspector that I had said I could not provide same as in my opinion he was not fit to return to the same position. Inspector said to put conditions on letter. discussed with [patient] and happy with wording.*²¹⁴

Sergeant Paul Barry's Return to Work on 29th March 2013

Sgt Barry returned to work on 29th March 2013. He told the tribunal that he thought he met Insp O'Sullivan on 30th March and he described in his evidence his exchange with Insp O'Sullivan on the issue of the medical certificate:

- Q. *... In your statement you describe it as sort of an inspection and a demand on his part that you produce a medical certificate. I mean, from his point of view he must have known or suspected that you hadn't in fact been certified as fit for coming back to work?*
- A. *No. When I met with him he asked me had I a certificate.*
- Q. *Yes.*
- A. *To say I was fit to return and I told him I hadn't, that my doctor wouldn't issue it, she didn't want to give me a cert.*
- Q. *Yes.*
- A. *And he said why, and I told him that she didn't want me coming in contact with the cause of my stress.*
- Q. *Yes.*
- A. *He said, you're going to have to have a certificate if you want to go back on full pay, because you will stay on [half pay] otherwise. And I said, she won't give it to me unless what she wants is in it. And he said, whatever conditions she wants, she can put in her cert.*²¹⁵

²¹³ Tribunal Transcripts, Day 188, pp. 74-75

²¹⁴ Tribunal Documents, p. 4773

²¹⁵ Tribunal Transcripts, Day 176, pp. 57-58

Mr Barry felt that because Insp O’Sullivan arrived unannounced, that it was an inspection because of the timing of his visit and the fact that he could have phoned him.²¹⁶ He agreed that Insp O’Sullivan had not arranged to meet him and he did not think he was there by chance. He thought that he was there to tell him that he needed a certificate before he could resume duty.²¹⁷

In his evidence to the tribunal, Mr Barry accepted that he should have had a certificate on returning to duty, and that there was nothing improper in Insp O’Sullivan requiring him to produce one.²¹⁸ He also conceded that he could not fault Insp O’Sullivan for reporting the matter to the superintendent, as this was his job. Mr Barry was clear in his recollection that he told Insp O’Sullivan that his doctor had refused to give him a certificate.²¹⁹

During cross-examination by counsel for Insp O’Sullivan, Mr Barry agreed that he knew he needed a medical certificate to go back to work, that he did not have one and that Insp O’Sullivan advised him about the need for a medical certificate.²²⁰ His complaint about the matter was that he considered it to be an inspection and not the fact that he was asked or told that he needed a medical certificate.²²¹ Mr Barry agreed that in the civil proceedings that he brought in the High Court he did not make any complaint in relation to this visit by Insp O’Sullivan and did not even refer to it in the details of the claim contained in replies to particulars. Mr Barry explained that he did not make a complaint in relation to it at the time, and it was only when he was asked how he was targeted in relation to this Inquiry that he related it.²²²

When cross-examined by counsel for Superintendent Michael Comyns, Mr Barry accepted that Supt Comyns had no role in directing Insp O’Sullivan in relation to the visit of 29th March 2013.²²³ He also confirmed that it was not unreasonable for the inspector to have reported the conversation to the superintendent.²²⁴

In his evidence to the tribunal, Supt Comyns said that he did not tell, direct or ask Insp O’Sullivan to inspect Sgt Barry and rejected the suggestion that Insp O’Sullivan was told to go there in full uniform and conduct an inspection in some way that was designed to intimidate Sgt Barry.²²⁵

Insp O’Sullivan gave evidence that he met Sgt Barry on 29th March 2013, which was a Good Friday, and that he bumped into him in Mitchelstown Garda Station.²²⁶ He said that he had called into the station on his way home from administering adult cautions in Mallow, that he had not come to ask him for a certificate, and that he did not know that Sgt Barry would be in work.²²⁷ He knew that Sgt Barry would need the certificate and when he met him he told him that he should produce one. He said that he did not recollect any discussion about full pay or half pay and that the visit did not constitute an inspection. He explained that he could not have phoned Sgt Barry in advance because he did not know that Sgt Barry was back on duty.²²⁸

²¹⁶ Tribunal Transcripts, Day 176, p. 58

²¹⁷ Tribunal Transcripts, Day 176, pp. 58-59

²¹⁸ Tribunal Transcripts, Day 176, p. 59

²¹⁹ Tribunal Transcripts, Day 176, p. 59

²²⁰ Tribunal Transcripts, Day 181, p. 43

²²¹ Tribunal Transcripts, Day 181, pp. 43-44

²²² Tribunal Transcripts, Day 181, p. 48

²²³ Tribunal Transcripts, Day 180, p. 107

²²⁴ Tribunal Transcripts, Day 180, p. 107

²²⁵ Tribunal Transcripts, Day 182, pp. 35-36

²²⁶ Tribunal Transcripts, Day 186, pp. 159-161

²²⁷ Tribunal Transcripts, Day 186, pp. 159-161

²²⁸ Tribunal Transcripts, Day 186, p. 163

In cross-examination by counsel for Mr Barry, Insp O’Sullivan confirmed that it was on the evening of 29th March 2013 that he met Sgt Barry and that he was in uniform.²²⁹ He denied a suggestion that he knew *‘full well’* that Sgt Barry was back at work. He did not discuss the issue of half pay with him, nor did he tell Sgt Barry to get the doctor to put whatever conditions she thought proper on the certificate.²³⁰

Insp O’Sullivan reported the matter to Supt Comyns and when no certificate had come in by 3rd April 2013, he phoned Sgt Barry and advised him that he was required to submit a certificate certifying his return to work.²³¹ On 4th April, Insp O’Sullivan collected his post from his in tray, which included a certificate produced by Sgt Barry from Dr Kiely, which in its body stated:

*Mr Paul Barry is fit to return to work under certain circumstances. Mr Barry should not work or attend at Fermoy Garda station and he should not come into contact with Superintendent Michael Comyns.*²³²

This certificate was brought by Insp O’Sullivan to Chief Superintendent Gerard Dillane at approximately 16:00 hrs on 4th April 2013. What occurred thereafter is the subject of the next chapter in this report.

C/Supt Dillane gave evidence that Supt Comyns rang him on Saturday 30th March 2013 and informed him that Sgt Barry had resumed work the previous night. He recalled that he was concerned because Sgt Barry was still certified as unfit for work by the Chief Medical Officer (CMO). He then rang Assistant Commissioner Fintan Fanning and asked him if it was correct for Sgt Barry to have resumed duty while he was still certified unfit by the CMO. A/C Fanning advised him that it was in order and that the paperwork could be corrected on the following Tuesday, as it was the Easter weekend. C/Supt Dillane stated that he then rang Supt Comyns and conveyed this message to him.²³³

Dr Oghuvbu, in evidence, confirmed that it was not necessary for him as CMO to have certified Sgt Barry as fit for work, as it was permissible for a member’s general practitioner to certify whether somebody was fit to return to work.²³⁴

Legal Submissions

Mr Paul Barry submitted as follows:²³⁵

- that Sgt Barry returned to work on 29th March 2013 and Insp O’Sullivan turned up at 21:00 hrs and informed Sgt Barry that he would need a certificate to go back on full pay.
- that there was a lack of credibility to Insp O’Sullivan’s explanation that he happened to be coming home late and decided to stop into Mitchelstown Garda Station. When cross-examined he said the boss would always stop to call into Mitchelstown, but in direct examination he said he would not be in Mitchelstown that often and that he might stop in.

²²⁹ Tribunal Transcripts, Day 187, p. 70

²³⁰ Tribunal Transcripts, Day 187, pp. 70-76

²³¹ Tribunal Transcripts, Day 186, p. 164

²³² Tribunal Documents, p. 3881

²³³ Tribunal Transcripts, Day 184, pp. 15-16

²³⁴ Tribunal Transcripts, Day 189, p. 73

²³⁵ The tribunal has considered all of Mr Paul Barry’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

- that whilst this inconsistency exists, there was also Insp O’Sullivan’s evidence regarding the night of 9th April 2013, when he said that Mitchelstown Garda Station was not open at night, hence C/Supt Dillane and he waited in a car in the car park. C/Supt Dillane also stated that members would be parading in Fermoy Garda Station at 21:00 hrs so the station was empty. It was difficult then to see why Insp O’Sullivan would call in to say hello at that time.
- that given the lack of credible explanation by Insp O’Sullivan he must have called to meet with Sgt Barry, and Sgt Barry perceived this as an inspection.
- that this instance, where the inspector called without prior notice, amounted to targeting connected with Sgt Barry’s protected disclosure.
- that regarding Insp O’Sullivan’s denial that he was directed to go, it can be inferred that he was directed by either Supt Comyns or C/Supt Dillane given the discussions in the background surrounding the need for Sgt Barry to furnish a medical certificate.

Superintendent Michael Comyns submitted as follows:²³⁶

- that it was clear from the evidence of C/Supt Dillane and Insp O’Sullivan that this was not an issue that related to Supt Comyns and Supt Comyns had no role in this at all.

Inspector Anthony O’Sullivan submitted as follows:²³⁷

- that he was not directed to go to Mitchelstown Garda Station on 29th March 2013 to inspect Sgt Barry. He was not aware that Sgt Barry had returned to work that night and it was happenstance that Insp O’Sullivan called into Mitchelstown Garda Station that night after doing adult cautions in Mallow.
- that he was not in full uniform.
- that he bumped into Sgt Barry in Mitchelstown Garda Station and was delighted to see him back at work. It was reasonable and appropriate for Insp O’Sullivan, as Sgt Barry’s line manager, to request a medical certificate confirming his ability to return to work.

Conclusion

The extent of this encounter is that Insp O’Sullivan said that Sgt Barry needed a certificate from his doctor to say that he was fit for work. It is not in dispute that such a certificate was required. Therefore the conversation about a certificate cannot amount to targeting or discrediting.

Neither does it seem to be in any way decisive in respect of victimisation whether Insp O’Sullivan was wearing his uniform or was in full uniform.

The evidence of Insp O’Sullivan is that he did not know that Sgt Barry was back at work and there is no evidence to contradict that.

Neither was there any evidence as to any involvement of C/Supt Dillane or Supt Comyns in Insp O’Sullivan’s visit to the station.

²³⁶ The tribunal has considered all of Superintendent Michael Comyns’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

²³⁷ The tribunal has considered all of Inspector Anthony O’Sullivan’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 63-64

The tribunal is left therefore with the suggestion that the conversation as to the medical certificate constituted an inspection, though just how it amounted to such formal process was never clarified, apparently consisting of the fact that the inspector was in uniform.

Actions by Insp O'Sullivan on his own initiative would actually fall outside term of reference [p] because he is below the rank of superintendent.

On any view of this matter it is impossible to construe it as an act of targeting or discrediting.

CHAPTER 6

ISSUE 3.F: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE VISIT TO HIS GENERAL PRACTITIONER ON 5TH APRIL 2013

Issue 3.f of the Schedule of Issues

Did Supt Michael Comyns and/or C/Supt Gerard Dillane target or discredit Sgt Barry as he alleges ... because he had made a protected disclosure –

(f) *by causing Insp O'Sullivan to make inappropriate enquiries from Sgt Barry's General Practitioner, Dr Margaret Kiely, on 5th April 2013?*

Background

Sergeant Paul Barry reported non-effective for duty on 6th August 2012 and remained on sick leave until 29th March 2013.²³⁸ During this period Sgt Barry submitted sick certificates that were issued by his general practitioner, a number of which recorded that Sgt Barry was medically unfit for work due to 'work-related illness'.²³⁹

On 12th December 2012, Dr Margaret Anne Kiely, General Practitioner, wrote to Dr Oghenov Oghuvbu, Specialist Occupational Physician at the Garda Occupational Health Service, and, *inter alia*, stated:

*I feel [Sgt Barry's] current mental health illness has been triggered by work related events and he is suffering from a work related condition.*²⁴⁰

The opinion of the doctor was based on extensive in-depth consultations with Sgt Barry during which he discussed his concerns surrounding the investigation of a sexual assault offence and his perception that his superintendent had unlawfully interfered with the investigation. Dr Kiely was also aware that Sgt Barry had made a complaint of bullying and harassment to his authorities against the same superintendent.²⁴¹

Because Dr Kiely had concerns about Sgt Barry's mental health she referred him to Dr John Dennehy, Consultant Psychiatrist, for his expert opinion and treatment.²⁴² On 18th December 2012, Dr Dennehy also wrote to Dr Oghuvbu and stated, *inter alia*, the following:

*In my opinion [Sgt Barry] is experiencing a depressive adjustment disorder predominantly, and in my view this is clearly related to his work experiences.*²⁴³

Sgt Barry remained on sick leave for the following three months.²⁴⁴ He attended numerous consultations with Dr Kiely, culminating with a visit to her on 28th March 2013. Counsel for the tribunal asked Dr Kiely if her patient was happy to resume duty at that time:

²³⁸ Tribunal Documents, p. 3998

²³⁹ Tribunal Documents, pp. 3999-4002 and pp. 3762-3767

²⁴⁰ Tribunal Documents, p. 1517

²⁴¹ Tribunal Documents, pp. 4771-4774

²⁴² Tribunal Documents, p. 4772

²⁴³ Tribunal Documents, p. 3758

²⁴⁴ Tribunal Documents, p. 3998

Well, from the notes that I recorded and my recollection, was that he didn't actually feel able to return to the same position that he had been in but that he felt he didn't have any choice, he described to me how he was under severe financial pressure, he hadn't been able to pay his mortgage and that the only reason he was returning to work was for financial reasons, that he felt he had no choice. He was quite tearful during the consultation, as I recorded, and that his sleep had become broken again. And he told me that he intended to use annual leave to only work nights for as long as possible to avoid coming in contact with the superintendent. And I had asked him as a safety net in practice that if there was any deterioration in mood or any thoughts of self harm that he should represent to me immediately.

Q. Yes. So it would appear there, that there was a discussion in relation to concern that he had of having [to] interact with his superintendent, is that right?

A. Yes, that's correct. My medical opinion at the time was that I didn't feel he was fit to return to work to the same circumstances.

...

My concern was that it would re trigger the difficulties that he had had a few months previously, as you mentioned, when I was very concerned and had referred him to Dr. Dennehy, a consultant psychiatrist, because I was very concerned for his mental health.²⁴⁵

However, Sgt Barry was determined to return to work, primarily due to significant financial pressures he was then experiencing. He resumed duty at Mitchelstown Garda Station on the evening of 29th March 2013, when he encountered Inspector Anthony O'Sullivan.²⁴⁶ This meeting is dealt with in the preceding chapter of this report.

It is common case that Insp O'Sullivan advised Sgt Barry that he required a letter from his doctor certifying that he was fit to resume duties. Mr Barry said that he informed Insp O'Sullivan that his GP was refusing to issue him with a certificate and that the inspector suggested that the GP could include conditions in her certificate.²⁴⁷ This is denied by Insp O'Sullivan.²⁴⁸

On 4th April 2013, Sgt Barry phoned Dr Kiely and requested a certificate stating that he was fit to resume duty. Counsel for the tribunal asked him about the conversation and referred to a note made by Dr Kiely at the time:

Q. "Patient phoned. Planned to return for financial reasons. Was told by inspector today that he cannot return with[out] a letter [from] me stating he is fit to work. Mr. Barry told inspector that I said I could not provide same as in my opinion he was not fit to return to same position. Inspector said to put conditions on letter. Discussed with patient and happy with wording."

So, do you recollect that discussion then happening in the doctor's surgery?

A. I recollect discussing with the doctor because she didn't want me to go back to work, I told her I had to and I needed a cert to go back. And she said I couldn't have contact with the superintendent if I was to go back or else she wouldn't certify me.

²⁴⁵ Tribunal Transcripts, Day 188, pp. 41-42

²⁴⁶ Tribunal Transcripts, Day 176, p. 57

²⁴⁷ Tribunal Transcripts, Day 176, pp. 57-58

²⁴⁸ Tribunal Transcripts, Day 186, p. 162

Q. She saw it as a health issue, is that right?

A. Yes.²⁴⁹

Counsel for the tribunal asked Mr Barry the following about how the conditions came to be in the certificate and how they were framed:

Q. Can I just ask you about the extent of discussions you had with your doctor about what are referred to as the work related conditions. I mean, presumably all she knew about your position and your working position and your duties was what you had told her yourself?

A. That's correct.

Q. Would it be fair to say that effectively the conditions put down in the letter are what you told her you would require?

A. No, that would be incorrect ... Dr. Kiely made her own decision. She did not want me to return to work. She refused to issue me a cert on the 28th. I requested a cert off her to return to work, she refused, she didn't think I was fit to return ... [a]nd she said I couldn't return until certain conditions were part of the cert.²⁵⁰

Dr Kiely recalled her conversation with Sgt Barry on 4th April 2013 during her evidence to the tribunal:

So I will speak from my notes. So, Mr. Barry phoned me and, you know, I recorded that he had planned to return to work for financial reasons, he told me that he had been told by the inspector that day that he couldn't return without a letter from me stating that he was fit for work and Mr. Barry told me that he informed the inspector that I had said I couldn't provide that as in my opinion he wasn't fit to return to the same position. And what Mr. Barry told me was that the inspector said to put these conditions on a letter. So I discussed that with the patient and I formulated the letter while I was on the phone to him, because – now I don't recollect that, but the fact that I recorded “discussed with patient and happy with [wording]” means that I – because that would be my practice, if somebody was looking for something particular, I would do it while they were with me and then read it to ensure that they were happy with the content.²⁵¹

The Medical Certificate

Dr Kiely issued a certificate to Sgt Barry on 4th April 2013 that stated the following:

Mr Paul Barry is fit to return to work under certain circumstances. Mr Barry should not work or attend at Fermoy Garda station and he should not come into contact with Superintendent Michael Comyns.²⁵²

This certificate was typed and dated 4th April 2013. However, the date was crossed out and '28th March' had been written in pen below it. Dr Kiely confirmed in her evidence that this amendment was not in her handwriting and her normal practice would be to initial any amendments she might make to a document.²⁵³ It should be noted that the certificate does not state the date from which Sgt Barry was fit to attend work, though this might be presumed from the date of the certificate itself.

²⁴⁹ Tribunal Transcripts, Day 176, pp. 60-61

²⁵⁰ Tribunal Transcripts, Day 176, pp. 66-67

²⁵¹ Tribunal Transcripts, Day 188, p. 43

²⁵² Tribunal Documents, p. 3938

²⁵³ Tribunal Transcripts, Day 188, p. 44

Counsel for the tribunal asked Dr Kiely if she knew that Superintendent Michael Comyns was stationed in Fermoy. She stated that:

I can't recollect, but that would have been why I was saying he shouldn't go to Fermoy Garda Station, was to avoid coming into contact with Superintendent Michael Comyns there.²⁵⁴

Dr Kiely was asked about the conditions in her certificate by counsel for Supt Comyns:

Q. And insofar as you were placing these conditions, that was on the basis that the primary – would it be fair to say that the primary complaint or reaction, reactor perhaps, in respect of Sergeant Barry's condition appeared to be his interactions with Superintendent Comyns?

A. Yes.

Q. And as such, I think you will agree, that from the point of view of his clinician this appeared to be a way of limiting, shall we say, the risk factors?

A. Yes.

Q. But in relation to that limitation, you weren't made aware by Sergeant Barry as to practically what that meant on the ground –

A. No.

...

And I suppose, I wouldn't be an occupational – I'm not an occupational health physician, so that would be more their area, you know, that they – I obviously just see it from the patient's point of view, whereas occupational health physicians look at the – the place of employment is always taken into consideration when they make recommendations, as well as the person.

Q. And, Dr. Kiely, your position in relation to it is right and proper, you're treating the patient, you're trying to deal with the patient and provide progress forward for that patient, I think is the best way to describe it. And there's no criticism from my client in that regard, that insofar as solving the conundrum in which your patient expressed himself as being in, certainly from the information that you had, this appeared to be a solution to the conundrum, I think would be perhaps one way to put it?

A. Yes.²⁵⁵

Retired Chief Superintendent Gerard Dillane

On the same day, Sgt Barry submitted the medical certificate to his superiors through the appropriate channels. At around 16:00 hrs the certificate came to the attention of Chief Superintendent Gerard Dillane. In his statement to the tribunal, C/Supt Dillane described how he reacted when he first saw the certificate:

I had to read it a few times as I could not believe a doctor would write such words. I wondered for a while, was it for real and I was particularly taken [a]back by the section which said that Paul Barry could not work at Fermoy Garda station as I took this to mean that Fermoy Garda station was not a safe place to work in. I was looking for clarification on this matter. It was my duty to get to the root of this as soon as I could and as Dr Kiely was

²⁵⁴ Tribunal Transcripts, Day 188, p. 44

²⁵⁵ Tribunal Transcripts, Day 188, pp. 61-62

*the author, I believed she was the first person to start with. ... I was not targeting Sergeant Barry with my actions, but I was doing my job as I saw fit.*²⁵⁶

Within minutes of receiving the certificate C/Supt Dillane sent an email to Assistant Commissioner Fintan Fanning, Human Resource Management (HRM), the Chief Medical Officer (CMO) and Assistant Commissioner Anthony Quilter. It read as follows:

This Medical Certificate confirms that Sergeant Barry is fit to return to work but states that “he should not work or attend at Fermoy Garda Station and should not come into contact with Superintendent Michael Comyns”.

Superintendent Comyns is the District Officer in Charge of Fermoy Garda District and it is totally unacceptable and completely unfeasible that the member can return to work under the conditions set out in this Medical Certificate. The member is either fit to resume duties in Fermoy District or [is] not.

*I would request that the Chief Medical Officer contact Dr. Margaret Anne Kiely to clarify this matter as a matter of urgency.*²⁵⁷

C/Supt Dillane spoke with Insp O’Sullivan. He said in his statement to the tribunal that:

*I asked Inspector O’Sullivan to find out from Dr Kiely if the certificate was genuine and also to explain how she could say that a member of An Garda Síochána could not work at Fermoy Garda station. I interpreted the certificate from Dr Kiely as saying that Fermoy Garda station was an unsafe place for a member of An Garda Síochána to work in. I needed to know the basis for that statement, as I believed there was nothing wrong with working at Fermoy Garda station or with any person working at Fermoy Garda station.*²⁵⁸

C/Supt Dillane mistakenly placed this conversation with Insp O’Sullivan as having taken place on 3rd April 2013, which does not accord with the known facts. He gave evidence to the tribunal that he had made a genuine mistake in his statement with regard to the date and also the circumstances of his meeting with Insp O’Sullivan. Insp O’Sullivan was not on his way to visit Dr Kiely when C/Supt Dillane spoke to him on 4th April 2013.²⁵⁹

In a Memorandum of Questions issued by the tribunal investigator, C/Supt Dillane was asked what concerns he had regarding the medical certificate. He said that:

*In all my years’ service I had never seen a medical certificate which stated that a person was fit to resume duty but could not attend at his place of work. I was concerned that this was saying to me that Fermoy Garda station was not a safe place of work and I was also concerned that it could start a trend.*²⁶⁰

Counsel for the tribunal asked C/Supt Dillane to expand on his reasoning:

... my first concern was when was the certificate from. And the doctor retrospectively wrote a second certificate, which clarified that matter. Because, was it a certificate from the 28th March or was it from the 4th April? That was my first issue, because Paul Barry had worked on the 29th and 30th and the 1st and 2nd, if it was from the 4th, well then he had worked days that he was certified as sick. Now, I couldn’t – and this is partly to do with payroll as

²⁵⁶ Tribunal Documents, p. 361

²⁵⁷ Tribunal Documents, p. 387 and p. 389

²⁵⁸ Tribunal Documents, p. 5629

²⁵⁹ Tribunal Transcripts, Day 184, pp. 16-18

²⁶⁰ Tribunal Documents, p. 5630

well, we couldn't draw his bank holiday allowances that he was entitled to, his Saturday allowance, his Sunday allowance, if he was out sick. There was implications for the payroll here as well. So I needed clarification on the date of the issue of the certificate. Secondly then, I had major issues with the content of it.

Q. The content, I mean it wasn't a million miles away from your own personal view as to whether it was appropriate for Sergeant Barry to work under Superintendent Comyns in the circumstances?

A. No, it wasn't. But there was other implications here, because could this start a trend? Other people come in with a certificate, I can't attend at Fermoy Garda Station. That was one of the concerns I had.²⁶¹

C/Supt Dillane was cross-examined by counsel for Mr Barry about the statement he made to the tribunal:

Q. ... And do you see there that when you write that in your statement "I then spoke with Inspector O'Sullivan, who was on his way to visit Dr. Kiely at her surgery", skipping forward "I asked Inspector O'Sullivan to find out from Dr. Kiely if the certificate was genuine and also ... to explain how she could [say] that a member of An Garda Síochána could not work at Fermoy Garda Station."

I mean, that's clearly two things, not one, isn't it?

A. That's the way I was thinking when I, when I asked Inspector O'Sullivan, I said can she genuinely mean this. That's the way –

...

CHAIRMAN: And what would you say to the suggestion that the words as they look, if it was genuine, suggest is it a fraudulent document or is it a true document?

A. Well, that was not my intention, Mr. Chairman. I never questioned the authenticity of the document.²⁶²

Inspector Anthony O'Sullivan

In his statement to the tribunal, Insp O'Sullivan recalled that:

On 04/04/13 at 4pm I received the medical certificate at Fermoy Garda Station. I forwarded this certificate to Chief Superintendent Gerard Dillane, Divisional Officer at Fermoy Garda Station. I was instructed by Chief Superintendent Dillane to call to Dr Margaret Kiely at the Glanmire Medical Centre to check the validity of the medical certificate. The doctor's signature wasn't legible and the date of issue had been amended by biro from 04/04/13 to 28th March 2013.²⁶³

During his interview with the tribunal investigator, Insp O'Sullivan said that C/Supt Dillane requested him to call to Dr Kiely and ask if it was a valid certificate.²⁶⁴ Counsel for the tribunal asked him what he understood was meant by the words '*valid certificate*':

²⁶¹ Tribunal Transcripts, Day 184, pp. 19-20

²⁶² Tribunal Transcripts, Day 184, pp. 149-151

²⁶³ Tribunal Documents, p. 1306

²⁶⁴ Tribunal Documents, p. 5324

It was always my understanding that it wasn't a forged certificate and Mr. Barry would not do that. I know Mr. Barry, he would not do something like that. But I think the certificate arrived into the garda – I had never seen a certificate like that, and I'm 35 years in the guards now, even at that time I had never seen a certificate like it and I think that the chief was trying to find out what are we going to do with this. We have a sergeant who is deemed fit for work by his doctor, he can attend work but he cannot enter his workplace. I think that was the reason the chief decided to check out the certificate.

Q. *But essentially were you checking was the certificate issued by her? Is that what you were checking?*

A. *I think the issue, and I go back again to – I never saw, and a lot has passed through my hands, I never saw a medical certificate with the dates changed on it with biro without being initialed by somebody, just left blank. That's like I getting a certificate, changing it to the week before, just for argument's sake. I had never seen one, and that's my writing in relation to the signature and I must have been deemed – why wasn't it initialed, is that the same signature. But as regards a forgery, no, that never came into my head.*

Q. *Okay, to be clear to the Chairman, were you instructed to go out and see was the [certificate] issued by the doctor?*

A. *I suppose Chief Superintendent Dillane, I can't speak for him, didn't know what to do with a certificate that arrived to him, that I believe I showed him on the Thursday evening, he didn't know what to do with it, this man is fit for work but he can't enter the workplace. And I suppose he said to go and check the certificate. But it was never an issue about it being a forged certificate, if that's what you mean, it was never an issue.²⁶⁵*

At 08:51 hrs the following morning C/Supt Dillane received an email from Sergeant Fiona Broderick, HRM writing on behalf of A/C Fanning in response to his email of the evening before. Sgt Broderick stated that:

I am directed by Assistant Commissioner Fanning to acknowledge receipt of your e mail.

He understands that a case conference has been convened for Monday morning to discuss this matter, can you please confirm.

Assistant Commissioner Fanning has directed that arrangements should be made to have an Inspector establish the non medical nature of this certificate with the person who issued same.

The non medical issues are those which concern local management. Medical issues can not be discussed.²⁶⁶

Shortly afterwards Insp O'Sullivan called to Dr Kiely's surgery and asked to speak with her. In her evidence to the tribunal Dr Kiely described the meeting as follows:

Well, I suppose most of the recollection is from my notes because it was a long time ago, but I do remember that he called to the surgery in what appeared to me to be full uniform and had requested to speak with me. I brought him into my office to speak with him there in privacy. I recall that he was asking me if I had produced that sick cert, which I confirmed that I had. I reiterated that I wouldn't be able to discuss Paul Barry with him as that would be breaching

²⁶⁵ Tribunal Transcripts, Day 186, pp. 170-171

²⁶⁶ Tribunal Documents, p. 1666

*patient confidentiality. And I know, from my notes, I don't recollect him saying that the note wouldn't be acceptable, but I had recorded in my notes at that time that he had said that the note, the conditions I had put on it wouldn't be accepted and that the occupational health physician would be phoning me and I said that I was happy to speak with the occupational health physician.*²⁶⁷

Counsel for the tribunal asked Dr Kiely if she was happy with the visit she received from Insp O'Sullivan. She said:

I suppose I wasn't. I was surprised. It was very unusual. Usually if an employer or a manager had an issue with something that we would provide, they would go through their occupational health department or an outside occupational health. It's very unusual, like, you know, I don't recall ever having a manager or an employer come to the surgery to speak with me.

Q. *Well, there seemed to be two concerns, or were there two concerns that Inspector O'Sullivan had: First of all, the contents of the document insofar as your view that Mr. Barry wasn't to attend at Fermoy Garda Station or come into contact with Superintendent Michael Comyns. Inspector O'Sullivan clearly indicated to you that that wasn't something that would be accepted by the chief medical officer, is that right?*

A. *Yes.*

Q. *And that was a matter that you weren't going to discuss with him because of client confidentiality, isn't that right?*

A. *Yes, that's correct.*

Q. *Yes. Then there's the second thing, as to the authenticity of the document itself. Did he raise any concerns as to whether or not this was a document that had been produced by you?*

A. *Yeah, my recollection is that I did feel he was questioning had I actually written the note. So I thought that he was referring more to the conditions in it and I did wonder was he implying perhaps that retired Sergeant Barry had in some way made the note. It was just, I felt he was questioning validity, as to whether or not it was a genuine note.*²⁶⁸

Dr Kiely was asked the following questions by counsel for Mr Barry:

Q. *... Now, Inspector O'Sullivan has described his attendance at your surgery as being discreet, he says that he took steps to have something on over his Garda shirt uniform and that he was acting discreetly so as not to be immediately identifiable as a guard. Do you have anything to say in response to that?*

A. *I don't. My recollection of events and the reason I feel I remember it, is because it was so unusual, was that he was identifiable as a guard. And the reason I saw him actually was because he was a guard. Like if somebody was to – like I think once in my career I've had a manager phoned once about a patient, and wanted to speak with me, and I directed the secretaries to let them know that I couldn't speak to them in relation to the patient because it would be a breach of patient confidentiality. But like, if gardaí were to call to the surgery we would always see them, because they could be calling for, you know, official business ...*²⁶⁹

²⁶⁷ Tribunal Transcripts, Day 188, pp. 44-45

²⁶⁸ Tribunal Transcripts, Day 188, pp. 45-46

²⁶⁹ Tribunal Transcripts, Day 188, pp. 67-68

Q. ... Certainly then you've also told the Chairman in your statement to the tribunal that you were annoyed, you felt annoyed by the visit because in your opinion it seemed inappropriate. Do you stand over that comment?

A. Yes. Like, I do feel it's inappropriate for a manager or an employer to query conditions on a medical certificate. Like the usual practice would be if there was a difficulty, which, you know, given that I don't understand the workings of An Garda Síochána, if there was a difficulty, the usual practice would be to refer to the occupational health department because they would be able to give more expert advice and as such, could override, you know, conditions that I would have suggested if they felt that was appropriate.²⁷⁰

Counsel for Mr Barry asked Dr Kiely the following questions, which focused on whether Insp O'Sullivan ever questioned the authenticity of the certificate:

Q. ... you already told Mr. Marrinan that you also felt that Inspector O'Sullivan was actually asking whether or not – you perceived that he was asking whether or not the medical certificate was a forgery, was something that Mr. Barry had created himself, is that correct?

A. Yes, yes.

Q. What was it about the engagement with Inspector O'Sullivan that day that led you to infer that? Why did you form that view?

A. Again, this is from a long time ago, I think it was because of the questioning of it, you know, if somebody asks you did you write that, well then that implies that they think somebody else wrote it, because why else are they asking you did you write it?²⁷¹

In his evidence to the tribunal, Mr Barry recalled receiving a phone call later that day from Dr Kiely:

She rang me after Inspector O'Sullivan visited her.

...

And she thought he was asking was the cert forged, that's what she understood.

Q. Well, he was looking for confirmation that it had been issued by her?

A. Yes. She said he asked her was the cert issued by me or her.²⁷²

In his evidence to the tribunal, Insp O'Sullivan resisted the suggestion that he was in full uniform when he visited Dr Kiely. Whether he was or not, there is little doubt that this was an official visit. As far as the inspector was concerned he made what he described as a '*discreet enquiry*' of the doctor and appeared surprised by her subsequent statement that she was '*unnerved*' by his visit.²⁷³

During his interview with the tribunal investigator, Insp O'Sullivan was referred to his visit to Dr Kiely and was asked to outline in general terms what transpired:

I was there for 10/15 minutes and I told Dr. Kiely I was asked to make an inquiry as to whether the certificate was valid or not. I asked was it issued by Dr. Kiely as the date was changed and she had no issues, she confirmed it was valid.²⁷⁴

²⁷⁰ Tribunal Transcripts, Day 188, p. 70

²⁷¹ Tribunal Transcripts, Day 188, p. 72

²⁷² Tribunal Transcripts, Day 176, p. 65

²⁷³ Tribunal Transcripts, Day 187, p. 111

²⁷⁴ Tribunal Documents, p. 5326

Insp O’Sullivan was specifically asked by the tribunal investigator about the suggestion that he was questioning the authenticity of the certificate and whether it might have been created by Sgt Barry:

Firstly, I did not say to Dr. Kiely was the cert issued by Sergeant Barry or herself as he [Mr Barry] alleges. That is not correct. I would have said to Dr. Kiely I was instructed to ask if it was issued by Dr. Kiely. The concern was around the date being changed and whether the contents of the certificate were accurate and correct. From my perspective, there was never an issue about Sergeant Barry forging the certificate.²⁷⁵

Dr Kiely amended the certificate by inserting the date from which Sgt Barry was certified fit for duty. A version of the certificate was disclosed to the tribunal that had handwritten points noted on the top right side of the document. Insp O’Sullivan confirmed to counsel for the tribunal that the notes were in his handwriting. On the first line ‘1. Signature’ was written in pen and below it ‘2. Amendment’ and below that ‘3 Receptionist’.²⁷⁶ Counsel asked Insp O’Sullivan why he had made the notes:

- A. *Well, the signature, I suppose I just see the signature, most doctors you cannot read the signature, but for some reason I put signature on it as well.*
- Q. *Okay. Can we look at the signature. I think this wasn’t the first medical certificate from this doctor from Mr. Barry. Was there a particular reason why this particular signature was in issue?*
- A. *I think that’s – no, that’s my own writing. That’s what I say, maybe I said something about the signature. There was never any issue about the signature being a forgery.*
- Q. *Well now, can we just start at the beginning, you wrote signature, why did you [write] signature, question mark?*
- A. *I’d say because I had never seen a doctor’s certificate that the date was changed without it being initialed and I was looking down at the signature then and I couldn’t [make] Kiely out of the signature.*
- Q. *But do you accept – are you telling the Chairman you questioned the bona fide of the signature, is that what it meant?*
- A. *No, not the bona fides. There was no issue with that when I called to the doctor. I think it was the wording of the certificate. There was no issue about the signature being a forgery.*
- Q. *If we just stay with the signature, it’s number 1, you have written it down, do you have a difficulty with the signature on the document, or is it somebody else who has a difficulty? Is it you?*
- A. *No, no, it’s not. That is my writing and if I wrote down signature, that is me. And I see it does probably go – if you look at it now, it is i e l y at the end of it, but I think that I would have expected maybe initials below the date which was changed. That is my writing, that’s what I put in myself. Maybe when I got the job to do I wrote that on it myself before I headed up there.*
- Q. *You write at number 2, amendment?*

²⁷⁵ Tribunal Documents, p. 5328

²⁷⁶ Tribunal Documents, p. 5345

- A. Yeah.
- Q. Why did you write that?
- A. Because the date was changed.
- Q. Okay. And then you write at number 3, receptionist, what does that mean?
- A. Maybe I was gathering that the receptionist changed the date on it, I don't know. But that is my writing.
- Q. Okay. Did you see these as the three things you wanted to query?
- A. No. I think I had never seen a certificate saying that somebody couldn't – is fit for work, he can attend work but he cannot enter the workplace, which was Fermoy Garda Station.
- Q. I am just asking you, sorry now, inspector, I am just asking you about the three things you have noted, are these your queries, yes or no?
- A. Oh they are, but I think you could probably add number 4, that I said as well. But the chief superintendent would have asked me to check out was that certificate issued by the doctor and what she meant by it, and that's what I done.²⁷⁷

Both Dr Kiely and Insp O'Sullivan agree that she amended the certificate so as to include the date from which Sgt Barry was fit to resume duty. The conditions remained unchanged.²⁷⁸ They also agree that Dr Kiely declined to discuss the contents of the certificate because of patient confidentiality.²⁷⁹

The same day, Insp O'Sullivan sent a report to C/Supt Dillane concerning his visit to Dr Kiely. The report read as follows:

With reference to the above and your instructions on the 04.04.2013, I called to Dr. Margaret Kiely at the Glanmire Medical Centre on the 05.04.2013 in relation to medical certificate submitted by Sergeant Paul Barry on 04.04.2013.

I informed Dr Kiely that I wasn't there to discuss any matters of patient confidentiality and only to discuss [the] validity of [the] medical certificate. Dr. Kiely informed me that it was a valid certificate issued by herself on the 04.04.2013, albeit it was dated the 28.03.2013.

I queried the work related conditions attached to the medical certificate but she declined to discuss them.²⁸⁰

Dr Margaret Anne Kiely

Later that day, 5th April 2013, Dr Kiely received a phone call from Dr Oghuvbu, which she recalled during her evidence to the tribunal:

So, again I am going from my notes because I don't – my recollection from the phone call is that Dr. Oghuvbu was in agreement with me, that there were difficult work circumstances that were contributing to retired Sergeant Barry's difficulties with work and that he felt that there were – as I said in the note, that he was going to be discussing Paul at a case conference

²⁷⁷ Tribunal Transcripts, Day 186, pp. 167-169

²⁷⁸ Tribunal Documents, p. 198; Tribunal Transcripts, Day 188, pp. 46-47; Tribunal Transcripts, Day 187, p. 103

²⁷⁹ Tribunal Transcripts, Day 188, pp. 71-72; Tribunal Transcripts, Day 187, pp. 112-113

²⁸⁰ Tribunal Documents, p. 5353

*on the Monday and that he was also interested in the patient's medical welfare and would not be getting involved in any management issues. He told me that he had a report from an independent medical adviser, Dr. Tobin, and he felt that management should be able to come to a mutually agreeable situation for a return to work for Paul while the investigation was taking place. So in essence I felt that Dr. Oghuvbu was in agreement with me.*²⁸¹

On 11th April 2013, Dr Oghuvbu wrote to Dr Kiely as follows:

Further to our communication on 05/4/2013, I have now provided recommendations to Garda management in relation to the above Garda member's medical fitness for policing duties. ...

My recommendations were as follows –

- 1. There are no compelling medical impairments to debar the member returning to work and policing duties.*
- 2. Certain circumstances which are currently subject of Garda management processes are regarded as plausible stressors for the member at this time and this would impact on the member's sustained wellbeing and effectiveness. On this basis, facilitation with certain workplace accommodations has been recommended.*²⁸²

Counsel for the tribunal asked Dr Kiely whether she interpreted this letter as indicating that the conditions on her certificate were being taken on board by Dr Oghuvbu and garda management. She stated:

*Yes. It was my understanding that Dr. Oghuvbu was, as you said, taking that on board. I did feel that the way he phrased the letter was in agreement with me. I just felt that he was phrasing it, I suppose, in a more – I would be quite direct, so I would state it very direct, whereas obviously Dr. Oghuvbu, as an occupational health doctor, I think he was possibly phrasing it in language that is used in that world, occupational health area.*²⁸³

Dr Kiely was cross-examined on this point by counsel for An Garda Síochána:

- Q. ... I just have to suggest to you that clearly the letter says what it says but that perhaps in your review of the letter you may be mistaken in considering that Dr. Oghuvbu agreed with what you said in your report, because in fact it's not in his report?*
- A. I would disagree with you, because my impression from the phone call I had with him was that he did feel that there were significant events that had affected Mr. Barry's mental health and that it would be better if those type of circumstances could be avoided, that was the impression that I had. I suppose you would have to ask Dr. Oghuvbu exactly what he meant. But that was the impression I had. That he was in agreement and he did send me on Dr. Tobin's letter as well, the independent medical adviser, who was a consultant psychiatrist, who also felt that Mr. Barry had experienced very severe mental distress and should have accommodations made.*²⁸⁴

During his evidence to the tribunal, Dr Oghuvbu was asked the following by counsel for the tribunal:

²⁸¹ Tribunal Transcripts, Day 188, pp. 47-48

²⁸² Tribunal Documents, p. 3879

²⁸³ Tribunal Transcripts, Day 188, p. 50

²⁸⁴ Tribunal Transcripts, Day 188, p. 57

Q. *Just trying to flesh it out, it would appear that you were obviously alerting her to Dr. Tobin's view, there's a reference to a mutually agreeable situation. She gave evidence yesterday, Dr. Kiely did, that she saw you as essentially taking on board what she had put in her certificate and that you were in essence agreeing with it and not disagreeing with it. Is that a fair and accurate portrayal?*

A. No.

Q. *Or do you want to comment further on that?*

A. *My comments on it would be that what she was saying, I understood where she was coming from but I wasn't endorsing the recommendation she was making. She was, as his primary care physician, you know, trying to look out for him in the best way she could, but I would look at things a bit differently because of my training, in terms of, you know, balancing the tensions that usually exist between maintaining the member's wellbeing and protecting the professional integrity of the organisation. And that would be the way I would approach the advice that I give. So I wouldn't be – I wouldn't say that advice was unusual, I get a lot of that in terms of from individual's doctors.*

...

Q. *Did you see them, those conditions as a non medical issue or did you see them inextricably bound up as part of the medical certification by the doctor?*

A. *Okay, I will answer it in this way: There are two things, one is that the individual, they have a medical condition, it's being treated, they've responded to the treatment, are they fit to come back to work without any, you know, consideration of any other factors? So is there any medical consideration that precludes them from coming back to work? In the circumstances, based on all the information that I had at that point in time, the answer was no. Are there issues that may impact on his wellbeing should he return to work and those issues are present, whether they are physical or psychological? Yes, there were, we had been dealing with this since October. So in other words, whatever advice we are going to be [giving] now will not be about the return to work, will be about making sure that the environment at work prevented a deterioration or decompensation in his wellbeing. So that is where those issues would come from in terms of work location, supportive workplace arrangements, so that it was reduced hours or restricted duties, that's where that comes in, because what you are trying to do is to protect wellbeing and support effectiveness.*

...

But they are two separate issues and I always keep them separate, because when a condition is treated, the individual becomes fit to return to work. The situation in which they return to work is another issue that you have to address and that's what my advices take into consideration, all the factors at play.

Q. *So it's sort of a regime of working conditions which support the continued fitness –*

A. *Yes, of the individual.*²⁸⁵

²⁸⁵ Tribunal Transcripts, Day 189, pp. 67-68 and pp. 74-76

Complaint made by Mr Barry

In his interview with tribunal investigators, Mr Barry said that he later confronted Insp O’Sullivan about his visit to Dr Kiely:

I asked Inspector O’Sullivan did he have authority to question a medical professional and he stated that he was directed to go to my doctor by Chief Superintendent Dillane. I asked him did he get that direction in writing, to which he said that he had not but that he would swear up that he was directed to do so by Chief Superintendent Dillane.²⁸⁶

Insp O’Sullivan wrote to Sgt Barry on the same day he visited Dr Kiely in the following terms:

I wish to acknowledge receipt of a Medical Certificate received at Garda Station Fermoy at 4.00pm on Thursday 4th April 2013 from Dr. Margaret Anne Kiely, Glanmire Medical Centre ... in relation to your return to work.

The contents of this Medical Certificate have been noted. However, I must inform you that all Garda members are subject to and operate under the authority of local Garda Management and the Garda Síochána Code, Directives and Instructions.

Accordingly, while your return to work is welcomed the non medical conditions as set out in the Medical Certificate submitted cannot be acceded to. Any medical issues can be referred to the Chief Medical Officer by your Medical Doctor.

As you are aware, directions have issued from Superintendent Comyns that all Sergeants and Gardaí are to attend at a District briefing at Fermoy Garda Station at 7.30am each morning and 9.30pm each night. You are required to attend at Fermoy Garda Station at the above times to brief your Unit when you are working.²⁸⁷

Mr Barry was asked by counsel for the tribunal how he reacted when he received the letter:

I was half expecting something like it because of the attitude of management up until that point. I didn’t see they were going to change their view that there’d be no accommodations offered or put in place.²⁸⁸

It should be noted at this juncture that this letter to Sgt Barry could not have been any clearer; the two conditions on the medical certificate were not acceptable to local management. Yet those very conditions and the failure to resolve them remained at the core of many of the issues that plagued the relationship between Sgt Barry and garda management in the following three years. Those issues will be dealt with later in this report.

Mr Barry told tribunal investigators that he had never had a medical certificate questioned in his many years of service and he believed that C/Supt Dillane had targeted him by sending Insp O’Sullivan to question his doctor. He was cross-examined by counsel for An Garda Síochána and the following was suggested to Mr Barry:

Q. *In terms of the approach, can I just suggest to you that insofar as Inspector O’Sullivan is concerned, this is the inspector with whom you have had a good rapport, that insofar as he was calling to the doctor to make that enquiry, I have to suggest to you that that was a reasonable enquiry which resulted in an amendment of the certificate to a satisfactory date stamp?*

²⁸⁶ Tribunal Documents, pp. 43-44

²⁸⁷ Tribunal Documents, p. 5348

²⁸⁸ Tribunal Transcripts, Day 176, p. 69

- A. *The original instruction that came from Assistant Commissioner Fanning was to question the non medical issues contained in the cert. It was not to query the date or the doctor's handwriting, as they alluded to later. They were questioning the conditions that my doctor put on my certificate and that's what I had issue with.*²⁸⁹

The gravamen of Mr Barry's complaint to the tribunal on this issue is that the visit by Insp O'Sullivan to Dr Kiely was wholly inappropriate in all circumstances. He claimed that Insp O'Sullivan in reality questioned the authenticity of the certificate that he had submitted to his superiors and in essence this constituted targeting and/or discrediting of him.²⁹⁰

During his evidence to the tribunal, Mr Barry absolved Supt Comyns of any responsibility in this regard but blamed C/Supt Dillane, since he had issued the instructions to Insp O'Sullivan to question Dr Kiely.²⁹¹ Further, Mr Barry claimed that the alleged targeting and/or discrediting was carried out because he had made a protected disclosure.²⁹²

Legal Submissions

Mr Paul Barry submitted as follows:²⁹³

- that within minutes of receiving the certificate, C/Supt Dillane sent a copy by email to the Assistant Commissioner, HRM and the CMO referring to its contents and stating that it was totally unacceptable and completely unfeasible for a member to return to work under the conditions set out in the medical certificate. C/Supt Dillane requested the CMO to contact Dr Kiely as a matter of urgency.
- that C/Supt Dillane did not wait for the CMO to make contact with Dr Kiely, but directed Insp O'Sullivan to attend Dr Kiely's surgery the following morning and make enquiries about the certificate. C/Supt Dillane in evidence said that his concern was the date on the certificate, '28th March 2013' or '04 April 2013', and he was concerned with the content. He said he was not concerned it was a forgery.
- that it was unclear whether the directions to Insp O'Sullivan were provided before or after the email to the CMO was sent. Insp O'Sullivan said directions to him were given around 17:00 hrs on 4th April 2013. It was clear that C/Supt Dillane gave the direction to Insp O'Sullivan around the time he adopted the view that the certificate was totally unacceptable and completely unfeasible.
- that Insp O'Sullivan attended Dr Kiely's surgery on 5th April 2013; he informed the receptionist that he was a guard and was checking about a medical certificate. He was seen by Dr Kiely about ten or fifteen minutes later and he denied being in full uniform. He said that Dr Kiely did not seem unnerved by his visit, and that she informed him she had issued the certificate and that it was valid.
- that Dr Kiely's account differed. She said Insp O'Sullivan called to the surgery in what appeared to her to be full uniform. He was identifiable as a guard, looked formally dressed as a guard, and the visit seemed very official to her. She recalled Insp O'Sullivan asking if she had produced the certificate and perceived this as asking if the medical certificate was a forgery; and also saying that what she had put in the certificate would not be acceptable.

²⁸⁹ Tribunal Transcripts, Day 178, p. 107

²⁹⁰ Tribunal Transcripts, Day 176, pp. 60-67

²⁹¹ Tribunal Transcripts, Day 180, p. 107

²⁹² Tribunal Documents, pp. 43-44

²⁹³ The tribunal has considered all of Mr Paul Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

- that Dr Kiely was surprised, unnerved and annoyed by the visit. She said that usually if an employer had an issue they would go through the occupational health department or an outside occupational health representative. She did not recall ever having a manager or employer come to the surgery to speak to her.
- that Insp O’Sullivan in evidence confirmed he had never made similar enquiries in respect of any other member.
- that there are a number of evidential conflicts between the accounts of Dr Kiely and Insp O’Sullivan and that the account of Dr Kiely should be preferred as all the details she gave in her evidence were backed up by her contemporaneous notes of the visit.
- that, based on Dr Kiely’s account, it would seem clear that Insp O’Sullivan made enquiries as to whether or not Dr Kiely had written the medical certificate. The implication was that he was suggesting the medical certificate might have been a forgery or something Sgt Barry wrote himself.
- that C/Supt Dillane and Insp O’Sullivan both appeared to deny that the enquiries related to whether the certificate was a forgery. These denials were not credible. C/Supt Dillane in his statement to the tribunal said that he was trying to find out if the certificate was genuine. Insp O’Sullivan in his statement said that he was tasked with determining if the certificate was valid. The nature of Insp O’Sullivan’s enquiries were reflected in the report he wrote after the visit: that it was a valid certificate and Dr Kiely wrote it.
- that as a matter of common sense, an enquiry into whether a document was ‘*valid*’ and ‘*genuine*’ was an enquiry into whether or not it was an authentic document.
- that C/Supt Dillane’s account of the entire episode was questionable. In his statement he indicated that Insp O’Sullivan was independently on his way to Dr Kiely’s surgery, rather than being directed by him to go, and that Dr Kiely refused to speak to Insp O’Sullivan. Both of these were incorrect.
- that even if the enquiries directed by C/Supt Dillane did relate solely to the conditions in the medical certificate, this was not the appropriate means of making those enquiries. This could have been more appropriately addressed through contact by Dr Oghuvbu.
- that in directing Insp O’Sullivan to visit Dr Kiely in this matter, C/Supt Dillane targeted Sgt Barry. Sgt Barry was singled out for highly unusual and inappropriate treatment, which appears to be extremely irregular for a garda to receive.
- that insofar as C/Supt Dillane directed enquiries into whether the medical certificate was genuinely issued by Dr Kiely, this discredited Sgt Barry by suggesting he was someone who would forge a medical document.
- that given the proximity between taking these actions and C/Supt Dillane learning of Sgt Barry’s protected disclosure it can be inferred that this targeting and/or discrediting was connected to the making of the protected disclosure.

An Garda Síochána submitted as follows:²⁹⁴

- that Sgt Barry produced a return to work certificate dated 4th April 2013, which was crossed out in ink and replaced with 28th March 2013. The content of the certificate was also considered surprising by C/Supt Dillane, who considered it unworkable and

²⁹⁴ The tribunal has considered all of An Garda Síochána’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

that the doctor appeared to stray into areas that were more appropriately management rather than welfare issues.

- that C/Supt Dillane asked Insp O’Sullivan to contact Dr Kiely to see if the certificate reflected her view. Any suggestion that his concern was that the certificate was not genuine was belied by the fact that he asked the CMO for advice on the contents and that his concerns were also shared by A/C Fanning.
- that the contents of the certificate were discussed at a case conference on 8th April 2013, including the difficulties management were having. Dr Oghuvbu gave his view that ‘*certain workplace accommodations*’ were required.
- that the manner in which garda management dealt with Dr Kiely’s certificate demonstrated committed efforts to deal with an unusual and complex situation to the satisfaction of all parties, including Sgt Barry. Rather than seek to target Sgt Barry, his superiors addressed matters at a high level within An Garda Síochána and sought the advice of the CMO in consultation with Sgt Barry’s doctor.
- that there was no evidence that the actions were in any way connected to Sgt Barry’s protected disclosure or amounted to an attempt to target or discredit Sgt Barry in response to disclosures.

Superintendent Michael Comyns submitted as follows:²⁹⁵

- that it was clear from the evidence of C/Supt Dillane and Insp O’Sullivan that this was not an issue that related to Supt Comyns.
- that it was clear from the evidence that there was no issue for Supt Comyns to address and Mr Barry now accepted this.
- that there was no evidence of Supt Comyns targeting or discrediting Sgt Barry, or being party to any targeting or discrediting of Sgt Barry by An Garda Síochána.

Inspector Anthony O’Sullivan submitted as follows:²⁹⁶

- that Insp O’Sullivan was not a ‘*senior member of An Garda Síochána*’ within the definition of term of reference [p].
- that it was at the direction of C/Supt Dillane that Insp O’Sullivan attended at Dr Kiely’s surgery to enquire about the certificate.
- that the enquiries were regarding the contents of the certificate, not whether the certificate was a forgery.
- that Insp O’Sullivan was not in full uniform when he called to Dr Kiely’s surgery. Dr Kiely was relying on notes to assist her recollection and may be uncertain as to what amounted to full uniform for a member of An Garda Síochána. No mention of the uniform was made in her notes.
- that Dr Kiely’s assertion that she was unnerved by the visit of Insp O’Sullivan was not supported in her notes and no complaint was made to An Garda Síochána.

²⁹⁵ The tribunal has considered all of Superintendent Michael Comyns’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

²⁹⁶ The tribunal has considered all of Inspector Anthony O’Sullivan’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 63-64

- that Insp O’Sullivan was at all times following the directions given by C/Supt Dillane to establish the position regarding the date and contents of the medical certificate.

Conclusion

There is no doubt that Dr Kiely formed the impression that Insp O’Sullivan was questioning the authenticity of the medical certificate submitted by Mr Barry on his return to duty. Further, she conveyed this to her patient when she advised him of the visit. Mr Barry had made very serious allegations of wrongdoing by his superintendent and he perceived that the spotlight was unfairly being shone on him. This, he says, was done to target and discredit him.

The tribunal heard evidence on this issue, which it has carefully considered. Both C/Supt Dillane and Insp O’Sullivan were adamant that they did not suspect that Sgt Barry had forged the document in whole or in part. It must be borne in mind that in their experience the conditions set out by Dr Kiely were unique and needed to be explored with the doctor. This view was shared by A/C Fanning, who issued an instruction to local management to make enquiries of Dr Kiely concerning the conditions set out in her certificate. While this instruction did not influence C/Supt Dillane’s decision to instruct Insp O’Sullivan to visit the doctor, it demonstrates that it was a genuine concern shared by HRM on examination of the same certificate.

Bearing in mind the unusual conditions imposed by Dr Kiely the tribunal accepts the evidence of the officers that they envisaged a genuine enquiry in relation to those conditions. The tribunal is satisfied that the officers have not manufactured a false narrative to disguise what is suggested was their true intent to undermine Mr Barry.

Insp O’Sullivan called to Dr Kiely’s surgery on his way to court; he was in uniform and identifiable as a member of An Garda Síochána. The tribunal considers that sending the inspector to visit and question the doctor without notice to her was unnecessary and insensitive. There was even less reason to do so if the officers did not suspect the provenance of the certificate. However, it can be said that the visit to Dr Kiely was productive in that it established at the earliest opportunity for An Garda Síochána that Dr Kiely had issued the certificate in the terms set out. It also clarified the date when the certificate was issued and it specified the date from which Sgt Barry was deemed fit to return to work. The certificate was reissued and signed by Dr Kiely to reflect all of that.

It would have been preferable in the circumstances if the enquiry had been made after advising Mr Barry of its true purpose, and perhaps seeking his consent. Indeed, Dr Kiely was happy to discuss the condition with Dr Oghuvbu shortly afterwards and this seems to be the appropriate channel of communication.

It is understandable that Mr Barry believed that management suspected that the certificate may have been forged by him. It was unfortunate that he was left with the mistaken impression that his credibility was being called into question by senior management. This belief emerged shortly after his return to work and no doubt coloured his view of management’s subsequent actions.

However, there is nothing to suggest that C/Supt Dillane was in any way responding to the bullying and harassment complaint that Sgt Barry had made in the previous September. The tribunal accepts his evidence that he was only vaguely aware of it. And there was more than enough of a concern arising from the certificate to explain his actions.

Accordingly, the tribunal rejects Mr Barry’s allegation under this heading.

CHAPTER 7

ISSUE 3.G: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE MEETING WITH CHIEF SUPERINTENDENT GERARD DILLANE ON 9TH APRIL 2013

Issue 3.g of the Schedule of Issues

Did Supt Michael Comyns and/or C/Supt Gerard Dillane target or discredit Sgt Barry as he alleges because he had made a protected disclosure –

(g) by confronting Sgt Barry in the car park of Mitchelstown Garda Station on 9th April 2013?

Background

A case conference concerning Sergeant Paul Barry was held at Garda Headquarters on 8th April 2013. Chief Superintendent Gerard Dillane attended on behalf of local management. In the normal course of events Superintendent Michael Comyns would also have attended but it was decided between C/Supt Dillane and Supt Comyns that due to the contents of Dr Margaret Anne Kiely's medical certificate the superintendent would not attend any conferences.²⁹⁷

Dr Oghenovo Oghuvbu and staff from the Sickness Absence Section also attended the conference. The note of the meeting discloses that a number of issues were discussed that focused primarily on Dr Kiely's certificate.²⁹⁸

It was noted that Sgt Barry had been reviewed by the Chief Medical Officer (CMO) on 13th March 2013 and that there were no compelling reasons why the member could not return to work and resume normal policing duties.

It was also noted that *'the Chief Medical Officer has recommended that in the context of providing an agreeable supportive workplace to foster the member's wellbeing and effectiveness, the member should be facilitated with appropriately reasonable and practicable temporary workplace accommodations in relation to his place of work.'*²⁹⁹ However these 'accommodations' were not identified at, or indeed after, the conference.

It was decided at the conference that C/Supt Dillane should meet Sgt Barry and inform him that Dr Kiely's recommendations could not be met *'on the basis of reasonability and practicability'*. Whilst there is a reference in the conference notes to putting in place *'suitable arrangements'* with Sgt Barry, in reality this could only refer to the sergeant agreeing to transfer from the Fermoy District. The meeting did not consider any other alternatives and none were identified.³⁰⁰

The following day, on 9th April 2013, Dr Oghuvbu wrote to Assistant Commissioner Fintan Fanning, Human Resource Management (HRM) with regard to Sgt Barry and stated, *inter alia*, that:

²⁹⁷ Tribunal Transcripts, Day 182, p. 39

²⁹⁸ Tribunal Documents, p. 390

²⁹⁹ Tribunal Documents, p. 199

³⁰⁰ Tribunal Documents, p. 390

1. *There are no compelling medical impairments to debar the member returning to work and policing duties.*
2. *Certain circumstances which are currently subject of Garda management processes are regarded as plausible stressors for the member at this time and this would impact on the member's sustained wellbeing and effectiveness. On this basis, facilitation with certain workplace accommodations has been recommended.*
3. *In the context of providing an agreeable safe and supportive workplace as has been recommended to foster the member's wellbeing and effectiveness (without prejudice to [the] outcome of the aforesaid processes), the member should be facilitated with appropriately reasonable and practical temporary workplace accommodations in relation to his place of work.³⁰¹*

Counsel for the tribunal asked Dr Oghuvbu about his view with regard to the conditions set out in Dr Kiely's medical certificate and whether he accepted them at the time; Dr Oghuvbu told the tribunal the following:

... I feel then that under health and safety considerations and the hierarchy of controls that ... go with that, you remove the person from the hazard or remove the hazard away from the person. So in that context, my understanding was that, you know, the person who was having difficulty had said, well, I can't work with this person, was Sergeant Barry, and so in that context the whole thing was to find an alternative means where he wouldn't have to work with Superintendent Comyns, and that would be for local management to determine because I wouldn't be very familiar in terms of the operational structures.³⁰²

On the same day Ms Monica Carr, Head of the HR Directorate, wrote on behalf of A/C Fanning to C/Supt Dillane and confirmed what had been discussed at the conference the day before and noted that:

The Chief Medical Officer has recommended that in the context of providing an agreeable supportive workplace to foster the members wellbeing and effectiveness, the member should be facilitated with appropriately reasonable and practicable temporary workplace accommodations in relation to his place of work.³⁰³

C/Supt Dillane was directed to meet with Sgt Barry and advise him of the contents of the letter. To this end C/Supt Dillane made enquiries in the District Office as to when Sgt Barry would next be on duty and was advised that he was due to resume duty at 21:00 hrs later that day.

C/Supt Dillane decided that he would call on Sgt Barry at Mitchelstown Garda Station at 21:00 hrs. It is not clear from the evidence why C/Supt Dillane invited Inspector Anthony O'Sullivan to the meeting. When giving evidence to the tribunal both officers resisted the suggestion that Insp O'Sullivan was there specifically to witness events.³⁰⁴ They arrived at Mitchelstown Garda Station shortly before 21:00 hrs.

Complaint made by Mr Barry

Sgt Barry arrived at Mitchelstown Garda Station to commence duty and observed C/Supt Dillane and Insp O'Sullivan sitting in a car in the car park. The garda station was closed to the public at the time.

³⁰¹ Tribunal Documents, p. 1541

³⁰² Tribunal Transcripts, Day 189, pp. 77-78

³⁰³ Tribunal Documents, p. 3877

³⁰⁴ Tribunal Transcripts, Day 184, pp. 28-38 and Day 186, pp. 179-180

Mr Barry told the tribunal that C/Supt Dillane was wearing a tunic and a Sam Browne belt, and he had a cap under his shoulder.³⁰⁵ He also told the tribunal that he believed on the night that he was being inspected by the officers. He explained that the main reason for his belief was that the officers had arrived unannounced, and that it would have been *'courteous'* for them to have informed him in advance that they were coming.³⁰⁶

In his evidence to the tribunal, Mr Barry described the visit as an *'ambush'*, and said that C/Supt Dillane had worn his full ceremonial uniform in order to intimidate him.³⁰⁷ In any event, all three went into the garda station and the meeting took place in the Sergeant's Office.

Mr Barry told the tribunal that the meeting was short, around ten minutes in duration.³⁰⁸ He recalled that C/Supt Dillane referenced the meeting he had with the CMO in Dublin on 8th April 2013 and asked Sgt Barry if he was aware of the contents of the report from Dr Oghuvbu. Sgt Barry informed C/Supt Dillane that he had already received the report and was familiar with the contents.

Mr Barry told the tribunal that because C/Supt Dillane had arrived in the company of Insp O'Sullivan, he informed the chief superintendent that he did not want to discuss any further matters unless he had his Association of Garda Sergeants and Inspectors (AGSI) representative present. He recalled that C/Supt Dillane agreed to his request and the meeting ended.

In his evidence, Mr Barry agreed that he was offered a transfer by C/Supt Dillane during the meeting but denied that he responded by saying that he was *'going nowhere'* and that Supt Comyns should be the person transferred.³⁰⁹ This will be explored later in the report.

Mr Barry complained to the tribunal that the only accommodation that was offered to him at this meeting was a transfer.³¹⁰ He further claimed that in all the circumstances he was targeted by C/Supt Dillane.

Retired Chief Superintendent Gerard Dillane

In his evidence to the tribunal, C/Supt Dillane denied that he was wearing his tunic and his Sam Browne belt when he visited Sgt Barry on 9th April 2013. He told the tribunal that the attire described by Sgt Barry was only worn by senior officers when attending court or ceremonial events.³¹¹ He recalled that he wore his ordinary uniform on the night, which he said he always wore whilst on duty.

C/Supt Dillane said that when he met Sgt Barry in the car park he greeted him and welcomed him back to work, and that all three of them went into the Sergeant's Office in the garda station.³¹² He said that he informed Sgt Barry that he had attended a case conference with the CMO the previous day and that any temporary workplace accommodation would have to be mutually agreed, but also reasonable and practicable.

³⁰⁵ Tribunal Transcripts, Day 176, p. 73

³⁰⁶ Tribunal Transcripts, Day 176, p. 72

³⁰⁷ Tribunal Transcripts, Day 176, p. 74

³⁰⁸ Tribunal Transcripts, Day 176, pp. 77-79

³⁰⁹ Tribunal Transcripts, Day 176, pp. 82-83

³¹⁰ Tribunal Transcripts, Day 178, pp. 149-151

³¹¹ Tribunal Transcripts, Day 184, pp. 28-31

³¹² Tribunal Transcripts, Day 184, p. 33

In his statement to the tribunal, C/Supt Dillane recalled that he told Sgt Barry that as far as he was concerned the conditions set out in Dr Kiely’s certificate could not be met as they were in his view unreasonable and impracticable.³¹³ He told Sgt Barry that Supt Comyns was appointed district officer for the Fermoy District by the Garda Commissioner and was in charge of the district in accordance with the Garda Síochána Code.

He told Sgt Barry that a district officer’s authority and responsibility could not be taken from him by Sgt Barry, Dr Kiely or any other person. C/Supt Dillane said he referred Sgt Barry to the Morris Tribunal report and the general statement that a superintendent cannot delegate his responsibility as district officer to any other person.³¹⁴

C/Supt Dillane told the tribunal that he asked Sgt Barry if he was complying with the superintendent’s instructions and Sgt Barry replied that he was. C/Supt Dillane then asked him if he had attended the daily briefings in Fermoy Garda Station and Sgt Barry replied that he had not, and cited the conditions on his medical certificate as justification for failing to do so.³¹⁵ He recalled that he pointed out to Sgt Barry that Supt Comyns was never in the station at 07:30 hrs or at 21:30 hrs when the briefings took place.

C/Supt Dillane told the tribunal that he explained to Sgt Barry the importance of the briefings for the policing of the district and expressed his opinion to Sgt Barry that he could not give the correct policing service to the people of Fermoy without conducting the briefings. He also told Sgt Barry that he believed Fermoy Garda Station and working with Supt Comyns was a safe working environment. However, he also told Sgt Barry that if he honestly felt it was not a safe working environment, he would respect his opinion.³¹⁶

In his evidence to the tribunal, C/Supt Dillane said that he advised Sgt Barry that he had the option under section 8.8 of the bullying and harassment policy document, *‘Working Together To Create a Positive Working Environment’*, to apply for a transfer, temporarily or permanently, to another station. He then offered Sgt Barry the opportunity to be facilitated at Cobh or Mallow Garda Stations, where there was a vacancy for a unit sergeant at the time, and he assured Sgt Barry that a transfer application would be given every consideration under the circumstances.³¹⁷ C/Supt Dillane explained to the tribunal what his offer of a transfer entailed and what he advised Sgt Barry:

... [W]hat I said to him is that, you see I couldn’t transfer him and I said we also had other vacancies in the division and we had a vacancy in Mallow and we had a vacancy in Cobh at the time. Now, I couldn’t tell him I was going to transfer him, but I just informed him that the vacancies were there. The option was in his court at this stage, he had the choice: Do you want to apply to go to one of these places, or do you want to stay and work with Superintendent Comyns?³¹⁸

In his statement to the tribunal, C/Supt Dillane quoted Sgt Barry as saying *‘I’m not taking that option, I’m going nowhere’* in response to his offer of a transfer.³¹⁹ C/Supt Dillane did not recall any discussion with Sgt Barry on the issue of whether a transfer would be at public or private expense.

³¹³ Tribunal Documents, p. 338

³¹⁴ Tribunal Documents, pp. 338-339

³¹⁵ Tribunal Transcripts, Day 184, pp. 35-36

³¹⁶ Tribunal Documents, p. 339

³¹⁷ Tribunal Documents, p. 339

³¹⁸ Tribunal Transcripts, Day 184, p. 37

³¹⁹ Tribunal Documents, p. 339

C/Supt Dillane told the tribunal that he tried to explain the complexity of the predicament to Sgt Barry but the sergeant accused him of trying to put him back into a situation that was at the time under investigation.³²⁰

C/Supt Dillane in his evidence to the tribunal summarised his meeting with Sgt Barry:

I went on to further say then that it was he invoked the bullying and harassment and that if he felt he couldn't work with him, he [had] a responsibility, I said, to the people of Mitchelstown, the people of Fermoy, to deliver a service and that, look, the option was in his court. What I was saying in a nutshell was, that you can stay here if you obey the directions. It's in black and white what the responsibilities of a superintendent are, and if you feel that you can't work with this person, well then there are options there, let's explore the options. His words were to me that he was going nowhere.³²¹

It is common case that the meeting ended when Sgt Barry requested time to consult with Inspector Michael Gallagher, his AGSI representative.

C/Supt Dillane was asked by his own counsel if Sgt Barry had responded to the offer of a transfer by stating that Supt Comyns was the 'one who had to go':

... [My] recollection is that night he just said, I'm going nowhere. I don't believe there was a reference to the super moving that night. That was only said to me on the October meeting in the car park.³²²

It should be noted that C/Supt Dillane wrote to the CMO on 12th April 2013, seeking clarification with regard to his advice.³²³ In the email C/Supt Dillane set out in some detail his meeting with Sgt Barry and referenced that he had requested Sgt Barry to reflect on the issue of a transfer and he quoted the sergeant as having replied that 'he was not going anywhere'. There was no reference to any mention of Supt Comyns by Sgt Barry.

C/Supt Dillane denied in cross-examination that he had targeted Sgt Barry by arriving unannounced at Mitchelstown Garda Station. He explained that he had received instructions from HRM to meet with Sgt Barry and had made enquiries as to when he was next on duty.³²⁴ He said he simply saw the sergeant at the first opportunity.³²⁵

It should be noted that on the same day, 9th April 2013, C/Supt Dillane wrote the following letter to Sgt Barry:

Taking into consideration your perception that you cannot work or attend Fermoy Garda Station or come into contact with Superintendent Michael Comyns it is not practical for you to work in Fermoy District at present. Pending the outcome of the current investigation and without prejudice, I am offering you the opportunity to be facilitated at Cobh Garda Station, where there is currently a vacancy for a member of Sergeant Rank.³²⁶

C/Supt Dillane requested a response from Sgt Barry before 15th April 2013, which was not forthcoming.

³²⁰ Tribunal Documents, p. 339

³²¹ Tribunal Transcripts, Day 184, p. 36

³²² Tribunal Transcripts, Day 185, pp. 95-96

³²³ Tribunal Documents, p. 393

³²⁴ Tribunal Transcripts, Day 185, p. 15

³²⁵ Tribunal Transcripts, Day 184, p. 32

³²⁶ Tribunal Documents, p. 3878

Inspector Anthony O’Sullivan

In his evidence to the tribunal, Insp O’Sullivan was unsure why he had been asked by C/Supt Dillane to attend the meeting on 9th April 2013. He was asked by counsel for the tribunal if C/Supt Dillane was wearing ceremonial attire that night. Insp O’Sullivan replied that he had:

... [seen] Superintendent Dillane only once with a Sam Browne belt on him and that was at the Kent memorial in 2016 in Castlelyons. So it wasn't. What I actually thought he had on was a blue shirt, what I would say half blue, and a blue anorak. Maybe he had a garda jumper. But we certainly weren't – what I class as full uniform is, you know, is full battle dress, there was no Sam Browne.³²⁷

In his statement to the tribunal, Insp O’Sullivan gave an account of the meeting on 9th April 2013, which largely coincided with that of C/Supt Dillane. However, when he came to give evidence at the tribunal he recalled that when Sgt Barry was offered a transfer he responded by saying the superintendent ought to go, or words to that effect. Counsel for Sgt Barry drew Insp O’Sullivan’s attention to the fact that he had not made any notes of the conversation and that C/Supt Dillane had made no reference in his notes or indeed in his evidence that Sgt Barry had responded by suggesting that the superintendent should go. However, Insp O’Sullivan remained convinced that some words had been spoken by Sgt Barry at the end of the meeting suggesting that the superintendent would have to ‘move’ or ‘go’.³²⁸

Insp O’Sullivan recalled in his evidence that when C/Supt Dillane offered Sgt Barry a transfer there was some discussion about whether this would be at public expense.³²⁹ As will be recalled, C/Supt Dillane did not believe that this issue had been discussed at the meeting. Counsel for Mr Barry asked the following:

Q. *The very last thing before we move on from this meeting, inspector, can we agree at least on this? There was definitely a discussion at that meeting about the transfer at public expense or a transfer at private expense?*

A. *There was.³³⁰*

Insp O’Sullivan stated that the meeting concluded when Sgt Barry asked that he be given an opportunity to consult with Insp Gallagher.

Finally, on 5th May 2013, Sgt Barry wrote a letter to the Assistant Commissioner, HRM in which he referred to his meeting with C/Supt Dillane and Insp O’Sullivan on 9th April 2013 and stated the following:

I don't believe that Chief Superintendent William Dillane is willing to offer anything other than a transfer and this is not acceptable to me for the following reasons. The Garda Policy on Bullying and Harassment provides that I can apply for a transfer to help me during the period of the investigation and this would be fine if we were only talking about bullying. I have made an allegation that the District Officer at Fermoy attempted to coerce me into perverting the course of justice ... It is because of his behaviour that I made this allegation as it is my duty within the law of the land to serve the whole community and protect the people whom I have proudly served for the past thirteen years, from all unlawful and harmful acts from whatever source.

I made my complaint as I believe that I have an obligation to be faithful to the principles of integrity and honour in the exercise of my duty. This obligation supersedes any perverted or

³²⁷ Tribunal Transcripts, Day 186, p. 180

³²⁸ Tribunal Transcripts, Day 186, pp. 181-183

³²⁹ Tribunal Transcripts, Day 186, pp. 183-184

³³⁰ Tribunal Transcripts, Day 187, p. 121

*misplaced loyalty in support or protection of any member of the Force whom I believe may be guilty of unethical or criminal behaviour. I can only protect this community I have proudly served for the last thirteen years by remaining in Mitchelstown. It is incumbent on me to see that the law of the land is upheld and that no member regardless of their rank, steps outside the limits of his/her authority.*³³¹

Legal Submissions

Mr Paul Barry submitted as follows:³³²

- that Mr Barry characterised this incident as an attempt to intimidate him. The evidence supported this and while there was a conflict about what C/Supt Dillane was wearing the uncontested matters were that:
 - C/Supt Dillane appeared unannounced even though previous meetings had been arranged for mutually suitable times. There was no explanation for this departure from previous practice.
 - C/Supt Dillane brought Insp O’Sullivan with him, no reason was given and this was a departure from previous practice.
 - C/Supt Dillane timed the meeting for when no one else would be present with Sgt Barry.
 - C/Supt Dillane waited in the car park for Sgt Barry to arrive.
 - C/Supt Dillane raised the issue of transfer again in the meeting.
- that these factors spoke to an attempt to intimidate Sgt Barry.
- that given the close proximity of the incident to the date C/Supt Dillane became aware of the protected disclosure, it could be inferred that this was an instance of targeting by C/Supt Dillane connected with the disclosure.

An Garda Síochána submitted as follows:³³³

- that the meeting on 9th April 2013 was an effort by C/Supt Dillane and Insp O’Sullivan to engage with Sgt Barry in addressing the medical certificate and was not an ‘inspection’ as claimed by Mr Barry in his personal injury claim and in evidence before the tribunal.
- that it was explained to Sgt Barry that his refusal to attend meetings at Fermoy Garda Station was not compatible with Supt Comyns’s authority and responsibility to manage the district. Sgt Barry was offered the option of a transfer and refused. C/Supt Dillane again sought the advice of the CMO.
- that nothing in the meeting of 9th April 2013 could be construed as anything but an attempt by a senior garda to resolve a difficult situation that was met with a blank refusal. There was no evidence of any attempt to target or discredit Sgt Barry in response to his protected disclosure.

³³¹ Tribunal Documents, pp. 195-196

³³² The tribunal has considered all of Mr Paul Barry’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

³³³ The tribunal has considered all of An Garda Síochána’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

Superintendent Michael Comyns submitted as follows:³³⁴

- that it was clear from the evidence of C/Supt Dillane and Insp O’Sullivan that this was not an issue that related to Supt Comyns. Supt Comyns had no role in this, and this was confirmed by Mr Barry in evidence.
- that there was no evidence of Supt Comyns targeting or discrediting Sgt Barry, or being party to any targeting or discrediting of Sgt Barry by An Garda Síochána.

Inspector Anthony O’Sullivan submitted as follows:³³⁵

- that Insp O’Sullivan and C/Supt Dillane both gave evidence that C/Supt Dillane was not in full uniform or wearing a Sam Browne belt.
- that Insp O’Sullivan denied Sgt Barry was inspected and that the meeting amounted to an ambush.

Conclusion

C/Supt Dillane came to Mitchelstown Garda Station on 9th April 2013, the day after a case conference at Garda Headquarters that was attended by Dr Oghuvbu at which it was agreed that he would speak to Sgt Barry about how the sergeant could be provided with reasonable accommodations. The chief superintendent knew that Sgt Barry was due to come on duty at 21:00 hrs and that would mean opening up the station.

The chief superintendent asked Insp O’Sullivan to accompany him and they waited in the station car park until the sergeant arrived. When he did so the officers went into the station and had a discussion in the Sergeant’s Office. The chief superintendent explained how he saw the conditions in the medical certificate as being impossible to comply with. He offered Sgt Barry a transfer to other stations in the division but the sergeant was not happy to accept either offer and said that he was going nowhere. After a discussion lasting approximately ten minutes, the sergeant terminated the meeting by saying that he would not proceed further without the presence of his AGSI representative.

Mr Barry claims that he was ambushed, that he was inspected, that the chief superintendent was in full dress uniform including Sam Browne belt and that Insp O’Sullivan was present to be a witness to what was said. In this way he says he was targeted.

Nothing happened at this meeting. There was no agreement. The chief superintendent and Sgt Barry are agreed that the latter said that he was going nowhere. Insp O’Sullivan gave evidence that the sergeant also said that the superintendent would have to go but Sgt Barry denied saying that and the chief superintendent did not recall it. Nothing turns on this point. It could be that the inspector is mistaken and may perhaps have misremembered because he reached the conclusion that Sgt Barry was saying he was going nowhere, which meant that the superintendent would have to be moved. But on any interpretation, whether Sgt Barry said it or did not say it does not matter.

It is true that the chief superintendent could have notified Sgt Barry in advance of his intention to come to the station to discuss the situation following the case conference and the report of Dr Oghuvbu, which Sgt Barry had seen. He could have come alone rather than in the company of Insp O’Sullivan. It could be argued that making the arrangement would have been more polite and that it would have been preferable if he came alone. But these are minor criticisms and not everybody would agree with them.

Even if C/Supt Dillane brought the inspector along as a witness to what happened, it is difficult to condemn that as being offensive behaviour or as constituting targeting.

The suggestion of targeting in this instance is unjustified.

³³⁴ The tribunal has considered all of Superintendent Michael Comyns’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

³³⁵ The tribunal has considered all of Inspector Anthony O’Sullivan’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 62-64

CHAPTER 8

ISSUE 3.H: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE REPORTING OF THE HOUSE FIRE ON 9TH APRIL 2013

Issue 3.h of the Schedule of Issues

Did Supt Michael Comyns and/or C/Supt Gerard Dillane target or discredit Sgt Barry as he alleges because he had made a protected disclosure –

(b) by making implicit criticism of Sgt Barry including requiring him to make a report in respect of a fatal fire that occurred on 9th April 2013?

Background

Following the meeting with Chief Superintendent Gerard Dillane and Inspector Anthony O’Sullivan on the night of 9th April 2013, Sergeant Paul Barry and his colleagues Garda Henry Ward and Garda John J Wall were called to attend at an incident involving a house fire in the Fermoy District.

Garda Wall created a PULSE Incident Summary Report recording that the occupant of the house was fatally injured in the fire and pronounced dead at 23:50 hrs. It was also recorded that the deceased was taken to the Mid-Western Regional Hospital for a post-mortem examination and that ‘*scene preserved and soc requested, no offences detected*’. Garda Ward was recorded as the investigating garda with the assisting members recorded as Garda Padraic Barrett, Garda Vincent Guerin, Sgt Paul Barry and Garda Denise Fitzgerald.³³⁶

Garda Ward completed a Form C71 (Report to Coroner) and submitted this to the coroner and the District Office the following day, 10th April 2013. This form outlined details of the deceased and the circumstances of the case including a description of the scene. It listed persons who may have been in a position to give evidence and identified the physician who attended the scene.³³⁷

The tribunal heard evidence of the contacts between the personnel concerned on the night of the incident and the following day. Mr Barry said that he was present when Garda Ward called Insp O’Sullivan on two occasions.³³⁸ In his evidence to the tribunal, Insp O’Sullivan accepted that maybe there were two calls on the night, one at 22:45 hrs and one at 23:50 hrs.³³⁹ Garda Ward stated in a subsequent report, referenced below, that he was in regular contact with Insp O’Sullivan that night and the following morning.³⁴⁰

Superintendent Michael Comyns said that he was contacted by Insp O’Sullivan on the night of the incident at 22:42 hrs. He said that they spoke again the following morning at 07:49 hrs and later that day at 12:44 hrs. He notified C/Supt Dillane of the incident at 08:06 hrs on 10th April 2013.³⁴¹

³³⁶ Tribunal Documents, p. 409

³³⁷ Tribunal Documents, p. 5697

³³⁸ Tribunal Documents, p. 141

³³⁹ Tribunal Transcripts, Day 187, p. 26

³⁴⁰ Tribunal Documents, p. 5341

³⁴¹ Tribunal Documents, pp. 731-732

The Reporting of Critical Incidents

An issue subsequently arose as regards the reporting of the incident in accordance with the directions of the Deputy Commissioner, Operations dated 2nd August 2012. By email to all assistant commissioners, the Deputy Commissioner, Operations directed as follows:

In compliance with the directions of Deputy Commissioner, Operations all critical incidents will be reported to the Office of Deputy Commissioner, Operations by Regional Offices within 30 minutes of the incident occurring. Such reports will be made as follows,

During normal office hours (7.30am to 6.30pm Mon to Fri) critical incidents will be notified by phone to Superintendent Fergus Dwyer, Operations at [landline telephone number].

Outside office hours a brief summary of such incidents will be text to Superintendent Dwyer on [mobile telephone number].

Following the initial notification a full report on the incident, signed by relevant District Officer, Acting District Officer or Superintendent on Call, will be forwarded by the relevant Regional Office to Operations via email before 8.15a.m. on the following day.³⁴²

This email was forwarded by Assistant Commissioner Anthony Quilter to every divisional officer on 3rd August 2012 and, on the same day, C/Supt Dillane sent these directions to each superintendent and inspector in the Cork North Division stating that strict compliance was required.³⁴³

Supt Comyns circulated the directions by email to every sergeant in the Fermoy District on 5th August 2012 stating that each sergeant was to ensure that all critical incidents occurring within the Fermoy District were to be notified to Supt Comyns or Insp O'Sullivan immediately after they occur. He stated that this was for 'immediate compliance'.³⁴⁴

The Aftermath of the Incident

On 11th April 2013, C/Supt Dillane wrote to Supt Comyns and, referring to A/C Quilter's direction, said that:

Communication from this office dated 3rd August 2012 (copy attached) clearly states that a report on all critical incidents should be reported to the Regional Office within 30 minutes of the incident occurring with a follow up report submitted to the Regional Office by 8.15am the following morning.

This was not adhered to in this case and I require a full explanation as to why this direction was not complied with in respect of this incident.³⁴⁵

In his evidence to the tribunal, Mr Barry said that he did not agree with this letter, which he viewed as suggesting that the 30-minute notification should have been submitted by him.³⁴⁶ In his statement to the tribunal, C/Supt Dillane said that the contact with the Regional Office was never an issue and that the problem was that there was no proper report submitted as directed by

³⁴² Tribunal Documents, p. 735

³⁴³ Tribunal Documents, p. 734

³⁴⁴ Tribunal Documents, p. 5710

³⁴⁵ Tribunal Documents, p. 147

³⁴⁶ Tribunal Transcripts, Day 176, p. 89

the Regional Office.³⁴⁷ In reply to a Memorandum of Questions posed by the tribunal investigator, Supt Comyns recalled that C/Supt Dillane was contacted and the incident reported to the Regional Office. He said that the issue was the report.³⁴⁸

Supt Comyns wrote to the sergeant in charge the following day and stated that he had not received a report on the fatal fire and that he had to rely on the PULSE record and the Form C71 when details of the fire were requested.³⁴⁹ This was forwarded for the attention of Garda Ward, who replied by report dated 16th April 2013.

Garda Ward reported that he did not have the opportunity to create a report on the matter as he was working until 07:00 hrs on 10th April 2013 and had resumed duty at 09:00 hrs to go to Limerick for the post-mortem examination for the incident. He said that he was available on his mobile phone at all times if there were any issues in relation to the incident, and that he had regular contact with Insp O’Sullivan on the night in question and also on the morning and afternoon of the post-mortem examination.³⁵⁰

Supt Comyns responded on 19th April 2013, stating that a sergeant and five gardaí had attended at the scene and a full explanation was required as to why the report was not completed and forwarded before the end of the tour of duty.³⁵¹ Sgt Barry replied on 29th April 2013 and said that he had requested Garda Ward to complete a detailed report on the Form C71 and leave a copy of it for the district officer at Fermoy.³⁵²

Supt Comyns reported to C/Supt Dillane on 8th May 2013. He enclosed Sgt Barry’s response and stated that he would not make any comment/recommendation in relation to the matter due to the ongoing investigation.³⁵³ This was a reference to the bullying and harassment investigation being carried out by Chief Superintendent Catherine Kehoe.

C/Supt Dillane responded on 10th May 2013. He said that, in future, he expected a comprehensive report by the working sergeant to be submitted in line with A/C Quilter’s directions.³⁵⁴

Complaint made by Mr Barry

In his statement to tribunal investigators, Mr Barry said that:

Garda Ward completed a Form C71, which is a report to the Coroner and the District Officer. On the Form C71, all relevant information is included and it is a comprehensive report of the incident. Garda Ward notified Inspector O’Sullivan of this fire and Inspector O’Sullivan was aware that I and Garda Ward were at the scene of the fire dealing with same. The Regional Office in Fermoy is supposed to notify the Deputy Commissioner of Operations of any serious incident that takes place. Inspector O’Sullivan failed to notify the Deputy Commissioner’s Operations office, and Superintendent Comyns then sent out a report questioning why I had not requested Garda Ward to submit a report on the fire and why the Deputy Commissioner of Operations was not informed of the incident by me. I had

³⁴⁷ Tribunal Documents, p. 5635

³⁴⁸ Tribunal Documents, p. 5404

³⁴⁹ Tribunal Documents, p. 146

³⁵⁰ Tribunal Documents, p. 5341

³⁵¹ Tribunal Documents, p. 144

³⁵² Tribunal Documents, p. 145

³⁵³ Tribunal Documents, p. 143

³⁵⁴ Tribunal Documents, p. 142

requested Garda Ward to submit a report. The incident had been reported by Garda Ward to Inspector O’Sullivan, who ought to have instructed the Regional Office to notify the Deputy Commissioner of Operations. I believe this unwarranted questioning of my work was a deliberate attempt to target me, even though I had done everything I was legally obliged to do on the night. I believe I was targeted in this instance by Superintendent Comyns and Chief Superintendent Gerard Dillane, as I had to submit a report to both of them addressing the questions raised by Superintendent Comyns, even though there was nothing that I should have had to report for. ... The direction that I submit a report detailing aspects of how I dealt with the fatal fire on the night, I believe, was an attempt to target me by erroneously suggesting I did not carry out my duty correctly.³⁵⁵

In his evidence to the tribunal, Mr Barry said that Garda Ward completed the Form C71 and that he was to forward a full report afterwards, which he did.³⁵⁶ He disagreed with the views of Supt Comyns and Insp O’Sullivan that it was his duty to provide the report.³⁵⁷ He asserted, in respect of the 30-minute report, that the Divisional Office would pass it on to the Regional Office.³⁵⁸ In respect of the full report, he claimed that the obligation was on the investigating garda, in this case Garda Ward.³⁵⁹ He did not accept that it was the obligation of the duty sergeant.³⁶⁰

Mr Barry told his own counsel that there was compliance with the email from Supt Comyns dated 5th August 2012 as Garda Ward made two phone calls to Insp O’Sullivan on the night ‘to notify him of what was happening’.³⁶¹

Mr Barry was asked by counsel for An Garda Síochána whether his superiors were entitled to investigate whether there was a gap in the process. He replied that:

Well I didn’t believe there was a gap. There was a report submitted.

Q. But if they did believe there was a gap –

A. Well they’re entitled to believe that.

Q. They are entitled?

A. Absolutely, yes.

Q. I’m saying in this case that’s all they did?

A. That’s perfect.³⁶²

³⁵⁵ Tribunal Documents, pp. 37-38

³⁵⁶ Tribunal Transcripts, Day 176, p. 94

³⁵⁷ Tribunal Transcripts, Day 176, p. 97

³⁵⁸ Tribunal Transcripts, Day 176, p. 95

³⁵⁹ Tribunal Transcripts, Day 176, p. 96

³⁶⁰ Tribunal Transcripts, Day 176, p. 96

³⁶¹ Tribunal Transcripts, Day 181, p. 131

³⁶² Tribunal Transcripts, Day 179, pp. 124-125

Superintendent Michael Comyns

Supt Comyns told the tribunal that the direction dated 3rd August 2012 was not a new direction. He explained that *‘[a]s long as I am in An Garda Síochána, if an incident happens, once upon a time called a significant incident, now called a critical incident, the members at the scene would be expected to complete a report for the district officer’*. He claimed that this was in line with Garda Síochána Code 33.10 and that it was the responsibility of the sergeant on duty at the particular time to ensure that the report was submitted and *‘always has been’*.³⁶³

Supt Comyns accepted that he had not noticed that a report was not submitted for his approval and signature and therefore he was not in compliance with the direction.³⁶⁴

It was his evidence that the author of the report really did not matter but that it was Sgt Barry’s responsibility to ensure that a report was sent.³⁶⁵ He said that the details on the Form C71 and the PULSE record would not have been detailed enough to send a report to the Regional Office.³⁶⁶ He claimed that he did not have the full information that was required.³⁶⁷

He accepted that A/C Quilter’s direction did not refer to a report being submitted by the duty sergeant but said that it was a *‘long built up practice that the working sergeant would ensure a report was submitted, for years and years’*.³⁶⁸

Retired Chief Superintendent Gerard Dillane

In his statement to the tribunal, C/Supt Dillane stated that Sgt Barry was the only sergeant working on the night and that he should have taken charge of the investigation and ensured that the matter was reported according to standing protocols in the Southern Region.³⁶⁹ He said that a Form C71 would never have been used to satisfy the obligations of reporting matters to the Regional Office.³⁷⁰

In his evidence to the tribunal, he recounted that he decided not to take any action on the matter, saying that was the way he dealt with things.³⁷¹ When cross-examined by counsel for Mr Barry, he said that he had been a member of An Garda Síochána for 40 years and it was the sergeant’s responsibility to ensure that the job was done.³⁷² He referred to his letter to Supt Comyns dated 10th May 2013,³⁷³ and said that he had drawn a line under the matter and, moving forward, that was what he wanted done.³⁷⁴

Inspector Anthony O’Sullivan

In his evidence to the tribunal, Insp O’Sullivan said that he did not make the 30-minute report on the night of the incident and he was unable to assist the tribunal as to who made these notification reports outside of office hours in the normal course and/or who made the notification on the night in question.³⁷⁵

³⁶³ Tribunal Transcripts, Day 182, pp. 45-46

³⁶⁴ Tribunal Transcripts, Day 182, pp. 46-47

³⁶⁵ Tribunal Transcripts, Day 182, p. 49

³⁶⁶ Tribunal Transcripts, Day 182, p. 50

³⁶⁷ Tribunal Transcripts, Day 183, p. 61

³⁶⁸ Tribunal Transcripts, Day 182, p. 53

³⁶⁹ Tribunal Documents, p. 341

³⁷⁰ Tribunal Documents, p. 5635

³⁷¹ Tribunal Transcripts, Day 184, p. 40

³⁷² Tribunal Transcripts, Day 185, p. 17

³⁷³ Tribunal Documents, p. 142

³⁷⁴ Tribunal Transcripts, Day 185, pp. 23-24

³⁷⁵ Tribunal Transcripts, Day 187, pp. 10-11

In respect of the report the following morning, he accepted that he did not sign any such report on the morning of 10th April 2013.³⁷⁶ It was his evidence that the report of the working unit would be read, signed off and forwarded by the working sergeant.³⁷⁷ He said that:

*... when that e-mail came out from the assistant commissioner, it went out to the inspectors, that would be sent on to the sergeants, they discuss it at the weekly PAF meetings, the superintendent when he comes in in the morning expects to have that report on his desk, whether marked urgent or not.*³⁷⁸

He told counsel for Mr Barry that the Form C71 was ‘*a total separate entity*’.³⁷⁹

Legal Submissions

Mr Paul Barry submitted as follows:³⁸⁰

- that C/Supt Dillane accepted in evidence that his letter of 11th April 2013 was an express criticism of Supt Comyns, who should have had a system in place for the reporting of critical matters. Supt Comyns agreed that the letter was a criticism of him rather than his subordinates.
- that on receiving the letter, Supt Comyns wrote to the sergeant in charge seeking an immediate and full explanation as to why a report was not forwarded. Garda Ward replied, and Supt Comyns followed up with a handwritten note, which he accepted appeared to have been directed at Sgt Barry. Sgt Barry replied to this note, reporting that he had requested Garda Ward to complete a detailed Form C71 and leave a copy for the District Office in Fermoy. Supt Comyns sent this report to C/Supt Dillane, who replied that he noted Sgt Barry’s report and in future expected a comprehensive report to be submitted by the working sergeant. This in turn was furnished by Supt Comyns to the sergeant in charge and then to Sgt Barry.
- that the letter of 10th May 2013 involved criticism by C/Supt Dillane of Sgt Barry as it suggested that Sgt Barry failed to comply with his duty under the minute of A/C Quilter dated 3rd August 2012. This was a baseless criticism in circumstances where the minute of A/C Quilter imposed no requirement on the working sergeant to submit a report.
- that the failure to comply with the minute was a failure by Supt Comyns, as it was ultimately his responsibility to send a report to the Divisional Office and he did not do so. Supt Comyns accepted he should have spotted the issue earlier and arranged for a report to be obtained.
- that rather than accept that the fault rested with him, Supt Comyns suggested that Sgt Barry was responsible and when sending on Sgt Barry’s report said that ‘*due to the ongoing investigation*’ he would not comment. The implication of this was that Sgt Barry was responsible for the failure to comply with the minute.

³⁷⁶ Tribunal Transcripts, Day 187, p. 12

³⁷⁷ Tribunal Transcripts, Day 187, p. 15

³⁷⁸ Tribunal Transcripts, Day 187, p. 91

³⁷⁹ Tribunal Transcripts, Day 187, p. 91

³⁸⁰ The tribunal has considered all of Mr Paul Barry’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

- that when giving evidence C/Supt Dillane, Supt Comyns and Insp O’Sullivan all made the point that whilst the minute did not impose an obligation on him, Sgt Barry was obliged as the working sergeant to ensure that the report was submitted. C/Supt Dillane said that Sgt Barry was not required to do the report, but was responsible for ensuring that it was done.
- that it was stated by the three witnesses that this was long-standing garda practice. This did not appear to be a requirement set out in the Garda Síochána Code. Supt Comyns made reference to Garda Síochána Code 33.10 as the basis for obligation. However, this provision does not impose any reporting obligation on a sergeant.
- that even if this was long-standing garda practice, two points arose. First, the criticism in C/Supt Dillane’s letter was that Sgt Barry should have submitted a report and failing to do so placed him in breach of A/C Quilter’s minute. All the witnesses accepted that this minute imposed no such obligation and that there was no obligation on Sgt Barry to submit the report himself. The second point was the extent to which Sgt Barry was under an obligation to ensure that a report was submitted. Sgt Barry could not be criticised as in his evidence he said he had instructed Garda Ward to complete a report. Garda Ward completed the Form C71 and was to complete a full report later, but did not do so due to work commitments. Supt Comyns had ample information to compile the report and Sgt Barry should not be criticised.
- that the implicit criticism levelled against Sgt Barry in relation to reporting the fatal fire incident was unfounded and was made shortly after it came to light that Sgt Barry had made a protected disclosure. The criticism levelled at Sgt Barry amounted to targeting and/or discrediting of Sgt Barry arising from the disclosure.

An Garda Síochána submitted as follows:³⁸¹

- that on 11th April 2013, C/Supt Dillane wrote to Supt Comyns seeking a *‘full explanation’* as to why a report on the incident had not been sent in compliance with a circular of August 2012 from the Assistant Commissioner, Southern Region.
- that it was difficult to see how a query of this nature could be construed as targeting, much less targeting in response to a protected disclosure. A garda circular was not complied with and C/Supt Dillane did no more than query with Supt Comyns why this was the case.
- that it should not be automatically assumed that merely because a district or divisional officer raised a query, or sought an explanation, that this equated to personalised criticism or targeting in any way.

Superintendent Michael Comyns submitted as follows:³⁸²

- that the request for a report was made by C/Supt Dillane to Supt Comyns, who required an explanation as to why the directions of the Assistant Commissioner, Southern Region were not complied with. This request was made to Supt Comyns and then referred to the sergeant in charge. This was normal management procedure in accordance with the chain of communication in An Garda Síochána and not a criticism or a request for a report from Sgt Barry.

³⁸¹ The tribunal has considered all of An Garda Síochána’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

³⁸² The tribunal has considered all of Superintendent Michael Comyns’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

- that the evidence of C/Supt Dillane, Supt Comyns and Insp O’Sullivan was that it was a long-standing practice that the working sergeant on duty at the time of a critical incident was responsible for ensuring that a report was provided.
- that there was no implicit criticism of Sgt Barry; he was not required to make a report, but to ensure that such a report was provided.
- that there was no evidence of Sgt Barry being targeted or discredited and no evidence of Supt Comyns targeting or discrediting Sgt Barry or being a party to targeting or discrediting of Sgt Barry by An Garda Síochána.

Conclusion

C/Supt Dillane wrote a letter to Supt Comyns in relation to a fatal fire that occurred on 9th April 2013 referring to standard protocols that were laid down in directions given by the Deputy Commissioner, Operations on 2nd August 2012. The particular issue concerned a report that the directions required to be submitted by the superintendent to the Regional Office. The letter was an implicit criticism of the superintendent for failing to comply with the protocols.

Sgt Barry and five gardaí attended at the fire. The incident was recorded on PULSE and Garda Ward also made out a report for the coroner: the Form C 71. However, the full report referred to in the directions was not completed. Supt Comyns referred the letter from the chief superintendent to Sgt Barry for his attention and reply. He was the senior member on duty at the critical incident.

The point that the chief superintendent and the superintendent made was that it was not sufficient to record the case on PULSE and to prepare the Form C 71 and to keep the inspector notified of the investigation on the site as it proceeded. All of those things had been done on this occasion but what was lacking was the full report.

It was not necessarily the obligation of Sgt Barry on the occasion to prepare the full report himself, but the contention was that it was his responsibility as the senior member to ensure that the full report was prepared and submitted if it was done by somebody else.

C/Supt Dillane’s letter to Supt Comyns was to the effect that in future he expected a comprehensive report by the working sergeant to be submitted in accordance with the directions.

The tribunal considers that this was a relatively routine issue arising in a disciplined police force. A specific issue was raised and it appears that the Operations Directive had not been complied with by the investigating team comprising Sgt Barry and five gardaí in that the requirement to forward a full report on the incident was not fulfilled. Sgt Barry sought to demonstrate that ample information was available through Insp O’Sullivan but that was not compliance.

It is also the case that the observations of C/Supt Dillane were directed to Supt Comyns so it can be more accurately regarded as a criticism of him.

Irrespective of the technicalities of the case, the correspondence concerned a specific protocol that the chief superintendent maintained had not been observed and it was referred to Sgt Barry because he was the senior member of the investigating team. The mere fact that he was involved in this way does not suggest that it was targeting.

The tribunal is satisfied that this was an ordinary workaday issue which is fully explained and from which no question of targeting can be inferred.

CHAPTER 9

ISSUE 5.G: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE REFUSAL OF HIS APPLICATION FOR ANNUAL LEAVE

Issue 5.g of the Schedule of Issues

Did Supt Comyns target or discredit Sgt Barry as he alleges because he made a protected disclosure –

(a) by refusing to authorise his annual leave application in May 2013?

Background

Mr Paul Barry, in his original statement to the tribunal dated 20th February 2019,³⁸³ referred to the refusal of his application for annual leave from 3rd July 2013 to 9th July 2013 and from 13th July 2013 to 19th July 2013 as targeting and he referred to 30 documents in relation to this.³⁸⁴

Mr Barry said:

As per attached and my application dated 26/5/2013 I asked Patricia Gould the clerical officer attached to Mitchelstown Garda Station to place my leave sheet in an envelope and address it to Inspector O Sullivan. Patricia Gould contacted me crying to say she was abused by Inspector O Sullivan for doing so and that my leave was to go through Superintendent Comyns. Superintendent Comyns obviously wanted to take personal charge of my application for leave. On the 3/4/2013 Superintendent Comyns wrote on my application to carry over annual leave that “due to previous allegations made by Sergeant Barry I believe it is not appropriate for me to put a recommendation on this application” yet he took personal command of my application for a family holiday from Inspector O Sullivan on the 20/5/2013. He ruined my family holiday with his vindictive behaviour and by his own admission he did not provide adequate cover for Unit B during my absence as on his report dated 16/08/2013. It is the responsibility of the District Officer to provide adequate supervision during my absence and he failed to do so. Sergeant Dunne in his report dated 22/07/2013 states “Both Sgt Quinn and I tried to explain this to the District Officer but to no avail”.³⁸⁵

This is also described in Mr Barry’s interview with tribunal investigators.³⁸⁶

Sgt Barry put in an Annual Leave Application Form D.9, seeking annual leave, *inter alia*, from 3rd to 9th July 2013 and from 13th to 19th July 2013.³⁸⁷ In his report of 26th May 2013, he explained that he had been on annual leave from 7th May 2013 to 24th May 2013 and had taken his leave sheet home as he intended to book a holiday in July 2013. He subsequently booked his holiday from 2nd to 25th July 2013. Mr Barry said that on 14th May 2013 he drove to Mitchelstown Garda Station with his annual leave sheet, where he handed it to Ms Patricia Gould, the Station Clerk. He said that:

³⁸³ Tribunal Documents, p. 322

³⁸⁴ Tribunal Documents, pp.151-180

³⁸⁵ Tribunal Documents, p. 151

³⁸⁶ Tribunal Documents, p. 39

³⁸⁷ Tribunal Documents, p. 176

*I asked her to place my leave sheet in an envelope addressed to Inspector O'Sullivan, Fermoy. I made my application well in advance and did not know that Sergeant Andrew Geary was already on leave.*³⁸⁸

Superintendent Michael Comyns signed the Form D.9 on 17th May 2013 refusing Sgt Barry's application for leave for those dates in July due to the fact that Sergeant Andrew Geary, also Unit B, had already been granted annual leave for those dates.³⁸⁹ This was forwarded to the Sergeant's Office in Mitchelstown for Sgt Barry's information.

Supt Comyns had, on the same date, 17th May 2013, granted annual leave for other dates sought by Sgt Barry on the Form D.9 and had also, on the same date, granted a request from Sgt Barry to have an earlier date of annual leave cancelled, i.e. 19th May 2013, as it fell on a rest day for Sgt Barry.³⁹⁰ Sgt Barry sought, in his report of 26th May 2013, a reconsideration of his application for the July leave on the following basis:

*As a result of my Leave being refused both Sergeant Jeremiah Quinn and Sergeant Aidan Dunne have offered to help cover my absence. Sergeant Quinn has stated that he is willing to work a later shift on the 7th and 8th of July if required. As most of the leave I applied for involved day shifts I believe there would be someone available either in Fermoy or Mitchelstown to cover these. I apologise for any inconvenience caused and ask that my application be reconsidered.*³⁹¹

Supt Comyns, by a report dated 28th May 2013, replied to Sgt Barry's report of 26th May 2013 and stated:

In order to reconsider this application I require Sergeant Barry to set out for each date applied for the name of the Sergeant who will detail Unit B and who will supervise the Unit during their tour of duty.

Sergeant Barry is also requested to sign for his amended leave on the 20th May 2013.

*A quick reply would be appreciated so that this matter can be adjudicated on without delay.*³⁹²

A reply by Sgt Barry was forwarded by the sergeant in charge at Mitchelstown Garda Station on 30th May 2013 to Supt Comyns. This reply indicated, in respect of each date sought, that in relation to the parading of members '*[i]n the absence of a Sergeant at parade senior Garda present will detail unit B*'. In respect of supervision it identified for each date in sequence the names of sergeants who were said to be willing to provide supervision or cover if required. It concluded by saying:

*With reference to Sunday 7th of July and Monday 8th of July Sergeant Gerry Quinn is willing to alter his shift to provide cover at night if required. I have had to cover both Cobh and Mallow Districts on a number of occasions when there was no Sergeant working in them and I am sure that they would provide the same cover if required. I did not sign for the 20/05/2013 as this is a rest day for me.*³⁹³

³⁸⁸ Tribunal Documents, p. 173

³⁸⁹ Tribunal Documents, p. 174

³⁹⁰ Tribunal Documents, p. 175

³⁹¹ Tribunal Documents, p.173

³⁹² Tribunal Documents, p. 172

³⁹³ Tribunal Documents, pp. 170-171

Supt Comyns responded on 10th June 2013 stating, *inter alia*, that:

There are two Sergeants attached to Unit B. One, Sergeant Geary, already has leave granted. In order to sanction Sergeant Barry's leave I require him to get a Sergeant to detail his Unit and provide supervision. If this application was for one or two days Sergeant Barry's suggestion of a senior Garda detailing the Unit may be feasible, however this application refers to a two week period involving twelve tours of duty.

*Annual Leave cannot be granted to Sergeant Barry unless he gets a Sergeant to cover his duties.*³⁹⁴

Sgt Barry did not respond to Supt Comyns with a list of sergeants who would detail the unit on parade in the mornings, but instead wrote on 16th June 2013 to Chief Superintendent Gerard Dillane referring to the fact that he had contacted his Association of Garda Sergeants and Inspectors (AGSI) representative, Inspector Michael Gallagher, who had suggested that the decision of the district officer should be appealed to the chief superintendent. Sgt Barry stated that he had answered all queries in relation to his leave and it was still being refused. He had a family holiday booked at considerable expense to him and his family and he was, accordingly, appealing this decision to refuse his leave.³⁹⁵

C/Supt Dillane sent a reply, directed not to Sgt Barry but to Supt Comyns, on 19th June 2013. This stated that:

The attached correspondence from Sergeant Paul Barry, Mitchelstown in connection with the above was found on the floor of the Divisional Office, Fermoy, on the morning of Monday the 17th June 2013 apparently having been left under the door the previous night.

*Sergeant Barry should be informed that appropriate channels should be utilised to forward such correspondence to this office.*³⁹⁶

This was forwarded to Sgt Barry for his information. Sgt Barry expressed his wish to have his appeal forwarded through the sergeant in charge at Mitchelstown to the divisional officer at Fermoy Garda Station and he attached correspondence from the airline indicating that the holiday had been booked on 10th May 2013.³⁹⁷ This was forwarded to C/Supt Dillane with a handwritten endorsement from Supt Comyns forwarding the appeal and stating:

*As with all members in Fermoy District if Sgt Barry can arrange some cover for his absence this leave will be granted.*³⁹⁸

C/Supt Dillane, by memo dated 3rd July 2013, directed to Supt Comyns, stated that having considered the attached application he approved Sgt Barry's annual leave on the condition that adequate cover was arranged for the period of his absence.³⁹⁹ Sgt Barry had in fact taken his leave by this time, on 2nd July 2013.

³⁹⁴ Tribunal Documents, p. 169

³⁹⁵ Tribunal Documents, p. 168

³⁹⁶ Tribunal Documents, p. 167

³⁹⁷ Tribunal Documents, pp. 165-166

³⁹⁸ Tribunal Documents, p. 164

³⁹⁹ Tribunal Documents, p. 163

C/Supt Dillane’s decision to approve Sgt Barry’s application on condition that adequate cover was arranged was returned to the sergeant in charge at Mitchelstown by Supt Comyns for his information and that of Sgt Barry with a request to provide details of the adequate cover arranged during Sgt Barry’s period of absence.⁴⁰⁰ Sergeant Aidan Dunne replied to Supt Comyns on 11th July 2013.⁴⁰¹ He referred to Sgt Barry’s earlier report with regard to cover and provided some detail of the cover provided by Sergeants Jeremiah (Jerry) Quinn and Liam Kelleher, but also pointed out that Sgt Barry had incorrectly stated that Sgt Dunne or Sergeant James Hallinan would be working on 13th July 2013, which was not the case as they were to be on rest days.

Supt Comyns replied to the sergeant in charge saying that he needed to know what sergeant was supervising Unit B on each date. A list of names was not adequate. Sgt Quinn replied on 16th July 2013 informing Supt Comyns that Sgt Hallinan would cover Unit B on 15th/16th July 2013 and Sgt Quinn would endeavour to cover Unit B on his working days as he overlapped from 15th to 19th July 2013.⁴⁰²

Supt Comyns subsequently replied on 18th July 2013, to the effect that he still did not know who supervised Unit B between 3rd July and 19th July 2013. He made a request for details of this supervision to be provided, as had been requested by C/Supt Dillane on 3rd July 2013.⁴⁰³ This latter request was forwarded to Sgt Barry for his report on his return from the Sergeant’s Office in Mitchelstown.⁴⁰⁴ This report also stated that *‘Both Sgt Quinn and [Sgt Dunne] tried to explain this to the District officer but to no avail’*. Sgt Barry, on his return, replied to this request in the following terms:

*With reference to above I would like to thank the Divisional Officer for granting my leave. I cannot comment on cover arranged for my absence as I was not in the country for that period. Forwarded for your information and attention please.*⁴⁰⁵

This report of Sgt Barry of 7th August 2013 was forwarded to the chief superintendent by Supt Comyns, which also stated *‘Unit B Fermoy District were not adequately supervised during Sergeant Barry’s period of absence’*.⁴⁰⁶ This was duly noted by the chief superintendent on 27th August 2013, who returned Sgt Barry’s annual leave file to the District Office in Fermoy.

Complaint made by Mr Barry

In his evidence to the tribunal, Mr Barry said that the normal practice was that if there was no cover then you would not take leave. He told the tribunal that:

The normal practice would be that the superintendent would provide cover. I can’t allocate a sergeant to cover. But I asked sergeants to change and accommodate me, my own two sergeants in Mitchelstown especially.

...

They were agreeable to change their shifts to accommodate me on those dates.

⁴⁰⁰ Tribunal Documents, p. 163

⁴⁰¹ Tribunal Documents, p. 161

⁴⁰² Tribunal Documents, p. 162

⁴⁰³ Tribunal Documents, p. 162

⁴⁰⁴ Tribunal Documents, p. 160

⁴⁰⁵ Tribunal Documents, p. 160

⁴⁰⁶ Tribunal Documents, p. 159

Q. *Well, did it not come down to some dates that you couldn't identify any particular sergeant to provide cover for?*

A. *It did come down to one or two dates I think.*

Q. *Yes. Ultimately it went to Chief Superintendent Dillane on the basis of a recommendation from Superintendent Comyns that annual leave could be granted subject to cover and you weren't able to identify, correct me if I am wrong, who would cover for those particular dates?*

A. *No.*⁴⁰⁷

Mr Barry accepted that he still took his leave on 2nd July 2013.⁴⁰⁸ He agreed that his original report to Supt Comyns did not identify specifically who would be providing cover.⁴⁰⁹

In relation to the assertion that nothing had happened to suggest that this was a form of targeting, Mr Barry said he believed it was.⁴¹⁰ He explained to the tribunal that this was because:

*... no matter what I supplied or what Sergeant Dunne or Sergeant Quinn said, he was still not accepting the explanations given. It had to go to Chief Superintendent Dillane to see reason and grant my leave.*⁴¹¹

When cross-examined by counsel for Supt Comyns as to who covered his shifts, Mr Barry said that that was a matter for Supt Comyns.⁴¹² He acknowledged that the chief superintendent granted his leave on the condition that there was cover provided. Mr Barry said that he could not provide cover, but that he did everything he could to find it. He agreed that he did not succeed.⁴¹³

In re-examination by his own counsel, Mr Barry confirmed that at that point in time there was no fixed system put in place that he would have to deal only with Inspector Anthony O'Sullivan and that all his communications were directed to go through the superintendent.⁴¹⁴ He was referred to a portion of Sgt Dunne's statement, which said that '*... I did speak to the superintendent about the issue, explaining that I believed that there was enough cover to facilitate the application for leave, save one day, July 13th, 2013*' and asked the following:

Q. *Does that coincide with your understanding of what was going on?*

A. *... I believe it came down to one day in the end, yes.*⁴¹⁵

Superintendent Michael Comyns

In his evidence to the tribunal, Supt Comyns said that there is no problem with leave in An Garda Síochána. For members of the rank of sergeant upwards the issue is who will cover your responsibilities while you are on leave.⁴¹⁶ He confirmed that he refused Sgt Barry's application for

⁴⁰⁷ Tribunal Transcripts, Day 176, p. 141

⁴⁰⁸ Tribunal Transcripts, Day 176, p. 142

⁴⁰⁹ Tribunal Transcripts, Day 176, p. 145

⁴¹⁰ Tribunal Transcripts, Day 176, p. 145

⁴¹¹ Tribunal Transcripts, Day 176, p. 145

⁴¹² Tribunal Transcripts, Day 180, p. 138

⁴¹³ Tribunal Transcripts, Day 180, p. 139

⁴¹⁴ Tribunal Transcripts, Day 181, pp. 113-114

⁴¹⁵ Tribunal Transcripts, Day 181, pp. 117-118

⁴¹⁶ Tribunal Transcripts, Day 182, p. 67

leave but told him that it would be granted once Sgt Barry could tell him the name of the sergeant who would supervise the unit on each of the dates applied for. Based on the reports that went back and forth, Supt Comyns was not happy that Sgt Barry had assigned a sergeant who was covering for him on a number of the dates.⁴¹⁷

Supt Comyns stated that what he was looking for was one sergeant for every tour of duty. If there were one or two tours of duty where the unit was not fully covered, he would accept that; but this was twelve tours of duty over a two-week period.⁴¹⁸ He was asked by counsel for the tribunal why he had pursued the matter after Sgt Barry had taken his leave. He replied that:

As the superintendent in charge of the district, I had a unit across the district now, not just the six members that Sergeant Barry was supervising, but all the members in the Fermoy and other stations south of the river on unit B, who were working with no sergeant on their unit, no one detailing them, and if anything should happen when those members were working, a serious incident that wasn't dealt with properly or, God forbid, some[thing] happening to one of the members, it's me who would be questioned about giving two sergeants leave and having no sergeant supervising the unit. That was going to come back on me and that was a risk that I saw.⁴¹⁹

He rejected the allegation of targeting because Sgt Barry had made a disclosure of alleged wrongdoing and stated that all he was asking for was the name of the sergeant who would cover while Sgt Barry was on leave. He said that he had a district to run and manage and that is what he was endeavouring to do in this case.⁴²⁰

In cross-examination by counsel for Mr Barry, Supt Comyns confirmed that Sgt Dunne spoke to him about cover for Sgt Barry, but disagreed that he was told that there would be cover for Sgt Barry to take leave at that time. He said that Sgt Dunne told him *'[i]t will be alright, if anything happens we'll cover it'* or *'[s]ome words to that effect'*.⁴²¹ Supt Comyns said that it was his view that when Insp O'Sullivan saw the way the application had been submitted i.e. put into his post box, he thought it should have gone to the District Office where it would be dealt with immediately, because he, Insp O'Sullivan, said that he did not go to his post box for days at a time.⁴²² Supt Comyns did not agree that Sgt Dunne's report of 11th July 2013 demonstrated that there was simply one day when there was no cover.⁴²³ He said that the report from Sgt Dunne did not provide any comfort to him because there was no cover on a lot of dates and the letter only referred to two dates that were covered.⁴²⁴

Supt Comyns stated that the reasonable way to solve this problem was to give him the name of the sergeant who would be covering the unit for each date, and he maintained that although he had asked the question as to who actually provided cover, he never found out.⁴²⁵

⁴¹⁷ Tribunal Transcripts, Day 182, pp. 67-68

⁴¹⁸ Tribunal Transcripts, Day 182, p. 69

⁴¹⁹ Tribunal Transcripts, Day 182, p. 70

⁴²⁰ Tribunal Transcripts, Day 182, p. 71

⁴²¹ Tribunal Transcripts, Day 183, p. 74

⁴²² Tribunal Transcripts, Day 183, p. 81

⁴²³ Tribunal Documents, p. 161

⁴²⁴ Tribunal Transcripts, Day 183, pp. 83-84

⁴²⁵ Tribunal Transcripts, Day 183, p. 88

Retired Chief Superintendent Gerard Dillane

C/Supt Dillane noted that Sgt Barry’s appeal was found on the floor of the Divisional Office and that it had been pushed under the door sometime after the office had been vacated on the previous Friday. He took a view as to the manner in which it had been communicated to him and sent it back.⁴²⁶ He asked for it to be sent through the correct channels. When asked whether he decided to allow Sgt Barry’s appeal, he said that he agreed with the superintendent that once there was cover provided, Sgt Barry could take his annual leave, so, effectively, it was granted on the same condition that Supt Comyns had applied to it.⁴²⁷

Inspector Anthony O’Sullivan

Insp O’Sullivan gave evidence as to the way in which leave was granted in the superintendent’s office. He explained that the leave application had to come into the superintendent’s building upstairs and putting it anywhere else would result in a delay in the application being received and considered.⁴²⁸ If, for example, the leave sheet arrived on the superintendent’s desk on a Monday morning, it would be dealt with early in the morning and the leave would be recorded.⁴²⁹

Insp O’Sullivan told the tribunal that he found Sgt Barry’s leave sheet on 5th April 2013 in the Public Office, applying for leave from that morning. He sent the superintendent’s report saying that he had granted leave for 4th and 5th April 2013 retrospectively, but that if it had been submitted in accordance with the district officer’s instructions he would have had to refuse it because Sgt Dunne was already on leave.⁴³⁰ Insp O’Sullivan also explained that he could only grant annual leave if he was the acting superintendent.⁴³¹ He said that the only dates he refused were 15th and 16th April 2013. Shortly after that he arrived at Fermoy Garda Station, and he again found a leave sheet in his post box. He stated that he was frustrated with that and he probably took it up to the District Office because he could not grant the leave or, more than likely, he put it in an envelope for the district officer.⁴³² He told the tribunal that:

I didn’t examine the leave sheet that came in that evening again because I was disappointed probably that it was back coming in again the same way. I didn’t examine how many days leave was in it and I believe I either sent it to the superintendent’s office or put it in an envelope. In actual fact, I removed my postbox afterwards because it was causing me difficulty.⁴³³

The statement of Ms Gould was put to Insp O’Sullivan.⁴³⁴ He told the tribunal that:

I cannot grant annual leave and basically I did tell Ms. Gould, please stop addressing the leave sheet to me, because it was causing me difficulties, in the sense that Mr. Barry might be without his leave, like I explained earlier, because it was not sent in the day it went in,

⁴²⁶ Tribunal Transcripts, Day 184, pp. 52-53

⁴²⁷ Tribunal Transcripts, Day 184, p. 54

⁴²⁸ Tribunal Transcripts, Day 187, p. 29

⁴²⁹ Tribunal Transcripts, Day 187, p. 30

⁴³⁰ Tribunal Transcripts, Day 187, pp. 30-31

⁴³¹ Tribunal Transcripts, Day 187, p. 31

⁴³² Tribunal Transcripts, Day 187, pp. 37-38

⁴³³ Tribunal Transcripts, Day 187, p. 38

⁴³⁴ Tribunal Documents, p. 1390

*and two or three sergeants could have got in for leave in the meantime while that sat in my postbox in the public office, while I could have been in Mallow or Middleton doing some job or report for the chief.*⁴³⁵

He explained that:

*I remember saying to Ms. Gould that Paul Barry had to comply with the regulations and the code with Mr. Comyns in relation to annual leave. I definitely said that. What she said to me was, I am going to take directions from Sergeant Barry ... I said, that's fine, I'm going to take my postbox. And that's what I did. I had to remove my postbox. Because I said, if Mr. Barry sent in another envelope next week, there was no postbox there, the chances are it would wind up in the super's post and it would be opened. That's what happened that day. And I was disappointed after sending out the instruction, being as nice as I could and I had repetition within a month again.*⁴³⁶

Insp O'Sullivan denied that he had verbally abused Ms Gould.⁴³⁷

In cross-examination by counsel for Mr Barry, Insp O'Sullivan confirmed that he was not told by Supt Comyns in April 2013 that he was to deal with leave applications made by Sgt Barry because of the fact that Supt Comyns was being investigated by Chief Superintendent Catherine Kehoe.⁴³⁸ When asked about his interaction with Ms Gould, Insp O'Sullivan said he did not abuse her; he said that he specifically told her that Sgt Barry must comply with the regulations laid down by the superintendent.⁴³⁹ He said there was no doubt that he said that Sgt Barry should comply with the instructions of Supt Comyns, but he did not believe he was 'raving'.⁴⁴⁰ He said that he did not process the May 2013 leave application and had nothing to do with it.⁴⁴¹

Retired Sergeant Aidan Dunne

Sgt Dunne gave evidence that Sgt Barry was, through him, requested by Supt Comyns to provide evidence that he had adequate cover for the period of time for which he had applied for annual leave. He identified the report put in by Sgt Barry indicating the cover that he had.⁴⁴²

He confirmed that Sgt Barry was not complying with Supt Comyns's practice whereby a unit would parade for duty at Fermoy Garda Station, either for the morning shift or later for the evening shift, for the purpose of being briefed and then briefing his own unit in Fermoy.⁴⁴³

He confirmed that he provided Sgt Barry with Supt Comyns's later instruction,⁴⁴⁴ whereby he was required to get a sergeant to detail his unit and provide supervision.⁴⁴⁵ He identified his own report dealing with the periods that were covered or not covered.⁴⁴⁶

⁴³⁵ Tribunal Transcripts, Day 187, p. 39

⁴³⁶ Tribunal Transcripts, Day 187, p. 40

⁴³⁷ Tribunal Transcripts, Day 187, p. 41

⁴³⁸ Tribunal Transcripts, Day 187, p. 129

⁴³⁹ Tribunal Transcripts, Day 187, pp. 133-134

⁴⁴⁰ Tribunal Transcripts, Day 187, p. 134

⁴⁴¹ Tribunal Transcripts, Day 187, p. 135

⁴⁴² Tribunal Transcripts, Day 188, pp. 102-103

⁴⁴³ Tribunal Transcripts, Day 188, pp. 103-104

⁴⁴⁴ Tribunal Documents, p. 755

⁴⁴⁵ Tribunal Transcripts, Day 188, p. 105

⁴⁴⁶ Tribunal Documents, p. 161

When asked whether he saw anything unusual in the superintendent's request that he should be informed of the exact cover that would be in existence during Sgt Barry's proposed leave, Sgt Dunne said *'looking at it there, it looks [like] there was a lot, but to be fair, he was the same with everyone'*.⁴⁴⁷ He said *'with all of the paperwork it probably is a little of a standout, but it wouldn't have been unusual'*.⁴⁴⁸

When cross-examined by counsel for Mr Barry, Sgt Dunne confirmed that he was supportive of Sgt Barry's leave application and that he and Sgt Quinn had made efforts to facilitate Sgt Barry so that he could take up that leave.⁴⁴⁹ He agreed that Sgt Barry's assertion in his report of 26th May 2013 that *'[a]s a result of my leave being refused both Sergeant Jeremiah Quinn and Sergeant Aiden Dunne have offered to help cover my absence'* was accurate.⁴⁵⁰ He confirmed that he did have a conversation with Supt Comyns outlining that in his view there was sufficient cover to facilitate Sgt Barry's leave application save for one day in July.⁴⁵¹ He said that he could not recall the details of that verbal conversation.

Sgt Dunne agreed with counsel for An Garda Síochána that in practical terms, as far as 13th July 2013 was concerned, it would have meant that there was no sergeant working on his unit and agreed that it was clearly a situation that had to be addressed.⁴⁵²

Sergeant Jeremiah (Jerry) Quinn

Sgt Quinn confirmed that he offered himself as being available to provide some cover for Sgt Barry for the purposes of his annual leave and that he spoke with Sgt Dunne, who was his direct superior and the sergeant in charge of Mitchelstown Garda Station, and they sent a report in writing to the District Office to that effect.⁴⁵³ He told the tribunal that:

*Sergeant Barry would have been a colleague, we would have shared one office and we would try and facilitate each other with changes in duty or hours if something cropped up. And it was kind of just what another colleague would do for someone else.*⁴⁵⁴

Legal Submissions

Mr Paul Barry submitted as follows:⁴⁵⁵

- that Supt Comyns's letter of 10th June 2013 requiring Sgt Barry to *'get a Sergeant to detail his Unit and provide supervision'* amounted to a further refusal and resulted in Sgt Barry lodging an appeal to C/Supt Dillane in respect of the decision to refuse leave.

⁴⁴⁷ Tribunal Transcripts, Day 188, p.106

⁴⁴⁸ Tribunal Transcripts, Day 188, pp. 106-107

⁴⁴⁹ Tribunal Transcripts, Day 188, p. 112

⁴⁵⁰ Tribunal Transcripts, Day 188, p. 112

⁴⁵¹ Tribunal Transcripts, Day 188, p. 113

⁴⁵² Tribunal Transcripts, Day 188, pp. 116-117

⁴⁵³ Tribunal Transcripts, Day 189, p. 41

⁴⁵⁴ Tribunal Transcripts, Day 189, pp. 41-42

⁴⁵⁵ The tribunal has considered all of Mr Paul Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

- that Sgt Dunne gave evidence that he spoke to Supt Comyns in support of Sgt Barry's leave application and that he believed there was enough cover. Sgt Dunne's view on adequacy of cover should be given particular weight, as he was sergeant in charge of Mitchelstown Garda Station.
- that Supt Comyns disagreed with Sgt Dunne's account of the conversation. However, Sgt Dunne's account was credible and it was difficult to see what basis he would have for misrepresenting the nature of the conversation.
- that Sgt Quinn gave evidence that he would provide cover to facilitate Sgt Barry's holidays and informed Sgt Dunne that he would change tours to enable Sgt Barry to obtain leave.
- that Sgt Barry was targeted by Supt Comyns because his application for leave was handled unfairly and unreasonably. Sgt Dunne had assured Supt Comyns that there was sufficient cover. Supt Comyns could have granted some of the leave; instead there was a refusal of all twelve days.
- that this occurred at the same time as other unusual behaviour shortly after Supt Comyns became aware of the first protected disclosure; the inference arises that it was connected with Sgt Barry's protected disclosure.
- that Sgt Barry provided a list of named sergeants who would supervise Unit B on the days he proposed to take leave. Supt Comyns disregarded this.
- that regarding who would detail the parade duty of the unit in Fermoy Garda Station, this was at a time when Sgt Barry was precluded from attending Fermoy Garda Station for this purpose and was not doing so at the time.
- that it must also be considered how Supt Comyns came to deal with the annual leave application. Sgt Barry's April 2013 leave was dealt with by Insp O'Sullivan, who suggested in evidence that this may have occurred because he was acting superintendent on the day. Supt Comyns said it was '*pure chance*' in April 2013. However, this is contradicted by the letter dated 19th April 2013 from Supt Comyns to C/Supt Dillane, which referred to the leave application and said that due to the '*ongoing investigation*' he did not deal with the application. This indicated a conscious decision to have Insp O'Sullivan deal with the matter. In his statement, Supt Comyns said that he delegated the application to Insp O'Sullivan.
- that there is a question over how Supt Comyns came to deal with the May 2013 application, given the fact that C/Supt Kehoe's investigation was still ongoing. The only explanation offered was that Insp O'Sullivan was probably not working. This was incorrect as the evidence was that the leave application was received by Insp O'Sullivan and rather than process it he placed it in Supt Comyns's pigeonhole and had words with Ms Gould.
- that the inference was that Supt Comyns initially decided it would be inappropriate for him to deal with Sgt Barry's leave applications, but then made a conscious decision to resume direct control over same. His motivation for this was questioned.

- that in a letter dated 16th August 2013 from Supt Comyns to C/Supt Dillane, Supt Comyns reported that Unit B had not been adequately supervised during Sgt Barry's absence. This letter was an unqualified criticism of Sgt Barry and suggested that there was inadequate cover for the entirety of the time he was on leave. This was despite the report provided by Sgt Barry. Such criticism of Sgt Barry provided a valuable insight into Supt Comyns's attitude.

Superintendent Michael Comyns submitted as follows:⁴⁵⁶

- that it was normal practice in An Garda Síochána for cover to be arranged when a unit sergeant was taking leave. Supt Comyns requested Sgt Barry to confirm that cover was provided for the leave dates to ensure that Unit B were supervised and managed for the period. Sgt Barry's report did not meet this requirement and Supt Comyns informed Sgt Barry that the leave was refused as there was no cover in place.
- that Sgt Barry made representations to C/Supt Dillane, who approved the leave application on condition that adequate cover was arranged, which was what Supt Comyns had required.
- that Sgt Barry on his return from leave was unable to confirm who had covered Unit B in his absence.
- that Supt Comyns's actions were part of the normal management of his district and had no connection to the alleged or any protected disclosure made by Sgt Barry. This could not objectively be viewed as targeting or discrediting of Sgt Barry by An Garda Síochána.

Conclusion

Sgt Barry's complaint under this head is that Supt Comyns unreasonably refused his application for annual leave.

The evidence and documentation make it clear that the established practice for all sergeants was that leave was granted in a manner that was intended to ensure that there was always cover by a sergeant for each unit. If a sergeant assigned to a unit was scheduled for annual leave, another sergeant seeking leave would have to show that he had a colleague of similar rank available for his period of leave.

Supt Comyns applied this procedure to Sgt Barry's application. The evidence as to the available cover was not clearly set out so as to demonstrate that there was actually a sergeant available for Sgt Barry's unit during the time when he was going to be on holiday. This was the specific requirement that he had to comply with and the fact is that he did not do so.

When the superintendent refused the application on the specific ground that Sgt Barry had not demonstrated that there was cover by a sergeant, Sgt Barry appealed to C/Supt Dillane, who confirmed that the leave would be granted on condition of cover.

Sgt Barry went on leave anyway, which makes his complaint about refusal of leave puzzling to say the least. Even more curious is his suggestion that this refusal constituted targeting. The evidence is that the system that was applied in this case was the same as with other sergeants.

⁴⁵⁶ The tribunal has considered all of Superintendent Michael Comyns's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

When Mr Barry was asked by counsel for Supt Comyns to say who covered his shifts, he said that would be a matter for the superintendent. He accepted that the chief superintendent granted the leave on condition that cover was provided and he said that he could not provide cover but he did everything he could to find it. He agreed that he did not succeed.

Mr Barry knew what the rules were before he organised his family holiday.

In circumstances where he knowingly failed to comply with rules that were the same for him as for the other sergeants and proceeded to take his leave anyway, the suggestion that this is an instance of targeting is unfounded.

CHAPTER 10

ISSUE 4.H AND ISSUE 5.B: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE INITIATION OF THE DISCIPLINE INVESTIGATION FOR TAKING *FORCE MAJEURE* LEAVE

Issue 4.h of the Schedule of Issues

Did C/Supt Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- (b) *by sanctioning discipline proceedings against Sgt Barry in respect of emergency family leave between 15th and 17th April 2013?*

Issue 5.b of the Schedule of Issues

Did Supt Comyns target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- (b) *by initiating discipline proceedings under Regulation 14 of the An Garda Síochána (Discipline) Regulations 2007 against Sgt Barry in respect of emergency family leave – “force majeure leave” – between 15th April and 17th April 2013?*

Background

On the occasion of Sergeant Paul Barry’s visit to his general practitioner on 28th March 2013 it was noted by Dr Margaret Anne Kiely that Sgt Barry intended to use his annual leave, insofar as possible, to avoid being on duty in any circumstances where it might place him in contact with Superintendent Michael Comyns.⁴⁵⁷ He subsequently applied, on 29th March 2013, to be allowed to carry over his annual leave from the previous leave year.⁴⁵⁸ This application was forwarded through the Sergeant’s Office to the Superintendent’s Office in Fermoy and to the Chief Superintendent’s Office.⁴⁵⁹

On 7th May 2013, Chief Superintendent Gerard Dillane approved Sgt Barry’s application to carry over 34 days’ annual leave from 2012/2013 to 2013/2014.⁴⁶⁰

In the interim, Sgt Barry submitted an application in relation to annual leave on Form D.9, which included, *inter alia*, seeking annual leave for 4th and 5th April 2013 and from 15th to 17th April 2013.⁴⁶¹ He stated that he had ‘... asked Patricia Gould the clerical officer attached to Mitchelstown Garda Station to place my leave sheet in an envelope and address it to Inspector O’Sullivan’.⁴⁶² He wrote to Inspector Anthony O’Sullivan on 10th April 2013 seeking confirmation as to whether the leave had been granted or not.⁴⁶³ Insp O’Sullivan replied in writing on 12th April 2013 as follows:

⁴⁵⁷ Tribunal Transcripts, Day 188, p. 42

⁴⁵⁸ Tribunal Documents, p. 178

⁴⁵⁹ Tribunal Documents, p. 179

⁴⁶⁰ Tribunal Documents, p. 177

⁴⁶¹ Tribunal Documents, pp. 152-153

⁴⁶² Tribunal Documents, p. 151

⁴⁶³ Tribunal Documents, p. 152

Re: Annual Leave Application for various dates between 04.04.2013 and 15.06.2013

With reference to the above, I received your Form D9 on 04.04.2013 at 4pm in public office, Fermoy Garda Station. Annual Leave applications must be submitted 16 days in advance to the District Office. Leave is not granted until signed off by the District Officer or Acting District Officer.

Had I received your application in advance of 04.04.2013 I would have refused the dates 4th and 5th April bearing in mind Sgt Aidan Dunne, i/c, Mitchelstown was already on Annual Leave. I have sanctioned both dates retrospectively in the circumstances bearing in mind your recent return to work.

I have sanctioned all other dates with the exception of 15th and 16th April 2013 due to Sgt i/c, Mitchelstown being already on Annual Leave.

Re-submit your application for 17.04.2013.

I attach copy of Supt. Comyns Guidelines in relation to new roster which includes Annual Leave issues.⁴⁶⁴

These guidelines state, *inter alia*, that '[a]ll Annual Leave applications must be submitted 16 days in advance and must be forwarded through the Duty Sergeant with a recommendation. Leave is not granted until signed off by the District Officer or Acting District Officer'.⁴⁶⁵

This reflects the provision at section 11.3 of the Garda Síochána Code.⁴⁶⁶ Insp O'Sullivan stated that prior to sending this written reply he phoned Sgt Barry to explain why he was refusing some of the annual leave sought. The contents of this conversation were a matter of dispute between Mr Barry and Insp O'Sullivan when they each gave evidence to the tribunal, with Mr Barry maintaining that in the course of this phone call he had indicated to Insp O'Sullivan that if he did not appear for duty on 15th April 2013, it was because he would be taking *force majeure* leave to look after his wife.⁴⁶⁷ Insp O'Sullivan denied this.⁴⁶⁸

No re-application for leave for 17th April 2013 was submitted, as had been suggested in Insp O'Sullivan's minute of 12th April 2013. Sgt Barry did not appear for duty on 15th, 16th or 17th April 2013, as he had been scheduled to do. Sgt Barry maintained later, when interviewed by the deciding officer, Superintendent Patrick Lehane, and in his evidence to the tribunal, that he had phoned Mitchelstown Garda Station on the morning of 15th April 2013 to inform members that he would not be appearing for duty.⁴⁶⁹

Force Majeure

Force majeure is provided for under the Parental Leave Act, 1998. The provisions of this are dealt with in HQ Circular 05/2010,⁴⁷⁰ and at section 11.25 of the Garda Síochána Code, which provides as follows:

⁴⁶⁴ Tribunal Documents, p. 154

⁴⁶⁵ Tribunal Documents, p. 155

⁴⁶⁶ Tribunal Documents, pp. 3256-3257

⁴⁶⁷ Tribunal Transcripts, Day 176, p. 132

⁴⁶⁸ Tribunal Transcripts, Day 187, pp. 50-51

⁴⁶⁹ Tribunal Documents, p. 1349, Tribunal Transcripts, Day 176, p. 130

⁴⁷⁰ Tribunal Documents, p. 4432

11.25 Force Majeure Leave

- (1) *The Parental Leave Act, 1998 also gives all members a right to limited time off for family emergencies caused by accident or illness (Force Majeure Leave). Force Majeure leave is paid and is separate from Parental Leave.*
- (2) *Force Majeure leave is limited to a maximum of 3 days in any 12 consecutive months or 5 days in any 36 consecutive month period. The leave covers situations where, owing to an injury to or the illness of a close family member, the immediate presence of the member is indispensably required at the place where the family member is.*
- (3) *“Family member” is defined as the following:
Child, spouse or a person with whom the member is living as husband or wife, a person to whom the member is in loco parentis, brother or sister, parent or grandparent.*
- (4) *A member who takes Force Majeure leave should, as soon as reasonably practicable thereafter, complete Form FM 1 and forward it through the normal channels of communication to the District Officer. Each District Officer/Superintendent should ensure that Parental Leave and Force Majeure leave is monitored accurately and recorded on Form D 5.⁴⁷¹*

Sgt Barry signed a Form FM1 on 18th April 2013, which stated:

I have availed of Force Majeure Leave as provided by section 13 of the Act for the following reason(s):

Owing to an illness and injury my immediate presence was required in the family home to look after my wife and family, and as such I was indispensable.⁴⁷²

He stated that the dates of force majeure leave were 15th, 16th and 17th April 2013.⁴⁷³ Supt Comyns reported to C/Supt Dillane on 19th April 2013 that he had received the notice of force majeure leave. He stated that:

Sergeant Barry had applied for Annual Leave on the 15th, 16th and 17th April 2013 along with numerous other dates. Due to the ongoing investigation by Chief Superintendent Kehoe I did not deal with this application. The Annual Leave for the 15th and 16th of April 2013 was refused as Sergeant Dunne, i/c Mitchelstown was already on Annual Leave. Inspector O’Sullivan who refused the leave attached an explanatory report which is attached to this report. Inspector O’Sullivan also telephoned Sergeant Barry and explained why the Annual Leave was refused to him.

On the 15th, 16th and 17th April 2013 Sergeant Barry did not report for duty. Neither Inspector O’Sullivan or I were contacted nor had we any idea why Sergeant Barry was not at work. Again due to the ongoing investigation I could not perform my duty as District Officer in relation to a member who at that time as far as I was concerned was absent without leave.

Sergeant Barry’s notice of Force Majeure Leave now explains his absence for the three dates in question but in my opinion contact should have been made with Inspector O’Sullivan on the 14th/15th April to explain this absence.

Forwarded for your information.⁴⁷⁴

⁴⁷¹ Tribunal Documents, p. 3269

⁴⁷² Tribunal Documents, p. 188

⁴⁷³ Tribunal Documents, p. 188

⁴⁷⁴ Tribunal Documents, p. 746

The Initiation of a Discipline Investigation

Having received Supt Comyns's report, C/Supt Dillane decided, on 27th May 2013, to have the matter investigated under the Garda Síochána (Discipline) Regulations, 2007 and he appointed Supt Lehane as the deciding officer under Regulation 14 to investigate the alleged breach as set out on the Form I.A.11.⁴⁷⁵ This was copied to the Chief Superintendent, Internal Affairs and Supt Comyns for their information. The brief details of the acts or conduct alleged stated:

*It is alleged that Sergeant Paul Barry, ... Mitchelstown Garda Station failed to report for duty on 15th, 16th and 17th of April 2013 having been refused Annual Leave and made no contact with the District Officer at Fermoy to explain his absence during the period in question.*⁴⁷⁶

Supt Lehane served the Notice of Interview on Sgt Barry on 14th September 2013, indicating that he intended to interview him on 3rd October 2013 at Mitchelstown Garda Station.⁴⁷⁷ Accompanying this, in Section B, was the breach of discipline alleged. This alleged a single breach of discipline:

*It is alleged that you Sergeant Paul Barry, ... of Mitchelstown Garda Station were absent from duty on Force Majeure Leave on the 15th, 16th and 17th April 2013 and that you were negligent in your duty in that you failed to make contact with or otherwise inform the District Officer or his staff to explain your absence during the period in question.*⁴⁷⁸

Accompanying this Notice were statements made to Supt Lehane by Supt Comyns and Insp O'Sullivan.⁴⁷⁹ The interview with Sgt Barry was conducted on 14th October 2013 in the presence of his Association of Garda Sergeants and Inspectors (AGSI) representative, Inspector Michael Gallagher.⁴⁸⁰ Arising from Sgt Barry's explanation that he had phoned Mitchelstown Garda Station on the morning of 15th April 2013, Supt Lehane took four further statements from the members on duty on that morning, each of whom confirmed that they had no recollection of Sgt Barry phoning or speaking to them on that day in relation to the matter.⁴⁸¹ Supt Lehane completed Section D of the relevant form on 17th October 2013, finding that Sgt Barry was not in breach and providing reasons in his formal report of interview. Having referred to section 11.25(4) of the Garda Síochána Code, Supt Lehane stated:

The primary legislation and Code regulations are silent on the issue of advance notification by personnel that intend to avail of Force Majeure Leave.

I have researched this issue extensively. The most valuable advice came from the Labour Relations Commission. The advice of the Commission is as follows:

By the very nature of Force Majeure Leave notice cannot be given but there is an obligation on an employee who takes this leave to, as soon as practicable thereafter to inform his/her employer in the prescribed form.

*On the basis of my investigation and research and information from the Labour Relations Commission I found that the member was not in breach of discipline.*⁴⁸²

⁴⁷⁵ Tribunal Documents, p. 422

⁴⁷⁶ Tribunal Documents, p. 4515

⁴⁷⁷ Tribunal Documents, p. 4518

⁴⁷⁸ Tribunal Documents, pp. 4518-4519

⁴⁷⁹ Tribunal Documents, pp. 4506-4507

⁴⁸⁰ Tribunal Documents, pp. 4512-4513

⁴⁸¹ Tribunal Documents, pp. 4508-4511

⁴⁸² Tribunal Documents, pp. 4523-4524

Supt Lehane wrote to C/Supt Dillane on 17th October 2013 enclosing his formal report under the Regulations.⁴⁸³ He summarised his enquiries and concluded:

While it is inconceivable that an employee in particular a member of An Garda Síochána could absent himself/herself from their work on Force Majeure Leave without notifying their authorities in advance, or during the absence, the legislation and the Garda Code Regulations make no reference to a requirement to give advance notice. On that basis I found that the member was not in breach of discipline and on the 16th of October 2013 I notified him of my decision. He acknowledged receipt of same.⁴⁸⁴

Supt Lehane also suggested that section 11.25 of the Garda Síochána Code be amended to require personnel to give advance notice to their line manager when they intended to avail of *force majeure* leave, or, if that was not possible, to give notice during absence on *force majeure* leave.⁴⁸⁵

C/Supt Dillane forwarded Supt Lehane's report to Supt Comyns on 22nd October 2013,⁴⁸⁶ and Supt Comyns duly notified Sgt Barry formally of the outcome on 24th October 2013.⁴⁸⁷

Complaint made by Mr Barry

In his statement of complaint to the tribunal, Mr Barry said that:

Superintendent Comyns manufactured a reason to discipline me when I was not in breach of any law or code. Chief Superintendent Dillane doubled on this false allegation and appointed Superintendent Lehane to investigate me. When Inspector O'Sullivan contacted me in relation to my leave application I explained to him that my wife was suffering from chronic back pain and was receiving physiotherapy during February, March and April and that I had to be there to look after her and my three children.

The alleged breach of discipline occurred in April and yet Superintendent Comyns waits until August to make his false allegation. I supplied phone records to prove I rang Fermoy Garda Station at 10.59pm on 15/04/2013 to inform that I was taking force majeure and that I rang the Sergeants Office at Mitchelstown on the 18/04/2013 at 10.22am to report that I was finished taking force majeure. There was no obligation on me to make these calls, but I did. ... This was yet another blatant act of targeting/discrediting.⁴⁸⁸

Mr Barry had earlier provided the tribunal with a copy of his email to the Garda Commissioner dated 28th November 2018 in which he had stated:

Superintendent Comyns manufactured a false reason to have me subjected to a disciplinary investigation by a Superintendent from another District. As his complaint was malicious he didn't succeed in his action.⁴⁸⁹

⁴⁸³ Tribunal Documents, p. 4502

⁴⁸⁴ Tribunal Documents, p. 4503

⁴⁸⁵ Tribunal Documents, p. 4504

⁴⁸⁶ Tribunal Documents, p. 191

⁴⁸⁷ Tribunal Documents, p. 190

⁴⁸⁸ Tribunal Documents, p. 323

⁴⁸⁹ Tribunal Documents, pp. 63-67

In his interview with tribunal investigators, Mr Barry described the phone calls referred to above and the sequence of events, and concluded by stating his belief that Supt Comyns had manufactured a reason to discipline him. He also claimed that there were no grounds, legally or within the Garda Síochána Code, for Supt Comyns to do so and that it was done out of pure malice and in order to target him.⁴⁹⁰

In his evidence to the tribunal, Mr Barry said that when Insp O’Sullivan rang him to explain why he was refusing leave for those dates, he told him that his wife had been suffering from chronic back pain for a couple of months and that he was taking his leave on his early tours just in case she had a recurrence as he was the only one at home to take the children to college or school at the time. Mr Barry stated that if his wife was not sick, he would have gone to work. He confirmed that he did not appear for duty on 15th, 16th or 17th April 2013 and that this was due to *force majeure* leave. He signed the form for that leave on 18th April 2013.⁴⁹¹

When asked by counsel for the tribunal about Supt Comyns’s report on this, and why he did not phone Insp O’Sullivan, Mr Barry said that he contacted the garda station to report it and that he had supplied phone records to an investigating officer to show that he had done so. He pointed out that he was not obliged to make either of these calls, but he did. He could not recall to whom he spoke because he was not interviewed until six months after this occurrence.⁴⁹² In answer to the Chairman, he said that he told Insp O’Sullivan that if his wife was sick on the relevant dates, he would not be at work and therefore he alerted the inspector to the possibility that he would not be around.⁴⁹³

He was asked about the statement in Supt Comyns’s report that *[n]either Inspector O’Sullivan nor I were contacted, nor had we any idea why Sergeant Barry was not at work*’ and replied that he did not have to contact either of those two officers and would not have contacted Supt Comyns in any event.⁴⁹⁴ He stated that he did not have to contact Insp O’Sullivan as he had already told him that if his wife was sick on those dates he would not be on duty.⁴⁹⁵

Mr Barry confirmed in evidence that he did not know his wife was going to be sick for three days, or how long he was going to be out, and he did not phone on any subsequent day to say that he was still on *force majeure* leave. He maintained that he had told Insp O’Sullivan expressly that if his wife was sick on those dates he would have to avail of *force majeure* leave.⁴⁹⁶ He said that he availed of a legitimate reason under the Parental Leave Act, 1998 to take leave for those dates and did not do anything illegal. He claimed that he should not have been subjected to an investigation and there were no grounds to investigate him for what had happened.⁴⁹⁷ He confirmed that he was satisfied with the outcome of Supt Lehane’s investigation.⁴⁹⁸

When cross-examined by counsel for An Garda Síochána, Mr Barry said that the discipline investigation could have been prevented from day one if he had been asked whether he had

⁴⁹⁰ Tribunal Documents, pp. 41-43

⁴⁹¹ Tribunal Transcripts, Day 176, pp. 120-121

⁴⁹² Tribunal Transcripts, Day 176, p. 126

⁴⁹³ Tribunal Transcripts, Day 176, p. 128

⁴⁹⁴ Tribunal Transcripts, Day 176, pp. 130-131

⁴⁹⁵ Tribunal Transcripts, Day 176, p. 131

⁴⁹⁶ Tribunal Transcripts, Day 176, pp. 131-132

⁴⁹⁷ Tribunal Transcripts, Day 176, pp. 133-134

⁴⁹⁸ Tribunal Transcripts, Day 176, p. 154

reported the *force majeure* leave and to whom he had reported.⁴⁹⁹ He confirmed that the *force majeure* leave was necessary for family reasons because he had to be in the family home.⁵⁰⁰ He was referred to a report by Dr John Dennehy dated 31st July 2014 indicating that he had attended an appointment with him on 15th April 2013; the doctor was located in the Mercy Hospital in Cork City, twenty minutes' drive away.⁵⁰¹ In answer to the Chairman, Mr Barry said that people would be entitled to wonder about taking *force majeure* leave having been refused annual leave. However, he did not believe that it was appropriate to initiate an investigation and thought that that was going too far.⁵⁰² He disagreed with the suggestion by counsel for An Garda Síochána that the inquiry was reasonable in the circumstances and was not an attempt to target or discredit him by reason of the making of a protected disclosure.⁵⁰³

Mr Barry maintained in cross-examination by counsel for Supt Comyns that he intended to possibly take *force majeure* leave on 15th April 2013 even though his wife was fine while he had been in work.⁵⁰⁴ He confirmed that nothing happened to him because he was acquitted, but he stated that he had been put through stress.⁵⁰⁵

Mr Barry confirmed to his own counsel that he had taken *force majeure* leave previously in 2010 while serving under Superintendent Tom Myers and had not been investigated or disciplined in relation to that.⁵⁰⁶

Superintendent Michael Comyns

In his evidence to the tribunal, Supt Comyns confirmed the contents of the report dated 19th April 2013 that he sent to C/Supt Dillane.⁵⁰⁷ He said that he did not consider making a recommendation that this should be looked at from a disciplinary point of view and that he had no role in the subsequent discipline investigation. His only part was in fact making a statement to Supt Lehane when he requested one.⁵⁰⁸

In answer to counsel for Mr Barry, Supt Comyns confirmed that his report to C/Supt Dillane was critical of the fact that neither himself nor Insp O'Sullivan had been informed of the fact that Sgt Barry was out on *force majeure* leave.⁵⁰⁹ He said that he made enquiries with Insp O'Sullivan as to whether an explanation had been given for Sgt Barry's absence and Insp O'Sullivan did not know why he had not been on duty for the three days.⁵¹⁰ He stated that he did not know of Mr Barry's assertion that he had told Insp O'Sullivan that, if he was not granted leave for the particular days, he would likely end up taking *force majeure* leave prior to Mr Barry giving evidence to the tribunal. He said that Insp O'Sullivan did not tell him that and that he did not know of that.⁵¹¹

⁴⁹⁹ Tribunal Transcripts, Day 179, p. 135

⁵⁰⁰ Tribunal Transcripts, Day 179, p. 136

⁵⁰¹ Tribunal Transcripts, Day 179, p. 137

⁵⁰² Tribunal Transcripts, Day 179, p. 141

⁵⁰³ Tribunal Transcripts, Day 179, p. 143

⁵⁰⁴ Tribunal Transcripts, Day 180, p. 143

⁵⁰⁵ Tribunal Transcripts, Day 180, p. 150

⁵⁰⁶ Tribunal Transcripts, Day 181, p. 107; Tribunal Documents, p. 5570

⁵⁰⁷ Tribunal Transcripts, Day 182, p. 54; Tribunal Documents, p. 746

⁵⁰⁸ Tribunal Transcripts, Day 182, p. 58

⁵⁰⁹ Tribunal Transcripts, Day 183, pp. 91-92

⁵¹⁰ Tribunal Transcripts, Day 183, p. 92

⁵¹¹ Tribunal Transcripts, Day 183, p. 93

Retired Chief Superintendent Gerard Dillane

In his evidence to the tribunal, C/Supt Dillane recalled that he was concerned by Supt Comyns's report. He believed that in an organisation like An Garda Síochána, if you are not going to turn up for a tour of duty, you have an obligation to contact your first line supervisor to inform them that you are not. Accordingly, he decided that it was a matter that should be looked into and he appointed Supt Lehane to enquire into it.⁵¹² He said that he believed that if he got the process right, he could stand over the outcome, and that this was the correct process to enquire into the matter.⁵¹³

In cross-examination by counsel for Mr Barry, C/Supt Dillane said that he was making an enquiry rather than holding a discipline hearing, as he wanted to see why Sgt Barry had not turned up for work. He had not notified his superiors and a Regulation 14 inquiry was the lowest form of inquiry that he could have initiated.⁵¹⁴ He accepted that prior notice of *force majeure* leave was not required under the legislation or the Garda Síochána Code.⁵¹⁵

Inspector Anthony O'Sullivan

In his evidence to the tribunal, Insp O'Sullivan confirmed that he had spoken with Sgt Barry by phone before writing to him on 12th April 2013 in relation to the application for leave and that he explained in a general way why he was refusing him leave.⁵¹⁶ He said that:

*I am aware that Superintendent Comyns would have asked me did I know anything about Sergeant Barry being off. I was aware of that ... we didn't know where he was.*⁵¹⁷

He stated that it was '110% incorrect' for Sgt Barry to say that he told him that if his wife was sick he would have to avail of *force majeure* leave during that phone conversation.⁵¹⁸ He said that he knew Sgt Barry's wife and if it had been said to him during the call that Sgt Barry's wife was in serious difficulty, he would not have forgotten it. He said that if he had known about it and had been told about it, he would have said it to Supt Comyns; and if he had, he asked rhetorically, why would he later make the statement that he made to Supt Lehane in the discipline inquiry?⁵¹⁹

When cross-examined by counsel for Mr Barry, Insp O'Sullivan repeated his answer that he was '110%' certain that Sgt Barry never mentioned he would have to take *force majeure* leave if his wife had a bad back.⁵²⁰

⁵¹² Tribunal Transcripts, Day 184, pp. 44-45

⁵¹³ Tribunal Transcripts, Day 184, p. 45

⁵¹⁴ Tribunal Transcripts, Day 185, p. 45

⁵¹⁵ Tribunal Transcripts, Day 185, p. 46

⁵¹⁶ Tribunal Transcripts, Day 187, pp. 32-33

⁵¹⁷ Tribunal Transcripts, Day 187, p. 48

⁵¹⁸ Tribunal Transcripts, Day 187, p. 50

⁵¹⁹ Tribunal Transcripts, Day 187, p. 51

⁵²⁰ Tribunal Transcripts, Day 187, p. 131

Legal Submissions

Mr Paul Barry submitted as follows:⁵²¹

- that Supt Comyns targeted and/or discredited Sgt Barry by letter dated 19th April 2013 to C/Supt Dillane. It was accepted by Supt Comyns that this letter was obviously critical of Sgt Barry and suggested he was guilty of a deficit in his duty by failing to explain his absence. The letter fostered disparagement and caused reputational damage to Sgt Barry in a personal and/or professional sense.
- that the criticisms were unwarranted as Sgt Barry had done all required of him in respect of *force majeure* leave under the Parental Leave Act, 1998 and the Garda Síochána Code.
- that Sgt Barry availed of *force majeure* leave in January 2010, where notice of leave was given after the leave period ended and Supt Myers raised no issue. This underlined the unjustified nature of the criticism.
- that Sgt Barry was not given an opportunity to address criticisms before they were communicated to C/Supt Dillane; if this had been done he could have made the case that he did in fact contact Mitchelstown Garda Station on 15th April 2013 and produced telephone records vouching same. However, there was a rush to criticise Sgt Barry to his divisional officer without first giving him an opportunity to respond.
- that the criticisms by Supt Comyns were unjustified and presented without giving Sgt Barry a fair opportunity to defend himself. They were made against a background where Supt Comyns became aware in January and February 2013 of the protected disclosures made in relation to him by Sgt Barry. This was an instance of targeting or discrediting of Sgt Barry by Supt Comyns in connection with those protected disclosures.
- that Mr Barry gave evidence to the tribunal that he phoned Mitchelstown Garda Station on the morning of 15th April 2013 to report that he was taking *force majeure* leave. This was supported by a phone record produced to Supt Lehane. Although Sgt Barry could not recall whom he spoke to, this was in the context of not being informed that there was an issue until he received disciplinary papers on 14th September 2013.
- that C/Supt Dillane in evidence was eager to minimise the Regulation 14 investigation as a form of inquiry. It is important to note that a Regulation 14 investigation involves a formal investigation of an alleged breach of discipline and could result in sanctions including a reduction in pay not exceeding two weeks' pay or a formal reprimand. It may have been open to C/Supt Dillane to conduct an informal inquiry if he wished, but instead he chose a formal process with the risk of sanction attached. The decision to do so was capable in principle of amounting to targeting.
- that the decision to institute discipline proceedings against Sgt Barry was entirely without justification. C/Supt Dillane was aware that Sgt Barry produced a Form FM1 on his return to work and in doing so complied with all requirements for *force majeure* leave under the Parental Leave Act, 1998, which are mirrored in the Garda Síochána Code, section 11.25(4).

⁵²¹ The tribunal has considered all of Mr Paul Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

- that the first notice Sgt Barry received that there was an issue was September 2013. This was an unfair way to handle the process.
- that the timing of C/Supt Dillane’s decision to institute discipline proceedings was important. He received Supt Comyns’s report on 19th April 2013, but did not appoint an investigator until 27th May 2013. In the interim, other matters arose for Sgt Barry; emails regarding the medical certificate, the fatal fire and Supt Comyns’s difficulties with Sgt Barry’s work practices. The timing suggested that these incidents may have had a role in the decision of C/Supt Dillane.
- that C/Supt Dillane’s decision was unjustified, unfair and made against a background where C/Supt Dillane was manifesting frustration with Sgt Barry in his correspondence. The decision was designed to punish Sgt Barry. It occurred shortly after C/Supt Dillane became aware of Sgt Barry’s protected disclosure. It amounted to targeting of Sgt Barry following the making of his protected disclosure.

An Garda Síochána submitted as follows:⁵²²

- that Sgt Barry initially requested leave for three days, from 15th to 17th April 2013. When leave for two of the days was refused, he claimed emergency or *force majeure* leave for those dates.
- that Mr Barry certified that this was a true and complete account of the circumstances and refused to agree with the Chairman that it looked a little suspicious. It also transpired that Sgt Barry had attended an appointment with Dr Dennehy on 15th April 2013, which was not referred to on the form.
- that Sgt Barry’s complaint with respect of *force majeure* leave was devoid of substance and was emblematic of Sgt Barry’s overall approach when garda management asked a question or raised a query. It was submitted that the facts spoke for themselves.

Superintendent Michael Comyns submitted as follows:⁵²³

- that Sgt Barry was refused annual leave for 15th and 16th April 2013 by Insp O’Sullivan who informed him that the reason was that another sergeant was on leave.
- that Sgt Barry did not attend for duty on 15th, 16th or 17th April 2013 and no contact was made with Insp O’Sullivan or Supt Comyns. Supt Comyns and Insp O’Sullivan only became aware of the reason for the absence when they received the Form FM1 on 18th April 2013, indicating that Sgt Barry had availed of *force majeure* leave for the period from 15th to 17th April 2013.
- that the Fourth Interim Report of the tribunal noted that unexplained absence by a garda who remained *incommunicado* was a serious concern. The matter was of significance, and upon receipt of the Form FM1, was reported by Supt Comyns to C/Supt Dillane.
- that Sgt Barry maintained that he contacted Mitchelstown Garda Station, but was unable to identify the person with whom he spoke. Supt Lehane, who investigated the

⁵²² The tribunal has considered all of An Garda Síochána’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190 pp. 36-61

⁵²³ The tribunal has considered all of Superintendent Michael Comyns’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

matter, did not accept the assertion that Sgt Barry made contact with a member in Mitchelstown Garda Station.

- that the appropriate person for Sgt Barry to make contact with was Insp O'Sullivan and there was no issue precluding contact with Insp O'Sullivan.
- that Mr Barry maintained he had alerted Insp O'Sullivan to the possibility that he may take *force majeure* leave due to his wife's illness. However, Insp O'Sullivan denied and refuted that Sgt Barry spoke to him about this.
- that Sgt Barry attended for a medical appointment with Dr Dennehy on 15th April 2013.
- that Supt Comyns had no role in the decision to initiate discipline proceedings against Sgt Barry and there was no reference to same in his report to C/Supt Dillane.
- that this could not be objectively viewed as Supt Comyns targeting or discrediting Sgt Barry, or being party to any targeting or discrediting of Sgt Barry by An Garda Síochána.

Conclusion

Sgt Barry applied for leave on different dates including 15th to 17th April 2013. Insp O'Sullivan replied referring to the procedure for seeking leave and then proceeding to say that he had sanctioned other dates but was refusing 15th and 16th April 2013 because the sergeant in charge in Mitchelstown Garda Station was already on annual leave. He told Sgt Barry to resubmit his application in respect of 17th April but Sgt Barry did not do that.

Sgt Barry did not turn up for work from 15th to 17th April 2013. On 18th April 2013, he submitted a Form FM1 saying that owing to an illness and injury his immediate presence was required in the family home to look after his wife and family and as such he was indispensable. That is the formula used in the *force majeure* regulations.

Supt Comyns reported to C/Supt Dillane that he was of opinion that the sergeant should have made contact with Insp O'Sullivan on 14th or 15th April to explain the situation.

While Sgt Barry did not contact Insp O'Sullivan, phone records later established that he made a telephone call to the station on the morning of 15th April 2013. He said that he told a garda on duty that he was taking leave but the relevant members were unable to remember this call. Word of this message did not reach Insp O'Sullivan or the superintendent.

C/Supt Dillane directed an investigation, which was carried out by Supt Lehane, who duly reported on 17th October 2013 finding that Sgt Barry was not in breach of the Discipline Regulations.

The fact that the family emergency arose on precisely the dates that were the subject of application and refusal and that Sgt Barry had not made contact with Insp O'Sullivan who had dealt with the application were matters that inevitably gave rise to unease and even suspicion.

It might be suggested that an informal approach could have been adopted but that was scarcely a realistic option in the circumstances of tension that were a feature of Sgt Barry's relations with management.

The tribunal is not concerned with the details of the investigation but it is satisfied that it was reasonable for Supt Comyns to express unease and for C/Supt Dillane to order an investigation under the part of the Discipline Regulations dealing with less serious breaches.

An issue arose, concern was expressed, the matter was investigated and Sgt Barry was cleared of any breach. The tribunal's view is that Supt Comyns was entitled to his opinion, which had a factual basis, and his expression of concern was proper and reasonable.

If there is not an obligation on a member of An Garda Síochána availing himself or herself of this form of leave to notify a superior as soon as reasonably possible, the scheme should be altered to include one.

This is accordingly not an example of targeting.

CHAPTER 11

ISSUE 8 AND ISSUE 4.C:

THE COMPLAINT MADE BY MR BARRY IN RELATION TO HIS ALLOCATION FOR DUTY AT THE IRISH OPEN GOLF CHAMPIONSHIP 2014

Issue 8 of the Schedule of Issues

Did Supt John Quilter target or discredit Sgt Barry because he made a protected disclosure by facilitating the presence of Supt Comyns at the Irish Open Golf Championship at Fota Island in June 2014?

Issue 4.c of the Schedule of Issues

Did C/Supt Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- (c) *by scheduling Sgt Barry for duty at the Irish Open Golf championship at Fota Island together with Supt Comyns in June 2014?*

Background

The Irish Open Golf Championship was held at Fota Island Resort Golf Club in June 2014. The location of the event fell within the Midleton District of the Cork North Division, where the district officer was Superintendent John Quilter.

Policing operations for the event commenced on 17th June 2014, with significant garda resources deployed between 19th and 22nd June 2014. Chief Superintendent Gerard Dillane, as divisional officer, had overall charge of all policing operations at Fota Island Resort for the relevant period.⁵²⁴

The planning for the event was described to the tribunal in the statements of Supt Quilter⁵²⁵ and Inspector Eoghan Healy.⁵²⁶

Supt Quilter explained that the event would attract up to 100,000 visitors and that the policing plan was over six months in the making. He said that, from a garda operational perspective, this was hugely resource driven and required the addition of a large number of garda personnel from outside the Midleton District to augment and support the policing operation.⁵²⁷

Insp Healy was attached to the Midleton District and was appointed to the planning team by Supt Quilter. In his statement to the tribunal, Insp Healy explained that the planning team was involved with drawing up an operational order and a traffic management plan. He outlined the manpower assessment tasks carried out to ascertain availability of members within the Cork North Division. He recalled that he sent requests through the Divisional Office to ascertain the availability of

⁵²⁴ Tribunal Documents, p. 4549

⁵²⁵ Tribunal Documents, p. 927

⁵²⁶ Tribunal Documents, p. 1437

⁵²⁷ Tribunal Documents, pp. 927-928

working members to support the operation. Lists of members were supplied and members were subsequently allocated to duties for the event on days they were available. He said that Sergeant Paul Barry was notified to him along with other members from the Fermoy District as available to work at the event.⁵²⁸ Insp Healy said that the Garda Operational Order incorporated a roster, which was distributed in advance of the event.

Superintendent John Quilter’s Annual Leave

In his statement to the tribunal, Supt Quilter said that he was not on duty for the actual event due to annual leave for a *‘long-standing family commitment’*.⁵²⁹

In his evidence to the tribunal, Supt Quilter recalled that in January 2014, when the Irish Open Golf Championship was announced, he *‘flagged’* to C/Supt Dillane that he would be on leave.⁵³⁰ Supt Quilter told the tribunal that he had spoken with Superintendent Michael Comyns the previous December regarding cover for his annual leave in June 2014. It was subsequent to this that they were notified of the golf event taking place in Fota Island Resort Golf Club.⁵³¹

Supt Quilter recounted in his evidence that he discussed the matter with C/Supt Dillane and it was agreed that he would continue with the operational plan. He said that it was C/Supt Dillane who decided that Supt Comyns would cover the golf event.⁵³²

Supt Quilter also said in his statement to the tribunal that he was involved in the planning and organising of the policing right up to the eve of the event.⁵³³ In his evidence to the tribunal he confirmed that he kept Supt Comyns up to date on progress and that it was in May or June 2014 when Supt Comyns attended some meetings and discussions on the event.⁵³⁴

Superintendent John Quilter’s Meeting with Sergeant Paul Barry

Mr Barry said in his interview with tribunal investigators that he attended a briefing in Middleton Garda Station prior to the event. He stated that he met with Supt Quilter and Insp Healy and *‘outlined to them the difficulty I would have in dealing with Superintendent Comyns directly, and they assured me that I wouldn’t have to come into contact with him’*. He explained that when the event was initially planned *‘both myself and Sergeant Andrew Geary from Fermoy were detailed to attend at it and I believed that it would be supervised by Superintendent John Quilter, but it turns out Superintendent Quilter took leave and left Superintendent Comyns in charge of the event’*.⁵³⁵

In his statement to the tribunal, Supt Quilter said that *‘[t]o the best of my knowledge, the only time I ever met Sergeant Barry was in June 2014 in Middleton Station’* at a briefing given by Insp Healy, which Sgt Barry and another sergeant from Fermoy were attending.⁵³⁶ Supt Quilter said that

⁵²⁸ Tribunal Documents, p. 1437

⁵²⁹ Tribunal Documents, p. 928

⁵³⁰ Tribunal Transcripts, Day 185, p. 115

⁵³¹ Tribunal Transcripts, Day 185, pp. 113-115

⁵³² Tribunal Transcripts, Day 185, p. 113

⁵³³ Tribunal Documents, p. 928

⁵³⁴ Tribunal Transcripts, Day 185, p. 114

⁵³⁵ Tribunal Documents, p. 51

⁵³⁶ Tribunal Documents, p. 927

following the briefing Sgt Barry spoke to him and Insp Healy and he *'highlighted his concern about potential contact with Superintendent Comyns at the event'*.⁵³⁷ Supt Quilter recalled that:

*I took this on board and placed Sergeant Barry in charge of the supervision of a key traffic location at Barryscourt, Carrigtwohill under the direct supervision of Inspector Healy, who was in charge of the Traffic Management plan for the event. Sergeant Barry was detailed for this location for the 2 days he worked at the event.*⁵³⁸

He told the tribunal that he made this decision in consultation with Insp Healy.⁵³⁹

Duty at the Irish Open Golf Championship

In his statement to the tribunal, Insp Healy said that:

*On the morning of each day of the event, members were briefed. It was neither possible nor prudent to brief all personnel at the one location. Members, due to their assigned duty at the event, were briefed at the location where they were to be fed, in advance of taking up duty ... On Thursday 19th June 2014 Sergeant Barry, was detailed for duty between Barryscourt Roundabout and Carrigtwohill Village, which is off the N25 Main Cork to Waterford Rd., which was the most Eastern part of the cordon from the Golf entrance. He was listed in charge of members in the vicinity of those locations and, as I was in charge of the Traffic Management Plan, I was the person he was to report to. On Friday the 20th June [2014] Sgt Barry was detailed for the same duty.*⁵⁴⁰

In his evidence to the tribunal, Supt Quilter agreed with counsel for Mr Barry that he knew that Sgt Barry would be required to attend briefings each morning and that Supt Comyns would be present. He stated that he knew that Insp Healy would be there as well.⁵⁴¹ He also stated that Sgt Barry would be reporting to Insp Healy and, should there be a serious event, Supt Comyns would be dealing with Insp Healy who was over traffic and to whom Sgt Barry reported.⁵⁴² It was Supt Quilter's view that having Insp Healy as the person Sgt Barry reported to was *'adequate in the situation'*.⁵⁴³

Supt Comyns described in his statement to the tribunal that between 19th and 22nd June 2014, he oversaw the policing at the event and attended the briefings. He claimed that he did not come into contact with Sgt Barry at any of the briefings.⁵⁴⁴ He said in his evidence to the tribunal that these briefings were organised as part of the operational order and every member who worked at the event was required to attend.⁵⁴⁵

⁵³⁷ Tribunal Documents, p. 928

⁵³⁸ Tribunal Documents, p. 928

⁵³⁹ Tribunal Transcripts, Day 185, p. 117

⁵⁴⁰ Tribunal Documents, pp. 1437-1438

⁵⁴¹ Tribunal Transcripts, Day 185, p. 142

⁵⁴² Tribunal Transcripts, Day 185, p. 143

⁵⁴³ Tribunal Transcripts, Day 185, p. 144

⁵⁴⁴ Tribunal Documents, pp. 565-566

⁵⁴⁵ Tribunal Transcripts, Day 182, pp. 86-87

Complaint made by Mr Barry

In his interview with tribunal investigators, Mr Barry alleged that Supt Quilter conspired with Supt Comyns to put him in contact with Supt Comyns.⁵⁴⁶ He maintained that had he refused to work at the golf event it would have given garda management another reason to transfer him.⁵⁴⁷ He said that he spoke with his Association of Garda Sergeants and Inspectors (AGSI) representative, Inspector Michael Gallagher, who advised him to attend.⁵⁴⁸ Mr Barry said in his statement that Supt Quilter deliberately took annual leave at the time of the event so that he would have to deal with Supt Comyns.⁵⁴⁹

In his evidence to the tribunal, Mr Barry was asked what his allegation of a conspiracy was based on:

Based upon the fact that Superintendent Quilter had changed duties with Superintendent Comyns, Superintendent Comyns took charge of the event. I had explained to Superintendent Quilter the problems I would have if I had to come in contact with Superintendent Comyns at the event. He told me that I would have no contact with him and I was happy with that, but I did actually have to attend at the briefing and as Superintendent Comyns himself stated in his report to the Tribunal, his statement to the Tribunal, had any event occurred in my area of responsibility he would have had to make contact with me. So that placed me in a situation where I would be in contact with Superintendent Comyns had anything happened at the event.

- Q. *So if something had happened where you were stationed, you feared that you might have been in direct contact with him?*
- A. *I feared it and he confirmed it.*
- Q. *I see. Is there anything else you wish to add in relation to that?*
- A. *No. But I believe Chief Superintendent Dillane was involved in the allocation, as was Superintendent Comyns. I believe the three of them together conspired to [put] me in that situation.⁵⁵⁰*

Mr Barry told the tribunal that the ‘*essence of [his] complaint*’ was that ‘*[i]t was effectively changing the scenario from Fermoy to Cobh, or to Carrigtwohill, whereby I could be in contact with the superintendent contrary to my doctor’s advice*’.⁵⁵¹

In his evidence to the tribunal, Mr Barry said that he attended for duty on the two days he was scheduled.⁵⁵² He accepted that he did not have any direct contact with the superintendent at the place where he was stationed for duty.⁵⁵³ He told the tribunal that he attended the briefings given by Supt Comyns in the mornings in a large room with possibly a hundred or more members.⁵⁵⁴ He

⁵⁴⁶ Tribunal Documents, p. 51

⁵⁴⁷ Tribunal Documents, p. 51

⁵⁴⁸ Tribunal Documents, p. 51

⁵⁴⁹ Tribunal Documents, p. 329

⁵⁵⁰ Tribunal Transcripts, Day 177, pp. 46-47

⁵⁵¹ Tribunal Transcripts, Day 177, p. 48

⁵⁵² Tribunal Transcripts, Day 177, pp. 45-46

⁵⁵³ Tribunal Transcripts, Day 177, p. 46

⁵⁵⁴ Tribunal Transcripts, Day 177, p. 46

explained that he regarded his attendance at these briefings as a breach of the assurance given by Supt Quilter and Insp Healy, saying that it made him *‘physically sick’*.⁵⁵⁵

It was put to Mr Barry by counsel for Supt Quilter that the assignment of people to the event had nothing to do with individual gardaí and was done on a unit basis. Mr Barry agreed that his assignment on the Thursday and Friday of the event arose because he was on Unit B.⁵⁵⁶

When cross-examined by counsel for Supt Quilter, Mr Barry acknowledged that Insp Healy was in charge of traffic and if he had any problems that he was to contact Insp Healy. However, Mr Barry focused on the extract in the statement made by Supt Comyns to the effect that if a serious incident occurred, the superintendent would have to deal with it.⁵⁵⁷

Mr Barry told the tribunal that he believed he was targeted by *‘being placed down there in the first place’* and that he should not have been put working in the same area as Supt Comyns.⁵⁵⁸

In his statement and in evidence to the tribunal, Mr Barry explained that he made his decision to apply for a pre-retirement course following the golf event, although he pointed out that the decision was made in light of the number of transfer attempts made in the years leading up to this.⁵⁵⁹ He told the tribunal that his situation mentally improved following the submission of his retirement application.⁵⁶⁰

Mr Barry was questioned by counsel for Supt Quilter about the reference to his application for retirement after this event. Mr Barry said that the golf incident was what triggered his application.⁵⁶¹ He was cross-examined on this issue as follows:

- Q. *So you had already sussed out your retirement and whether your service in the prison would be included long before Fota?*
- A. *Initially when I met my solicitor he asked me what service I had left, when I could go, and that is what triggered me to enquire as to having my prison service –*
- Q. *Long before Fota you had already looked into your [pension] situation and the prison service, isn't that right?*
- A. *I had calculated when I could go, yes.*
- Q. *So long before – I will ask it again: Long before Fota and this event you had looked into whether your prison service would be included in your retirement and you looked into that. It's a yes or no.*
- A. *It's true, yes, I did.*⁵⁶²

⁵⁵⁵ Tribunal Transcripts, Day 177, pp. 48-49

⁵⁵⁶ Tribunal Transcripts, Day 181, pp. 28-29

⁵⁵⁷ Tribunal Transcripts, Day 181, p. 34

⁵⁵⁸ Tribunal Transcripts, Day 181, p. 35

⁵⁵⁹ Tribunal Documents, p. 52; Tribunal Transcripts, Day 177, p. 106; Tribunal Transcripts, Day 181, pp. 36 -37

⁵⁶⁰ Tribunal Transcripts, Day 181, p. 40

⁵⁶¹ Tribunal Transcripts, Day 181, p. 36

⁵⁶² Tribunal Transcripts, Day 181, p. 37

Mr Barry told the tribunal that he was upset about the daily contact but agreed with counsel for Supt Quilter that he did not record this in his diary.⁵⁶³ It was also put to Mr Barry that he went for a review with Dr John Dennehy, Consultant Psychiatrist, on 23rd June 2014 and did not mention the golf event. Mr Barry said he did not recall why he did not mention it, or whether he did or did not.⁵⁶⁴

Responding Statements and Evidence on the Issues

Retired Chief Superintendent Gerard Dillane

C/Supt Dillane gave evidence to the tribunal that following notification of the Irish Open taking place in Fota Island Resort Golf Club, he received a phone call from Supt Quilter advising that he had booked annual leave, which Supt Comyns had agreed to cover.

C/Supt Dillane explained that Supt Comyns was the only superintendent available to cover the event due to the fact that the Mallow Home and Garden Show was also taking place during that period.⁵⁶⁵ C/Supt Dillane claimed that it was never brought to his notice that there was *any conflict between Superintendent Comyns or Paul Barry*, who were working in the same area.⁵⁶⁶ He said in his evidence that he was not involved in *‘the minute details of who was doing what’*.⁵⁶⁷

Retired Superintendent John Quilter

In his statement to the tribunal, Supt Quilter recalled that he had never met with or dealt with Sgt Barry other than the meeting in June 2014. He did however state that he was aware that Supt Comyns had *‘difficulties’* with Sgt Barry. He said that:

*In so far as I can recall, these difficulties related to the supervision of Sergeant Paul Barry. It is my recollection that Sergeant Barry was refusing to comply with directions given by Superintendent Comyns. My recollection relates to issues surrounding his refusal to attend Fermoy Garda Station for duty to parade the District Unit.*⁵⁶⁸

Supt Quilter was asked by counsel for the tribunal about how he came to know about these *‘difficulties’* and he said that it would probably have arisen during the divisional Performance Accountability Framework (PAF) meetings.⁵⁶⁹ He was also asked about his knowledge of the medical certificate issued in respect of Sgt Barry by his general practitioner, Dr Margaret Anne Kiely, in April 2013. Supt Quilter stated that the only thing he would have been aware of was that there was a difficulty with Sgt Barry attending at Fermoy Garda Station.⁵⁷⁰ When asked about his knowledge of the medical certificate stating that Sgt Barry should not come into contact with Supt Comyns, Supt Quilter claimed that he would not have seen it and was not aware of the *‘specifics’* that were contained in the medical certificate.⁵⁷¹ Supt Quilter also stated that he did not recall the medical certificate being mentioned to him by Supt Comyns.⁵⁷²

⁵⁶³ Tribunal Transcripts, Day 181, p. 41

⁵⁶⁴ Tribunal Transcripts, Day 181, p. 41

⁵⁶⁵ Tribunal Transcripts, Day 184, p. 111

⁵⁶⁶ Tribunal Transcripts, Day 184, p. 112

⁵⁶⁷ Tribunal Transcripts, Day 184, p. 112

⁵⁶⁸ Tribunal Documents, p. 927

⁵⁶⁹ Tribunal Transcripts, Day 185, p. 107

⁵⁷⁰ Tribunal Transcripts, Day 185, p. 109

⁵⁷¹ Tribunal Transcripts, Day 185, pp. 110-111

⁵⁷² Tribunal Transcripts, Day 185, p. 127

In respect of the event itself, Supt Quilter recalled in his evidence that the selection of members to work was done on a unit basis, having regard to financial considerations.⁵⁷³ He said that his focus was on the units and that it was not until later that the names of the members from the various districts were furnished.⁵⁷⁴ When asked by counsel for Mr Barry whether he noticed that Sgt Barry was listed to work on two days, he said that he was not looking at the personnel.⁵⁷⁵

Supt Quilter told the tribunal that he did not tell Sgt Barry that he would have no contact with Supt Comyns and that:

I couldn't have given him an undertaking that he would have no contact with Superintendent Comyns, because this was a major event, Sergeant Barry would have been aware we were policing [a] major event, anything can go wrong, there could be anything from a fatal accident to a serious incident, which then would be under the control of Superintendent Comyns. So I couldn't have given him that commitment. I certainly took it on board and that's why, if you look at the duty detail, he [was] under the supervision of Inspector Healy.⁵⁷⁶

In his statement to the tribunal, Supt Quilter referred to Mr Barry's interview with tribunal investigators and pointed out that Mr Barry had conceded that he did not in fact have any contact with Supt Comyns and that, as a result, Supt Quilter did '*not understand how any allegation, inference, or imputation*' arose.⁵⁷⁷

In response to Mr Barry's allegation that he should not have been allocated to the golf duty in the first place, Supt Quilter told the tribunal that:

Sergeant Barry highlighted his concern, I took it on board, I placed him at the location knowing that Superintendent Comyns would have been primarily engaged with the golf on site and that Sergeant Barry would have been under the control, I suppose, of Inspector Healy at the time.⁵⁷⁸

In response to Mr Barry's allegation that Supt Quilter deliberately took leave to facilitate him working under Supt Comyns at the event, Supt Quilter told the tribunal that:

I applied for my leave and I booked my holidays back in December of ... 2013. I had no knowledge that we were even having the golf competition at that stage, so I can't see how that is the case.⁵⁷⁹

In relation to the contention that he targeted or discredited Sgt Barry because he made a protected disclosure by facilitating the presence of Supt Comyns at the Irish Open Golf Championship, Supt Quilter told the tribunal:

That's totally incorrect. I had my holidays booked well before I ever knew that the Irish Open Golf was going to take place at Fota Island.⁵⁸⁰

⁵⁷³ Tribunal Transcripts, Day 185, pp. 112-113

⁵⁷⁴ Tribunal Transcripts, Day 185, p. 140

⁵⁷⁵ Tribunal Transcripts, Day 185, p. 140

⁵⁷⁶ Tribunal Transcripts, Day 185, pp. 117-118

⁵⁷⁷ Tribunal Documents, p. 928

⁵⁷⁸ Tribunal Transcripts, Day 185, p. 121

⁵⁷⁹ Tribunal Transcripts, Day 185, p. 121

⁵⁸⁰ Tribunal Transcripts, Day 185, p. 144

Superintendent Michael Comyns

In his statement to the tribunal, Supt Comyns recalled that he was asked by Supt Quilter to cover his district for a period of annual leave during which the Irish Open Golf Championship was taking place.⁵⁸¹ In his evidence to the tribunal Supt Comyns confirmed that this was soon after it was announced that the Irish Open would be held in Fota Island Resort Golf Club, and he was to take command of the policing operation.⁵⁸² He said it was normal that when one superintendent took leave, the superintendent in the next district would carry out their functions for that period.⁵⁸³

In his statement, Supt Comyns said that all the planning for the event was undertaken by Supt Quilter and Insp Healy, who were both aware of Sgt Barry's medical certification, and who briefed Supt Comyns on the plans.⁵⁸⁴ In his evidence to the tribunal, Supt Comyns said that the selection and deployment of members was done by Supt Quilter and Insp Healy and that it was a '*budgetary matter*', as it was cheaper for Unit B to work the event. He explained that this was why '*Sergeant Barry, along with all members on unit B in Fermoy district, worked at the event*'.⁵⁸⁵

In his statement, Supt Comyns refuted Mr Barry's allegations of a conspiracy with Supt Quilter and made the point that Sgt Barry was on traffic management duty and would not have come in contact with him unless something happened in Sgt Barry's area of responsibility.⁵⁸⁶ Supt Comyns in evidence acknowledged that in the event of an incident he could have communicated with Sgt Barry through Insp Healy, saying '*it would have to be something very serious for me to have to go to that area*'.⁵⁸⁷

Inspector Eoghan Healy

In his statement to the tribunal, Insp Healy referred to the planning for the event in relation to resources and manpower. He said that part of the process involved assessing the manpower needs versus the manpower availability in the division, and then beyond the division, to ensure that there were sufficient members deployed for the event. He said that he sent requests through the Divisional Office to ascertain the availability of working members to support the operation. Lists of members were supplied and they were subsequently allocated to duties for the event on days they were available. He recalled that Sgt Barry was notified to him along with other members from the Fermoy District as available to work at the event.

He stated that, in consultation with the planning team, he developed an operational order incorporating a roster based on the traffic management plan and manpower requirements and distributed that roster in advance of the event.

He also stated that '*[i]n advance of the event Supt Quilter notified me that he may be unable to attend the event. I believe his wife had booked a holiday at short notice for the same week of the event. I believe in May (possibly at a briefing with the A/C), I was informed that Superintendent Comyns was to have overall charge of the event, in the absence of Superintendent Quilter*'.⁵⁸⁸

⁵⁸¹ Tribunal Documents, p. 564

⁵⁸² Tribunal Transcripts, Day 182, p. 84

⁵⁸³ Tribunal Transcripts, Day 183, p. 149

⁵⁸⁴ Tribunal Documents, p. 565

⁵⁸⁵ Tribunal Transcripts, Day 182, pp. 85-86

⁵⁸⁶ Tribunal Documents, p. 566

⁵⁸⁷ Tribunal Transcripts, Day 182, p. 88

⁵⁸⁸ Tribunal Documents, pp. 1437-1438

Insp Healy said that he remained as the on-site controller, and in charge of the traffic management plan for the event and that he was not aware of any impact Supt Comyns had on Sgt Barry until he received the tribunal material.

Retired Inspector Michael Gallagher

In his evidence to the tribunal, Insp Gallagher confirmed that he was contacted by Sgt Barry, who was in a *'distressed state'*, and who informed him that he was being detailed to work at the Irish Open golf tournament. Sgt Barry told Insp Gallagher that he was thinking of not attending due to fear of coming in contact with Supt Comyns. Insp Gallagher said that his advice to Sgt Barry was to attend, as if he did not he would leave himself open to a disciplinary inquiry.⁵⁸⁹

Legal Submissions

The allegation that C/Supt Dillane targeted or discredited Sgt Barry by scheduling him for duty at the Irish Open Golf championship at Fota Island Resort Golf Club together with Supt Comyns in June 2014

Mr Paul Barry submitted as follows:⁵⁹⁰

- that C/Supt Dillane reviewed the operational order and left Sgt Barry assigned to the event, rather than removing him, in circumstances where he knew that Supt Comyns was playing a significant role.
- that C/Supt Dillane said that he signed off on the plan without reading through the names of those assigned to work. Given that he knew Supt Comyns was exercising a prominent role at the event and knew of the issues between Supt Comyns and Sgt Barry, it was expected that C/Supt Dillane would have looked to see if Sgt Barry was working the event. He must have realised that this was the case and nevertheless consciously decided to leave Sgt Barry on duty for the event.
- that this amounted to targeting by C/Supt Dillane. The failure of C/Supt Dillane to remove Sgt Barry from duty meant that he was required to attend morning briefings in a community hall with a large number of other members on 19th and 20th June 2014 when Supt Comyns gave the briefings. This situation made Sgt Barry physically sick. There was also the possibility of contact between Sgt Barry and Supt Comyns if a serious incident happened within Sgt Barry's zone of responsibility.

An Garda Síochána submitted as follows:⁵⁹¹

- that Supt Comyns was assigned to the golf event as he was the only superintendent that C/Supt Dillane could allocate because of resources.

⁵⁸⁹ Tribunal Transcripts, Day 188, p. 134

⁵⁹⁰ The tribunal has considered all of Mr Paul Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

⁵⁹¹ The tribunal has considered all of An Garda Síochána's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

- that C/Supt Dillane was aware that Supt Comyns and Sgt Barry were likely to be working together at the event. However, he did not seek to put them together, nor was he involved in the rostering, which was done by Supt Quilter and Insp Healy.
- that there was no intention on the part of C/Supt Dillane to force Sgt Barry and Supt Comyns together and there was no evidence suggestive of targeting or discrediting.

The allegation that Supt Quilter targeted or discredited Sgt Barry by facilitating the presence of Supt Comyns at the Irish Open Golf Championship at Fota Island Resort Golf Club in June 2014

Mr Paul Barry submitted as follows:⁵⁹²

- that Supt Quilter took leave to place Supt Comyns in charge of the event. While Supt Quilter denied this and said he had indicated months in advance that he would not be present at the event, this was in striking contrast with Insp Healy’s statement. It is a matter for the tribunal as to whether Supt Quilter’s account was credible.
- that Supt Quilter, despite being in control of the operational order and the members who would serve at the golf event, decided that Sgt Barry would still be required to perform duty. This was in circumstances where he knew that Sgt Barry would be placed under the command of Supt Comyns and would be required to be in the same room as him. This was following Sgt Barry expressing concerns about contact and the medical certificate in place, which precluded contact between Sgt Barry and Supt Comyns. This amounted to targeting of Sgt Barry, which facilitated a situation where Sgt Barry was placed in contact with Supt Comyns.
- that Supt Quilter accepted in his evidence that he became aware in late 2012 or 2013 that Sgt Barry made an allegation of bullying and harassment against Supt Comyns. He denied being aware of the details of the allegation and stated that he was not aware it concerned an allegation that Supt Comyns interfered with a criminal investigation in February 2012 until he was contacted by Chief Superintendent Catherine Kehoe in October 2014. It was a matter for the tribunal as to whether or not it found this evidence credible. Supt Quilter emphasised in evidence that he and Supt Comyns had a close personal and professional relationship, having known each other since 1984. It was highly unusual that they would not discuss the nature of the allegations made against Supt Comyns.
- that Supt Quilter admitted knowing from 2012/2013 that Sgt Barry had made a protected disclosure. The targeting of Sgt Barry was connected with this knowledge of the protected disclosure that had been made.

⁵⁹² The tribunal has considered all of Mr Paul Barry’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

Retired Superintendent John Quilter submitted as follows:⁵⁹³

- that Supt Quilter had no prior personal involvement with Sgt Barry, had little or no involvement with Sgt Barry professionally, and the briefing at Midleton Garda Station sometime prior to the golf event in June 2014 was the first and only time they met.
- that Sgt Barry indicated in his evidence that he would have had no issue with attending the golf event if Supt Quilter was in charge.
- that C/Supt Dillane told the tribunal that in all his dealings with Sgt Barry no mention was made of Supt Quilter by Sgt Barry.
- that the upshot of the alleged conspiracy was that Sgt Barry had to twice attend a short pre-duty briefing with Supt Comyns along with over a hundred other gardaí, in a room as large as the tribunal hearing room in Dublin Castle. There was no contact between Supt Comyns and Sgt Barry over the two days and Supt Comyns told the tribunal that he did not even see Sgt Barry for the two days of duty.
- that if such a conspiracy existed it involved a very large amount of effort between the co-conspirators for remarkably little effect or result.
- that elements of Mr Barry's evidence caused concern:
 - despite the upset caused by the attendance at the golf event, Sgt Barry made no reference or note of same in his diary.
 - despite stating in evidence (and in statements) that the upsetting nature of the attendance at the event resulted in him '*there and then*' deciding to retire and applying for a pre-retirement course, Sgt Barry had already applied to have his prison service included for pension purposes. He reluctantly accepted in evidence that long before the Fota Island Resort event he had looked into whether his prison service would be included in his retirement.
 - despite the upsetting nature of attendance at the event, when Sgt Barry attended at a consultation with his psychiatrist three days later, on 23rd June 2014, he told his psychiatrist about being upset in relation to a transfer appeal, he told him about the Labour Relations Commission, he told him about meeting a victim, but he made no reference whatsoever to the upsetting attendance at the Irish Open.
 - in the personal injuries summons of Sgt Barry, dated 3rd February 2015, there was no reference whatsoever to events relating to attendance at the event.
- that in his testimony to the tribunal, Mr Barry on a number of occasions related his concern regarding contact with Supt Comyns at the event to what Supt Comyns stated in his statement to the tribunal in 2021. This was an example of yet another *ex post facto* construct that was explored by the Chairman with Mr Barry, the latter accepting that this aspect had only occurred to him after the tribunal papers were served and that at the time in 2014, in the words of the Chairman, he '*sailed on completely comfortably with Inspector Healy*'⁵⁹⁴

⁵⁹³ The tribunal has considered all of Superintendent John Quilter's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 69-74

⁵⁹⁴ Tribunal Transcripts, Day 181, p. 34

- that at no point was there evidence to establish that Supt Quilter was conspiring with Supt Comyns by taking his annual leave. In any event, Supt Comyns was in due course and in the ordinary way delegated to replace Supt Quilter at the Irish Open by C/Supt Dillane.
- that the height of C/Supt Dillane's evidence was that he may have been aware of the fact that there had been a bullying and harassment complaint but there was no evidence that he was aware of the details and, moreover, there was no evidence that he was aware that one aspect was a complaint of criminal wrongdoing. That the evidence was not such that the tribunal could be satisfied that the targeting or discrediting (which was denied) was connected to the protected disclosure.
- that when Supt Quilter attended at the tribunal and gave evidence, most of which could not be contradicted, when cross-examined by counsel for Mr Barry it was never even put to him that he had engaged in the behaviour complained of.
- that the allegations as they related to Supt Quilter were of the most spurious kind, with the potential to cause significant harm to his reputation, and amounted to a mere expression of ill-conceived belief on the part of Mr Barry.

Superintendent Michael Comyns submitted as follows:⁵⁹⁵

- that this matter was not directly relevant to Supt Comyns.
- that the planning for the event was in consultation with the AGSI and the Garda Representative Association (GRA) and the decision to have Unit B attend was the most cost-effective option.
- that Sgt Barry did not raise any objection through appropriate channels. Sgt Barry met with Supt Quilter and never requested not to work the event.
- that Supt Comyns agreed to cover Supt Quilter's leave prior to the golf event being announced.
- that it was C/Supt Dillane who appointed Supt Comyns to oversee the golf event.
- that whilst at the briefings, Supt Comyns did not recall seeing Sgt Barry.
- that Sgt Barry was located at a roundabout five kilometres away from the golf club at Fota Island Resort and was under the direct supervision of Insp Healy.
- that this could not be objectively viewed as targeting or discrediting of Sgt Barry by An Garda Síochána, and/or Supt Comyns being a party to same.

⁵⁹⁵ The tribunal has considered all of Superintendent Michael Comyns's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

Conclusion

Sgt Barry was on duty for two days at the Irish Open Golf Championship at Fota Island in June 2014. He was aware that Supt Comyns was in charge of the large force of gardaí who were engaged for the event. He had previously explained his difficulties with the superintendent at a meeting with Supt Quilter and Insp Healy and they had sought to minimise the possibility of contact between the two men by assigning Sgt Barry to duty at a roundabout at the extreme eastern end of the control zone.

The sergeant knew that Supt Comyns would be in overall charge of the event and he had discussed the matter with his AGSI representative and decided that he would attend for duty as scheduled on the two days.

There was in fact no direct contact between the superintendent and Sgt Barry. However, there was a short briefing session on each morning at the start of duty at which Supt Comyns presided and which was attended by over 100 members of An Garda Síochána. In his evidence Sgt Barry drew attention to part of Supt Comyns's written statement to the tribunal where he stated that if some serious event had occurred at the area where Sgt Barry was in charge, his presence would have been required as the senior officer in charge of the event.

In respect of the latter point of conjecture by the superintendent, this was something that came to Mr Barry's knowledge only in the course of the tribunal's proceedings. Besides, considering the fact that it is a simple statement of the obvious, the tribunal rejects the suggestion that it constituted targeting or could have done so.

Mr Barry goes so far as to suggest that his being in the situation where he was exposed to the presence of Supt Comyns and to potential direct contact or engagement with him was the result of a conspiracy involving C/Supt Dillane, Supt Quilter and Supt Comyns. The event took place in Supt Quilter's district so he would in the ordinary way have been the officer in charge. His evidence was that he had a long-arranged holiday in June 2014 and in December 2013 he had made arrangements with his colleague Supt Comyns to look after his district while he was away. This arrangement he said was made before he knew about the golf championship, of which he became aware in January 2014.

Despite the fact that Supt Quilter was going to be away for the event itself, he remained in charge of all the planning, which he and Insp Healy undertook.

Insp Healy's statement differed from his superintendent as to when it became clear that Supt Comyns was going to be in charge but the tribunal accepts Supt Quilter's evidence on this point.

Counsel for Supt Comyns cast doubt on Sgt Barry's account of being physically sick at the sight of Supt Comyns at the briefings, pointing out that the sergeant did not mention anything about this event to his psychiatrist at a consultation a short few days later and in circumstances where he detailed other events. Moreover, it appears that the golf championship did not feature as an element in Sgt Barry's legal proceedings. The tribunal does not consider that it is necessary to address any such alleged conflict in order to reach its conclusion on the issues under term of reference [p].

It is not in dispute that Supt Quilter endeavoured to accommodate Sgt Barry's concerns by assigning him to a post far away from where Supt Comyns would be operating. The fact that there was a short daily briefing attended by Supt Comyns cannot have come as a surprise to Sgt Barry as an experienced member of An Garda Síochána. And he was aware of the possibility of some sight of his superintendent because he discussed the matter with his AGSI representative.

There is a more fundamental point. It is improbable to the point of being incredible that the officers concerned would have conspired to target Sgt Barry in order to expose him to the mere presence of Supt Comyns for short briefing periods on two days in the presence of some 100 or more members of the force.

The tribunal is accordingly satisfied that this was not a case of targeting and neither is there any connection between the conduct of the officers and Sgt Barry's protected disclosure.

CHAPTER 12

ISSUE 4.D: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE CASE CONFERENCE ON 2ND FEBRUARY 2015

Issue 4.d of the Schedule of Issues

Did C/Supt Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- (d) *by alleging that Sgt Barry was to be faulted for non-attendance at a case conference on 2nd February 2015 in respect of an alleged rape when he had not been notified about the conference?*

Background

On Friday 30th January 2015, two separate reports of alleged rape were made to Garda Rosemarie O'Connell at Mitchelstown Garda Station. Sergeant Paul Barry was nominated by Inspector Joseph O'Connor as supervising officer for one of the investigations.⁵⁹⁶

Detective Garda James Fitzpatrick phoned Superintendent Michael Comyns on 30th January 2015 at 12:33 hrs and informed him of the two reports. Supt Comyns requested D/Garda Fitzpatrick to organise a case conference for 16:00 hrs that day at Mitchelstown Garda Station and to notify the members involved.⁵⁹⁷ D/Garda Fitzpatrick spoke with the investigating officer, Garda O'Connell, who said that she was unavailable at the proposed time. Supt Comyns then postponed the conference to 12:00 hrs on Monday 2nd February 2015.⁵⁹⁸

The case conference proceeded on 2nd February 2015 and it was attended by Sergeant Tony O'Flynn, D/Garda Fitzpatrick, Garda Denise Fitzgerald and Garda O'Connell. Sgt Barry did not attend the conference.⁵⁹⁹

On 3rd February 2015, Supt Comyns sent a report on the matter to Chief Superintendent Gerard Dillane. He informed the chief superintendent that Sgt Barry did not attend the conference, stating that D/Garda Fitzpatrick had notified Sgt Barry of both the original scheduled conference and the rescheduled conference on 2nd February 2015. He reported that:

I had not seen Sergeant Barry in Mitchelstown Garda station on Monday 2nd February, 2015. I checked the Station Diary to find that Sergeant Barry was marked on duty at 12 midday. I signed the Station Diary.

The situation with Sergeant Barry has been allowed to continue for almost [t]wo and a half years by An Garda Síochána. I have reported previously that I cannot perform my duties as District Officer because of Sergeant Barry's behaviour. Assistant Commissioners Kenny and Ó Cualáin have spoken in the last week about challenging staff who do not perform. When I challenged Sergeant Barry I have been left in the situation where he has ignored me for over two years and I have got no backing by the hierarchy in An Garda Síochána.⁶⁰⁰

⁵⁹⁶ Tribunal Documents, p. 351

⁵⁹⁷ Tribunal Documents, p. 570, pp. 831-832 and p. 1760

⁵⁹⁸ Tribunal Documents, p. 1760

⁵⁹⁹ Tribunal Documents, p. 835

⁶⁰⁰ Tribunal Documents, pp. 474-475

C/Supt Dillane referred to this report in an email to Chief Superintendent Anthony McLoughlin, Human Resource Management (HRM) on 3rd February 2015, stating that Supt Comyns had outlined *'how the present situation with Sergeant Barry is seriously interfering with the administration of Justice in the Fermoy district'*. He went on to state that:

Superintendent Comyns called for a case conference for Mitchelstown Garda station at 12 noon on Monday 2nd February 2015 in relation to an alleged rape which was reported at Mitchelstown Garda station on 29th January 2015. All members of the investigation team attended except Sergeant Barry who was also working in the station at the time. Sergeant Barry continues his non co-operation with his district officer and this is not serving the administration of Justice in the Fermoy district any good.

C/Supt Dillane then outlined his dealings with Sgt Barry during January 2015 and addressed the issue of transferring him out of the district. He attached Supt Comyns's report and stated that *'I now wish to have Sergeant Barry transferred to a district outside Fermoy Garda district immediately'*.⁶⁰¹

Complaint made by Mr Barry

In his statement to the tribunal, Mr Barry said that:

*I was not notified of this conference, and the first I realised that the conference was taking place was when I arrived for duty at Mitchelstown Garda Station on the 2nd of February 2015. One of the Gardaí told me that Superintendent Comyns was in the Station as I entered through the back door of the Station. He was in the public office with members from my unit and I turned to my left into the Sergeant's Office, put on my uniform and went on patrol. I was not requested to attend the conference, either verbally or in writing. The first I heard of this complaint about me was following my appeal to the Transfer Review Board, and it was contained in a letter from Chief Superintendent Dillane to Mr. John Barrett, Executive Director dated 7th August 2015 ... The first I knew about this was two months prior to my retirement in 2016, and I believe that this complaint was manufactured as an excuse to transfer me, as I had not been notified of this conference.*⁶⁰²

In his evidence to the tribunal, Mr Barry was asked by counsel for the tribunal to outline the sequence of events leading up to the conference:

- Q. Apparently there was a conference scheduled, which I think was Friday, 30th January, which was meant to be scheduled at 4pm, to be presided over by Superintendent Comyns. That got adjourned, as it were, to the following Monday. The suggestion is that you were informed of the conference by Detective Garda Fitzpatrick and you should have attended on Monday, the 2nd, to be present at the conference at 12pm, is that correct?
- A. That's not correct.
- Q. Could you correct me in my understanding of the sequence? Could you explain the sequence to the Chair?

⁶⁰¹ Tribunal Documents, pp. 476-477

⁶⁰² Tribunal Documents, pp. 55-56

A. *I was not notified to attend – I was not notified of the original conference date nor the adjourned conference [date] by Detective Garda Fitzpatrick.*

Q. *Or by anyone?*

A. *Or by anyone, verbally or in writing. And also, Superintendent Comyns was made aware on 3rd April 2014 that him having contact with me would be injurious to my health. So why [would he] request that I be in attendance at a meeting with him at Mitchelstown Garda station? And furthermore, when I was notified I had to attend a golf conference in Fota, I immediately contacted my AGSI rep, and I would have done the same in this situation if I was notified to attend a meeting –*

CHAIRMAN: *But it didn't arise because you didn't get the notification?*

A. *No.*

CHAIRMAN: *Full stop, end of, is that right?*

A. *That's correct.*

CHAIRMAN: *If you had got it, that would have been a different story? I take it you wouldn't have gone?*

A. *I would not have ... attended.*⁶⁰³

Mr Barry confirmed to the tribunal that the conference was scheduled for Mitchelstown Garda Station and did not require him to go to Fermoy.⁶⁰⁴ He said that he reported for duty as usual that day in Mitchelstown and when he went into the station he *'was notified that there was a conference taking place with the superintendent and I saw him in the public office and I immediately went into my office, got my patrol jacket and hat and went out on patrol'*.⁶⁰⁵ He said that if he had known that Supt Comyns was attending a conference in Mitchelstown that day he would have taken sick leave.⁶⁰⁶ He also told the tribunal that it was only upon taking up duty that he was informed of the conference taking place.⁶⁰⁷

Mr Barry was referred by counsel for the tribunal to the reports of Supt Comyns and C/Supt Dillane. Mr Barry accepted that it was normal for supervising members to attend a case conference but said that these were not normal or ideal circumstances.⁶⁰⁸ When referred to the statement in the report of Supt Comyns that he had been notified of the case conference by D/Garda Fitzpatrick, Mr Barry claimed that this was not correct.⁶⁰⁹

Mr Barry was cross-examined on the issue by counsel for An Garda Síochána. Mr Barry was certain that D/Garda Fitzpatrick did not tell him about the case conference.⁶¹⁰ It was put to Mr

⁶⁰³ Tribunal Transcripts, Day 177, pp. 72-73

⁶⁰⁴ Tribunal Transcripts, Day 177, p. 73

⁶⁰⁵ Tribunal Transcripts, Day 177, pp. 73-74

⁶⁰⁶ Tribunal Transcripts, Day 177, p. 74

⁶⁰⁷ Tribunal Transcripts, Day 177, p. 75

⁶⁰⁸ Tribunal Transcripts, Day 177, pp. 80-81

⁶⁰⁹ Tribunal Transcripts, Day 177, p. 75

⁶¹⁰ Tribunal Transcripts, Day 178, p. 132

Barry that he saw that a conference was taking place but that he nevertheless went out on patrol. Mr Barry responded that he *'would not go into the same room as Supt Comyns'*.⁶¹¹ He explained that he *'would not have attended the conference because of my doctor's certificate'*.⁶¹² He was asked the following by counsel for An Garda Síochána:

Q. *You see, I have to suggest to you that you must know from your own experience that taking that as an example, that in terms of that particular issue, that acting as you did would undermine the position of Superintendent Comyns and his authority within the district, in front of your colleagues?*

A. *It protected my mental health, my welfare was number one to me.*⁶¹³

...

Q. *This is a case conference with a significant number of officers present, isn't that right?*

A. *Four or five.*

Q. *Yes. So from the point of view of process, in this particular station can I suggest to you that what you did in those circumstances was clearly undermining of the authority of ... your superior?*

A. *What I did at that stage was to protect my mental health as instructed by a medical professional.*

Q. *And can I suggest to you that the way to have avoided that interference with the public interests would have been to be reasonable and to accept a transfer to a different location on a temporary basis to avoid the conflict which you say was causing you stress.*

A. *And I would have accepted it, if it was to a station that I felt I would be safe and secure in.*

Q. *You did say something a moment ago, that ultimately your own health was the number one issue for you, and I appreciate that is your concern, but would you not accept that in this situation from Garda management's point of view, it was balancing a variety of issues in terms of the organisation and management of the force. In other words, your perspective was not the only perspective?*

A. *My perspective was my own mental health, that was my priority. I don't know what management had envisaged for that meeting but it certainly wasn't to aid my mental health.*⁶¹⁴

⁶¹¹ Tribunal Transcripts, Day 178, p. 132

⁶¹² Tribunal Transcripts, Day 178, p. 132

⁶¹³ Tribunal Transcripts, Day 178, p. 133

⁶¹⁴ Tribunal Transcripts, Day 178, pp. 134-135

Superintendent Michael Comyns

In his statement to the tribunal, Supt Comyns outlined his conversation with D/Garda Fitzpatrick on Friday 30th January 2015 regarding the scheduling of the case conference. He said that D/Garda Fitzpatrick was tasked with notifying all members about the conference.⁶¹⁵ He stated in reply to counsel for Mr Barry that it was normal when holding a case conference for a member to notify the other members of the conference.⁶¹⁶

He recalled in his statement that:

The conference was held as arranged on Monday 2nd February 2015 at Mitchelstown Garda Station. It was attended by Sergeant Tony O'Flynn, Detective Garda Jim Fitzpatrick, Garda Denise Fitzgerald and Garda Rosemary O'Connell. Sergeant Paul Barry did not attend the conference, having been notified by Detective Garda Jim Fitzpatrick. Sergeant Barry was the direct supervisor of the investigating member ... Garda Rosemary O'Connell in one of the alleged rapes. I checked to see whether Sergeant Barry was on duty at the time of the conference.

*Sergeant Barry was the direct supervisor of the investigating member, Garda Rosemary O'Connell. These were serious crimes, and I had to be sure that everything was being done correctly and that all investigative steps were being taken. The non-attendance of Sergeant Barry at a case conference deprived the case conference of a key member of the investigative team and the input that goes with that. A supervising sergeant is a key cog, and when missing, naturally impacts on the team and the investigation. It is a particular concern for a District Officer, as it could easily cause problems.*⁶¹⁷

With regard to the notification of Sgt Barry, he stated that:

*In regard to Sergeant Barry's assertion that he was not notified to attend the case conference on 2nd February 2015 as set out on Pages 55/56 of his statement to the Tribunal I was informed that everyone including Sergeant Barry was informed of the conference by Detective Garda Jim Fitzpatrick who I had directed to notify everyone. I specifically asked Detective Garda Fitzpatrick after the conference if he had notified Sergeant Barry and he told me that he had. I reported the matter to Chief Superintendent Dillane the Divisional Officer to inform him again of the difficulties I was having with doing my job because of Sergeant Barry not interacting with me.*⁶¹⁸

In his reply to a Memorandum of Questions provided by the tribunal investigator, Supt Comyns stated that he was satisfied that D/Garda Fitzpatrick had notified Sgt Barry.⁶¹⁹ Supt Comyns said that he later transferred out of the Fermoy District on 9th March 2015.⁶²⁰

⁶¹⁵ Tribunal Documents, p. 570

⁶¹⁶ Tribunal Transcripts, Day 183, pp. 63-64

⁶¹⁷ Tribunal Documents, p. 570

⁶¹⁸ Tribunal Documents, p. 571

⁶¹⁹ Tribunal Documents, p. 5417

⁶²⁰ Tribunal Documents, p. 571

In his evidence to the tribunal, Supt Comyns was asked by counsel for the tribunal whether he had *'any real expectation'* that Sgt Barry would attend the conference given that he had previously said he would not have any interaction with the superintendent. He said that he thought, because of the seriousness of the investigation, that Sgt Barry may attend.⁶²¹ He told the tribunal that Sgt Barry could not supervise the investigation if he was not aware of what was discussed at the conference or what Supt Comyns wanted done in the investigation. He pointed out that *'[i]f he wasn't there, he couldn't oversee what we required to be done'*.⁶²² Supt Comyns highlighted his report to C/Supt Dillane on 3rd February 2015 as expressing his *'frustration'* with the situation.⁶²³

Supt Comyns was cross-examined by counsel for Mr Barry and did not accept that his criticism of Sgt Barry in his report of 3rd February 2015 was unfair.⁶²⁴ He said that he did not make any direct contact with Sgt Barry about the conference.⁶²⁵ Supt Comyns was referred to contacts with Sgt Barry in respect of his non-attendance at Performance Accountability Framework (PAF) meetings and Supt Comyns accepted that he had phoned Sgt Barry directly on two occasions.⁶²⁶

Supt Comyns agreed with his own counsel that it was the obligation of sergeants to follow the directions of superintendents. He was asked the following:

- Q. *In relation to the situation created by Mr. Barry in refusing to have engagement with you, what was the affect on your ability to follow your directions from a chief superintendent and to ensure the proper provision of policing services within your district?*
- A. *It cut off a whole line of communications really and a whole line of supervision of the group of members that Sergeant Barry was in charge of.*⁶²⁷

Retired Chief Superintendent Gerard Dillane

In his statement to the tribunal, C/Supt Dillane confirmed that he spoke to Supt Comyns on the afternoon of 2nd February 2015, when he was informed of the case conference and the non-attendance of Sgt Barry even though he was based in Mitchelstown Garda Station.⁶²⁸ Referring to the report from Supt Comyns dated 3rd February 2015, C/Supt Dillane explained in his statement that Supt Comyns felt that he could not challenge Sgt Barry as the last part of Assistant Commissioner Jack Nolan's investigation had not yet concluded.⁶²⁹ He described the action he took on receiving the report:

⁶²¹ Tribunal Transcripts, Day 182, p. 94

⁶²² Tribunal Transcripts, Day 182, pp 94-95

⁶²³ Tribunal Transcripts, Day 182, p. 96; Tribunal Transcripts, Day 183, p. 62

⁶²⁴ Tribunal Transcripts, Day 183, p. 62

⁶²⁵ Tribunal Transcripts, Day 183, pp. 63-64

⁶²⁶ Tribunal Transcripts, Day 183, pp. 65-66

⁶²⁷ Tribunal Transcripts, Day 183, pp. 152-153

⁶²⁸ Tribunal Documents, p. 350

⁶²⁹ Tribunal Documents, p. 351

*At 14.46hrs on the same day 3rd February 2015, I conveyed this information to Chief Superintendent Tony Mc Loughlin at Human Resource Management ... to emphasise the urgency to have Sergeant Barry transferred out of the Fermoy District as I felt that his presence was having a negative impact on the policing of the area. On 9th February 2015 ... I received a notification from HRM dated 5th February 2015, of a transfer for Sergeant Paul Barry from Mitchelstown Garda Station to Anglesea Street Garda Station which was to take place on 24th February 2015.*⁶³⁰

C/Supt Dillane stated that he wrote to Sgt Barry on 9th February 2015 notifying him of the transfer and ‘*explaining the logic behind it*’.⁶³¹ He also stated that Sgt Barry should have attended the conference if he was aware of it:

*I note from my reading of Paul Barry’s statement at page 56 that he claims that he was not notified and that the first he knew about the conference was when he arrived at Mitchelstown Garda station for duty on 2nd February 2015. Paul Barry commenced his tour of duty at 12md on 2nd February 2015, the same time as the conference was held and if, as he states that this was the first, he heard of the conference, he had ample opportunity to attend it. He goes on to say that when he arrived, Superintendent Comyns was in the public office with members of his unit and when he (Paul Barry) saw Superintendent Comyns, he went into the sergeant’s office put on his uniform and then went out on patrol. If he was aware of the conference when he arrived at the station, which he says he was, he should have attended it.*⁶³²

C/Supt Dillane told the tribunal that within a very short time of receiving Supt Comyns’s report he sent an email to C/Supt McLoughlin, HRM requesting Sgt Barry’s immediate transfer from the Fermoy District.⁶³³

When cross-examined by counsel for Mr Barry, C/Supt Dillane accepted that he sent the email to HRM ‘*within a very short period of time, a mere matter of minutes*’.⁶³⁴ He agreed with counsel for Mr Barry that he did not speak to Sgt Barry in advance of this, did not ask him for an explanation for his non-attendance and did not contact D/Garda Fitzpatrick.⁶³⁵ He said that he had ‘*no reason to doubt what I was being told by Supt Comyns*’.⁶³⁶ He stated that:

- A. *I knew there were issues because I was listening to them on a regular basis from Superintendent Comyns, but from my perspective, I had no reason to doubt Superintendent Comyns, the veracity or the legitimacy of what he was trying to tell me.*
- Q. *Did you know when you contacted Human Resources Management that Superintendent Comyns had not actually taken any steps to determine how Detective Garda Fitzpatrick had notified my client about the case conference?*

⁶³⁰ Tribunal Documents, p. 351

⁶³¹ Tribunal Documents, p. 351

⁶³² Tribunal Documents, p. 364

⁶³³ Tribunal Transcripts, Day 185, p. 39

⁶³⁴ Tribunal Transcripts, Day 185, p. 39

⁶³⁵ Tribunal Transcripts, Day 185, pp. 39–40

⁶³⁶ Tribunal Transcripts, Day 185, p. 40

- A. No, I hadn't, I just took his word for it, because from what I knew of Superintendent Comyns, he wouldn't make a statement unless he could back it up and I took his word for it and to this day, if he made a statement like that and gave it to me in writing, I would believe it.
- Q. And it's furnished with your comment that you believe that it's, in order to emphasise the urgency of getting Sergeant Barry out of the Fermoy district, I am giving this on to you right now?
- A. That's correct. But remember, this is in the context now of my other dealings with Chief Superintendent McLoughlin. We're on to January 2015. This thing was going on since March 2013 or October – August 2012 actually.⁶³⁷

When asked by counsel for Mr Barry if he considered this to be 'unfair' to Sgt Barry he replied that:

... it was a rape conference and I think the seriousness of it is what really struck home to me. That look, how can we deliver a service to the public, this is a very serious case, when the sergeant in charge will not turn up to the conference? You know, that was the seriousness of the whole thing. Like we were here to provide a service to the public and here we were squabbling ourselves. You know, I was taking it very, very, very serious, that this was affecting the policing that I was able to deliver to the people of Cork north at the time.⁶³⁸

Retired Detective Garda James Fitzpatrick

In his statement to the tribunal, D/Garda Fitzpatrick said he was contacted by Supt Comyns on 30th January 2015, who proposed a case conference at 16:00 hrs that day in relation to two rape investigations. He recalled that the conference was rescheduled by Supt Comyns to 12:00 hrs on 2nd February 2015 and that he relayed the details of the rescheduled conference to Garda O'Connell.⁶³⁹ He went on to state that:

As Sergeant Paul Barry was the appointed Supervisor on the investigation his attendance was also requested by Supt Comyns and I relayed the details of the re-scheduled conference to Sergeant Barry at approximately 4pm on Friday 30th January 2015. On Monday the 2nd February at approximately 12 midday the conference commenced at Mitchelstown Garda Station. To the best of my recollection at the outset of the conference Supt Comyns asked me where was Sergeant Barry and also asked if he was informed of the conference details. I confirmed that I had informed him and I went downstairs to try to locate Sergeant Barry to no avail.⁶⁴⁰

In reply to a Memorandum of Questions provided by the tribunal investigator, D/Garda Fitzpatrick stated that he verbally notified Sgt Barry of the details of the case conference on 2nd February 2015.⁶⁴¹ He also said that he was aware that Sgt Barry was present in the station just prior to the beginning of the conference.⁶⁴²

⁶³⁷ Tribunal Transcripts, Day 185, pp. 40-41

⁶³⁸ Tribunal Transcripts, Day 185, pp. 41-42

⁶³⁹ Tribunal Documents, p. 1760

⁶⁴⁰ Tribunal Documents, p. 1760

⁶⁴¹ Tribunal Documents, p. 1926

⁶⁴² Tribunal Documents, p. 1927

In his evidence to the tribunal, D/Garda Fitzpatrick confirmed that he notified Sgt Barry as he was the supervising sergeant and would normally attend at a case conference.⁶⁴³ He said that he was aware of friction between Sgt Barry and Supt Comyns and that there was no contact between them.⁶⁴⁴ He was asked by counsel for the tribunal whether he was absolutely certain that he notified Sgt Barry of the requirement to attend and he said that he was.⁶⁴⁵

He told the tribunal that on 2nd February 2015, when Supt Comyns asked him where Sgt Barry was, he went to locate him:

So I go downstairs, I was aware Sergeant Barry was in the station. Now I'm not a hundred percent certain on this, but from thinking about it, I think I met Sergeant Barry in the hallway, and I said, Paul, the conference is on upstairs, come on up. And he just opened the back door and went out, exited the station.

Q Yes, go on, you went back up to the conference?

A. *Went back up to the conference, I just did this to Superintendent Comyns, shrugged. The conference went ahead. It didn't last long. When the conference was over, Superintendent Comyns called me and said, did you tell him, Sergeant Barry that is, and I said, yeah, I told him twice. Or, he was told twice. He was told twice, that's what I said.*⁶⁴⁶

D/Garda Fitzpatrick was cross-examined by counsel for Mr Barry in respect of his evidence that he had bumped into Sgt Barry in the hallway. It was put to him that in his statement to the tribunal he claimed that he had sought to locate Sgt Barry downstairs that day but to no avail. He told the tribunal that:

On reflection, since I made that statement obviously it was running through my mind, and from thinking about what happened and running my mind through the conference, that is now my recollection.

Q. *It's a fairly extraordinary thing to remember and not tell anybody about in advance of giving your evidence, isn't it?*

A. *Well, this is my recollection.*

Q. *Yes, well your recollection three months ago was different?*

A. *I agree with that.*⁶⁴⁷

He went on to say that:

*As I said, Mr. Chairman, I'm not one hundred percent sure, but that is now my recollection. That I recall meeting him in the hallway, I says, Paul, come on up or [words] to that effect, and he goes out the back door.*⁶⁴⁸

⁶⁴³ Tribunal Transcripts, Day 187, p. 162

⁶⁴⁴ Tribunal Transcripts, Day 187, p. 162

⁶⁴⁵ Tribunal Transcripts, Day 187, p. 163

⁶⁴⁶ Tribunal Transcripts, Day 187, pp. 165-166

⁶⁴⁷ Tribunal Transcripts, Day 187, p. 167

⁶⁴⁸ Tribunal Transcripts, Day 187, pp. 170-171

He was asked by the Chairman whether he was less than certain about his encounter with Sgt Barry downstairs and he told the tribunal that he was *‘fairly certain that that’s what happened’*.⁶⁴⁹

Legal Submissions

Mr Paul Barry submitted as follows:⁶⁵⁰

- that C/Supt Dillane’s email to C/Supt McLoughlin contained a clear criticism of Sgt Barry that was pitched at a high level. These criticisms were unfair as Sgt Barry had not in fact been notified to attend the conference. Further, Sgt Barry was being criticised for failing to attend a conference with Supt Comyns despite the fact that a medical certificate was in place precluding Sgt Barry from having contact with Supt Comyns and in circumstances where Dr Oghenovo Oghuvbu advised in April 2014 that contact between the two could damage Sgt Barry’s health.
- that the criticisms were made in an unfair fashion. The first Sgt Barry heard of the complaint was two months prior to his retirement in 2016. Sgt Barry was not provided with an opportunity to respond to the complaint or give his explanation before the criticism was made. No effort was made to verify with D/Garda Fitzpatrick whether he had in fact notified Sgt Barry. C/Supt Dillane proceeded on the assumption that Sgt Barry deliberately absented himself and rushed to inform HRM in an effort to have Sgt Barry transferred.
- that the unfair criticisms expressed by C/Supt Dillane in his email amounted to instances of targeting and/or discrediting of Sgt Barry on foot of the protected disclosure he made. This was the latest in a sequence of unfair behaviour by C/Supt Dillane that started when C/Supt Dillane learned of the first protected disclosure.

An Garda Síochána submitted as follows:⁶⁵¹

- that on 2nd February 2015, C/Supt Dillane spoke with Supt Comyns and was informed of a case conference concerning a rape case held in Mitchelstown Garda Station; and that Sgt Barry, who was to supervise the investigation, was in the station but failed to attend. Supt Comyns followed up on 3rd February 2015 with a report.
- that C/Supt Dillane referred to the matter in correspondence with C/Supt McLoughlin saying that Sgt Barry’s presence continued to have a negative impact on policing in the area and this correspondence was in the context of an ongoing dispute over Sgt Barry’s proposed transfer from Mitchelstown Garda Station.
- that the correspondence from C/Supt Dillane did no more than highlight his genuine concern about the impact the issue was having on policing.
- that C/Supt Dillane was under no obligation to check the veracity of the complaint from Supt Comyns before acting on it.

⁶⁴⁹ Tribunal Transcripts, Day 187, p. 174

⁶⁵⁰ The tribunal has considered all of Mr Paul Barry’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

⁶⁵¹ The tribunal has considered all of An Garda Síochána’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

Conclusion

This complaint arises out of a report that C/Supt Dillane sent to C/Supt McLoughlin of HRM at Garda Headquarters on 3rd February 2015. He referred to the case conference that Supt Comyns had arranged for the previous day at Mitchelstown Garda Station. He said that all the members of the investigation team attended except for Sgt Barry *'who was also working in the station at the time'*. He complained about the sergeant's non-cooperation with his district officer and after addressing some other issues he said *'I now wish to have Sgt Barry transferred to a district outside Fermoy Garda district immediately'*.

Supt Comyns maintains that he instructed D/Garda Fitzpatrick to notify all the relevant parties including Sgt Barry to attend the meeting on 2nd February and the detective told the tribunal that he notified Sgt Barry on the previous Friday. Subsequent to making his statement to the tribunal he had reflected on the matter and he had a recollection of actually meeting Sgt Barry in the station when he went to look for him but he said he was not 100% certain on that. The tribunal is satisfied that this officer was doing his best to assist in this matter but considers it safer not to accept that this meeting took place.

The result is that D/Garda Fitzpatrick is sure that he notified Sgt Barry about the meeting but the latter denies that it happened. He was present in the station on Monday 2nd February 2015 at 12:00 hrs and he saw that a conference was about to take place which would be attended by Supt Comyns. He turned away and went about other business.

The position is therefore that Sgt Barry says that he was not notified about the meeting but if he had been he would not have attended with Supt Comyns. And it would appear that he was aware of the meeting taking place when he arrived at work at 12:00 hrs, which was as it happened the scheduled time for the conference to take place. In his statement to the tribunal, Mr Barry said: *'I was not notified of this conference, and the first I realised that the conference was taking place was when I arrived for duty at Mitchelstown Garda Station on the 2nd of February 2015'*.

So it seems reasonable to assume that Sgt Barry was probably aware that the conference was taking place about a case in which he was involved. However, in case that is possibly an unwarranted conclusion the tribunal proceeds on the basis that Sgt Barry would not have attended even if he had been informed about it and that Supt Comyns would be present. And the sergeant's absence cannot have been unexpected.

This situation illustrates the difficulties that were presented to the management of the district and division by the conditions laid down in the medical certificate of April 2013. Sgt Barry was the supervising member in respect of a serious crime in which the superintendent had or wished to have a role with the assistance and co-operation of the sergeant. But that was impossible in the circumstances. Obviously, Supt Comyns was frustrated by the restrictions under which he was obliged to operate and C/Supt Dillane shared his discomfort.

It is evident that C/Supt Dillane did not complain of Sgt Barry's failure to attend notwithstanding having been notified but rather said that he was also working in the station at the time, which actually appears to be correct. However, the point of this letter is to seek to have Sgt Barry

transferred because of his failure to work with the district officer. The letter was not concerned with the precise details of notification to Sgt Barry but rather with the reality that irrespective of notice to him or knowledge independently on his part, he was not going to attend the case conference with Supt Comyns.

The tribunal is satisfied that the report in question was not concerned with a complaint about non-attendance despite notice but rather with the more fundamental question of policing in the district under the restrictions that existed.

This was not a case of targeting and it arose out of and because of the restrictions that the officers felt were impeding their efforts to achieve satisfactory policing. The report in question had nothing to do with Sgt Barry's protected disclosure.

CHAPTER 13

ISSUE 5.c: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE CERTIFICATION OF HIS DUTY UNDER THE HADDINGTON ROAD AGREEMENT

Issue 5.c of the Schedule of Issues

Did Supt Comyns target or discredit Sgt Barry as he alleges because he had made a protected disclosure –

- (c) *by requiring Sgt Barry to apply to Insp O'Sullivan or Supt Comyns for certification of Haddington Road hours?*

Background

The Public Service Stability Agreement 2013-2016 (Haddington Road Agreement) provided for a series of reforms in relation to the working hours, rostering, redeployment, and performance management of all public servants. The agreement also introduced changes to overtime payments and flexible working arrangements, and provided for a longer working week.

In 2013, HQ Directive 61/2013 introduced, *inter alia*, a requirement for gardaí to work additional unpaid hours, which became known as '*Haddington Road hours*'.

At the end of April 2014, Sergeant Paul Barry submitted an application on a form headed '*Application for Extra Duty (Overtime)*' to Sergeant Aidan Dunne, who was the sergeant in charge of Mitchelstown Garda Station. Sgt Barry applied for a ten-hour period of duty he completed on 25th April 2014 to be counted as Haddington Road hours performed by him. Sgt Dunne approved the extra duty and signed the form, which was then forwarded to the district officer who had the authority to sanction the extra duty.⁶⁵²

On the same occasion, Garda Henry Ward submitted a similar application to Sgt Dunne for a ten-hour tour of duty that he completed with Sgt Barry on 25th April 2014 and a further one-hour period he performed separately, on 22nd April 2014. Sgt Dunne signed the form approving the extra periods of duty and forwarded Garda Ward's application to the District Office.⁶⁵³

On 1st May 2014, Superintendent Michael Comyns wrote to Sgt Dunne concerning the applications for Haddington Road hours claimed by both Sgt Barry and Garda Ward for the ten-hour tour of duty on 25th April. Supt Comyns enquired who had given prior sanction for the duty and required Sgt Barry and Garda Ward to explain '*exactly what they did for 10 hours*'.⁶⁵⁴

Supt Comyns's queries were raised with Sgt Barry through Sgt Dunne. Sgt Barry replied on 3rd June 2014 and stated that the sergeant in charge in Mitchelstown Garda Station had given prior sanction and outlined the duties that he had performed.⁶⁵⁵ He further advised Sgt Dunne that Garda Ward would explain his duty on his return from sick leave.

⁶⁵² Tribunal Documents, p. 249

⁶⁵³ Tribunal Documents, p. 250

⁶⁵⁴ Tribunal Documents, p. 247

⁶⁵⁵ Tribunal Documents, p. 245

Sgt Dunne then wrote to Supt Comyns on 4th June 2014 and outlined the duties that had been performed by Sgt Barry.⁶⁵⁶

On 6th June 2014, Supt Comyns again wrote to Sgt Dunne and directed him to instruct Sgt Barry that he and Inspector Anthony O’Sullivan were *‘the people who can sanction extra duty of any type’* in the Fermoy District.⁶⁵⁷ Supt Comyns also asked Sgt Dunne if he had sanctioned the extra duty.

On 10th June 2014, Sgt Dunne replied to Supt Comyns and stated that he had indeed sanctioned the Haddington Road hours incurred by Sgt Barry and Garda Ward. He outlined the nature of the work undertaken by Sgt Barry and Garda Ward and confirmed that he had instructed Sgt Barry with regard to the *‘procedure for working any extra duty’*.⁶⁵⁸ There does not appear to have been any instruction from Supt Comyns in regard to Sgt Dunne offering similar advice to Garda Ward.

Complaint made by Mr Barry

In his statement to tribunal investigators, Mr Barry outlined his complaint to the tribunal in the following terms:

*In relation to Haddington Road duty on the 25th of April 2014, I checked with a number of other Sergeants only to find that I was the only Sergeant in the District who had apply to Superintendent Comyns or Inspector O’Sullivan for permission to incur Haddington Road duty. All other Sergeants could apply to their Sergeant-In-Charge. In my case, this would have been Sergeant Aidan Dunne. I believe I was deliberately targeted by Superintendent Comyns, as I was the only Sergeant who had to do so.*⁶⁵⁹

And further that:

*No other Sergeant had to apply for Haddington Road to an Inspector or Superintendent. I was singled out for this and other matters of leave, as already covered.*⁶⁶⁰

In his evidence to the tribunal, Mr Barry said that prior to Supt Comyns’s instruction to him it was possible for him to have Haddington Road hours approved by the sergeant in charge but from that point on he had to look for prior approval from Supt Comyns or Insp O’Sullivan.⁶⁶¹ He told the tribunal that *‘as far as [he] was aware’* other members could still have their Haddington Road duty approved by the sergeant in charge and that he was the only sergeant who had received this instruction.⁶⁶² Mr Barry did not identify any occasion on which sanction was not forthcoming for overtime or Haddington Road hours.

In support of his assertion that he was treated differently Mr Barry referred the tribunal to a number of Haddington Road hours applications from gardaí in the Fermoy District, which were circulated by the tribunal to the parties.⁶⁶³ Mr Barry claimed that these forms suggested that other members were sanctioned by Supt Comyns and Insp O’Sullivan after the hours were actually worked.

⁶⁵⁶ Tribunal Documents, p. 246

⁶⁵⁷ Tribunal Documents, p. 246

⁶⁵⁸ Tribunal Documents, p. 248

⁶⁵⁹ Tribunal Documents, pp. 50-51

⁶⁶⁰ Tribunal Documents, p. 58

⁶⁶¹ Tribunal Transcripts, Day 181, p. 7

⁶⁶² Tribunal Transcripts, Day 181, p. 7

⁶⁶³ Tribunal Documents, pp. 5460-5561

The relevant forms include a column for the signature of the sergeant in charge under the heading '*approving duty involved*'. The forms also contain a column for the signature of the district officer under the heading '*sanctioning the extra duty involved*', which are signed off on by Supt Comyns or Insp O'Sullivan. The dates of those signatures post-date the date on which the hours were worked, often by a number of weeks. Mr Barry argued that this suggested sanction was retrospectively provided after the hours were worked.

It is Mr Barry's case that he was singled out by Supt Comyns and that the requirement for prior sanction applied only to him. He claims this was done because he had made a protected disclosure against Supt Comyns in which he alleged serious wrongdoing.

Responding Statements and Evidence on the Issue

Superintendent Michael Comyns

In his evidence to the tribunal, Supt Comyns explained the operation of the Haddington Road Agreement:

Prior to the Haddington Road hours being introduced, any member working in the Fermoy district had to have prior approval to work extra hours. So, Haddington Road, when it was introduced, again was extra hours, this was in July 2013, it was members who were working outside of their normal tours of duty. They had to work one - if my memory is correct now, they had to work ten one hours, which could be worked in blocks of two hours or three hours; they had to work one ten hour shift for free, shall we say, and they had to work another ten hour shift where you got 15 hours time off for that ten hour shift. So that was extra duty that members were coming in on.

So, from the introduction of Haddington Road, I applied the same practice with the extra hours that you were working under Haddington Road as I did for overtime or for toil.

Q. Which means it has to be sanctioned by either –

A. Myself or Inspector O'Sullivan.⁶⁶⁴

Supt Comyns told the tribunal that at the outset of his appointment as district officer in Fermoy in July 2010 he directed that any extra hours worked had to be sanctioned by Insp O'Sullivan or himself prior to the duty being undertaken.⁶⁶⁵ According to Supt Comyns this practice did not change with the introduction of the Haddington Road Agreement but remained in place, and all extra hours, whether overtime or Haddington Road hours, had to be sanctioned as instructed.⁶⁶⁶

Counsel for Mr Barry suggested to Supt Comyns that this did not represent the practice at the time and that the true situation was that the sergeants in charge were delegated the function of giving prior approval since they were closer to what was happening on the ground. However, Supt Comyns did not agree with this assertion and pointed out that he and Insp O'Sullivan had to be aware at all times exactly which members were or were not performing any particular duties.⁶⁶⁷

⁶⁶⁴ Tribunal Transcripts, Day 182, pp. 101-102

⁶⁶⁵ Tribunal Transcripts, Day 182, p. 12

⁶⁶⁶ Tribunal Documents, pp. 5420-5422

⁶⁶⁷ Tribunal Transcripts, Day 183, pp. 115-116

Supt Comyns told the tribunal that after the extra hours were sanctioned by himself or Insp O’Sullivan the member would complete them. The hours worked would then be verified or confirmed as having been performed by a sergeant. Payment, on the other hand, would not be made until the extra hours were certified by himself or Insp O’Sullivan.

Supt Comyns was asked by the Chairman to explain the system in place for claiming extra duty before and after the Haddington Road Agreement:

When a member would work extra duty, Chair, this form would be attached to his A85. This form was in use in Fermoy district since the year 2000. So the member would submit the form and that second last column to the right would be signed by the sergeant. It should be certifying really. The word approving is in there, it should be certifying. And then it would be sanctioned by myself or Inspector O’Sullivan.

CHAIRMAN: *And what does that mean? What was the role of the sergeant as you understand it, whatever it says on the –*

A. *The member worked the duty.*

CHAIRMAN: *I am sorry?*

A. *The member worked the duty. The sergeant is certifying that the member actually worked the duty.*

CHAIRMAN: *And do you say that this form or this process was the same or different from the Haddington Road process?*

A. *The same.*⁶⁶⁸

As noted, Supt Comyns stated that prior sanction to work extra duty was always required. He was cross-examined by counsel for Mr Barry and conceded that this sanction was not recorded in writing at the time and that neither he nor Insp O’Sullivan kept a written record of it.⁶⁶⁹ He said that the form would normally be submitted within a week of the duty being performed and that he was confident that he would recall granting the approval in any particular instance.

Supt Comyns’s attention was drawn by counsel for Mr Barry to the actual wording on the form, namely the use of the word ‘*approval*’ in the column to be signed by the sergeant in charge. Counsel suggested that this inferred that the duty was carried out with the prior approval of the sergeant and that the district officer merely approved payment ‘*after the fact*’. Supt Comyns responded as follows:

*The instruction from 2010 was that approval could only be given by myself or Inspector O’Sullivan and the form long predated that. We didn’t change the form but the form long predated 2010.*⁶⁷⁰

According to Supt Comyns, Sgt Barry was treated in the same manner as all personnel in the Fermoy District in relation to how Haddington Road hours were approved and certified. In his evidence, he referred to a number of Form A85s that he claimed supported his position.⁶⁷¹

⁶⁶⁸ Tribunal Transcripts, Day 183, p. 124

⁶⁶⁹ Tribunal Transcripts, Day 183, pp. 114-115

⁶⁷⁰ Tribunal Transcripts, Day 183, p. 122

⁶⁷¹ Tribunal Documents, pp. 5460-5561

The Form A85s for Sgt Barry showed that he did not work any Haddington Road hours before October 2013, by which time the procedure for performing such duty had been in place for several months following its implementation on 1st July 2013.⁶⁷²

Supt Comyns was asked by the Chairman if he treated Sgt Barry any differently to other members in Fermoy:

*No. I treated him the exact same. And the evidence is there attached to the A 85s, they're all signed by myself or Inspector O'Sullivan for everyone's Haddington Road. And if on any particular occasion I saw something on a form that I didn't know about, I'd ask the question, what is this about or how come I don't know about this, across the board.*⁶⁷³

Supt Comyns denied that he targeted and/or discredited Sgt Barry because he made a protected disclosure by requiring him to apply to himself or to Insp O'Sullivan for certification of Haddington Road hours.

Inspector Anthony O' Sullivan

During his evidence to the tribunal, Insp O'Sullivan was asked by counsel for the tribunal about his understanding of the operation of Haddington Road hours:

*All I can say is, my recollection of Haddington Road, and ... that would include myself, if I was getting Haddington Road, I would say to Superintendent Comyns, look, I'm doing five hours Haddington Road. I believe all Haddington Road was pre-sanctioned. Now it may not, can I explain this to you, the 85s would come in at the end of the week, so they would be there on the Monday morning. And if a couple of guards had taken Haddington Road during the week, they may not have it signed, sanctioned the day before but they would have made some contact with the superintendent or I and said, I'm at such a thing, I want to do some of my ten hours Haddington Road, do you mind if I do that? What would happen on Monday morning, and many the time Superintendent Comyns would have come out to my portacabin and said, did you sanction that Haddington Road and I said, for who, and we'll say he has three of them, and I say, yeah, two out of them three guards did make contact with me, Garda Gerry Murphy from Mitchelstown, we'll say, Garda Alan Murray from the policing unit, they've contacted me. He would say, what about the third one? And he'd send the third one back out, who sanctioned this? So I believe that's what happened.*⁶⁷⁴

Insp O'Sullivan was cross-examined by counsel for Mr Barry and stated that his recollection was that Supt Comyns took up duty as district officer in 2010 and thereafter all extra duty had to be sanctioned in advance by the superintendent or himself. He recalled that everyone was treated the same by Supt Comyns.⁶⁷⁵

Retired Sergeant Aidan Dunne

In his statement to the tribunal, Sgt Dunne stated the following:

In relation to the issue raised by retired Sergeant Paul Barry regarding Haddington Road Duty I can confirm that at one time I did sign and approve all such applications made

⁶⁷² Tribunal Documents, pp. 5547-5549

⁶⁷³ Tribunal Transcripts, Day 182, p. 103

⁶⁷⁴ Tribunal Transcripts, Day 187, p. 46

⁶⁷⁵ Tribunal Transcripts, Day 187, p. 143

by retired Sergeant Barry as well as for the other Sergeant attached to the Mitchelstown Garda station, Sergeant Jerry Quinn. However this practice changed under Superintendent Michael Comyns in which he directed that all such applications should be forwarded to him for sanction or to the District Inspector, Anthony O'Sullivan. I cannot recall if initially this applied to retired Sergeant Barry only but I can say that before he moved from the Fermoy district all such applications did have to be forwarded to Superintendent Comyns. All such applications made by me for Haddington Road duty had to be forwarded to Supt Comyns / Insp O'Sullivan as my direct supervisors.⁶⁷⁶

Sgt Dunne was asked by counsel for the tribunal about his practice with regard to sanctioning or approving Haddington Road hours. He told the tribunal that he initially granted them but was then instructed that everything was 'to go through' Supt Comyns or Insp O'Sullivan. He stated that this change occurred around the time of the first or second Form A85s being submitted following the implementation of the Haddington Road Agreement.⁶⁷⁷

Sgt Dunne told the tribunal that his signature on the forms or A85s thereafter was to be read as merely certifying that the duty had been performed.

Legal Submissions

Mr Paul Barry submitted as follows:⁶⁷⁸

- that Mr Barry's complaint was that from April 2014 there was an unfair difference of treatment between him and other gardaí in relation to how Haddington Road duty was handled. He was the only sergeant in the Fermoy District who had to apply to Supt Comyns or Insp O'Sullivan for prior approval to incur Haddington Road duty. Others could apply to the sergeant in charge and then seek sanction from Supt Comyns or Insp O'Sullivan. This amounted to targeting by Supt Comyns, which arose against the background of the protected disclosures.
- that Supt Comyns in evidence said that prior approval from him or Insp O'Sullivan was required for all members. Insp O'Sullivan also said that all Haddington Road duty was sanctioned in advance by him or Supt Comyns. Sgt Dunne stated that he initially approved Haddington Road duty, but was told it had to go through Supt Comyns or Insp O'Sullivan and that this applied to all members he was looking after. The materials included applications for Haddington Road duty that cast doubt on the explanations offered. The materials suggested that a member could obtain sanction after the hours were worked, suggesting a retrospective sanction. Supt Comyns and Insp O'Sullivan explained this by saying that sometimes approval would be granted orally and the paperwork would follow. Supt Comyns said that he would not make a note of those to whom he verbally granted prior sanction.
- that the credibility of this explanation was questionable, given that there were a significant number of gardaí working under the supervision of Insp O'Sullivan and Supt Comyns. The idea that they were able to remember every person to whom they verbally gave prior sanction, without notes, and then sign off on a Form A85 was not tenable.

⁶⁷⁶ Tribunal Documents, p. 1881

⁶⁷⁷ Tribunal Transcripts, Day 188, pp. 109-110

⁶⁷⁸ The tribunal has considered all of Mr Paul Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

Superintendent Michael Comyns submitted as follows:⁶⁷⁹

- that the requirement to work extra hours under the Haddington Road Agreement came into effect on 1st July 2013. The hours worked under the Haddington Road Agreement had to be recorded on a revised Form A85.
- that on his appointment in Fermoy in July 2010 Supt Comyns directed that all extra hours had to be sanctioned either by him or by Insp O’Sullivan. This did not change with the Haddington Road Agreement and it remained in place that all extra hours, whether overtime or Haddington Road, had to get prior approval from Insp O’Sullivan or Supt Comyns.
- that Sgt Dunne’s evidence was that he initially sanctioned Haddington Road hours, but he was told that he was not to do so any more and that everything was to go through the superintendent or inspector. This change happened around the time of the receipt of the first or second Form A85s following implementation of the Haddington Road Agreement.
- that Sgt Barry’s Form A85 showed that he did not work any Haddington Road hours before October 2013 even though the procedure had been in place for several months.
- that the process was that extra hours had to be sanctioned in advance by Insp O’Sullivan or Supt Comyns. When worked, the hours were verified by the signature of a sergeant on the Form A85, but payment was not made until they were certified by the signature of the inspector or superintendent.
- that Sgt Barry was treated in the same manner as all other members in the Fermoy District.
- that Supt Comyns did not target or discredit Sgt Barry, nor was he a party to targeting or discrediting Sgt Barry by An Garda Síochána because he made a protected disclosure by requiring him to apply to Insp O’Sullivan or Supt Comyns for certification of Haddington Road hours.

Retired Sergeant Aidan Dunne submitted as follows:⁶⁸⁰

- that he received a direction from his superiors that he was not to grant Haddington Road hours and this direction applied to all members.
- that in his dealings with Sgt Barry, Sgt Dunne was professional and courteous and performed his duties in a proper fashion.

⁶⁷⁹ The tribunal has considered all of Superintendent Michael Comyns’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190 pp. 64-69

⁶⁸⁰ The tribunal has considered all of Sergeant Aidan Dunne’s legal submissions on this issue and what follows is a summary of the same.

Conclusion

This issue was explored in detail in examination by counsel for the tribunal and in cross-examination by counsel for Mr Barry. The relevant documentation was scrutinised and the evidence did not reveal any discrimination in the treatment of the hours worked by Sgt Barry and by other members including sergeants.

Under the Haddington Road scheme, which began in 2013, gardaí were required to work extra hours, some of them without pay and the others on the basis of leave granted in lieu. The question was whether Sgt Barry was treated differently from others in respect of such extra duty.

Supt Comyns gave evidence that when he came to the district in 2010, he made it a rule that extra duty had to be sanctioned in advance by him or by Insp O'Sullivan. He applied the same rule with Haddington Road duty. Advance sanction did not have to be in writing and if he got an application for certification of such duty and he had not sanctioned it, he would check with Insp O'Sullivan to see if he had done so.

This rule applied to Sgt Barry and the other members in the district. It is true that the form in use for this leave referred to sanction by the sergeant in charge but that is not the way the system worked.

Sgt Dunne, the sergeant in charge in Mitchelstown Garda Station, said that he sanctioned Haddington Road duty on a number of occasions after it first came into use but shortly after that he was instructed that everything had to go through the superintendent or the inspector. Thereafter, that was what happened.

The evidence on this point is clear. It is possible to read the pre-existing application forms as meaning something different but the evidence is all one way and there is simply no basis for contending that Sgt Barry was treated differently.

CHAPTER 14

ISSUE 3.B, ISSUE 3.D AND ISSUE 4.I: THE COMPLAINT MADE BY MR BARRY IN RELATION TO ALLEGED ATTEMPTS TO TRANSFER HIM FROM MITCHELSTOWN GARDA STATION

Issue 3.b of the Schedule of Issues

Did Supt Michael Comyns and/or C/Supt Gerard Dillane target or discredit Sgt Barry as he alleges because he had made a protected disclosure –

- (b) *by failing to make proper temporary workplace accommodations for Sgt Barry to which he was entitled?*

Issue 3.d of the Schedule of Issues

Did Supt Michael Comyns and/or C/Supt Gerard Dillane target or discredit Sgt Paul Barry as he alleges because he had made a protected disclosure –

- (d) *by pressurising Sgt Barry to agree to transfer to another station against his will?*

Issue 4.i of the Schedule of Issues

Did C/Supt Gerard Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- (i) *by stating in a letter to Mr John Barrett dated 7th August 2015 that Sgt Barry was having a negative effect on policing in the Fermoy District?*

The tribunal will deal with these three issues together as they are closely interwoven and substantially arise from the same facts. It is clear that central to Mr Paul Barry's case is the general allegation that there were attempts to transfer him from Mitchelstown Garda Station while his disclosures were under investigation. This, he said, constituted targeting and/or discrediting him by senior management in the Fermoy District because he made a protected disclosure.

The transfer issue arose as early as September 2012 and remained live until May 2016, shortly before Sgt Barry's retirement from An Garda Síochána.

In reviewing the evidence, the tribunal considers it necessary to set out in some detail the events that impacted on both the transfer and the temporary workplace issues. This may entail some repetition of earlier chapters in this report and where this arises the references will be kept to a minimum.

The Garda Síochána Code and Policy Documents

Chapter 8 of the Garda Code makes it clear that the allocation and transfer of garda members is the responsibility of garda management, rather than a matter of choice for any individual member. Provision is made in chapter 8.13 of the Garda Code for a member to appeal an unrequested transfer if he/she feels the transfer is *'harsh or unjust'*.⁶⁸¹

Under paragraph 8.8 of the Garda Síochána policy and procedures document for dealing with harassment, sexual harassment and bullying: *'Working Together To Create A Positive Working Environment'*, a person making a complaint of bullying or harassment, or the person complained of, may apply to be transferred, temporarily or permanently, to another station or section irrespective of whether the complaint is upheld or not, and in such circumstances the application will be given every consideration.⁶⁸²

The same policy document also states that a member who makes a complaint of bullying or harassment will not be victimised or, provided the complaint is made *bona fide*, subjected to discipline proceedings.⁶⁸³

Complaint made by Mr Barry

In his interview with tribunal investigators, Mr Barry succinctly stated the gravamen of his complaint to the tribunal on these issues in the following terms:

*Chief Superintendent Dillane met me while I was out on sick leave and offered me a transfer. That was the first attempt at transferring me by him and I believe he offered this because I wasn't getting on with Superintendent Comyns, even though the Bullying Policy says that you should not be transferred unless you apply for same ... I believe the transfer attempts were direct targeting because I made my complaint.*⁶⁸⁴

Mr Barry went further and stated his firmly held belief that it was garda policy at the time to transfer and isolate members who made protected disclosures. This, he claims, is exactly what happened to him after he made his disclosures.⁶⁸⁵

He also complained that despite recommendations from the medical advisers no temporary workplace accommodations were put in place on his return to work, and the only concession to his predicament was the offer of a transfer.⁶⁸⁶

August–September 2012

Sgt Barry reported non-effective for duty on 6th August 2012, citing work-related stress as the cause of his illness.⁶⁸⁷ On 9th August 2012, Superintendent Michael Comyns directed Inspector Anthony O'Sullivan to make enquiries of Sgt Barry as to the cause of his work-related stress.⁶⁸⁸

⁶⁸¹ Tribunal Documents, p. 1476

⁶⁸² Tribunal Documents, p. 3529

⁶⁸³ Tribunal Documents, p. 3529

⁶⁸⁴ Tribunal Documents, p. 58

⁶⁸⁵ Tribunal Documents, p. 327

⁶⁸⁶ Tribunal Documents, pp. 37-38

⁶⁸⁷ Tribunal Documents, p. 4004

⁶⁸⁸ Tribunal Documents, p. 3727

On 4th September 2012, Insp O’Sullivan met with Sgt Barry, but the sergeant declined to discuss any issues in relation to his absence. In his report to Supt Comyns, dated 10th September 2012, Insp O’Sullivan stated that Sgt Barry indicated that he had ‘*some issue*’ with the superintendent, but declined to discuss it. Sgt Barry requested that a file be forwarded for investigation to an officer from outside the Fermoy District.⁶⁸⁹

In a report dated 10th September 2012, Supt Comyns advised Chief Superintendent Gerard Dillane that he had appointed Insp O’Sullivan to investigate Sgt Barry’s work-related stress in accordance with HQ Directive 139/10, but that Sgt Barry had declined to discuss the matter. Supt Comyns observed that it appeared Sgt Barry had an issue with him and recalled that on 2nd August 2012 he had dealt with a minor breach of duty by the sergeant under Regulation 10 of the Garda Síochána (Discipline) Regulations, 2007.⁶⁹⁰

It is agreed that on 13th September 2012 there was a discussion between C/Supt Dillane and Sgt Barry concerning his absence, though the circumstances in which the discussion took place are disputed.

In his statement to the tribunal, C/Supt Dillane recalled that he met Sgt Barry in order to enquire into his welfare and see if there was anything he could do to try ‘*to resolve his issues*’.⁶⁹¹ During his evidence to the tribunal C/Supt Dillane told the tribunal that he believed the meeting took place somewhere around Watergrasshill based on a letter he wrote to the Assistant Commissioner, Human Resource Management (HRM) four days after the meeting in which he referred to this encounter. He had no memory of where the encounter took place when giving evidence.⁶⁹²

In his statement to the tribunal, C/Supt Dillane recalled that at the start of the meeting Sgt Barry told him that he was suffering from work-related stress, but that he did not want to discuss the details with him because C/Supt Dillane was in the same garda station as Supt Comyns. C/Supt Dillane informed Sgt Barry that he had already requested that a chief superintendent from outside the division be appointed to investigate his complaint as he had requested.⁶⁹³

C/Supt Dillane also stated that he informed Sgt Barry that he could be facilitated somewhere he would not have contact with Supt Comyns until the issues were resolved. Sgt Barry agreed to meet him again on 21st September 2012 after ‘*he had some time to reflect on matters*’.⁶⁹⁴

Four days after this meeting C/Supt Dillane sent a report to Assistant Commissioner Fintan Fanning, HRM, in which he stated, *inter alia*, that:

*I wish to report that on the Thursday 13th September 2012 I met with Sergeant Paul Barry at Watergrasshill to discuss his current absence from duty. Sergeant Barry left me in no uncertain terms that he would not discuss the matter with me and again reiterated that he wished to have an officer from outside Cork North Division deal with the matter.*⁶⁹⁵

Mr Barry did not dispute that this conversation took place, or the general thrust of it, but told the tribunal that he believed he had not met the chief superintendent in person on 13th September 2012.⁶⁹⁶

⁶⁸⁹ Tribunal Documents, p. 5368

⁶⁹⁰ Tribunal Documents, p. 366

⁶⁹¹ Tribunal Documents, p. 333

⁶⁹² Tribunal Transcripts, Day 183, pp. 159-161

⁶⁹³ Tribunal Documents, pp. 333-334

⁶⁹⁴ Tribunal Documents, p. 334

⁶⁹⁵ Tribunal Documents, p. 370

⁶⁹⁶ Tribunal Transcripts, Day 175, pp. 164-167

In his statement to the tribunal, C/Supt Dillane recalled that on 21st September 2012 Sgt Barry contacted his office and cancelled their appointment on what the sergeant claimed was legal advice.⁶⁹⁷

Meeting on 13th October 2012

In his evidence to the tribunal, Mr Barry recalled that he met C/Supt Dillane at Grandons Service Station in Glanmire on 13th October 2012. He said that C/Supt Dillane told him he would facilitate him with a transfer until the investigation was complete and offered to transfer him to Carrigtwohill or Glanmire. Mr Barry responded by observing that there was already a sergeant in Carrigtwohill and the chief superintendent assured him he would make room for two.⁶⁹⁸

Mr Barry told the tribunal that he informed C/Supt Dillane that he was not interested in going to Glanmire because he had relatives living in the area.⁶⁹⁹

Mr Barry told the tribunal that he informed C/Supt Dillane that he would accept a transfer to Mallow, but that he would not apply for it.⁷⁰⁰ He also stated that he told the chief superintendent that he did not want to go into Cork city because Superintendent John Quilter was stationed there. According to Mr Barry, he told C/Supt Dillane that he would not accept a transfer to any district where he believed *'anyone connected with that incident was'*.⁷⁰¹

Counsel for the tribunal asked Mr Barry if he had decided at this meeting not to accept any offer of a transfer:

*That's correct. I decided on that date that I wasn't going to look for a transfer, I wasn't [willing] to go to Glanmire or Carrigtwohill, and I wasn't going to apply to go to Mallow.*⁷⁰²

Mr Barry then described in evidence how his meeting with C/Supt Dillane concluded:

*... when I said to him that I would never apply for the transfer, because under the bullying policy document you don't have to, that was when he told me to get out of the car.*⁷⁰³

Counsel for the tribunal asked Mr Barry about C/Supt Dillane's statement to the tribunal in which he stated that Sgt Barry immediately refused his offer of a transfer and declared that *'if anyone were to move it would be the superintendent'*.⁷⁰⁴ Sgt Barry denied that he had made this remark, stating that:

*Because for someone to say that of my service you would want to be stupid, because I could not request a transfer of a superintendent. What I stated to him at that time was because I had made my complaint under the bullying policy, that neither the person who made the complaint nor the person complained of should be transferred unless they applied for same. And that was why, that's how I said to him that I would not apply to go to Mallow, but if I was to go to Mallow I'd accept it rather than go to a district where Superintendent Quilter or Superintendent Comyns would be.*⁷⁰⁵

⁶⁹⁷ Tribunal Documents, p. 334

⁶⁹⁸ Tribunal Transcripts, Day 175, p. 148

⁶⁹⁹ Tribunal Transcripts, Day 175, p. 148

⁷⁰⁰ Tribunal Transcripts, Day 175, p. 148

⁷⁰¹ Tribunal Transcripts, Day 175, p. 151

⁷⁰² Tribunal Transcripts, Day 175, p. 152

⁷⁰³ Tribunal Transcripts, Day 175, p. 155

⁷⁰⁴ Tribunal Documents, p. 334

⁷⁰⁵ Tribunal Transcripts, Day 175, p. 171

In his statement to the tribunal, C/Supt Dillane recalled a meeting with Sgt Barry at 14:00 hrs on 13th October 2012 in a car park in Glanmire. He stated that he enquired about the sergeant's health and expressed concerns about his absence from work. He told Sgt Barry that he could facilitate him with a station closer to his home under different management while the investigation was pending. C/Supt Dillane stated that Sgt Barry refused the offer and the sergeant responded as referred to above.⁷⁰⁶

C/Supt Dillane explained to Sgt Barry that he did not have the authority to transfer a superintendent but could allocate a sergeant to a station within his division. He told the tribunal that he had in mind facilitating Sgt Barry at Glanmire Garda Station, in the Cobh District, as it was closer to Sgt Barry's home and would reduce his travelling time.⁷⁰⁷

C/Supt Dillane was cross-examined by counsel for Mr Barry, who suggested that his client had not responded to the offer of a transfer by declaring that *'if anyone were to move it would be the superintendent'* but the chief superintendent was adamant that Sgt Barry had made this comment.⁷⁰⁸ He also denied that Sgt Barry had expressed a willingness to transfer to Mallow as long as it was not at his own request.⁷⁰⁹ He was pressed on this by counsel for Sgt Barry, who suggested that his client had raised the issue of whether the transfer would be at public or his own expense. However, C/Supt Dillane denied that this was ever mentioned by Sgt Barry in any of their conversations.⁷¹⁰

Case Conference on 22nd January 2013 and Subsequent Events

As will be recalled, Sgt Barry reported non-effective for duty due to work-related stress on 6th August 2012. Following his absence, he was referred to the Garda Occupational Health Service and was reviewed by Dr Oghenovo Oghuvbu on 11th October 2012.⁷¹¹ In his statement to the tribunal, Dr Oghuvbu stated that he noted that Sgt Barry had been medically certified with a reactive depressive episode that was attributed to grievances related to interpersonal difficulties with his local senior management. He found Sgt Barry to have features consistent with mixed anxiety and depression and deemed him temporarily unfit for work pending further clinical management and evaluation.⁷¹²

In his report to the Assistant Commissioner, HRM dated 12th October 2012, Dr Oghuvbu advised that Sgt Barry was temporarily medically unfit to attend work and noted that there were workplace related issues. He advised that Sgt Barry be informed of the confidential supports for garda members.⁷¹³

C/Supt Dillane attended a case conference with the Garda Occupational Health Service at Garda Headquarters on 22nd January 2013.⁷¹⁴ During the conference it was noted that prior to reporting sick Sgt Barry had been sanctioned for being late at the start of a shift and that he had lodged a complaint under the bullying and harassment policy against the superintendent who had initiated the sanction. C/Supt Dillane advised the meeting that Sgt Barry had been offered a transfer to Glanmire Garda Station, but that he had declined the offer.⁷¹⁵

⁷⁰⁶ Tribunal Documents, p. 334

⁷⁰⁷ Tribunal Documents, p. 334

⁷⁰⁸ Tribunal Transcripts, Day 184, p. 122

⁷⁰⁹ Tribunal Transcripts, Day 184, p. 123

⁷¹⁰ Tribunal Transcripts, Day 184, pp. 126-127

⁷¹¹ Tribunal Documents, p. 3730; p. 3731; p. 3738

⁷¹² Tribunal Documents, p. 1481

⁷¹³ Tribunal Documents, p. 1513

⁷¹⁴ Tribunal Documents, p. 335

⁷¹⁵ Tribunal Documents, p. 1515

The conference was informed that Sgt Barry was seeking an injury on duty classification. It was decided that nothing could be done in that regard until the official investigation into the sergeant's complaints had been completed.⁷¹⁶

The case conference notes also record that Sgt Barry was seeking medical retirement.⁷¹⁷ Mr Barry denies that he was considering this option at the time. Counsel for the tribunal asked him if he had mentioned retiring on medical grounds to anybody around that time. Mr Barry recalled that he had attended an Association of Garda Sergeants and Inspectors (AGSI) conference on 21st January 2013 and that the president of the AGSI had suggested he should talk to his solicitor about a medical pension. However, Mr Barry was adamant that he was not considering medical retirement at that time.⁷¹⁸ The tribunal has been unable to identify the source of the above noted information.

In a subsequent report dated 14th February 2013 to A/C Fanning, HRM, C/Supt Dillane stated that he informed Dr Oghuvbu at the conference that he was in a position to facilitate Sgt Barry with a transfer to Glanmire Garda Station, which he believed would be a '*safe working environment*' for Sgt Barry pending the outcome of the investigation. He concluded his report by stating that Dr Oghuvbu undertook to discuss this with Sgt Barry at their next consultation.⁷¹⁹

Mr Barry told the tribunal that he spoke with Chief Superintendent John Grogan, HRM, on 29th January 2013 and that the possibility of a transfer was discussed. However, Sgt Barry told C/Supt Grogan that he did not believe that such an option was suitable for him at that time.⁷²⁰

Sgt Barry was reviewed by Dr Oghuvbu on 25th January 2013, and on 4th February 2013 the sergeant emailed A/C Fanning, HRM, and outlined a number of concerns he had following his consultation with the doctor. He stated, *inter alia*, the following:

Dr Oghuvbu did mention a safe working environment and it is to this end that I want to ask the following questions.

1. *Does H.R.M find it acceptable that I should have to work with a person against whom I have made an allegation of bullying and criminal behaviour.*
2. *What steps have H.R.M taken to provide me with a safe working environment.*

I spoke with Chief Superintendent John Grogan on the 29/01/13 and I outlined the above concerns. I also expressed my view that a transfer was not an option for me because of the nature of my complaint and the persons mentioned [therein].⁷²¹

In his evidence to the tribunal, Mr Barry stated that he thought Dr Oghuvbu was contemplating accommodations in his workplace, which was Mitchelstown Garda Station. He emphasised to the tribunal that he would not apply for a transfer, but if he had been transferred to a district where he would have no contact with Supt Comyns or Supt Quilter he would have accepted it.⁷²²

On 7th February 2013, Sgt Barry's email to A/C Fanning, HRM, referred to above, was forwarded by C/Supt Grogan to Assistant Commissioner Jack Nolan and Assistant Commissioner Anthony

⁷¹⁶ Tribunal Documents, p. 1515

⁷¹⁷ Tribunal Documents, p. 1515

⁷¹⁸ Tribunal Transcripts, Day 176, p. 12

⁷¹⁹ Tribunal Documents, p. 384

⁷²⁰ Tribunal Transcripts, Day 176, p. 19

⁷²¹ Tribunal Documents, p. 4078

⁷²² Tribunal Transcripts, Day 176, pp. 19-20

Quilter for their respective views. C/Supt Grogan noted in his email to A/C Nolan that he had asked Sgt Barry how the organisation could facilitate him in relation to a transfer, but that the sergeant declined this offer, stating that a transfer ‘*was not viable in the circumstances*’.⁷²³

The following day, 8th February 2013, A/C Quilter replied to C/Supt Grogan and attached a report on the topic from C/Supt Dillane. He made the following observation:

*Please see attached from Divisional Officer Cork North. I believe you have also offered to facilitate this member with a transfer to ease his plight. I do not know how the member can be facilitated any other way pending outcome of A/C Nolans investigation.*⁷²⁴

The attached report from C/Supt Dillane referred to his meeting with Sgt Barry on 13th October 2013 and their discussion as outlined earlier in this chapter. The chief superintendent highlighted that Glanmire Garda Station was in the Cobh District and that Sgt Barry’s commuting time would be greatly reduced.⁷²⁵

Meanwhile Sgt Barry remained on sick leave, and he told the tribunal that on 14th February 2013 C/Supt Dillane phoned him and expressed concern that he was on reduced pay. Mr Barry recalled in evidence that during the conversation the chief superintendent suggested a transfer to units A or E in Glanmire and said that he would create two positions for a sergeant in Carrigtwohill. According to Mr Barry’s diary, the chief superintendent informed him that the CMO had advised that he could not work in Mitchelstown.⁷²⁶

Mr Barry told the tribunal that in his view the only workplace accommodation that was offered was a transfer. This, in his opinion, was in breach of the bullying and harassment policy document. Counsel for the tribunal asked Mr Barry if he thought the policy gave him a veto on a possible transfer:

*It wasn’t that I had veto, it’s just the policy document was stating that would you not be transferred, even if the bullying and harassment complaint was not upheld, that neither the superintendent nor I could be transferred unless we applied for same. That was my reading of the document.*⁷²⁷

On the same day the solicitor for Mr Barry wrote on his behalf to C/Supt Dillane and referred to what he stated was an inordinate delay in progressing the investigation under A/C Nolan. Sgt Barry’s solicitor then stated the following:

In the meantime my client remains, as certified by the CMO, unfit to work but as he has set out in correspondence would agree to return to work if that were to be in a safe environment which would not exacerbate his ongoing issues.

In your telephone conversation with him this morning, you indicated that you would transfer him to Glanmire Garda Station. With due respect and having regard to the circumstances of this matter it would not be proper or appropriate to have our client transferred. As a compromise and so that our client may return to work he would accept such return on the basis that he would not come under the direct command of the party (whose identity is known to you) about whom such complaints have been made by him.

⁷²³ Tribunal Documents, pp. 4077-4080

⁷²⁴ Tribunal Documents, p. 4079

⁷²⁵ Tribunal Documents, pp. 4079-4080

⁷²⁶ Tribunal Transcripts, Day 176, p. 25

⁷²⁷ Tribunal Transcripts, Day 176, p. 30

*In this respect therefore my client wishes to return to work under the direct management of Inspector O'Sullivan. I would be obliged if you would confirm that this is in order and represents a without prejudice compromise on his part.*⁷²⁸

It might be noted that the offer of a transfer to Glanmire is referred to by Sgt Barry's solicitor, and that there is no mention of Sgt Barry's willingness to transfer to Mallow.

Counsel for Mr Barry asked C/Supt Dillane if he had considered the suggestion in the letter that Insp O'Sullivan supervise Sgt Barry. He replied that he had given it '*very little consideration*', but that he did give it '*some consideration*'.⁷²⁹ He further stated in evidence that:

*The decision I made was – what I was asked was that Inspector O'Sullivan, he would be answerable to Inspector O'Sullivan, but before he could be answerable to Inspector O'Sullivan he had to obey the directions of Superintendent Comyns. And that was the part we needed to get right first. If he would obey the directions of Superintendent Comyns, well then we could look at could he be answerable to somebody else, but it never came to that.*⁷³⁰

Counsel for Mr Barry referred C/Supt Dillane to the view expressed by C/Supt Grogan in his interview with the tribunal investigator that such '*a compromise would be a unique situation*' but that on reflection he would have allowed it.⁷³¹ C/Supt Dillane disagreed with that view and stated that he was working within limitations at the time and that in his view the proposed compromise was not '*reasonable or practicable*'.⁷³²

Later that day, 14th February 2013, C/Supt Dillane sent a report to A/C Fanning outlining his conversation with Sgt Barry. In particular he noted that he informed Sgt Barry that he met with Superintendent Patrick Lehane on 13th February 2013 and he had agreed that, if Sgt Barry consented, he could be facilitated in either Unit D or E at Glanmire Garda Station. He reported that he stressed to Sgt Barry that the offer was made for the wellbeing of his family, as he felt there was no need for him to be on half pay when he could be facilitated in a station much closer to his home. C/Supt Dillane went on to state that in his view '*Sergeant Barry is fit to work and carry out his duties*', however he felt it would be inappropriate to have him stationed in Mitchelstown pending the outcome of the investigation that was being carried out by A/C Nolan. He referred to the offer set out in the letter from Sgt Barry's solicitor that Insp O'Sullivan manage Sgt Barry and stated that in his view it was '*not practicable at that time*'.⁷³³

Counsel for the tribunal asked C/Supt Dillane why he formed the view that it was inappropriate for Sgt Barry to be stationed in the Fermoy District pending the outcome of the investigation. C/Supt Dillane explained that Sgt Barry had acknowledged that he had a problem with Supt Comyns, and he did not expect them to work together. If Sgt Barry had an issue he was willing to facilitate him and this would be '*the best way forward to try and ensure a proper policing service to the people*'.⁷³⁴

On 8th March 2013, C/Supt Grogan replied to Sgt Barry's email of 7th February 2013 and explained that he had forwarded the sergeant's email to A/C Quilter for his views and

⁷²⁸ Tribunal Documents, p. 382

⁷²⁹ Tribunal Transcripts, Day 185, p. 11

⁷³⁰ Tribunal Transcripts, Day 185, p. 12

⁷³¹ Tribunal Documents, p. 5148

⁷³² Tribunal Transcripts, Day 185, p. 13

⁷³³ Tribunal Documents, pp. 383-384

⁷³⁴ Tribunal Transcripts, Day 184, pp. 13-14

observations. C/Supt Grogan noted that C/Supt Dillane was willing to facilitate him in Glanmire and enquired if Sgt Barry wished to ‘make an application’ for Glanmire.⁷³⁵

On 12th March 2013, Sgt Barry responded to this email from C/Supt Grogan:

In my email to your office on the 07/02/2013 I stated that “a transfer was not an option for me because of the nature of my complaint and the persons mentioned [therein]”. As Assistant Commissioner Southern Region is one of the persons mentioned [therein] I find it strange you would forward my email to him for his views and observations. Mitchelstown Garda Station is my work place and has been for the past thirteen years and it is to this work place I will return when and if HRM provide me with a safe working environment to which I can return. I will not be “facilitated” with a transfer to Glanmire as it is my view that a transfer is not an option for me because of the nature of my complaint and the persons mentioned [therein] and the fact that I have relations in the Glanmire sub district. The delay and inaction by HRM in addressing my complaint is causing me considerable financial and welfare hardship and I now for the fourth time want HRM to answer the following ...”⁷³⁶

Sgt Barry then reiterated the questions that he asked in his email of 7th February 2013.

In the meantime, Dr Oghuvbu had referred Sgt Barry to Dr John Tobin, Consultant Psychiatrist, for an independent assessment.⁷³⁷ In his report dated 11th March 2013 Dr Tobin stated, *inter alia*, the following:

... it appears that Sgt Barry has developed a mixed anxiety/depressive reaction secondary to events that occurred at work. These events are to be the subject of a formal investigation. In the meantime, without prejudice to the findings of the enquiry, I would recommend that Sgt Barry returns to work when a mutually agreed safe supportive working environment is available for him.⁷³⁸

On 15th March 2013, C/Supt Grogan forwarded Sgt Barry’s email of 12th March 2013 to A/C Fanning and noted that Sgt Barry had been offered a transfer to Glanmire, which he had rejected. C/Supt Grogan concluded by stating that he was at ‘a loss to identify a solution in light of the members refusal’.⁷³⁹

On the same day A/C Fanning replied to C/Supt Grogan and observed that ‘its a pity to see that this man is in the position he is especially as he has given so much of his life to An Garda Síochána’. However, he went on to state that he could not accept that Mitchelstown Garda Station was an unsafe working environment or that there was any bullying or harassment in the absence of a review or finding to that effect. He queried if Sgt Barry ‘would wish to be considered’ for a transfer, and, if so, he would give the matter serious consideration.⁷⁴⁰

During his evidence to the tribunal, Mr Barry described the difference between requesting a transfer and accepting a transfer. He explained that in the latter situation he would have been transferred at public expense, with considerable financial benefits. He stated that if he had accepted a transfer to Mallow he could have sold his house and bought another one without

⁷³⁵ Tribunal Documents, p. 4074

⁷³⁶ Tribunal Documents, p. 4074

⁷³⁷ Tribunal Documents, p. 1532

⁷³⁸ Tribunal Documents, p. 1535

⁷³⁹ Tribunal Documents, p. 4073

⁷⁴⁰ Tribunal Documents, p. 4073

incurring stamp duty or legal fees. On the other hand, if he applied for a transfer there were no financial benefits. However, he told the Chairman that if he had transferred to Glanmire, either at his own expense or at public expense, there were no financial advantages, since it was nearer to his home.⁷⁴¹

On 21st March 2013, A/C Fanning replied to the letter of 14th February 2013 from Sgt Barry's solicitor, referred to above, and stated, *inter alia*, that:

I am to advise that Sergeant Barry was offered a transfer to Glanmire Garda station and declined same ...

*The Garda Policy on Bullying and Harassment provides that Sergeant Barry can apply for a transfer to any Garda Station to help him during the period of the investigation if he so wishes. Should Sergeant Barry apply for a transfer I will give the matter very serious consideration, and then at the final outcome of the process, I can transfer your client back.*⁷⁴²

It should be noted that in his reply A/C Fanning did not refer to the offer of a compromise proposed by the solicitor for Sgt Barry in his letter of 14th February 2013 with regard to Insp O'Sullivan supervising Sgt Barry.

On 22nd March 2013, A/C Fanning wrote to C/Supt Dillane and enquired if Sgt Barry would consider applying for a transfer. The chief superintendent replied on 4th April 2013 and stated that he had spoken to Sgt Barry, who stated that he did not '*wish to be considered for a transfer to a different Garda Station*'.⁷⁴³

Case Conference on 8th April 2013

A case conference involving the HRM sickness absence section, C/Supt Dillane, and the Garda Occupational Health Service took place on 8th April 2013 at Garda Headquarters.⁷⁴⁴

The medical certificate dated 4th April 2013 issued by Dr Margaret Anne Kiely was discussed. The certificate stated that Sgt Barry was fit to resume duty under the condition that he '*should not work or attend at Fermoy Garda station and he should not come into contact with Superintendent Michael Comyns*'.⁷⁴⁵

It was noted at the conference that there were no medical issues preventing Sgt Barry's return to work once a '*mutually agreed safe supporting environment was provided*'. This was a quote from the recommendation in the report of Dr Tobin referred to above. It was also noted that Sgt Barry had declined an offer of a transfer.⁷⁴⁶

The conference decided that local management should meet with Sgt Barry with a view to putting in place '*suitable arrangements*', though these were not specified. Sgt Barry was also to be informed that Dr Kiely's recommendations could not be met because they were considered to be both unreasonable and impracticable.⁷⁴⁷

⁷⁴¹ Tribunal Transcripts, Day 176, pp. 52-54

⁷⁴² Tribunal Documents, p. 4107

⁷⁴³ Tribunal Documents, p. 3850

⁷⁴⁴ Tribunal Documents, p. 390

⁷⁴⁵ Tribunal Documents, p. 198

⁷⁴⁶ Tribunal Documents, p. 390

⁷⁴⁷ Tribunal Documents, p. 390

The conference notes also recorded some discussion around the possibility of Sgt Barry rejecting the offer of a transfer and whether in those circumstances a member could be transferred without applying for same.⁷⁴⁸ Counsel for the tribunal asked C/Supt Dillane if he had considered transferring Sgt Barry against his will at this time and he replied that he could not at that time as the investigation had not concluded.⁷⁴⁹

After the conference, Dr Oghuvbu sent a report, dated 9th April 2013, to A/C Fanning and stated, *inter alia*, the following:

*Certain circumstances which are currently subject of Garda management processes are regarded as plausible stressors for the member at this time and this would impact on the member's sustained wellbeing and effectiveness. On this basis, facilitation with certain workplace accommodations has been recommended.*⁷⁵⁰

Counsel for the tribunal asked Dr Oghuvbu to explain what this recommendation was intended to achieve:

*... I feel then that under health and safety considerations and the hierarchy of controls that ... go with that, you remove the person from the hazard or remove the hazard away from the person. So in that context, my understanding was that, you know, the person who was having difficulty had said, well, I can't work with this person, was Sergeant Barry, and so in that context the whole thing was to find an alternative means where he wouldn't have to work with Superintendent Comyns, and that would be for local management to determine because I wouldn't be very familiar in terms of the operational structures.*⁷⁵¹

Later in the same report Dr Oghuvbu stated:

*In the context of providing an agreeable safe and supportive workplace as has been recommended to foster the member's wellbeing and effectiveness (without prejudice to outcome of the aforesaid processes), the member should be facilitated with appropriately reasonable and practical temporary workplace accommodations in relation to his place of work.*⁷⁵²

Counsel for the tribunal asked Dr Oghuvbu if he was referring to any particular place of work in the above paragraph:

No, I wouldn't have been ... into a particular location.

...

It was about a place that was mutually agreed as safe.

...

Or a system of work that was reasonably agreed as safe. So it could be a system of work or it could be a place. I wasn't particular about whether it was a place or system of working.

⁷⁴⁸ Tribunal Documents, p. 390

⁷⁴⁹ Tribunal Transcripts, Day 184, pp. 27-28

⁷⁵⁰ Tribunal Documents, p. 1541

⁷⁵¹ Tribunal Transcripts, Day 189, pp. 77-78

⁷⁵² Tribunal Documents, p. 1541

- Q. *Yes. But you weren't opting for one or the other of recommendations that had been made either by management or Dr Kiely?*
- A. *No. Because that would have to form the subject of an engagement between the member and his management and that's why we kept coming back to that phrase "mutually acceptable". That means they are mutually agreeable. There had to be an engagement, there had to be a discussion.*⁷⁵³

Meeting on 9th April 2013

As will be recalled from chapter 7, C/Supt Dillane and Insp O'Sullivan met with Sgt Barry at Mitchelstown Garda Station at 21:00 hrs on 9th April 2013. There is no need to rehearse the full circumstances of the meeting here. It is common case that the issue of a transfer was discussed and that C/Supt Dillane mentioned a number of vacancies in the district, including at Cobh and Mallow. C/Supt Dillane explained to Sgt Barry that he could not transfer him and that he would have to apply for a transfer. In his evidence to the tribunal the chief superintendent stated that after he mentioned the proposed garda stations he asked Sgt Barry if he wanted *'to apply to go to one of these places, or [did he] want to stay and work with Superintendent Comyns?'*⁷⁵⁴

In his evidence to the tribunal, Mr Barry complained that the only accommodation that was offered to him at this meeting was a transfer.⁷⁵⁵ Counsel for the tribunal asked Mr Barry in his view what temporary workplace accommodations, other than a transfer, might have been put in place at the time. Mr Barry asserted that he could have been handled by Insp O'Sullivan, as he had offered at the time through his solicitor.⁷⁵⁶

Mr Barry told the tribunal that he specifically raised the issue of whether he would be transferred to Mallow at public or private expense. As will be recalled C/Supt Dillane denied that this had been mentioned in any of his conversations with Sgt Barry.⁷⁵⁷

Insp O'Sullivan recalled in his evidence to the tribunal that when C/Supt Dillane offered Sgt Barry a transfer there was some discussion about whether this would be at *'public expense'*.⁷⁵⁸ Counsel for Mr Barry asked Insp O'Sullivan the following:

- Q. *The very last thing before we move on from this meeting, inspector, can we agree at least on this? There was definitely a discussion at that meeting about the transfer at public expense or a transfer at private expense?*
- A. *There was.*⁷⁵⁹

Later on 9th April 2013, C/Supt Dillane wrote to Sgt Barry and referred to their meeting. He stated the following:

Taking into consideration your perception that you cannot work or attend Fermoy Garda Station or come into contact with Superintendent Michael Comyns it is not practical for you to work in Fermoy District at present. Pending the outcome of the current investigation and

⁷⁵³ Tribunal Transcripts, Day 189, pp. 78-79

⁷⁵⁴ Tribunal Transcripts, Day 184, p. 37

⁷⁵⁵ Tribunal Transcripts, Day 178, pp. 149-151

⁷⁵⁶ Tribunal Transcripts, Day 176, p. 116

⁷⁵⁷ Tribunal Transcripts, Day 176, pp. 51-52

⁷⁵⁸ Tribunal Transcripts, Day 186, p. 183

⁷⁵⁹ Tribunal Transcripts, Day 187, p. 121

*without prejudice, I am offering you the opportunity to be facilitated at Cobh Garda Station, where there is currently a vacancy for a member of Sergeant Rank.*⁷⁶⁰

C/Supt Dillane requested a response from Sgt Barry by 15th April 2013.

On 12th April 2013, C/Supt Dillane wrote to Dr Oghuvbu and set out a full account of his meeting with Sgt Barry on 9th April 2013. In particular he referenced Dr Kiely's medical certificate and sought clarification on Dr Oghuvbu's previous advices.⁷⁶¹

Dr Oghuvbu sent a reply to C/Supt Dillane, dated 15th April 2013, in which he stated that he was not in a position to offer any further medical advice in the case. He advised, based on the information available to him, that there was no compelling medical issue that precluded Sgt Barry attending work and undertaking assigned policing duties in what the doctor described as a safe, supportive environment. He also noted that Sgt Barry appeared to be refusing to agree, or cooperate, with garda management's effort to progress his return to work in what appeared to be fraught circumstances. Dr Oghuvbu concluded by suggesting that the matter was best addressed by '*Garda management utilising relevant Garda Code, Garda Directives or employment contractual processes*'.⁷⁶²

In the meantime, on 19th April 2013 Supt Comyns wrote to C/Supt Dillane and asked for advice and directions with regard to how he was to perform his duties as district officer in light of the conditions set out in Dr Kiely's medical certificate. He expressed his opinion that Sgt Barry could not perform the duties that he as district officer required him to perform whilst the conditions on the medical certificate were accepted as part of his medical fitness to return to work.⁷⁶³

On 1st May 2013, C/Supt Dillane wrote to A/C Fanning setting out in detail his interactions with Sgt Barry and the problems, as he saw them, caused by Dr Kiely's medical certificate. He referred to discussions he had with Supt Comyns in which the superintendent highlighted problems he was encountering with Sgt Barry, such as his failure to attend Performance Accountability Framework (PAF) meetings and daily briefings of his unit in Fermoy Garda Station. C/Supt Dillane concluded by stating:

This situation is likely to [be] a protracted one as when the Bullying and Harassment investigation is completed a disciplinary investigation is due to commence arising from Sergeant Barry's complaint.

*As Divisional Officer for the Cork North Division I cannot allow this situation to continue. I am not in a position to over-ride the Doctor's certificate which in my view is both impractical and unreasonable. I am now seeking your directions as to the correct course of action to be taken.*⁷⁶⁴

Sgt Barry wrote to A/C Fanning on 5th May 2013 and stated the following:

I don't believe that Chief Superintendent William Dillane is willing to offer anything other than a transfer and this is not acceptable to me ...

I made my complaint as I believe that I have an obligation to be faithful to the principles of integrity and honour in the exercise of my duty. This obligation supercedes any perverted or

⁷⁶⁰ Tribunal Documents, p. 3878

⁷⁶¹ Tribunal Documents, pp. 393-394

⁷⁶² Tribunal Documents, p. 1560

⁷⁶³ Tribunal Documents, p. 397

⁷⁶⁴ Tribunal Documents, pp. 399-401

*misplaced loyalty in support or protection of any member of the Force whom I believe may be guilty of unethical or criminal behaviour. I can only protect this community I have proudly served for the past thirteen years by remaining in Mitchelstown.*⁷⁶⁵

On 24th May 2013, C/Supt Dillane sent an email to Dr Oghuvbhu and attached his email to A/C Fanning, dated 1st May 2013, referred to above. The chief superintendent asked the following:

*As this situation is now dragging on and in the interest of the running of this organisation I wish to seek your directions on the following matter. If I direct Sergeant Barry to attend at Fermoy Garda station and to deal with Superintendent Comyns will it adversely affect his health?*⁷⁶⁶

On the same day Dr Oghuvbu sent the following reply to C/Supt Dillane:

*As I previously advised, the management of the member's return to the workplace and the arrangements to facilitate these are the responsibility of Garda management in the context of workplace accommodations that are reasonable and practicable. In the light of what appears to be an impasse at this time, further relevant processes available to Garda management should be deployed to resolve the matter in a timely and constructive manner that both preserve the member's wellbeing and Garda operational integrity.*⁷⁶⁷

C/Supt Dillane responded and noted Dr Oghuvbu's reply. He again asked whether, if he directed Sgt Barry to attend Fermoy Garda Station and have dealings with Supt Comyns, it would adversely affect his health.⁷⁶⁸ The reply from Dr Oghuvbu expressed no further opinion on the issue.⁷⁶⁹

Transfer to Fermoy Garda Station

C/Supt Dillane told the tribunal that in June 2013 he was informed that Sgt Barry's complaints of bullying and harassment against Supt Comyns were not upheld. He also became aware that Sgt Barry's appeal against the findings had been dismissed by Assistant Commissioner John Twomey.⁷⁷⁰

In the autumn of 2013 there were a number of structural changes introduced in the Cork North Division and, more generally, to the national roster system in An Garda Síochána. In his statement to the tribunal C/Supt Dillane recalled that he reviewed staffing levels generally within his division and one of the changes involved an enlarged Watergrasshill Sub-District amalgamating with the Fermoy District. He stated that at the time there were only four unit sergeants in Fermoy and Unit D was supervised by one of two unit sergeants in Mitchelstown. Sgt Barry and Sergeant Jerry Quinn were the two unit sergeants available at the time.⁷⁷¹

On 15th October 2013, C/Supt Dillane phoned A/C Fanning, HRM, in order to establish the status of Sgt Barry's discipline complaint, as he was one of the sergeants he considered moving to Fermoy. He did not speak to A/C Fanning but one of the office staff advised him that the discipline investigation was progressing.⁷⁷²

⁷⁶⁵ Tribunal Documents, pp. 195-196

⁷⁶⁶ Tribunal Documents, pp. 415-416

⁷⁶⁷ Tribunal Documents, p. 414

⁷⁶⁸ Tribunal Documents, p. 415

⁷⁶⁹ Tribunal Documents, p. 415

⁷⁷⁰ Tribunal Documents, p. 342

⁷⁷¹ Tribunal Documents, p. 343; Tribunal Transcripts, Day 184, pp. 55-56

⁷⁷² Tribunal Documents, p. 343; Tribunal Transcripts, Day 184, p. 55

On 7th November 2013, Supt Comyns wrote to C/Supt Dillane and highlighted the changes that were to come into effect on 10th November 2013. He expressed the view that the enlarged sub-district would benefit from five unit sergeants being based in Fermoy and requested that a sergeant be transferred from the Mitchelstown sub-district to supervise one of the five units in Fermoy.⁷⁷³

In his evidence to the tribunal, Supt Comyns recalled that there were three sergeants stationed in Mitchelstown Garda Station at the time: Sergeant Aidan Dunne, Sgt Quinn and Sgt Barry. He did not consider moving Sgt Dunne as he was the sergeant in charge. He told the tribunal that he considered that Sgt Quinn would be suitable for the post because ‘*Sergeant Quinn was unit D, it was his unit that was down a sergeant in Fermoy*’. Supt Comyns stated that he was aware that Sgt Barry’s medical certificate was still in existence and of the difficulties that would arise if Sgt Barry was the sergeant transferred to Fermoy.⁷⁷⁴

Tribunal counsel asked Supt Comyns if he discussed the topic with C/Supt Dillane. He said that:

*I believe – we did discuss it at around the time, maybe just before or directly after I sent that report. And again, I would have suggested Sergeant Quinn because he was the sergeant on unit D.*⁷⁷⁵

On 10th December 2013, C/Supt Dillane emailed a request to HRM to have Sgt Barry transferred from Mitchelstown Garda Station to Fermoy. He explained that the reason for the transfer was to ensure the delivery of efficient policing in the new Fermoy District, which had been expanded as a result of the recent amalgamations.⁷⁷⁶ C/Supt Dillane pointed out that Sgt Barry’s commute would be reduced by 30 kilometres each day as result of the transfer. He also referred to a similar proposal in 2004. This was successfully appealed by Sgt Barry on the grounds that he had relatives residing in Glanmire, which would have involved a breach of Code 7.5. However, C/Supt Dillane pointed out that on 11th November 2013 the Glanmire sub-district had become part of the Cork City Division, which is exempt from the terms of Code 8.3. He also applied for an exemption to the terms of Code 8.3 in respect of Sgt Barry.⁷⁷⁷

Counsel for the tribunal asked C/Supt Dillane if he had considered that the proposed transfer to Fermoy Garda Station flew in face of Dr Kiely’s medical certificate:

*Well, first of all, I had to take into consideration I was told by the CMO this was a management problem, not a medical problem. I had asked would it affect his health if I brought him in and I was told he could give me no further advices. And I had also delivered a message to him, that we could not accede to the conditions on his medical certificate when I met him on the 9th April 2013. Now, this message wasn’t from me. This message, as far as I was concerned, was from the commissioner HRM, who had put it together, and I had delivered the message. So, as far as I was concerned, he had been informed that the conditions on his medical cert couldn’t be adhered to, the CMO says it’s a management problem, not a medical problem and I needed a sergeant badly in Fermoy.*⁷⁷⁸

Counsel for the tribunal asked C/Supt Dillane why, bearing in mind all the circumstances and Supt Comyns’s stated view on the issue, he did not simply transfer Sgt Quinn rather than Sgt Barry:

⁷⁷³ Tribunal Documents, p. 429

⁷⁷⁴ Tribunal Transcripts, Day 182, pp. 74-75

⁷⁷⁵ Tribunal Transcripts, Day 182, p. 76

⁷⁷⁶ Tribunal Documents, p. 430

⁷⁷⁷ Tribunal Documents, p. 430

⁷⁷⁸ Tribunal Transcripts, Day 184, pp. 59-60

Well, I considered it and deeply considered it. And I didn't really want to transfer Sergeant Barry there, but why should Sergeant Quinn and his family suffer because Sergeant Barry had a complaint made against a superintendent? Sergeant Quinn was living in Mitchelstown, was a part of the community. Now I was going to discommode him and his family because Sergeant Barry had made a complaint. To me, that didn't add up. Sergeant Barry was travelling, passing Fermoy on the way to Mitchelstown, so I was making his journey shorter and I would have been discommoding Sergeant Quinn. And I just had to balance it myself. That was my decision I had to make. But I felt I shouldn't discommode one sergeant because another sergeant had made a complaint.⁷⁷⁹

C/Supt Dillane confirmed to tribunal counsel that he did not consult Sgt Quinn or Sgt Barry before making his application to HRM. He considered that HRM knew the background to his application and *'if they felt it wasn't right ... then they wouldn't allow the transfer'*.⁷⁸⁰

In his statement to the tribunal, C/Supt Dillane recalled that he met Sgt Barry in his office on 19th January 2014. After enquiring into Sgt Barry's welfare C/Supt Dillane explained to him that he had decided to transfer him to Fermoy Garda Station, and outlined the reasons for his decision.⁷⁸¹ C/Supt Dillane told tribunal counsel that Sgt Barry immediately indicated that he did not want to go to Fermoy, and that he then advised the sergeant that there were two vacancies in Mallow and that he could be facilitated there if he wanted. He stated that Sgt Barry responded to the offer by claiming that there was one part of his bullying and harassment complaint still under investigation. C/Supt Dillane told Sgt Barry that he did not believe there was, but undertook to check it out with HRM.⁷⁸²

Mr Barry told the tribunal that he was shocked by the decision to transfer him to Fermoy Garda Station as it was a health and safety issue; he was protecting his own health.⁷⁸³ He agreed that a transfer to Mallow was mentioned at the meeting but told the Chairman that he informed C/Supt Dillane that he was not going to apply for it.⁷⁸⁴

Counsel for Mr Barry again suggested to C/Supt Dillane that when the issue of Mallow arose Sgt Barry made it clear that he would not go to Mallow at his own behest and that he would have to be directed to go there so that it would be at public expense. C/Supt Dillane denied that this was ever said by Sgt Barry.⁷⁸⁵

On the same issue counsel for Mr Barry suggested to C/Supt Dillane that Sgt Barry had made it clear to him that he was willing to move to Mallow, but that he would not apply in writing and would only go if ordered, as opposed to asking or volunteering to transfer. Again, the chief superintendent denied that Sgt Barry had raised this issue. He told the tribunal he merely asked Sgt Barry to nominate a station, and if he had done so he would have arranged for the transfer to be at public expense.⁷⁸⁶

⁷⁷⁹ Tribunal Transcripts, Day 184, p. 60

⁷⁸⁰ Tribunal Transcripts, Day 184, p. 61

⁷⁸¹ Tribunal Documents, p. 344

⁷⁸² Tribunal Transcripts, Day 184, pp. 61-62

⁷⁸³ Tribunal Transcripts, Day 177, p. 6

⁷⁸⁴ Tribunal Transcripts, Day 176, p. 164

⁷⁸⁵ Tribunal Transcripts, Day 184, p. 129

⁷⁸⁶ Tribunal Transcripts, Day 184, pp. 127-128

In fact, Sgt Barry wrote on 22nd January 2014 protesting about the intended transfer and describing in his own words how C/Supt Dillane *'informed me that he intended to transfer me to either Fermoy or Mallow Garda Station'*.⁷⁸⁷ This appears to be consistent with an ordered transfer only, which Mr Barry maintained he was willing to accept. However in his evidence to the tribunal, Mr Barry maintained that he was *'basically being told to apply for a transfer to either Fermoy or Mallow'*. He agreed that his reply did not say he was not going to apply voluntarily.⁷⁸⁸

C/Supt Dillane wrote to Supt Comyns on 28th January 2014 and referred in detail to his meeting with Sgt Barry on 19th January 2014. He reported that Sgt Barry informed him that he did not wish to work in Fermoy and that he had explained to Sgt Barry that, due to a shortage of manpower, he could not afford the luxury of having three sergeants stationed in Mitchelstown. He stated that he advised Sgt Barry that his decision was in line with his overall divisional policing plan and that after much consideration he believed Sgt Barry was the best man for the job.⁷⁸⁹

C/Supt Dillane also referred to his offer to facilitate Sgt Barry in Mallow Garda Station and stated that he told the sergeant it was a *'matter completely up to himself'*. He concluded by stating:

*The present working situation of Sergeant Barry cannot continue and in order to run the Cork North Division in a cohesive manner, I intend to advise Commissioner, Human Resource Management that I wish to have Sergeant Barry transferred to Fermoy Garda station immediately.*⁷⁹⁰

On 29th January 2014, C/Supt Dillane duly wrote to A/C Fanning and stated, *inter alia*, the following:

*The present working situation of Sergeant Barry cannot continue and in order to run the Cork North Division in an effective and cohesive manner I intend to transfer Sergeant Barry to Fermoy Garda Station with immediate effect. Forwarded for inclusion in the next Personnel Bulletin, please.*⁷⁹¹

C/Supt Dillane agreed with counsel for the tribunal that a divisional officer does not have power to direct a transfer and that accordingly this was merely his recommendation to HRM.⁷⁹²

In his statement to the tribunal, C/Supt Dillane outlined that he spoke to Sgt Barry again on 30th January 2014 and informed him that under Code Regulation 8.1.3 he was obliged to outline the reasons for the proposed transfer.⁷⁹³

On 21st February 2014, Sgt Barry's transfer from Mitchelstown to Fermoy appeared on HRM Personnel Bulletin No. 03/14.⁷⁹⁴ Sgt Barry immediately appealed the transfer and it was put on hold pending his appeal.⁷⁹⁵

On 24th February 2014, Sergeant Ronan Murphy, HRM reported by email that Sgt Barry had phoned him alleging a breach of provisions of the Code and wishing to update the addresses of his relatives for his personnel file.⁷⁹⁶

⁷⁸⁷ Tribunal Documents, p. 4145

⁷⁸⁸ Tribunal Transcripts, Day 181, p. 140

⁷⁸⁹ Tribunal Documents, pp. 432-433

⁷⁹⁰ Tribunal Documents, pp. 432-433

⁷⁹¹ Tribunal Documents, p. 434

⁷⁹² Tribunal Transcripts, Day 184, pp. 65-66

⁷⁹³ Tribunal Documents, p. 344

⁷⁹⁴ Tribunal Documents, p. 1934

⁷⁹⁵ Tribunal Documents, p. 4148

⁷⁹⁶ Tribunal Documents, p. 437

During the public hearing an issue arose in respect of a note recorded by C/Supt Dillane of a conversation with A/C Fanning on 19th March 2014 when they discussed a number of members in the context of welfare issues. C/S Dillane recorded the following in his journal:

*Paul Barry – discussed the case – I explained developments since I requested his transfer – told me to discipline him –*⁷⁹⁷

In his evidence to the tribunal, C/Supt Dillane stated that this was not a direction from the assistant commissioner and was therefore merely a throwaway comment. He considered it reflected his own frustration with the situation, but believed that other more serious human resource cases that he was dealing with may have fuelled his frustration.⁷⁹⁸

On 21st March 2014, A/C Fanning wrote to Dr Oghuvbu with the following enquiry:

Chief Superintendent Cork North has sought to transfer Sergeant Barry from Mitchelstown Garda Station to Fermoy Garda Station for operational reasons. Sergeant Barry has appealed this transfer to this office.

*I am to enquire are there any medical reasons that I need to consider regarding this transfer and the appeal of same by Sergeant Barry. If so, should medical confidentiality be waived?*⁷⁹⁹

Dr Oghuvbu replied to A/C Fanning's enquiry on 1st April 2014 and stated:

1. *As per mine of 09/04/2013 ... following the member's last review at this service on 11/03/2013, there were no compelling clinical considerations to debar the member undertaking normal policing duties in a safe and supportive working environment.*
2. *The temporary accommodations advised in point (3) of mine of 09/04/2013 were specifically in the context of the subsisting local workplace situation at the time.*
3. *On the basis that appropriate risk assessment has determined that the new or proposed station is a safe and supportive workplace environment there are no clinical considerations to debar the member working there based on the information currently available to me.*⁸⁰⁰

On 2nd April 2014, Supt Comyns wrote to C/Supt Dillane concerning Sgt Barry's failure to attend a PAF meeting on 3rd March 2014 and stated that in his view, due to Dr Kiely's medical certificate, Sgt Barry was unable to perform his duties as a sergeant, and he was unable to perform his duties as superintendent. Supt Comyns stated that his authority as district officer had been undermined by the medical certificate and 'by the Garda Organisation for failing to contest the validity of this "medical certificate"'. He concluded with a request that Sgt Barry's failure to attend the meeting and 'the validity of the ... "medical certificate" be dealt with without delay'.⁸⁰¹

It should be noted that on 3rd April 2014 Supt Comyns instructed Insp O'Sullivan to deal with all future written correspondence concerning Sgt Barry. In his evidence to the tribunal Mr Barry stated that he was not informed of this development.⁸⁰²

⁷⁹⁷ Tribunal Documents, p. 2085

⁷⁹⁸ Tribunal Transcripts, Day 184, pp. 68-69

⁷⁹⁹ Tribunal Documents, p. 1566

⁸⁰⁰ Tribunal Documents, p. 1563

⁸⁰¹ Tribunal Documents, pp. 441-442

⁸⁰² Tribunal Transcripts, Day 177, pp. 19-20

On 3rd April 2014, C/Supt Dillane attended a meeting at Garda Headquarters in relation to an unrelated matter. During the lunchtime break he was passing the door to the office of Dr Donal Collins, the Chief Medical Officer. He told the tribunal that he decided to speak to Dr Collins as he was not happy with *‘everything that was going on’*. He explained to the tribunal that on the one hand he had complaints coming from Supt Comyns to the effect that the public were not getting a proper service because of the situation, and on the other, when he spoke to Sgt Barry he relied on Dr Kiely’s medical certificate. Further, he had also asked for clarification from Dr Oghuvbu on a number of occasions and had been told that it was a management, not a medical, problem.⁸⁰³

C/Supt Dillane told the tribunal that he spoke to Dr Collins and explained in detail the background to Sgt Barry’s case. Dr Collins then asked Dr Oghuvbu to attend the meeting. C/Supt Dillane recalled that during the conversation Dr Oghuvbu expressed the view that working with the superintendent might be detrimental to the sergeant’s health and that this raised a health and safety issue for the organisation. He described to the tribunal how he reacted to the advice from the doctors, in the context of his request to have Sgt Barry transferred to Fermoy Garda Station:

*I said whoa, whoa, in my own mind, stop here, like you know, what am I after doing ... it would be detrimental to Paul Barry’s health, because that’s the last thing I was going to do, is cause grief to somebody’s health by an action I was taking.*⁸⁰⁴

Counsel for the tribunal asked Dr Oghuvbu if he recalled telling C/Supt Dillane that a move to Fermoy might give rise to a *‘health and safety’* issue for Sgt Barry:

Again, I think I would approach this from the point of view that we had identified – the member was presenting a hazard, what he considered a hazard to us, and whether that hazard was actually a hazard or not was not really the issue, the fact he was presenting something to us that this was a hazard for him. And so, the decision in terms of facilitating him in the context of a supportive workplace would be to take that into consideration and provide arrangements that would work around that.

...

*And that was what I had consistently said in the context of, you know, the supportive work arrangements. It was the fact that he was reporting something as a hazard. Whether anybody else viewed it as a hazard or not was not really the issue. If it was present as a hazard to him, then we had to take that on board, that was his concern, we had to kind of say, okay, how can we address his concern? That is what supportive means. Mutual in this case would be that we would sit down with him and say okay look, how can we address this concern on the basis that whatever was going to be arrived at was going to have to be something that was reasonable and practicable.*⁸⁰⁵

The following day, 4th April 2014, C/Supt Dillane sent an email to A/C Quilter advising him of his meeting with Dr Collins and Dr Oghuvbu. He referred to his application of 29th January 2014 to HRM to have Sgt Barry transferred to Fermoy Garda Station and stated that during the meeting Dr Oghuvbu brought a matter to his notice that in his view threw *‘a different light on my application to transfer the member to Fermoy’*. He considered it might be prudent to discuss the matter with HRM.⁸⁰⁶

⁸⁰³ Tribunal Transcripts, Day 184, pp. 71-72

⁸⁰⁴ Tribunal Transcripts, Day 184, pp. 72-73

⁸⁰⁵ Tribunal Transcripts, Day 189, pp. 94-95

⁸⁰⁶ Tribunal Documents, p. 445

A case conference was held at the Garda Occupational Health Service on 17th April 2014. The extensive notes of the meeting disclose a review of Sgt Barry's case history.⁸⁰⁷ The notes go on to, *inter alia*, record:

*Bullying and harassment claims against Superintendent – investigated – none upheld.
Member has submitted GP certificate saying he cannot work with Superintendent. Member to be transferred – appeal against transfer currently being reviewed by AC HRM Member has declined transfer offers. Superintendent reports that member is undermining him.
Member will not engage with Superintendent at all – will not attend meetings – report to him – organisational risk Member is having detrimental effect on station and colleagues.*⁸⁰⁸

At the conference a number of options that might be available were canvassed. It was noted that the superintendent could not be transferred as the complaints against him had not been upheld. It was suggested that if both parties agreed, a mediation service might resolve Sgt Barry's perceived difficulties with his superintendent. Finally, the issue of offering Sgt Barry a transfer was discussed and it was noted that if he declined and decided to stay in his current role he must comply with organisational procedures and deal with his superintendent. It was decided that C/Supt Dillane should meet Sgt Barry and again discuss the possibility of a transfer. Middleton, Mallow and Glanmire Garda Stations were identified as possible options.⁸⁰⁹

Sgt Barry, accompanied by his AGSI representative Inspector Edmund Golden, met with C/Supt Dillane and Insp O'Sullivan on 21st April 2014. During the meeting the chief superintendent reiterated his stance that he could not allow Sgt Barry to continue in his present role if he refused to abide by the normal rules and directions from Supt Comyns. He offered Sgt Barry the mediation facilities of the Labour Relations Commission to try and resolve the issues. C/Supt Dillane told the tribunal that Sgt Barry indicated that he wished to discuss the matter with Inspector Michael Gallagher, who was on the National Executive of the AGSI, and he agreed to meet Sgt Barry and Insp Gallagher at 15:00 hrs on 24th April 2014 at Mitchelstown Garda Station. At the conclusion of the meeting C/Supt Dillane asked Sgt Barry if he had any suggestions that could solve the problem, but the sergeant did not have any suggestions at that time.⁸¹⁰

On 24th April 2014, C/Supt Dillane asked Supt Comyns if he would agree to mediation and explained what was involved. The superintendent indicated that he would need time to consider the proposal. On 6th May 2014 he wrote to C/Supt Dillane stating that he had taken legal advice and mediation was not considered appropriate; he was therefore not consenting to the process.⁸¹¹

C/Supt Dillane emailed Dr Collins on 6th May 2014 and referred to their meeting on 3rd April 2014 and the case conference on 17th April 2014. The chief superintendent highlighted that Sgt Barry was not performing his duties as directed by his district officer and that he continued to cite Dr Kiely's certificate as justification for his refusal. C/Supt Dillane stated, *inter alia*, that this scenario was totally unacceptable to him as the divisional officer. He also pointed out that all members are obliged to interact with their superintendent and that '*[b]y allowing Sergeant Barry to continue to serve in the Cork North Division it may appear that [he was] compounding his perceived health and safety issues*'. He concluded by requesting Dr Collins's medical advice on what he described as '*this burning issue*'.⁸¹²

⁸⁰⁷ Tribunal Documents, p. 447

⁸⁰⁸ Tribunal Documents, p. 447

⁸⁰⁹ Tribunal Documents, p. 447

⁸¹⁰ Tribunal Transcripts, Day 184, pp. 76-78

⁸¹¹ Tribunal Documents, p. 451

⁸¹² Tribunal Documents, p. 452

On 16th May 2014, C/Supt Dillane emailed Sgt Murphy and indicated that one of the parties had not consented to the proposed mediation service and that therefore it was not an option. He also stated that in light of the health and safety issue highlighted by Dr Oghuvbu and Sgt Barry's doctor he wished to withdraw his application to transfer Sgt Barry to Fermoy Garda Station. However, he proposed that Sgt Barry be transferred to Glanmire Garda Station instead, where he would not come into contact with Supt Comyns or Fermoy Garda Station. In this regard C/Supt Dillane stated that he had discussed the matter with Chief Superintendent Michael Finn, Divisional Officer Cork City, who expressed his willingness to have Sgt Barry assigned to Glanmire. C/Supt Dillane highlighted the fact that Glanmire was closer to the sergeant's home.⁸¹³

On 18th June 2014, C/Supt Dillane wrote again stating that he did not want to proceed with the transfer to Fermoy and that Glanmire was more suitable.⁸¹⁴

However, on 16th July 2014, C/Supt Dillane received an email from Inspector Sinéad Power, HRM on behalf of A/C Fanning (in reply to C/Supt Dillane's email earlier that day seeking permission to advise Sgt Barry of the withdrawal of the application),⁸¹⁵ advising him that as Sgt Barry had appealed his transfer to Fermoy the original application could not be withdrawn. Insp Power queried if C/Supt Dillane now contended that Sgt Barry's appeal should be allowed.⁸¹⁶

C/Supt Dillane sent a response to A/C Fanning on 21st July 2014 in which he stated that his application to withdraw the transfer request was based on the advice of the CMO, that he still required a sergeant in Fermoy Garda Station to supervise a unit, and that Sgt Barry was *'the most suitable person to carry out that duty'*.⁸¹⁷

It might be noted that on 23rd July 2014, Sgt Barry lodged an application for Assessment of Compensation pursuant to section 11 of the Personal Injuries Assessment Board Act, 2003. Within this document he corrected a statement made in a report by his psychiatrist, Dr John Dennehy:

*Dr Dennehy incorrectly records that I am hoping for a transfer however in fact I am seeking to resist a transfer but am hoping that Superintendent Comyns avails of a transfer or Change which will remove the necessity to work directly with him.*⁸¹⁸

In his evidence to the tribunal C/Supt Dillane stated that on 19th September 2014 he received a phone call from Supt Comyns, who reported an incident between Sgt Barry and another garda. This was not a matter that was examined by the tribunal and is outside its remit. The chief superintendent referred to it as an event that merely fuelled his concerns about Sgt Barry's ability to perform his functions at Mitchelstown Garda Station.⁸¹⁹

On 5th November 2014, C/Supt Dillane met Chief Superintendent Anthony McLoughlin, HRM, and enquired if there was any updated advice from the CMO with regard to Sgt Barry. He was advised that there was none.⁸²⁰

On 18th November 2014, Dr Oghuvbu sent a report to C/Supt McLoughlin. In paragraph 1 of the report he pointed out that he had no cause to review Sgt Barry's medical fitness since 11th March 2013. He went on to state the following:

⁸¹³ Tribunal Documents, p. 453

⁸¹⁴ Tribunal Documents, p. 454

⁸¹⁵ Tribunal Documents, p. 455

⁸¹⁶ Tribunal Documents, p. 456

⁸¹⁷ Tribunal Documents, p. 456

⁸¹⁸ Tribunal Documents, p. 5759

⁸¹⁹ Tribunal Transcripts, Day 184, p. 82

⁸²⁰ Tribunal Transcripts, Day 184, pp. 82-83

2. *As there have been no new clinical circumstances reported to this Service, my previous advices on the member's medical fitness in mine of 09/04/2013 stand ...*
3. *Without prejudice to [the] outcome of any investigations into the reported workplace interpersonal relationship issues, based on the information available to me, it would be appropriate to facilitate the member with a safe and supportive workplace environment that precludes obligatory interactions between the parties concerned as far as is reasonably practicable.*
4. *There are no clinical considerations known to this service at this time to preclude the member from attending regularly and undertaking normal policing duties in an appropriate workplace environment in keeping with point (3) above.*

*I hope this clarifies the position of this service in respect of your enquiry.*⁸²¹

In his statement to the tribunal, Dr Oghuvbu rejected the suggestion contained in Mr Barry's statement to the tribunal that he had altered his advices to facilitate his transfer.⁸²² He stated:

*I strongly refute any assertion that I changed Sergeant Barry's "original certificate" for a non medical reason. I did not alter or change any document to facilitate Sergeant Barry's transfer to another district. I entirely refute any assertion that my advices to Garda management were in some way provided as a means to enable management achieve a determined end (i.e. to facilitate Sergeant Barry's transfer...).*⁸²³

Dr Oghuvbu told the tribunal that his advice in respect of Sgt Barry had remained consistent throughout, and he was not saying anything in this report that differed from his earlier advices.⁸²⁴

C/Supt Dillane again emailed C/Supt McLoughlin on 5th December 2014 seeking an update on the CMO's position and was told on 7th December 2014 that there was none but that it would be followed up.⁸²⁵

It appears that C/Supt Dillane was not informed of the latest report from Dr Oghuvbu and sent him an email on 5th January 2015 in which he referred to their meeting in Dr Collins's office on 4th April 2014. He recalled that on that occasion Dr Oghuvbu had informed him that he had spoken with Dr Kiely and expressed his belief that contact with Supt Comyns and Fermoy Garda Station may have a detrimental effect on Sgt Barry's health. He attached a copy of Dr Kiely's original medical certificate and enquired as to '*its current status*'.⁸²⁶

On the same day Dr Oghuvbu sent a reply to C/Supt Dillane stating that he had sent a report to C/Supt McLoughlin on 18th November 2014 and that C/Supt McLoughlin was best placed to deal with his query.⁸²⁷ C/Supt Dillane then emailed C/Supt McLoughlin and requested an update on Sgt Barry's '*medical certificate and his working conditions*'.⁸²⁸

⁸²¹ Tribunal Documents, p. 1564

⁸²² Tribunal Documents, p. 324

⁸²³ Tribunal Documents, p. 1490

⁸²⁴ Tribunal Transcripts, Day 189, p. 101

⁸²⁵ Tribunal Documents, p. 460

⁸²⁶ Tribunal Documents, p. 461

⁸²⁷ Tribunal Documents, p. 461

⁸²⁸ Tribunal Documents, p. 461

C/Supt McLoughlin forwarded a copy of Dr Oghuvbu's report to C/Supt Dillane on 13th January 2015. In the covering letter C/Supt McLoughlin quoted from the third paragraph of Dr Oghuvbu's report, and concluded by stating that *'[t]aking into consideration the advice from Dr. Oghuvbu, Sergeant Paul Barry's transfer to Fermoy Garda Station will be cancelled'*.⁸²⁹

Counsel for the tribunal asked C/Supt Dillane if the situation with regard to Sgt Barry and the medical certificate was clearer to him at that time. He answered that it was, and that the letter was an indication that *'there was an obligation on [him] to preclude interaction between'* Sgt Barry and Supt Comyns.⁸³⁰

On 20th January 2015, C/Supt Dillane met Sgt Barry in his office. He recalled in his evidence to the tribunal that he informed the sergeant that his transfer to Fermoy had been cancelled; Sgt Barry acknowledged that he had already heard this news. He told Sgt Barry that he could not allow the problems arising from his issue with Supt Comyns to continue. He also advised Sgt Barry that HRM intended moving him but *'he could nominate a station that would suit him'* as long as it was not in the same district. He gave the sergeant until the following Friday to nominate a station, otherwise HRM would select one.⁸³¹

Mr Barry agreed with C/Supt Dillane's account of the meeting, but expressed his unhappiness at what was said to him. Immediately after the meeting he wrote a letter to the sergeant in charge claiming that C/Supt Dillane told him he had until Friday 23rd January 2015 to supply him with the name of a station to which he wished to be transferred and *'indicated that if I did not supply this transfer request that he would let HRM deal with me'*. Sgt Barry stated that *'this demand has upset [me] and caused me considerable stress'*. He queried whether HRM was demanding he *'apply to be transferred'*, or whether it was C/Supt Dillane.⁸³²

Transfer to Anglesea Street Garda Station

In his evidence to the tribunal, C/Supt Dillane recalled that on 23rd January 2015 he received correspondence from Sgt Barry stating that he had been stationed in Mitchelstown for the previous fifteen years and that he considered it the only safe and supportive workplace environment for him to work in. Accordingly, he would not be applying for a transfer.⁸³³ This letter has not been located by the tribunal. However, C/Supt Dillane was not challenged on his description of the contents.

On the same day, having received Sgt Barry's written response, C/Supt Dillane sent a report to the Assistant Commissioner, HRM in which he outlined his meeting with Sgt Barry on 20th January 2015 and quoted from Sgt Barry's written reply, as above. The chief superintendent further stated that:

Sergeant Barry chose to ignore the fact that the CMO's [advice] was that the safe and supportive workplace environment should preclude obligatory interaction between himself and Superintendent Michael Comyns the district officer for Fermoy district. This is not possible if he is to remain to be stationed in Mitchelstown Garda station.

⁸²⁹ Tribunal Documents, p. 462

⁸³⁰ Tribunal Transcripts, Day 184, p.86

⁸³¹ Tribunal Transcripts, Day 184, pp. 87-88

⁸³² Tribunal Documents, p. 466

⁸³³ Tribunal Transcripts, Day 184, p. 91

C/Supt Dillane concluded his report by stating that he wished to *'have Sergeant Barry transferred to a District outside of Fermoy Garda District'*.⁸³⁴

Meanwhile, and as discussed in chapter 12, Supt Comyns had arranged a case conference in respect of two unrelated rape cases for 2nd February 2015 at Mitchelstown Garda Station. The investigating members, Garda Rosemarie O'Connell, Detective Garda James Fitzpatrick, Garda Denise Fitzgerald and Sergeant Tony O'Flynn, were requested to attend. Sgt Barry was Garda O'Connell's supervising sergeant and Supt Comyns instructed D/Garda Fitzpatrick to notify him that he was required to attend the conference.⁸³⁵ It might be noted that this was the only occasion on which Sgt Barry and Supt Comyns would have met since the sergeant's return to work in March 2013.

Sgt Barry failed to attend the conference and D/Garda Fitzpatrick informed Supt Comyns that he had advised him that his attendance was required. It might be noted that Mr Barry does not accept that he was ever instructed to attend this conference. He told the tribunal that he turned up for duty at 12:00 hrs on 2nd February 2015 and was informed that there was a conference taking place with the superintendent. Mr Barry recalled that he observed Supt Comyns in the Public Office and immediately went into his own office, got his patrol jacket and hat and went on patrol.⁸³⁶ Indeed, Mr Barry told the tribunal that if he had known Supt Comyns was attending a conference in Mitchelstown Garda Station on that occasion he would have *'gone sick'*.⁸³⁷

D/Garda Fitzpatrick gave evidence to the tribunal that he told Sgt Barry on the previous Friday that he should attend the conference on the following Monday, 2nd February 2015.⁸³⁸

On 3rd February 2015, Supt Comyns sent a report concerning Sgt Barry's failure to attend the conference to C/Supt Dillane. The superintendent once again highlighted his difficulty managing his district because of Sgt Barry's behaviour. He complained in trenchant terms that the issue had been allowed to continue for almost two and a half years, during which time Sgt Barry had ignored him. He concluded by stating that he felt he had not received *'backing by the hierarchy in An Garda Síochána'*.⁸³⁹

Later on 3rd February 2015, C/Supt Dillane sent an email to C/Supt McLoughlin in which he highlighted the superintendent's concerns. He also expressed his own view that Sgt Barry continued his non-cooperation with Supt Comyns and that this was not serving the administration of justice in the Fermoy District any good. He concluded by stating that he wished to have Sgt Barry transferred to a district outside Fermoy Garda District immediately.⁸⁴⁰

Counsel for Sgt Barry suggested to C/Supt Dillane that it was unfair to write this email to HRM without first requesting an explanation from Sgt Barry and D/Garda Fitzpatrick. The chief superintendent disagreed and stated that the offence under investigation was a very serious one.⁸⁴¹

On 5th February 2015, HRM notified C/Supt Dillane that Sgt Barry was to be transferred to Anglesea Street Garda Station effective from 24th February 2015.⁸⁴² Counsel for the tribunal

⁸³⁴ Tribunal Documents, p. 469

⁸³⁵ Tribunal Documents, pp. 350-351

⁸³⁶ Tribunal Transcripts, Day 177, pp. 72-75

⁸³⁷ Tribunal Transcripts, Day 177, p. 74

⁸³⁸ Tribunal Transcripts, Day 187, pp. 161-162

⁸³⁹ Tribunal Documents, pp. 474-475

⁸⁴⁰ Tribunal Documents, pp. 476-477

⁸⁴¹ Tribunal Transcripts, Day 185, p. 41

⁸⁴² Tribunal Documents, p. 4213

referred C/Supt Dillane to Sgt Barry's complaint that his transfer to Anglesea Street placed him in the same position as he had been in originally. The chief superintendent denied that he had any input into which particular garda station Sgt Barry was transferred to, stating that this was entirely a matter for HRM.⁸⁴³

On 9th February 2015, C/Supt Dillane wrote to Sgt Barry and notified him that he would transfer at public expense from Mitchelstown Garda Station to Anglesea Street Garda Station on 24th February 2015. C/Supt Dillane set out the rationale behind the decision in the following terms:

*Your doctor has certified that you should not work or attend at Fermoy Garda Station and that you should not come into contact with Superintendent Michael Comyns. The Garda Chief Medical Officer has advised that it would be appropriate to facilitate you with a safe and supportive workplace environment that precludes obligatory interaction between Superintendent Comyns and yourself as far as [reasonably] practical. I explained to you that in order to ensure there was no obligatory interaction between yourself and Superintendent Comyns that you would have to transfer out of the District.*⁸⁴⁴

Anglesea Street Appeal

Sgt Barry immediately appealed his transfer to Anglesea Street Garda Station and in a letter to Human Resources and People Development (HRPD) dated 16th February 2015 set out the relevant background circumstances, as he saw them, that led to his transfer.⁸⁴⁵ Of particular significance to this issue, Sgt Barry stated that he believed that *'this second transfer and the original attempt'* were *'solely in response to my criminal/disciplinary complaint against Superintendent Comyns'*.⁸⁴⁶

In this letter Sgt Barry also referred to a rumour circulating in the Fermoy District that Supt Comyns was about to transfer into the Cork City Division. He maintained that if this rumour was correct, it demonstrated that the proposed transfer was being pursued in order to maliciously *'further victimise and torment'* him. This was, in his view, because Dr Oghuvbu's recommendation that there should be no obligatory interaction between the parties would be irrelevant.⁸⁴⁷

The rumour referred to by Sgt Barry turned out to be accurate and Supt Comyns was transferred to the Cork City Division with responsibility for the Mayfield District as recorded on HRM Personnel Bulletin No. 03/15 dated 27th February 2015. The transfer was to take effect on 9th March 2015.⁸⁴⁸

In his evidence to the tribunal, Supt Comyns was unsure exactly when he became aware of the transfer but thought it would have been at least a number of weeks before it appeared on the bulletin. He also stated that his reasons for applying for the transfer had nothing to do with the issues concerning Sgt Barry as he had always wanted to work in Cork city and it was nearer to his home.⁸⁴⁹

⁸⁴³ Tribunal Transcripts, Day 184, pp. 97-98

⁸⁴⁴ Tribunal Documents, p. 479

⁸⁴⁵ Tribunal Documents, pp. 98-103

⁸⁴⁶ Tribunal Documents, p. 100

⁸⁴⁷ Tribunal Documents, p. 103

⁸⁴⁸ Tribunal Documents, p. 227

⁸⁴⁹ Tribunal Transcripts, Day 182, pp. 97-98

C/Supt Dillane told the tribunal that he did not advise HRM that Supt Comyns had transferred to Mayfield because the bulletin had already issued. He said that Sgt Barry *'still wasn't coming in in the mornings and evenings to do his duty, even though Superintendent Comyns was gone'*.⁸⁵⁰

It might be noted that on 27th April 2015 C/Supt Dillane was informed by A/C Quilter that Sgt Barry had written to the Minister for Justice and Equality alleging improper interference by Supt Comyns in the investigation of a sexual assault and claiming that he was subjected to bullying and harassment by senior management after raising his concerns.⁸⁵¹

The Garda Code provided that the Assistant Commissioner, HRM was the appropriate person to receive appeals against a transfer. However, Mr John Barrett, then recently appointed Executive Director, HRPD, stepped into this role in Sgt Barry's case following a direction from the Garda Commissioner on 20th May 2015.⁸⁵²

Issue 4.i and the letter from Chief Superintendent Gerard Dillane to Mr John Barrett dated 7th August 2015

On 24th June 2015, Sgt Barry submitted a report to Inspector Joseph O'Connor, who was the acting district officer in Fermoy, concerning the proposed transfer of Garda Shane Hanafin from one unit to another. In the report Sgt Barry outlined a number of serious allegations against a detective garda and other members in Mitchelstown Garda Station. The nature and scope of those allegations are beyond the remit of the tribunal. It is sufficient to note that on 10th July 2015 C/Supt Dillane requested Inspector Eoghan Healy, Midleton Garda Station, to conduct *'preliminary enquiries/investigations in respect of the matters raised by Sergeant Barry in his report'* and to advise whether or not a discipline investigation was warranted.⁸⁵³

Insp Healy duly submitted his report to C/Supt Dillane on 4th August 2015, in which he detailed a number of alleged breaches of discipline, ranging from minor to serious breaches, against a number of members. There was also, in his view, the possibility of a criminal investigation. In the circumstances, the inspector recommended that advice be sought as to how best to proceed.⁸⁵⁴

C/Supt Dillane, after considering Insp Healy's report, submitted an eight-page report dated 7th August 2015 to Mr Barrett, in which he set out a history of all his interactions with Sgt Barry from 13th September 2012 until the date of the report. He highlighted, *inter alia*, that Sgt Barry had made serious complaints against Supt Comyns, lodged a personal injuries claim against An Garda Síochána, and made a further report containing serious allegations. The chief superintendent stated that these matters should be investigated; however, he expressed the view that there should not be two or three investigations carried out simultaneously into the same circumstances. Accordingly, he requested Mr Barrett's advice on how best to proceed.⁸⁵⁵

Ostensibly, the report concerned the nature of any investigation to be carried out into Sgt Barry's fresh allegations. However, the report alluded to the transfer issue and the steps taken by C/Supt Dillane in this regard. He specifically referred to Sgt Barry's failure to attend the rape conference on 2nd February 2015 and stated that he had:

⁸⁵⁰ Tribunal Transcripts, Day 184, p. 101

⁸⁵¹ Tribunal Documents, p. 484 and pp. 5010-5014

⁸⁵² Tribunal Documents, p. 5780

⁸⁵³ Tribunal Documents, p. 4672

⁸⁵⁴ Tribunal Documents, p. 4679

⁸⁵⁵ Tribunal Documents, pp. 124-125

*... immediately conveyed this information to Human Resource Management to emphasise the urgency to have Sergeant Barry transferred out of the Fermoy Garda District as I felt that his presence was having a negative impact on the policing of the area.*⁸⁵⁶

As will be recalled Sgt Barry denied that he was requested to attend this case conference. He told tribunal investigators that he first became aware of this complaint against him two months before his retirement in June 2016. Sgt Barry told the investigators that he believed the complaint had been manufactured as an excuse to transfer him.⁸⁵⁷

In his statement to the tribunal, C/Supt Dillane stood over his assertion that Sgt Barry was having a negative impact on policing in the district at the time. He highlighted the sergeant's failure to attend monthly PAF meetings and the daily briefings in Fermoy Garda Station as potentially resulting in some corporate responsibility if anything were to happen to any member of the public, or garda, because the member on duty had not been properly briefed.⁸⁵⁸

Counsel for Mr Barry suggested to C/Supt Dillane that in the circumstances his negative comment about his client was grossly unfair. The chief superintendent replied that he based his opinion on correspondence he received from Supt Comyns and from his own personal knowledge. He told the tribunal that if an incident had occurred that Sgt Barry was obliged to deal with, he would have been unable to make an informed decision because he was not attending the daily briefings. C/Supt Dillane stated that he felt at the time he might have been personally culpable if something did happen, because he was *'leaving this to continue and it was going on all the time'*.⁸⁵⁹

Transfer Appeal Decisions

On 29th September 2015, Mr Barrett recommended that the transfer should proceed.⁸⁶⁰ In his statement to the tribunal he set out his reasons for rejecting Sgt Barry's appeal:

The first one was by this date, Sept 2015, this matter had been ongoing for a number of years. Various accommodations offered, such as a move to Glanmire, close to Sgt Barry's residence, had been declined by Sgt Barry.

The second point is Sgt Barry maintained that the only safe working environment that he felt available to him was Mitchelstown. I couldn't agree with that in circumstances where the regional headquarters (Anglesea Street) has many facilities not available in smaller stations such as the onsite presence of employee assistance personnel and a large pool of available jobs.

*The final point was irrespective of where Michael Comyns was, in Fermoy or Mayfield where he was subsequently posted, Anglesea Street was essentially in a different orbit, a different place. To me, those factors met with what Dr. Oghuobu was proposing and didn't offend either gentleman.*⁸⁶¹

The tribunal investigator asked Mr Barrett if senior garda management had formed the view that Sgt Barry had been intransigent or recalcitrant in his approach to the issue of a transfer.

Mr Barrett replied that:

⁸⁵⁶ Tribunal Documents, p. 124

⁸⁵⁷ Tribunal Documents, pp. 55-56

⁸⁵⁸ Tribunal Documents, p. 361

⁸⁵⁹ Tribunal Transcripts, Day 185, pp. 48-49

⁸⁶⁰ Tribunal Documents, p. 5884

⁸⁶¹ Tribunal Documents, pp. 5784-5785

I read the report of Chief Supt Dillane and concluded that a reasonable effort had been made to find an alternative to the original suggestion that he move to Glanmire. When that was declined, given that it addressed all of the issues, in a like with like comparison, the policing duties would have been similar, he was advantaged by his geography, and it was taking away [the] issue of contact with Supt Comyns, I felt that was a reasonable effort by Chief Supt Dillane.⁸⁶²

In his evidence to the tribunal, Mr Barrett outlined the reasons why he chose to transfer Sgt Barry to Anglesea Street Garda Station:

There would be a substantial number of sergeants relative to district offices or sub offices. And so, in that regional headquarters there is also employee assistance personnel, Morgan Landy was one who was there at the time, he worked exclusively on assisting people who had difficulties and issues of all sorts. And the opportunity that was being created in a move to Anglesea Street served to address the prospect of doing all of the things that the CMO had proposed, providing a safe working environment, and the support services that simply would not be available anywhere else.

...

And that was irrespective of where Superintendent Comyns was based at any point in time.⁸⁶³

Counsel for the tribunal asked Mr Barrett if he observed anything untoward or improper in C/Supt Dillane's motives or actions at the time:

No, no. In fact, it was from Chief Superintendent Dillane's report that I read that there had been an effort made to accommodate him closer to his residence in a way that he would be in a station comparable to Mitchelstown. And I felt that was a reasonable effort in the circumstances by Chief Superintendent Dillane.⁸⁶⁴

On 11th October 2015, Sgt Barry appealed Mr Barrett's decision to the Garda Commissioner. His grounds of appeal relied heavily on the submission that Dr Oghuvbu's advice was redundant because Supt Comyns had left the district.⁸⁶⁵

Before considering Sgt Barry's appeal the Garda Commissioner sought an update on the various investigations conducted by A/C Nolan and the views of Deputy Commissioner Dónall Ó Cualáin.⁸⁶⁶

On 3rd March 2016, the deputy commissioner sent a full report concerning the outcome of A/C Nolan's investigation to the Garda Commissioner. He stated that he had examined Sgt Barry's file and noted his submissions. In particular, he noted the views of the divisional officer, who stated that '*Sergeant Barry's presence in the district is having a negative impact on the policing of the area*'. He recommended that Sgt Barry's transfer should proceed as directed.⁸⁶⁷

⁸⁶² Tribunal Documents, p. 5787

⁸⁶³ Tribunal Transcripts, Day 189, p. 28

⁸⁶⁴ Tribunal Transcripts, Day 189, p. 22

⁸⁶⁵ Tribunal Documents, pp. 4275-4276

⁸⁶⁶ Tribunal Documents, p. 4286

⁸⁶⁷ Tribunal Documents, p. 4288

On 8th March 2016, the Garda Commissioner, having examined the file and the rationale for the proposed transfer, decided that Sgt Barry's transfer should proceed.⁸⁶⁸ Sgt Barry was notified of the decision on 29th March 2016.⁸⁶⁹

In the meantime, on 16th March 2016, Sgt Barry had notified the sergeant in charge at Mitchelstown Garda Station that he intended to retire on 16th June 2016.⁸⁷⁰ This development was notified to C/Supt Dillane.⁸⁷¹

On 29th March 2016, Sgt Barry appealed the decision of the Garda Commissioner to the Transfer Review Body. Again he submitted that there was no justification for transferring him since Supt Comyns had transferred to the Cork City Division. He also complained that subsequent to making his disclosure against Supt Comyns there had been a campaign by senior management to '*bully and intimidate*' him with '*relentless transfer attempts*'. Sgt Barry claimed that he had been forced '*to retire from a job*' he had '*once loved and had no intention of leaving*'.⁸⁷²

The Transfer Review Body considered Sgt Barry's appeal and, by its decision dated 20th May 2016, recommended that the Commissioner should not proceed with the transfer. The reason given for its recommendation was that it was not fully evident that the reasons for Sgt Barry's transfer, namely his obligatory interaction with Supt Comyns and his presence in the district having a negative impact on policing in the area, remained valid.⁸⁷³

Sgt Barry retired from An Garda Síochána on 19th June 2016.⁸⁷⁴

Legal Submissions

Allegation that Supt Comyns and/or C/Supt Dillane failed to make proper temporary workplace accommodations for Sgt Barry to which he was entitled.

Mr Paul Barry submitted as follows:⁸⁷⁵

- that following a case conference on 8th April 2013, Dr Oghuvbu issued a report recommending that Sgt Barry be facilitated with reasonable and practicable temporary workplace accommodations.
- that Mr Barry's evidence to the tribunal was that the only accommodation offered was a transfer. It was also C/Supt Dillane's view that a transfer was the only solution he saw, in light of the medical certificate from Sgt Barry's doctor.
- that Dr Oghuvbu in his evidence said that what was needed was a solution to prevent continuous interaction between Sgt Barry and Supt Comyns. Thus a transfer was not the only option: a solution could have been found by allocating Sgt Barry a role that would not involve obligatory interactions with Supt Comyns.

⁸⁶⁸ Tribunal Documents, p. 4293

⁸⁶⁹ Tribunal Documents, p. 4294

⁸⁷⁰ Tribunal Documents, p. 4723

⁸⁷¹ Tribunal Documents, p. 4725

⁸⁷² Tribunal Documents, p. 4296

⁸⁷³ Tribunal Documents, p. 4313

⁸⁷⁴ Tribunal Documents, p. 2

⁸⁷⁵ The tribunal has considered all of Mr Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36.

- that this was the approach suggested in the letter dated 14th February 2013 from the solicitor for Sgt Barry to C/Supt Dillane, with Sgt Barry being placed under the direct management of Insp O’Sullivan. However, this was dismissed by C/Supt Dillane as impractical. That this approach could have worked, for Insp O’Sullivan to interpose to limit interactions, even if in a limited manner.
- that this was the arrangement put in place in April 2014, when Insp O’Sullivan dealt with all correspondence in relation to Sgt Barry. Had this arrangement been in place it would have avoided the issues that arose in May 2013 regarding leave applications.
- that even if a transfer were the only option, the location chosen by C/Supt Dillane, Fermoy, was unsuitable as it would place Sgt Barry in the same building as Supt Comyns.
- that Sgt Barry indicated to C/Supt Dillane that he would consider going to Mallow Garda Station, but would not apply for it as he wished to go at public expense. However, C/Supt Dillane denied that Mallow was discussed. There was a conflict here, but Mr Barry’s evidence was corroborated by Insp O’Sullivan, who confirmed that there was discussion of a transfer at public expense at a meeting on 9th April 2013.
- that the only workplace accommodation C/Supt Dillane and/or Supt Comyns considered was a transfer; alternatives were not considered. Again, that Sgt Barry was treated unfairly and unreasonably in relation to the provision of workplace accommodations; this amounted to targeting and took place in the months after C/Supt Dillane and Supt Comyns became aware of Sgt Barry’s first protected disclosure and was connected to same.

An Garda Síochána submitted as follows:⁸⁷⁶

- that Chapter 8 of the Garda Code makes it clear that the allocation and transfer of garda members is the responsibility of garda management rather than a matter of choice of individual members. Chapter 8.13 permits members to appeal an unrequested transfer if they feel it is harsh or unjust, which Sgt Barry did on every occasion a decision was made to transfer him from Mitchelstown Garda Station.
- that at a meeting on 13th October 2012, C/Supt Dillane sought to establish reasons for Sgt Barry’s absence and offered a transfer to Glanmire, which was rejected by Sgt Barry. C/Supt Dillane was clear that it was at this meeting that Sgt Barry said Supt Comyns should move and indicated that he was *‘going nowhere’*.
- that C/Supt Dillane denied that Sgt Barry suggested a transfer to Mallow Garda Station. The first time Mallow was mentioned by Mr Barry was in his evidence on Day 175.
- that Mr Barry had never previously referred to his willingness to move to Mallow in meetings with tribunal investigators, nor in contemporary correspondence.
- that the transfer issue arose again when Sgt Barry met C/Supt Dillane in February 2013, when an offer was made to transfer to Glanmire Garda Station. Sgt Barry’s then solicitor wrote declining this offer, but significantly the letter makes no mention of

⁸⁷⁶ The tribunal has considered all of An Garda Síochána’s legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

Mallow, or of any indication from Sgt Barry that a transfer to Mallow would be an option.

- that Sgt Barry's email on 4th February 2013 to A/C Fanning stated that *'a transfer was not an option for me'*.
- that the first case conference concerning Sgt Barry was on 22nd January 2013 and it recorded the offer of a transfer to Glanmire Garda Station and its refusal by Sgt Barry.
- that in an email of 7th February 2013 C/Supt Grogan referred to meeting Sgt Barry and Sgt Barry's refusal of a transfer offered by him. There was no mention recorded by C/Supt Grogan of Sgt Barry having any interest in a transfer to Mallow or a transfer at public expense.
- that on 12th March 2013, Sgt Barry sent an email to C/Supt Grogan seeking a safe working environment in Mitchelstown Garda Station, to which he would return, and saying a transfer was not an option.
- that on 15th March 2013, C/Supt Grogan wrote to Sgt Barry confirming that if he were to apply for a transfer it would be given consideration, without being prescriptive as to the place of transfer. Again, if Sgt Barry had been willing to transfer to Mallow this would be an opportunity to refer to it, but there was no record of such an indication being given.
- that on 21st March 2013, A/C Fanning wrote to Sgt Barry's solicitors advising that their client could ask to be considered for a temporary transfer. A/C Fanning followed this up with a letter to C/Supt Dillane enquiring if Sgt Barry would seek a temporary transfer. He was informed in a letter dated 4th April 2013 that Sgt Barry had stated that he did not wish to be considered for a transfer to a different station.
- that on 5th May 2013, Sgt Barry wrote to A/C Fanning in terms that strongly indicted his unwillingness to move to any station other than Mitchelstown.
- that in June 2013 C/Supt Dillane became aware that the bullying and harassment allegations made against Supt Comyns were not upheld.
- that on 10th December 2013, C/Supt Dillane sent a letter to the Assistant Commissioner, HRM asking to transfer Sgt Barry to Fermoy Garda Station. C/Supt Dillane in evidence said that his reasoning was that he needed a sergeant in Fermoy and he chose Sgt Barry over Sgt Quinn as Sgt Barry would be least inconvenienced, as he lived closer to Fermoy than Mitchelstown. C/Supt Dillane considered the move to be appropriate at this time, as the allegations against Supt Comyns were not upheld by Chief Superintendent Catherine Kehoe.
- that at a meeting on 19th January 2014, C/Supt Dillane informed Sgt Barry of this plan; Sgt Barry said he did not wish to transfer to Fermoy. C/Supt Dillane then offered a transfer to Mallow or Middleton, which was declined. On 29th January 2014, C/Supt Dillane notified HRM of his decision to seek to transfer Sgt Barry to Fermoy and asked HRM to publish the transfer in the next bulletin. Sgt Barry appealed this transfer, remained in Mitchelstown, and persisted in his refusal to attend Fermoy.

- that on 2nd April 2014, C/Supt Dillane received a report from Supt Comyns setting out that as a result of Dr Kiely's certificate Sgt Barry could not perform his sergeant duties and, in turn, Supt Comyns could not perform his duties as superintendent; and that this was undermining his authority as district officer.
- that C/Supt Dillane was in a difficult position; he had gaps to fill and sought to deploy Sgt Barry by transfer to Fermoy. However, this was not possible with an appeal pending. C/Supt Dillane reversed his decision to transfer Sgt Barry and attended a case conference on 17th April 2014, following which he was to meet Sgt Barry to discuss transfers (Midleton, Mallow, Glanmire).
- that C/Supt Dillane met Mr Barry on 21st April 2014 at Fermoy Garda Station. He told Sgt Barry that he had to comply with all processes and procedures that are part of a sergeant's role and offered him the facilities of the Labour Relations Commission for mediation. A similar offer of mediation was made to Supt Comyns, who on 4th May 2014 declined the offer.
- that in July 2014 Sgt Barry lodged an application for Assessment of Compensation pursuant to section 11 of the Personal Injuries Assessment Board Act, 2003. Within the documents was a reference made by Dr John Dennehy that Sgt Barry was seeking to resist a transfer; Sgt Barry sought to correct this.
- that this was a contemporary record, which contradicted Sgt Barry's belated insistence that he was open to a transfer to Mallow and made it clear his attitude was as recorded by C/Supt Dillane in April 2013: that he was *'going nowhere'*.
- that on 20th January 2015, C/Supt Dillane met Sgt Barry to try to resolve matters. Sgt Barry was informed that the situation with him and Supt Comyns could not continue and that HRM had advised of the need to prevent interactions. Sgt Barry was then informed that, as it was he who had difficulty with Supt Comyns, HRM intended to move him to a station where he would have no interactions with Supt Comyns. He was invited to nominate a station for HRM to consider.
- that on the same day, Sgt Barry wrote to the sergeant in charge, copying Supt Comyns, and sought to have it clarified whether it was HRM who were demanding he apply for a transfer, or whether it was at C/Supt Dillane's request. This letter was forwarded to C/Supt Dillane, who replied to Supt Comyns on 21st January 2015 confirming what was explained to Sgt Barry.
- that on 23rd January 2015, Sgt Barry responded, stating that he had been stationed in Mitchelstown for the past fifteen years, that he considered it the only safe and supportive workplace environment for him, and that he would not be applying for a transfer. On the same day C/Supt Dillane wrote to C/Supt McLoughlin requesting the immediate transfer of Sgt Barry to a district other than Fermoy.
- that on 5th February 2015, HRM notified C/Supt Dillane of Sgt Barry's transfer to Anglesea Street Garda Station, effective from 24th February 2015. Sgt Barry requested a review of this transfer, which was carried out by Mr Barrett. Mr Barrett was of the view that the matter had been ongoing for a number of years, that Anglesea Street had

many facilities that were not available in Mitchelstown, and that Anglesea Street was in a different place. He said that these factors met with what Dr Oghuvbu was proposing.

- that in March 2015 Supt Comyns transferred from Fermoy to Mayfield Garda Station.
- that on 21st March 2015, Mr Barrett informed Sgt Barry of the decision reached by the Garda Commissioner on 10th March 2015 that the transfer to Anglesea Street should proceed on 6th April 2015.
- that even though Supt Comyns had transferred out of Fermoy, Sgt Barry had not resumed attending morning and evening meetings in Fermoy Garda Station. C/Supt Dillane considered that he still was not performing his duties and that the transfer remained appropriate.
- that C/Supt Dillane's approach in not acting to stop the transfer and review by Mr Barrett was reasonable and could not be considered targeting or discrediting.
- that Sgt Barry successfully appealed against this transfer and remained in Mitchelstown until his retirement on 19th June 2016.
- that there was a conflict of evidence between Mr Barry and C/Supt Dillane as to Mr Barry's willingness to consider a transfer to any station other than Mitchelstown. This should be resolved in favour of C/Supt Dillane in light of the contemporaneous records. There was no record of Sgt Barry's willingness to transfer to Mallow or any other station. The evidence suggested that Sgt Barry wished to remain in Mitchelstown and that any transfer was not an option. It is curious that Mr Barry, if he, as he now claims, indicated in October 2012 that he would have accepted a transfer to Mallow at public expense, did not make this point before giving evidence or in any correspondence from him or his solicitor.
- that this is a belated repositioning by Mr Barry to distance himself from his own inflexible dismissal of reasonable suggestions of transfer from C/Supt Dillane and C/Supt Grogan to offer workplace accommodations that would allow Sgt Barry to return to work. It might also have been an attempt to dilute in the eyes of the tribunal the efforts by C/Supt Dillane to accommodate Sgt Barry with a transfer and indirectly support Mr Barry's allegations in Issues 3.b and 3.d.
- that rather than targeting Sgt Barry extensive efforts were made by senior garda officers to deal with his refusal to work with Supt Comyns. The better option was to transfer Sgt Barry out of the situation and to another district, but this was rendered impossible by the terms of the bullying and harassment policy, which precluded mandatory transfer, and by Sgt Barry's refusal to apply for a transfer. There was no evidence that these efforts amounted to targeting or discrediting Sgt Barry, much less that he was targeted in connection with his protected disclosures.

Superintendent Michael Comyns submitted as follows:⁸⁷⁷

- that it was clear from the evidence that this is not an issue that related to Supt Comyns. The putting in place of '*workplace accommodations*' was not for Supt Comyns, where he was the subject of a complaint by Sgt Barry.

⁸⁷⁷ The tribunal has considered all of Superintendent Michael Comyns's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

- that it was difficult to see what further *'temporary workplace accommodations'* could have been put in place. Sgt Barry requested that he remain in Mitchelstown without being subject to oversight or direction from Supt Comyns, and refused to take phone calls from Supt Comyns or attend necessary meetings; in particular PAF meetings, which were fundamental to the proper policing, management and supervision of a district by a superintendent.
- that the suggestion in the letter dated 14th February 2013 from Sgt Barry's then solicitors that Sgt Barry be under the exclusive direction of Insp O'Sullivan ignored the chain of command and the necessity for a superintendent to oversee and manage the district.
- that it was apparent from the evidence that steps were taken to facilitate Sgt Barry by way of transfer, which was the only practical mechanism to accommodate Sgt Barry, but that Sgt Barry impeded and rejected every such transfer.
- that Sgt Barry was in fact accommodated by superiors, in that he suffered no consequences in the workplace for his refusal to attend Fermoy Garda Station or engage with Supt Comyns.
- that there was no evidence of Sgt Barry being targeted or discredited, and no evidence of Supt Comyns targeting or discrediting, or being a party to any targeting or discrediting, of Sgt Barry by An Garda Síochána.

Allegation that Supt Comyns and/or C/Supt Dillane pressurised Sgt Barry to agree to transfer to another station against his will.

Mr Paul Barry submitted as follows:⁸⁷⁸

- that from October 2012 onwards C/Supt Dillane raised the issue of transferring Sgt Barry from Mitchelstown Garda Station and on 10th December 2013 he made an application to have Sgt Barry transferred to Fermoy Garda Station. Prior to this, on 7th November 2013, Supt Comyns requested that a sergeant be transferred to Fermoy from Mitchelstown. Supt Comyns expressed a preference for Sgt Quinn in Unit D, as the position he wished to fill was in Unit D. However, C/Supt Dillane opted for Sgt Barry.
- that C/Supt Dillane accepted that this would put Sgt Barry and Supt Comyns in daily contact, which flew in the face of the medical certificate. There was no consultation with Sgt Barry or Sgt Quinn.
- that on 19th January 2014, Sgt Barry was directed to transfer to Fermoy Garda Station and met C/Supt Dillane, who explained his rationale for the transfer. When Sgt Barry declined, C/Supt Dillane offered Mallow or Middleton as alternative stations for transfer. This was intended to apply pressure on Sgt Barry to accept a transfer out of Mitchelstown and may have been the reason for suggesting Fermoy in the first place.
- that following a meeting with Dr Collins and Dr Oghuvbu, when he was advised by Dr Oghuvbu that contact with Supt Comyns could be detrimental to Sgt Barry's health, C/Supt Dillane sought on 16th May 2014 to withdraw the application for transfer and instead have Sgt Barry transferred to Glanmire.

⁸⁷⁸ The tribunal has considered all of Mr Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp 6-36

- that it was clear that this proposal to transfer, although withdrawn, could not be considered to be without issues: Sgt Barry's medical certificate was still in place and in April 2013 Dr Oghuvbu was suggesting workplace accommodations and limiting contact between Sgt Barry and Supt Comyns. C/Supt Dillane was alive to these issues in an email to Dr Oghuvbu on 24th May 2013, when he queried if contact with Supt Comyns would affect Sgt Barry's health.
- that on 13th January 2015, C/Supt Dillane met with Sgt Barry and told him that he was applying to have him transferred out of the district, and gave him a deadline by which to nominate a station. Then on 23rd January 2015, C/Supt Dillane applied to have Sgt Barry transferred out of the Fermoy Garda District. Sgt Barry was then informed that he was being transferred to Anglesea Street Garda Station, effective on 5th February 2015. This was around the same time that Supt Comyns was transferring to Mayfield, meaning that it was likely that there would be contact between both men.
- that Supt Comyns transferred to Mayfield in March 2015. However, efforts to have Sgt Barry transferred from Mitchelstown persisted.
- that the efforts of C/Supt Dillane to have Sgt Barry transferred to Fermoy amounted to targeting; this was a deliberate effort to place Sgt Barry in an unsuitable environment. It went against the recommendations of Dr Kiely and Dr Oghuvbu, the wishes of Sgt Barry and the preferences of Supt Comyns; and could not be justified.
- that the decision was intended to penalise Sgt Barry or coerce him into accepting a transfer to another location.
- that persistent efforts to transfer Sgt Barry amounted to targeting and occurred in a context where C/Supt Dillane had knowledge of Sgt Barry's protected disclosure and acted in an unfair and unjustified way towards Sgt Barry, and were connected to protected disclosures.

Superintendent Michael Comyns submitted as follows:⁸⁷⁹

- that it was clear from the evidence of Mr Barry and C/Supt Dillane that Supt Comyns had no role in any proposed transfer.
- that Sgt Barry's complaint, as noted by his general practitioner Dr Kiely on 10th August 2012, predated the making of any complaint by Sgt Barry.
- that the only time Supt Comyns featured was when he signed a letter on behalf of C/Supt Dillane. Supt Comyns had no input into the letter; it was confirmed by C/Supt Dillane in evidence that the letter was created at his instruction and Supt Comyns simply issued it on his behalf.
- that Supt Comyns gave evidence that he could only transfer individuals within his own district.
- that Sgt Barry maintained his complaint against Supt Comyns without any evidence or basis for his belief, and that the evidence confirmed that Supt Comyns had no role in the proposed transfer.

⁸⁷⁹ The tribunal has considered all of Superintendent Michael Comyns's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 64-69

- that Mr Barry in his evidence took issue with the report of Dr Dennehy, consultant psychiatrist, who noted that Sgt Barry was *'hoping to obtain a transfer'*.
- that there was no evidence of Sgt Barry being targeted or discredited and no evidence of Supt Comyns targeting or discrediting Sgt Barry or being a party to targeting or discrediting of Sgt Barry by An Garda Síochána.

Allegation that C/Supt Dillane targeted or discredited Sgt Barry in a letter to Mr Barrett dated 7th August 2015 stating that Sgt Barry was having a negative effect on policing in the Fermoy District

Mr Paul Barry submitted as follows:⁸⁸⁰

- that the letter to Mr Barrett contained obvious criticism of Sgt Barry, which appeared to be linked to the reported non-attendance of Sgt Barry at a case conference on 2nd February 2015.
- that those criticisms for non-attendance were wholly unfair and amounted to another instance of targeting and/or discrediting of Sgt Barry on foot of the protected disclosure he made.

Conclusion

The conclusions to be reached in this chapter are in relation to the following:

1. Did the failure by C/Supt Dillane to put temporary workplace accommodations in place amount to targeting or discrediting?
2. Did the chief superintendent's attempts to transfer Sgt Barry amount to targeting or discrediting?
3. Specifically, did C/Supt Dillane's attempt to move Sgt Barry to Fermoy Garda Station amount to targeting or discrediting?
4. Did C/Supt Dillane's letter to Mr Barrett dated 7th August 2015 amount to targeting or discrediting?

Temporary Workplace Accommodations

Sgt Barry's general practitioner Dr Kiely reluctantly certified him as being fit to return to work but she attached conditions that she had discussed with the patient and had obtained his approval of them. The conditions were that he should not attend Fermoy Garda Station and neither should he come in contact with Supt Comyns. C/Supt Dillane and the superintendent considered that these conditions were impossible to fulfil in that they were totally impracticable and made it impossible for the superintendent to supervise his district in accordance with his obligations.

In circumstances where a member of An Garda Síochána is declared fit for work but only on conditions that local management consider to be impossible to satisfy, it would seem that there is a major question as to whether the member is truly fit for work in the ordinarily understood

⁸⁸⁰ The tribunal has considered all of Mr Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp 6-36

meaning of that expression. In this case, when Sgt Barry returned to work and the conditional certificate was accepted as entitling or permitting him to do so, the gardaí created for themselves an unresolvable dilemma. That is the background to this investigation.

It may be argued that Sgt Barry's certificate declared him fit for work but not the same work as he had been doing when he went on sick leave. The certificate had created a quite new situation. It did not contain any diagnosis and neither did it indicate any time limit on the conditions that it laid down for Sgt Barry's return to work. The conditions were clear. Any temporary workplace accommodations had to be respected so they were in effect absolutes. Although declared to be temporary they were actually unlimited as to time and in fact they remained unchanged until Sgt Barry retired in February 2016.

Although the certificate did not specify the medical rationale for the restrictions it contained, the fact is that Sgt Barry's illness was never questioned by the assistant CMO. He commissioned a specialist psychiatrist report, which he obtained in late 2012. Dr Oghuvbu spoke to Dr Kiely about Sgt Barry and, while he did not accept the conditions that she had imposed, neither did he reject them. When consulted by HRM, Dr Oghuvbu recommended temporary workplace accommodations but he did not engage in analysis of the practicality of any scheme of accommodations. His view, as he told the tribunal, was that it was a matter for management to implement in specific measures the general recommendations for steps that were reasonable and practicable.

That brought the matter back to local management, and specifically to C/Supt Dillane. His fundamental objection was that the conditions made normal, proper and orderly management of policing in the district impossible.

Sgt Barry's submissions suggest that the solution put forward by his solicitor in a letter to C/Supt Dillane dated 14th February 2014, that Sgt Barry should be placed under the direct management of Insp O'Sullivan, could have worked, even if in a limited manner, and that this was the arrangement that was put in place in April 2014.

The reality is that Sgt Barry himself adopted workplace accommodations by applying the conditions in the medical certificate whereby he avoided Fermoy Garda Station and made sure that he did not have any contact with Supt Comyns. The only thing that was missing was agreement by local management.

It may be argued that C/Supt Dillane should actually have agreed to the basis on which Sgt Barry had opted to work. As to that question there was an impasse. Sgt Barry and his doctor and Dr Oghuvbu appear to have envisaged the possibility of producing accommodations of a temporary nature that would deal with the problem. The only one suggested was Sgt Barry's solicitor's. But C/Supt Dillane was utterly unconvinced and wholly opposed to the possibility that any solution internally in the district could be put in place that would not seriously undermine the orderly management of policing.

The tribunal does not have to decide whether there were reasonable and practicable accommodations available. The question is whether C/Supt Dillane genuinely believed in the position he adopted. It is relevant in this connection that his immediate reaction on seeing

the medical certificate was to get in touch with HRM and Dr Oghuvbu among others with expressions of alarm at the implications. The point is not that the formula put forward by Sgt Barry's solicitor, or some other unspecified solution, could have worked. Neither is it that some adaptation of that scheme was actually in place at a later point, a fact actually disputed by the chief superintendent.

The point here is that the chief superintendent was of the honest belief in the impossibility of that proposed solution. Targeting is not making a wrong decision.

Having considered all the evidence the tribunal is satisfied that this was not a case of targeting.

Transfer

C/Supt Dillane saw the only solution to the problem of insulating Sgt Barry from any contact with Fermoy Garda Station and the superintendent as being a transfer, which he envisaged as being on a temporary basis until the investigation process arising out of Sgt Barry's complaints was completed. For his part, Sgt Barry was determined to remain in Mitchelstown Garda Station. Sgt Barry maintained in evidence that he was willing to submit to being transferred to Mallow Garda Station although he would not apply for such a move.

There was dispute at the hearings as to whether Sgt Barry had ever offered to move to Mallow Garda Station, something that C/Supt Dillane rejected as having ever been offered by Sgt Barry. The sergeant contended that he had set out the position that he would not voluntarily apply for a transfer but that he would accept a move to Mallow Garda Station if that was done at public expense. When a member of An Garda Síochána is transferred otherwise than voluntarily there can be significant financial advantages, but it is unnecessary to explore that question. It is true that Insp O'Sullivan recalled some reference to public expense being made at a meeting at which he was present together with the chief superintendent and Sgt Barry at which the transfer question was being discussed.

The submissions of An Garda Síochána draw attention to certain evidence casting doubt on whether Sgt Barry ever actually made this offer. It is clear that it was never made in writing; in fact Sgt Barry's position as set out in correspondence – to A/C Fanning, for example – is that he had no intention of moving. Not only that, he queried how it could be that he was expected to work with a person whom he had accused of committing a serious crime.

If Sgt Barry was indeed willing, subject to certain qualifications, to move to Mallow Garda Station, it seems irresistible that his message did not get through to C/Supt Dillane. If it had, the tribunal is satisfied that the officer would have been greatly relieved at this news and would have actively supported it or would simply have implemented it without delay. A transfer was exactly what the chief superintendent had been seeking, believing as he did that it was the only solution. Although he had suggested Glanmire Garda Station it would not have made any sense for him to insist that that was the only one.

In the result, on any view of the situation it is clear that the chief superintendent believed that Sgt Barry was unwilling to move from Mitchelstown and never became aware that the sergeant would have accepted a transfer to Mallow.

There was accordingly a complete impasse. To the chief superintendent's knowledge Sgt Barry would not move and he was medically certified as having to be insulated from the superintendent and the district headquarters. The chief superintendent was not in a position to make a transfer that Sgt Barry did not agree to. The assistant CMO was supportive of the need for practicable measures to accommodate the member and considered it a matter for management to sort out just how that might be achieved.

Sgt Barry had done nothing wrong. He had made a bullying and harassment complaint and the relevant rules prohibited a transfer while the matter was being investigated. That applied both to Sgt Barry and to the superintendent. The investigation of items 1 to 8, which were properly considered to come under that heading, came to an end on 30th May 2013 with no finding of breach made against the superintendent. As a person accused of a crime, Supt Comyns was entitled to the presumption of innocence and indeed the Director of Public Prosecutions ultimately decided not to instigate a prosecution. The remaining investigation concerned alleged breaches of garda discipline, and again that resulted in a decision in favour of the superintendent. So the superintendent's position was protected by procedural rules and the general law.

Fermoy and Anglesea Street

C/Supt Dillane applied in December 2013 to HRM to have Sgt Barry transferred to Fermoy. Obviously, he knew that that would conflict with the conditions in the medical certificate. In January 2014 he explained his reasons for the transfer to Sgt Barry, who was unsurprisingly not agreeable to the move. However, having consulted Dr Oghuvbu and also the CMO Dr Collins, the chief superintendent changed his mind and tried to withdraw the application.

In regard to the proposed transfer to Anglesea Street Garda Station in early 2015, it was arguably reasonable, although obviously the matter is debatable, for the chief superintendent to want to take Sgt Barry out of the situation of conflict in which he had been working since April 2013. The point is that Supt Comyns had moved from Fermoy to Mayfield in March 2015 so that the district no longer constituted a conflict zone. The particular problem of the conditions in the medical certificate was no longer an issue undermining local management so the proposed transfer was not necessary.

The chief superintendent denied that he was attempting to bring matters to a head by seeking the transfer to Fermoy and maintained that he was just trying to organise his district. In regard to the Fermoy transfer, it is fair to acknowledge that he sought to withdraw the application at an early stage. As to Anglesea Street, the problem of the certificate was no longer relevant as stated above.

In these circumstances, the tribunal considers that the chief superintendent cannot escape criticism for these two decisions. However, the tribunal does not accept that he set out to target or discredit Sgt Barry and considers that these actions were not done because Sgt Barry had made a protected disclosure.

As for Sgt Barry, the tribunal does not criticise him for not agreeing to a transfer. There was no obligation on him to do so. He was happy in Mitchelstown Garda Station and did not want to move elsewhere. He did not have to solve the problem that his certificate presented. It might well have been better for his mental health to go to another district but that was for him and his

advisers to decide and not for this tribunal. However, it was perhaps inevitable that Sgt Barry would have been sensitive and on high alert for any actions that were possibly hostile to him and susceptible to thinking they were reactions to his protected disclosure.

The questions as to temporary workplace accommodations and efforts to transfer Sgt Barry are not matters that concern Supt Comyns.

Finally, the chief superintendent's letter to Mr Barrett of 7th August 2015 in which he opined that Sgt Barry was having a negative effect on policing in the Fermoy District was no more than an expression of his view made to the proper and relevant person and was a matter on which he was entitled to express his opinion.

CHAPTER 15

ISSUE 6.A: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE INVESTIGATIONS CONDUCTED BY CHIEF SUPERINTENDENT CATHERINE KEHOE

Issue 6.a of the Schedule of Issues

Did C/Supt Kehoe target or discredit Sgt Barry as he alleges –

(a) *by taking an inordinate time to complete her investigation?*

Background

As noted earlier in this report, Sergeant Paul Barry submitted his complaint under the Garda Síochána policy and procedures document for dealing with harassment, sexual harassment and bullying: *Working Together To Create A Positive Working Environment* by post on 28th September 2012 and by email on 2nd October 2012.

Prior to the commencement of the public hearings, the tribunal conducted case management hearings with the relevant parties and Mr Barry's complaints concerning the investigations into these bullying and harassment allegations were included in Issue 6 of the Schedule of Issues.

The public hearings commenced on 17th May 2022, and on 27th May 2022 Mr Barry confirmed through his counsel that while he wished to pursue Issue 6.a of the Schedule of Issues, he was not now persisting with the balance of his complaints under Issue 6.⁸⁸¹

Former Assistant Commissioner Jack Nolan

Following the making of his complaint, Sgt Barry was contacted by Ms Kathleen Hassett of Human Resource Management (HRM) on 3rd October 2012. Ms Hassett acknowledged receipt of his report and said that due to the reference to his local assistant commissioner, she would require directions from the Assistant Commissioner, HRM as to who would investigate the complaint.⁸⁸²

Sgt Barry was informed on 9th October 2012 by Chief Superintendent John Grogan, HRM that his correspondence had been forwarded to Assistant Commissioner Jack Nolan, South Eastern Region for his appropriate attention.⁸⁸³

By letter dated 9th October 2012, A/C Nolan was requested by HRM to identify the person appointed to investigate Sgt Barry's complaint if the assistant commissioner considered the complaint admissible under the bullying and harassment policy.⁸⁸⁴

⁸⁸¹ Tribunal Transcripts, Day 181, pp. 65-66

⁸⁸² Tribunal Documents, p. 2481

⁸⁸³ Tribunal Documents, p. 2482

⁸⁸⁴ Tribunal Documents, p. 2485

A/C Nolan appointed Superintendent Patrick Lordan to assist him and take a statement from Sgt Barry,⁸⁸⁵ which he did on 21st November 2012 when Sgt Barry outlined nine allegations of bullying and harassment against Superintendent Michael Comyns.⁸⁸⁶ By report dated 6th December 2012, Supt Lordan wrote to A/C Nolan referring to one of Sgt Barry's allegations and stating that it was a serious allegation that needed to be fully investigated, but it was possibly outside of the remit of his investigation.⁸⁸⁷ This issue concerned allegation nine in the bullying and harassment complaint: that Supt Comyns interfered with the investigation into alleged sexual abuse that was reported at Mitchelstown Garda Station on 2nd February 2012.

In a letter dated 4th January 2013, A/C Nolan sought the advice of the Assistant Commissioner, HRM as to whether a separate investigation should be commenced in relation to that issue.⁸⁸⁸

In a response dated 16th January 2013, provided to A/C Nolan on 29th January 2013, C/Supt Grogan, HRM directed that A/C Nolan should appoint a chief superintendent to carry out an investigation under the bullying and harassment policy and *'any criminal offence identified'*. It was also stated that consideration should be given to the appointment of a chief superintendent under the Discipline Regulations to investigate allegations that Supt Comyns interfered with an investigation.⁸⁸⁹

In the interim, on 4th January 2013, A/C Nolan wrote to both Supt Comyns⁸⁹⁰ and Sgt Barry⁸⁹¹ seeking an extension of time to 1st March 2013 under section 8.5 of the bullying and harassment policy document.⁸⁹² The policy requires at section 8.4 that a suitable investigator is appointed who reports his/her findings *'within 28 days of the complaint being received at the Divisional office'*.⁸⁹³ Section 8.5 states that extensions to the time limits are acceptable once there is a clear justification and both the complainant and the person complained of have indicated that they have no objection to the extension.⁸⁹⁴

Supt Comyns did not object to the requested extension of time.⁸⁹⁵ However, by email dated 14th January 2013, Sgt Barry stated that he did not agree to the proposed extension of time as three months had passed since A/C Nolan's appointment. He claimed that he was on sick leave due to the unacceptable behaviour of Supt Comyns and that to agree to the extension of time would mean that he was consenting to having his pay cut in half. He said that he was under considerable stress and that his ability to provide for his family had been limited with the loss of allowances and half pay. He also stated that he wanted the investigation to be done within the time frame set out in the bullying and harassment policy.⁸⁹⁶ Sgt Barry wrote in similar terms to the Assistant Commissioner, HRM on 16th January 2013.⁸⁹⁷

In his evidence to the tribunal, Mr Barry said that he was not happy with the delay as he was still out sick and it meant that he would continue on sick leave without his allowances.⁸⁹⁸

⁸⁸⁵ Tribunal Documents, p. 2483

⁸⁸⁶ Tribunal Documents, pp. 86-95

⁸⁸⁷ Tribunal Documents, p. 2488

⁸⁸⁸ Tribunal Documents, p. 2490

⁸⁸⁹ Tribunal Documents, pp. 2493-2494

⁸⁹⁰ Tribunal Documents, p. 2492

⁸⁹¹ Tribunal Documents, p. 2489

⁸⁹² Tribunal Documents, p. 3498

⁸⁹³ Tribunal Documents, p. 3523

⁸⁹⁴ Tribunal Documents, p. 3525

⁸⁹⁵ Tribunal Documents, p. 959

⁸⁹⁶ Tribunal Documents, pp. 957-958

⁸⁹⁷ Tribunal Documents, p. 955

⁸⁹⁸ Tribunal Transcripts, Day 176, p. 6 and p. 10

On 11th February 2013, Sgt Barry's solicitor wrote to the Assistant Commissioner, HRM stating that Sgt Barry had provided a full statement to Supt Lordan but had been advised that A/C Nolan was not in a position to conclude the investigation. Sgt Barry was stated to be left in an impossible position where a decision concerning his absence from duty was reducing his pay and significantly impacting him financially.⁸⁹⁹ This letter was forwarded to A/C Nolan by C/Supt Grogan, who pointed out that the Association of Garda Sergeants and Inspectors (AGSI) had also made a representation on behalf of Sgt Barry enquiring as to why the matter had not yet been finalised.⁹⁰⁰

By letter dated 14th February 2013, Sgt Barry's solicitor wrote to Chief Superintendent Gerard Dillane referring to A/C Nolan's investigation alleging that there had been inordinate delay in progressing the same.⁹⁰¹

By email dated 18th February 2013, Sgt Barry wrote again to A/C Nolan stating that he had never received a progress report on the matter and that the delay in the investigation was causing him *'untold stress'*.⁹⁰² He requested a report on the current status of the investigation. A/C Nolan replied on the same date stating that the issues raised in his statement were complex in nature and required significant investigation. He said that these investigations were currently in progress.⁹⁰³

By letter to HRM dated 21st February 2013, A/C Nolan informed the assistant commissioner that he had appointed Chief Superintendent Catherine Kehoe, Tipperary Division *'to complete this investigation as a matter of urgency'*.⁹⁰⁴

Notwithstanding the language used by A/C Nolan in a number of letters suggesting that an investigation was underway, A/C Nolan told the tribunal that it would never have been his intention to actually physically conduct the investigation himself given his volume of work.⁹⁰⁵

Retired Chief Superintendent Catherine Kehoe

A/C Nolan met with C/Supt Kehoe on 7th February 2013 and, according to the chief superintendent's notes of the meeting, A/C Nolan told her that he did not have the time to fully investigate the case himself.⁹⁰⁶ C/Supt Kehoe said in her evidence to the tribunal that she did not know the complainant or Supt Comyns.⁹⁰⁷

By letter dated 11th February 2013, received by the chief superintendent on 18th February 2013, A/C Nolan appointed C/Supt Kehoe to investigate the allegations of bullying and harassment made by Sgt Barry and *'any criminal offences identified in Sergeant Barry's complaint'*. A/C Nolan requested an expeditious investigation of the matter.⁹⁰⁸

A/C Nolan enclosed material with this letter, including the emails from Sgt Barry dated 14th and 16th January 2013 referenced above, wherein he complained about the issue of delay.⁹⁰⁹ C/Supt

⁸⁹⁹ Tribunal Documents, p. 2498

⁹⁰⁰ Tribunal Documents, p. 2500

⁹⁰¹ Tribunal Documents, p. 2502

⁹⁰² Tribunal Documents, p. 2504

⁹⁰³ Tribunal Documents, p. 2503

⁹⁰⁴ Tribunal Documents, p. 2505

⁹⁰⁵ Tribunal Transcripts, Day 188, p. 10

⁹⁰⁶ Tribunal Documents, p. 947

⁹⁰⁷ Tribunal Transcripts, Day 186, p. 7

⁹⁰⁸ Tribunal Documents, pp. 949-950

⁹⁰⁹ Tribunal Documents, pp. 954-958

Kehoe accepted in her evidence to the tribunal that she knew from this material that there was an issue with the extension of time and that Sgt Barry was not happy with what had happened to date.⁹¹⁰ She also explained in her evidence that this informed her opinion to take the bullying and harassment matters first.⁹¹¹

C/Supt Kehoe said that she saw the clock starting again with her appointment, which she received on 18th February 2013,⁹¹² and it was her evidence that the 28-day time period under the policy document started on that date.⁹¹³ When questioned about the interpretation of the time limits in the policy document, she told counsel for Mr Barry that she could only deal with the complaint when she became aware of it and she *‘couldn’t possibly have dealt with it in October, when I wasn’t appointed to it. I was appointed to it from a date, the date I received it I interpreted it, and that’s from the date I continued with the investigation’*.⁹¹⁴ She said that was how she interpreted policy in relation to her investigation.⁹¹⁵

The chief superintendent was also appointed to investigate an alleged breach of discipline by Supt Comyns under Regulation 14 of the Garda Síochána (Discipline) Regulations, 2007. The conduct alleged was that *‘Superintendent Comyns interfered with the investigation into alleged sexual abuse which was reported at Mitchelstown Garda Station on the 2nd February 2012’*.⁹¹⁶

C/Supt Kehoe told the tribunal that when she received her appointment she *‘saw three component parts of an investigation’* with the ninth allegation made by Sgt Barry falling under *‘any other criminal offence’*.⁹¹⁷

C/Supt Kehoe appointed a number of officers to assist with the investigation, including Detective Inspector William Leahy,⁹¹⁸ whom she tasked with conducting enquiries into the criminal/discipline investigation.⁹¹⁹ She explained in evidence that she was acutely aware that the criminal investigation would take precedence over the bullying and harassment investigation and appointed the detective inspector to commence enquiries into the criminal matters while she was dealing with the bullying and harassment.⁹²⁰

C/Supt Kehoe also stated in evidence that the team she appointed were not designated solely to this investigation and that *‘all of them had a very heavy workload and portfolios themselves and they only could prioritise this as the need arose in relation to it’*.⁹²¹ This was accepted by Mr Barry in his evidence to the tribunal.⁹²²

⁹¹⁰ Tribunal Transcripts, Day 186, p. 12

⁹¹¹ Tribunal Transcripts, Day 186, p. 13

⁹¹² Tribunal Transcripts, Day 186, p. 13

⁹¹³ Tribunal Transcripts, Day 186, p. 13

⁹¹⁴ Tribunal Transcripts, Day 186, p. 74

⁹¹⁵ Tribunal Transcripts, Day 186, p. 74

⁹¹⁶ Tribunal Documents, p. 951

⁹¹⁷ Tribunal Transcripts, Day 186, p. 14

⁹¹⁸ Tribunal Documents, pp. 1043-1044

⁹¹⁹ Tribunal Documents, p. 930

⁹²⁰ Tribunal Transcripts, Day 186, p. 16

⁹²¹ Tribunal Transcripts, Day 186, p. 25

⁹²² Tribunal Transcripts, Day 179, p. 14

The Bullying and Harassment Investigation

C/Supt Kehoe met with her team on 26th February 2022. In her notes of this meeting she recorded that the 28-day period under the policy document would expire on 17th March 2013.⁹²³ She spoke with Sgt Barry later that day, who gave her an outline in relation to his sick leave and half pay. In her evidence to the tribunal, C/Supt Kehoe accepted that a timely outcome to her investigation was of particular importance to Sgt Barry in the light of these factors.⁹²⁴

C/Supt Kehoe also recorded in her notes that she told Sgt Barry that she would do her utmost to adhere to the time frame under the policy but would *not compromise the thoroughness of the investigation process to expedite matters prematurely*.⁹²⁵

Supt Comyns was notified of the eight bullying and harassment allegations on 26th February 2013 and C/Supt Kehoe requested all relevant official documentation in his possession and a response within one week.⁹²⁶ He replied by letters dated 5th March 2013⁹²⁷ and 11th March 2013.⁹²⁸

By letter to Sgt Barry dated 12th March 2013, C/Supt Kehoe told the sergeant that the investigation was progressing expeditiously and said that it was a *‘complex investigation that requires parallel investigation under both the Garda Policy and Procedures Harassment, Sexual Harassment and Bullying – Working together to create a Positive Working Environment and the Garda Síochána Discipline Regulations 2007’*. C/Supt Kehoe also requested a further extension of time of two weeks for the bullying and harassment investigation, informing Sgt Barry that it was also her intention to investigate the discipline matter expeditiously.⁹²⁹

C/Supt Kehoe said in her evidence that the discipline investigation had not started at that stage other than the fact that the matters investigated under the criminal investigation were going to be relied upon for the discipline investigation. She said it was a *‘parallel investigation’*.⁹³⁰

C/Supt Kehoe met with Sgt Barry on 14th March 2013. In her notes of the meeting the chief superintendent recorded that Sgt Barry expressed dissatisfaction with the delay brought about by A/C Nolan.⁹³¹ In her evidence to the tribunal C/Supt Kehoe accepted that Sgt Barry was *‘quite annoyed’* by the delay of four months and said that she told him he would have to make that complaint separately.⁹³²

By letter dated 15th March 2013, Sgt Barry agreed to the extension of time requested by C/Supt Kehoe, whilst also stating that the extension would bring the combined delay to 1st April, exactly six months since A/C Nolan was appointed to deal with the matter.⁹³³ In her evidence to the tribunal she accepted that this was a legitimate statement on his part.⁹³⁴

⁹²³ Tribunal Documents, p. 5682

⁹²⁴ Tribunal Transcripts, Day 186, p. 79

⁹²⁵ Tribunal Documents, p. 5684

⁹²⁶ Tribunal Documents, pp. 1046-1048

⁹²⁷ Tribunal Documents, pp. 1050-1054

⁹²⁸ Tribunal Documents, pp. 1059-1060

⁹²⁹ Tribunal Documents, pp. 1062-1063

⁹³⁰ Tribunal Transcripts, Day 186, p. 24

⁹³¹ Tribunal Documents, p. 1086

⁹³² Tribunal Transcripts, Day 186, p. 29

⁹³³ Tribunal Documents, pp. 1246-1247

⁹³⁴ Tribunal Transcripts, Day 186, p. 31

Supt Comyns was interviewed on 22nd March 2013. C/Supt Kehoe then met with Sgt Barry on 8th April 2013 to put all the material to him and seek any submissions. C/Supt Kehoe submitted her investigation file in the bullying and harassment investigation to her appointing officer on 30th May 2013.⁹³⁵ She did not uphold any of Sgt Barry's eight complaints. A/C Nolan affirmed the findings on 17th June 2013.⁹³⁶ These findings were appealed by Sgt Barry.

Allegation of Delay in the Criminal Investigation

At this stage in the process, D/Insp Leahy had transferred on promotion from Thurles and C/Supt Kehoe sought a replacement. She also sought an update from the inspector as to the progress of his enquiries. He replied by letter dated 9th August 2013 outlining that five members of An Garda Síochána had been interviewed and that he had had difficulty securing the cooperation of a civilian.⁹³⁷

C/Supt Keogh was asked by counsel for the tribunal whether she accepted that D/Insp Leahy was still at a very preliminary stage and she told the tribunal that *'I would accept that at the time I received that report I was disappointed with the level of progress that had been made'*.⁹³⁸ She told counsel for Mr Barry that she had hoped that more would have been done to progress the investigation, which was not going at the speed that she had hoped. However, she said that she could understand the position as he was her detective inspector who had a lot of work to do and had other portfolios to attend to.⁹³⁹

A few days later, C/Supt Kehoe received a letter from Assistant Commissioner John Twomey, who had been appointed to review the bullying and harassment investigation file. He requested the chief superintendent's views on the specific grounds of appeal that had been lodged by Sgt Barry.⁹⁴⁰ On 9th October 2013, C/Supt Kehoe replied explaining that she had been on annual leave and further stating that there was no provision in the policy document for her to supply her views.⁹⁴¹ She also stated that she had been advised by HRM that Sgt Barry had had sight of her findings, which was contrary to the policy document.

In a letter to A/C Nolan dated 9th October 2013, C/Supt Kehoe referred to the correspondence from A/C Twomey and stated that *'[h]aving reviewed the content of this document ... I am firmly of the view that to continue with the criminal investigation as directed by you would be prejudicial to any findings in the case'*.⁹⁴² She requested that consideration be given to the appropriateness of her continuing with the investigation. She was asked for *'specific reasons'* for this request by A/C Nolan,⁹⁴³ and in a letter dated 31st October 2013 C/ Supt Kehoe stated that *'[t]o continue my Investigations into the Disciplinary matters and any Criminal matters arising could in [my] view compromise the investigation as I am now fully aware of Sergeant Paul Barry's views in respect of my investigation into the Bullying and Harassment aspect of the case and hence my impartiality could be brought into question'*.⁹⁴⁴

⁹³⁵ Tribunal Documents, p. 1085

⁹³⁶ Tribunal Documents, pp. 2519-2526

⁹³⁷ Tribunal Documents, pp. 1093-1094

⁹³⁸ Tribunal Transcripts, Day 186, pp. 33-34

⁹³⁹ Tribunal Transcripts, Day 186, pp. 95-96

⁹⁴⁰ Tribunal Documents, p. 1096

⁹⁴¹ Tribunal Documents, p. 1098

⁹⁴² Tribunal Documents, pp. 1101-1102

⁹⁴³ Tribunal Documents, p.1104

⁹⁴⁴ Tribunal Documents, pp. 1106-1107

Mr Barry agreed with counsel for An Garda Síochána that it was reasonable for C/Supt Kehoe to raise these points.⁹⁴⁵

It can be noted that on 31st October 2013, A/C Twomey conducted a review of the investigation and concluded that all appropriate steps had been taken and that a thorough and impartial investigation had been carried out.⁹⁴⁶

In her evidence to the tribunal, C/Supt Kehoe said that she was told to press on with her investigations.⁹⁴⁷ When asked by counsel for An Garda Síochána whether he knew that C/Supt Kehoe had been told to press ahead, Mr Barry said he believed that he did.⁹⁴⁸ However, C/Supt Kehoe subsequently wrote back to the assistant commissioner, referring specifically to Regulation 14 (5) of the Garda Síochána (Discipline) Regulations, 2007, which states that *'[t]he appointing officer shall ensure that the deciding officer has not been involved in any capacity in relation to an earlier aspect of the case'*.⁹⁴⁹ The chief superintendent was told to proceed by the assistant commissioner on 23rd December 2013.⁹⁵⁰ When it was pointed out by counsel for the tribunal that this was six months after the submission of the bullying and harassment file and that everything appeared to have stalled, C/Supt Kehoe responded that the clarification was required in order for her to continue with her investigation.⁹⁵¹

In an email to the chief superintendent in December 2013, Sgt Barry asked C/Supt Kehoe to clarify whether it was the criminal or the discipline matter that she was investigating and to account for the delay.⁹⁵² In her reply to Sgt Barry dated 12th December 2013, C/Supt Kehoe explained that she had requested clarity in respect of Regulation 14 (5).⁹⁵³

In his evidence to the tribunal, Mr Barry accepted that this request for reassurance as to the propriety of her appointment was *'to her credit'*.⁹⁵⁴ He was asked by counsel for the tribunal whether the delay arising from this issue in this regard was justifiable:

Q. ... if there is delay in that, it's arguably justifiable in the sense that she ought to know that she's in fact properly authorised to do what she was now continuing to embark upon?

A. That's fair.⁹⁵⁵

C/Supt Kehoe subsequently spoke with her appointing officer on 19th February 2014 and told him that she was pressing on with her investigation despite not receiving any clarity in respect of her query.⁹⁵⁶ In the interim, she had appointed Inspector Paul O'Driscoll to assist her with the investigation in the light of the transfer of D/Insp Leahy.⁹⁵⁷

⁹⁴⁵ Tribunal Transcripts, Day 179, pp. 18-19

⁹⁴⁶ Tribunal Documents, pp. 313-315

⁹⁴⁷ Tribunal Transcripts, Day 186, p. 38

⁹⁴⁸ Tribunal Transcripts, Day 179, p. 19

⁹⁴⁹ Tribunal Documents, p. 5720

⁹⁵⁰ Tribunal Documents, p. 1113

⁹⁵¹ Tribunal Transcripts, Day 186, p. 39

⁹⁵² Tribunal Documents, p. 2681

⁹⁵³ Tribunal Documents, pp. 3150-3151

⁹⁵⁴ Tribunal Transcripts, Day 177, p. 90

⁹⁵⁵ Tribunal Transcripts, Day 177, p. 90

⁹⁵⁶ Tribunal Documents, p. 1119

⁹⁵⁷ Tribunal Documents, p. 1115

In her evidence to the tribunal, C/Supt Kehoe accepted that although she had submitted the bullying and harassment file in May 2013, nothing substantive had happened by February 2014.⁹⁵⁸ She told counsel for Mr Barry that she was waiting for clearance to properly go ahead and deal with this matter.⁹⁵⁹

C/Supt Kehoe met with Sgt Barry on 20th February 2014 in the presence of his AGSI representative Inspector Michael Gallagher and Insp O’Driscoll. Her notes of the meeting record that she explained to Sgt Barry that she had ‘parked’ the criminal investigation/discipline investigation for advice under the Regulations.⁹⁶⁰ She recorded that Sgt Barry was annoyed that he had not been informed of that decision. In her evidence to the tribunal, C/Supt Kehoe accepted that she did not speak to him about this or consult with him but said that she had been expecting an earlier response to her query.⁹⁶¹ She also recorded in her note that Sgt Barry said he ‘*always understood that I was running both investigations in tandem. I said I did not*’. In her evidence to the tribunal, C/Supt Kehoe said that:

... when I initially got this investigation to do, it was my intention that it would run as a parallel investigation. In other words, the bullying and harassment would have to take precedence in the context of the timeframe and, therefore, Detective Inspector Leahy was appointed at the outset to conduct enquiries. And my thinking was then, that as soon as the bullying and harassment was completed, that all the personnel that were appointed could concentrate on the criminal/discipline aspect of it. Therefore, it would be continuing in that sequential order. But, as I say, the bullying and harassment was always going to have to take preceden[ce] over the ... criminal/discipline, for my functionality in relation to it.⁹⁶²

Sgt Barry wrote to C/Supt Kehoe on 20th March 2014. He stated that C/Supt Kehoe’s comments at the meeting on 20th February were in total contradiction to her letter dated 12th March 2013. He said that:

Your investigation to date under the Garda Síochána Discipline Regulations 2007 has not been parallel or expeditious and is contrary to what you promised me on 12th March, 2013. It is exactly one year later now and I would appreciate an explanation as to why you did not conduct this investigation in the manner which you alluded to in your letter to me dated 12th March, 2013.⁹⁶³

In her evidence to the tribunal, the chief superintendent said that she explained to Sgt Barry that she could not deal with both of the investigations at the same time and that one had to take precedence over the other for the purposes of decision-making.⁹⁶⁴ She said she did not accept the full content of this letter as she had conducted a parallel investigation for a period of time.⁹⁶⁵

C/Supt Kehoe replied to Sgt Barry on 9th April 2014 stating that it would not have been possible to interview Supt Comyns both in respect of the bullying and harassment investigation and the discipline investigation as each required a distinctly different approach.⁹⁶⁶ She also indicated that

⁹⁵⁸ Tribunal Transcripts, Day 186, p. 45

⁹⁵⁹ Tribunal Transcripts, Day 186, p. 99

⁹⁶⁰ Tribunal Documents, p. 1119

⁹⁶¹ Tribunal Transcripts, Day 186, pp. 46-47

⁹⁶² Tribunal Transcripts, Day 186, p. 47

⁹⁶³ Tribunal Documents, pp. 1207-1208

⁹⁶⁴ Tribunal Transcripts, Day 186, p. 50

⁹⁶⁵ Tribunal Transcripts, Day 186, p. 50

⁹⁶⁶ Tribunal Documents, pp. 1210-1212

statements in support of the criminal/discipline investigation had been taken in March and April 2013. Mr Barry in his evidence said that at the time he did not know that statements had been taken.⁹⁶⁷ He also accepted that this letter gave him some comfort as he had been unaware of what the progression was and that was why he had written to her.⁹⁶⁸

In a letter to C/ Supt Kehoe dated 2nd July 2014, Sgt Barry requested an update on the investigation and pointed out that it would be two years in two months since he had made his initial complaint.⁹⁶⁹ He stated that he would like to know how long more the investigation would be delayed for. In a response to Sgt Barry, C/Supt Kehoe did not accept that there had been a delay given the complexities of the investigation.⁹⁷⁰ In her evidence to the tribunal, C/Supt Kehoe stated that:

*... I had to make a query in relation to 14(5), that's what caused what you could call a time gap in relation to the investigation, but it was being progressed in that context. I don't accept that there was an inordinate delay, I think it was important and I think it was pointed out that it was important to establish that I had proper grounding for the second arm of the investigation.*⁹⁷¹

In her statement to the tribunal, C/Supt Kehoe stated that the criminal investigation received ongoing monitoring and attention with regular conferences and reviewing of jobs. She said that there were several avenues explored including technical data from phone billing of suspects and persons of interest, fingerprint analysis and interviews of witnesses.⁹⁷² In his evidence to the tribunal, Mr Barry said that these requests should have issued twelve months, if not more, previously.⁹⁷³ This was disputed by C/Supt Kehoe who said that the *'process was the process'* and that she dealt with it as expeditiously as she could.⁹⁷⁴

Supt Comyns and other persons of interest were interviewed under voluntary caution between September 2014 and June 2015.⁹⁷⁵ In his evidence to the tribunal, Mr Barry said that the later interviews were two years after C/Supt Kehoe had been appointed.⁹⁷⁶

A file was submitted to the Office of the Director of Public Prosecutions on 28th August 2015 and C/Supt Kehoe stated in her recommendation that, having given careful consideration of the many facets of the case, it was her considered view that there was insufficient evidence to sustain a prosecution. Accordingly, she recommended no prosecution against any party mentioned in the file.⁹⁷⁷

On 17th November 2015, the Director of Public Prosecutions directed no prosecution based on insufficient evidence.⁹⁷⁸ C/Supt Kehoe notified Sgt Barry of the Director's decision on 24th November 2015.⁹⁷⁹

⁹⁶⁷ Tribunal Transcripts, Day 177, p. 14

⁹⁶⁸ Tribunal Transcripts, Day 177, p. 16

⁹⁶⁹ Tribunal Documents, p. 1214

⁹⁷⁰ Tribunal Documents, pp. 1218-1219

⁹⁷¹ Tribunal Transcripts, Day 186, p. 53

⁹⁷² Tribunal Documents, p. 933

⁹⁷³ Tribunal Transcripts, Day 179, p. 31

⁹⁷⁴ Tribunal Transcripts, Day 186, p. 58

⁹⁷⁵ Tribunal Documents, pp. 2923-3055

⁹⁷⁶ Tribunal Transcripts, Day 179, p. 31

⁹⁷⁷ Tribunal Documents, pp. 2823-2890

⁹⁷⁸ Tribunal Documents, p. 2811

⁹⁷⁹ Tribunal Documents, pp. 1175-1176

Allegation of Delay in the Discipline Investigation

Counsel for the tribunal asked C/Supt Kehoe whether the investigation under Regulation 14 of the Garda Síochána (Discipline) Regulations, 2007 was effectively parked during this period. C/Supt Kehoe said that it would be ‘*normal practice*’ to allow the criminal aspect to be dealt with first. She was unable to assist the tribunal as to whether Sgt Barry had been told that this was the case.⁹⁸⁰

C/Supt Kehoe told the tribunal that the substantive matter remaining in August 2015 was Supt Comyns and interviewing him for the discipline file.⁹⁸¹ However, this did not take place for a number of months.

On 29th September 2015, C/Supt Kehoe wrote to Supt Comyns advising him that the criminal investigation file had been submitted to the Office of the Director of Public Prosecutions and asking whether he was in agreement that the discipline investigation would be placed in abeyance pending the directions.⁹⁸² Supt Comyns replied on 5th October 2015 stating that he wished to have all matters finalised without further delay.⁹⁸³

C/Supt Kehoe then proceeded and sought an additional appointment under the Discipline Regulations on 12th November 2015. She referred to Sgt Barry’s complaint in 2012 where he alleged that he was subject to discipline proceedings under Regulation 10 for his failure to be on time for duty despite his explanation to the contrary.⁹⁸⁴ While this re-appointment was sought in late 2015, C/Supt Kehoe accepted in her evidence that this was not a new allegation.⁹⁸⁵ Mr Barry told counsel for An Garda Síochána that he was unaware that C/Supt Kehoe was reappointed and that he would have objected had he known this was the case.⁹⁸⁶

C/ Supt Kehoe prepared the Notice of Interview for Supt Comyns and the specific alleged breaches of discipline were outlined as follows:

1. *Discreditable Conduct*

That is to say that you, Superintendent Michael Comyns ... conducting yourself in a manner which you knew or ought to have known, would be prejudicial to discipline or reasonably likely to bring discredit on An Garda Síochána in that you interfered with the investigation into alleged sexual abuse ... which was reported at Mitchelstown Garda Station on 2nd February 2012.

2. *Misconduct towards a member*

That is to say oppressive conduct towards Sergeant Paul Barry ... in that you ... did on the 1st August 2012 inspect Sergeant Paul Barry, ... reporting on duty at Mitchelstown Garda Station at 12.15 pm, and having been given an explanation from the said Sergeant Paul Barry for being 15 minutes late for duty, you served on the member a Regulation 10 Notice under the Garda Síochána (Discipline) Regulations on the 2nd August 2012.

⁹⁸⁰ Tribunal Transcripts, Day 186, pp. 60-61

⁹⁸¹ Tribunal Transcripts, Day 186, pp. 61-62

⁹⁸² Tribunal Documents, p. 3191

⁹⁸³ Tribunal Documents, p. 848

⁹⁸⁴ Tribunal Documents, pp. 1180-1181

⁹⁸⁵ Tribunal Transcripts, Day 186, pp. 63-64

⁹⁸⁶ Tribunal Transcripts, Day 179, p. 44

3. Discourtesy

*That is to say that you Superintendent Michael Comyns ... failed to behave with due courtesy towards Sergeant Paul Barry ... in that you did on the 2nd day of August 2012 in the course of serving a Notice under Regulation 10 of the Garda Síochána (Discipline) Regulations on Sergeant Paul Barry did sneer at the member.*⁹⁸⁷

Following the institution of civil proceedings by Sgt Barry against the Garda Commissioner, C/Supt Kehoe wrote to her appointing officer on 11th February 2016 and sought advice as to whether it was appropriate for her to continue with the discipline investigation.⁹⁸⁸ She was instructed to proceed with her investigation on 25th February 2016.⁹⁸⁹

The team proceeded to interview Supt Comyns on 27th April 2016 and by report to A/C Nolan dated 12th May 2016, C/Supt Kehoe said that she was satisfied that Supt Comyns was not in breach of discipline.⁹⁹⁰

That concluded her investigations.

Complaint made by Mr Barry

Mr Barry made his complaint of bullying and harassment on 2nd October 2012. C/Supt Kehoe completed her investigations on 12th May 2016, over three and a half years later. In his interview with tribunal investigators, Mr Barry alleged that C/Supt Kehoe *'spent almost three years investigating a serious matter of sexual assault'* and that she *'deliberately targeted me by not treating my complaint promptly and/or properly'*.⁹⁹¹

In a letter to the Minister for Justice and Equality dated 17th February 2015, Sgt Barry claimed that C/Supt Kehoe was *'sitting on'* his complaint for two years.⁹⁹² In a later letter to the Minister dated 24th June 2015 Sgt Barry stated that *'[s]urely the delay in investigating my complaint and the manner in which the investigation is being conducted is in itself a perversion of the course of Justice'*.⁹⁹³

In a third letter to the Minister, dated 20th January 2016, Sgt Barry said that:

*I wish to formally make an allegation to the Minister for Justice that Chief Superintendent Kehoe has perverted the course of justice by deliberately delaying her investigation and by conducting a biased investigation devoid of morality, sentiment and conscience and that she has conducted this sham investigation without informing the injured party.*⁹⁹⁴

Mr Barry stood over these allegations in his evidence to the tribunal.⁹⁹⁵ He was asked the following by counsel for the tribunal:

⁹⁸⁷ Tribunal Documents, pp. 3079-3080

⁹⁸⁸ Tribunal Documents, pp. 1198-1199

⁹⁸⁹ Tribunal Documents, pp. 1201-1202

⁹⁹⁰ Tribunal Documents, pp. 1204-1205

⁹⁹¹ Tribunal Documents, p. 46

⁹⁹² Tribunal Documents, pp. 96-97

⁹⁹³ Tribunal Documents, p. 105

⁹⁹⁴ Tribunal Documents, p. 109

⁹⁹⁵ Tribunal Transcripts, Day 177, p. 87

Q. *Looking back now on what you did allege to the minister about her responsibility and deliberately delaying and herself being guilty of a perversion of the course of justice, is it fair to her and the process, as you have seen it now in all the papers, to characterise it as that?*

A. *I believe so ...*⁹⁹⁶

In relation to the bullying and harassment investigation, Mr Barry, in response to questions from counsel for An Garda Síochána, told the tribunal that there was inordinate delay because he *'had to consent to a two-week delay with her'*.⁹⁹⁷ When asked by the Chairman how the delay was excessive, Mr Barry replied that:

*I say it was excessive in relation to the 28 day timeframe was not met and this was the second time I had been asked for an extension of time for the investigation. She was appointed in February and it wasn't submitted until May. That was how I felt it was being delayed.*⁹⁹⁸

He also told the tribunal that his complaint in relation to C/Supt Kehoe *'was in relation to the overall investigation which ... took three years'*.⁹⁹⁹ Mr Barry agreed that he was not really concerned with the first part of the investigation, saying he was more concerned about what happened afterwards.¹⁰⁰⁰

In his evidence to the tribunal, Mr Barry told the Chairman that he was targeted by C/Supt Kehoe, stating that *'I believe the delay, taking three years to investigate the serious allegation was targeting'*.¹⁰⁰¹ The following exchange with the Chairman is relevant to the issue:

CHAIRMAN: *Are we agreed on what targeting means? You say that she is going to do you down, she is going to victimise you, by deciding, I will take time, I will fix this fellow now by taking longer?*

A. *The longer the investigation took, the more stress I was under.*

CHAIRMAN: *Okay. So it's basically a simple proposition in all the circumstances, including the stress you were under. You say, taking the time that it took, whatever exactly time that was, that was too much and you say that you believe that was targeting?*

A. *Yes.*

CHAIRMAN: *But I am not understanding you to say that Chief Superintendent Kehoe had any desire to do you down or to harm you, is that correct?*

A. *There was aspects of the investigation which I believed were to do me harm.*¹⁰⁰²

...

⁹⁹⁶ Tribunal Transcripts, Day 177, pp. 118-119

⁹⁹⁷ Tribunal Transcripts, Day 179, p. 12

⁹⁹⁸ Tribunal Transcripts, Day 179, p. 13

⁹⁹⁹ Tribunal Transcripts, Day 179, p. 13

¹⁰⁰⁰ Tribunal Transcripts, Day 179, pp. 13-14

¹⁰⁰¹ Tribunal Transcripts, Day 179, p. 37

¹⁰⁰² Tribunal Transcripts, Day 179, p. 39

CHAIRMAN: *My understanding is that you're not accusing Chief Superintendent Kehoe of making a deliberate decision to do you down by delaying her investigation, but you do say that the delay in the investigation was miserable for you, added to your stress and in all those circumstances you say that amounted to targeting?*

A. *That's correct.*¹⁰⁰³

Responding Statements and Evidence on the Issue

Retired Chief Superintendent Catherine Kehoe

In her statement to the tribunal, C/Supt Kehoe set out the sequencing of her investigations, which she said were carried out thoroughly and expeditiously. She told the tribunal that:

*I believe I conducted a diligent and very thorough investigation and any elements of delay were justified in the context of making sure that I was properly appointed to conduct all arms of this investigation. This investigation had three arms to it. It was a very serious investigation, this is a very serious matter against senior officers, it took the time it took. It was very important to me that it was thorough, and it was thorough. And I covered every aspect. Indeed, up to 2015 I was taking statements on the request of Sergeant Barry in relation to this matter.*¹⁰⁰⁴

Asked by counsel for the tribunal whether she targeted Sgt Barry, she stated that:

*Under no circumstances did I target Sergeant Barry. All I ever did was to make sure the investigation was thorough at every aspect of it, whether it was the bullying and harassment, the criminal and the discipline. I certainly did not target Sergeant Barry in any shape or form, nor would I.*¹⁰⁰⁵

In respect of the allegation of delay, C/Supt Kehoe said in her statement that:

*I do not accept that there was an inordinate delay in carrying out the three facets of this investigation, that required assistance and co-operation from other sections within An Garda Síochána and externally. I met with Sergeant Barry on several occasions and I corresponded with him extensively keeping him up to date with case progress. I reject the allegation that I targeted him in any way during this investigation. I was always fully committed to ensuring that these investigations were thoroughly investigated, and I progressed them as expeditiously as possible.*¹⁰⁰⁶

In respect of the request for advices regarding Regulation 14(5) of the Discipline Regulations, she explained in her statement to the tribunal that:

*... these advices were necessary to ascertain, if I was in fact prejudiced by having investigated and made a finding on a previous aspect of the case. Also, I had concerns having inadvertently received the grounds of appeal from Assistant Commissioner Twomey, the Reviewing Officer for my initial findings. This in no way can be held to be a deliberate and intentional delay to target Sergeant Barry in all reasonableness.*¹⁰⁰⁷

¹⁰⁰³ Tribunal Transcripts, Day 179, p. 40

¹⁰⁰⁴ Tribunal Transcripts, Day 186, pp. 65-66

¹⁰⁰⁵ Tribunal Transcripts, Day 186, p. 66

¹⁰⁰⁶ Tribunal Documents, p. 940

¹⁰⁰⁷ Tribunal Documents, p. 941

In respect of the bullying and harassment investigation, C/Supt Kehoe rejected the suggestion by counsel for Mr Barry that it was prioritised over the criminal investigation, saying that it was conducted as a parallel investigation.¹⁰⁰⁸ She also rejected the contention that it took eight months to conclude the investigation of a complaint received in October 2012 saying that she only received her appointment on 18th February 2013.¹⁰⁰⁹

In respect of the criminal investigation, she accepted that it took two years and six months to conclude. When asked by counsel for Mr Barry whether this was a considerable period of time for an investigation to take, she replied that:

*Investigations take whatever time they take in the context of what is required of them. This investigation was a very serious investigation, as you correctly say, against a senior officer. Every aspect of the complaint was thoroughly investigated. It took the time it took in the context of having to analyse critical data, which took a considerable period of time to do. It was essential to do it as thoroughly as possible, to make sure that every aspect of this investigation was done to the highest standard and that's what I set out to do and I did.*¹⁰¹⁰

She told the tribunal that it was a very technical investigation, relying a lot on data, with thirty-one statements and thirty-four exhibits. She described it as *'quite a comprehensive investigation'*.¹⁰¹¹ When asked if there was inordinate delay, she stated that:

*I disagree totally with you in relation to that matter. This was a very, very complex investigation, it required time, it required a number of pieces of data to be examined. I think it has been accepted that that data was very, very useful in this investigation. And it was presented very, very comprehensively.*¹⁰¹²

In respect of the discipline investigation, counsel for Mr Barry suggested that it took a further nine months to complete this investigation after the submission of the file to the Director of Public Prosecutions:

A. Yes. Well, it took – yes, approximately I think maybe six, seven months to complete it.

Q. Yes. In total you're talking about a period of three years and three months to carry out that disciplinary investigation?

A. I wouldn't agree with that assertion, Chairman. It took a period of time of two years, two and a half years to do the criminal investigation and arising out of the criminal investigation the disciplinary investigation was undertaken, relying on documentation from the criminal investigation. So, you know, I don't necessarily take the point that it took three years and three months to do the discipline investigation, because I was doing three parts of an investigation over that period.¹⁰¹³

It was put to C/Supt Kehoe that the period of nine months to complete the discipline investigation constituted an *'inordinate delay'*; this was rejected by the chief superintendent.¹⁰¹⁴

¹⁰⁰⁸ Tribunal Transcripts, Day 186, p. 69

¹⁰⁰⁹ Tribunal Transcripts, Day 186, p. 76

¹⁰¹⁰ Tribunal Transcripts, Day 186, pp. 80-81

¹⁰¹¹ Tribunal Transcripts, Day 186, pp. 107-108

¹⁰¹² Tribunal Transcripts, Day 186, p. 108

¹⁰¹³ Tribunal Transcripts, Day 186, p. 115-116

¹⁰¹⁴ Tribunal Transcripts, Day 186, p. 117

Before he began to examine C/Supt Kehoe, counsel for An Garda Síochána pointed out that counsel for Mr Barry had not suggested to the witness that she had targeted or discredited Sgt Barry. The following exchange is relevant to the issue:

MR. O'HIGGINS: ... [Issue] 6A is not just delay and what I am seeking to have clarified is, because it hasn't been put certainly to the witness: Is it being abandoned that she deliberately targeted and discredited Mr. Barry by reason of the delay?

CHAIRMAN: I hear what you are saying, Mr. O'Higgins, and surely it's a matter for me to draw such inferences as I think are appropriate from a failure to allege straight up to the witness that she deliberately targeted Sergeant Barry. If Mr. Perry wants to make an addition, but I am not interrogating Mr. Perry, I am taking his cross examination to be what it is, but I have noticed, I have to say, I have observed that there has been no allegation put to Chief Superintendent Kehoe that she deliberately victimised Mr. Barry by delaying her investigation. I have noted that.

MR. O'HIGGINS: May it please you, Chairman.

...

CHAIRMAN: Mr. Perry ... you heard what Mr. O'Higgins said. I don't need an explanation. We will come to a time in due course when people can make submissions and arguments. ... So I am not looking for an explanation. I am not looking for anything else. All that can be done later. But if there was a question that you felt you wanted to put or a suggestion that you wanted to make, I said I would give you an opportunity of doing that.

...

CHAIRMAN: ... I am responding to Mr. O'Higgins's comment and I don't want to be unfair to anybody. So at the end of the questioning, if you want to say please, may I say something else, not an explanation, but ask a question or put a suggestion, I will be sympathetic to it, and obviously that would mean that anybody else could have another go themselves.¹⁰¹⁵

No such application was made by counsel for Mr Barry when the witness concluded her evidence.

In response to questions from counsel for An Garda Síochána, the chief superintendent told the tribunal that she first became aware that Sgt Barry had made a protected disclosure when she received material in respect of the Disclosures Tribunal on 4th November 2020.¹⁰¹⁶ In her statement to the tribunal she said that:

I further wish to state that I had no knowledge that Sergeant Paul Barry made a Protected Disclosure under the Protected Disclosure's Act 2014 either before or after the commencement of the Act. Therefore, the accusation made by Sergeant Barry that as a consequence of

¹⁰¹⁵ Tribunal Transcripts, Day 186, pp. 118-121

¹⁰¹⁶ Tribunal Transcripts, Day 186, p. 127

*making his disclosure that I targeted him by failing to promptly and properly investigate his complaint is unfounded.*¹⁰¹⁷

C/Supt Kehoe outlined to the tribunal what was entailed in the three investigations:

Mr. Chairman, I was appointed, as I have already gone through this morning, [to] a very complex investigation, involving three arms of an investigation, requiring different approaches to different aspects of it. There was the bullying and harassment, which was under, as you know, the internal Garda policy, which had a very ambitious timeframe of 28 days, very difficult to achieve that and conduct a number of allegations, 18, within that timeframe. I did so to the very best of my ability. I certainly did not sit on that investigation at any point in time. I think the timeline in relation to it, it speaks for itself. I moved it as swiftly as I possibly could and I submitted a file by the 30th May, some three months after the appointment. As I said already this morning, from the time the investigation is finished from an investigative point of view, that report goes out to the complainant and Sergeant Barry had it for just a period of one month, which fed into the timeline. And I had it for three weeks then, making the submissions on it. So all of those things fed into it, but at no time was it purposefully or inadvertently delayed by me or the team.

In relation to the criminal aspect of it, this was a very, very serious allegation made about a senior investigating officer, which had implications for a second senior investigating officer. I took the time it took in relation to making sure that every aspect of Sergeant Paul Barry's complaint was thoroughly investigated. It was very, very important. I never suggested for one minute that this would take a backseat or [be] put to one side at no time through that investigation. And if you look through the timeline, Chairman, you will see find that at all stages there was paperwork going one place or another in relation to keeping people informed, including my own authorities and also dealing with a series of matters that Sergeant Barry raised during it, or Superintendent Comyns or indeed, Superintendent Quilter. I dealt with the legal teams and I dealt with the members concerned. All of that paperwork had to be done. It took time. It took effort. We gave it that effort, despite the fact I had a very busy workload myself. This was not the only investigation I had. I had a number of investigations during that period of time and I conducted them all to the very best of my ability.

*The discipline aspect of it came after because of the fact that that's the course of action that normally that would take in the context of ... allowing the criminal to be determined before you take on the discipline. There's a number of reasons for that and it is a part of the discipline regulations, section 8. I did that to the best of my ability and I made my determination at the conclusion on the 27th April 2016, and I submitted my file in very early stages, by the 12th May 2016.*¹⁰¹⁸

Former Assistant Commissioner Jack Nolan

A/C Nolan was asked about the issue of delay by counsel for Mr Barry:

Q. Okay. I just want to put it to you that the period of time that it took to complete the criminal investigation and the disciplinary breach allegation investigation was inordinate and amounted to, I am putting it to you, an excessive amount of time, it was in fact overly delayed, they were overly delayed. Do you wish to reply to that?

¹⁰¹⁷ Tribunal Documents, p. 944

¹⁰¹⁸ Tribunal Transcripts, Day 186, pp. 122-124

- A. *I don't believe it was delayed by any deliberate act of any person. Investigations take a period of time and that's the period of time they took.*¹⁰¹⁹

Legal Submissions

Mr Paul Barry submitted as follows:¹⁰²⁰

- that it was obvious that C/Supt Kehoe was aware of Sgt Barry's first protected disclosure having been assigned to investigate same.
- that in relation to the bullying and harassment investigation, there was a need for expediency, as chapter 8.4 of the policy and procedures of An Garda Síochána for dealing with harassment, sexual harassment and bullying in the workplace required an investigator to report their findings within 28 days of the complaint being received. In this case the timeline was far exceeded prior to C/Supt Kehoe's appointment.
- that notwithstanding the urgency, C/Supt Kehoe did not complete the bullying and harassment investigation until 30th May 2013.
- that the criminal investigation commenced when C/Supt Kehoe was appointed on 11th February 2013, but did not conclude until 28th August 2015. This was an inordinate amount of time for an investigation into an allegation of a serious criminal offence.
- that D/Insp Leahy, who was lead investigator in the criminal investigation, was promoted and transferred in May 2013 and his involvement came to an end in August 2013. A replacement was not appointed until 30th January 2014.
- that a legal issue arose in August 2013 that was not resolved until December 2013.
- that there was little substantive progress in the investigation between 25th April 2013 and 20th February 2014.
- that the discipline investigation had been placed in abeyance pending the outcome of the criminal investigation, which concluded on 28th August 2015. The bulk of the materials required for the discipline investigation were to hand and only some additional statements were required. However, the discipline investigation took approximately nine months to complete from the completion of the criminal investigation.
- that there was inordinate delay by C/Supt Kehoe in the completion of her investigation and this amounted to targeting of Sgt Barry in connection with his protected disclosure.

An Garda Síochána submitted as follows:¹⁰²¹

- that there was no evidence to support this allegation or its connection to Sgt Barry's protected disclosure and it was refuted in the strongest possible terms by C/Supt Kehoe.

¹⁰¹⁹ Tribunal Transcripts, Day 188, p. 29

¹⁰²⁰ The tribunal has considered all of Mr Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

¹⁰²¹ The tribunal has considered all of An Garda Síochána's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

- that C/Supt Kehoe was not even aware that Sgt Barry had made a protected disclosure until she received the tribunal materials on 4th November 2020. This evidence was not challenged, but was enough to refute the final allegation made against her.
- that the investigation did not take an inordinate amount of time to complete and any delays in the investigation were explicable and did not amount to anything approaching a deliberate campaign to target Sgt Barry.
- that C/Supt Kehoe was given an overview of Sgt Barry’s bullying and harassment complaint on 7th February 2013 and was officially appointed to investigate the matter on 18th February 2013 and received formal terms of reference on that date also. On 21st February 2013 C/Supt Kehoe appointed members to investigate the matter.
- that C/Supt Kehoe prioritised the bullying and harassment complaint as she was mindful of Sgt Barry’s concerns regarding delay and the *‘ambitious’* 28-day time frame in which such investigations were required in ordinary course to be completed. Sgt Barry was aware that the bullying and harassment investigation was to be proceeded with first.
- that C/Supt Kehoe anticipated that the criminal investigation would run in parallel and appointed another officer to conduct that investigation.
- that a two-week extension was sought in March 2013 and Sgt Barry consented to this. The investigation was completed on 30th May 2013. Mr Barry said in evidence that he was more concerned with what occurred after this.
- that C/Supt Kehoe felt it was necessary to seek advice from HRM on the interpretation of Regulation 14 of An Garda Síochána (Discipline) Regulations, 2007 and a direction was received from A/C Nolan on 18th November 2015 to continue the criminal/discipline investigation.
- that C/Supt Kehoe ensured that both Sgt Barry and Supt Comyns were kept abreast of matters on an ongoing basis.
- that the criminal investigation was the most sensitive matter and commenced when Sgt Barry gave his statement on 21st February 2013 and concluded on 28th August 2015.
- that C/Supt Kehoe then turned her attention to the discipline investigation and again guidance was sought on proceeding with this matter, which was received, and she proceeded to interview Supt Comyns on 27th April 2016. On 12th May 2016, C/Supt Kehoe submitted her final report to A/C Nolan, in which she declined to uphold any of Sgt Barry’s allegations.
- that throughout this time C/Supt Kehoe did not have access to a standalone team, and personnel from Tipperary were selected who already had heavy workloads. C/Supt Kehoe moved as quickly as she could within the limits of the resources available and the requirements of fair procedures.
- that Mr Barry refined his complaint to say that it was a combination of a delay and a communication complaint. He argued that it may have been efficient but it was not

timely, and stated his belief that taking over three years to investigate serious allegations was targeting.

- that there was no evidence to support this allegation of targeting and Mr Barry's belief was not evidence of an attempt to deliberately target or discredit him.
- that the allegations made in Issues 6.b to 6.f of the Schedule of Issues were abandoned by Mr Barry during the hearings on 27th May 2022, in many cases ten years after they were made and circulated to a great number of people including C/Supt Kehoe's immediate supervising officers, the Garda Commissioner and the Minister for Justice and Equality.
- that no explanation was given as to why the allegations were allowed to persist for so long and no apology was offered before or since.
- that the allegations caused considerable stress and embarrassment for C/Supt Kehoe when she became aware of them on receipt of tribunal material on 4th November 2020, which was exacerbated by anticipation that they were about to be aired in public hearings.
- that Mr Barry withdrew the allegations on the first occasion they were to be subjected to any scrutiny and was grossly unfair to do so without explanation or apology.

Conclusion

This section of the issues to be investigated originally contained six allegations to the effect that C/Supt Kehoe had targeted Sgt Barry in different ways in the course of her investigations arising out of his bullying and harassment complaint of early October 2012. However, when the tribunal turned to consider this chapter of the complaints Sgt Barry, through his counsel, withdrew all of the allegations except for the first one, namely, that the chief superintendent took an inordinate time to complete her investigation.

C/Supt Kehoe gave evidence and was cross-examined by counsel for Mr Barry. At the conclusion of this cross-examination, counsel for C/Supt Kehoe and other members of An Garda Síochána pointed out that it had not been suggested to C/Supt Kehoe that she targeted Sgt Barry in any way. The Chairman offered counsel for Mr Barry an opportunity of applying to put that specific allegation but no application was made.

It is regrettable that having refrained from actually making the suggestion to C/Supt Kehoe when she gave her evidence Sgt Barry's submissions proceeded to contend *'that there was inordinate delay by C/Supt Kehoe in the completion of her investigation and this amounted to targeting of Sgt Barry in connection with his protected disclosure'*. The submission did not make any reference to the evidently conscious decision not to make that very allegation to the witness's face.

There was indeed substantial delay in the completion of this investigation but there were complications and difficulties that provided the explanation for why the whole process took so long. It consisted of three parts, namely, investigation of items 1 to 8, being the bullying and harassment element. There was a tight initial time limit of 28 days for this, a limitation which in the tribunal's view was quite unrealistic, but that was the reason why this element required to

be completed before the others, having inevitably exceeded the time limit. Then there was the criminal process, which culminated in the report to the Director of Public Prosecutions. Finally, there was the discipline investigation.

C/Supt Kehoe went back to the appointing officer, A/C Nolan, when she had furnished her report and raised queries as to whether it was appropriate for her then to embark on the criminal aspect. She was perhaps even more concerned that her position might be questioned in relation to the final element. On each application there was further delay but that was not the fault of C/Supt Kehoe. Her approach demonstrated a scrupulous concern for propriety to be seen to characterise the process.

It also must be borne in mind that her team consisted of officers who themselves had busy caseloads so it was not a case of having personnel available who could drop everything and concentrate full-time on these investigations.

The reasons for the delays in this case are explained in the evidence and they do not reveal any malicious motivation in respect of Sgt Barry.

The suggestion that this officer deliberately delayed her investigations in order to victimise Sgt Barry is unfounded and unjust.

CHAPTER 16

ISSUES 4.A AND 4.B:

THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE ISSUING OF HIS CERTIFICATE OF SERVICE

Issue 4.a of the Schedule of Issues

Did C/Supt Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- a. *by refusing to issue a Certificate of Service for him?*

Issue 4.b of the Schedule of Issues

Did C/Supt Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- b. *by classifying Sergeant Barry's service as "very good" instead of "exemplary"?*

Background

On 16th March 2016, Sergeant Paul Barry notified the sergeant in charge at Mitchelstown Garda Station of his intention to retire from An Garda Síochána at midnight on 19th June 2016.¹⁰²² He stated that he would have completed 30 years' service in the force at that date and time.

On 23rd March 2016, Garda Pensions, Human Resource Management (HRM) received correspondence from Chief Superintendent Gerard Dillane along with the application from Sgt Barry to retire. The chief superintendent stated that there was no reason that would prohibit Sgt Barry from retiring on that date and that, accordingly, his application was recommended. It was stated in this letter that:

*In accordance with the terms of Garda Code 12.12, I would categorise the member's service as 'Very Good' during his career in An Garda Síochána.*¹⁰²³

Code 12.12 requires that, where a member retires or resigns from An Garda Síochána, the relevant divisional officer should express an opinion as to the *'general standard of the member's service'*.¹⁰²⁴ The category of service is shown on the member's certificate of service and is recorded as either 'exemplary', 'very good', 'good' or 'fair'.

If the recommendation under Code 12.12 is 'very good', 'good' or 'fair', reasons must be provided for the classification by the divisional officer.

Sgt Barry's application to retire was processed and he retired at midnight on 19th June 2016.¹⁰²⁵

¹⁰²² Tribunal Documents, p. 4723

¹⁰²³ Tribunal Documents, p. 4726

¹⁰²⁴ Tribunal Documents, p. 3679

¹⁰²⁵ Tribunal Documents, p. 4738

On 31st March 2017, Ms Monica Carr, Head of the HR Directorate at the Garda Pensions Section, wrote to C/Supt Dillane in respect of the retirement of Sgt Barry. She referred to matters that she said were still outstanding in his case as follows:

1. History Papers – Forms D5, D6 and D7
2. Retired Members Reference Form
3. Recommendation under Code 12.12

Ms Carr stated, *'[p]lease note that if your recommendation under Code 12.12 is "Fair", "Good" or "Very Good", you must give reasons for your classification'*.¹⁰²⁶

On 1st October 2017, Mr Barry wrote to Garda Pensions, HRM requesting his certificate of service. He stated that members who had retired more than six months after he retired had received their certificates.¹⁰²⁷

Mr Barry phoned the Garda Pensions Section on 3rd October 2017 asking why he had not received his certificate. He was told that his file was not yet closed as the paperwork and classification of service was outstanding.¹⁰²⁸ Following this contact, Ms Carr reissued her letter dated 31st March 2017 to C/Supt Dillane.¹⁰²⁹ The chief superintendent was requested to treat the correspondence as urgent and to reply in early course.

Mr Barry phoned the Garda Pensions Section on 2nd November 2017 asking for his certificate of service. He was again told that the paperwork remained outstanding.¹⁰³⁰ The letter dated 31st March 2017 was reissued by Garda Pensions to C/Supt Dillane on 2nd November 2017 and it was stated that *'[t]he former member has contacted this office on a number of occasions regarding his Certificate of Service but we are unable to issue as the above listed items remain outstanding'*.¹⁰³¹

Mr Barry phoned the Garda Pensions Section on 23rd November 2017 and was told that his file remained open pending the submission of papers from the Cork North Division.¹⁰³²

On 11th December 2017, Mr Barry wrote to C/ Supt Dillane asking *'could you please explain why you are refusing to forward the necessary paperwork to HRM Navan so that they can issue me with a certificate of service'*.¹⁰³³ He delivered a reminder by hand on 2nd January 2018.

On 5th January 2018, C/Supt Dillane wrote to Garda Pensions, HRM referring to this correspondence from Mr Barry and stating that he had submitted a letter regarding Mr Barry's classification of service on 23rd March 2016 in which he had classified his service as 'very good'. He said that *'[m]y reason for not awarding Sergeant Barry an Exemplary classification is that in my limited dealings with the member I found him to be very difficult and discourteous'*.¹⁰³⁴

¹⁰²⁶ Tribunal Documents, p. 4739

¹⁰²⁷ Tribunal Documents, p. 4740

¹⁰²⁸ Tribunal Documents, p. 4755

¹⁰²⁹ Tribunal Documents, p. 4741

¹⁰³⁰ Tribunal Documents, p. 4756

¹⁰³¹ Tribunal Documents, p. 4742

¹⁰³² Tribunal Documents, p. 4756

¹⁰³³ Tribunal Documents, p. 4743

¹⁰³⁴ Tribunal Documents, p. 5675

On 8th January 2018, Mr David Cahill, Garda Pensions, HRM spoke with C/Supt Dillane and the chief superintendent said that he could not return Mr Barry's history papers as there was a legal case involving Mr Barry.¹⁰³⁵

On 26th March 2018, Mr Cahill spoke with Mr Barry and advised him that C/Supt Dillane had categorised his service as 'very good'. On 2nd April 2018, Mr Barry wrote to Mr Cahill and stated that:

*I wish to know in writing why my certificate was downgraded by Chief Superintendent Dillane and I am appealing his decision. I will await a response from you and as I have already informed you this is indicative of Chief Superintendent Dillane's nasty attitude to me in general and follows his failure to respond to my recent correspondence.*¹⁰³⁶

On 9th April 2018, Garda Pensions, HRM informed C/Supt Dillane that Mr Barry had requested the reasons in writing for his category of service and queried whether the category of service could be amended to 'exemplary'.¹⁰³⁷ C/Supt Dillane replied on 11th May 2018 stating as follows:

My reasons for awarding Sergeant Barry a 'Very Good' rating as opposed to an 'Exemplary' rating was based on my dealings with the member since my appointment to Fermoy as Divisional Officer in 2012.

*However, having consulted with a number of the members previous District and Divisional Officers I now accept that his rating during his overall service in An Garda Síochána merits an Exemplary rating.*¹⁰³⁸

C/Supt Dillane concluded his letter by stating that Mr Barry's history papers were attached as requested.

On 21st June 2018, Mr Barry's was one of a number of certificates sent to the Garda Commissioner for signing.¹⁰³⁹ Mr Barry's certificate of service, categorising his standard of service as 'exemplary', was sent to him on 16th July 2018.¹⁰⁴⁰

Complaint made by Mr Barry

In his interview with tribunal investigators, Mr Barry alleged that 'even after' he retired, C/Supt Dillane continued to target and discredit him. He referred to HRM making eight requests to C/Supt Dillane for paperwork so that the certificate of service could be issued.¹⁰⁴¹ He said that:

My view is that my Certificate of Service should have recorded an exemplary service record. I was and still am of the view that Chief Superintendent Dillane downgraded my service record to that of 'very good' in an effort to undermine me and cause me distress. In addition, when Chief Superintendent Dillane forwarded the Certificate to HRM, he did not provide my history papers to them, as had been requested by them. My history papers would have shown that I ought to have been granted an exemplary record of service. I therefore appealed

¹⁰³⁵ Tribunal Documents, p. 4756

¹⁰³⁶ Tribunal Documents, p. 4746

¹⁰³⁷ Tribunal Documents, p. 4745

¹⁰³⁸ Tribunal Documents, p. 4747

¹⁰³⁹ Tribunal Documents, p. 4752 and p. 4751

¹⁰⁴⁰ Tribunal Documents, pp. 262-263

¹⁰⁴¹ Tribunal Documents, p. 52

*what I believed was his downgrading of my service to HRM Navan, and on the 18th of June 2018, exactly two years after I retired, I received my Certificate which had been upgraded to 'exemplary' following appeal ... I believe I was deliberately targeted by Chief Superintendent Dillane as he was obliged to issue me with a Certificate of Service and I should not have had to seek this certificate. He made me wait two years and downgraded me without just cause, and in doing so, I believe he deliberately targeted me and this was two years after I had retired.*¹⁰⁴²

In his evidence to the tribunal, Mr Barry said that he did not accept the classification of 'very good' by C/Supt Dillane and referred to the statement of the divisional clerk, Sergeant David Hughes, who Mr Barry said had known him since 2000. He said that Sgt Hughes prepared the letter dated 23rd March 2016 for the signature of the chief superintendent and it was Sgt Hughes's view that his '*... service should go forward to the chief as exemplary as opposed to very good*'.¹⁰⁴³

In respect of the letter from C/Supt Dillane dated 5th January 2018 and the reasons outlined for the categorisation of 'very good', Mr Barry told the tribunal that:

*... that would be indicative of his nasty attitude to me in general. And I was never difficult or discourteous with him. I was difficult in that I wouldn't submit a station to go to, that may be difficult for him to accept. But I had my own reasons for that.*¹⁰⁴⁴

When asked by counsel for the tribunal about the recategorisation, Mr Barry said that '*my Certificate of Service should be for my own service and not just for his dealings with me*' and that '*I believe he should have done that from the outset*'.¹⁰⁴⁵

Mr Barry was asked about his complaint in respect of this issue:

CHAIRMAN: *The real complaint is that you weren't given a certificate of exemplary service. If it took a few months for it actually to come out, I take it that's not something you're going to make a big complaint about?*

A. *No.*

CHAIRMAN: *The big one is very good instead of exemplary, which you say should have been the case all along?*

A. *Yes.*¹⁰⁴⁶

When cross-examined by counsel for An Garda Síochána, Mr Barry did not accept that C/Supt Dillane had '*regrouped*' and '*reflected on the position*'. He said that it was a '*downgrading*' of his service, which had personal and future implications for him if he was applying for a job.¹⁰⁴⁷

¹⁰⁴² Tribunal Documents, pp. 53-54

¹⁰⁴³ Tribunal Transcripts, Day 177, p. 110

¹⁰⁴⁴ Tribunal Transcripts, Day 177, pp. 124-125

¹⁰⁴⁵ Tribunal Transcripts, Day 177, p. 126

¹⁰⁴⁶ Tribunal Transcripts, Day 177, p. 127

¹⁰⁴⁷ Tribunal Transcripts, Day 179, pp. 152-153

Responding Statements and Evidence on the Issues

Retired Chief Superintendent Gerard Dillane

In his statement to the tribunal, C/Supt Dillane referred to his classification of Sgt Barry's service on 23rd March 2016 as 'very good' and said that:

This is a very subjective matter [to] which I gave some serious thought before putting it to paper. In Paul Barry's case I had worked in the same Garda division as him since 2012 and in my opinion, he had not done his job as directed by his district officer. He did ... not attend the daily briefings and monthly accountability meetings as was required of him. He was given many opportunities to get himself out of the situation he perceived he was in, but he declined each time. In my dealings with Paul Barry, I felt that his own needs were always put before the needs of the people he was supposed to provide a policing service to. I felt he was disrespectful to me in not even considering any of my efforts to try to get him out of his perceived situation. After some deliberation using the Garda Decision Making Model, I felt that the "very good" category was the most suitable one to give him.¹⁰⁴⁸

C/Supt Dillane also stated that Sgt Barry's recommendation under Code 12.12 was provided by him on 23rd March 2016 and not on 22nd March 2018 as alleged by Mr Barry.

In his evidence to the tribunal, C/Supt Dillane elaborated on his decision to certify Sgt Barry's service as 'very good' in the first instance:

I put a lot of thought into this, into it at the time, because it wasn't a thing that I would do easy. But I looked at a number of sergeants that were retiring and I said, right, I had sergeant X and sergeant Y and since I came into contact with sergeant X and Sergeant Barry in 2012/2013, he hadn't performed his job. Okay, we'll give him the benefit, he said he had a problem with Superintendent Comyns. But now this was 12 months after Superintendent Comyns had left and he still hadn't come in to do his duties in the mornings and evenings. So, Superintendent Comyns is gone and he's still not coming in to do his duties. So, can I give him the same grading as I am giving a sergeant who has done that correctly for his 30 years? I felt I couldn't, in my own heart, to be equal to everyone, not just Sergeant Barry, but I had to be fair to the other sergeants that I was giving exemplary to as well. And then, I suppose, I felt that during my dealings with him, and this is my expression, I couldn't lead nor drive him. I tried my best to help him, I tried my best to do everything. As I said earlier, I had a number of serious HR problems, everybody, once I gave a bit, they gave a bit and we compromised. But there was no compromise, I felt, and that is why I gave him very good. But I did judge it on the four years that I dealt with him. On reflection, when I spoke to people he had dealt with earlier, I said, well look, over the 30 years, the four years is a small part. And it's a subjective matter, and it's my point of view, the commissioner doesn't have to issue the certificate, he only asks me for my point of view. And, you know, that was my reasoning behind it.¹⁰⁴⁹

¹⁰⁴⁸ Tribunal Documents, pp. 362-363

¹⁰⁴⁹ Tribunal Transcripts, Day 184, pp. 105-106

When asked about the stated reasons of *‘difficult and discourteous’* as relied on in his letter of 5th January 2018, he explained to the tribunal that:

*... discourteous towards the people of Cork North or the Fermoy district, because he didn't provide the service he was supposed to be. I found him difficult to deal with, insofar, as I said earlier, I could not lead him or drive him.*¹⁰⁵⁰

C/Supt Dillane was cross-examined by counsel for Mr Barry about the initial classification. He said that during his six years as a chief superintendent, between 20 and 30 gardaí had retired.¹⁰⁵¹ He agreed with counsel for Mr Barry that Mr Barry was the only member during that time to whom he gave a less than ‘exemplary’ classification.¹⁰⁵² He said that he was not aware of the requirement to give reasons where the classification was less than ‘exemplary’ at that time as it was not stated in the Garda Síochána Code.¹⁰⁵³

In respect of the recategorisation of Sgt Barry’s standard of service, C/Supt Dillane said in his statement that:

*I then contemplated on the matter further and after consultation with some people including two of his previous officers and looking at his 30 years’ service as a whole rather than the last 4 years, I decided the prudent thing to do was to amend my opinion as to the category of his service from Very Good to Exemplary.*¹⁰⁵⁴

In the Memorandum of Questions put to C/Supt Dillane by the tribunal investigator, C/Supt Dillane was asked to elaborate on his rationale for amending the classification of service for Mr Barry to ‘exemplary’. He said that he reviewed his recommendation using the Garda Decision Making Model. He said that he decided to speak with two of Sgt Barry’s previous officers and that both officers told the chief superintendent that they had no problem with Sgt Barry during the period they worked with him. He stated that:

*... considering that I based my original opinion on the experience I had with Paul Barry since 2012, I then looked at his service for the whole of the 30 years and decided to amend my opinion.*¹⁰⁵⁵

In relation to Mr Barry’s history papers, the chief superintendent said in his statement that a member of his staff contacted HRM in the HR Directorate in Navan and explained that Mr Barry’s file was required at Fermoy in relation to the personal injuries claim that Mr Barry had taken against the State. He said that these papers were forwarded to HRM on 5th January 2018.¹⁰⁵⁶ C/Supt Dillane was cross-examined by counsel for Mr Barry in respect of the delay and claimed that the two-year delay was as a result of the civil claim that Mr Barry had instigated and that when he was finished with the Chief State Solicitor’s Office in relation to that matter all the paperwork was sent to HRM.¹⁰⁵⁷

¹⁰⁵⁰ Tribunal Transcripts, Day 184, p. 107

¹⁰⁵¹ Tribunal Transcripts, Day 185, p. 26

¹⁰⁵² Tribunal Transcripts, Day 185, p. 27

¹⁰⁵³ Tribunal Transcripts, Day 185, pp. 26-27

¹⁰⁵⁴ Tribunal Documents, p. 363

¹⁰⁵⁵ Tribunal Documents, p. 5644

¹⁰⁵⁶ Tribunal Documents, p. 353

¹⁰⁵⁷ Tribunal Transcripts, Day 185, p. 36

Counsel for An Garda Síochána referred C/Supt Dillane to the number of certificates sent to the Commissioner for his signature on 21st June 2018 and the chief superintendent agreed that there was *'quite a period of delay involved with other retirees'* also.¹⁰⁵⁸

Mr Edmund O'Reilly

Mr Edmund O'Reilly took over as Head of the HR Directorate on 15th July 2019.¹⁰⁵⁹ In a statement to the tribunal, Mr O'Reilly, Garda Pensions, HRM said that:

*In respect of time frames for issuance of Certificates of Service, there is no specified timeframe that is determined in the Garda Code or policy documents, the HRM Pensions Office will leave the file opened until all the relevant documentation is returned so that a Certificate of Service can then issue to the retiree. As part of the processing of a member's application for retirement, the Divisional Officer (Chief Superintendent) is notified what is required in order to close the retirement file and are reminded of the Garda Code requirements of classification of a member's service.*¹⁰⁶⁰

In respect of Mr Barry's case, he said that the paperwork and the classification of service were received by Garda Pensions, HRM in May 2018 and that the pensions file was closed in May 2018.¹⁰⁶¹

Sergeant David Hughes

In his statement to the tribunal, Sgt Hughes said that he was attached to the Divisional Office in Fermoy in March 2016. He recalled that he prepared a cover letter for forwarding Sgt Barry's application to retire to HRM and for signature by C/Supt Dillane. He said that:

*I stated in the communication that the member's service would be categorised as exemplary during his career in An Garda Síochána. An exemplary category of service was the general category I included in correspondence when forwarding applications to retire to Garda Headquarters and I saw no reason to amend the category in the case of Sergeant Barry. However, when the correspondence regarding Sergeant Barry's retirement was noted by Chief Superintendent Dillane, he instructed me to amend the category of service from exemplary to very good.*¹⁰⁶²

He also referred to Mr Barry's history papers, which were retained at the Divisional Office as there were ongoing enquiries regarding Mr Barry. He explained that these papers were required for reference and he informed Garda Headquarters of the necessity to retain these papers at the Divisional Office.

¹⁰⁵⁸ Tribunal Transcripts, Day 185, p. 98

¹⁰⁵⁹ Tribunal Documents, p. 1580

¹⁰⁶⁰ Tribunal Documents, p. 1870

¹⁰⁶¹ Tribunal Documents, p. 1871

¹⁰⁶² Tribunal Documents, p. 1864

Legal Submissions

Mr Paul Barry submitted as follows:¹⁰⁶³

- that on 23rd March 2016, when C/Supt Dillane sent written notification to HRM of Sgt Barry's intention to retire, he classified his service as 'very good' and this was a deliberate decision. Sgt Hughes said in his statement that when he prepared the letter for C/Supt Dillane's signatory he had included a categorisation of 'exemplary' as this was the general category included on such correspondence. C/Supt Dillane directed Sgt Hughes to change this to 'very good'.
- that C/Supt Dillane gave evidence that of the '20 to 30' recommendations for certificates he had issued in his six years as a chief superintendent, Sgt Barry's was the only one that was less than exemplary.
- that C/Supt Dillane did not give any reason to HRM for his classification of Sgt Barry's service, though he was aware of the requirement to give a reason for a 'very good' classification. Numerous requests were sent in 2017 by HRM seeking reasons and other paperwork. Mr Barry also wrote to C/Supt Dillane.
- that C/Supt Dillane wrote to HRM on 5th January 2018 stating that he categorised Mr Barry's service as 'very good' and that his reason for not awarding 'exemplary' was that in his limited dealings with Sgt Barry he found him very difficult and discourteous.
- that following further correspondence from HRM, C/Supt Dillane wrote to HRM saying that upon further consideration he was amending the categorisation to 'exemplary'. In evidence C/Supt Dillane said the amendment was made after he spoke to persons whom Sgt Barry worked with before C/Supt Dillane came to Fermoy.
- that in the initial classification of 'very good' C/Supt Dillane treated Sgt Barry unfairly and/or attempted to penalise him. The only reason provided by C/Supt Dillane was that in his limited dealings with Sgt Barry over a four-year period he found him discourteous and difficult. C/Supt Dillane did not take Sgt Barry's full career into account or speak to others and had no proper reason to downgrade Sgt Barry. It also took C/Supt Dillane two years to provide reasons for the classification and this might well be as C/Supt Dillane had no sustainable reason for the classification.
- that this was further targeting of Sgt Barry by C/Supt Dillane on foot of his protected disclosures.

An Garda Síochána submitted as follows:¹⁰⁶⁴

- that at the preliminary hearing on 25th April 2022 it was submitted on behalf of the Garda Commissioner that Mr Barry's complaints regarding his certificate of service related to circumstances occurring after he retired from An Garda Síochána.
- that the delay in issuing Mr Barry's certificate of service was dealt with by counsel for the tribunal on Day 177 by referring Mr Barry to certificates of service for members who retired before him that showed the delay was by no means abnormally long and could not be said to amount to targeting within the terms of reference of the tribunal.

¹⁰⁶³ The tribunal has considered all of Mr Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

¹⁰⁶⁴ The tribunal has considered all of An Garda Síochána's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

- that regarding the classification of Sgt Barry's service, C/Supt Dillane in accordance with Garda Code 12.12 expressed an opinion as to category of service. C/Supt Dillane deemed appropriate the category 'very good'; this was twelve months after Superintendent Michael Comyns transferred and Sgt Barry had still not resumed morning and evening duties in Fermoy Garda Station.
- that C/Supt Dillane reconsidered matters and having taken advice from peers subsequently changed the certification to 'exemplary' having regard to Sgt Barry's service prior to 2012.
- that the explanation given by C/Supt Dillane was entirely reasonable in the circumstances and could not be considered targeting of any kind.

Conclusion

C/Supt Dillane said that he had given a good deal of thought to the matter before he decided on the category 'very good'. In due course, when asked for his reasons for doing so, he responded. In further correspondence Garda Pensions, HRM informed the chief superintendent that Sgt Barry had requested the reasons in writing for his category of service and asked whether it might be amended to 'exemplary'. He answered in the affirmative.

This is not a case of demeaning Sgt Barry by issuing a certificate with a lower category because that did not happen. The worst that can be said is that the chief superintendent originally thought that he was not entitled to 'exemplary' status but then changed his mind.

There does indeed seem to have been substantial delay in the provision of relevant documents by the Divisional Office to Garda Pensions, HRM. There was also delay in issuing the certificate when the question of category was resolved. However, the reality is, as Sgt Barry acknowledged, that the essence of his complaint was that the category of 'very good', which he felt was a denigration of his service, was deliberately done by the chief superintendent and represented targeting.

The fact that C/Supt Dillane changed his original categorisation when invited to do so by Garda Pensions, HRM is evidence that any intended denigration of Sgt Barry's service was reversed and his service was elevated to the highest description.

It is a matter of judgement as to whether C/Supt Dillane was entitled in all the circumstances to reach the original decision. In light of the history of events since 2013 it is understandable that he might form a less favourable opinion of Sgt Barry based on that period of service alone and as experienced by him. On one view, the chief superintendent was entitled to his opinion and it was his function to express it and in due course to explain his reasons, which is what he did. On the other hand, it could be considered somewhat harsh and unsympathetic to the difficult circumstances in which the sergeant found himself. The tribunal considers that these arguments are fairly evenly balanced, but it does not have to reach a conclusion on that question.

It seems obvious on any view of the history of relations between the two men that the chief superintendent's decision as to the second rather than the first category was because of the

events that happened after Sgt Barry's return to work with the conditional certificate. It would be eccentric in the circumstances to look for a motive outside and beyond those events and the relationship that arose as a result. So, there is no question on this issue of looking to the protected disclosure for a motive. In the circumstances, this is not a case of targeting or discrediting.

CHAPTER 17

ISSUE 4.F: THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE ALLEGED ACCUSATION THAT HE INCITED SERGEANT JERRY (JEREMIAH) QUINN TO RESURRECT A COMPLAINT

Issue 4.f of the Schedule of Issues

Did C/Supt Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

(f) by accusing Sgt Barry of inciting Sgt Gerry Quinn to resurrect a complaint concerning the planting of drugs in Mallow by a garda?

Background and Complaint

In his statement to tribunal investigators, Mr Paul Barry said that he was targeted by Chief Superintendent Gerard Dillane and accused of inciting Sergeant Jerry (Jeremiah) Quinn to reactivate a complaint regarding a drugs incident in Mallow.¹⁰⁶⁵

This allegation was outlined in detail by Mr Barry in additional submissions to the tribunal dated 4th April 2019, where he stated that:

Chief Superintendent Dillane accused me in person of stirring up trouble in the District by making my own complaint and that I persuaded Sergeant Quinn to resurrect his complaint. He subsequently reported to Garda management that my presence was having a negative effect on policing in Fermoy District. Chief Superintendent Dillane also told Sergeant Quinn that he believed I was inciting him to make his complaint. I never knew anything about his complaint until after he had submitted it, and I did not urge him to make it.¹⁰⁶⁶

During the course of his evidence, it was put to Mr Barry by counsel for An Garda Síochána that the chief superintendent had never made such an accusation.¹⁰⁶⁷ This was refuted by Mr Barry.

Mr Barry told the tribunal that C/Supt Dillane made the accusation in his office on 20th January 2015, on the same day that Sgt Quinn went on sick leave with work-related stress.¹⁰⁶⁸ Mr Barry said that he was attending a prearranged meeting with C/Supt Dillane to discuss his own case and that the chief superintendent accused him of ‘*stirring things up*’ with Sgt Quinn.¹⁰⁶⁹ He gave evidence that C/Supt Dillane told him that ‘*Sergeant Quinn had gone sick from work related stress and that it was because I incited him to resurrect his complaint*’.¹⁰⁷⁰

It was put to Mr Barry by counsel for An Garda Síochána that there was no evidence of targeting or discrediting by C/Supt Dillane in relation to this issue and that ‘*even on your own evidence, there’s no evidence that anything that you say was said was done to target or discredit you because you made a protected disclosure*’. Mr Barry disagreed.¹⁰⁷¹

¹⁰⁶⁵ Tribunal Documents, p. 6

¹⁰⁶⁶ Tribunal Documents, p. 266

¹⁰⁶⁷ Tribunal Transcripts, Day 179, p. 125

¹⁰⁶⁸ Tribunal Transcripts, Day 179, pp. 125-126

¹⁰⁶⁹ Tribunal Transcripts, Day 179, p. 128

¹⁰⁷⁰ Tribunal Transcripts, Day 179, p. 129

¹⁰⁷¹ Tribunal Transcripts, Day 179, pp. 130-131

Responding Statements and Evidence on the Issue

In his statement to the tribunal, C/Supt Dillane stated that:

*I totally deny this. I did meet Sergeant Jerry Quinn many times in my office, sometimes in relation to a complaint which he was pursuing at the time and other times about various different things. The name of Paul Barry did come up in some of those conversations but never in the context of Paul Barry inciting Jerry Quinn. ... Paul Barry again states ... that I accused him in person of stirring up trouble in the district and that I persuaded Sergeant Quinn to resurrect his complaint. I never accused Paul Barry of stirring up trouble in the district and I totally deny this accusation.*¹⁰⁷²

In his evidence to the tribunal, C/Supt Dillane said that he had been dealing with Sgt Quinn's complaint and had a lot of inside information about it. He said that he had been 'on good terms with Sergeant Quinn in relation to ... how we were progressing that'. As a result, the allegation made by Mr Barry did not make sense to him.¹⁰⁷³ He told the tribunal that he totally denied the allegation.¹⁰⁷⁴

Sgt Quinn was tendered as a witness during the public hearings and cross-examined by counsel for Mr Barry. Sgt Quinn told the tribunal that 'Sergeant Barry never asked me to make a complaint, never advised me nor passed any comment on it'.¹⁰⁷⁵

In his legal submission to the tribunal on the issue, Mr Barry said that there was a conflict in the evidence of Mr Barry and C/Supt Dillane and that the evidence of Mr Barry should be preferred. It was further submitted that the incident amounted to a clear instance of targeting and/or discrediting arising from his protected disclosure. The alleged criticism directed at Sgt Barry was such as to foster disparagement, mistrust and suspicion in Sgt Barry.

No submissions were made on the issue on behalf of An Garda Síochána.

Conclusion

Mr Barry elaborated on his original complaint in a letter dated 4th April 2019. He said that 'Chief Superintendent Dillane also told Sergeant Quinn that he believed I was inciting him to make his complaint'. The tribunal notes that counsel for Mr Barry, who had requested this witness attend to give evidence at the public hearings, did not ask him anything about this statement. The tribunal also notes that no other counsel questioned the witness.

There was no independent evidence to confirm the alleged statement. Mr Barry had the opportunity of supporting his version by evidence of Sgt Quinn.

The tribunal is not satisfied that C/Supt Dillane said what Mr Barry alleged. For completeness the tribunal considers that there is no ground for connecting any statement of the kind alleged with a protected disclosure.

¹⁰⁷² Tribunal Documents, pp. 360-361

¹⁰⁷³ Tribunal Transcripts, Day 184, p. 94

¹⁰⁷⁴ Tribunal Transcripts, Day 184, p. 95

¹⁰⁷⁵ Tribunal Transcripts, Day 189, p. 40

CHAPTER 18

ISSUE 5.D:

THE COMPLAINT MADE BY MR BARRY IN RELATION TO UNIT CHANGES IN MITCHELSTOWN GARDA STATION

Issue 5.d of the Schedule of Issues

Did Supt Comyns target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- (d) *by changing Sgt Barry's unit and personnel following his complaint about the conduct of a garda at Mitchelstown Garda Station?*

Background and Complaint

In his statement to tribunal investigators, Mr Barry said that he made an oral complaint to his sergeant in charge, Sergeant Aidan Dunne, on a date shortly after 13th April 2014 in respect of what he described as '*the behaviour*' of a garda colleague. He referred to a further incident on 1st September 2014 concerning this colleague and said that he made '*verbal Disclosures*' at the time of the incident.¹⁰⁷⁶ He said that Detective Garda James Fitzpatrick, Sgt Dunne and members of Fermoy and Mitchelstown Garda Stations were all aware of these incidents.¹⁰⁷⁷

Later, on 19th September 2014, an encounter took place between Sgt Barry and his garda colleague, which was reported to Superintendent Michael Comyns by Detective Garda Tom Ryan.

Mr Barry told tribunal investigators that his verbal complaints were communicated to Supt Comyns by Sgt Dunne and that '*Superintendent Comyns then targeted me for making these complaints.*'¹⁰⁷⁸ He said that two gardaí, Garda J.J. Wall and Garda Henry Ward, were removed from his unit. He did not accept that this change was for operational reasons but said it was because they had notified Sgt Barry of the garda colleague's conduct. He stated that:

*Those two Gardaí were members I trusted and could depend on. Their removal undermined my management of my team and was related solely to the fact that I had made this complaint. I felt that the transfer of those two Gardaí was a punishment for the making of the complaint and reflected badly on me. I felt guilty for the way in which they were treated.*¹⁰⁷⁹

He also stated that he was removed from supervising three gardaí in Mitchelstown and then transferred from Unit B to Unit C. He said in his statement that:

¹⁰⁷⁶ Tribunal Documents, p. 21

¹⁰⁷⁷ Tribunal Documents, p. 26

¹⁰⁷⁸ Tribunal Documents, p. 54

¹⁰⁷⁹ Tribunal Documents, p. 54

*This transfer was put to me by Sergeant Dunne who said that he was told by Superintendent Comyns that either I move to Unit C or all my unit would be moved to Unit C or all of Unit C would be moved to my unit, which was Unit B.*¹⁰⁸⁰

*I believe I was targeted by Superintendent Comyns ... I believe this to be continued victimisation having made my first complaint about Superintendent Comyns relating to the alleged perversion of the course of justice.*¹⁰⁸¹

In his evidence to the tribunal, Mr Barry said that he accepted the move in order to avoid moving garda members who would have holiday and work arrangements, so that they would not be put out.¹⁰⁸²

Responding Statements and Evidence on the Issue

In his statement to the tribunal, Supt Comyns said that he completely denied these allegations. He said that on 15th August 2014 he organised the transfer of Garda Marie McCarthy from Mitchelstown to Fermoy Garda Station and the transfer of Garda Seán Twomey from Fermoy to Mitchelstown Garda Station.¹⁰⁸³ He told counsel for the tribunal that this had nothing to do with Sgt Barry.¹⁰⁸⁴

He also said in his statement that on 19th August 2014 he consulted with the inspector and sergeants in charge on proposed unit changes in the Fermoy District. He said that he circulated details of numerous other changes within the Fermoy District, which were to take effect from 15th September 2014.¹⁰⁸⁵ He said that *‘[n]umerous members were transferred from one unit to another as well as the two members who were transferred to different stations’*.¹⁰⁸⁶ He told the tribunal that members in Rathcormac and Watergrasshill had retired and that he needed to transfer members to these stations.¹⁰⁸⁷ He also told the tribunal that these transfers had nothing to do with Sgt Barry.¹⁰⁸⁸

He said in his statement that *‘I note Sergeant Barry takes issue with the moving of Garda Wall and Garda Ward from his unit. I can confirm that none of the changes had anything to do with Sergeant Barry’*.¹⁰⁸⁹ He denied in his evidence to the tribunal that these changes had anything to do with hostility towards or the targeting of Sgt Barry.¹⁰⁹⁰

In reply to the Memorandum of Questions by the tribunal investigator, Supt Comyns said that his *‘primary focus was on policing and the best use of policing resources available in the District at the time’*.¹⁰⁹¹ Mr Barry said in his evidence that he did not accept this explanation.¹⁰⁹²

¹⁰⁸⁰ Tribunal Documents, p. 55

¹⁰⁸¹ Tribunal Documents, p. 58

¹⁰⁸² Tribunal Transcripts, Day 177, p. 50

¹⁰⁸³ Tribunal Documents, p. 567

¹⁰⁸⁴ Tribunal Transcripts, Day 182, p. 89

¹⁰⁸⁵ Tribunal Documents, p. 811

¹⁰⁸⁶ Tribunal Documents, p. 567

¹⁰⁸⁷ Tribunal Transcripts, Day 182, p. 89

¹⁰⁸⁸ Tribunal Transcripts, Day 182, p. 90

¹⁰⁸⁹ Tribunal Documents, p. 568

¹⁰⁹⁰ Tribunal Transcripts, Day 182, p. 90

¹⁰⁹¹ Tribunal Documents, p. 5423

¹⁰⁹² Tribunal Transcripts, Day 177, p. 51

In respect of the incident on 19th September 2014, Supt Comyns said in his statement that Sgt Dunne had told him that Sgt Barry did not have a good relationship with the garda colleague but had not communicated *‘any specific incident or complaint’*.¹⁰⁹³ He said that as Sgt Barry was not the direct supervisor of this colleague, he did not consider it a particularly significant issue. He said that on 23rd September 2014, the colleague made a verbal complaint to him about how they had been *‘treated and humiliated’* in front of other garda members by Sgt Barry on 19th September 2014.¹⁰⁹⁴

Supt Comyns said that he spoke with Sgt Dunne who undertook in turn to speak with Sgt Barry. He said that Sgt Dunne *‘assured me that he could talk to Sergeant Paul Barry and he was confident Sergeant Barry would agree to move to another Unit within the station. As far as I recall, it was Sergeant Dunne who proposed this. At 3.45pm that evening Sergeant Dunne rang me to say that he had spoken to Sergeant Barry and confirmed to me that Sergeant Barry would change units. I was not made aware of any issue, quite the opposite. I am certain if there was an issue, it would have been raised there and then’*.¹⁰⁹⁵

Mr Barry rejected the suggestion by counsel for Supt Comyns that reassigning people was a practical way of dealing with the issue.¹⁰⁹⁶

In relation to the allegation made by Mr Barry that he was told by Sgt Dunne that either he change unit or his whole unit would be moved, Sgt Dunne told counsel for Mr Barry that he could not remember how the changes came about.¹⁰⁹⁷ He said that *‘I can’t say that conversation happened but neither can I deny that it did’*.¹⁰⁹⁸

Mr Barry told tribunal investigators that he made a report in relation to the conduct of his garda colleague to the superintendent in Fermoy on 24th June 2015.¹⁰⁹⁹ Inspector Eoghan Healy was later appointed by C/Supt Dillane to enquire into the matter and provide a report.¹¹⁰⁰ This was provided on 4th August 2015.¹¹⁰¹ C/Supt Dillane told the tribunal that he decided to forward this report to Mr John Barrett, Executive Director, Human Resources and People Development (HRPD), to be put with the other complaints that had been made by Sgt Barry.¹¹⁰²

In his legal submissions to the tribunal, Mr Barry submitted that he was pressurised into changing unit by Supt Comyns. He said that this amounted to another instance of targeting on foot of his protected disclosures.

It was submitted on behalf of Supt Comyns that the incident that arose between Sgt Barry and his colleague was in no way related to targeting or otherwise of Sgt Barry, but was a practical solution to an interpersonal difficulty that arose. It was further submitted that this could not be objectively viewed as Supt Comyns targeting or discrediting Sgt Barry, or being a party to any targeting or discrediting of Sgt Barry by An Garda Síochána.

¹⁰⁹³ Tribunal Documents, p. 568

¹⁰⁹⁴ Tribunal Documents, p. 568

¹⁰⁹⁵ Tribunal Documents, p. 569

¹⁰⁹⁶ Tribunal Transcripts, Day 180, p. 8

¹⁰⁹⁷ Tribunal Transcripts, Day 188, p. 108

¹⁰⁹⁸ Tribunal Transcripts, Day 188, p. 109

¹⁰⁹⁹ Tribunal Documents, p. 21

¹¹⁰⁰ Tribunal Transcripts, Day 177, pp. 49-50

¹¹⁰¹ Tribunal Documents, pp. 501-508

¹¹⁰² Tribunal Transcripts, Day 184, p. 103

Conclusion

The tribunal is satisfied on the evidence that the unit personnel changes in Mitchelstown Garda Station came about as a result of disagreements between members involving Sgt Barry and that the new assignments represented a practical solution to such conflicts and that the principal agent of change was Sgt Dunne, the sergeant in charge. He reported to Supt Comyns that he had spoken to Sgt Barry who was agreeable to changing units. The tribunal is satisfied that this was not a case of targeting but rather a means of dealing with a local issue to which Sgt Barry consented.

CHAPTER 19

ISSUE 4.E:

THE COMPLAINT MADE BY MR BARRY IN RELATION TO THE RECORDING OF HIS TRANSFERS ON PULSE AND HRM BULLETINS

Issue 4.e of the Schedule of Issues

Did C/Supt Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- (e) *by directing/condoning the announcements in HRM bulletins and on Pulse that Sgt Barry had been transferred when that was not the case and when it was well known that Sgt Barry had refused transfers?*

Background

As outlined in detail in chapter 14, on 29th January 2014, C/Supt Dillane wrote to the Assistant Commissioner, Human Resource Management (HRM) and stated that he intended to transfer Sgt Barry to Fermoy Garda Station with immediate effect.¹¹⁰³

This transfer was recorded in HRM Personnel Bulletin No. 03/14 dated 21st February 2014 and the proposed transfer date was stated to be 11th March 2014.¹¹⁰⁴ Sgt Barry immediately filed an appeal on 5th March 2014,¹¹⁰⁵ and the transfer was put on hold. The transfer was recorded as deferred in HRM Personnel Bulletin No. 05/14 dated 14th March 2014.¹¹⁰⁶

However, during March 2014, Sgt Barry was recorded on the Garda PULSE system as assigned to Fermoy Garda Station.¹¹⁰⁷ Sgt Barry contacted his Association of Garda Sergeants and Inspectors (AGSI) representative, Inspector Edmund Golden, on 10th March 2014 and showed him the PULSE records. Insp Golden met with C/Supt Dillane later that day and went through the PULSE system with the chief superintendent.

The following year, the proposed transfer was recorded as cancelled on HRM Personnel Bulletin No. 01/15 dated 15th January 2015.¹¹⁰⁸

¹¹⁰³ Tribunal Documents, p. 434

¹¹⁰⁴ Tribunal Documents, p. 221

¹¹⁰⁵ Tribunal Documents, p. 4148

¹¹⁰⁶ Tribunal Documents, p. 222

¹¹⁰⁷ Tribunal Documents, pp. 223-225

¹¹⁰⁸ Tribunal Documents, p. 226

On 5th February 2015, a minute was issued from the HRPD section of An Garda Síochána directing the transfer of Sgt Barry to Anglesea Street Garda Station. The proposed transfer date was 24th February 2015.¹¹⁰⁹ On 9th February 2015, Sgt Barry appealed the transfer.¹¹¹⁰

The transfer, albeit on hold at this point, was recorded on HRM Personnel Bulletin No. 04/15 dated 6th March 2015.¹¹¹¹ The transfer was not recorded as deferred until HRM Personnel Bulletin No. 14/15 dated 10th September 2015.¹¹¹²

Throughout 2015, and after 10th September 2015, Sgt Barry was recorded on the Garda PULSE system as assigned to Anglesea Street Garda Station.¹¹¹³

On 13th August 2015, Sgt Barry emailed the HRM Records Unit stating that he was attached to Mitchelstown Garda Station, yet he was allocated to Anglesea Street Garda Station. He said that as a result, confidential correspondence was incorrectly addressed to him at Anglesea Street Garda Station and had been opened. He stated that this was a breach of his human rights and he looked for the matter to be addressed.¹¹¹⁴ He received a reply the following day from Ms Nicola McAuley, Executive Officer, Resource Management. She stated that *'Garda records can only be updated on foot of a Bulletin. If Bulletin 04/15 is incorrect you will need to contact the Transfers Section, Garda Headquarters'*.¹¹¹⁵

In 2016, it was recorded on HRM Personnel Bulletin No. 05/16 dated 1st April 2016 that Sgt Barry was to transfer to Anglesea Street Garda Station.¹¹¹⁶ This was recorded as deferred on HRM Personnel Bulletin No. 07/16 dated 21st April 2016.¹¹¹⁷

During April 2016, Sgt Barry was recorded on the Garda PULSE system as assigned to Anglesea Street Garda Station.¹¹¹⁸

Sgt Barry retired from An Garda Síochána on 19th June 2016. The transfer was recorded as cancelled on HRM Personnel Bulletin No. 11/16 dated 6th July 2016.¹¹¹⁹

Complaint made by Mr Barry

In his interview with tribunal investigators, Mr Barry complained that he appeared in twelve HRM personnel bulletins. He said that he believed *'senior gardaí'* targeted him on the PULSE system because he immediately appeared as transferred on the PULSE system when other sergeants who were identified as being due to be transferred did not. He said that:

I believe senior Gardaí were playing targeted psychological mind-games with me and they worked. I believe I was singled out for this treatment, as when I would check the HR

¹¹⁰⁹ Tribunal Documents, p. 4211

¹¹¹⁰ Tribunal Documents, p. 4215

¹¹¹¹ Tribunal Documents, p. 228

¹¹¹² Tribunal Documents, p. 229

¹¹¹³ Tribunal Documents, pp. 232-238

¹¹¹⁴ Tribunal Documents, p. 4254

¹¹¹⁵ Tribunal Documents, pp. 4253-4254

¹¹¹⁶ Tribunal Documents, p. 239

¹¹¹⁷ Tribunal Documents, p. 240

¹¹¹⁸ Tribunal Documents, pp. 243-244

¹¹¹⁹ Tribunal Documents, p. 241

*bulletins, there could be four or five Sergeants transferred on the bulletin and I would be the only one transferred on PULSE immediately. This meant that when I would check my incidents on the PULSE system, I was no longer at Mitchelstown even though I was stationed there. I would have to check my incidents through Fermoy or Anglesea Street Garda Stations. Whilst I wasn't transferred in person, they had me transferred on PULSE and that caused me great stress because both times I was transferred on HR bulletins, the first time a Garda from Fermoy rang me to say I had been transferred, and the second time, a Garda from the Mayo Division rang to tell me I had been transferred. I can't identify specifically the senior members who targeted me here, but to transfer someone on PULSE would have to come from a senior level.*¹¹²⁰

In relation to the PULSE records in March 2014, Mr Barry said that Insp Golden made representations on his behalf at his request. He said that Insp Golden made the chief superintendent aware of this *'intimidation in relation to PULSE'* and Sgt Barry was changed back to Mitchelstown Garda Station on the PULSE system.¹¹²¹

In his evidence to the tribunal, Mr Barry said that he was recorded as back in Fermoy Garda Station a week later.¹¹²² Mr Barry said that he contacted Ms McAuley at HRM and she said it was *'beyond her control, that it would have been senior officers within Garda Headquarters who would decide'*.¹¹²³

Mr Barry said in his interview that this was *'targeted victimisation'* throughout 2014, 2015 and 2016.¹¹²⁴ He also said that this was *'intentional emotional abuse'* and showed the contempt he was held in by the garda authorities.¹¹²⁵

Mr Barry told counsel for the tribunal that he believed he was *'targeted'* as he was the only sergeant on the bulletin transferred immediately on PULSE.¹¹²⁶ However, when cross-examined by counsel for An Garda Síochána, Mr Barry said that he did not know who actually made the changes.¹¹²⁷ He said that he assumed it was C/Supt Dillane.¹¹²⁸ He went on to say it was someone in HRM at Garda Headquarters *'at the behest of Chief Superintendent Dillane'*.¹¹²⁹

When further cross-examined on the matter, Mr Barry agreed with counsel for An Garda Síochána that he did not have any evidence that C/Supt Dillane *'directed or condoned'* the change to the PULSE entries.¹¹³⁰

¹¹²⁰ Tribunal Documents, pp. 49-50

¹¹²¹ Tribunal Documents, p. 49

¹¹²² Tribunal Transcripts, Day 177, p. 26

¹¹²³ Tribunal Transcripts, Day 177, p. 26

¹¹²⁴ Tribunal Documents, p. 49

¹¹²⁵ Tribunal Documents, p. 218

¹¹²⁶ Tribunal Transcripts, Day 177, p. 26

¹¹²⁷ Tribunal Transcripts, Day 178, p. 153

¹¹²⁸ Tribunal Transcripts, Day 178, p. 153

¹¹²⁹ Tribunal Transcripts, Day 178, pp. 153-154

¹¹³⁰ Tribunal Transcripts, Day 178, p. 154

Responding Statements and Evidence on the Issue

In his statement to the tribunal, C/Supt Dillane denied these allegations. He stated that he had no knowledge or insight into technical aspects of changing a person's station on the PULSE system when their name appears on a personnel bulletin. He said that this was solely a matter for HRM at Garda Headquarters and he had no part to play in it. He referred to meeting with Insp Golden and said that he immediately rang HRM transfers section and *'had the matter rectified'*.¹¹³¹

When cross-examined by counsel for Mr Barry, C/Supt Dillane said that he had no *'hand, act or part'* in the matter,¹¹³² and that he rang HRM as he was trying to help Sgt Barry.¹¹³³ He told the tribunal that he had no responsibility for what was written on PULSE.¹¹³⁴

In his evidence to the tribunal, Superintendent Edmund Golden confirmed that he met with Sgt Barry on 10th March 2014 and that Sgt Barry showed him his transfer on HRM Personnel Bulletin No. 03/14. He said that Sgt Barry then opened the PULSE system and showed the inspector his current status under the Garda Personnel section, which recorded Sgt Barry as stationed at Fermoy and not Mitchelstown Garda Station even though the transfer was not due to take place until 11th March 2014, and even though it was under appeal.¹¹³⁵

Supt Golden said that Sgt Barry logged in the names of a number of other sergeants appearing for transfer on HRM Personnel Bulletin No. 03/14 who had not been changed on PULSE and Supt Golden confirmed to counsel for the tribunal that this was the case.¹¹³⁶ He said that he met with C/Supt Dillane at Fermoy Garda Station later that day and took him through the PULSE records. He said that the chief superintendent *'couldn't understand it and didn't know why'* and said he would contact HRM to clarify the matter.¹¹³⁷

In his evidence to the tribunal, Mr Barrett, Executive Director, HRPD was asked by counsel for the tribunal whether he had any knowledge of the recording of the transfers on the PULSE system. He told the tribunal that he had no knowledge of how this might occur and that he had *'no hand, act or part in that administrative process'*.¹¹³⁸

In her statement to the tribunal, Ms McAuley said that her response by email to Sgt Barry on 14th August 2015 was the correct response in line with the procedure that applied at that specific time. She stated that this would have been the standard response given to any member.¹¹³⁹

¹¹³¹ Tribunal Documents, p. 362

¹¹³² Tribunal Transcripts, Day 185, p. 42

¹¹³³ Tribunal Transcripts, Day 185, p. 43

¹¹³⁴ Tribunal Transcripts, Day 185, p. 43

¹¹³⁵ Tribunal Transcripts, Day 188, pp. 83-84

¹¹³⁶ Tribunal Transcripts, Day 188, pp. 84-85

¹¹³⁷ Tribunal Transcripts, Day 188, p. 86

¹¹³⁸ Tribunal Transcripts, Day 189, pp. 20-21

¹¹³⁹ Tribunal Documents, p. 1460

Legal Submissions

Mr Paul Barry submitted as follows:¹¹⁴⁰

- that the treatment of Sgt Barry in relation to PULSE was a form of targeting arising from his protected disclosures. The evidence established that Sgt Barry was subjected to a form of discriminatory and unfair treatment. He was singled out for treatment when his name appeared on HRM bulletins and, unlike other sergeants, he was immediately transferred on PULSE: before the date of his transfer and even after his transfer was deferred. The facts rebut any suggestion that this was an innocent accident. Even after Sgt Barry's station was changed back from Fermoy to Mitchelstown in 2014, it was changed back again a week later, indicating that a deliberate action had taken place.
- that this treatment caused great stress to Sgt Barry: he had to check Fermoy or Anglesea Street Garda Station to deal with his incidents and private correspondence was sent to him in Anglesea Street in error. This treatment was a form of coercion designed to compel Sgt Barry to simply accept a transfer.
- that C/Supt Dillane denied having '*hand, act or part*' in the changes on PULSE. Mr Barry made the case that C/Supt Dillane either directed or condoned the changes. It appeared that C/Supt Dillane had the ability to effect changes to PULSE, as after his meeting with Insp Golden he contacted HRM and had Sgt Barry changed back to Mitchelstown.
- that in the light of all the evidence heard in relation to C/Supt Dillane's eagerness to have Sgt Barry transferred, it was open to the tribunal to draw the conclusion that C/Supt Dillane did in fact play a role in directing or condoning the changes that took place on the PULSE system.

An Garda Síochána submitted as follows:¹¹⁴¹

- that there was no reasonable basis for this allegation and that C/Supt Dillane in evidence explained that the PULSE records had nothing to do with him. Although he requested formal notification in the bulletins, this was requested as part of the transfer process and was also not posted by him.

Superintendent Edmund Golden submitted as follows:¹¹⁴²

- that he was an inspector at the material time and accordingly was not a senior member of An Garda Síochána within the definition of term of reference [p].
- that his dealings with Sgt Barry were in his capacity as Sgt Barry's AGSI representative. He was acting in such representative capacity when meeting with C/Supt Dillane in relation to a PULSE recording of a transfer.

¹¹⁴⁰ The tribunal has considered all of Mr Barry's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 6-36

¹¹⁴¹ The tribunal has considered all of An Garda Síochána's legal submissions on this issue and what follows is a summary of the same; Tribunal Transcripts, Day 190, pp. 36-61

¹¹⁴² The tribunal has considered all of Superintendent Edmund Golden's legal submissions on this issue and what follows is a summary of the same.

Conclusion

In regard to the PULSE records about transfers the evidence was that C/Supt Dillane had nothing to do with making these entries. Insp Golden took up Sgt Barry's complaint with C/Supt Dillane and took him through the PULSE records. The chief superintendent could not understand why the situation was as described and undertook to contact HRM, which he did, and had the matter resolved.

The essential point is that these changes were made by HRM and not at the instigation of C/Supt Dillane.

CHAPTER 20

CONCLUSION

Mr Barry was attested as a member of An Garda Síochána on 8th October 1986 and was a sergeant in Mitchelstown Garda Station in County Cork for sixteen years. He first contacted the tribunal on 24th January 2019 and in his statement of complaint Mr Barry made a number of allegations in respect of Superintendent Michael Comyns, his district officer, and Chief Superintendent Gerard Dillane, the divisional officer.

These are the principal parties whom Mr Barry accuses in the series of issues covered by this report, but lesser roles were also played by Chief Superintendent Catherine Kehoe and Superintendent John Quilter. Inspector Anthony O'Sullivan was involved by direction of C/Supt Dillane.

Mr Barry outlined in his statement that he made a series of protected disclosures beginning with one made to Garda Síochána Human Resource Management (HRM) on 2nd October 2012 in the form of a complaint under the *'Working Together To Create A Positive Working Environment'* policy document, informally known as a bullying and harassment complaint. This consisted of nine allegations of bullying and harassment against Supt Comyns. The final allegation accused the superintendent of wrongdoing by unlawfully interfering in the criminal investigation into an alleged case of sexual assault reported to Mitchelstown Garda Station in February 2012. The tribunal is satisfied that, while not described as such in the document, this was in substance the making of a protected disclosure under the Protected Disclosures Act, 2014 and the starting point of its investigations.

Earlier events are relevant as background and as revealing the seeds of discord and subsequent conflict between Sgt Barry and his district and divisional officers.

In respect of the sexual assault investigation in February 2012, Sgt Barry did not make a complaint about Supt Comyns at the time and proceeded to complete the investigation and submit a file to the superintendent for transmission to the Director of Public Prosecutions. However, he avoided contact with the superintendent as much as he could.

Matters came to a head for Sgt Barry with an incident that happened on 1st August 2012. He was due on duty in Mitchelstown Garda Station at 12:00 hrs but he did not arrive at the garda station until 12:20 hrs, where the superintendent criticised him for being late on this and on a previous occasion. Supt Comyns issued him with a Regulation 10 Notice and Sgt Barry felt that this sanction was unjust. The tribunal does not have to make a decision on the appropriateness of the Regulation 10 Notice but it is not difficult to understand how different interpretations could have arisen in respect of these events.

This incident appears to have been the precipitating event for Sgt Barry's going on sick leave on 6th August 2012 with work-related stress. While on sick leave, Sgt Barry informed Chief Superintendent John Grogan, HRM, that he wished to make a complaint under the Garda Síochána bullying and harassment policy. Even at this early stage in the case, the opportunities

for suspicion and misunderstanding were present. C/Supt Dillane sent a letter to Sgt Barry that included the following:

*On this date, 1st October 2012, I am aware that you informed my office that following legal advice you would be submitting the said statement to Human Resource Management, Garda Headquarters. I have no objection to this course of action, but I do require that you submit your statement outlining your full complaint within seven days in order that I can conclude my investigation.*¹¹⁴³

This was interpreted by Sgt Barry as a request to submit his protected disclosure directly to the chief superintendent. Mr Barry was reluctant even at the hearing to accept that he had misunderstood the letter.

In accordance with garda protocols, because of Sgt Barry's certified illness being attributed to work-related stress, an investigation was warranted and Supt Comyns sent Insp O'Sullivan to investigate; but Sgt Barry said he wanted an investigator from outside the Fermoy District. C/Supt Dillane applied to the Assistant Commissioner, Southern Region for that and it came to HRM, who decided to wait for the result of the bullying and harassment inquiry.

If his illness had been designated as an injury on duty, as Sgt Barry wished, he would have received full pay for the whole time he was ill. As that did not occur he suffered a reduction from 6th February 2013 to 29th March 2013. However, the tribunal is satisfied that C/Supt Dillane and Supt Comyns were not responsible for that predicament.

Sgt Barry remained out of work until 29th March 2013, when he returned in circumstances and on terms that are central to his complaints of targeting and the tribunal's investigation. He provided a certificate from his general practitioner, Dr Margaret Anne Kiely, stating the following:

*Mr. Paul Barry is fit to return to work under certain circumstances. Mr. Barry should not work or attend at Fermoy Garda station and he should not come into contact with Superintendent Michael Comyns.*¹¹⁴⁴

C/Supt Dillane was shocked at the contents of the certificate, believing that it would be impossible to comply with the conditions at the same time as running a proper police service. He immediately communicated with HRM and the Chief Medical Officer (CMO) among others, asking that the doctor contact Dr Kiely about the matter. There were reasons for C/Supt Dillane's unease about the certificate itself. The date had been changed without any initialling and it did not state a date from which Sgt Barry was to be considered fit for work. It may be noted in addition that it provided a protective shield for Sgt Barry and it required that there be an exclusion zone for the superintendent; it did not contain any diagnosis and neither did it indicate any time limit on the operation of the conditions so that it was an unlimited set of conditions.

Another concern was that a different member might produce a similar certificate in relation to a superior from whom he had to be sequestered, and it might not actually be a superior in respect of whom the member had a deep-seated aversion.

C/Supt Dillane sent Insp O'Sullivan to speak to the doctor and the encounter is the subject of chapter 6. The doctor saw this visit as the inspector questioning the authenticity of her certificate and she subsequently conveyed that to Sgt Barry. The two senior gardaí insisted in evidence that

¹¹⁴³ Tribunal Documents, p. 2480

¹¹⁴⁴ Tribunal Documents, p. 4001

there was no question of their suspecting that it was a forgery. The tribunal accepts the evidence of the gardaí on this point but it considers that Sgt Barry had grounds for thinking the worst. It may be noted in regard to the visit that Assistant Commissioner Fintan Fanning, HRM had responded on the morning of Insp O'Sullivan's visit recommending that an inspector be sent to talk to the doctor. By the time this recommendation was received C/Supt Dillane had dispatched the inspector so the visit was not a response to the suggestion from the Assistant Commissioner, HRM. The point is, however, that the Assistant Commissioner, HRM was of the same mind.

In addition to his view about the impossibility of compliance with the conditions, C/Supt Dillane, not surprisingly, believed that there were no temporary workplace arrangements that could be availed of to deal with the problem. Dr Oghenovo Oghuvbu did speak to Dr Kiely and he advised local management that temporary workplace arrangements should be put in place but he did not specify any particular measures because he took the view that such arrangements were not medical matters for him but were administrative issues for local management.

It was clear to C/Supt Dillane that it was going to be difficult for Sgt Barry and Supt Comyns to work together while the complaints were outstanding, and he made efforts to get the sergeant to agree to transfer away from the district. One particular suggestion was Glanmire Garda Station, which was closer to Sgt Barry's home, thus reducing his commute. However, the sergeant was not interested in being transferred.

The positions of Sgt Barry and C/Supt Dillane on these matters were irreconcilable and friction and conflict became inevitable. Sgt Barry was not willing to move. Whatever view is taken of his evidence to the tribunal that he was willing to move to Mallow on certain conditions, which was rebutted by C/Supt Dillane, the fact is that the chief superintendent was not aware of any such attitude. So, if the offer was made the chief superintendent did not understand it to have been made. Indeed, on several occasions Sgt Barry had made it abundantly clear to C/Supt Dillane and others that he was not willing to move away from Mitchelstown, but the point is that the chief superintendent would have been relieved to know that the sergeant was indeed agreeable to a move.

One way or another, therefore, Sgt Barry's position was understood to be a simple refusal to countenance a transfer away from Mitchelstown Garda Station.

There was no obligation on the sergeant to move. While the bullying and harassment complaint was being investigated he had the specific protection of the terms of that policy. It is not a question as to whether he was reasonable or not; he was free to choose to remain in the garda station in which he had been for a long number of years.

Sgt Barry himself implemented the precise terms of the medical certificate. He shunned Fermoy Garda Station and he refused to have anything to do with Supt Comyns, including answering phone calls from the officer.

It is not easy to understand what temporary workplace accommodations could have arisen or could have been necessary in addition. Sgt Barry was fully adhering to the stated conditions. Just what else might have been put in place is not obvious. Granted, Sgt Barry's solicitor had made the suggestion that he be supervised by Insp O'Sullivan in lieu of the superintendent and some such arrangement was implicitly accepted by local management for a time. But that was not a restriction

on Sgt Barry but merely a facility. It did not alter the fact that he was operating on the basis of the certificate in its precise terms and whether Insp O'Sullivan or some other member was in place did not affect that. The only thing that was missing was agreement by local management to the conditions but that did not affect the regime under which Sgt Barry was operating.

The chief superintendent and superintendent felt that they had been left to their own devices to deal with a problem and that they got no help either from HRM or from the Garda Occupational Health Service, to whom they had appealed. C/Supt Dillane was firmly of the view that the only solution to the problem was for Sgt Barry to transfer to another garda station. He made repeated efforts to achieve this result by seeking agreement to it, but the sergeant was resolute. He was not moving. The possibility that Sgt Barry might have been willing to move to Mallow Garda Station can be discounted because it is evident to the point of being obvious that the chief superintendent was not aware of it. Whatever the reality as to whether that possibility might have been stated, it did not lodge with C/Supt Dillane.

It is also clear that Sgt Barry is a strong and determined person. He knew what was being proposed and he was sure of his own position. He simply refused to go along with the suggestion that he should transfer. He was never persuaded to do something that he did not want to do. So the situation was that the chief superintendent saw a means of solving the difficult problem that he had and he sought to achieve it by getting Sgt Barry's agreement. But nothing came of his efforts because the sergeant would not agree. Two adults were engaged. Nothing happened. There was no agreement.

The responses of Sgt Barry and of C/Supt Dillane to the medical certificate are at the heart of this investigation. The issues of temporary workplace accommodations and of proposals to transfer Sgt Barry are the most fundamental and substantial issues that the tribunal has had to address. Obviously, the tribunal is not deciding the reasonableness or appropriateness of the different positions, but rather the much more specific questions as to whether C/Supt Dillane engaged in targeting or discrediting of Sgt Barry and whether his conduct is attributable to the complaints made by the sergeant in October 2012.

The tribunal does not accept that these attempts to solve the problem by moving Sgt Barry represented targeting or discrediting. And again, there is nothing to suggest any motivation on the part of the officer by reference to the bullying and harassment complaint. The mere fact that the divisional officer tried to persuade Sgt Barry is not targeting or discrediting.

In regard to the transfer to Fermoy Garda Station, C/Supt Dillane may be criticised for going against the terms of the medical certificate but, in fairness to him, when Dr Oghuvbu said that it would be detrimental for Sgt Barry, C/Supt Dillane applied to withdraw the application to transfer.

It is not surprising that other more specific issues of contention arose.

On 9th April 2013, C/Supt Dillane and Insp O'Sullivan came to Mitchelstown Garda Station and met Sgt Barry with a view to discussing a transfer, which was itself claimed by Mr Barry to be targeting. Another issue arose concerning the reporting of a serious incident, which gave rise to correspondence between the chief superintendent and Supt Comyns that reflected on Sgt Barry.

In April and June 2013 issues arose in regard to leave applications by Sgt Barry, which, like all the other issues, are the subject of detailed consideration in the report. In one case Sgt Barry's application for three days leave was refused in respect of two of the days. He took leave for the three days on the basis of *force majeure*, indicating that he did so because of family illness. This was the subject of an investigation that cleared Sgt Barry but that he contends represented targeting. Given the state of relations between local management and Sgt Barry it is scarcely surprising that the situation was viewed with some unease.

On a subsequent occasion Sgt Barry sought sanction for annual leave for his family holiday and correspondence took place in regard to cover for Sgt Barry's absence. He acknowledged in evidence that despite efforts on his part he had been unable to provide cover for each of the dates of his proposed holiday. He nevertheless went on holiday.

It is unnecessary to describe all the issues in this summary, but two incidents should be mentioned.

Sgt Barry was involved in the investigation of an allegation of rape and a case conference was arranged for Monday 2nd February 2015, having being adjourned from the previous Friday to suit the availability of investigating members. Supt Comyns attended in Mitchelstown Garda Station and chaired the conference. Sgt Barry maintained that he had not been notified of either the Friday date or the new date. The member who was assigned to notify parties including Sgt Barry maintained that he had done so and gave evidence to the tribunal to that effect. He also testified that he had freshly recalled when thinking about his evidence that he had seen and spoken to Sgt Barry at the garda station on the day of the conference. Mr Barry denied that. However, Mr Barry acknowledged that he noticed the superintendent and members attending for the conference and he also candidly acknowledged that even if he had been notified, he would not have attended.

The superintendent checked whether Sgt Barry was notified and when that was confirmed he reported the non-attendance to C/Supt Dillane. He in turn referred to this in communication with Mr John Barrett, Executive Director, Human Resources and People Development (HRPD) and the contents of his letter gave rise to an allegation of targeting.

The final chapter in the story of the relations between Mr Barry and C/Supt Dillane concerns the certificate of service issued on foot of the chief superintendent's assessment following Mr Barry's retirement. Mr Barry's complaint concerned not the final certificate – which classed his service as 'exemplary' – but a previous recommendation by the officer that the service should be deemed 'very good', which is a step below 'exemplary'.

In addition to the complaints about C/Supt Dillane, Supt Comyns and other officers come in for criticism, by which is meant allegations of targeting or discrediting by reference to Sgt Barry's complaints. First is C/Supt Kehoe, who investigated the bullying and harassment complaint made by Sgt Barry and the allegation of criminal misconduct by Supt Comyns. The chief superintendent also examined whether there was a breach of the garda discipline regulations. This officer is the subject of an allegation that these investigations were delayed and thereby targeted and discredited Sgt Barry. Secondly, Supt Quilter is the subject of an allegation that he was instrumental in having Supt Comyns take charge of a major golf tournament at Fota Island Resort Golf Club at which Sgt Barry was required to attend on two of the four days over which it ran.

The tribunal is not empowered to investigate the protected disclosure itself. In this case that means it cannot enquire into Mr Barry's original allegation that his superintendent interfered with a criminal investigation. In respect of the central causes of conflict its task is not to say whether the concerns of the chief superintendent and the superintendent about the conditions in the medical certificate were correct or justified. It would be relevant if such concerns were contrived or manufactured but that is not suggested and simply does not arise on the evidence. Similarly, with the temporary workplace arrangements and the transfer efforts of C/Supt Dillane, the tribunal is not attempting to determine whose position is correct, and is not permitted to do so.

This report concludes that the tribunal is satisfied that Sgt Barry was not targeted or discredited by senior members of An Garda Síochána following the making of a protected disclosure.

CHAPTER 21

GENERAL NOTE AND APPROACH TO RECOMMENDATIONS

Complaints under Term of Reference [p]

Following the publication of reports in respect of terms of reference [a] to [o] and the appointment of a Chairperson to the division of the tribunal dealing with term of reference [p], substantive enquiries commenced in respect of fifteen complaints received by the tribunal.

Six complaints were either withdrawn or not pursued by the complainant. Five were withdrawn at a relatively early stage of the tribunal's enquiries but one was only withdrawn following extensive preliminary enquiries.

Six further complaints were rejected by the tribunal as not admissible in accordance with its interpretation of term of reference [p]. These complaints were the subject of varying degrees of preliminary enquiries with some involving extensive discovery orders, investigator interviews and private preliminary hearings.

Thus, of the fifteen complaints to the tribunal, three proceeded to public hearings. These are the cases of Garda Nicholas Keogh, retired Sergeant William Hughes and Mr Paul Barry.

Difference between Terms of Reference [a] to [o] and Term of Reference [p]

The terms of reference contain marked distinctions between the fifteen subjects listed in paragraphs [a] to [o] and the contents of the final paragraph, which is [p]. The first tranche is couched in quite specific directions, by contrast with the general nature of [p]. It is clear that the legislature considered that it was prescribing an inquiry to be conducted in two separate and distinct phases, if not in effect two inquiries. The terms of reference specified that Mr Justice Peter Charleton was to conduct the first one as sole member and when that was done he was given the option of handing over the conduct of the mandate under term [p] to another judge. That is actually what happened, but not precisely or technically as originally provided.

Following amendments made to the original terms of reference, a retired judge – the former president of the Court of Appeal Mr Justice Sean Ryan – was appointed to the tribunal and thereafter Mr Justice Charleton appointed him to deal with term of reference [p]. It is quite clear therefore that the Oireachtas envisaged a different process for dealing with the sixteenth term of reference.

Whereas the first phase of the Inquiry refers to identified persons, term of reference [p] contains an implicit invitation to any member of a defined cohort of gardaí who considered themselves to be comprised in the specified category. That is, that they alleged they were targeted or discredited with the knowledge or acquiescence of senior members of An Garda Síochána following the making by them of protected disclosures alleging wrongdoing within the force.

The open nature of the category of members to whom term of reference [p] was available contrasted with the narrowness of the specific concern of the Oireachtas, which was directed to the treatment of whistleblowers after they made revelations or allegations of wrongdoing in the force. In the result, complaints of targeting or discrediting in general were inadmissible unless they were causally related to a protected disclosure. This very significant confinement obviously limited the jurisdiction of the tribunal under this term of reference. However, despite the specificity of the question, as the detailed chapters of the report demonstrate, the nature of the inquiry process leading to the answer to the question was very extensive.

The fact that the tribunal did not uphold allegations of targeting or discrediting that happened after, and by implication because, the member made a protected disclosure limits the opportunity for making recommendations based on the findings of the investigations. This was not an inquiry into something that went wrong, seeking explanations and possibly assigning responsibility to persons or bodies. The mandate specified the particular set of conditions to be investigated in each case.

The Specific Question

The tribunal in this phase was directed to a very specific question in each case under term of reference [p], namely: did named senior officers in the particular circumstances target or discredit the member in the manner alleged because of the making of a protected disclosure alleging wrongdoing in the force?

In the light of Sergeant Maurice McCabe's allegations the Oireachtas was concerned that Garda whistleblowers might have been victimised because they revealed wrongdoing in the force, and that such mistreatment might have been condoned by senior officers. That is the focus of term of reference [p].

Conduct that might be considered questionable or unreasonable or unfair was not within the tribunal's remit unless it could be causally related to a protected disclosure.

The complaint made by Mr Barry was not that colleagues other than specified senior officers victimised him; he confined his allegations to specific superior officers, claiming that they victimised him because he had made a protected disclosure.

The tribunal was confined by its terms of reference to the specific question set out above.

In this case of Mr Barry there was an underlying ground of complaint that was not frivolous or vexatious, that was the subject of a protected disclosure and that he firmly and genuinely believed. The examination of this underlying complaint was outside the jurisdiction of the tribunal.

As a result of its detailed investigation, the tribunal was not satisfied that the officers accused of targeting and discrediting Mr Barry behaved in a manner defined by the Oireachtas in term of reference [p].

In light of the findings on the specific complaints made by Mr Barry, the question of preventing similar happenings recurring does not arise.

Some suggestions based on the tribunal's experience are nevertheless put forward, as matters that arose in the course of the proceedings, for consideration by An Garda Síochána and other appropriate relevant bodies. But it should be remembered that these proposals are essentially advanced for the purpose of consideration.

Recommendations

The tribunal has absolved the senior officers from the charges that Mr Barry made, as appears from the chapters where his detailed allegations are reviewed in light of the evidence. It follows that the tribunal does not come to the question of recommendations with condemnations of conduct and suggested measures as to how to eradicate misconduct.

But some issues have emerged that the tribunal considers merit consideration. For the most part, the tribunal does not go further than raising matters to be considered because it has not had evidence in respect of proposals that might guide conduct in the future.

In the earlier report of the case of Garda Nicholas Keogh, the tribunal set out recommendations that appeared to arise from the hearings in that investigation. The tribunal refers back to them by way of reminder and now sets out its suggestions bearing the above reservations in mind.

Work-Related Stress

It is apparent that the existing regime in respect of work-related stress is in need of clarification.

Consideration should be given to providing clarity as to who is the final decision maker when a member cites work-related stress as constituting an injury on duty. Clear criteria should be established to enable the decision maker to make prompt, consistent and transparent determinations. In particular, the role of the Chief Medical Officer (CMO) should be clarified.

Consideration should be given to requiring all applications for a certificate pursuant to Code 11.37 to be considered centrally by Human Resources and People Development (HRPD), with HRPD outlining what precisely is to be investigated in a particular work-related stress investigation.

Consideration should also be given to such work-related stress investigations being carried out by personnel from Human Resource Management or under their direction and independent of divisional/district management where local stressors are alleged.

A point that arises clearly from this Inquiry is the importance of keeping relevant parties informed of the progress of a work-related stress investigation. This can operate to generate confidence in the process and to dispel unwarranted suspicion and unease in what can be a difficult process for the member.

Bullying and Harassment Policy

The tribunal has been informed that the current Garda Síochána policy and procedures document for dealing with harassment, sexual harassment and bullying: *‘Working Together To Create A Positive Working Environment’* is under review.

If not already considered as part of this process, the tribunal recommends that the 28-day time frame for an investigator to complete his/her investigation should be reviewed and amended as it is insufficient and inflexible in terms of a reasonable time frame to complete such investigations.

Delay

The series of garda investigations in Mr Barry’s case took a long time to complete. It is true that the delays were explained and the tribunal did not find any targeting or discrediting as alleged by Mr Barry. It is also true that the matters were complex and gave rise to some difficult procedural concerns. Nonetheless, the tribunal is of opinion that this is an area requiring reform. It may seem anomalous for the tribunal to recommend that more time be given to bullying and harassment investigations but it is obviously important that all investigations be brought to expeditious conclusions. Long delays are unsatisfactory, potentially prejudicial and distressing for persons concerned.

One way to improve the situation may be to reduce the burden of ordinary, routine work that investigators have to contend with in addition to internal processes by redistributing their usual tasks. Whether there should be a separate internal affairs division to investigate criminal and disciplinary matters is a matter of policy for the garda authorities and the tribunal is not in a position to advise on it.

Appendix 1

OPENING STATEMENT OF THE DISCLOSURES TRIBUNAL ON THE 11TH APRIL 2019

Introduction

The Disclosures Tribunal was established by Ministerial Order on the 17th February 2017 to inquire into definite matters of urgent public importance which were set out in 16 Terms of Reference listed from [a] to [p]. The instrument appointed Mr Justice Charleton as the Sole Member and it directed that the inquiry be carried out in two modules, the first dealing with terms from [a] to [o] and the second dealing with term of reference [p].

The first module concerned Sergeant Maurice McCabe, Garda Keith Harrison and Tusla. Mr Justice Charleton completed his inquiry into these matters and submitted reports on the 30th November 2017 and the 11th October 2018.

The instrument of appointment and the Resolutions on which it was founded envisaged that the second module of the inquiry, dealing with issues under term of reference [p], might be carried out by a judge other than Mr Justice Charleton if he indicated a wish for that to happen when he had inquired into terms [a] to [o]. The judge notified the Government that he did wish to be replaced for term of reference [p] and new Resolutions were in due course passed by Dáil Éireann and Seanad Éireann providing for my appointment as a member of the tribunal.

Because Mr Justice Charleton had a continuing role dealing with costs in relation to the inquiry into terms [a] to [o], the amending Resolutions provided that he remain as overall chair of the tribunal. He then appointed me as chair of the inquiry into term of reference [p]. These various resolutions and instruments are available on the tribunal's website.

Term of reference [p] is as follows:

To consider any other complaints by a member of the Garda Síochána who has made a protected disclosure prior to 16th February, 2017 alleging wrong-doing within the Garda Síochána where, following the making of the Protected Disclosure, the Garda making the said Protected Disclosure was targeted or discredited with the knowledge or acquiescence of senior members of the Garda Síochána.

In this opening statement I want to say a word about the inquiry generally, publish the tribunal's interpretation of term of reference [p], make some general comments and refer to upcoming hearings.

Public Inquiry Function

In a judgment of the Supreme Court in July 1998,¹ Chief Justice Hamilton said that:

...the principal function of such Tribunals has been to restore public confidence in the democratic institutions of the State by having the most vigorous possible enquiry consistent with the rights of its citizens into the circumstances which give rise to the public disquiet.

The Court also said:

The essential purpose ... for which a Tribunal is established under the 1921 Act is to ascertain the facts as to the matters of urgent public importance which it is to enquire into and report those findings to parliament or the relevant Minister.

The Chief Justice outlined the stages of a tribunal of inquiry as follows:

- (1) *A preliminary investigation of the evidence available;*
- (2) *The determination by the Tribunal of what it considers to be evidence relevant to the matters into which it is obliged to enquire;*
- (3) *The service of such evidence on persons likely to be affected thereby;*
- (4) *The public hearing of witnesses in regard to such evidence and the cross-examination of such witnesses by or on behalf of persons affected thereby;*
- (5) *The preparation of a report and the making of recommendations based upon facts established at such public hearing.*

In this inquiry, the steps in the full consideration of a complaint begin with the additional task of determining admissibility. Then there is the work of assembling documentary materials, using the legal process of discovery as necessary, identifying relevant witnesses and obtaining statements and defining the issues, before embarking on preparations for hearings, with all the procedural measures the law dictates for the protection of rights.

These observations may help to explain why tribunals are lengthy and costly no matter how efficiently they are administered. The visible element of an investigation,

¹ Haughey v Moriarty [1999] 3 IR 1

when public hearings take place, represents a small fraction of the body of work that they do. The task of this tribunal in preparing for the hearing of an admissible complaint may be likened to a legal firm preparing the cases of all the litigants in a multi-party and multi-issue case.

It will also be apparent that the tribunal is dependent on the co-operation of participants and other parties and witnesses in carrying out its work. This co-operation includes compliance with discovery of documents requests or orders, providing statements and responding to queries as well as facilitating tribunal investigators in conducting their interviews.

Term of Reference [p] and Interpretation

The tribunal gets its jurisdiction from the terms of reference and only from them. It has no inherent or independent capacity to investigate or, in the words of term of reference [p], to consider any complaint unless it comes within the reference term.

In the judgment cited above, the Supreme Court adopted a passage from the 1966 Salmon Report in England about the interpretation of the terms of reference as a correct statement of the law and practice applicable to tribunals of inquiry in this jurisdiction:

The tribunal should take an early opportunity of explaining in public its interpretation of its terms of reference and the extent to which the inquiry is likely to be pursued. As the inquiry proceeds, it may be necessary for the tribunal to explain any further interpretation it may have placed on the terms of reference in the light of the facts that have emerged.

The tribunal's interpretation of its mandate under term of reference [p] is explained in this statement and it may be summarised as follows. The essence of this reference is that the tribunal is to consider complaints made by persons who, as members of An Garda Síochána, made protected disclosures before the relevant date and who allege that they were thereafter targeted or discredited with the knowledge or acquiescence of officers of superintendent rank or higher.

A complaint in the meaning of paragraph [p] is a written communication made to the tribunal by an individual who maintains that he or she was victimised in the specific manner described in [p].

An essential condition of admissibility under heading [p] is that the garda concerned made a protected disclosure prior to the date when the Tribunal was established. Any later events are excluded from consideration by this body as a matter of jurisdiction.

What is a protected disclosure? This is the kind of report of wrongdoing that is the subject of the Protected Disclosures Act, 2014. The reference at [p] is to a disclosure as defined in the Act. If a report does not come within the statutory definition, it is excluded because the tribunal does not have any jurisdiction to consider it. The Act specifies the content of the disclosure and the persons and bodies to whom it is made and it is not intended to set out or summarise its provisions in this introductory statement. The legislation should be consulted for the full terms, the interpretation of which may require to be determined in a particular case. Subject to that reservation, for present purposes it is sufficient to say that a protected disclosure includes a report to an appropriate person or body by a garda of wrongdoing in the force that constitutes an offence in law or a failure to comply with a general (not merely a contractual) legal obligation and that came to the garda's attention in course of work. The 2014 Act provides safeguards for whistle-blowers whose reports of wrongdoing comply with these statutory conditions. It is noteworthy that the 2014 Act applies to a qualifying disclosure whether it was made before or after the legislation was enacted.

An important limitation on any consideration by the tribunal is that the focus of the mandate, and therefore the tribunal, is not on the wrongdoing reported in the disclosure, no matter how serious the allegations, but rather on the conduct towards the garda subsequent to the disclosure. While these matters may not in particular circumstances be sealed off in discrete compartments and there may be some elements of overlap, the focus of any inquiry is clearly defined in term of reference [p].

Another essential jurisdictional requirement under term of reference [p] is that the targeting or discrediting directed towards the whistle-blower after the disclosure was condoned or tolerated or known about by senior members of An Garda Síochána. The tribunal notes the context of [p] in relation to the other terms of reference of the tribunal, the majority of which directed an investigation into grave allegations of misconduct against senior garda management in relation to Sergeant Maurice McCabe. We may take it that the Oireachtas was concerned to ascertain whether there were other gardaí in a similar situation to Sgt McCabe who maintained that they were victimised because they spoke out about wrongdoing in the force and that senior officers knew about it or acquiesced in it. So members who made protected disclosures reporting serious malpractices and were subsequently targeted or discredited with official or senior condonation were intended to be covered.

In his opening statement at the first phase dealing with terms of reference [a] to [o], Mr Justice Charleton defined “discredit” within the meaning of the inquiry as including the fostering of disparagement, mistrust, suspicion, disbelief or otherwise to convey or cause reputational damage in a personal and/or professional sense.

“Targeted” meant abuse or criticism directed at a person. He also defined “senior members of the Garda Síochána” as being officers of the rank of superintendent and above, as well as anybody acting in those capacities. The tribunal adopts those definitions for this phase.

The gardaí to whom term of reference [p] applies, i.e. individuals whose complaints may be considered by the tribunal, are persons who, as members of An Garda Síochána, made protected disclosures before the 16th February 2017 and who allege that they were thereafter targeted or discredited with the knowledge or acquiescence of officers of superintendent rank or higher. While a close, literal reading of term of reference [p] may suggest that complaints could only be received by the tribunal from serving gardaí, the tribunal is satisfied that it has construed the true intention of the Oireachtas and that such a narrow interpretation would be unreasonable and impracticable and inconsistent with the intention of the legislature. Therefore, the tribunal is considering complaints from both serving and retired members of An Garda Síochána.

However, there is no reason to think that the Oireachtas intended that this module of the tribunal should embark on a historical investigation of every case of a garda who believed he or she was victimised because of making a complaint of serious misconduct. If a major historical inquiry was envisaged, it would have been charted in more than a brief, final term of reference and in clear language. This view is supported by analysis of the debates in the Houses on the Resolutions establishing this inquiry. The warrant contained in the terms of reference does not require or justify an open-ended consideration of complaints from serving or retired gardaí.

In a public statement in November 2017 the tribunal called for receipt of complaints, stating:

The tribunal is also carrying out a scoping exercise on term of reference (p), as to any targeting or discrediting of any Garda “who has made a protected disclosure”. The tribunal is calling for any Garda who made such a protected disclosure prior to 16 February 2017, who has not already done so, to provide a statement to it by the latest 18 December 2017.

Term of reference [p] does not specify a time frame for complaints. However, the tribunal is in existence to address urgent matters of public importance and is obliged to complete its work expeditiously. It is therefore impractical for the tribunal to issue a general invitation for new submissions of complaints to add to those already notified but neither can it be said that the door is closed in all circumstances.

It remains to refer to a key component of the mandate set out in term [p], which is “*to consider*”. The terms of reference as a whole mandate the tribunal “*to investigate*” specified matters in thirteen terms of reference and “*to examine and consider*” in two terms of reference. On only one occasion, in reference [p], is the simple verb “*to consider*” employed. It is apparent from the context of this tribunal and from the meaning of the word that “consider” allows for an investigation of a complaint but does not require that.

“*Consider*” in context implies a wide discretion as to the mode of examination and indeed it is a decision for the tribunal whether to proceed with a complaint, even if it complies with the admissibility requirements of reference [p]. Issues of justice, practicability or expediency may make it inappropriate to proceed with a complaint. For example, many of the persons involved may be deceased in a case that depends on personal recollection and testimony. It may be impossible to conduct a thorough consideration of a complaint for a variety of reasons. On the other hand, it might be possible to consider a complaint in a compact, focused format.

Consideration of some cases will focus primarily or exclusively on admissibility questions. The tribunal interprets its function under [p] as giving a wide discretion as to what complaints to examine and as to the mode of consideration while being alert at all times to the stringent constitutional and legal requirements of fair procedures.

Procedures

The tribunal has published its scheme of procedures which as stated therein are not rigid canons to be applied in all circumstances, irrespective of practicality or justice. They may have to be altered in particular situations where they might otherwise be unfair or unreasonable or unsatisfactory. To revert to Hamilton CJ speaking for the Supreme Court in the seminal case cited above, he referred to the constitutionally protected guarantee of basic fairness of procedures and endorsed the following authority:

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth.

Questions of relevance of issues, evidence and witnesses will as far as possible be addressed in private session in advance of hearings in order to respect the rights of persons affected.

General Comments

As mentioned in the interpretation, it is a cardinal principle of inquiries that the terms of reference define the jurisdiction of the tribunal. It is not a matter of choice; the inquiry simply does not have any legal competence to investigate matters that are outside its terms of reference.

It is understandable that some persons making complaints to the tribunal may be disappointed to find that it is not possible to investigate their grievances because they are not within the tribunal's remit and therefore inadmissible. Gardaí whose complaints are considered admissible may also be unhappy because some substantial or significant part of their allegations is not the subject of investigation or a public hearing. Legal advisers will no doubt apprise their clients of the legal constraints on a public inquiry such as this. If we were to trespass outside our limited zone of jurisdiction it would be open to anybody affected by the investigation to get an order from the High Court prohibiting it. But fear of litigation is not a factor; the reality is that no tribunal would intentionally engage in a process when it was not authorised to do so.

I recognise that it may be difficult for parties to exercise the necessary restraint in this matter and for lawyers to resist the urgings of their clients but it is not a matter of choice. The person making the complaint may well be disappointed that the original allegation is not being examined to establish the truth one way or the other. The tribunal however does not have the legal capacity to embark on such an investigation. That is not what the Oireachtas has specified in the terms of reference. It is important I think to make this clear so that there is no misunderstanding.

There would be serious potential injustices if the consideration of a complaint trespassed into unauthorised areas. If criticisms are made of persons, the tribunal has the dilemma of how to respond in a manner that reflects fairness as well as legality. Suppose, for example, that criticism were to be levelled in respect of an inadmissible allegation against persons not involved in the tribunal's consideration. The tribunal is not permitted to embark on an inquiry into the matter. If the tribunal report offers a view on the criticism it will have done so on the basis of inadequate evidence. The factual basis of the complaint may be strongly, even vehemently, held by the complainant but that does not make it admissible; moreover, engaging with the inadmissible element or even having a battle over admissibility is fraught with unsatisfactory outcomes.

Considerations of admissibility also apply to the preliminary analysis of complaints. If the case as put by the person applying to the tribunal cannot fit within the term of reference then it is not legally possible for it to be considered. The tribunal does not

apply a test of validity or credibility to a complaint in order to decide admissibility. The tribunal does not adopt an overly-technical approach at this preliminary stage and will direct further inquiries to be made, if necessary by assigning tribunal investigators to interview the complainant, in order to clarify any doubtful point on admissibility. The tribunal also takes the view that in a doubtful or debatable case it may be appropriate to seek legal submissions on the question of admissibility.

The terms of reference assign the tasks that the tribunal is required to accomplish. It is for the tribunal itself to identify the specific issues it will address in achieving this objective.

The Present Position

The tribunal's legal team is preparing for the first cases that will be the subject of public hearings. The tribunal is anxious to proceed as expeditiously as possible, bearing in mind the importance and urgency of the issues but it is imperative not only to respect fair procedures but also to be sure that all appropriate preparatory inquiries have been made. The measures outlined in the scheme of procedures previously published on the tribunal's website are designed to ensure that participants in the tribunal's work are afforded all necessary facilities.

Other persons who have made complaints to the tribunal have been notified of this preliminary session but there is no obligation on them to attend, although they are of course most welcome to do so.

This is not an occasion for applications for legal representation. The tribunal deals with applications for legal representation by correspondence as far as possible. If it becomes necessary to have a hearing in public on such an issue that will be arranged in due course with a specific agenda. Anybody seeking legal representation in respect of any part of the tribunal's work, who has not already done so, should write to the tribunal setting out the reasons why representation is sought and the nature of the representation requested.

We have received applications for legal representation and we are dealing with these on an individual basis and in correspondence. The granting of representation and the consequential right of audience before the tribunal does not in any way determine the level of representation that any party wishes to have. That is a matter for each party. It is further not an order for costs in respect of any party. The grant of legal representation does not mean that costs will automatically be paid and any application for an award of legal costs must be made at the conclusion of the tribunal in accordance with the relevant legislation.

Timescale and Schedule

The tribunal is planning to embark on considering the first complaint in late June 2019. Other cases will follow later in the year and, as I anticipate, into 2020.

The tribunal will also address issues of admissibility and notify persons who made complaints of the decisions. We will proceed with our mandate as expeditiously as possible, consistent with observance of fair procedures.

Appendix 2

SCHEDULE OF ISSUES IN THE CASE OF MR BARRY

1. **Is there an issue as to whether retired Sergeant Paul Barry made a protected disclosure on any one or more of the following dates?**
 - a. 2nd October 2012 (Bullying and Harassment complaint)
 - b. 16th February 2015 (Transfer appeal)
 - c. 17th February 2015 (Minister for Justice and Equality)
 - d. 24th June 2015 (Complaint to Superintendent, Fermoy)
 - e. 24th June 2015 (Minister for Justice and Equality)
 - f. 11th October 2015 (Transfer appeal)
 - g. 20th January 2016 (Minister for Justice and Equality).

2. **Are complaints in respect of events prior to 2nd October 2012 excluded from consideration by the tribunal because they are inadmissible?**

3. **Supt Michael Comyns and/or C/Supt Gerard Dillane:**

Did Supt Michael Comyns and/or C/Supt Gerard Dillane target or discredit Sgt Barry as he alleges in any one or more of the following circumstances because he had made a protected disclosure –

 - a. by treating his sick leave as ordinary illness and not work-related illness, resulting in loss of pay to which Sgt Barry was entitled?
 - b. by failing to make proper temporary workplace accommodations for Sgt Barry to which he was entitled?
 - c. by failing to carry out an investigation into his work-related stress?
 - d. by pressurising Sgt Barry to agree to transfer to another station against his will?
 - e. by causing Insp Anthony O’Sullivan to attend at Mitchelstown Garda Station in full uniform at approximately 9 pm on a date between 29th March 2013 and 9th April 2013 and request Sgt Barry to provide a return to work certificate?
 - f. by causing Insp O’Sullivan to make inappropriate enquiries from Sgt Barry’s General Practitioner, Dr Margaret Kiely, on 5th April 2013?

- g. by confronting Sgt Barry in the car park of Mitchelstown Garda Station on 9th April 2013?
- h. by making implicit criticism of Sgt Barry including requiring him to make a report in respect of a fatal fire that occurred on 9th April 2013?

4. C/Supt Gerard Dillane:

Did C/Supt Dillane target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- a. by refusing to issue a certificate of service for him?
- b. by classifying Sgt Barry’s service as ‘very good’ instead of ‘exemplary’?
- c. by scheduling Sgt Barry for duty at the Irish Open Golf Championship at Fota Island together with Supt Comyns in June 2014?
- d. by alleging that Sgt Barry was to be faulted for non-attendance at a case conference on 2nd February 2015 in respect of an alleged rape when he had not been notified about the conference?
- e. by directing/condoning the announcements in HRM bulletins and on PULSE that Sgt Barry had been transferred when that was not the case and when it was well known that Sgt Barry had refused transfers?
- f. by accusing Sgt Barry of inciting Sgt Jerry Quinn to resurrect a complaint concerning the planting of drugs in Mallow by a garda?
- g. by writing to Sgt Barry while he was on sick leave, requesting submission of Sgt Barry’s protected disclosure directly to him?
- h. by sanctioning disciplinary proceedings against Sgt Barry in respect of emergency family leave between 15th and 17th April 2013?
- i. by stating in a letter to Mr John Barrett dated 7th August 2015 that Sgt Barry was having a negative effect on policing in the Fermoy District?

5. Supt Michael Comyns:

Did Supt Comyns target or discredit Sgt Barry as he alleges because he made a protected disclosure –

- a. by refusing to authorise his annual leave application in May 2013?
- b. by initiating disciplinary proceedings under Regulation 14 of the Garda Síochána (Discipline) Regulations, 2007 against Sgt Barry in respect of emergency family leave – “force majeure leave” – between 15th April and 17th April 2013?

- c. by requiring Sgt Barry to apply to Insp O’Sullivan or Supt Comyns for certification of Haddington Road hours?
- d. by changing Sgt Barry’s unit and personnel following his complaint about the conduct of a garda at Mitchelstown Garda Station?

6. C/Supt Catherine Kehoe:

Did C/Supt Kehoe target or discredit Sgt Barry as he alleges –

- a. by taking an inordinate time to complete her investigation?
- b. by dealing with Sgt Barry’s bullying claims before his allegations about the sexual assault investigation?
- c. by not informing the complainant of sexual assault of her investigation and Sgt Barry’s complaint, despite having been instructed by the Director of Public Prosecutions to do so?
- d. by sending private and confidential letters addressed to Sgt Barry to Angelsea Street Garda Station, Cork including one referring to taking his fingerprints for the purposes of elimination, and one identifying the suspect?
- e. by cancelling an appointment between Inspector Paul O’Driscoll and Sgt Barry so as to exclude a denial Sgt Barry wished to make of something Supt Comyns had said about arresting the sexual assault suspect?
- f. by unreasonably and irrationally arriving at a preconceived conclusion to dismiss the grave allegations made by Sgt Barry?

7. A/C Fintan Fanning and C/Supt John Grogan: Did A/C Fanning and/or C/Supt Grogan target or discredit Sgt Barry because he made a protected disclosure by referring his query or request as to temporary workplace accommodations to Assistant Commissioner Anthony Quilter notwithstanding the latter’s connection with persons relevant to the protected disclosures?

8. Supt John Quilter: Did Supt John Quilter target or discredit Sgt Barry because he made a protected disclosure by facilitating the presence of Supt Comyns at the Irish Open Golf Championship at Fota Island in June 2014?

Dated: 28th April 2022

Appendix 3

Disclosures Tribunal Personnel

Sean Ryan, Tribunal Chairman

Diarmaid McGuinness, Senior Counsel

Patrick Marrinan, Senior Counsel

Sinéad McGrath, Barrister-At-Law

Ciara Walsh, Solicitor

Emma Toal, Barrister-At-Law, Documentary Counsel

Lalita Pillay, Barrister-At-Law, Documentary Counsel

Peter Kavanagh, Registrar

Ian Murphy, Office Manager

Carl Ryan, Investigator (courtesy of the Garda Síochána Ombudsman Commission)

Orla Doolin, Legal Researcher

Susan McCormack, Administration

Stenographers to the Tribunal:

Gwen Malone Stenography Services

Niamh Kelly

Proofreader to the tribunal:

Pat Neville

The tribunal also expresses its gratitude to all former staff:

John Davis, former Solicitor

Phillip Barnes, former Office Manager

Joanne O'Donohue, former Investigator

Retired Detective Inspector Maura Walsh, former Investigator

Ella Woolfson, former Legal Researcher

Brenda Byrne, former Administrator

Appendix 4

Parties represented before the tribunal

For Mr Paul Barry:

Shane Costelloe, Senior Counsel
David Perry, Barrister-at-Law
Lydia Daly, Barrister-at-Law
Instructed by Michael Kelleher Solicitors

For Superintendent Michael Comyns:

Mark Harty, Senior Counsel
John Ferry, Barrister-at-Law
Instructed by O'Mara Geraghty McCourt Solicitors

For Retired Superintendent John Quilter:

Paul Carroll, Senior Counsel,
Breffni Gordon, Barrister-at-Law
Instructed by M.E. Hanahoe Solicitors

For Former Assistant Commissioner Fintan Fanning, Inspector Anthony O'Sullivan, Superintendent Edmund Golden and Retired Sergeant Aidan Dunne:

Paul McGarry, Senior Counsel
Patrick O'Brien, Barrister-at-Law
Instructed by Seán Costello & Company Solicitors

For Garda Rosemarie O'Connell and Garda Henry Ward:

James Kane, Barrister-at-Law
Instructed by Hughes Murphy Solicitors

For the Commissioner of An Garda Síochána, other senior members of An Garda Síochána:

Shane Murphy, Senior Counsel
Mícheál P. O'Higgins, Senior Counsel
John Fitzgerald, Senior Counsel
Donal McGuinness, Barrister-at-Law
Shelley Horan, Barrister-at-Law
Kate Egan, Barrister-at-Law
Instructed by the Chief State Solicitor's Office

For Mr John Barrett:

Helen Callanan, Senior Counsel
David Byrnes, Barrister-at-Law
Instructed by Noble Law Solicitors

Appendix 5

Witnesses who appeared before the tribunal:

17, 19, 20, 24, 25, 26 and 27 May 2022

Mr Paul Barry

31 May and 1 June 2022

Superintendent Michael Comyns

1, 2 and 3 June 2022

Retired Chief Superintendent Gerard Dillane

3 June 2022

Retired Superintendent John Quilter

14 June 2022

Retired Chief Superintendent Catherine Kehoe

Inspector Anthony O'Sullivan

16 June 2022

Inspector Anthony O'Sullivan

Retired Detective Garda James Fitzpatrick

21 June 2022

Former Assistant Commissioner Jack Nolan

Dr Margaret Anne Kiely

Superintendent Edmund Golden

Retired Sergeant Aidan Dunne

Retired Inspector Michael Gallagher

22 June 2022

Mr John Barrett, Executive Director HRPD

Sergeant Jeremiah Quinn

Dr Oghenovo Oghuvbu

Mr Paul Barry

Appendix 6

Tribunal timeline in the case of Mr Paul Barry

16th February 2017	Resolutions passed by Dáil Éireann and Seanad Éireann.
17th February 2017	The tribunal was established by the Minister for Justice and Equality under the Tribunals of Inquiry (Evidence) Act, 1921 by instrument. This instrument appointed Mr Justice Peter Charleton, Judge of the Supreme Court, as sole member of the tribunal.
19th May 2017	First interim report.
4th July 2017	Tribunal commenced hearing evidence on terms of reference [n] and [o].
24th November 2017	Tribunal issued public notice seeking complaints under term of reference [p].
30th November 2017	Second interim report of the tribunal on terms of reference [n] and [o].
22nd June 2018	Tribunal concluded hearing evidence on terms of reference [n] and [o].
11th October 2018	Third interim report of the tribunal on terms of reference [a] to [o].
13th and 29th November 2018	Resolutions passed by Dáil Éireann.
14th and 29th November 2018	Resolutions passed by Seanad Éireann.
7th December 2018	The Minister for Justice and Equality, by Instrument, appointed Mr Justice Sean Ryan, Former President of the Court of Appeal, to be a member of the Disclosures Tribunal.
11th December 2018	Mr Justice Peter Charleton determined that Mr Justice Sean Ryan be Chairperson of a division of the tribunal to continue and conclude that work of the tribunal comprised in term of reference [p].
8th March 2019	Tribunal published 'Procedures of the Tribunal in relation to Term of Reference [p]' on its website.

11th April 2019	Opening statement of the tribunal in respect of term of reference [p].
14th October 2019	Tribunal commenced hearing evidence for the first complaint considered under term of reference [p] in a public hearing concerning Garda Nicholas Keogh of Athlone Garda Station.
8th July 2021	Fourth interim report of the tribunal in the Case of Garda Nicholas Keogh.
20th December 2021	Private case management hearing in respect of the case of Mr Paul Barry, formerly Mitchelstown Garda Station.
1st February 2022	Tribunal commenced hearing evidence for the second complaint considered under term of reference [p] in a public hearing concerning retired Sergeant William Hughes.
1st March 2022	Tribunal concluded hearing evidence in respect of retired Sergeant William Hughes.
25th April 2022	Private case management hearing in respect of the case of Mr Paul Barry.
17th May 2022	Tribunal commenced hearing evidence for the third complaint considered under term of reference [p] in a public hearing concerning Mr Paul Barry. Day 175 of tribunal hearings: Mr Paul Barry gave evidence.
19th May 2022	Day 176 of tribunal hearings: Mr Paul Barry gave evidence.
20th May 2022	Day 177 of tribunal hearings: Mr Paul Barry gave evidence.
24th May 2022	Day 178 of tribunal hearings: Mr Paul Barry gave evidence.
25th May 2022	Day 179 of tribunal hearings: Mr Paul Barry gave evidence.
26th May 2022	Day 180 of tribunal hearings: Mr Paul Barry gave evidence.

27th May 2022	Day 181 of tribunal hearings: Mr Paul Barry gave evidence.
31st May 2022	Day 182 of tribunal hearings: Superintendent Michael Comyns gave evidence.
1st June 2022	Day 183 of tribunal hearings: Superintendent Michael Comyns and retired Chief Superintendent Gerard Dillane gave evidence.
2nd June 2022	Day 184 of tribunal hearings: retired Chief Superintendent Gerard Dillane gave evidence.
3rd June 2022	Day 185 of tribunal hearings: retired Chief Superintendent Gerard Dillane and retired Superintendent John Quilter gave evidence.
14th June 2022	Day 186 of tribunal hearings: retired Chief Superintendent Catherine Kehoe and Inspector Anthony O’Sullivan gave evidence.
16th June 2022	Day 187 of tribunal hearings: Inspector Anthony O’Sullivan and retired Detective Garda James Fitzpatrick gave evidence.
21st June 2022	Day 188 of tribunal hearings: former Assistant Commissioner Jack Nolan, Dr Margaret Anne Kiely, Superintendent Edmund Golden, retired Sergeant Aidan Dunne and retired Inspector Michael Gallagher gave evidence.
22nd June 2022	Day 189 of tribunal hearings: Mr John Barrett, Sergeant Jerry (Jeremiah) Quinn, Dr Oghenovo Oghuvbu and Mr Paul Barry gave evidence.
22nd July 2022	Final submissions from parties were heard by the tribunal.