Neutral Citation [2013] IEHC 313

THE HIGH COURT

RECORD NO. 2012/956JR

BETWEEN

DENIS KIELY

APPLICANT

-AND-

THE MINISTER FOR EDUCATION AND SKILLS

RESPONDENT

Judgment of Mr. Justice Hedigan delivered the 10th of July 2013.

1. This is an application for judicial review seeking to quash a number of decisions made by the Minister for Education and Skills (The Respondent) in August 2012, refusing an award of Professional Added Years as per the pension regulations relating to the public service. The Applicant, who is now retired, was employed as a full time lecturer in Law at Cork VEC (now Cork Institute of Technology), commencing his post on 1 February 1977 and retiring on 29th February 2012. He held this position for 35 years.

Background

2. On 24 January 2012, the Applicant made an application for Added Professional Years under the Education Sector Superannuation Scheme, on the basis that the successful candidate for the post for which he was recruited was required, at minimum, to have an honours law degree coupled with a professional legal qualification which would enable him /her to have the necessary three years post-qualification experience as required. The advertisement, which appeared in the 181h July 1976 edition of the Sunday Press, laid out the required qualifications as follows:

> "***Qualifications***: In addition to the academic qualifications laid down by the Department of Education candidates should note that at least 3 years appropriate post-qualification experience is required for the permanent appointment to these posts."

3. However, the Applicant was informed by way of letter dated 22 February 2012, that the Minister had only allowed the Applicant one extra year, subject to payment contributions. He subsequently appealed this decision under the Internal Dispute Resolution Process. A determination of the appeal was issued on 20 August 2012 whereby the decision of the Minister was upheld. The determination was decided on the basis that it was not a necessary requirement for the successful candidate to have been a legal professional in the manner in which it would ordinarily be assumed to mean employment as a barrister or solicitor. Consequently, the two years necessary to earn a legal qualification were excluded from the assessment. This was further bolstered by correspondence between the Department of Education and Cork IT, whereby it was indicated that based on file evidence the qualifications for the post were an honours degree along with three years "post qualification experience", and that no evidence or documentation could be located to suggest that qualification as a barrister or a solicitor were required. A letter dated August 20th 2012 was sent to the Applicant rejecting his appeal, where it was noted that the then Cork Regional Technical College did not have a law degree course in 1976, and that in the present instance CIT did not offer one either. Law was and is a module in business courses taught there. In considering the criteria for a commercial studies lecturer and the advertisement for the post it was decided that there was no documentary evidence ascertaining that the qualification of solicitor or barrister was a necessary requirement for the post. Thus the request for added professional years was rejected.

4. This rejection opened up further correspondence between the parties, with the Applicant contending that the existence of a degree course in law, or its non-existence was irrelevant and that he had no chance to comment on same during the appeal process. He also provided a copy of his appointment letter which set out the qualifications of his post which were as follows:

> (i). "The degree in Law (BCL or LLB) of a recognised awarding authority.
>
> (ii). "Not less than three years of appropriate professional experience subsequent to obtaining the above mentioned qualification"

It is contended by the Respondent that this document dates from c. 1980 and did not set out the relevant qualifications for the post to which the Applicant was appointed. A reply sent to the Applicant on August 31st 2012 explained inter alia the relevance of the absence of such a degree course in law at CIT. In the absence of a degree course in law, the position given to the Applicant was to lecture in the law module in a business course.

5. Further correspondence between the Applicant and Respondent on 26 September 2006 explained that the terms "post-qualification" or "appropriate professional experience" did not necessarily mean experience as a practicing solicitor or barrister. Also in that letter was a clarification as to what the Department relied on in making the determination against the application. The Department wrote that it had relied on the "*academic qualifications laid down by the Department of Education*" as applicable to Lecturers Scale 1 in Commercial Subjects. These requirements are as follows:

> "(a). An Appropriate University Degree or an equivalent Professional Qualification.
>
> (b). Not less than three years of appropriate professional experience subsequent to obtaining the above mentioned qualification".

6. The Applicant feels aggrieved by the decision of the Respondent and now seeks to have the decision set aside for reasons of irrationality.

The Framework of the Scheme

7. The terms and conditions relating to the awarding of Additional Professional Years in the Education Sector of the Public Service is governed by statute and a number of circular letters which lay out and particularise the rules governing the scheme. Under Article 66 (8) of the Local Government (Superannuation) (Consolidation) Scheme 1998 (which was brought into effect by Statutory Instrument 455 of 1998) the functions of same were transferred to the Minister fro Education and Skills in 1998 (by S.I. 362/1998) and 2001 (by S.I. 14/2001). The conditions and rules governing the Scheme are set out in Circular Letter S.6/87 and/or PEN 23/05, dependent on the situation at hand. The circulars set out a formula for the determination of professional years to be added, if any. The formula under S.6/87 is 18 + Q + E- 18, provided 18 + Q + E exceeds 25. Q stands for qualification while E refers to experience.

8. A subsequent Scheme arises out of Circular PEN 23/05 but the formula under this scheme is different. PEN 23/05 applies where an employee was originally recruited to a professional, technical or specialist post in a VEC or IT and where by reason of the entry requirements ofthe competition, it is not possible for the employee to secure full service by maximum retiring age or by age 65 in the case of persons who are new entrants for the purposes of the Public Service Superannuation (Miscellaneous Provisions) Act 2004. The formula in this regard is 19 + Q + E - 25. Q is the minimum number of years in which the required qualification can be earned and E stands for the minimum number of years of essential experience required.

9. As two regimes exist in this regard, it remains possible for employees to come under either scheme, if the requirements under the S.6/87 Circular are satisfied. The Applicant, it is submitted, is a person to whom either scheme applies.

Submissions of the Applicant
10. It is the Applicant's submission that the Respondent acted irrationally in failing to give due regard to the plain meaning of the advertisement and the stated requirements for the post, and as a result of this irrationality, the Respondent misdirected itself in the assessment of the Applicant's request for added professional years under the S.6/87 Circular. It is also submitted that the Respondent failed to have proper regard to the Applicant's right to fair procedures through failing to take account of material considerations in considering the Applicant's application. In support of this the Applicant' relies on the decision of the Supreme Court in *P&F Sharpe and Grove Developments Limited v. Dublin City and County Manager and Dublin County Council* [1989] 1 IR 701, whereby it was held that a decision maker must have regard to all relevant and legitimate factors which are before it in making its determination.

11. In the current matter it is submitted that the Respondent failed to take due consideration of the advertisement's requirement that the successful candidate be professionally qualified to obtain the needed "-*post qualification experience*" It is further contended by the Applicant that the meaning of the word "professional" in the instant legal context means a solicitor or a barrister. The Applicant submits that, based on a common reading and understanding of the words, a professional qualification as either a solicitor or a barrister was needed. The years spent in pursuit of that qualification should then be taking into consideration in assessing the application under the terms of the Scheme. In supporting this contention, the Applicant's states in affidavit that it was standard practice in the 1970s that lecturers in vocational colleges were to have professional qualifications in their respective fields.

12. Furthermore, the Applicant contends that the Respondent, acting through its officers, made the decision in breach of fair procedures in that the officer making the decision had no involvement with either the setting up of the job campaign or in applying the requirements needed for the decision. It is contended that this forms an error of interpretation for which there is no support, and that the decision ought to be invalidated in light of the failure to consider relevant material. Reliance is placed on the judgment of Finlay Geoghegan J in *AMT v. The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* [2004] 2 IR 607, whereby a decision of the respondent Tribunal in that case, was quashed on the basis that the tribunal member had relied on factors to which no relevant material related, and, also, that the tribunal member failed to consider relevant evidence. It is the Applicant's contention that the failure to conside relevant material invalidates the whole decision. The Applicant makes reference to the decision of Lord Keith of Kinkel in *Tesco Stores v. Secretary of State for the Environment and Others [1995*] 1 WLR 759, whereby it was held; "*If the decision maker wrongly takes the view that some consideration is not relevant and therefore has no regard to it, his decision cannot stand and he must be required to think again.* . '

Submissions of the Respondent
13. The Respondent makes a number of submissions in response to the contentions of the Applicant. The initial submission is that the Respondent does not consider that there is a relevant difference between the meaning of the phrases of "post-qualification experience", "relevant professional experience" or "appropriate professional experience" in the context of the Applicant's appointment to the post of lecturer in 1977. It is contended by the Respondent that the experience needed for the position was post qualification, but that qualification in this case did not arise out of a professional qualification but rather out of obtaining a law degree. The reason for this was that one could obtain a legal professional qualification without first obtaining a primary degree in law. This is still the case today.

14. It is further submitted by the Respondent that necessary qualifications as per the Circulars calculate the added years entitlement on the basis of the minimum qualifications that were necessary for the post. The Respondent contends that in all cases, the minimum qualification required for the post was that of a law degree in both circular formulations. The Applicant's argument that such experience had to be professional is rejected, and it is submitted that it is the Applicant who is rejecting the clear meaning of the wording of the first element of the circular criteria for the granting of extra years. Making reference to Memo V7 of September 1972, which set out the necessary academic qualifications laid down by the Department of Education at the time the Applicant was appointed, the necessary qualification was "An appropriate University degree or an equivalent Professional Qualification" It is contended by the Respondent that the Applicant ignores the clear meaning of the "or" in the above, and instead turns the alternative term into an addition. This misreading, it is submitted, attempts to recast the criteria in order to create a false necessity to have both a law degree and a professional qualification.

15. The meaning of the term "equivalent" as reference in the above passage means "being the same, or effectively the same, in effect, value or meaning". Thus in this case a professional qualification which is the same as (or has the same value as) a University degree means just that, and does not mean a professional qualification which has a higher value than a University degree or takes longer to complete than a University degree. The ultimate contention is that the post required either a law degree or a relevant professional qualification, and not both.

16. Lastly on this argument, it is contended that as a law degree was minimally sufficient for the post, the Respondent was correct in its calculations under the Circulars and the decision, therefore, ought not to be set aside.

17. Submissions were also made doubting the legal basis for the Applicant's challenge against the Respondent. It is contended that at no stage in the Statement of Grounds was it claimed that the Respondent failed to consider relevant matters. There is no claim of error of law either to that effect. It is submitted that the only legal basis for the challenge is one of irrationality on the part of the decision maker in that the Respondent irrationally failed to have regard to the wording of the requirements as set out in the advertisements for the post in 1976. The test for irrationality is set out in *The State (Keegan) v. The Stardust Victims Compensation*

Tribunal [1986] I.R. 642 and *O'Keefe v. An Bord Pleanala and Ors* [1993] 1 I.R. 39 where the core principle is that the decision maker should not disregard fundamental reason or common sense in reaching a decision. It is submitted that the Respondent cannot be shown to have acted in such a manner in reaching the decision regarding the Applicant's added years request. The alternative basis that no evidence for the decision in question was offered is also denied.

The Pensions Ombudsman as an alternative remedy
18. It is argued by the Respondent that a more appropriate cause of action lay for the Applicant in an appeal to the Pensions Ombudsman, because it is a more effective and relevant forum to hear such a case.. This is an area of contention between the parties. It is the Respondent's contention that the Court should use its discretion to dismiss the action in light of a more suitable appeal mechanism being available. The Applicant disagrees, citing the case of *Tomlinson v. Criminal Injuries Compensation Tribunal* [2006] 4 IR 321 whereby the Supreme Court held that the High Court should only utilise its discretion in refusing an application for certiorari on the basis that judicial review is not the most appropriate remedy. The Applicant also questions whether the Ombudsman is an appropriate avenue of appeal or a wholly alternative remedy in light of the facts of the case at hand. It is argued by the Applicant that judicial review is more appropriate in this situation as there is a sole net question of law that must be determined. To undertake an appeal before the Pensions Ombudsman would put into motion a de novo appeal which would expose the Applicant to full risk. Judicial review allows him to challenge the sole issue of legality with regards to the Respondent's decision.

Decision of the Court
19. I will deal first with the plea made that there was an alternative remedy that ought to have been availed of by the applicant in this case. The respondents claim that there is an alternative remedy available to the applicant under the provisions of s. 131 of the Pensions Act 1990 (as inserted by the Pensions (Amendment) Act 2002). This provides that a person such as the applicant who has already exhausted an internal appeal may apply to the Pensions Ombudsman to determine their claim. This officer can hear the matter entirely *de novo* taking into account all aspects of the claim. From his determination there is a full appeal to the High Court. This remedy was brought to the attention of the applicant both at the time of the decision impugned herein and later in correspondence dated 4th March, 2013. In this correspondence the respondent offered to allow the applicant pursue this line of appeal and strike out this judicial review application with no order as to costs. The applicant refused this offer.

The Law
20. The Court has been referred to the decision of the Supreme Court in *Tomlinson v. Criminal Injuries Compensation Tribunal* [2006] 41.R. 321. At page 325, Denham J., as she then was, set out the settled law in cases of application for judicial review where an alternative remedy exists as already found by her in *Stefan v. The Minister for Justice [*2001] 41.R. 203;

> "Once it is determined that an order of *certiorari* may be granted, the court retains a discretion in all the circumstances of the case as to whether an order of *certiorari* should issue. In considering all the circumstances, matters including the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order of *certiorari* is not granted and the degree of fairness of the procedures, should be weighed by the court in determining whether certiorari is the appropriate remedy to attain a just result."

Thus in considering whether to grant an order of *certiorari*, this Court in this case must consider whether there does exist an alternative remedy as noted above. It seems to me that because the Ombudsman appeal is a remedy in which the applicant's case will be dealt with *de novo*, it is a far broader and more useful remedy for the applicant than that of judicial review. I do not understand the concern expressed by the applicant with a *de* novo appeal. There is nothing he has achieved in the hearing to date of his complaint that is in danger of being lost as was being considered in Tomlinson. There is in fact much to be gained in a *de novo* appeal that cannot be achieved in a judicial review. The Ombudsman is free to make value judgments about the meaning of the wording of the Act. This is something this Court in judicial review cannot do save in the most limited circumstances. The Ombudsman can examine the entire history of the posts such as was held by the applicant and make findings of fact thereon. This is also something not generally possible for a court in judicial review. I confess to being somewhat mystified as to why the applicant chose the closely restricted, very limited and very expensive remedy of judicial review when he had available to him the broad and free remedy of the Ombudsman. Were he to be dissatisfied with the Ombudsman's decision, he then had a right to a full hearing *de novo* in the High Court. In those circumstances the High Court would be free to make value judgments and to simply interpose its judgment of the interpretation of the wording or findings of fact in relation to the practice relating to posts similar to those held by the applicant. This is not open to the court in this application. It seems to me that on any judgment of the situation, his choice of remedy was plainly inappropriate. Thus, in my view, the existence of a far more suitable remedy than judicial review must lead the Court to the view that the orders sought should be refused.

In the event of an appeal and because the matter was argued with some force before me, I think I should express a view on the essence of the applicant's case herein. This is set out at paragraph 25ofhis statement of grounds herein:

> "In coming to the determination of the applicant's entitlement to added years pursuant to Circular S.6/87 23/05 the respondent irrationally failed to have regard to the plain and clear meaning of the wording of the requirements as set out in the advertisements for the post of law lecturer at Cork VEC in 1976 and as such has failed to take account of the total number of years necessary for any candidate to obtain the requisite professional qualification."

21. This is the only ground claimed and this Court's jurisdiction is limited to a consideration of that specific ground.

22. In order to accept this claim of irrationality, the Court must ignore the fact that the advertised qualifications do not specify that the successful candidate must be qualified either as a barrister or a solicitor. Where such a requirement exists it will surely be stated clearly and unequivocally. The applicant asks the Court to read into the qualifications required, a qualification that is not mentioned in the advertisement. If it was required, it seems to me that the advertisement would have said so. It did not.

23. Moreover, Circular 6/87 sets out the formula for calculating any added years entitlement, which before appropriate adjustments, will be

> (i) the aggregate of the minimum number of years in which the qualifications can be obtained and the minimum number of years of essential experience required, such aggregate to be calculated as if the commencement date was the officer's eighteenth birthday;
>
> or
>
> (ii) the minimum entry age for the competition from which the officer was recruited reduced by twenty five whichever is the greater."

This formula calculates entitlement by reference to the minimum requirements. What those minima are is relevant to the post and not the particular candidate involved. This means that what is to be taken into account is the minimum number of years required to obtain the qualification in question. Applied to the applicant, this allowed four years for his law degree and three years post-qualification experience. This gave him no entitlement under Circulars 6/87. Under the slightly more generous formula provided by PEN 23/05, the applicant obtained one extra year. Thus it seems to me that even though the applicant had spent two years obtaining his professional qualification, this was not the minimum requirement for the post but was in excess of minimum requirements. Thus it could not be taken into account. The minimum qualification in all the formulae referred to is a law degree. The reference to an equivalent professional qualification on a clear reading of the requirements was as an alternative to the university degree and not as an additional requirement. The applicant had both of the qualifications required but the minimum was just one. Thus the years allowed could only be in respect of one qualification because that was the minimum. In my view, the decision of the respondent on this matter was not only not irrational but was the only decision that could be made on a proper and accurate reading of the advertisement. Thus the only ground upon which the applicant can challenge, i.e. irrationality must fail.

24. For the above reasons the orders sought by the applicant herein must be refused.