Neutral Citation Number: [2005] IEHC 293

**THE HIGH COURT**

**Record Number; 2005 No. 2659P**

**BETWEEN**

**MALCOM GANNON**

**PLANTIFF**

**AND**

**THE MINSTER FOR DEFENCE,IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**Judgment of Mr Justice Michael Peart delivered on the 15th August 2005**

1. This is an application for an interlocutory injunction pending the determination by the Court as to whether certain declarations ought to be made, and damages awarded in circumstances where the defendants are alleged by the plaintiff to have acted unlawfully, in breach of the plaintiff's statutory contract of employment, ultra vires the Defence Forces Regulations and in breach of the principles of natural and constitutional justice in or about the purported discharge of the plaintiff from the Defence Forces on the 26th July 2005.

2. Following the purported discharge, the plaintiff has not been in receipt of any salary, and nor has he any other source of income, save Social Welfare Benefit. He has a partner and one small child to support.

3. The plaintiff left school after completing his Intermediate Certificate examination, and joined the Armed Forces at the age of 19 years in August 2001 for a fixed term of five years. That period can be extended in certain circumstances. In July 2005, just one year short of the expiration of that five year term of service, the plaintiff was discharged from the force, and the reason for the discharge is that which appears at paragraph 58(r) of the Defence Force Regulations A10, namely *"his services being no longer required"*. The "Special Instructions" contained in these Regulations relating to this reason for a discharge state:

> *"Applies only in the case of –*
>
> > *(i) a man whose discharge is clearly desirable in the interests of the service and in whose case no other reason for discharge is possible, or*
> >
> > *(ii) ……*
> >
> > *(iii) ……*
>
> *Where the grounds on which the application for discharge is based so warrant and where it will benefit the individual concerned to do so, the reason for discharge may be suitably amplified."*

4. A discharge under Regulation 58(r) is a discreditable discharge, ameliorated perhaps if there is some reason for discharge is given by way of amplification, but for the purposes of this case there is no such amelioration. He has received a discreditable discharge on the basis that his services are no longer required, and it is contended by the defendants that there exists no other reason for his discharge. There is little doubt that this form of discharge is one which casts the plaintiff in a poor light as far as any future prospects of employment are concerned, if a prospective employer were to make appropriate enquiries, hence presumably the proviso that if there is any other reason for discharging a soldier it must be used rather than Regulation 58(r). For example, and it is relevant in the present case according to the plaintiff, a soldier can be discharged under Regulation 58(p) which provides for discharge if the soldier is "below Defence Forces medical standards". The special instructions applicable to this regulation states:

> *"A man will be discharged under this subparagraph only when recommended as being medically unfit for service in the Defence Forces by a Medical Board. Where a man is in a civil hospital or sanatorium or otherwise not located at a military centre, the Certificate of Service will be sent by registered post so as to reach the man on or before the date of his discharge."*

5. In other words, even in the case of a man whose services are no longer required in accordance with Regulation 58(r), and who is also medically unfit as recommended under Regulation 58(p), he must be discharged under the latter regulation rather than the former.

6. The plaintiff says in his grounding affidavit that as a result of "certain experiences" (unspecified) during his time in the army he developed "a social anxiety disorder", and that he was referred by the Army Medical Officer, Commandant Murphy, to Dr John Quinn, a Psychiatrist in Kildare for treatment for that condition and received medication also. He says that as a result of that condition, of which the army was aware from its own records, he was absent on certified sick leave over the months of May, June and July 2005. He states that he was due to return to duties on the 25th July 2005 but that about three weeks prior to that date he was called to the Curragh Camp to attend before his Commanding Officer. He believed that this was so that he could be given his annual report, but in fact he was told at that meeting by Commandant Prendergast that he would recommending his discharge on grounds which the plaintiff recalls being described as *"ineffectivity"*.

7. The request for discharge form dated 27th May 2005 sets out the dates of sick leave for the plaintiff since 1st January 2005 under the heading: "Listed below are the times that Pte Gannon has been ineffective due to sick leave since Jan 2005" (my emphasis) There are 110 days listed for that period from 1st January 2005 to 24th May 2005. That is 110 days out of 144 days according to my calculations. In fact the earliest date shown for sickness during that period is the 7th March 2005, so the proportion of sick days is even greater from that date to the 24th May 2005. There is no detail on that form as to the nature of the illness affecting the plaintiff in this period. The same form shows that in 2003 he was *"ineffective"* for 109 days, and in 2004 for 35 days. On the 5th April 2005 he was temporarily medically downgraded until the 6th July 2005 and was excused armed duties. On the 21st April 2005, he was mandatorily selected for overseas duties, but Commandant Prendergast states that he did not certify him as eligible for overseas duty *"due to his poor sickness record and his conduct rating being FAIR".*

8. This form of request for discharge also reveals that Commandant Prendergast spoke to the plaintiff on the 27th April 2005 on which occasion he informed the plaintiff that *"his performance and military conduct were below the required minimum standard and that I would seek his discharge if he did not improve……there has been no improvement in Pte Gannon's attendance"(*my emphasis). There is no comment as to whether his *conduct*, as opposed to his attendance, improved.

9. However, in the annual report dated 18th April 2005 and which signed by the plaintiff on the 27th April 2005, Commandant Prendergast comments that the plaintiff is "Below Average", and goes on:

> *"Pte Gannon is an ineffective soldier due to AWOL and sickness. His performance needs to improve dramatically if he wants to be recommended for extension of service in Aug 2006" (my emphasis)*

10. The plaintiff looks to this comment to indicate that at the April meeting there was no hint of an intention to discharge him, but merely an indication that he would not get an extension of his service when his five years was up in August 2006.

11. The grounds for discharge contained in the Application for Discharge (Long Form) dated 8th July 2005 state that his discharge is clearly desirable in the interest of the service and that no other cause of discharge is applicable. These grounds are expanded upon in paragraph 3 of that form. It is stated that the plaintiff is "a below average soldier with an extremely poor attendance record". It is noted in this form that between the 1st January 2005 and that date (8th July 2005) the plaintiff "has been ineffective for 145 days as a result of sickness and AWOL", and that in 2003 he was ineffective for 109 days and in 2004 for 35 days. It is noted also that in February 2005 he was stated to have an unsuitable medical record for the purpose of serving in the Medical Corps after he had completed a medical training course.

12. Michael Howard BL for the plaintiff submits that there was enough evidence of sickness in the case of the plaintiff for there to have been a reason for the discharge of the plaintiff other than for the reason that his services were not required, and that therefore discharge under regulation 58(r) was inappropriate and contrary to regulations.

13. On the other hand, Colm O h-Oisin BL. on behalf of the defendants has referred to averments in the affidavit of Commandant Prendergast that when on the 30th June 2005 the plaintiff was paraded before him he informed him of the intention to have him discharged on the ground that his services were no longer required, and that he explained the reasons for this, and furthermore that the long form of application for discharge was read out to him in its entirety, and that at all times the plaintiff had an opportunity to address any issues which he was unsure of. Commandant Prendergast goes on to state that he was concerned to ensure that the plaintiff understood precisely the form of application for discharge which would be made, and told him clearly that he had seven days within which to make representations, orally or in writing and that the plaintiff could have been under no misapprehension about these matters. He goes on to reiterate that as far as he was concerned the plaintiff was clearly somebody whose discharge was desirable in the interests of the service and that no other reason for his discharge was applicable.

14. The plaintiff made a representation in writing in fact, but this document contains nothing of substance and simply states that he wants an appeal in relation to the request for his discharge. But no reasons for are stated such as that his alleged "ineffectivity" and status as someone whose services were not required was as a result of illness.

15. Company Sergeant Michael O'Neill has also sworn an affidavit in which he states that he was present at the meeting with the plaintiff and Commandant Prendergast to which I have referred and he confirms that the application for discharge form was read out cogently and clearly to the plaintiff, that it was explained to him, and that he, as Company Sergeant was available to assist the plaintiff should he want assistance in the matter of the preparation of any representation he might wish to make against his proposed discharge.

16. The defendants submit that this evidence of what took place at the meeting and the clear and precise manner in which everything was explained including his right to make representations, is so strong and overwhelming that it ought to displace the evidence of the plaintiff to the point where the Court should be satisfied that the plaintiff is simply incorrect. I consider that to be going too far at this stage of the case, where cross-examination has not taken place.

17. I do not propose to set out all the contents of the various affidavits which have been filed. There is clearly a dispute between the parties as to exactly what took place at the meetings with the plaintiff, and these conflicts will have to await the hearing of the case in due course. For example the plaintiff maintains that he was never told that his discharge was being sought under Regulation 58(r), whereas the defendants are adamant that he was and that the application form was read out to him and explained clearly to him and the reasons for the proposed discharge were contained in that.

18. In order to obtain an interlocutory injunction which would have the effect of ensuring that the plaintiff remained a Private in the armed forces and was paid between now and the hearing of this case, the plaintiff must establish that there is a serious or fair issue to be tried.

19. The defendants make a preliminary point that the plaintiff ought to have proceeded by way of judicial review under O.84 of the Rules of the Superior Courts, rather than by way of plenary summons. Mr O h-Oisin submits that as a member of the armed forces he is engaged under a public law contract provided for by statute, and that in these circumstances a private law remedy by way of plenary summons is not available to him, and that if he seeks to challenge the decision to discharge him, he is seeking in effect an order of certiorari of an administrative decision, and that the appropriate way of doing this is by way of seeking leave to bring judicial review proceedings. In such a case the plaintiff would have to overcome the hurdle of establishing that he has an arguable case, and would be subject to the requirement to apply promptly and would have to have his case decided by reference to judicial review principles, including reasonableness. In other words there would be obstacles in the way of the plaintiff under judicial review which he may not encounter in plenary proceedings, because it is a public law remedy being pursued.

20. Mr Howard has referred to a number of cases similar to the present one where plenary summons procedure has been adopted without difficulty. He submits that even though the plaintiff's contract of employment is a statutory contract, the remedy for the plaintiff as an individual soldier is a private law one, and that if the Court finds in favour of the plaintiff it has no effect on any other member of the Defence Forces. Obviously things would be different if an effect of a finding for the plaintiff was to quash some regulation in general.

21. I cannot see that there is any virtue in trying to force the plaintiff to proceed by way of judicial review. Even though he is engaged upon an occupation which has a clear public dimension, and is engaged by virtue of a contract prescribed by statute, it is still the case that the decision under challenge is one which affects only the plaintiff, and is so akin to a claim for wrongful dismissal as to make no distinction. I find no reason to direct that these proceedings be discontinued, or be replaced by proceedings under O.84 RSC.

22. The question is whether a fair issue has been raised that the defendants proceeded inappropriately to effect the discharge of the plaintiff under Regulation 58(r), in circumstances where his sickness record - of which the defendants must be deemed to have been aware since the plaintiff was referred by them to a psychiatrist and presumably have the plaintiff's medical records - would have

provided another reason for discharging him, namely under Regulation 58(p) instead.

23. If that were to be the case then a declaration could be granted that the defendants have acted unlawfully in as much as they have discharged him under a Regulation which was inapplicable. It seems to me that taking the plaintiff's case at its highest which I must do in view of the conflict of evidence, there is an argument to be made that the sickness record of the plaintiff was not taken into account, or given sufficient weight, other than for the purpose of deeming the plaintiff to be ineffective as a soldier and someone whose services were not required. There does not on the face of the documentation appear to have been any consideration given to even the possibility that the reason behind all the absences of the plaintiff either on sickness grounds or AWOL was in fact the illness for which the army appear to have treated him and referred him to a specialist. There is no mention of his medical records or discussions with doctors. That could mean that the army had closed their minds to, or at least not considered whether another ground for the discharge of the plaintiff existed.

24. Mr O h-Oisin has said that the plaintiff never brought his medical condition, if any, to the attention of the army in the context of his discharge, and that if he wanted that matter to be considered as a reason for his discharge he ought to have raised the matter himself, either orally or in his written representation. But that he remained silent in that regard. However, I am of the view for the purpose of this application that it appears arguable at least that the regulations place no onus on the soldier to bring matters to the attention of the army personnel in order that reasons for discharge can be considered. It seems to me that the terms of Regulation 58(r) require those making the decision to discharge to satisfy themselves that there is no other reason in existence for his discharge. In the case of the plaintiff such other reason may have been his medical record and if consideration had been given to that, it is possible that he may have been entitled to a more favourable discharge on the ground of his medical record. That opportunity may have been denied this plaintiff.

25. Even if it is accepted that the plaintiff ought at the least to have mentioned his sickness record to Commandant Prendergast at the meeting on the 30th June 2005, and it is strange that he did not, one must allow for the fact that a humble Private on parade before his Commandant and other officers in circumstances where they are informing him of an intention to discharge him could be regarded as being in an unequal situation where it may not be easy to speak up for oneself. However, I do not rely on that factor strongly. In my view a serious issue has been raised that this plaintiff may have been incorrectly discharged under Regulation 58(r) where another reason for his discharge may exist and to which he would be entitled to the benefit. In other words that the defendants cannot rely on Regulation 58(r) where either the real reason was his ill-health causing his absenteeism, or that such might have availed the plaintiff as a reason for his discharge even if, without ill-health, his conduct generally would have justified his discharge under Regulation 58(r). Mr O-hOisin on the other hand has submitted that this Court should assume that the army gave appropriate consideration to the question as to whether discharge under regulation 58(p) - medical grounds - was appropriate. He also submits that there is no suggestion that the plaintiff's ill-health came within the terms of Regulation 58(p). However, and certainly for the purpose of deciding the question of a fair issue to be tried, I am prepared to accept that it is arguable that insufficient consideration was given to the question as to whether the plaintiff's discharge would be merited under 58(p) in circumstances where he had such a poor attendance record through, inter alia, illness - a step which would clearly be of benefit to the plaintiff in the future.

26. Mr Howard has also made the point also that even if the army was justified in discharging him under 58(r) they in fact did not comply with appropriate procedures, in as much as they did not carry out a pre-discharge medical examination, and did not allow him to take leave which he was entitled to take prior to the date of his discharge. The defendants dispute that they are in breach of the procedures.

27. I should mention that Mr O h-Oisin has submitted also that the plaintiff has sought merely declaratory reliefs in his plenary proceedings, and has referred the Court to cases such as Philpott v. Ogilvy and Mather, High Court, unreported, 21st March 2000; *Parsons v. Irish Rail* [1997] E.L.R. 203; *O'Donnell v. DunLaoghaire Corporation* [1991] I.L.R.M. 301 in support of his submission that in circumstances where there is no claim brought by the plaintiff for wrongful dismissal, his claims for declaratory relief cannot stand alone. However, Mr Howard has pointed to the fact that the plaintiff has included a claim for damages for breach of contract of employment, and has also pointed to the fact that the plaintiff has not entitlements under the Unfair Dismissals Act procedures, and has submitted that whether the plaintiff describes his claim for damages as being on the grounds of wrongful dismissal or breach of contract of employment has no distinction of substance, and that it is perfectly permissible for him to claim under breach of contract and to seek associated declaratory reliefs. I propose to leave over any detailed consideration of that question for the substantive hearing.

28. The Court has also been referred by Mr Howard to the judgment of Budd J. in *Cassidy v. Shannon Castle Banquets and Heritage Ltd* [2000] E.L.R. 248, as confirming the availability of declaratory relief that his dismissal was without efficacy and invalid as an independent relief and without claiming damages for wrongful dismissal.

29. Each side has relied on significant and interesting passages from the judgments in *The State (Gleeson) v. The Minister for Defence* [1976] I.R. 280. I do not propose to examine those judgments for the purpose of this application.

30. As to the question of whether the plaintiff will suffer irreparable loss if the injunction is not granted, and the adequacy of damages, the fact is that he is a man who has little education and no training outside what he achieved in the employment of the defendants. One cannot rule out the possibility that he will gain employment, but the manner of his discharge from the army may not assist him. He has no other source of income. In my view the plaintiff is in a parlous position pending the hearing of this case, and while there can be no doubt as to the capacity of the defendants to meet any award of damages which may be made at any later stage of this case, the fact is that the plaintiff in my view comes within the principles of the judgment in the Fennelly case, the full detail of which is not immediately available to me. In other words that even though damages are an adequate remedy, the plaintiff should be in receipt of his salary pending the full hearing of the case, on the plaintiff undertaking to carry out any work which may be asked of him by his employer during that time, but that this does not mean that he is required at all times to turn up for duty.

31. Whatever about the adequacy of damages, there can be no question about the fact that the balance of convenience lies in favour of the plaintiff in this regard.

32. I therefore propose to make an order in terms of paragraph (c) of the Notice of Motion herein dated 29th July 2005, pending the determination of these proceedings, and provided that the plaintiff gives the undertaking that he will carry out any duties during that time as may be required of him, if any, and also that he will take such steps as are open to him at all times to expedite as far as possible the hearing of this case.