

Group Briefing

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Kerins Decision: A Cautionary Tale for Employers

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

The Supreme Court recently ruled that the Public Accounts Committee (the “PAC”) acted outside its remit during the questioning of former Rehab CEO, Angela Kerins. The decision acts as a reminder to employers of the importance of acting within agreed terms of reference when conducting a disciplinary investigation. Failure to do so may amount to a fundamental breach of fair procedures and be detrimental to the entire process.

BACKGROUND

The High Court rejected Ms Kerins' challenge to her treatment before the PAC hearings during the course of its examination of State funding to the Rehab Group in 2014. She appealed the ruling to the Supreme Court. Ms Kerins voluntarily attended the first hearing in February 2014 and alleged that the treatment of her at that hearing resulted in shock, stress and anxiety requiring hospitalization, and an attempt to take her own life.

The PAC denied her claims and argued that it was entitled to scrutinise how public monies are spent, given that Rehab companies were in receipt of approximately €83 million of public monies annually, and that Ms Kerins had received a €240,000 salary. The High Court had said that, due to the separation of powers, the courts could not intervene

in how hearings were conducted before the PAC.

BASIS FOR SUPREME COURT DECISION

On appeal, Mr Justice Clarke, Chief Justice of the Supreme Court, said that a combination of factors led to its finding that it was appropriate for the Court to intervene in this case, namely that:

1. the PAC had acted “*very significantly*” outside its terms of reference;
2. the Committee on Procedure and Privileges (CPP) of the Houses of the Oireachtas had found that the PAC had acted ultra vires and refused to grant compellability powers to the PAC in respect of Ms Kerins' attendance before PAC;
3. there was the possibility that the PAC had engaged in an unlawful and unfair process by acting in a manner

significantly different from the basis on which it had invited Ms Kerins to attend before it; and

4. the Oireachtas had taken no action to deal with these matters.

The Court found that it would be necessary to have a further hearing before the Court of Appeal to decide on related matters. At the time of writing, a decision is awaited relating to the identity of the appropriate defendant, after a finding in the High Court that it was not appropriate, for constitutional reasons, to name the individual members of a committee as defendants; and, secondly, whether it is appropriate to characterise the actions of the PAC “as a whole” as being a “significant and material” breach of the basis on which Ms Kerins was initially invited to appear before it.

ACTING OUTSIDE THE TERMS OF REFERENCE

The Court said that there was no “absolute barrier” to the bringing of proceedings concerning the actions of a committee of the Houses of the Oireachtas. However, it stressed that proceedings could not be properly brought, if to do so would breach the privileges and immunities, conferred by Article 15 of the Constitution, on utterances of members of the Oireachtas, or otherwise amount to an inappropriate breach of the separation of powers.

In the circumstances of this case, the Court was satisfied that it would not be a breach of the separation of powers to declare the actions of the

PAC unlawful in light of the fact it had acted “significantly” outside the terms of reference, a view that the CPP had also reached. The Court said that it is for the Houses of the Oireachtas to confer appropriate functions on its committees but that it is “important” that a committee does not exceed its remit without prior authorisation to carry out the extended remit. The Court went even further, stating “the Committee is not legally entitled to an answer to any question which is not relevant to the proceedings and which is not within its terms of reference”.

When the PAC wrote to Ms Kerins, the letter stated that the PAC was inviting her to appear for the examination of-

“Payments made by the HSE to Rehab under section 39 of the Health Act, 2004.

The operation of the Charitable Lotteries Scheme and payments made to Rehab from the Vote of the Department of Justice and Equality.

Payments made by Solas to Rehab for the provision of Specialist Vocational Training.”

The High Court held that the PAC acted outside these terms of reference in discussing Ms Kerins pay, modes of transport, the company in which her family members were involved etc.

CONSIDERATIONS FOR EMPLOYERS

The Supreme Court’s condemnation of the PAC’s competence creep is a cautionary tale for employers when agreeing and abiding by terms of reference in disciplinary investigations. The judgment makes clear that an

employee, who is the subject of an investigation, may legitimately refuse to answer questions which fall outside the terms of reference. Even where an employee answers such questions, a fundamental breach of fair procedures may exist which could prove detrimental to the entire process.

We recommend that employers:

- (a) Draft terms of reference that accurately reflect the proposed scope of the investigation.
- (b) Agree the terms of reference for the investigation with the employee who is the subject of the disciplinary investigation.
- (c) Abide by the terms of reference that are set or agree any changes with the employee in advance. The terms of reference for an investigation are the roadmap that the employer sets for itself in conducting investigations and disciplinary process. Once the terms of reference are agreed, employers should act within these parameters, as failing to do so may be of itself a breach of fair procedures and may ultimately jeopardize the process. The terms of reference represent the benchmark against which the actions of an employer will ultimately be judged. A critical consideration for employers is appropriately handling additional matters, which could form the basis for allegations not contemplated at the outset of the process, should a process or indeed an outcome flowing from that process be challenged.

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