Neutral Citation [2013] IEHC 181

THE HIGH COURT

Judicial Review

Record Number: 2012 No 409 JR

Between:

Fergal O'Connell

Applicant

And

FÁS,

FETAC,

The Minister for Education and Skills, The Health and Safety Authority, The Minister for Enterprise, Trade and Employment

Respondents

Judgment of Mr Justice Michael Peart delivered on the 26th day of April 2013:

1. The applicant has represented himself in relation to these proceedings generally, and when it was heard by me. He is a self-employed man who for more than 20 years has worked in the business of drilling and blasting, and has provided those services for large contractors on sites throughout this State. It is by its very nature a dangerous and highly skilled occupation. According to his grounding affidavit the work includes blasting on road infrastructure projects, but may also include tunnelling work as well as drilling and blasting at sea and in quarries.

2. It is surprising given the dangerous and skilled nature of this type of work involving the use of explosives that, according to the applicant's grounding affidavit, there were no regulations in place in this State until quite recently.

3. By virtue of Article 74(e) and Schedule 4 of the Safety, Health and Welfare at Work (Construction) Regulations 2006 (S.I. 504/2006) as amended by Safety, Health and Welfare at Work (Construction)(Amendment) (No.2) Regulations 2008 (S.I. 423/2008) all construction shotfirers were obliged as and from 6th July 2009 to hold a FÁS Constructions Skills Certification Scheme ("CSCS") registration card.

4. By virtue of Article 13(c) and Schedule 1 of the Safety, Health and Welfare at Work (Quarries) Regulations 2008 (S.I. 28/2008) all quarry shotfirers were required as and from 1st November 2009 to hold a FÁS Quarries Skills Certification Scheme ("QSCS") registration card.

5. In order to be in a position to certify construction shotfirers and quarry shotfirers for the purposes of these Regulations, FÁS designed programmes so that experienced shotfirers could obtain the required certification. These programmes involved the completion of a theory assessment and a practical assessment. FÁS provided the courses, but it is the second named respondent FETAC which issues the necessary certification. Following this certification, FÁS will issue the necessary registration cards to those certified in respect of specified tasks, once the relevant training, assessment and qualification has been completed to the required standard. This assessment, certification and validation procedure has been set forth in detail in the affidavit filed on behalf of FETAC in these proceedings.

6. One of the requirements under the Quarries Regulations in relation to a person being assessed during the practical assessment part of the FÁS programme is that the practical assessment must be supervised by a person in possession of a QSCS Shotfiring registration card. It is accepted that as of the 1st November 2009 when those regulation commenced there was no person in this State who had such a registration card. That was for the obvious reason that by that date clearly no person had undergone the necessary certification process.

7. Bearing in mind that under the Regulations FÁS was obliged to ensure that certification programmes took place so that persons could obtain the necessary FETAC certification, a somewhat pragmatic step was taken. In that regard, FÁS decided that an instructor did not have to hold a QSCS Shotfiring registration card in order to provide training and instruction to the required standard provided that the instructor was suitably experienced and qualified. At some later stage FÁS sought and received Counsel's Opinion which was to the effect that even though such an instructor did not hold a QSCS Shotfiring registration card, this did not present a difficulty as regards the validity of the assessment or award provided that the candidate was trained and assessed to the standard required by FÁS. The applicant submits that if one looks closely at the Regulation in question this Opinion of Counsel is incorrect. The point is made also by FÁS that the courses were actually delivered by authorised training organisations which met FÁS requirements and who agreed to provide training in accordance with FÁS and FETAC standards and specification.

8. The applicant is himself the holder of a CSCS Shotfiring registration card, a QSCS Shotfiring registration card, and also a QSCS Explosives Supervisor registration card. He obtained his QSCS registration card through a different procedure and which was based on his prior knowledge in relation to Blasting Operations. This was obtained by him in December 2010. He appears to be unique in this regard.

9. In these proceedings he makes complaint about the validity of the certification received by those candidates who underwent their practical assessment in the presence of a supervisor who did not himself hold a QSCS Shotfiring registration card. The precise reliefs and declarations which the applicant seeks in this regard as set forth in his Statement of Grounds are somewhat unclear, but it does seem that he wishes this Court to declare that those persons who have been so assessed and in due course certified and issued with registration cards have been invalidly assessed, certified and issued with registration cards because the practical assessments were not supervised by a person who was himself the holder of a QSCS registration card, and he seeks to ask this Court to order that the

registration cards be surrendered, and that some form of injunction be issued to restrain the appropriate bodies from carrying out any such assessments, and certifications in breach of the regulations. The applicant's complaints relate to the integrity of both the CSCS assessments and the QSCS assessments.

10. The applicant first raised his concerns with FÁS in June 2009. That of course was some months before Regulation 13 and Regulation 16 of the Quarries Regulation came into operation on the 1st November 2009. But the legal requirement to hols a CSCS registration card in respect of construction shotfiring had come into force in July 2009. The applicant and FÁS were in communication during that summer. FÁS had sent an email to the applicant on the 14th September 2009 saying that it was looking into the matters of concern to the applicant which he had raised with them. In die course on the 16th November 2009, FÁS wrote to the applicant confirming that they would meet the applicant three days later on the 19th November 2009 to discuss his issues.

11. In November 2009 the applicant raised his concerns directly with the Minister for Labour Affairs who confirmed receipt of the applicant's email on the 10th November 2009. During November 2009 and December 2009 it appears that the applicant raised his concerns with the Health and Safety Authority on three occasions. HSA has stated that during the period November 2009- September 2010 the applicant made a considerable number of complaints to it in relation to matters of concern, and further that during that period HSA in fact carried out 376 inspections in the mines and quarries sector.

12. A very useful chronology of events, contacts, correspondence between the applicant and the various respondents herein reveals a lot of communication back and forth from November 2009 and December 2011. Meetings took place, issues were raised, complaints were investigated as they were raised with HAS. FÁS issued a report following an internal investigation into his complaints The Minister even met with the applicant in July 2011.

13. Given the fact that the applicant commenced the within proceedings it is clear that he was not satisfied that his concerns had been properly addressed, but the fact is that the grounds for his concerns in relation to the running of the courses and the manner in which assessments are made by what he considers to be unauthorised personnel, and the reliefs which he seeks as a result, had arisen at least by November 2009, or possibly as far back as June 2009 when he first raised his concerns. But certainly by the time Regulations 13 and 16 of the Quarries Regulations were commenced the applicant was well aware of the issues which he had in relation to these issues. Even if one was to disregard those dates, it is a fact that following an internal investigation by FÁS the applicant met with FÁS on the 21st January 2011 when he was told of the outcome of that investigation. He met them again on the 13th July 2011 when he was informed that FÁS was satisfied that the approved trainers/assessors were competent to assess the trainee shotfirers for the purpose of the practical assessment, and further that FÁS was satisfied that all quarry shotfirers in possession of the required QSCS registration card had demonstrated their competence and had met the necessary and agreed standards, and that their qualification was valid. Even if the Court was to indulge the applicant and regard this meeting on the 13th July 2011 as the date on which the grounds for seeking judicial review reliefs first arose, it is surprising that the applicant waited a further 10 months approximately before he moved his *ex parte* leave application on the 18th May 2012. I note that his grounding affidavit was sworn on the 30th March 2012.

14. The respondents all submit that this delay in commencing these proceedings should itself be a reason for refusing the reliefs sought and for the application to dismissed *in limine*. They each submit that the delay has not been explained and that this Court should conclude that there is no reasonable explanation and therefore no good reason why time should be extended in this regard. The applicant has put forward no reason, good or otherwise, as to why he did not commence his proceedings in July or November 2009 or even after the meeting in July 2011 already referred to. I appreciate that he is a lay litigant, but it appears that these proceedings are not the first such proceedings which this applicant has brought by way of judicial review, and it must be presumed that he has some knowledge of the applicable time limits. The mere fact that he represents himself is not a sufficient basis for endless indulgence by the Court. As a matter of reasonable fairness I would suggest that a Court in considering whether or not to extend time on the basis of stated reasons for delay should extend some tolerance to take account of particular circumstances which may militate against a personal litigant meeting a short deadline. But it cannot be allowed to interfere with or set at nought even the requirement that parties move promptly in search of redress, and in the case of judicial review commence their proceedings within three months of the date on which grounds first arise. Apart from anything else, it is desirable in the interests of certainty that a party which has made a decision which can be amenable to review, should be able to expect that if no challenge has been brought within three months then they can be reasonably assured that no challenge will be brought. That is a desirable objective and purpose of the time limit imposed by Order 84 RSC.

16. It is worth stating also that in the present case, if the Court was to ultimately find in favour of granting the reliefs sought, the rights of third parties would be affected, such as those persons who have completed the courses which the applicant seeks to impugn and the qualifications and certificates which have issued as a result, and which they have been using ever since. That is a factor among several factors which this Court is entitled to have regard to when balancing the rights of the various parties in the matter of extending time, even where that has been sought and good reasons have been urged upon the Court. In fact, in the present case the applicant has not included an application to extend time. However, making allowance for the fact that he represents himself, the Court could be indulgent in that regard and not stand on a strict observance of form and procedure, particularly where it appears that there may well be a good reason which could avail the applicant. But I can see no good reason for the applicant's delay in commencing these proceedings. On the leave application a matter such as this may not be immediately apparent to the judge hearing the leave application. In this case I heard that application. It may not have been evident to me in the short length of time one has on a busy Monday list to grasp the facts sufficiently to become aware that time was an issue. However, even if I had some concerns in that regard, I would in all probability have extended the time to the date of the application for the bringing of the *ex parte* application, but in accordance with my invariable practice made it clear to the applicant that by so doing I was not precluding any argument at full hearing that the application is brought out of time.

17. In the present case I am satisfied that the applicant's proceedings should be dismissed on the basis that they have not been commenced within the permitted period from which the grounds first arise.

18. I should add that even if time was not an insurmountable problem for the applicant, he has another problem in relation to his standing to seek the reliefs, as it is uncontroverted that he is the holder of all relevant certificates and that none of the courses leading to that which he attended suffer from the frailties which he alleges in these proceedings. He is fully and properly qualified in all these matters as already set forth, and he is not therefore in any way affected by any frailty in the course, assessments and certification of others. He makes the point that there are now, if he is correct, persons who ought not to be regarded as suitably qualified for the work involved, and who nevertheless are competing for the same work as he is seeking from time to time. However, I do not consider that this would be a sufficient interest to give him standing to seek the reliefs which are set forth in his Statement of Grounds.

19. Quite apart from those two factors, I have grave doubts as to whether or not the applicant's case would succeed. I am however

not making any finding in that regard, because I do not consider that I need to, and ought not to, given that the applicant is so long out of time for bringing his application.

20. For these reasons I dismiss the application for judicial review as sought.