

'Speaking up and reporting wrongdoing' – the repercussions in An Garda Síochána?



But John Barrett is getting his day in court over an improper investigation of him ordered by Commissioner Drew Harris and endorsed by Minister Charlie Flanagan

By Michael Smith

ON JUNE 30 John Barrett, An Garda Síochána's suspended Executive Director for Human Resources and People Development, secured a High Court order for discovery against the Minister for Justice and the Garda Commissioner. He was also awarded costs.

Barrett, whistleblower, suspended

He had been suspended with pay on in October, 2018. News of his suspension was leaked to the media in advance, and it was widely covered in the broadsheets, social media and on radio and television.

Bizarrely he remains suspended for the 'tone' but not the 'content' of two letters he wrote to the former Acting Garda Commissioner, Donall Ó'Cualáin. In his letters of August 2018 Barrett disclosed serious wrongdoing which he believed was being perpetrated against him.

What happened?

Barrett's impugned 2018 letters argue that a disciplinary 'misconduct' investigation launched against him in May 2018, by Kate Mulkerrins, the Garda's Executive Director of Legal and Compliance, was invalid, not founded upon any complaint and seemed to be retribution for his track record of 'speaking up' as required by the Code of Ethics for An Garda Síochána.

The Acting Commissioner, the recipient of the letters, made no complaint concerning either the tone or the content of the correspondence sent by Barrett to him in August 2018 and as required by the Garda's Protected Disclosures policy, the Acting Commissioner forwarded the letters to the Minister for Justice.

The Mulkerrins' letter of 3 May, 2018, asserted that a complaint had been made against him on foot of a text message he had sent in November 2017 to Assistant Commissioner Fintan Fanning. Mulkerrins

stated that this matter now was considered possible misconduct and warranted investigation under the Civil Service Disciplinary Code.

Barrett was advised that an external investigator, Luán Ó'Braonáin SC had already been appointed. When Barrett requested details of the complaint made and the powers and authority under which Mulkerrins had been empowered to act, his requests were ignored.

In July 2018 Barrett discussed the matter directly with the alleged complainant, Assistant Commissioner Fanning, on two separate occasions. Fanning made clear that he had made no such complaint against him. Instead, he explained, that he had raised a concern about an appeal decision made by Barrett in October 2017 in a recruitment process. Assistant Commissioner Fanning asked at the time that Barrett's decision be reviewed by the Commission for Public Service Appointment (CPSA). Based on this assurance and clarification, Barrett wrote to the Acting Commissioner on 1 August and 20 August 2018, challenging the basis of the Mulkerrins misconduct disciplinary process.

Harris replaces Ó'Cualáin

In September 2018, Drew Harris became Garda Commissioner. Within days he took delivery of two Lever Arch folders presented to him by the Chief Administrative Officer (CAO), Joe Nugent. In October 2018, Barrett was summoned by the Commissioner and presented with a 7-page letter to which he was given 24 hours to reply,

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Garda Commissioner

setting out the reasons why Harris should not recommend to the Minister to suspend him.

While Barrett's legal team asked for time to consider the letter, Harris wrote to the Minister, Charlie Flanagan TD, the following day, seeking Barrett's suspension pending a new investigation.

Harris then established a 'serious misconduct' investigation, which he 'directed' and 'commissioned'. He appointed/reappointed the investigator, Ó'Braonáin. He upgraded the subject of the investigation to serious misconduct such that dismissal became a possible sanction.

Later, even when Harris jettisoned the entire basis of the original misconduct investigation, he maintained that the reduced scope (the 'tone' of letters!) still amounted to 'serious misconduct'.

In this investigation process, Drew Harris assumed the conflicting roles of sole 'complainant' and also 'relevant manager' under the Civil Service Disciplinary Code. The only oral evidence presented to the investigation was from Harris himself.

His evidence related to events which occurred before his appointment and when he was resident in a different jurisdiction. In his evidence he said that he had never spoken to the former Acting Commissioner about Barrett's correspondence.

It was Harris who played the role of 'relevant manager'. In this capacity he considered the eventual report from the investigator (whom he appointed) reciting Harris's own evidence. It was Harris who considered whether the investigator had acted appropriately under the Civil Service Disciplinary Code.

As relevant manager, it was also Harris who decided that Barrett had indeed received due process. This breached the fundamental principle of 'nemo iudex in causa sua'.

In December 2020, and on the back of Harris's satisfaction with the report of the investigator and supposed adherence to the code and due process, the Garda Commissioner wrote to the Minister for Justice recommending that Barrett be dismissed within days of Christmas.

During the disciplinary investigation Barrett sought access to documents and to cross-examine witnesses, both explicitly provided for under the Code.

He sought for matters of protected disclosure, under statute, to be considered so that he could advance his defence. He sought that the factual context and background to his letters be inquired into.

All these applications were denied to him.

Barrett withdrew from the process per the code, for 'good reason' and put matters before the High Court.

But behind the scenes....

In May 2019, the original terms of reference which suggested that Assistant Commissioner

JOHN BARRETT

John Barrett, who was brought in to the Garda from a successful career in business, has an established record of calling out wrongdoing in the Garda.

He drew the attention of the Public Accounts Committee to the astounding financial irregularities in the Garda College in Templemore.

He uncovered the fraud on EU Grant Funds drawn down by the Garda, a matter curiously still 'under investigation' by GSOC more than five years on.

He sought to defend the confidentiality of disclosures made to him by Sergeant Maurice McCabe, for whom he was protected disclosures manager.

Fanning had made a complaint against Barrett was suddenly dropped. The investigator was informed of this by the Commissioner and no further inquiries were made by the investigator as to why this occurred.

Barrett told *Village* he saw this as "vindicating the entire substance of what he wrote even while so much more was kept from view".

Therefore, matters which were only to emerge later concerning interference in the investigation did not come to light then and were not inquired into at the relevant time in the disciplinary investigation.

Bizarrely though, a serious misconduct investigation was maintained based solely on the 'tone' of the letters in which Barrett had called out wrongdoing.

However, no details of Harris's repeated written 'directions' to Assistant Commissioner Fanning between March and May 2019 to breach the Garda Investigative Code were revealed by the Commissioner in his four days of evidence to the Commission.

Only in May 2020 did Barrett and his legal team learn that Harris interfered by formally directing Fanning, the alleged original complainant to breach the Garda policy.

These directions were for Fanning to give a statement of his evidence to the investigation to the Garda side in advance. Harris repeatedly directed Fanning to meet Nugent privately with the Garda legal team at an appointed date and time.

Fanning refused to attend such a meeting citing this 'direction' from Harris would be in contravention of Garda Síochána policy. (HQ Directive 29/2014).

In reply, in a letter of May 2019, the Commissioner admonishes Fanning, saying "I have commissioned the Ó' Braonáin process and it continues under my direction....it is not your role to determine the process by which your alleged serious allegation is investigated".

Further, through FOI Barrett also learned that between January 2018 and March 2020, Nugent and Mulkerrins engaged secretly with the Commission on Public Service Appointments (CPSA) on Fanning's original concern. In correspondence with the CPSA they purported to be conducting a 'fair investigation' into Fanning's concern regarding the recruitment process about which Barrett upheld an appeal made by Garda Christopher Rushe.

No investigation was ever conducted by Nugent or Mulkerrins. At no point was Barrett, Fanning or the Garda appellant in that recruitment competition, Rushe ever made aware of the existence of the purported investigation.

Nonetheless, groundless 'findings' detrimental to Barrett were made in writing by Nugent and sent to the CPSA in March 2020.



Whistleblower Barrett

Only in the Summer of 2021, did it emerge that the Garda Commissioner had used his powers to institute a criminal investigation against Barrett within weeks of his suspension in December 2018.

However, the commissioner made no reference to this in his four days of evidence to the disciplinary investigation.

This use of the criminal code only came to Barrett's attention through leaked media reports more than two and a quarter years after the Garda Commissioner launched this investigation.

Curiously, these reports emerged just weeks before a scheduled hearing of Barrett's application to the High Court.

In the 101 years since this statute was enacted, no criminal prosecution under this section has ever come before a court.

But isn't the Minister in charge?

Barrett is a civil servant of the government at Assistant Secretary General grade.

The statutory authority for such senior civil servants is vested exclusively in the Minister. In matters of discipline or suspension it is only the Minister, (or his/her formal delegate) who can commence a disciplinary investigation of staff

at or above the level of principal officer.

The delegation of this Ministerial power is explicitly restricted to civil servants not gardaí who are public *servants*.

Barrett further learned that the Minister who suspended him, Charlie Flanagan TD, was informed in writing by Fanning that he, as AOC, had been inappropriately directed to act contrary to the Garda HQ Directives by Commissioner Harris at a time when Harris had formal authority over him.

The Minister was informed that the Garda Commissioner 'directed' Fanning to collaborate (unknown to Barrett) with Nugent, (whom Fanning merely described as an unnamed "witness") and the Garda legal team in what purported to be an 'independent investigation'.

Assistant Commissioner Fanning made clear that such a direction was contrary to the Garda investigative code.

The Minister and his officials seemingly ignored this highly relevant information and failed in their lawful duty to bring this evidence to Barrett's attention.

Barrett's solicitors wrote to the Minister in June of 2020 and notified him of what they had come to know with respect to the Minister's knowledge of material facts. The letter formally requested

Barrett's impugned 2018 letters argue that a disciplinary 'misconduct' investigation launched against him, by the Garda's Director of Compliance, was retribution for 'speaking up'

that the Ministerial wrongdoing be fully investigated by his superior, pursuant to the provisions of the Protected Disclosures Act 2014. However, no substantive reply was ever received.

And what is the cost to the taxpayer?

Through FOI it was learned that the Garda Commissioner, Harris, has already spent more than €480,000 of taxpayers' money on the Garda costs of the 'disciplinary investigation' he 'commissioned' and 'directed'. This takes no account of the costs awarded to Barrett in the recent discovery order.

So, what will happen next?

Barrett remains suspended for the tone of letters he wrote which were never the subject of complaint by the recipient and in which letters serious wrongdoing was called out but never investigated.

The Minister and the Commissioner have now been ordered by the High Court to make discovery of ten categories of documents by 25 August. This case promises to be extraordinary – with Ministers, Commissioners and other high-ranking officials all facing searing cross examination in open court.

As Judge Anthony Barr, tellingly asked when he was given the background to this case at the discovery hearing, "Are the Guards living in a parallel universe?". **LE**