

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 474 J.R.]

BETWEEN

DIANE BYRNE

APPLICANT

AND

MINISTER FOR THE DEFENCE, IRELAND AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 25th day of July, 2016

1. On 28th July, 2014, Baker J. gave leave to apply by way of an application for judicial review for the following reliefs:-

- (i) A declaration that the applicant was qualified for promotion from the rank of Captain to Commandant in accordance with para. 8 (4) of the Defence Force Regulations (herein "DFR") A15.
- (ii) A declaration that the applicant qualified for fixed period promotion to the rank of Commandant on 28th May, 2013, after having completed nine years service in the rank of Captain in accordance with para. 8 (4) of the DFR A15.
- (iii) An order of *mandamus* directing the first named respondent to comply with the provisions of para. 8 (4) of the DFR A15, promoting the applicant from the rank of Captain to Commandant, taking effect from 28th May, 2013, with the applicant having completed nine years service in the rank of Captain.
- (iv) A declaration that the respondents are in breach of Article 2 (2) (c), Article 14 (2) and Article 15 of Directive 2006/54/EC of the European Parliament and of the Council of 5th July, 2006, on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment.
- (v) An order of *mandamus* directing the respondents to comply with the provisions of Article 2 (2) (c), Article 14 (2) and Article 15 of Directive 2006/54/EC of the European Parliament and of the Council of 5th July, 2006.
- (vi) Damages for loss of earnings from 28th May, 2013, to date.
- (vii) An order providing for further or other relief
- (viii) An order providing for an award of costs of these proceedings to the applicant.

Statutory and administrative framework

2. The document entitled "Department of Defence, conditions governing the appointment of Engineer Officers in the Corps of Engineers" was put before the Court, and it sets out terms of appointment for Engineer Officers:

- "(a) Successful candidate[s] will be expected to take up duty as soon as possible allowing for reasonable notice to current employer or reasonable expiry of current contractual obligations but subject to the overriding requirement to fill the vacancies in the Corps of Engineers.
- (b) Successful candidates will be appointed to the rank of Lieutenant.
- (c) Salary will commence at the fourth point of the Lieutenant scale.
- (d) The primary duties of an Engineer Officer [are] the application of engineering science to military requirements [...]"

Paragraph 11 sets out conditions of the pay and promotion of technical officers. This Court notes that the conditions of pay for Engineer Officers are distinct from conditions of pay for other technical officers.

- "(i) A person appointed as an Engineer Officer as a result of this competition who immediately prior to appointment was liable for modified social insurance as a public sector employee, will be able to claim Class C PRSI contributions in addition to contributions for survivors' pensions.
- (ii) A person appointed as an Engineer Officer as a result of this competition who immediately prior to appointment was not liable for modified social insurance as a public sector employee, will be liable to pay Class A PRSI contributions in addition to appropriate contributions in respect of personal and survivors' superannuation benefits.

Subject to the terms of the Defence Forces Regulations, promotion up to the rank of Commandant is *assured* [this Court's emphasis] after satisfactory service as follows:

Lieutenant to Captain – after 3 years in rank of Lieutenant

Captain to Commandant – after 9 years in rank of Captain."

Paragraph 14 establishes a general requirement that officers complete "courses":

"In order to ensure that he/she will be competent to carry out the duties of higher rank to which he/she may be promoted, an officer will be required to undergo such courses as may be laid down from time to time."

Paragraph 18 states the following regarding maternity leave:

"Statutory provisions in relation to maternity leave apply in the Permanent Defence Forces."

3. Section 45 (1) of the Defence Act 1954 confers power on the Minister for Defence to make regulations governing service in the Permanent Defence Forces. Section 45 (1) provides that:

"The Minister may, in accordance with regulations made by him, promote any officer to a higher substantive rank."

4. DFR A15, para. 8, is a statutory instrument made pursuant to the Defence Act 1954, by the Minister for Defence. The regulations establish conditions in respect of fixed period promotions. Regulation 8 (4) (b) provides:

"An Engineer Officer who is in receipt of a rate of remuneration prescribed by officers of his rank by virtue of professional or technical qualifications appropriate to the branch of the permanent Defence Force in which he is serving may be promoted from Lieutenant to Captain on completing 3 years' service in the rank of Lieutenant and from Captain to Commandant on completing nine years' service in the rank of Captain, provided that:

(i) His service in the rank of Lieutenant or Captain, as the case may be, is certified by the Chief of Staff to have been satisfactory.

(ii) He has satisfied an interview board appointed by the Chief of Staff as to his suitability for promotion.

(iii) In the case of promotion to the rank of Commandant, he has successfully completed a Standard Course or a course certified by the Chief of Staff as acceptable in lieu thereof or has otherwise reached a satisfactory standard as determined by the Chief of Staff."

5. Regulation 8 (5) provides that an officer who is promoted for

"whom no vacancy exists in the rank to which he is promoted in the establishments of the service corps in which he is serving shall be borne supernumerary to the Establishments for his rank in that service corps but shall block the consequential vacancy in the rank from which he is promoted."

6. It is noted by the Court that the regulations discussed above uniquely apply to the promotion of Engineer Officers, and these regulations are distinct from the ordinary promotional matrix applied to non-technical officers.

Factual Background

7. The applicant was born on 21st December, 1977. She qualified as a mechanical engineer in the year 2000, and completed a Masters of Environmental Science in 2010. She is a Chartered Member of Engineers Ireland.

8. On 28th May, 2001, she was commissioned as an Engineer Officer of the Defence Forces, to the rank of Lieutenant. The applicant was part of a group of seven such officers commissioned at the time. She was fourth in seniority in the group. The applicant states she was required to sign a contract upon appointment to the Defence Forces, which, with her appointment being subject to DFR A15, expressly included certain conditions, including fixed period promotion. Pursuant to her contract, she gave certain undertakings in respect of service in the Defence Forces. Pursuant to DFR A15, para. 8, she was duly promoted to the rank of Captain on 28th May, 2004, on completion of three years service in the rank of Lieutenant.

9. During her service, the applicant completed the following courses:

- (a) An Engineers Young Officers Course;
- (b) An Operational Fire Fighting Course including a breathing apparatus course;
- (c) A Search Course; and
- (d) An Engineer Special List Search and a Clearance Officers Conversion Course.

10. To her credit, she completed a six month tour of duty in Liberia.

11. She states that she never fully completed a fitness assessment, as this was not required of her as an Engineer Officer.

12. The applicant contends that she and her cohort were due fixed period promotion to the rank of Commandant pursuant to DFR A15 para. 8 by or on the 28th May, 2013.

13. At the material time, two of the Engineer Officers from the applicant's cohort had retired, leaving the applicant and four male Engineer Officers due a fixed period promotion.

14. On 26th November, 2012, the applicant went on maternity leave. Prior to taking maternity leave, the applicant was second in command of 506 Squadron, No. 5 Support Wing of the Air Corp in Baldonnell, where she had served for five years since 12th June, 2007.

15. She availed of additional, albeit unpaid maternity leave from 27th May, 2013, to 15th September, 2013.

16. The four male Engineer Officers in the applicant's cohort were promoted to the rank of Commandant on or about 28th August, 2013, whilst the applicant was on maternity leave.

17. Additional to the above, during the currency of the applicant's maternity leave, without her knowledge or consent, and contrary to common custom and practice, the applicant was transferred on 7th December, 2012, from Baldonnell to Cathal Brugha Barracks.

18. The applicant presented herself at Cathal Brugha Barracks on 11th November, 2013 as instructed and at this time received verbal instructions to return to Baldonnell on 15th November, 2013. She later received a telephone call from Lieutenant Colonel O'Driscoll on 13th December, 2013 informing her that she had been transferred to Cathal Brugha Barracks, effective from 9th December, 2013.

19. It is common case that the applicant was not promoted with her cohort of Engineer Officers. She states that she was not aware of their being promoted, nor was she notified of the convening of any board, nor was she aware of the holding of interviews.

20. The applicant additionally referred to e-mails from Lieutenant Colonel Gerry O'Driscoll detailing her difficulties in obtaining approval for unpaid maternity leave, despite applying for unpaid maternity leave before going on paid maternity leave.

She said the manner in which she had been treated had caused her stress and anxiety, resulting in her doctor has placing her on sick leave on several occasions. She further says that throughout her pregnancy she was subjected to undue stress, causing her seek assistance from the Defence Forces Personal Support Service. She states that she was wrongly treated whilst on maternity leave, and further, she believes that she has been discriminated against vis-à-vis her colleagues.

Application of DFR A15 para. 8 (4)

21. Counsel for the respondent denies that the contract *signed by the applicant* (this Court's emphasis) that governed her terms and conditions of employment with the respondent guaranteed her promotion pursuant to para. 8(4) of the DFR A15, as alleged. It is also denied that the applicant was entitled to fixed period promotion to the rank of Commandant on 28th May, 2013, having completed 9 years' service in the rank of Captain.

22. Counsel for the respondent contends that the applicant was assessed by the Commissioned Officers of Management Office (herein "COMO") and was not deemed eligible on the basis that she had not completed a Standard Engineers Officers Course, nor the Junior Command and Staff Course. These courses are referred to in the document "Defence Force Regulations CSG Military Education and Recreational Training". Counsel argues that the Junior Command and Staff Course is run on an annual basis and is designed to train officers in the skills needed for the rank of Commandant.

23. Commandant McEvitt stated in his affidavit that the applicant was notified on each occasion when the Junior Command and Staff Course was to be run between the years 2007 and 2013, and he also notes that there was no record of the applicant having completing a fitness test. Whilst it is stated that COMO is responsible for the management of fixed period promotions, no regulations governing COMO's role in the management of the promotion of officers has been put before this Court.

24. It is common case that the applicant was not informed about any eligibility assessment of her conducted by COMO. It is contended that the assessment of the applicant as ineligible for promotion was entirely unrelated to her pregnancy and her being on maternity leave.

This Court notes that which is contained in the affidavit of Commandant McEvitt, regarding a situation in which an officer was promoted from the rank of Captain to Commandant without having completed a Junior Command and Staff Course. This arose in the context of a Legal Officer who had applied for a position on the Junior Command and Staff Course on four separate occasions, but was denied a place due to the exigencies of service.

25. This Court notes the replying affidavit of Diane Byrne, sworn on 20th April 2015, which states that despite not having completed either course as mentioned, she successfully carried out the duties of Commandant on several occasions, for lengthy periods of time, in the absence of a commanding officer. She further contends that as an Engineer Officer, much of the content of the courses mentioned was not essential to her particular duties.

26. This Court notes the restricted letter from Colonel Jim Burke to 'DJ1', dated 13th May, 2013 and headed "Request for convening of appointments board for COE promotions to Commandant and Captain". As a preliminary note, it is unclear to this Court if 'DJ1' refers to COMO, or another administrative body. The letter sets out the following:

"1. In accordance with the above references I request that an appointments board be convened by the Chief of Staff for the purposes of assessing candidates of the Corps of Engineers for making a recommendation to him as to the officers to be appointed. At present there are four vacancies at Commandant rank in the Engineer Corps in accordance with CS 4 (2012). The following Engineer Captains are due fixed period promotion to Commandant as a result of having completed 9 years in the rank of Captain. [The four names were removed from the submissions to ensure anonymity]

...

3. As a consequence of these promotions there will be 4 Captains' vacancies. The following Engineer Lieutenants are due promotion to Captain as a result of having served 5 years in the rank of Lieutenant".

27. The applicant opines that it was in the Defence Forces own interest not to deem her eligible for promotion, due to ongoing issues relating to supernumerary promotion of fixed period officers. The applicant further contends that her pregnancy, and her being on maternity leave were used by the Defence Forces as a way to keep her in the dark.

Submissions on behalf of the applicant

28. Dr Craven S.C., submitted that the applicant ought have been promoted from the rank of Captain to Commandant in accordance with DFR A15 para. 8, and that the respondents, in failing to promote the applicant are in breach of statutory duty.

29. The applicant completed 9 years' service in the rank of Captain in receipt of the appropriate pay. There was never any issue as to the satisfactory nature of the applicant's military service.

30. Whereas the applicant had not completed a Standard Course or an alternative course, there was no determination by the Chief of Staff if she had reached a satisfactory standard, in lieu of not having completed such courses.

31. Having never been apprised of the convening of a promotions board, and never being informed of the outcome of the board's determination, she accordingly never had any opportunity to address it.

32. He also submitted that DFR A15, para. 8 (4) is silent on any question of a requirement to complete a Junior Command and Staff Course. The regulations do not require completion of both a Standard Engineer Officer's Course and a Junior Command and Staff Course.

33. He further submits, insofar as any issue arises in relation to the applicant's failure to complete a fitness test, this fact did not preclude her deployment overseas, or her being dispatched on strenuous training courses.

34. He contends that the process set out by the respondents, namely, that COMO deemed the applicant ineligible for promotion, manifestly fails to comply with the provisions of DFR A15 para. 8(4), and further no statutory or justification for the steps taken by COMO have been, or can be advanced, and the resultant breach of statutory duty cannot be excused. The purported notification policy adopted by COMO was inflexible, unjustified and unlawful and deprived the applicant of any opportunity to present a case on her own behalf. The fact that this occurred while she was on maternity leave, and that all other officers promoted were male, *prima facie* raises the issue of discrimination and unequal treatment by reason of her pregnancy and maternity leave. The determination that the applicant was not eligible for promotion by reason of not meeting the criteria provided in DFR A15, para. 8(4) is unlawful and unsustainable.

Submissions on behalf of the respondent

35. Counsel for the respondent, Marguerite Bolger, S.C., argues that the applicant did not meet the criteria established by Defence Force Regulations A15, para. 8 and therefore was not promoted. The applicant had met the criterion of requirement of service, having completed nine years service, but was deemed ineligible for promotion by COMO, by virtue of not having completed the relevant courses, and thus was not assessed by the Interview Board, having been deemed ineligible for promotion.

36. Secondly, she argues that the applicant ought to have pursued her claim of less favourable treatment on grounds of maternity leave through the internal defence forces procedure; namely, under section 114 of the Defence Act. This section details an internal defence force dispute resolution mechanism, and further avers to a possible referral of such a complaint to the Workplace Relations Commission.

37. Section 114 of the Defence Act sets out that if an officer thinks himself wronged, he may complain to his commanding officer, and if the commanding officer does not deal with the complaint to the officer's satisfaction, he may complain in the prescribed manner to the Chief of Staff who shall inquire into the complaint and give his directions thereon. Section 114 (3) sets out that every officer to whom a complaint is made (in pursuance of this section) shall inquire into the complaint and if satisfied, take necessary steps to give full redress to the complainant in respect of the matter complained of, and inform the complainant of the course of action.

38. Counsel submits that the applicant failed to exhaust the statutory remedies available to her, and following from this, the applicant's claim is non-justiciable before this Court.

Discussion

39. It appears to this Court that DFR A15, para. 8 requires first, that the applicant's service must be satisfactory. There is no suggestion on behalf of the respondent that her service in the rank of Lieutenant or Captain was unsatisfactory. Her promotion to the rank of Captain after three years was never in issue.

Secondly, under the regulations she must satisfy an interview board appointed by the Chief of Staff as to her suitability for promotion. It is common case that the applicant was never invited to an interview board, as expressly provided by para. 8(4) of the regulations.

Thirdly, the regulations stipulate that the applicant must have completed a standard course, or a course certified by the Chief of Staff as acceptable in lieu thereof, or have otherwise reached a satisfactory standard as determined by the Chief of Staff. Counsel for the respondent argues that the applicant was assessed by COMO, and was deemed ineligible as she had not completed the Engineering Standards Course, nor the Junior Command and Staff Course.

It appears to this Court that in the event of the applicant not completing a requisite course, there had to be a determination by the Chief of Staff as to whether she had reached a satisfactory standard. In this Court's view, this would have required some form of assessment, in which where the applicant had an opportunity to make her case.

40. Without any notice to the applicant, her cohort of four male Engineer Officers was promoted on or about the 28th August, 2013. This was presumably in accordance with DFR A15 para. 8, namely that they were promoted having completed the nine years' service, having satisfied an interview board appointed by the Chief of Staff, and having completed the Standard Course, or being certified by the Chief of Staff as having reached a satisfactory standard.

Breach of Contractual and Statutory Duty

41. This Court finds that there was a failure by the respondents to comply with the provisions of DFR A15 para. 8 (4). The applicant was wrongly excluded from fixed period promotion by the respondent's failure to comply with their contractual and statutory duties.

42. The applicant was not informed as to the convening of any board assessing the suitability of officers for promotion, and subsequently was not given an opportunity to put her case to the Chief of Staff, or any interview board appointed by him.

43. The respondents have sought to indicate that there is an 'eligibility' requirement stipulated in the regulations, which was determined by COMO. They accept that this was done without informing the applicant, and without giving the applicant an opportunity to make a case.

44. This Court finds that no legislative basis exists for the Chief of Staff's delegation of his role to COMO, to assess an officer's eligibility for promotion.

Exhaustion of statutory remedies

45. Counsel for the respondent argues that the High Court does not have the jurisdiction to consider the merits of the applicant's complaint, and that the complaint ought be processed through the available statutory mechanisms. She cites *Doherty v. South Dublin County Council* (No. 2) [2007] 2 I.R. 696, where Charleton J considered the creation of a mechanism of redress in statute:

"[...] Where, however, an Act creates an entirely new legal norm and provides for a new mechanism for enforcement under its provisions, its purpose is not to oust to the jurisdiction of the High Court but, instead, to establish new means for the disposal of controversies connected with those legal norms [...] these new legal norms and a new means of disposal through tribunal are created. This expressly bypasses the courts in dealing with these matters. The High Court retains its supervisory jurisdiction to ensure that hearings take place within jurisdiction, operate under constitutional standards of fairness and enjoy outcomes that do not fly in the face of fundamental reason and common sense".

46. The fact that a remedy exists under s. 114 of the Defence Force Act does not preclude the applicant from making an application

for judicial review. In *O'Donnell v Tipperary (South Riding) County Council* [2005] I.E.S.C. 18, Denham J. held that in assessing the merits of an administrative appeal process against the merits of judicial review,

"[...] the true question is as to which is the more appropriate in the context of common sense, the ability to deal with the questions raised, and the issues of fairness".

47. This Court is satisfied that the appropriate remedy in this case lies in judicial review. Section. 114 is an internal Defence Force dispute mechanism, and there exists only a possibility of a complaint such as the applicants being referred on to the Workplace Relations Commission under s. 114. This Court finds that s.114 offers little to applicant by way of adequate remedy.

Equal Treatment under the Directive

48. Counsel for the respondent sets out the provisions of Art. 2 (2) of Council Directive 2006/54/EC of 5th July, 2006 in relation to matters of employment and occupation as follows:

"For the purposes of this Directive, discrimination includes:

(c) any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC."

He further submitted that Art. 15, entitled "Return from maternity leave" provides:

"A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence."

Counsel for the applicant quotes from *Napoli v. Ministero della Giustizia* (Case C-595/12). The First Chamber Court stated at para. 25:

"Article 2 (2) (c) of Directive 2006/54 provides that less favourable treatment of a woman related to pregnancy or maternity leave constitutes discrimination on grounds of sex and that Article 14 (1) of that directive specifies the fields in which there must be no discrimination. Thus, direct and indirect discrimination are prohibited as regards conditions for access to employment, including selection criteria and recruitment conditions, access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining and also as regards work experience, conditions of employment, working conditions and participation in an organisation which represents workers or other organisations."

49. Counsel submits that the failure to inform the applicant of the convening of the board amounts to unfavourable treatment for the purposes of Art. 15 of the Directive. He argues that the applicant is entitled to rely on the provisions of the Directive, which have direct effect, and cites *Napoli v. Ministero della Giustizia* (Case C-595/12):

"[...] The Court has consistently held in that regard that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by individuals as against the Member State before the national court [...]"

50. Relevant to this Court's assessment of the Directive include the following. Article 1 describes the purpose of the Directive to ensure the *implementation* (this Court's emphasis) of the principle of equal opportunities and equal treatment of men and women in matters of employment.

51. Article 14 (2) sets out that

"Member States may provide, as regards access to employment, including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate."

The burden of proof under Article 19(1) provides:

"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment."

In this Court's view, the respondent has not discharged this onus of proof. The applicant was on maternity leave at the time of the request for the convening of an 'Interview Board'. This Court finds, and it is not impressive, that she has been excluded from the promotion process as a result of her being on maternity leave.

52. This Court will, therefore, make:-

(a) a declaration that the applicant is qualified for promotion from the rank of captain to commandant in accordance with para. 8 (4) of the DFR A15;

(b) a declaration that the applicant qualifies for fixed period promotion to the rank of commandant on 28th May, 2013, after nine years service in the rank of captain in accordance with para. 8 (4) of the DFR A15; and

(c) a declaration that the respondents are in breach of Article 2 (2) (c), Articles 14 (2) to Article 15 of the Directive 2006/54/EC of the European Parliament and of the Council of 5th July, 2006, on the implementation of the principle of equal opportunities and the equal treatment of men and women in matters of employment.

53. The court will hear in due course submissions in relation to damages for loss of earnings from 28th May, 2013, to date.

Counsel on behalf of the applicant, Dr. Ciaran Craven, and Gerard Humphreys, B.L., instructed by Colman McCabe Solicitors.

Counsel on behalf of the respondents, Marguerite Bolger, S.C., and Aoife Carroll, B.L., instructed by the Chief State Solicitor.