THE HIGH COURT

JUDICIAL REVIEW

[2017 279 J.R.]

BETWEEN

OLGA BENNETT AND MAIREAD MARRON

APPLICANTS

AND

THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Noonan delivered on the 30th day of October, 2018

1. The applicants were appointed as assistant film censors in the 1990's on foot of indeterminate contracts which provided for termination on the giving of one months' notice. Their titles were subsequently changed by legislation to that of assistant classifiers. In more recent times, a number of other assistant classifiers were appointed, but, unlike the applicants, on fixed term contracts. In August 2016, the applicants were given notice by the respondent that their contracts would terminate on the 31st March, 2017. The contracts of the fixed term assistant classifiers also came to an end and a competition was arranged to engage new assistant classifiers which was open to those whose contracts had concluded, including the applicants. The applicants unsuccessfully applied to be re-engaged.

2. The reason given by the respondent for termination of the applicants' contracts was that the respondent had been advised that all assistant classifiers should be treated in a similar manner regardless of their type of contract. The applicants' case however is that the respondent determined that the applicants be treated the same as assistant classifiers employed on fixed term contracts so as to avoid the provisions of the Protection of Employees (Fixed Term Work) Act, 2003. This is denied by the respondent.

3. In the within judicial review proceedings, the applicants challenge the decision to terminate their contracts, primarily on the ground that the reason advanced by the respondent for doing so is arbitrary, irrational and perverse. It is important to note that the applicants do not challenge the decision on the ground that the reason given by the respondent was not the true reason or was not given bona fide.

4. The application now before the court is one for discovery of documents. Two categories of document are sought but I think it is fair to say that the first category is no longer being actively pursued by the applicants. The remaining category is as follows:

> "All documentation relating to the respondent's decision to terminate the applicants' office, generated during the period between 1 April, 2015 and 31 March, 2017."

5. There is no dispute between the parties as to the legal principles to be applied to applications for discovery in judicial review proceedings. As noted by Kelly J. (as he then was) in *Sheehy v. Ireland* (High Court unreported 30th July, 2002) the necessity for discovery in judicial review proceedings is rare and is the exception rather than the rule (at pp. 4-5). A very helpful summary of the relevant principles was given by McDermott J. in his judgment in *McEvoy v. Garda Commissioner* [2015] IEHC 203. He noted that, as in all cases, discovery should only be granted where the applicant establishes that it is relevant and necessary for the fair disposal of the issues in the case. Those issues are to be determined by an examination of the pleadings. He said (at p. 19):

> "(6) If a decision is challenged as unreasonable or irrational, discovery will not be necessary because, if the decision is clearly wrong, it is not necessary to ascertain how it was reached."

6. Similar views were expressed by Donnelly J. in *Marques v. Minister for Justice and Equality* [2017] IEHC 597 where she carried out a detailed analysis of relevant principles and approved a passage in Hogan and Morgan's *Administrative Law in Ireland* (4th ed. Round Hall) which includes the following (at pp. 13-14):

> "Here again if the challenge is based on irrationality or unreasonableness grounds, discovery will 'not normally be necessary because if the decision is clearly wrong it is not necessary to ascertain how it was arrived at' [*Kilkenny Broadcasting Co Ltd v. Broadcasting Authority of Ireland* [2003] 3 I.R. 528, 537]."

7. The applicants clearly agree with this proposition as the affidavit grounding this application sworn by their solicitor, John O'Connor, avers at para. 7:

> "The applicants agree that where a decision is irrational, discovery may not be necessary to ascertain how it is reached. However, on the facts of this particular case the applicants say that the respondent is entitled to make the decision made, but that same must be done on a reasoned basis. It is therefore relevant to and therefore necessary for the determination of the within proceedings that the reasons basing the decision are exposed."

8. It seems to me however that this is precisely what the authorities indicate is not permissible. The decision here is challenged solely on the basis that the reason given for it is irrational. It is of course for the applicants to establish that. It is neither necessary nor appropriate for the applicants to seek to go behind the reason given by delving into the considerations or thought processes involved in arriving at the decision and the reason given therefor. That would involve an analysis of the merits, clearly something which is outside the scope of judicial review. The decision is either rational on its face or it is not.

9. Different considerations might arise where it was alleged that the decision was taken *male fides* and the reason given was not the true reason. As I have pointed out however, that is not the case here.

10. For these reasons therefore, the applicants have not satisfied me that the discovery sought is necessary for the fair disposal of the issues arising and I will therefore refuse this application.