Neutral Citation: [2016] IEHC 203

THE HIGH COURT

[2014 No. 511 J.R.]

BETWEEN

AISLING DUNNE

APPLICANT

AND

IRISH PRISON SERVICE

RESPONDENT

AND

COMMISSIONER FOR PUBLIC SERVICE APPOINTMENTS

NOTICE PARTY

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NOTICE PARTY

JUDGMENT delivered by Mr. Justice Michael White on the 16th day of March 2016.

1. The respondent has issued identical motions in these applications for judicial review seeking an order pursuant to the inherent jurisdiction of the court striking out or dismissing the claims of the applicants on the grounds that the proceedings are now moot.

2. The background to these judicial review proceedings is that the applicants are prison officers in the Irish Prison Service. The first applicant joined the Prison Service on 10th January, 2000 and the second applicant joined on 9th June, 2008.

3. On 30th May, 2013, the respondent (Circular 02/2013) advertised an internal competition for promotion to work training officer. The areas covered by the competition were:-

(i) services: laundry, industrial cleaning;

(ii) catering/catering bakery;

(iii) environmental horticultural waste management, environment;

(iv) industrial skills, embroidery, engraving, light assembly, domestic fabric work, painting, tiling, maintenance, car maintenance;

(v) crafts, metal work, welding, carpentry, joinery, construction skills

(vi) ISM - Integrated Sentence Management, Personal Development – employability skills;

(vii) physical education;

(viii) computers, printing.

4. On the completion of the selection process and review, the first applicant was placed 24 on the panel for work training officer in Integrated Sentence Management and was unsuccessful at that time in securing a position of work training officer on that panel.

5. The second applicant was placed 21 on the panel for Integrated Sentence Management and 23 on the panel for Services and was unsuccessful in securing a position.

6. Both applicants appealed within the internal appeals structure of the respondent.

7. Subsequently, both applicants applied for leave to bring judicial review proceedings and by order of 29th August, 2014, Mac Eochaidh J. granted leave on certain grounds.

8. The applicants subsequently issued separate motions dated 5th September, 2014, seeking the following reliefs:-

> (i) an order of *certiorari* by way of judicial review, quashing the results of a selection process for posts of work training officer in the Irish Prison Service carried out on foot of Circular 02/2013;
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> (ii) an order of prohibition preventing the respondent, its servants or agents from making appointments to the post of work training officer on foot of selection process carried out under Circular 02/2013;
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> (iii) a declaration that the respondent, its servants or agents acted *ultra vires* and are in breach of the requirement of natural and constitutional justice in the manner in which it conducted the selection process for the posts of work training officer;
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> (iv) A stay pursuant to O. 84, r. 27 of the Rules of the Superior Courts 1986, pending the determination of the within judicial review proceedings, restraining the respondent, its servants or agents from making further appointments to the post of work training officer; and
>
> (v) if necessary, an injunction (including an interim or interlocutory injunction), pending the determination of the within judicial review proceedings, restraining the respondent from taking any further steps to implement the decisions made on foot of the selection process carried out on foot of Circular 02/2013.

9. No interim injunctive relief was granted.

10. Following the service of the proceedings, the respondent did not proceed to fill further vacancies in either the Integrated Sentence Management panel or the Services panel. However, by letter dated of 6th January, 2015, the Chief State Solicitors Office advised that the respondent proposed to proceed with appointments to the position of work training officer as and from 13th January, 2015. This was opposed by the applicants. By letter dated 13th February, 2015, the respondent offered the first applicant promotion to the position of work training officer with effect from 28th February, 2015.

11. The first applicant accepted the offer of the position as a work training officer in Integrated Sentence Management but stated that the acceptance of the offer did not, in any way, amount to withdrawing or compromising the judicial review proceedings.

12. By letter dated 2nd February, 2015, the respondent offered the second applicant promotion to the position of work training officer with effect from 21st February, 2015. The second applicant by letter dated 6th February, 2015, accepted the position but again advised by letter that the acceptance of the offer by her did not, in any way, amount to withdrawing or compromising the judicial review proceedings.

13. By letter dated 27th February, 2015, sent by the Chief State Solicitors Officer to the relevant applicant's solicitors, the respondent alleged that as the applicants had been formally offered the position as work training officer and had formally accepted,the proceedings were now moot. The letter stated that the respondent viewed the further prosecution of these proceedings as an abuse of process.

14. The applicants' solicitors by separate letters of 26th March, 2015, replied and rejected the allegations that the proceedings were moot or an abuse of process.

15. In reply to the allegation that the proceedings were moot and an abuse of process, the first applicant in her affidavit sworn on 17th June, 2015, stated as follows:-

> "11. I note that in para. 16 of his affidavit that Mr. Beirne contends that I have suffered no loss or damage as a result of my placement on the panel as a result of what I say was a defective selection process. I say that this is not the case. As a result of having to accept the position in Midlands Prison. I will incur additional travelling expenses. Furthermore, I say that being the most junior WTO in ISM that future transfer requests will be affected but more immediately, it will affect me on my return to work from maternity leave as due to staffing levels, the most junior WTO as regularly reassigned off ISM duties to work on the floor of the prison.
>
> 12. I say that I have found the whole experience to be humiliating and stressful in that as a result of the flawed selection process, I was removed from an area of work where I was greatly experienced and had an acknowledged expertise.
>
> 13. I say that in December 2013, I was instructed to clear out my office for someone else who was a place higher up to me on the WTO panel. Furthermore, I say that I was regularly upset at home as I found it very difficult in work as prisoners and colleagues were regularly commenting to me that I was no longer working in ISM and why I was placed so low on the panel. I was placed in the embarrassing position of having to explain to prisoners and outside services to inform them that I would no longer be dealing with them.
>
> 14. I say that I initiated these proceedings because of the actions of the respondents specifically in that they conducted a selection process in breach of the code of practice of the notice party.
>
> 15. I say that I have followed the procedures laid down by the respondent for dealing with complaints and reviews including a reference to the notice party.
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> 16. I say that I awaited the issue of the report by the notice party, as it is the statutory body charged with responsibility in such matters.
>
> 17. I say that I exhausted all the internal mechanisms available to me prior to a reference to this Honourable Court by way of judicial review and I say that I am advised that this was the proper course to follow.
>
> 18. I say that subsequent to initiating these proceedings that I accepted my current position in order to mitigate my loss.

19. I say that the current state of affairs has been brought about entirely by the actions of the respondent, in particular the decision by the respondent to resume appointments to WTO in January this year which had the effect of exhausting the panels. I note that in para. 20 of his affidavit that Mr. Beirne states that the respondent has been prepared to defer appointments to other WTO posts pending appeals by other individuals, yet was not prepared to defer further action in my case despite the proceedings herein."

16. The second applicant in response to the motion and affidavit to strike out the proceedings in her affidavit of 17th June, 2015, stated at para. 11:-

"11. I note that in para. 16 of his affidavit that Mr. Beirne contends that I have suffered no loss or damage as a result of my placement on the panel as a result of what I say was a defective selection process. I say that this is not the case. I say that as a result of being so far down the panel I was junior to other WTO and this will affect my position in relation to future transfers. Furthermore, being so far down the panel meant that the positions available to me i.e. Limerick and the Dóchas Centre were limited.

12. I say that I have found the whole experience to be humiliating and stressful.

13. I say that had I been offered the WTO position in Limerick earlier, I could have moved home to the Limerick region prior to my baby being born. This was my intention as I have a strong family network of support in the Limerick region. This would have allowed me ample time to organise living arrangements, crèche/child minding facilities and afforded my partner time to seek alternative employment in the region.

14. I say that my son was five months old when I was offered the position and he had been enrolled in a crèche in Dublin at that point and relocation to Limerick, closer to my family was not an option at that point in time.

15. I say that the whole experience caused me undue stress and anxiety and may have been a contributory factor in being diagnosed with post natal depression.

16. I say that I initiated these proceedings because of the actions of the respondent specifically in that they conducted a selection process in breach of the code of practice of the notice party.

17. I say that I have followed the procedures laid down by the respondent for dealing with complaints and reviews including a reference to the notice party.

18. I say that I awaited the issue of the report of the notice party as it is the statutory body charged with responsibility in such matters.

19. I say that I exhausted all the internal mechanisms available to me prior to a reference to this Honourable Court by way of judicial review and I say that I am advised that this was a proper course to follow.

20. I say that subsequent to initiating these proceedings that I accepted my current position in order to mitigate my loss.

21. I say that the current state of affairs has been brought about entirely by the actions of the respondent, in particular the decision by the respondent to resume appointments to WTO in January this year which had the effect of exhausting the panels. I note that in para. 20 of his affidavit that Mr. Beirne states that the respondent has been prepared to defer appointments to other WTO posts pending appeals by other individuals, yet was not prepared to defer further action in my case."

17. The legal principles are very helpfully set out in a judgment of Lofinmakin v. Minister for Justice, Equality and Law Reform [2013] IESC 49 (20th November 2013) in the judgment of McKechnie J., when he stated:-

"51. From the relevant authorities thus reviewed and leaving aside the issue of costs which is dealt with separately (para. 71 infra et seq.), the legal position can be summarised as follows:-

(i) A case, or an issue within a case can be described as moot when a decision thereon can have no practical impact or effect on the resolution of some live controversy between the parties and such controversy arises out of or is part of some tangible and concrete dispute then existing.

(ii) Therefore, where a legal dispute has ceased to exist, or where the issue has materially lost its character as a lis , or where the essential foundation of the action has disappeared, there will no longer be in existence any discord or conflict capable of being justiciably determined.

(iii) The rationale for the rule stems from our prevailing system of law which requires an adversarial framework, involving real and definite issues in which the parties retain a legal interest in their outcome. There are other underlying reasons as well, including the issue of resources and the position of the court in the constitutional model.

(iv) It follows as a direct consequence of this rationale, that the court will not – save pursuant to some special jurisdiction – offer purely advisory opinions or opinions based on hypothetical or abstract questions.

(v) That rule is not absolute, with the court retaining a discretion to hear and determine a point, even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness.

(vi) In conducting this exercise, the court will be mindful that in the first instance it is involved in potentially disapplying the general practice of supporting the rule, and therefore should only do so reluctantly, even where there is an important point of law involved. It will be guided in this regard by both the rationale for the rule and by the overriding requirements of justice.

(vii) Matters of a more particular nature which will influence this decision include:-

(a) the continuing existence of any aspect of an adversarial relationship, which if found to exist may be sufficient,

depending on its significance, for the case to retain its essential characteristic of a legal dispute;

(b) the form of the proceedings, the nature of the dispute, the importance of the point and frequency of its occurrence and the particular jurisdiction invoked;

(c) the type of relief claimed and the discretionary nature (if any) of its granting, for example certiorari ;

(d) the opportunity for further review of the issue(s) in actual cases;

(e) the character or status of the parties to the litigation and in particular whether such be public or private: if the former, or if exercising powers typically of the former, how and in what way any decision might impact on their functions or responsibilities;

(f) the potential benefit and utility of such decision and the application and scope of its remit, in both public and private law;

(g) the impact on judicial policy and on the future direction of such policy;

(h) the general importance to justice and the administration of justice of any such decision, including its value to legal certainty as measured against the social cost of the status quo;

(i) the resource costs involved in determining such issue, as judged against the likely return on that expenditure if applied elsewhere; and

(j) the overall appropriateness of a court decision given its role in the legal and, specifically, in the constitutional framework.

52. The matters above mentioned as being material to the exercise of the courts' discretion are indicative only and are not intended in any way to be exhaustive and may well have to be adjusted to reflect the particular circumstances of any given situation. However, once all appropriate matters are established and their relevance identified, the conclusion of the resulting analysis in all cases should reflect the basic purpose of the rule and should be concordant with its underlying rationale.

53. In summary it can be said that in light of the considerations stated above, the courts do not in principle try issues which are moot, notwithstanding that these may have been an important question of law in issue between the parties and it is only where there are a range of exceptional circumstances that the courts will exercise their discretion to do so."

18. The applicants could well be affected by the alleged illegal actions of the respondent if the Court decides that is the case. There is a possibility that a declaration in favour of the applicants would assist in respect of future promotions.

19. However the applications for *certiorari*, prohibition, a stay and an injunction are now moot. The only remaining matter that is justiciable between the applicants and the respondent is the declaration sought at para. 3 of the original notice of motions that is "a declaration that the respondent's servants or agents acted *ultra vires* and are in breach of the requirements of natural and constitutional justice in the manner in which it conducted the selection process for the posts of work training officer.

20. Counsel for the applicants made submissions on the possibility of the applicants being entitled to damages. However, damages are not included in the leave order or the notice of motion and if the applicants wish to seek damages as they are now entitled to do pursuant to O. 84, r. 24(1), they would need to make an application to amend the order of leave and their respective motions.