Neutral Citation [2013] IEHC 110

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 1182 J.R.]

BETWEEN

MICHAEL SMYTH

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND DEFENCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Dunne delivered the 1st day of February 2013

The applicant in this case was born on the 28th June, 1986 and is now 26 years of age. It was an ambition of the applicant to become a member of the Irish army and to that end he applied for a traineeship as a three star private in the Defence Forces via its website in August 2010. Ultimately, on the 5th October, 2011, the applicant, having been through a number of steps in furtherance of his ambition, was informed that as he would be over the age of 25 on the enlistment date of the 14th November, 2011, he would not be recruited as a member of the Defence Forces.

As a consequence, the applicant has brought an application for judicial review seeking the following reliefs:-

> "1. A declaration that there was a binding contract between the applicant and the respondents made on the 4th October, 2011, when the applicant accepted the offer of a traineeship as a three star private in the Defence Forces;
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> 2. An order of *certiorari* by way of application for judicial review of the purported decision of the respondents on the 5th October, 2011, to rescind the said contract and or withdraw the offer of a traineeship as a three star private in the Defence Forces;
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> 3. A declaration that the requirement that recruits to the Defence Forces be under that age of 25 years on the date of enlistment is unlawful;
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> 4. If necessary, an order quashing the requirement of the respondents that recruits to the Defence Forces be under the age of 25 years on the date of enlistment;
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> 5. A declaration that s. 37(5) of the Employment Equality Act 1998, does not apply to recruitment to the ranks of the Defence Forces;
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> 6. If necessary, an order of specific performance of the contract between the applicant and the respondents;
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> 7. Further or in the alternative damages for loss and damage suffered by the applicant."

A number of ancillary reliefs were sought.

I do not propose to set out all of the grounds upon which relief was sought but it would be helpful to set out some of the grounds relied on by the applicant. The first relief sought by the applicant relates to an alleged breach of contract and the grounds relied on are as follows:-

> "The respondents made an unconditional offer of employment as a three star private in the Defence [Forces] on the 4th October, 2011, to the applicant after a formal process in which the applicant had completed an application form and a medical examination. The offer of employment was made to the applicant by a servant or agent of the respondents who was duly authorised so to do. The offer was formally communicated to the applicant and the applicant unambiguously accepted the offer on the terms it was made. Pursuant to the agreement the applicant then notified his employers that he would be resigning from his job in order to take up the position in the Defence Forces (although the applicant has subsequently been able to retrieve employment). Since the 5th October, 2011, when the respondents purported to withdraw the offer and/or rescind the agreement the respondents have failed and/or refuse to acknowledge their obligations to the applicant."
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> The grounds for reliefs 2, 3 and 4 are set out collectively. They are as follows:-
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> "(a) There was no valid or lawful reason to purport to rescind the contract and/or offer.
>
> (b) The purported rescission of the said contract and/or withdrawal of the offer on the 5th October, 2011, constituted a breach of contract to which the parties had bound themselves. The reason advanced on behalf of the respondents is the mistaken and/or incorrect belief (which the applicant says is in any event not lawfully permissible as a reason) that there is a rule or regulation that persons such as the applicant must be under 25 years of age at the date of enlistment (the applicant's date of birth is the 28th June, 1986).
>
> (c) …
>
> (d) Secondly, the stipulation that recruits be 25 years or more is in clear breach of s. 8(1) of the Employment Equality Act

1988, which prohibits discrimination by an employer against a prospective employee in relation to *inter alia* access to employment or training for employment. The discrimination is of a kind included in s. 6(2)(f) of the said Act, and which is referred to in the provision as "the age ground".

(e) The reference to the upper age limit of 25 years was stated to offend against the European Directive on equal treatment in employment and education (Directive 2000/78/EC). Article 2.2(a) of the European Directive on equal treatment in employment and education states that 'direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any grounds referred to in Article 1.'

(f) The decision to withdraw the offer of employment to the applicant on age grounds runs counter to the recruitment guidelines contained in the Defence Forces policy document – dated November 2007 – and entitled Equality, Diversity and Equally Status Policies.

(g) There is no justification – objective or otherwise – for an upper age limit of 24 years in the Defence forces.

(h) To deprive the applicant of a position in the Defence Forces on the grounds that he is 25 years of age is to breach his constitutional rights to equality and to earn a livelihood contrary to Articles 40.1 and 4.3.1 of Bunreacht na hEireann.

(i) The upper age limit was never drawn to the attention of the applicant at any stage during the lengthy and rigorous course of the application process."

The other reliefs sought are such that the grounds for same are self evident and it is not necessary to set them out in detail at this point.

Leave to apply for judicial review was granted by order of the court (Peart J.) on the 12th December 2011.

A series of affidavits have been exchanged between the parties starting with that of the applicant grounding the statement required to ground applications for judicial review. Affidavits were sworn by Georgina James, a captain in the Permanent Defence forces and by Peter Norton, a Commandant in the Permanent Defence Forces on behalf of the respondents. The applicant furnished a supplemental affidavit and an affidavit sworn by his father, Thomas Smyth. Finally, an affidavit of discovery was sworn by Linda Brady on behalf of the Minister for Defence.

First affidavit of Michael Smyth
Mr Smyth explained that following his application he attended a medical examination in September 2012, which he passed and he was invited for interview in October 2010. Subsequently he was advised that he was not successful.

In March 2011, he received a phone call from a captain in the Defence Forces asking if he was still interested in joining as a recruit. He attended a further medical examination, which he subsequently passed. Mr. Smyth exhibited three emails at this point, dated the 24th September, 201, the 28th September, 2010 and the 15th October, 2010, which make the following references to the age limit:

> "If you are 24 years old on application but turn 25 before 03 December 2010, you will no longer be eligible for recruitment."
>
> and
>
> "As per the terms and conditions outlined on our web site candidates must be 'under 25 years of age on the date of enlistment' to qualify for service in the Irish Defence Forces."

The latter clause appeared in the email of the 24th September, while the former clause appeared in those of the 28th September, 2010, and 15th October, 2010.

The applicant then dealt with the matter at the heart of these proceedings and it would be useful to set out in full his averments in this regard:-

> "6. I say that on Tuesday, October 4 2011, I received a telephone call from Captain Georgina James of the Defence Forces. When I told her that I was still interested in joining the army, she was pleased to inform me of a Government decision to recruit a platoon of 40 new trainee soldiers. She added my name was in ninth position on the list of would be recruits and she formally offered me one of the positions.
>
> 7. I was thrilled and I expressed with the offer which I unambiguously accepted. The telephone call concluded by her saying: "Yes, I can guarantee you a place. You will be starting on November 14, 2011". I immediately informed my employers that I would be resigning from my work no later than November 12, 2011, so that I would be ready to take up my new career in the Defence Forces.
>
> 8. I say that the following day – Wednesday, October 5, 2011 – I received a second telephone call from the same Captain Georgina James. She informed me that there had been a mistake regarding my application. Specifically, she said that she could not offer me the position because I would be 25 years old on the enlistment date, November 14, 2011. She apologised for the 'misunderstanding' and hung up. I was devastated."

Following this, the applicant contacted a local representative and the ombudsman for the Defence Forces. He said the issue of an upper age restriction was never notified to him at any stage in the recruitment process. He referred to confusion on the part of the respondents in regard to the actual upper age restriction. In this respect, he referred to a page in the Defence Forces website in which it is stated, "the upper age limit for recruits is 25 years". In a subsequent visit to the website, this had been changed to read, "the upper age limit for recruits is 24 years of age".

Finally I should refer to the fact that applicant stated in his affidavit that following the phone call of the 4th October, 2011, he informed his employers that he would resigning from his work, but fortunately, he had no difficulty in retaining his employment with them. He has accordingly suffered no loss of income as a result, but claims that he will be at a financial loss into the future when promotional prospects, pension rights and so on are taken into account.

Affidavit of Captain Georgina James
Captain Georgina James in her first affidavit explained that sanction to induct a platoon of 40 recruits into Easter Brigade was received on the 27th September, 2011. Fourteen applicants including the applicant herein had already passed a physical fitness test, medical examination and Garda vetting and thus were already on a panel of applicants. The applicant herein was the ninth of the fourteen on the list. She then explained that she contacted the fourteen applicants by telephone on that date.

At para. 5 of her affidavit she made the following averment:

> "I had a short and similar conversation with each of the fourteen. I explained to each of them:
>
> '(a) A platoon of recruits will be inducted to two Eastern Brigade;
>
> (b) The 14th November, 2011, was the proposed start date, but this was not as yet confirmed;
>
> (c) Location of training was not confirmed'
>
> I also clarified their contact details and I inquired as to their continuing availability for an interest in the Defence Forces. I asked whether they were employed or studying. Finally, I advised each of them that should he be eligible and selected, a formal offer in the form of an email would be sent out in the coming weeks to successful candidates. Accordingly, they should monitor their email account and reply accordingly."

She went on to say that the following day, when finalising an administration work relating to the applicants on the panel, she checked this applicant's date of birth and realised that he was 25 years of age and therefore, no longer eligible for recruitment. She rang the applicant to confirm his date of birth and then explained to him that because he had turned 25, he was no longer eligible. She explained that his date of birth was not on the application for as was required and had it been, she would not have phoned him the previous day. She "reminded the applicant that he would have received a number of emails throughout the process but highlighted the age requirements . . .". She asked him whether he was aware that the upper age limit was being under 25 years old. He responded to the effect that he did, but added that he knew someone in the army who said he would be "alright". She said that she did not apologise for the "misunderstanding" as it occurred because of the applicant's failure to include his date of birth on the application form. She added that she did not hang up abruptly. She went on to explain that an offer of a place is made by email and that she did not "formally offer" a position or "guarantee" a place and to that extent she said that the applicant's averment was mistaken.

In any event, she added that she had no authority to make a formal offer over the telephone. She added, that while the proposed induction date was the 14th November, 2011, the induction date was ultimately not until the 28th November, 2011. She also confirmed that she had a phone call from the applicant's father on the 5th October, 2011, as spoke to him in similar terms as in her conversation with the applicant.

Affidavit of Commandant Peter Norton.
An affidavit was also sworn by Cmdt. Peter Norton. He dealt with the conditions governing recruitment which was set out in Defence Force Regulations made pursuant to the Defence Act 1954, as amended. It is specified in the regulations that the age limits for recruits for general service in the army are "17 and less than 25 on a date to be determined by the Minister". He added "that date has always been determined as the date of enlistment which in this case was the 28th November, 2011". In 2000, the age limit was increased from "under 20 years of age" to the present limit to increase the number of eligible candidates.

Cmdt. Norton reiterated a number of the points made by Capt. James in her affidavit. He disputed the possibility that the applicant would be at a financial loss in the future as there was no guarantee that the applicant would have successfully completed recruit training. He then exhibited the applicant's application which left blank the section referring to date of birth.

Finally, Cmdt. Norton referred to the Employment Equality Acts 1998 to 2011, which he stated avail of a derogation permitted by the European Directive 2000/78/E.C. This deals with the issue of a derogation in respect of the Defence Forces in the context of alleged age discrimination.

Supplemental Affidavit of the Applicant
A supplemental affidavit was furnished by the applicant in which he disputed the averments of Capt. James in relation to the telephone conversation of the 4th October, 2011. He said that in the conversation, Capt. James asked if he was still interested in joining the Defence Forces. He said he was. He continued: ". . . she said she was happy to tell me that on foot of a recent Government decision, a platoon of 40 new trainees were to be enlisted. She told me that my name was on the list of people to be offered traineeships and she then formally offered me one such traineeship. She told me that the place was guaranteed and that the start date was the 14th November, 2011".

He added that he had no doubt from this conversation that he had been made a formal offer to take up a traineeship which he accepted. He then told his father the news.

The applicant also took issue with Capt. James's account of the conversation on the 5th October, 2011. He said that he could specifically recall that she said a mistake had been made in relation to the offer of the previous day, the problem being his age on the enlistment day. She said that she was sorry and ended the phone call abruptly.

He disputed the averment of Capt. James to the effect that she told him that he would not have received a telephone call the previous day had his date of birth been included on the application form. He also disputed the averment that Capt. James asked him if he was aware that the upper age limit was under 25 years. He did not at any stage say that he had a contact within the Defence Forces who could secure his admission.

Finally he exhibited what was described as contemporaneous note of the two conversations with Capt. James. He accepted that the note might not be a verbatim reproduction of the conversations but said it was an accurate and truthful account of the conversations. That note appears to have been compiled in the context of an email to the Office of Ombudsman for the Defence Forces.

Affidavit of Thomas Smyth
The applicant's father swore a short affidavit confirming that his son contacted him on the 4th October, 2011, to tell him that he had been offered a traineeship. He said that in the conversation, his son confirmed that Capt. James had used the word "formal". He

received the news the following day about the withdrawal of the offer and contacted Capt. James directly. He denied being irate. She rejected the possibility of a meeting with Mr. Smyth.

Supplemental affidavit of Capt. James
Capt. James swore a second affidavit dealing with the applicant's supplemental affidavit and that of his father. She reiterated her position as previously outlined.

Cross examination of deponents
Given the nature of the dispute on affidavits exchanged between the parties, not surprisingly, a notice of cross examination was served on behalf of the applicant in respect of the affidavits of Capt. James and Comdt. Norton. No such notice was served on behalf of the respondents on the applicant. When the matter came before me for hearing, Capt. James and Comdt. Norton were duly cross examined..

Comdt. Norton in the course of his cross examination went through administrative instructions for the Defence Forces in relation to personnel matters dealing with, inter alia, recruitment. That document states that it is to be read in conjunction with Defence Forces Regulations, A10. Enlistment procedures are dealt with in s. 2, para. 121. It deals with eligibility for enlistment, matters such as parental consent, where the applicant is under 18 years of age, medical examinations, the completion of form AF339 and so on. Comdt. Norton said that in April 2011, the applicant met all the criteria for enlistment.

In relation to the question of the age limit, he said that the critical date by which the age of the candidate was considered was the date of enlistment. He expressed the view that this allowed the maximum period of time for candidates but accepted that this was not of benefit to candidates at the upper end of the age limit. The point made by Comdt. Norton was that if the relevant date is the date of enlistment that is if benefit to candidates who were under 17 at the time of application, but have reached the age of 17 by the date of enlistment. Obviously, that is of no assistance to those at the upper end of the age limit.

Although Defence Forces Regulations at regulation 7 state the age limit in the following terms: "17 and less than 15 years on a date to be determined by the Minister", Comdt. Norton said that it was his understanding that the relevant date had always been the date of enlistment and he assumed that the Minister had delegated to the Chief of Staff of the Defence Forces the task of determining the date.

In relation to the applicant's birth certificate, he noted that under the administrative instructions at para. 107, the applicant is required to be in possession of their birth certificate and he had no reason to doubt that the applicant had produced his birth certificate at interview. He accepted that the attestation form contains a place for the applicant's date of birth. (This is a form which is required to be completed by the attesting officer and by a medical officer It sets out a list of questions to be put to the intending recruit including as to his/her date of birth).

Capt. James was then cross examined. She explained that sanction to recruit was received in September 2011. She took over the role of attestation officer in June 2011, and was aware that there was a panel of candidates in existence. The applicant was called for a medical examination in St. Bricins Hospital on the 14th April, 2011, and on that date form AF339 was initiated. It was sent back to the Manpower office of the Eastern Brigade. She noted that the applicant was ninth in the list of fourteen on the panel.

She explained that the main purpose of the phone calls to the fourteen individuals on the panel was to find out if they were still interested. If not, she would have to increase the number to be recruited. At that stage, she had fourteen names on the panel and she had to recruit a total of 40. She would have to organise medical examinations and so on for further recruits.

She was cross examined in detail on the basis of the note of the conversations made by the applicant. It would be helpful to set out in full the note which as I have previously noted was contained in the email sent by the applicant to the Ombudsman for the Defence Forces on the 6th October, 2011. The first note dealing with the 4th October, 2011, is as follows:-

> "Capt. GJ Hi, is this Michael Smyath?
>
> Me It is indeed.
>
> Capt GJ Hi, this is Capt. Georgina Jones (sic) ringing from Cathal Brugha Barracks, following up on your application to join the Irish Defence Forces. Are you still interested?
>
> Me Yes I am.
>
> Capt GJ Are you currently employed at the moment or what is your current situation?
>
> Me Yes, I am actually employed in two jobs at the moment.
>
> Capt. GJ Well would you like a third one?
>
> Me A third one or a permanent one?
>
> Capt GJ Well I am pleased to say that the Government have given us the go ahead to take in another recruit platoon of 40 and you are No. 9 on the list, so I can offer you a place.
>
> Me Are you serious?
>
> Me Yes definitely.
>
> Capt. GJ Yes I can guarantee you a place, you will be starting on the 14th November, 2011. I don't have all the information for you right now, but you will receive an email in the next couple of days with all the information.
>
> Capt GJ are you still working off the same email address msmyth86@gmial.com ?
>
> Me I am, yes.
>
> Capt. GJ Ok, well keep an eye on your emails over the next few days.

Me I will do, thank you very much, you have really brightened up my day.

The following is the note of the conversation on the 5th October, 2011.

Capt. GJ Hi, is this Michael Smyth?

Me It is yeah.

Capt. GJ I believe I was talking to you yesterday.

Me You were, yes.

Capt. GJ Unfortunately, I was looking through your file and there is a slight problem.

Capt. GJ What age are you?

Me I am 25.

Capt. GJ Unfortunately you are over the age limit, we can't take you on, once you have turned 25.

Capt. GJ You never filled out your date of birth on your application form.

Me I thought that if I had completed my fitness, interview and medical all when I was 24, that since the Government had a ban on recruiting I could still be taken on?

Capt. GJ No, that's not the way it works, you can't be sworn in when you are 25, we can't touch anyone under 17 or anyone 25 or over.

Capt. GJ It's not just figures that we make, legally we just cannot do it.

Capt. GJ It's just unfortunate, had we been taking people on before June, you would have been fine, but its just unfortunate.

Me Ok.

I should point out that the applicant stated in the email to the Ombudsman for the Defence Forces that "the phone calls that I have logged may not be exact quotes".

Capt. James stated that she did not offer the applicant a place. She was passing on what was undoubtedly good news to a number of people who had not been contacted for a number of months. She also denied saying "I can guarantee you a place". She pointed out that she was not in a position to recruit anyone at that stage – there was always a chance that the recruitment of the proposed platoon would not go ahead. Capt. James added that when she was making the calls, she was doing so with a view to an induction date of the 14th November, 2011. She needed 40 offers and acceptances.

She was asked about the others on the list and indicated that one of those was no longer available as he had gone to Australia. She made a note of those she thought would accept an offer. She said that her understanding of the rules was that a candidate had to be no more than 24 years of age on the date of enlistment.

In relation to the second phone call, she said that she had his AF339 and she verified his date of birth. She said she would have explained to him that he was no longer eligible and that he would not be sent a formal offer. She said that the language in the note of the conversation of the 5th October, 2011, did not look like anything she would use. She added that there was no copy of the applicant's birth certificate on file, but she was absolutely not suggesting that the applicant was concealing his age.

In re-examination, Capt. James spoke of the difference between attestation and induction. She said the induction process could take some time. She went on to describe the phone calls on the 4th October, 2011, as being courtesy calls to see if the candidates concerned were still interested and to confirm their contact details. Her main focus was to establish contact. The panel she was dealing with had been assembled in December 2010. When she was dealing with the matter, the applicant was ninth on the list. She had the candidates files. If the date of birth had been on the application form for the applicant, she would not have contacted him. She added that she would probably have sent him an email subsequently explaining that he was not eligible.

That concluded the evidence before the court.

Submissions.
The first part of the applicant's case is to assert that there was binding contract between himself and the respondents following an offer of a traineeship as a three star private in the Defence Forces. I have outlined the nature of the cross examination that took place and in particular that of Capt. James on the question as to whether a "formal" offer of a traineeship was given to the applicant. I also had the benefit of the applicant's affidavits in this regard. It is a pity that the respondents chose not to serve a notice of intention to cross examine the applicant on his affidavits as the hearing before me was somewhat incomplete on that basis.

Having made that observation, I have no doubt whatsoever, that following the phone call on the 4th October, 2011, the applicant was genuinely under the impression that was going to be given a place in the platoon about to be recruited. He acknowledged that further information was to be sent to him by email.

Having said that, and having considered the evidence of Capt. James as to the terms of the conversation she recalls and considered the affidavits of the applicant, together with that of his father, I am satisfied that Capt. James in the conversation did not make a formal offer to the applicant on the 4th October, 2011. I think it is clear that she was to provide further information to the applicant and I accept that the further information would have included a formal offer. The whole purpose of the conversation was to check contact details with a view to furnishing a formal offer by email. Consequently I am satisfied that no binding contract was entered into between the applicant and the first named respondent on the 4th October, 2011.

Other issues

I now want to consider the other points raised on behalf of the applicant. These can be summarised as follows:-

> 1. In the course of the hearing, one of the points made on behalf of the applicant was that the Defence Force Regulations (A.10) provide in relation to recruits for general service at regulation 7 that the recruit is to be "17 and less than 25 years on a date to be determined by the Minister".

The evidence before me made it clear that this date is taken to be the "enlistment" date, that is the date on which the recruitment is first inducted into the Defence Forces as outlined previously in respect of the evidence of Comdt. Norton. It appears from the evidence that despite the provision in the Defence Forces Regulations referred to above, the Minister has never determined a date. Comdt. Norton in his evidence as recited above, assumed that the Minister had delegated to the Chief of Staff the task of determining the date. The practice of using the enlistment date as the relevant date is as noted by Comdt. Norton to the advantage of those at the lower age of the age requirement. In any event, the position appears to be clear that the Minister has never determined the date and no evidence was put before the court to suggest otherwise. I will return to this point at a later stage in the course of this judgment.

The second point relied on by the applicant is to the effect that the respondents requirement that a prospective recruit should be under the age of 25 is a breach of s. 8(1) of the Employment Equality Act 1998. It is also contended that the age limit of 25 years also offends against European Directive on Equal Treatment in Employment and Education (Directive 2000/78/E.C).

The third point relied on by the applicant is that the respondent is not entitled to rely on the provisions of s. 37(5) of the Employment Equality Act 1998, which affords a derogation from the provisions of the Act to the Defence Forces. It is contended that the derogation provided in that section is one in respect of those in "employment in the Defence Forces" and that as the applicant was not an employee of the Defence Forces, the exemption does not apply to him.

It would be helpful at this stage in order to consider the applicant's submission to set out the relevant provisions of the European Directive and the Statutory Provisions relied on in these proceedings. Council Directive 2000/78/E.C establishing a general framework for equal treatment and occupation sets out in the preamble the following at paras. 18 and 19:

> "18. This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.
>
> 19. Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation."
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> Further on at para. 25 it is provided in the preamble as follows:-
>
> "25. The prohibition of age discrimination is an essential part of meeting the aims set out in the Employment Guidelines and encouraging diversity in the workforce. However, differences in treatment in connection with age may be justified under certain circumstances and therefore require specific provisions which may vary in accordance with the situation in Member States. It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination which must be prohibited." The purpose of the Directive is set out in Article 1 as follows:-
>
> "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."
>
> Article 2 continues;-
>
> "(1) For the purposes of this Directive, the 'principle of equal treatment' shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1."
>
> A number of other provisions are of assistance. Article 3.1 provides:-
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> "Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
>
> (a) 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 the professional hierarchy, including promotion; . . .
>
> (4) Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces."

Article 6 describes justification of differences of treatment on grounds of age and specifically provides that:-

> "Such differences of treatment may include, among others:
>
> . . .
>
> (c) The fixing of a maximum age for recruitment which is based on the training requirements of the post in question or the need for a reasonable period of employment before retirement."
>
> The Employment Equality Act 1998, in s. 6(1) provides:-
>
> "(1) For the purposes of this Act, discrimination shall be taken to occur where, on any of the grounds in subsection (2) (in this Act referred to as 'the discriminatory grounds'), one person is treated less favourably than another is, has been or would be treated."

(2) As between any 2 persons, the discriminatory grounds (and the descriptions of those grounds for the purposes of this Act) are -

. . .

(f) that they are of different ages, but subject to subsection (3) (in this Act referred to as 'the age ground')"

It should be pointed out that the Equality Act 2004, substituted a different subsection for subs. (3), but nothing turns on the contents of subs. (3) of the context of this case.

Section 8(1) of the Employment Act 1998, provides:-

"(1) In relation to -

(a) access to employment,

(b) conditions of employment,

(c) training or experience for or in relation to employment,

(d) promotion or re-grading, or

(e) classification of posts,

an employer shall not discriminate against an employee or prospective employee and a provider of agency work shall not discriminate against an agency worker."

Section 8(5) provides:-

"(5) Without prejudice to the generality of subsection (1), an employer shall be taken to discriminate against an employee or prospective employee in relation to access to employment if the employer discriminates against the employee or prospective employee -

(a) in any arrangements the employer makes for the purpose of deciding to whom employment should be offered, or

(b) by specifying, in respect of one person or class of persons, entry requirements for employment which are not specified in respect of other persons or classes of persons, where the circumstances in which both such persons or classes would be employed are not materially different."

Finally s. 37 of the 1998 Act amended by s. 25 of the Equality Act 2004, provides as follows:-

"Section 37 (exclusion of discrimination on particular grounds in certain occupations) of the Act of 1998 is amended by the substitution of the following subsections for subsections (2) to (6):

(5) In relation to discrimination on the age ground or disability ground, nothing in this Part or Part II applies in relation to employment in the Defence Forces."

The first point made on behalf of the applicant is that the derogation contained in s. 37(5) of the 1998 Act as amended and relied by the respondents does not avail the respondents.

It goes without saying that a restriction on the recruitment of an individual for a job by reason of age would offend against Council Directive 2000/78/E.C. The respondent s rely on the derogation permitted by the Directive and provided for in s. 37(5) of the 1998 Act in respect of the Defence Forces. However, it is contended on behalf of the applicant that s. 37(5) only affords an exemption to the Defence Forces in respect of those in employment and does not afford an exemption in respect of the applicant as he suffered discrimination in relation to his recruitment to the Defence Forces.

In support of this argument reference was made to a number of authorities commencing with the decision of the High Court in the case of the Minister for Justice, Equality and Law Reform and the Commissioner of An Garda Síochána v. Director of the Equality Tribunal (Unreported, High Court, 17th February, 2009). That case is under appeal to the Supreme Court, but reliance was placed on a passage at para 7 of the judgment of Charleton J. in which he stated:-

"The Equality Act 2004 was specifically passed in order to give effect to Council Directive 2000/78/E.C.. It is beyond the scope of any decision that I am required to make in this judicial review as to whether that national legislation correctly implemented the Directive. In circumstances where an ambiguity arises, both this Court and any administrative body, including the respondent, is obliged to construe national legislation in the light of the obligation under European law in which it had its origin. That obligation, however, does not extend to re-writing the legislation; to implying into it a provision which is not there; or to doing violence to its express language."

Counsel on behalf of the applicant described this as a correct statement of the position in relation to the 2004 Act which as seen above, amends the provisions of Act of 1998. I see not reason to disagree with the general statement contained in the passage referred to above.

The plaintiff also relied on the Article 26 reference to the Supreme Court in the *Employment Equality Bill 1996* [1997] 2 I.R. 321. One of the issues considered in that case was the provision of s. 37(6) of the Employment Equality Bill 1996, which provided that:-

"In relation to discrimination on the age ground or the disability ground, nothing in this Part or Part II applies to employment-

(a) in the Defence Forces;

. . .

The provisions as to the age ground are challenged as being discriminatory, without rational justification and a violation of Article 40, s. 1 of the Constitution."

Hamilton C.J. in the court's judgment stated at p. 344:-

"It was further submitted that s. 37, sub-s. 6 which exempted employment in the Defence Forces, the Garda Síochána and the prison service from the application of the provisions of the Bill outlawing discrimination on the age ground itself constituted an objectively unjustifiable discrimination between employees in the public and private sectors (such as, for example, employees of security firms) which was itself in breach of Article 40, subsection (1).

It was finally submitted in relation to the age ground by counsel assigned by the Court that, considered from the employers' perspective, these provisions constituted an unjust and disproportionate interference with the rights of citizens to earn their livelihood and with their property rights in preventing them from taking into account in recruiting employees their suitability for the work in question having regard to their age.

Hamilton C.J. continued at p. 349 of the judgment:-

"It might be, at first sight, more difficult to defend on constitutional grounds the wide-ranging exclusion from the Bill's provisions of employment in the Defence Forces, the Garda Síochána or the prison service. Once, however, it is accepted that discrimination on the grounds of age falls into a different constitutional category from distinction on grounds such as sex or race, the decision of the Oireachtas not to apply the provisions of the Bill to a relatively narrowly defined class of employees in the public service whose duties are of a particular character becomes more understandable. It must be emphasised again at this point that a provision of this nature in this particular Bill does not have as its consequence a shielding from judicial scrutiny on constitutional grounds of legislation fixing age limits for any of the employments in question. The right of persons affected by such legislation to advance a challenge to compulsory retirement at a specified age without any testing to determine individual fitness for the post in question, such as was unsuccessfully advanced in the United States case of *Massachusetts Board of Retirement, et al v. Murgia* 427 U.S. 307, remains. Given the distinctive requirements associated with these branches of the public service and the particular importance of ensuring a high level of physical and mental fitness, it can hardly be said, in the Court's view, that the decision of the Oireachtas to remove them from the ambit of this particular measure, whether correct or not, is unrelated to a permissible legislative objective or irrational or unfair."

Having referred to that decision it was submitted that at no point in the discussion of the provisions of s. 37(5) of the Bill was the suggestion made that the derogation could be availed of in respect of recruitment into the said institutions.

I was also referred to a decisions of the European Court of Justice in the case of *Kucukdeveci v. Swedex Gmb H and Company Kg*, case C-55/07 in which the ECJ held that:-

"European Union law, more particularly the principle of non-discrimination on grounds of age as given expression by Council Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment and occupation, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that periods of employment completed by an employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal."

And further that:

"It is for the national court, hearing proceedings between individuals, to ensure that the principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, is complied with, disapplying if need be any contrary provision of national legislation, independently of whether it makes use of its entitlement, in the cases referred to in the second paragraph of Article 267 TFEU, to ask the Court of Justice of the European Union for a preliminary ruling on the interpretation of that principle."

In that case a preliminary ruling was requested in the following terms:-

"By its first question, the referring court asks essentially whether national legislation such as that at issue in the main proceedings, under which periods of employment completed by the employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal, constitutes a difference of treatment on grounds of age prohibited by European Union law, in particular primary law or Directive 2000/78. It is unsure, in particular, whether such legislation is justified on the ground that only a basic notice period is to be observed in the case of dismissal of younger workers, first, in order to enable employers to manage their personnel flexibly, which would not be possible with longer notice periods, and, second, because it is reasonable to require greater personal and occupational mobility from younger workers than from older ones."

The court noted at para. 21 as follows:-

"In that context, the Court has acknowledged the existence of a principle of non-discrimination on grounds of age which must be regarded as a general principle of European Union law (see, to that effect, *Mangold*, para. 75). Directive 2000/78 gives specific expression to that principle (see, by analogy, Case 43/75 *Defrenne* [1976] E.C.R. 455, para. 54)."

Finally the point was made on behalf of the applicant that regulation 7 of the Defence Force Regulation provides for a date to be determined by the Minister. No such date has been determined. Should the date be taken as the enlistment date? Should it be the date of application or when the AF339 form was initiated? There is no dispute that the applicant was of age when the process commenced. He has now been disqualified because of the application of loose terminology. This is not sufficient to disqualify the applicant and to allow the respondents to rely on the derogation. To avail of the derogation, the scope of the derogation must be clearly defined. It should not be ambiguous. There is simply no clarity as to the date by which one becomes ineligible on reaching 25. Accordingly, it was submitted there is no clear rule entitling the respondents to rely on the derogation provided for in s. 37(5) of the Act of 1988 from the obligations set out in Directive 2000/78/E.C..

Mr. Kerr on behalf of the respondent took issue with the arguments on behalf of the applicant to the effect that s. 37(5) of the Act of 1998 in so far as it was a derogation from the directive applied only to those in employment in the defence forces as opposed to those being recruited to the defence forces. He relied in this context on Recitals 18 and 19 of Directive 2000/78/EC as set out above. He also noted the specific terms of Articles 31 of the Directive which provides that it applies in relation to, *inter alia*, "access to employment, to self employment or to occupation including selection criteria and recruitment conditions" and "access to all types and to all levels of vocational guidance, vocational training, advance vocational training, including practical work experience" as well as employment and working conditions. Thus he pointed out that the article in using the word "including" applies just as much to access to employment as to conditions of employment.

Mr. Kerr went on to examine the positions of s. 37(5) of the Act of 1998 as amended and accepted that the decision of Charleton J. in the judgment referred to above as to the role of the court in interpretation of the legislation was the appropriate approach. He argued that the derogation provided for in s. 37(5) is expressly committed under the Directive. He made the point that when one looks at the provisions of the Act as a whole and considers the provisions in relation to the description of discrimination as set out in s. 6 of the Act of 1998 and the provisions of s. 8 of the Act that it is clear when one considers those provisions that the Act is addressing the question of discrimination in relation to access to employment as well as in relation to conditions of employment. He urged on the court that one should not consider the words used in s. 37(5) in isolation from the other provisions of the Act. Mr. Kerr finally made the point that the interpretation urged on the court by Mr. Quinn, S.C. on behalf of the applicant would result in an absurdity in the sense that it would be absurd to allow a derogation from the provisions of the Directive in relation to persons in employment in the defence forces but not to provide for such a derogation in relation to access to employment

Decision
A central part of the argument on behalf of the applicant was that the respondents could not rely on the provisions of s. 37(5) of the Act of 1998 as amended on the basis that the provisions of s. 37(5) applied only to "employment in the defence forces" as opposed to a person in the process of being recruited as an employee in the defence forces.

I cannot accept this argument. Looking at the provisions of the Employment Equality Act, 1998 as amended by the Equality Act 2004 implementing Directive 2007/78/E.C., it is, in my view the clear intention of the Oireachtas that the provisions of the legislation refer not just to the employment of an individual but also the recruitment of an individual. That this is so is clear from s. 8 of the Act of 1998. This is also clear from the terms of the Directive and in particular Article 31A of the Directive. Had the legislator intended that the derogation provided for in the Directive was applicable only to those actually employed in the defence forces, one would have expected such a distinction to be expressly and unambiguously provided for in the legislation. I accept that at some points, the legislation refers specifically to access to employment and to conditions of employment but I do not accept that the reference to different aspects of employment has the effect contended for on behalf of the applicant. The phrase "in relation to employment in the defence forces" as used in s. 37(5) includes, in my view, access to employment and conditions of employment and there is nothing therein that would lead me to the conclusion that s.37(5) does not apply to the recruitment of persons to the defence forces.

It follows from the conclusion that use of an age restriction in respect of persons seeking to join the defence forces is not contrary to s. 8 of the Act of 1998 as amended.

A further argument made by Mr. Quinn, on behalf of the applicant, was that if the defence forces are to rely on a derogation from the Directive, this must be done unambiguously and clearly. Recital 19 of the Directive noted that the Member States could choose not to apply the provisions of the Directive concerning disability and age to all or part of their armed forces and went to conclude as follows:-

> "The Member States which make that choice must define the scope of that derogation".

It is clearly the case that the Minister has never determined the date by which a recruit for general service has to be less than twenty five years of age. It does appear to be the case that members of the defence forces such as Comdt. Norton have operated under the assumption that the relevant date to consider is the date of enlistment but this simply has not been determined by the Minister. Comdt. Norton acknowledged that the use of the date of enlistment is to the advantage of recruits at the lower end of the age requirement. There are many practical reasons for choosing the date of enlistment as the relevant dates. For example an applicant may submit an application but if the date of application was the relevant date, there would be no obvious upper age limit in the sense that a person could be entitled to enlist long after they had reached and passed the age of twenty five.

Recital 19 of the Directive requires Member States to define the scope of the derogation. In circumstances where the Minister has failed to determine the relevant date, it could not be said that the scope of the derogation has been defined. Until such time as the date is determined by the Minister, one cannot say what is the relevant date. To that extent, it seems to me that whilst the legislation has appropriately implemented in accordance with the Directive and the Defence Force Regulations have provided for an age requirement, the final step, on evidence before me, to be taken to give effect to the derogation is the determination by the Minister of the relevant date and that step has not been taken. In those circumstances it appears to me that there is a difficulty for the respondents in relation to the derogation and they cannot rely upon the derogation against the applicant. The process by which the State can rely on the derogation is incomplete.

I will therefore hear the parties further in relation to the appropriate form of orders to be made having regard to the findings I have reached.