Neutral Citation: [2014] IEHC 446

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 160 J.R.]

BETWEEN

GARY PALMER

APPLICANT

AND

MINISTER FOR DEFENCE AND ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Cross delivered on the 16th day of May, 2014

1. The applicant in this case is a serving private in the PDF having been born on 24th June, 1971, and has had some 23 years of unblemished experience and service in the army.

2. He was nominated in 2012 by his commanding officer to undergo a non-commissioned officer's training course of intensive training to render him qualified for promotion to non-commissioner officer rank. He was afterwards selected by the designated staff officer of the General Office Commander of the Second Eastern Brigade. The course commenced on 30th October, 2012. Prior to the course commencing, in September 2012, the applicant underwent general preparation training so that he could satisfy the pre-course requirements and he came in to work in McKee Barracks during his days off during the summer and autumn 2012, in order to make his preparations for the course.

3. He attended a medical and was pronounced fit.

4. Upon reporting for the course on 30th October, 2012, at Casement Aerodrome, Baldonnell, he commenced the course but two days later he and two other members were called into the headquarters and asked their age by the commanding officer who advised that they were too old for the course and that a decision would be made the following Friday whether he and others over 40 years of age would return to his unit. The applicant continued on the course and on the Friday he was advised that he was being sent back to his army unit in McKee Barracks without being allowed to complete the remainder of the course.

5. The applicant says and I accept that he was greatly upset by this because he had passed all the other criteria for the course and that as a result he claims that he was really disappointed and distressed and has suffered a loss of earnings.

6. Accordingly, the applicant applied for leave for judicial review and was granted leave on 4th March, 2013, to quash the decision of the respondents of 2nd November, 2012, to remove him on age grounds from the training course and to deprive him of a place in the training course when he had already commenced work and to deny him the opportunity to complete the training course for which he had been selected.

7. The applicant further sought by way of *certiorari* an order to quash the entry criteria for entering onto the course for non-commissioned officers in the absence of clear and transparent and published objective justification for the age limitation therefore and further the applicant sought a declaration that his removal was unfair and unreasonable and an order of *mandamus* by way of application for judicial review directing that the respondents allocate the applicant a place in a future course and damage.

8. The grounds of the claim were that the decision of 2nd November, was unfair and reasonable and unlawful and in breach of the applicant's legitimate expectation contrary to fair procedure and indeed discriminatory under the equality provisions.

9. At the hearing of the application, it was accepted that the equality provisions did not arise and though counsel for the applicant did make the case that the decision was irrational under the O'Keeffe principles the main thrust of the applicant's case was that the applicant and had a legitimate expectation that he would be allowed to continue and that the age requirements would not be strictly applied (in this regard the applicant demonstrated that two other persons were permitted to complete a course in earlier times when over 40). It was further claimed that in the alternative of an order for *certiorari* that the applicant would be entitled to damages.

10. The applicant accepted the qualifying criteria for entry onto the course excluded anyone over 40.

11. The respondent contends that the decision to admit the applicant onto the course was an unfortunate administrative error. The applicant's physical fitness is accepted but evidence was given that the applicant was not qualified by age for acceptance on the course and that the applicant at least ought to have known of the age requirements. Evidence was furnished by way of affidavit by Colonel Gerard Kerr, Medical Doctor as to the reasons why an age cut off 40 was applied for this course in that the human body deteriorates after the age of 25 and decreases in strength as a result the activity required under the non-commissioned officer's course may not be safe for older applicants however fit they may seem to be.

12. The court heard the submissions of counsel for the applicant and the respondent and read the two affidavits of the applicant and the four affidavits of Captain Conor Connelly, the affidavit of Colonel Kerr of the Battalion Sergeant Major Lambe, the affidavit of Captain Paul O'Callaghan and Colonel Dermott Hannifin on behalf of the respondent.

The Applicant's Case

13. The applicant claims that he had a legitimate expectation that having been accepted onto the course that he would be allowed to continue to complete it and in all probability to pass through and be qualified for promotion.

14. In *Glencar Exploration Plc v. Mayo County Council (No. 2)* [2002] I.R. 184, Fennelly J. stated at p. 162:-

> "In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied, as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it."

15. The above definition was adopted with approval by MacMenamin J. in *Power v. Minister for Social and Family Affairs* [2007] I.R. 543.

16. Counsel for the applicant also relied upon the judgment of Denning M.R. in *Amalgamated Property Company Limited v. Texas Bank Limited* [1982] Q.B. 84 at p. 122:-

> "When the parties to a transaction proceed on the basis of an underlying assumption – either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.'

17. Fennelly J. also approved of the *Glencar* doctrine in *McGrath v. Minister for Defence* [2010] I.R.

18. In *McGrath*, the applicant had been retained in the army for more than sixteen years during which he had suffered from a significant disability. The army could (as was held by Fennelly J.) have decided to reclassify the applicant medically and to discharge him at an earlier date. However, he was kept in service to the benefit of both the army and himself and in 1994, he sought an extension in order to build up his pensionable service and Fennelly J. construed what occurred as the army representing that he would be retained in service for two years evening with his existing medical classification and that he was entitled to rely on that representation.

19. The applicant relying upon these authorities and also the statement of Denning M.R. that legitimate expectation may arise whether "due to misrepresentation or mistake makes no difference" (see above), submit that the applicant had a legitimate expectation once he was accepted onto the course that he would be allowed to continue and qualify for a promotion. As a result of the legitimate expectation, the applicant is entitled to at least to some of the reliefs as claimed.

The Respondent's Case

20. The respondent submits that in the first place there was no expectation. Secondly, if there was an expectation it was not a legitimate one and thirdly if there was a legitimate expectation that the respondent are entitled to the strength of that public policy not to afford the applicant the benefit of such legitimate expectation.

21. The respondent also contends that the applicant knew or rather ought to have known about the age requirement. It is quite clear that any mistake in the matter is primarily the mistake of the respondents and that is not disputed. The applicant accepts that he had previously indicated to his superiors that he wanted to apply for the NCO course "before he was too old" or words to that effect. The age requirement is stipulated in the "qualifying criteria" which list a series of grades as being the minimum requirements i.e. 11424. The first "1" represents an age less than 40. The applicant's grades started with a "2" indicating that he was at the time over 40. The difficulty for the applicant was that the applicant was abroad in 2009 when the last NCO course was made and there was no course due to the economic situation of the country in either 2010 and 2011. When the applicant applied in 2012, he was over the limit. The limit was I hold to be a matter of reasonable policy on behalf of the respondents and accordingly, the applicant was not qualified for entry to the course in 2012. The fact that he was accepted was described as very unfortunate and counsel for the respondents accepts that the respondent was very disappointed and indeed may have been humiliated as a result of being returned to the barracks.

22. The respondent further relied upon the decision of the Supreme Court in *Daly v. Minister for the Marine & Ors* [2001] 3 I.R. 513, which held, *inter alia*, that the mere fact of an expectation could not suffice an applicant without some context relevant to fairness in the exercise of legal or administrative powers and the notion of fairness had within it the idea that there was an existing relationship which would be unfair to alter.

23. The respondent then relied upon the decision of *Wiley v. Revenue Commissioners* [1994] I.R. 160, and relied upon the decision of O'Flaherty J. at p. 174:-

> "The applicant is not concerned with seeking fair procedures in the sense of submitting that he should have been heard by the Revenue Commissioners before they changed their evidentiary requirements in relation to the granting of a refund. Rather does he submit that he should continue to have conferred on him a substantive benefit by way of exemption in the circumstances that he was not informed in advance of the more stringent requirements that the Revenue Commissioners had put in place to satisfy themselves so that they could properly discharge their duty in accordance with the scheme that they had set up under the relevant legislation.
>
> It will be clear immediately that acceptance of this submission would involve a radical enlargement of the scope of legitimate expectation. It would involve the Court saying to the administration that it was not entitled to set more stringent standards, so that it might discharge its statutory obligations, without giving notice to anyone who might have benefited in the past from a more relaxed set of rules."

24. While the respondent accepts that in this case there is no statutory requirement that a 40 year old limit be set, they do contend that the court should not interfere with a policy decision based on reasons to impose such an age restriction.

25. The respondent also relies upon the decision of Dunne J. in *Curran v. Minister for Education and Science* [2009] I.R. 300, which was held that the doctrine of legitimate expectation could be qualified by public interest considerations. That decision followed the

dicta in *Glencar* and in other cases.

What Occurred in this Case?
26. Private Palmer was accepted onto the NCO course. Before he was accepted he had to undergo a medical examination which he passed. He was highly recommended by his superiors. His superiors had previously suggested to him that he should apply for NCO promotion. While Private Palmer was aware in general of the fact that this application should be made before he got very much older, I do not think it has been established that Private Palmer knew or ought to have known that an absolute 40 year cut off was applicable.

27. The code in the application criteria that indicates a maximum of 40 years is not clear and it is obvious that the respondents who ought to have known about the age requirements were not alert to the applicant's failure to meet the age requirement. I accept the applicant's affidavit evidence as to his ignorance of the age requirement.

28. The applicant accepts that there is an age requirement preventing persons being accepted on the course who are over the age of 40. I do not hold the fact that in previous years, two persons who were over 40 were accepted on and completed the course and subsequently were promoted to corporal is evidence of anything other than the respondent making a similar administrative error and in those cases not finding out about that error until after the promotions were made.

29. The first question to be asked is whether the applicant had an expectation within the meaning of *Glencar* and other cases that he would be allowed to continue on the course notwithstanding his age. I do not believe that the applicant has established such an expectation. The respondents made a significant error. The applicant then not realising that an error had been committed, expended some energy in preparing for the course and was two days on the course before he was told there was a problem and was approximately a working week on the course before he was removed. I do not accept that that action constitutes an expectation in any real sense. Undoubtedly, the applicant had a great hope that he would be able to complete the course and proceed to promotion and I am not satisfied that the respondent's error created an expectation in the first place. I am not satisfied that as a result of being accepted onto the course that the applicant did any adverse to his interests or that any question of estoppel could arise.

30. It must always be remembered that the doctrine of legitimate expectation in this State stems from the decision of *Webb v. Ireland* [1988] I.R. 353, in which Finlay C.J. stated:-

> "The doctrine… is but an aspect of the well-recognised equitable concept of promissory estoppel…whereby a promise or representation as to intention may in certain circumstances be held binding on the representor or promisor."

31. I do not find in this case that there was any promise or any representation made by the respondents. What occurred was a mistake by them as to the applicable criteria and the applicant did nothing to his legal detriment in order to invoke the operation of the doctrine even accepting Denning M.R's view as I do that mistake can result in the legitimate expectation operating.

32. I also accept the submission on behalf of the respondent that if I am incorrect in viewing that no expectation arose that there was certainly no legitimate expectation. The applicant was never eligible from inclusion in the course as he did not satisfy the criteria set out in the Joining Instructions. The applicant accordingly never had any legitimate expectations about the course, that he never had an expectation which was either reasonable or legitimate which is a prerequisite for the doctrine to arise.

33. If the applicant had a legitimate expectation, it would have been of an expectation that the defence forces would breach their well established and reasoned policy for imposing an age limit. I do not believe that the applicant has so demonstrated.

34. Thirdly, again if I am incorrect in the above analysis, I would conclude that the operation of a reasonable policy by the Defence Forces to apply an upper age limit can and does override any legitimate expectation the applicant might have.

35. I further hold that if insofar as it was argued (and the applicant's argument centred on legitimate expectation), I do not find there has been any breach of fair procedures or natural justice. This was not a decision or process which would have attached the principles of fair procedures and natural justice in the first place. The applicant was wrongly placed on a course, the criteria for which he did not satisfy and was rapidly removed when this error came to light. He did not have a right to be heard in advance to the return to unit and in any event, had he been heard I do not accept that anything the applicant could have said would have altered the situation.

36. For the above reasons, I must dismiss the applicant's case noting the high regard to which he is held in the Defence Forces and I wish him every success in this continued career there.