

**THE HIGH COURT**

**[2012 No.136 MCA]**

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 79(7) OF THE EMPLOYMENT EQUALITY ACTS 1998 – 2004**

**BETWEEN**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**APPELLANT**

**AND**

**RAVINDER SINGH OBEROI**

**RESPONDENT**

**AND**

**THE DIRECTOR OF THE EQUALITY TRIBUNAL**

**NOTICE PARTY**

**[2012 No. 174 MCA]**

**BETWEEN**

**RAVINDER SINGH OBEROI**

**APPLICANT**

**AND**

**THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**RESPONDENT**

**Judgment of Mr. Justice Feeney delivered on 30th day of May, 2013.**

1.1 These proceedings are an appeal and a cross-appeal brought pursuant to s. 79(7) of the Employment Equality Act 1998 (as amended) (hereinafter "the Equality Acts"). Section 79(7) of the Equality Acts provides:

"... the complainant or respondent may appeal to the High Court on a point of law from a decision made by the Director under this section."

As there is an appeal and a cross-appeal for ease of reference Ravinder Singh Oberoi will be referred to in this judgment as the complainant and the Commissioner of An Garda Síochána shall be referred to as the respondent.

2.1 The complainant made a complaint under the Equality Acts which complaint was referred to the Equality Tribunal. The complainant claimed that he had been discriminated against on the grounds of religion and/or ethnicity contrary to s. 8 of the Equality Acts. The complainant is a member of the Irish Sikh community and in accordance with the requirement of his Sikh faith he does not shave his beard and wears a turban. Unshaved hair and the use of a turban are part of the articles of faith of Sikhism. The complainant is a follower of Sikhism and a member of the Sikh people. The complainant's complaint arose in circumstances where he had applied to join the Garda Reserve and had met the selection criteria for entry and had completed the first three stages of training when he was informed, at the commencement of the fourth stage, that he was required to wear a full Garda uniform, including a Garda hat, during training and would not be permitted to wear a turban. As a result of that requirement the complainant claims that he was unable, due to his religious beliefs and ethnicity, to continue his training and thereby become a member of the Garda Reserve.

2.2 In making his complaint under the Equality Acts, the complainant claimed that he had been treated less favourably in accessing employment, in his conditions of employment and in relation to training for employment and/or in relation to vocational training due to his religion and his ethnicity in that he was prohibited from wearing his turban and so was unable to complete his training and become a member of the Garda Reserve.

2.3 The complainant's complaint came on for hearing before the Equality Tribunal on the 24th November, 2010 and the Garda Commissioner (the respondent) raised a preliminary issue in relation to the jurisdiction of the Equality Tribunal to hear and determine the complainant's complaint. That issue was raised on the basis that it was claimed that the Equality Acts do not apply to members of the Garda Reserve as they are not "employees" within the meaning of the Equality Acts. The decision in relation to that preliminary issue was given by the Equality Tribunal in March 2012. The decision of the Equality Officer was communicated by letter dated the 16th March, 2012. The decision set out in the letter stated that the Equality Officer had decided that the complainant was not an employee for the purpose of the Equality Acts and that the Equality Officer would "provide detail of this consideration on the preliminary issues in my final written decision". The Equality Officer further determined that the complainant was correct in his submission where he had placed reliance on s. 12 of the Equality Acts and that the induction process into the ranks of An Garda Síochána constituted vocational training within the meaning of s. 12(2) of the Equality Acts.

2.4 The preliminary decisions determined by the Equality Officer resulted in one decision in favour of the complainant and one in favour of the respondent. The complainant has appealed the determination of the Equality Tribunal that he is not an employee within the meaning of the Equality Acts and that the respondent, has appealed the interpretation made by the Equality Tribunal of s. 12(2) of the Equality Acts. Section 79(3A) of the Equality Acts provides that a decision on a preliminary issue can be made by the Equality Tribunal. It is the two preliminary decisions which are the subject matter of the appeal and cross-appeal brought to this Court. The preliminary decisions were, ultimately, set out in a letter of the 5th April, 2012 from the Equality Officer wherein a written reasoned decision was set out. The Equality Officer purported to backdate that decision to the date of the original decision contained in the letter of the 16th March, 2012. No issue arises from either of the parties in relation to the date of appeal and both parties have proceeded on the basis that the decision set out in the letter of the 5th April, 2012 is the decision of the Equality Officer and it is that decision which is the subject of the appeals to this Court.

2.5 The matters which I have to determine is first whether the Director of the Equality Tribunal, his servant or agent, was correct in law in determining that Mr. Singh, the applicant, falls within the ambit of the Equality Acts by virtue of s. 12(2) and secondly, whether he is a member of the Garda Reserve "an employee" within the meaning of the Equality Acts.

3.1 In his appeal Mr. Singh claims that a member of the Garda Reserve is an employee within the meaning of ss. 2(3), 6 and 8 of the Equality Acts. The issues which the Garda Commissioner raises in his appeal is whether the Equality Tribunal has jurisdiction by virtue of s. 8(1)(c) and/or s. 12 of the Equality Acts to rule on a claim of discrimination by Mr. Singh with regard to being permitted to become a member of the Garda Reserve and: whether being a member of the Garda Reserve is "training or experience for or in relation to employment" within the meaning of s. 8(1)(c) or "a course of vocational training" within the meaning of s. 12. The Equality Officer determined that he had jurisdiction to hear the complainant's complaint on the basis that a Garda Reserve officer was in vocational training. As indicated above, the Equality Officer also determined that Mr. Singh, the complainant, was not an employee as Garda Reserve members are volunteers and do not perform their functions under a contract of employment.

4.1 Discrimination for the purposes of the Equality Acts is set out in s. 6(1) where it is provided:

"For the purpose of this Act and without prejudice to its provisions relating to discrimination occurring in particular circumstances discrimination shall be taken to occur where . . .

(a) a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified . . ."

Among the discriminatory grounds specified in the Equality Acts which are relevant to this case are the grounds set out at s. 6(2)(e) which is:

"(e) That one has a different religious belief from the other, or that one has a religious belief and the other has not (in this Act referred to as 'the religion ground')." And

Also the ground set out at s. 6(2)(h) which provides:

"(h) That they are of different race, colour, nationality or ethnic or national origins (in this Act referred to as 'the ground of race')."

In the section of the Equality Acts dealing with discrimination in specific areas, s. 8 deals with discrimination by employers both in relation to employees or prospective employees, and covers access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading and classification of posts. To be covered by that section, a person has to be an employee or a prospective employee. An employee is defined as a person who has entered into or works under a contract of employment. There is no statutory definition of a prospective employee. However, a contract of employment is defined in s. 2 and is stated to mean a contract of service or apprenticeship or any other contract whereby an individual agrees with another person personally to execute any work or service for that person. Section 2(3) of the Equality Acts expressly provides that a person holding office under or in the service of the State (including a member of An Garda Síochána or the Defence Forces) are "For the purposes of this Act deemed to be an employee employed by the State or Government,...under a contract of service". Section 3 of the Garda Síochána Act 2005 defines a member of An Garda Síochána as being:

"(a) a member of any rank (including the Garda Commissioner) appointed under Part 2 or under an enactment repealed by this Act, and

(b) a reserve member."

A reserve member is defined in s. 15 as being a reserve member of An Garda Síochána. It follows that a reserve member is a member of An Garda Síochána and that, therefore, it is claimed that under the provisions of the Equality Acts and, in particular, s. 2(3)(a) that the provisions of that Act are applicable to "members" of An Garda Síochána.

4.2 Reserve members of An Garda Síochána are provided for in s. 15 of the Garda Síochána Act 2005. Section 15 provides:

"15. – (1) The Garda Commissioner may, subject to subsection (4) and the regulations, appoint persons as reserve members of the Garda Síochána to assist it in performing its functions.

(2) A person is not eligible to be appointed as a reserve member unless he or she has completed the prescribed training.

(3) Subject to subsection (5), a reserve member has, while on duty, the same powers, immunities, privileges and duties as a person appointed under section 14 to the rank of garda.

(4) The power to appoint persons under subsection (1) may be exercised only if –

(a) the Garda Commissioner has submitted proposals to the Minister for the training of persons to be so appointed, and

(b) regulations have been made concerning their recruitment and training and prescribing the terms and conditions of their position.

(5) The Garda Commissioner may determine the range of powers to be exercised and duties to be carried out by reserve members."

4.3 A reserve member of An Garda Síochána is appointed pursuant to s. 15 of the Garda Síochána Act 2005 and the appointment of such person is governed and regulated by the Garda Síochána (Reserve Members) Regulations 2006 (S.I. No. 413/2006) hereinafter referred to as "the Regulations". A person who becomes a member of An Garda Síochána Reserve does not sign a contract and s. 15(6) of the Garda Síochána Act 2005 (as inserted by s. 43 of the Criminal Justice Act 2007) provides that:

"A reserve member is a volunteer and does not perform his or her functions as such a member under a contract of employment."

It is claimed on behalf of the Commissioner of An Garda Síochána that as a result of that provision, that the Equality Acts do not apply to a member of the Garda Reserve or to a person who seeks to become a member of the Garda Reserve. In considering this matter I must determine how the "deeming" provision provided for in s. 2(3) of the Equality Acts falls to be interpreted in the light of s. 15(6) of the Garda Síochána Act 2005. The respondent contends that the deeming provision has no application to the members of the Garda Reserve or to a person who seeks to become a member of the Garda Reserve due to the express words of s. 15(6). The complainant claims that such contention is incorrect and that the Equality Acts do apply to members of the Garda Reserve and prospective members in that s. 15(6) of the Garda Síochána Act 2005 makes no reference to the provisions of the Equality Acts and is not stated as amending any provision of the Equality Acts that the complainant is an employee for the purpose of the Equality Acts when the legislation properly interpreted and applied.

4.4 Section 12 of the Equality Acts deals with vocational training. That section precludes discrimination against a person in the provision of vocational training, access thereto or in respect of the terms offered to them in relation to such training. The relevant part of s. 12 provides as follows:

"12. – (1) Subject to subsection (7) any person, including an educational or training body, who offers a course of vocational training shall not, in respect of any such course offered to persons over the maximum age at which those persons are statutorily obliged to attend school, discriminate against a person (whether at the request of an employer, a trade union or a group of employers or trade unions or otherwise) –

(a) in the terms on which any such course or related facility is offered,

b) by refusing or omitting to afford access to any such course or facility, or (c) in the manner in which any such course or facility is provided.

(2) In this section "vocational training" means any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying on of an occupational activity and which may be considered as exclusively concerned with training for such an activity."

The Equality Officer determined in his decision dated the 16th March, 2012 that:

"The prescribed training programme for eligibility as a member of An Garda Síochána, designated as a reserve member, amounts to 'vocational training' as defined by s. 12 of the Employment Equality Acts."

5.1 In his decision, dated 16th March, 2012, the Equality Officer determined in relation to the preliminary issue concerning employment at paragraph 2.4, as follows:

"Given that the Garda Síochána Act postdates the enactment of the Employment Equality Acts and, notwithstanding that it does not specifically mention the Employment Equality Acts, I am persuaded by the respondent's arguments that the intention of the legislature is to prevent the 'deeming' of certain members of An Garda Síochána specifically those designated as reserve members as employees.

2.5 I therefore conclude that the complainant is not an employee as defined by s. 2 of the Employment Equality Acts."

5.2 In relation to the preliminary issue concerning vocational training, the Equality Officer determined as follows:

"3.4 I am mindful of the following issues:

- Members of An Garda Síochána, designated as reserve members, are required to wear a specific uniform issued to them by the respondent
- Members of An Garda Síochána, designated as reserve members, have, while on duty, the same powers, immunities, privileges and duties as a person appointed to the rank of garda (Section 15(3) of the Garda Síochána Act, as amended)
- Members of An Garda Síochána, designated as reserve members, are subject to the Disciplinary Regulations of An Garda Síochána for any breach of discipline
- Members of An Garda Síochána, designated s reserve members, have to undertake specific training as prescribed by An Garda Síochána before they are eligible to become reserve members
- Members of An Garda Síochána, designated s reserve members, are not in receipt of remuneration, neither are they deemed to be employees, and therefore, on the balance of probabilities, must have some other reason to undertake the possibly onerous tasks placed upon them
- Experience gained as members of An Garda Síochána, designated as reserve members, must, in accordance with SI 509/2006 - Garda Síochána (Admissions and Appointments)(Amendment) Regulations 2006, be taken into account if/when they apply for a position as a member of An Garda Síochána, not so designated

3.5 Having considered the submissions from both parties, and on the balance of probabilities, it is difficult to conclude

that any training system that places such obligations on a person, places a person under the authority of another to such a degree, and places a person in such a visible position of representation of the authority of the State, while not being an employee, can amount to anything other than the vocational training envisaged by Section 12(2) for the carrying out of an occupational activity.

3.6 I therefore conclude that this complaint falls within the ambit of Section 12 of the Acts."

5.3 The legal issues for my determination are those two matters identified in the decision of the Equality Officer. The first is whether the complainant as a member of the Garda Reserve or as a prospective member of that organisation is or is not an employee as defined by s. 2 of the Equality Acts. The second is whether the complainant's complaint falls or does not fall within the ambit of s. 12 of the Employment Equality Acts and is training for the Garda Reserve training as envisaged by s. 12(2) of the Equality Acts.

5.4 The above two matters are the two points of law arising from the decision of the Equality Tribunal which are the subject matter of the s. 79(7) appeal and cross-appeal pursuant to the provisions of the Employment Equality Acts.

6.1 Garda Reserves are trained and appointed to assist An Garda Síochána in performing its functions. The Garda Síochána Act 2005 provides for the establishment of Garda Reserves and the appointment, training and regulation of reserves are governed by the 2005 Regulations (S.I. 413/2006). The Criminal Justice Act 2007 by s. 43 inserted into the Garda Síochána Act 2005 a provision at s. 15(6) which provided that:

"A reserve member is a volunteer and does not perform his or her functions as such as a member under a contract of employment."

That amendment thereby amended the Act establishing a Garda Reserve. A reserve member is deployed or placed on duty by, or on behalf of the relevant District Officer and has no power to place him or herself on duty. The relevant District Officer is the person who assigns duties to the reserve member and those duties are limited and any placement on duty must be under the supervision of a member. The reserve member receives no payment for duty other than an annual sum (€1,000) for expenses together with expenses relating to court appearances. The annual expense sum is paid on completion of 208 hours per annum and a reserve member may not "be required" to work more than 208 hours in any twelve month period. A reserve member wears a garda uniform with a blue sleeve on the shoulder, similar to that of garda students, and may not be deployed in plain clothes. A reserve member may only be placed on duty following mutual agreement between the volunteer, (i.e. the reserve) and the relevant District Officer and whilst on duty is subject to the Garda Disciplinary Code.

7.1 Pursuant to Statutory Instrument No. 509/2006 entitled Garda Síochána (Admissions and Appointments) (Amendments) Regulations 2006, the principal regulations in relation to admissions and appointments were amended. The 2006 Statutory Instrument amendment relating to the admission of a trainee to train to become a member of the guards came into operation on the 9th October, 2006 and provided that Regulation 5(1) of the principal Regulations was amended by substituting the following for sub-paragraph (e):

"(e) He has been notified by the Public Appointment Services that the person has been successful in a competition which

(i) includes a competitive interview, and

(ii) is of such standard and takes into account such matters, including the giving of due recognition to any satisfactory service by the person as a reserve member of An Garda Síochána, as the Public Appointment Service, after consultation with the Minister, determines; and . . ."

That amendment to the Regulations obliges the authorities in considering the admission of a person for training to become a member of An Garda Síochána to take into account satisfactory experience in the Garda Reserve. The obligation and mandate imposed by the Statutory Instrument is to give due recognition to any satisfactory service by a person as a Garda Reserve but does not place any obligation over and beyond an obligation to take that matter into account.

7.2 The evidence available to me is that there are currently some 1,102 members of the Garda Reserve, of which 794 are male and 308 are female. As of February 2013 there were a further 138 persons in training, of which 95 were male and 43 were female. Of the combined total of trained Garda Reserves and trainees, 78 of that number are non-nationals. The current position is that there are no members being recruited to An Garda Síochána due to an embargo on recruitment. That embargo does not apply to reserve membership of An Garda Síochána, such persons being deemed volunteers.

8.1 The first issue I have to decide is whether or not a member of the Garda Reserve is an employee for the purpose of the Equality Acts. The Employment Equality Act of 1998 in the opening words of its long title identifies that that Act is "to make further provision for the promotion of equality between employed persons" and "to make further provision with respect to the discrimination in, and in connection with, employment, vocational training and membership of certain bodies". For the applicant in this case to be an employee under the provisions of the Equality Acts, he would have to be "a person who has entered into or works under . . . a contract of employment and, where the context admits, includes a member or a former member of a regulatory body, but, so far as regards access to employment, does not include a person employed in another person's home for the provision of personal services for persons residing in that home where the services affect private or family life of those persons". An employer is defined as meaning the "person with whom the employee has entered into or for whom the employee works under (or, where the employment has ceased, entered into or worked under) a contract of employment". A contract of employment means "a contract of service or apprenticeship" or "any contract whereby an individual agrees with another person personally to execute any work or services for that person, or . . . where the contract is express or implied and, if express, whether oral or in writing". Section 2(3) of the Equality Acts makes it clear that the provisions of the Equality Acts extend to members of An Garda Síochána. Subsequent to the Employment Equality Acts 1998 – 2004, s. 16(6) of the Garda Síochána Act 2005 was inserted by s. 43 of the Criminal Justice Act 2007 and that section provided that a reserve member is a volunteer and does not perform his or her functions as such as a member under a contract of employment. The respondent contends that the effect of s. 15(6), as inserted by the 2007 Act, is that the complainant is not an employee and that the Garda Síochána Act which is later in time to the Equality Acts in time overrides s. 2(3) of the Equality Acts. The complainant disputes this contention.

8.2 The complainant argues that the definition of employment in the Equality Acts as inserted in s. 2 by s. 3 of the Equality Act 2004, has the effect of extending the definition beyond employment, or contract for service to include any "other contract whereby an individual agrees with another person personally to execute any work or service for that person". However, that provision is dealing with and providing a definition of "contract of employment" and the "other contract" referred to is deemed to be within the definition

of a contract of employment. The "other contract" must be read as being within an enactment containing a definition and such provision must be read as being applicable to the enactment itself and to the Act under which the enactment is made. The enactment was in the context of employment and the 2007 Act expressly provided that a reserve member does not perform his or her functions under "a contract of employment". "Other contracts" must be read as part of the definition of a contract of employment.

8.3 A member of An Garda Síochána is identified as working under a contract of service and therefore under a contract of employment by reference to s. 2(3) of the Employment Equality Act 1998. In reliance upon the maxim of *leges posteriores priores contrarias abrogant*, the deeming provision set out at s. 2(3) of the Employment Equality Act 1998 does not apply to reserve members of An Garda Síochána. Indeed, an examination of the legislation and its chronology identifies that the deeming provision at s. 2(3) of the Employment Equality Act 1998 cannot apply to Garda Reserve members. At the time of the enactment of s. 2(3) in the 1998 Act, the Garda Reserve had not yet been established. When the Garda Reserve was established, it is apparent that s. 2(3) was not applied to reserve members as s. 15(6) of the Garda Síochána Act 2005 as inserted by s. 43 of the Criminal Justice Act 2007 provides that a reserve member is a volunteer and does not perform his or her functions as such a member under "a contract of employment". For me to determine that a member of the Garda Reserve is an employee for the purpose of the Equality Acts would require me to disregard the express terms of s. 15(6) of the Garda Síochána Act 2005 and to ignore its clear meaning and intention. The chronology of the legislation establishes that when statutory provision was made for the establishment and appointment of reserve members it was done so after the enactment of the Equality Acts 1998 to 2004. At the time when the Garda Reserve was established the legislative scheme was such that pursuant to s. 2(3) of the Employment Equality Act 1998, that a member of An Garda Síochána was deemed to be an employee. When s. 15 of the Garda Síochána Act 2005 was inserted pursuant to s. 43 of the Criminal Justice Act 2007, legislation had been enacted for the establishment and operation of a Garda Reserve. It was expressly provided that reserve members were volunteers and did not perform their functions under a contract of employment. It follows that they are not employees and that the deeming provisions applicable to members of An Garda Síochána did not apply and was not intended to apply to reserve members. The consequence of the statutory provision which provides that a reserve member is a volunteer and does not perform his or her functions under a contract of employment is that they are volunteers and are not employed under a contract of employment. That flows from the clear and unambiguous words of s. 15(6). As I am satisfied that a member of the Garda Reserve does not work under a contract of employment, he is not an employee within the meaning of the Equality Acts. Since he is not an employee within the meaning of the Equality Acts, the Equality Tribunal does not have any jurisdiction to deal with the complainant's complaint under those Acts as the Tribunal is a statutory body which must act within the terms of the legislation.

8.4 The starting point for the correct approach to statutory interpretation can be identified from the words of Kelly J. in the case of *Ní Eilí v. Environmental Protection Agency* [1997] 2 ILRM 458 where (at p. 464), the Judge stated:

"All statutory construction has as its object the discernment of the intention of the legislature."

In that case, Kelly J. decided that to allow for the interpretation argued for by the applicant would "in his opinion, run counter to the will of parliament as expressed" in the statute under consideration. A similar consideration exists in this case and for me to hold that the complainant as a reserve member of An Garda Síochána or as a prospective reserve member is other than a volunteer or that he performs his or her functions as such a member under a contract of employment would be to ignore the express intention of the legislature. Section 2 of the Equality Acts has not been amended by s. 15(6) of the Garda Síochána Act 2005, but the latter provision was enacted in circumstances where there were existing statutory consequences if a person was deemed an employee or deemed to be under a contract of employment. Section 15(6) of the Garda Síochána Act 2005 made it clear that a member of the Garda Reserve was a volunteer and therefore did not perform his or her functions as such a member under a contract of employment. This is not a case such as the one referred to in the dictum of Hency J. in *DPP v. Gray* [1986] I.R. 317 where he stated (at p. 325):

"It may be stated as a general rule that the courts lean against the repeal or exclusion of earlier statutory provisions by implication. The rationale underlying this approach is that a statutory provision, formally and solemnly enacted by Parliament, should not be deemed to have been abrogated or excluded, obliquely or indirectly or inadvertently, by a provision in a later statute, when that later statute contains no expression of an intention to abrogate or exclude the earlier provision."

In this case the later statute is not repealing the earlier statute by implication but rather dealing with a situation which did not arise at the time that the earlier statute was enacted as at that time the Garda Reserve did not exist. There was no such body. Therefore, the provision contained in s. 15(6) of the Garda Síochána 2005 is the provision providing for the consequence of what arises as a result of the establishment of a Garda Reserve and provides the clarification that members of the Garda Reserve are volunteers and do not perform their functions under a contract of employment. This is not, a case, as contended for by the complainant of the specific provisions of the Equality Acts being overridden by the provision contained in s. 15(6) of the Garda Síochána Act 2005 but rather that the provision contained in the 2005 Act was providing for a situation which did not and could not have been considered or addressed at the time of the enactments of the Employment Equality Acts 1998 and 2004. The provisions of s. 15(6) of the Garda Síochána Act 2005 do not amend s. 2 of the Employment Equality Act 1998 but rather make express provision to provide that a member of the Garda Reserve does not come within the unamended definition of contract of employment contained in s. 2 of the 1998 Act.

8.5 Even without the provisions contained in s. 15(6) of the Garda Síochána Act 2005, I am satisfied that a reserve member could not be held to work under a contract of employment within the Equality Acts and therefore could not be considered an employee for the purpose of those Acts. For there to be a contract of employment and for a person to be an employee, the requirement of mutuality of obligation must be present. That is, there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. In the absence of such mutuality, there is no contract of employment as there is no contract for services. In the absence of a mutuality of obligation, I could not conclude that there was in existence a contract of service or a contract of employment. Under the statutory scheme there is no obligation to provide work to a Garda Reserve and there is, therefore, no contract of service or other form of contract whereby an individual agrees with another personally to execute any work or services for that person. This fundamental requirement, or *sine qua non*, to the existence to a contract of service or a contract of employment was considered by the Court of Appeal in England and Wales in the case of *Cable & Wireless Plc v Muscat* [2006] 1 ICR 975. Lady Justice Smith in delivering the judgment of the Court analysed whether or not a person was an employee within the meaning of the UK Employment Rights Act of 1996 and held as follows (at paras. 31 and 32):

"31. The basic requirements of a contract of employment were described by MacKenna J. in *Ready Mixed Concrete (South East) Ltd. v. Minister of Pensions and National Insurance* [1968] 2 QB 497. He said, using the language of master and servant, that there were three essential features of a contract of service. There were (i) that the servant agreed in consideration of remuneration to provide his own work or skill in the performance of service for the master; (ii) that the servant agreed expressly or impliedly that he would be subject to control by the master; and (iii) that the other provisions of the contract were not inconsistent with a contract of service. MacKenna J. also said that, if examination of the rights

conferred and duties imposed by the contract led to the inference that the contract was a contract of service, it was irrelevant that the parties had declared it to be something else.

32. In the context of statutory employment rights, such as those now granted by the Employment Rights Act 1996, is has been said on more than one occasion that the irreducible minimum of mutuality of obligation necessary to support a contract of employment is the obligation on the 'employer' to provide work and the obligation on the worker to perform it. That mutuality of obligation must be accompanied by a sufficient degree of control by the employer over the worker: see *Nethermere (St. Neots) Ltd. v. Gardiner* [1984] ICR 612, 623 C-G, and *Clark v. Oxfordshire Health Authority* [1998] IRLR 125, 128, para 22, as approved by the House of Lords in *Carmichael v National Power plc* [1999] ICR 1226, 1230."

Whilst Lady Justice Smith was dealing with a similar but not identical statutory provisions to the one in this case, it is the identification by her of the basic requirements of a contract of employment which is of assistance. When one looks at the provisions relating to a Garda Reserve, one identifies that there is an absence of an agreement in consideration of remuneration to provide work or skill in the performance of service for the master. Other provisions relating to the establishment and management of a Garda Reserve are inconsistent with the existence of a contract of service including the absence of a mutuality of obligation. The principle of mutuality of obligation is key to there being a contract of service or a contract personally to execute any work or labour. The concept of volunteer is inconsistent with the principle of mutuality and the statutory provisions make it clear that a reserve member is a volunteer. For a volunteer to be engaged under a contract of employment, and to establish that such a contract exists, it would be necessary for the person claiming the existence of a contract of employment to establish that such person was obliged under a contract to carry out work. Fundamental to the position of a volunteer is that volunteers provide their services voluntarily, without reward and are therefore entitled to withhold those services with impunity. Such impunity results in there being no mutuality.

8.6 For a person to be employed under a contract of service, or a contract personally to execute any work or service, it is necessary that there be not only an obligation to perform work and an obligation to provide work, but also that there be receipt of remuneration. The Supreme Court in the United Kingdom recently considered the position of volunteers in the case of *X v. Mid Sussex Citizens Advice Bureau & Anor.* [2012] UKSC 59 in a decision delivered on 12th December, 2012. Lord Manse handed down the judgment of the Court. He held that the appellant in that case, as a volunteer for a Citizens Advice Bureau, was not an employee and therefore fell outside the scope of the protection against discrimination on the grounds of disability afforded by the Disability Discrimination Act 1995 and Directive 2000/78/EC. The Supreme Court held that since the appellant in that case had no contract of employment, she did not on the face of it benefit by the domestic protection afforded by the UK Disability Discrimination Act 1995 and whether she could have any claim depended upon whether it was the intention of Article 3(1)(a) of the Framework Directive on Equal Treatment in Employment and Occupation that there should be wider protection, covering volunteers in her possession. Following a detailed examination of the legal position, Lord Manse concluded (at para. 48):

"In my opinion, there is no scope for reasonable doubt about the conclusion that the Framework Directive does not cover voluntary activity. The position having regard to the English language material is clear. None of the other language versions to which the Court was referred throw any doubt on this conclusion. On the contrary, they reinforce it."

Lord Manse in his analysis of Article 3(1) of the Framework Directive identified eight separate detailed arguments as to why that definition did not include unpaid volunteers. One of those arguments, which was identified as the sixth, was the argument that the term "worker" did not apply to voluntary work. Lord Manse's analysis included consideration of the initial drafts of the Directive with regard to employment equality and the provisions of Article 3 of the Framework Directive which were identical to the provisions contained in the Directive 2000/78 and contained provisions covering unpaid work. These ultimately were not accepted by the Council and not included in the Framework Directive. In arriving at my conclusion that a worker cannot be interpreted to include a volunteer, I adopt and support the exhaustive analysis and consideration of the matter contained in the judgment of Lord Manse.

8.7 A Garda Reserve has no obligation to perform work and can withdraw his or her services with impunity and merely has to notify the District Officer that he intends to be unavailable. There is no contract in writing between the reserve member and An Garda Síochána and there is no legally binding contract implied between the parties. Both the legislative scheme and the documentation relating to the operation of the scheme makes it clear that a Garda Reserve is a volunteer. It is also the case that there is no valuable consideration passing between the parties as there is no remuneration and merely an allowance for expenses. It is also the case that there is no legal obligation to place a reserve member on duty and a reserve member may only be placed on duty by or on behalf of the relevant District Officer. It follows from the above analysis that I am satisfied both from my interpretation of the statutory provisions and from my analysis of the provisions applying to a reserve member and the terms and conditions under which a reserve member operates that a reserve member is not an employee, either for the purposes of the Employment Equality Acts or otherwise. I will, therefore, refuse the appeal by the applicant.

9.1 The second preliminary determination of the Equality Officer which is the subject of appeal relates to his determination that the complainant was correct in his submission when he placed reliance on s. 12 of the Equality Acts, and that the induction process into the ranks of An Garda Síochána constituted vocational training within the meaning of s. 12(2) of the Equality Acts for carrying out an occupational activity. The complainant claims that the Equality Officer has jurisdiction to investigate the complainant's complaint and submits that s. 12 of the Equality Acts amplifies s. 8 of the Act, so as to place "beyond doubt that it is unlawful to discriminate against any applicant for or participant in all courses of vocational training". It is also claimed on behalf of the complainant that it is clear from the provisions of s. 12 that the prohibition against discrimination "is engaged irrespective of whether one is engaged in employment or not". It is claimed that there is no requirement that a person be engaged in employment pursuant to a contract of employment within the meaning of s. 2 of Act before the provisions of s. 12 apply, and "that the provisions of s. 12 are clearly engaged by the facts of this case whether or not the complainant was engaged pursuant to a contract of employment, or a deemed contract of employment". The respondent claims that the Equality Officer is wrong in law and has failed to apply the definition contained in s. 12(2) of the Equality Acts to the position of a Garda Reserve. The respondent claims that the facts establish that neither membership of the Garda Reserve nor training to become a member of that Reserve is a system of instruction exclusively concerned with training for the carrying of an occupational activity.

9.2 I have already identified the definition of vocational training as contained in s. 12(2) earlier in this judgment. As such definition is central to my determination on this matter, it is appropriate to repeat the definition. Section 12(2) of the Employment Equality Act 1998, which remains in force, provides:-

"(2) In this section vocational training "means any system of instruction which enables a person being instructed to acquire, maintain, bring up to date or perfect the knowledge or technical capacity required for the carrying out of an occupational activity in which may be considered as exclusively concerned with training for such activity."

9.3 The Equality Officer determined in his decision that even though the Garda Reserve was not remunerated, a person training to be

a member of a Garda Reserve must have some other reason to undertake the possibly onerous tasks placed upon them and went on to decide:-

"It is difficult to conclude that any training system that places such obligations on a person, places a person under the authority of another to such a degree, and places the person in such a visible position of representation of the authority of the state, while not being an employee, can amount to anything other than vocational training envisaged by section 12(2) for the carrying out of an occupational activity."

That conclusion and decision is not based upon an interpretation and application of the provisions of s. 12(2) but rather on a conclusion made by the Equality Officer that since the duties of a volunteer are both onerous and important, they must amount to vocational training. The Equality Officer in his conclusions and decisions fails to address the requirement contained in s. 12(2) that for the vocational training of a Garda Reserve to be covered by the section, such training must be exclusively concerned with training for the carrying on of an "occupational activity". Even though the duties of a Garda Reserve and the training involved in becoming a Garda Reserve can be properly identified as involving onerous and significant obligations, that fact does not of itself mean that a person volunteering to be a Garda Reserve is exclusively carrying out an occupational activity. The statutory obligation in s. 12(2) is for vocational training to be exclusively concerned with training for such occupational activity is not addressed by the Equality Officer. It is also the case that the requirement set out in Statutory Instrument 509/2006 to take into account and have due regard to any satisfactory service by a person as a reserve member of An Garda Síochána when considering whether or not to admit a person to be trained as a member of An Garda Síochána is not determinative of the issue as to whether or not training to be a Garda Reserve is vocational training. The obligation contained in Statutory Instrument in 509/2006 is no more than an obligation to take that matter together with other matters into account.

9.4 In the UK volunteers have sought to bring themselves within the scope of discrimination law by contending that they have been discriminated against by an employer in the arrangement he makes for the purposes of determining to whom he should offer employment. Under s. 39(1) of the UK Equality Act 2010, it is provided that an employer must not discriminate against a person in arrangements that the employer makes when deciding to whom to offer employment. Article 3(1)(a) of Directive 2000/78EC requires the scope of discrimination protection to encompass "conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy". In the Court of Appeal consideration in the case of *X. v. Mid Sussex Citizens Advice Bureau* [2011] ICR 460, the Court of Appeal considered the issue as to whether a voluntary post with an Advice Bureau could be viewed as seeking to secure advisers to provide advice to its clients or to create a potential pool from which full-time staff could be drawn. In the judgment of Elias L.J. he considered the legal position commencing at para. 9(p. 464) where he set out the provisions of Directive 2000/78. The concept of worker and occupation were addressed at paras. 12 and 13, and the provisions of the UK Disability Discrimination Act 1995, at paras. 14 to 17. At para. 40, Elias L.J. gave the decision of the court in relation to what is described as the vocational training argument and held as follows:-

"40. The EHRC's submissions were that the voluntary post was a form of vocational training, and that the complainant had been denied access to it in breach of article 3(1)(c). The concept of "vocational training" includes, so it was submitted, any form of volunteering which in essence trains the participant in a skill, albeit that there is no formal training contract relationship.

41. I do not accept that submission. The argument is essentially the same as the domestic section 14C argument which was unsuccessfully advanced before the employment judge and not pursued further, and it fails for essentially the same reasons. The observations of the employment judge reproduced above at para. 24 are equally applicable here and I respectively endorse them. To be vocational training, the purpose of the activity must be to train for a job. It is not the purpose of the CAB when it appoints volunteers to provide training to enable these workers to become full-time workers, either with the CAB or with any other employer.

42. Nor can the advisers, on any sensible meaning of the term, be described as carrying on vocational training. They are not being trained for anything; they are providing services for third parties in the same way as full-time staff would do. The fact that their volunteering provides experience which will improve the chance of obtaining a full-time CAB post, or indeed other employment, is irrelevant. A middle manager is building up experience which will help him to become a senior manager, but it would be an abuse of language to describe him as undergoing vocational training."

Earlier in his judgment Elias L.J. held at para. 37:-

"37. An arrangement is not for the purpose of determining who should be offered employment if that is not what it is designed to achieve. It is obvious that the purpose here is to secure advisers to provide advice to clients of the CAB; the purpose is not to create a potential pool from which full-time staff can be drawn. Most voluntary advisers have no wish to obtain a permanent staff post. Furthermore, the pool from which persons are chosen to fill those posts is in fact far wider than volunteers, as the employment judge found. All paid positions are externally advertised and are open to everyone.

38. Nor is the purpose to improve the employability of the relatively small proportion of volunteers who may at some later date seek a full-time position. That may be one of the effects or by-products of this arrangement, but it is not its purpose."

That judgment emphasises the importance of focusing and analysing the scope of discrimination in law through its purpose rather than on its effect. When one looks at the facts in this case it cannot be said that training for the Garda Reserves is vocational training to become a member of An Garda Síochána, and it certainly cannot be said that training for the Garda Reserves could be deemed to be exclusively concerned with training for the guards. Nor can it be said that being a Garda Reserve is an occupational activity. Vocational training for an occupational activity would have to be training for a job not to be a volunteer. The same factual position exists in this case as was present in the *X. v. Mid Sussex Citizens Advice Bureau* case in that many of the persons training to be a volunteer, either as a Citizens Advice Bureau worker or as a Garda Reserve, do not want to or could not become permanent workers. Persons receiving training to be a Garda Reserve would in many instances be in full-time employment and would neither want nor be available to be full-time members of An Garda Síochána. The requirement contained within s. 12(2) of the Employment Equality Act 1998, requires that for that section to apply that vocational training must be exclusively concerned with training for such an activity and that activity cannot be said to be a fully trained member of the guards. It is to be noted that the decision of the Court of Appeal in relation to the vocational training argument in the *X. v. Mid Sussex Citizens Advice Bureau* case was not appealed to the Supreme Court and, therefore, is not dealt with in the judgment of Lord Manse.

9.5 The correct reading of s. 12(2) of the Employment Equality Act 1998, requires that for vocational training to be within the

meaning of that section, such training must be considered as being exclusively concerned with training for such an occupational activity. The Garda Reserve is not an occupational activity and training to be a Garda Reserve is for the purpose of being a Garda Reserve and no more.

9.6 Section 12 can only apply to training to become a Garda Reserve if the Garda Reserve itself is a body exclusively concerned with training for entry into the Gardaí proper. The purpose of training to become a member of the Garda Reserve is training to be a member of that body and is not designed or intended to achieve occupational training or for a person to become a member of An Garda Síochána. The purpose of being a member of the Garda Reserve is not designed to achieve occupational training and, therefore, it cannot be said, in law, that that is what it is. It is unquestionably the case that a trained and successful member of the Garda Reserve gains experience which may assist that person in ultimately becoming a member of An Garda Síochána, but that is a by-product of the training to be a Garda Reserve and being a Garda Reserve rather than its purpose. It follows that the training for membership of the Garda Reserve cannot be considered to be vocational training for an occupational activity so as to come within the scope of ss. 8 and/or 12 of the Equality Acts. It is to become a member of the Garda Reserve which is the end in itself and the fact that some members of the Garda Reserve might have ambitions to become members of An Garda Síochána, and that service in the Garda Reserve can be taken into account in favour of an applicant, is not a basis for characterising training for or service in the Reserve as training for the Gardaí. My conclusion in relation to this matter is reinforced by the use of the word "exclusively" in s. 12(2) of the Employment Equality Act 1998. Membership of the Garda Reserve is an end in itself and even if in some instances members of the Garda Reserve might use such membership as a springboard to becoming members of An Garda Síochána, it cannot be said that the training to be a Garda Reserve is "exclusively" concerned with training to be a member of An Garda Síochána.

10.1 In the light of the findings that I have made in this case, I conclude that the Garda Reserve is not within the scope of the Employment Equality Acts and is not employment within the meaning of that legislation. I am satisfied that s. 15(6) of the Garda Síochána Act 2005, has the effect of expressly excluding members of the Garda Reserve from the provisions of the Employment Equality Acts. I am satisfied that being a member of the Garda Reserve or training to be a member of that Reserve is not training or experience for or in relation to employment within the meaning of s. 8(1)(c) of the Equality Acts, or a course of vocational training within the meaning of s. 12 of the Employment Equality Act 1998. I am, therefore, satisfied that the Equality Officer did not have jurisdiction to proceed on the basis that a Garda Reserve was in vocational training. I will, therefore, allow the appeal brought by the Garda Commissioner and will refuse the appeal brought by Ravinder Singh Oberoi.