

**THE HIGH COURT
JUDICIAL REVIEW**

[2013 No. 805 JR]

BETWEEN

PASCAL HOSFORD

APPLICANT

AND

THE MINISTER FOR SOCIAL PROTECTION

RESPONDENT

JUDGMENT of Mr. Justice Seamus Noonan delivered the 6th day of February, 2015

Introduction

1. The applicant is a higher executive officer in the Department of Social Protection ("the Department") and a deciding officer under the Social Welfare (Consolidation) Act 2005. In August 2009, the applicant was appointed as section manager in the Scope Section of the Department. On the 23rd September, 2013, the applicant was transferred from this position to another position within the Department. The applicant alleges that the transfer was directed by the respondent for an improper motive and he brings the within judicial review proceedings seeking, *inter alia*, a declaration that this reassignment was *ultra vires* and unlawful. The applicant appeared in person.

Background Facts

2. The applicant, who is a qualified certified accountant, commenced his career in the civil service in 1977 in the Comptroller and Auditor General's Office. In 1981, he was transferred to the Revenue Commissioners and in 1983, to the Department of Posts and Telegraphs. In or around 1985, the applicant was transferred to the Department of Social Welfare. On the 4th June, 1987, the applicant was offered a permanent post of higher executive officer subject to the completion of a form of acceptance which was duly signed by the applicant on the 5th June, 1987 and provides as follows:

"I am prepared, if appointed to the post of higher executive officer in the Department of Social Welfare, to perform any duties which may be assigned to me from time to time by direction of the Minister for Social Welfare appropriate to my new appointment."

3. Since then, the applicant has worked in different sections of the Department and in or about July 2009, the applicant was transferred to the Scope Section of the Department. That section is headed by a principal officer and below him or her, an assistant principal officer. Next in seniority is a higher executive officer, formerly the applicant, who is responsible for managing a number of executive and clerical staff. The function of Scope Section is to determine the employment status of individuals for the purposes of their Pay Related Social Insurance liabilities and entitlements under the relevant social welfare legislation. The applicant was also appointed as a deciding officer for this purpose under s. 299 of the Social Welfare (Consolidation) Act 2005.

4. It would appear that not long after the applicant commenced in the Scope Section, an issue arose as to the appropriate classification of individuals working in companies of which they were directors and shareholders and in particular, whether in certain circumstances such individuals might be classified as self employed for PRSI purposes depending on the nature of their shareholding in the company and other factors. It is fair to say that the applicant developed a very definite and perhaps even passionate view of the law in this regard which he considered should be applied without regard to any policy considerations. The applicant alleges that the Department operated a policy in relation to this issue which was unlawful and he expressed that view on numerous occasions to his superiors and other parties both inside and outside the Department.

5. It is clear that this issue became a source of considerable conflict and friction between the applicant and his superiors within the Department. In November 2012, the applicant threatened to apply to the High Court for a judicial review of what he saw as its unlawful policies and seems to have viewed himself as a whistleblower acting in the public interest. He also complained unsuccessfully to the Ombudsman. He disclosed what the Department viewed as confidential material and privileged legal advice to outside parties including the Ombudsman, the Revenue Commissioners and his own lawyers.

6. In further correspondence later that month, he indicated to a personnel officer in the Department that he intended making what he described as "protected disclosures" under draft whistleblower legislation to a range of bodies including the High Court, the Ombudsman, the Comptroller and Auditor General, Dail Committees and perhaps the troika. Considerable time and effort appears to have been devoted within the Department to dealing with lengthy correspondence from the applicant. Departmental meetings were frequently disrupted where the applicant was involved and he alleges that he was wrongfully expelled from such meetings. Indeed it would appear that the entire decision making process of Scope Section in relation to working directors had to be suspended for a lengthy period.

7. In a replying affidavit filed on behalf of the respondent, Mary Kennedy, the principal officer in Scope Section, sets out a very detailed account of the difficulties encountered with the applicant from the commencement of his assignment to Scope Section. Ms. Kennedy says that the applicant declined on many occasions to follow the instructions of his line managers and not just in relation to the working directors issue and she gives a number of examples. The Social Welfare and Pensions (Miscellaneous Provisions) Act 2013 came into effect on the 28th June, 2013 and one of its effects was that persons who owned or controlled 50% or more of the shareholding in companies in which they were employed and of which they were directors were to be regarded as self-employed for PRSI purposes.

8. Where such persons held less than a 50% shareholding, Department policy determined that they should be assessed on a case by

case basis in accordance with criteria determined by the Department and embodied in a code of practice. The applicant appears to have taken it upon himself to decide that he would not implement this policy as he considered it not to be in accordance with law.

9. On the 6th September, 2013, Ms. Kennedy met with the assistant secretary of the Department responsible for Scope Section, Ms. Ryan, who requested that human resources reassign the applicant in the interests of the smooth running of Scope Section having regard to the difficulties that were being encountered with him. On the 23rd September, 2013, Ms. Kennedy and Scope Section assistant principal, Ms. O'Donnell met with the applicant to advise him that he was being reassigned to a new initiative regarding human resources record management called PeoplePoint.

10. The applicant in his affidavit says that he was told at the meeting that he was a good worker and had initiated a number of improvements in the Scope Section. He says he was told that he was being reassigned due to his difficulty in accepting management decisions and carrying out management instructions as directed. The applicant exhibits Ms. O'Donnell's minute of the meeting as evidence of what occurred. In it, Ms. O'Donnell gives examples of improvements made by the applicant in the section. She felt however that there were issues with regard to accepting management decisions and carrying out her instructions as directed. She explained that she needed to be able to rely on her higher executive officer to carry out her instruction and that she felt she was unable to rely on him to do so. Ms O'Donnell explained to the applicant that she found many of their conversations challenging because he was very opinionated and had difficulty listening to other people's point of view. This was having a draining effect on her ability to get changes implemented. She gave a number of examples.

11. Ms. Kennedy avers that the PeoplePoint project is a shared human resources facility for the entire civil service and is a very important high profile project for the Department. The applicant took issue with this description and described his new assignment as "being sent to Siberia."

12. It is common case that the applicant's pay and conditions and promotional prospects are entirely unaffected by his reassignment. No disciplinary action has been taken against him and the respondent says his new role is not a demotion and if anything enhances his experience and thus promotional prospects. The applicant disagrees. Ms. O'Donnell says that since the applicant left Scope Section, there has been a perceptible and significant improvement in the level of engagement by the officers in that section.

13. In fact, in June 2014, the applicant was transferred again to what he himself describes as a key position in the Facilities Management-Finance Unit. This unit is responsible for managing the Department's property portfolio across the State and has an annual budget of some €50m. He makes no complaint in the within proceedings about this reassignment and has not sought to amend his grounds to do so.

Submissions

14. In essence, the applicant's claim boils down to the sole contention that his reassignment to PeoplePoint was invalid because it was made by the respondent *mala fide* for an improper purpose. The applicant identifies that purpose as being to discipline him for upholding the law and prevent him from interfering further in the perpetuation of unlawful policies by the respondent. The applicant alleges that the circumstances of the transfer amounted to a public rebuke to and humiliation of him, were defamatory and have caused great damage to his reputation and standing.

15. Mr. Humphreys SC, on behalf of the respondent, submits that the respondent has the right to transfer officers within her department at her absolute discretion. This right is statutory and is further acknowledged in the applicant's contract as noted above. The applicant accepts this to be so. Such transfer is a purely administrative action which does not engage any rights the applicant enjoys under the Constitution or European Convention on Human Rights. He argues that in view of the seriousness of the applicant's allegations, he carries a heavy burden of proving them and they are unsupported. The onus of proof remains on the applicant and where averments are made and contradicted on affidavit, that burden remains undischarged in the absence of cross-examination. He accepts that a transfer could in theory be challenged if the evidence established that it was capricious or for an improperly punitive purpose but nothing in the applicant's case establishes that.

16. He contends further that the merits of the applicant's transfer are not a matter for the court, which cannot act as an appellate tribunal from the decision of the respondent. Even if it were the case that the transfer had an impermissible objective, which was entirely refuted, the applicant must still establish that this was the primary and dominant purpose of the transfer.

17. Quite apart from the foregoing, the transfer complained of had now expired, there was no complaint about the applicant's current position and his claim was therefore moot. There was no evidence of the applicant having suffered any financial or other loss. He said that the applicant's allegation that his reputation and prospects were somehow damaged was entirely undermined by the fact of his subsequent transfer to an important post which the applicant himself describes as "key".

18. Mr. Humphreys submitted that the reality of the applicant's claim was that he was seeking to use his transfer as a platform to ventilate his views on the law relating to so called proprietary directors and attempt to cause what he perceives to be embarrassment to the respondent as he has been threatening since 2012. This is a clear abuse of process.

Analysis

19. The applicant accepts that he was and remains liable to transfer at the sole discretion of the respondent. It could not realistically be suggested that every decision to reassign a civil servant to different duties engages the full panoply of Constitutional and Convention rights and that the party thereby affected must be afforded fair procedures including for example the right to make submissions or be given reasons. That would be evidently absurd. There is clearly a range of decisions in the context of employment that may be taken which are merely administrative or managerial in nature and do not give rise to such rights or which are amenable to judicial review. The position may be different where the decision complained of is disciplinary in nature and involves the imposition of a penalty or perhaps dismissal. On occasion, a civil servant may not like being transferred from one role to another but that is an incident of the job and not a matter for judicial review. It is debateable whether there is any public law element arising in such circumstances.

20. In the present case, the applicant makes a number of very serious allegations against the respondent which are notably unsupported by any evidence other than his own opinion. His views in that regard are entirely contradicted by the respondent's evidence and the applicant has not sought to cross-examine any of the deponents. There are significant conflicts in the evidence on both sides which clearly cannot be resolved by the court in the absence of cross-examination. One such conflict arises in relation to the central issue in the case, namely, the respondent's reason for transferring the applicant. The applicant has advanced his belief as to the real reason.

21. The respondent's senior officers on the other hand have sworn to a number of reasons for the transfer which taken at face value

are entirely valid and legitimate reasons. The onus of proving his case rests on the applicant and it seems to me that he has not discharged the onus of establishing any factual basis upon which the court could interfere with the respondent's decision herein.

22. Even if that were not the case, there is no evidence that the applicant has suffered any detriment whatsoever. Whilst he suggests that his standing and reputation have been damaged, the only evidence of this is his own belief that it is so and that is quite inconsistent with subsequent events which show that he has now been reassigned to a highly responsible position which he himself describes as "key". Indeed, given his subsequent transfer, about which he makes no complaint, the proceedings are effectively moot and the only issue that could arise is that of costs even were it the position that the applicant had a good case to start with.

23. It seems to me that the applicant has embarked on something of a crusade for the past number of years to champion the public interest, as he sees it, in proving that his view of the law on a particular topic is correct. On more than one occasion during the course of the hearing, he invited me to make determinations regarding the status of proprietary directors for PRSI purposes. He devoted considerable time in his oral and written submissions to an exposition of the law in this area. This drives me to conclude that the respondent's submission in this respect is well-founded and that the applicant seeks to abuse the process of this court to ventilate issues that are of no relevance to these proceedings.

24. Accordingly I will dismiss this application.