Neutral Citation Number: [2009] IEHC 72

THE HIGH COURT

JUDICIAL REVIEW

2008 793 JR

BETWEEN

THE MINISTER FOR JUSTICE, EQUALITY AND

LAW REFORM AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA,

APPLICANTS

AND

THE DIRECTOR OF THE EQUALITY TRIBUNAL

RESPONDENT

AND

RONALD BOYLE, GERARD COTTER AND BRIAN FITZPATRICK

NOTICE PARTIES

JUDGMENT of Mr. Justice Charleton delivered on the 17th day of February, 2009

1. The question for decision in this case is whether the Equality Tribunal, as a body whose powers are defined by statute, is entitled to commence a hearing that has the result that it assumes a legal entitlement to overrule a statutory instrument made by the first applicant where by law it is not entitled so to do. My view is that it is not.

Background

2. In 2005 the notice parties applied to train as members of An Garda Síochána. They were then aged between 36 and 48 years. The relevant personnel department wrote to each of them explaining that in order to be eligible, applicants had to be at least 18 years of age and under 35 as of 1st September in the year in which they apply. This refusal was followed by a complaint from them to the Commissioner of An Garda Síochána, and to the Equality Tribunal that age discrimination stood in the way of their entering into training. It is only necessary to briefly quote, without conviction, from the letter written by the first notice party to the Commissioner, dated the 6th January, 2006, as follows:-

> "As a physically fit – 48 year old – married man with two young children, I believe I have amassed life skills/experience which are invaluable to the role of police officer dealing with the public in every day human situations. These particular attributes have long been recognised by neighbouring police forces throughout the British Isles, as well as around the world where the upper age limit for entry is 50 plus.
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> I would like to know why, in an era of Justice, Equality and Law Reform, being 48 years old – I am considered ineligible to become a Member of the Garda Síochána to serve society – of which I am very much representative of – when a fellow citizen of 35 years of age is? I do not believe this age limit is justified or defensible under equality legislation. I would therefore ask you to reconsider my application and to re-instate my invitation to examination."

3. By reply, the Commissioner pointed out that entry to training within An Garda Síochána is governed by the Garda Síochána (Admissions and Appointments) Regulations 1988 (S.I, No. 164 of 1988), as amended. Regulation 5(1), as amended by the Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2001 (S.I. No. 498 of 2001) and the Garda Síochána (Admission and Appointments) (Amendment) Regulations 2004 (S.I. No. 749 of 2004), now reads:-

> "5. (1) Subject to these Regulations, the Commissioner shall not admit a person as a trainee unless-
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> …
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> (c) he is satisfied that the person is at least 18, but under 35, years of age on the first day of the month in which an advertisement of the vacancy to which the admission relates was first published in a national newspaper."

Equality Legislation

4. The Employment Equality Act 1998 was passed in order to make discrimination unlawful and to ensure equal access to employment, training, promotion and working conditions. In part, it originated in Council Directive 75/117/E.E.C. of 10 February, 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, O.J. L045 19.2.1975 and Council Directive 76/207/E.E.C. of 9 February, 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. L39 14.2.1976. The Act of 1998 was in turn amended by the Equal Status Act 2000 and then subsequently by the Equality Act 2004. In its long title, the Act of 2004 recited that among its purposes was to implement the principle of equal treatment established by Council Directive 2000/78/E.C. of 27 November, 2000 establishing a general framework for equal treatment in employment and occupation, O.J L303/16 2.12.2000 and Directive 2002/73/E.C. of the European Parliament and of the Council of 23 September, 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, O.J. L269, 5.10.2002. Section 82 of the Act of 1998, as amended by s.36 of the Equality Act 2004, defines the limits of the jurisdiction available to the respondent on a complaint. These include the

entitlement to make an order for compensation in the form of arrears of remuneration; an order for equal remuneration; an order for compensation for discrimination; an order for equal treatment; an order of an injunctive kind; and an order that an employer re-engage a complainant, with or without compensation.

5. Under European law it is the duty of every administrative and legal tribunal to implement European legislation. That can not be done, however, without a legal framework. The Act of 2004 was specifically passed in order to implement Council Directive 2000/78/E.C. The purpose of the Directive, as stated by Article 1, was to lay down a general framework for combating discrimination on grounds which might fairly be regarded as obnoxious; including religion, sexual orientation, or age. Article 9.1 of the Directive deals with the defence of rights whereby remedies may be obtained. It states:-

> "Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended."

6. By a letter dated the 5th April, 2006, the Equality Authority made it clear that its view was that any exemption of An Garda Síochána from the general prohibition on age discrimination was removed by the Equality Act, 2004. They quoted s. 25 of that Act and then stated:-

> "It would appear that the Garda Síochána (Admission and Appointments) Regulations as amended are not therefore consistent with the Employment Equality Acts, or with the provisions of the framework employment directive".

7. 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 extent to re-writing the legislation; to implying into it a provision which is not there; or to doing violence to its express language. In *Impact v. Minister for Agriculture and Food & Others (Case C-268/06),* the Court of Justice expressed that principle in clear terms:-

> "46. … the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, *Rewe-Zentralfinanz and Rew-Zentral,* paragraph 5; *Comet,* paragraphs 13 to 16; *Peterbroech*, paragraph 12; *Unibet,* paragraph 43 and *van der Weerd and Others,* paragraph 28).
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> 47. Those requirements of equivalence and effectiveness, which embody the general obligation on the Member States to ensure judicial protection of an individual's rights under Community law, apply equally to the designation of the courts and tribunals having jurisdiction to hear and determine actions based on Community law.
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> 48. A failure to comply with those requirements at Community level is – just like a failure to comply with them as regards the definition of detailed procedural rules – liable to undermine the principle of effective judicial protection.
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> …
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> 51. In those circumstances, where the national legislature has chosen to confer on specialised courts jurisdiction to hear and determine actions based on the legislation transposing Directive 1999/70, the obligation which would be placed on individuals in the situation of the complainants – who sought to bring a claim based on an infringement of that legislation before such a specialised court – to bring at the same time a separate action before an ordinary court to assert the rights which they can derive directly from that directive in respect of the period between the deadline for transposing it and the date on which the transposing legislation entered into force, would be contrary to the principle of effectiveness if – which is for the referring court to ascertain – it would result in procedural disadvantages for those individuals, in terms, inter alia, of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from that directive.
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> …
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> 54. If the referring court were to find such an infringement of the principle of effectiveness, it would be for that court to interpret the domestic jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law (see, to that effect, *Unibet,* paragraph 44).
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> 55. Having regard to the foregoing considerations, the answer to the first question must be that Community law, in particular the principle of effectiveness, requires that a specialised court which is called upon, under the, albeit optional, jurisdiction conferred on it by the legislation transposing Directive 1999/70, to hear and determine a claim based on an infringement of that legislation, must also have jurisdiction to hear and determine an applicant's claims arising directly from the directive itself in respect of the period between the deadline for transposing the directive and the date on which the transposing legislation entered into force if it is established that the obligation on that applicant to bring, at the same time, a separate claim based directly on the directive before an ordinary court would involve procedural disadvantages liable to render excessively difficult the exercise of the rights conferred on him by Community law. It is for the national court to undertake the necessary checks in that regard."

8. There is no principle of European law which allows an administrative body or a court of limited jurisdiction to exceed its own authority in order to achieve a result, whereby it is of the view that European legislation has not been properly implemented at national level and that this situation is to be remedied by the re-ordering in ideal form of national legislation. The limit of jurisdiction is of primary importance to the exercise of authority, whether the court be one established as an administrative body, or is one of the courts under the Constitution. In the event that a view emerges that national legislation has not properly implemented European legislation, this is no more than an opinion. The respondent does not have the authority to make a binding legal declaration of inconsistency or insufficiency on a comparison of European and national legislation. The High Court has that power as this has been expressly reserved to it by Article 34 of the Constitution. The respondent is bound by S.I. No. 749 of 2004 fixing the upper age for admission to training as a member of An Garda Síochána at 35 years.

9. Furthermore, as a matter of fact, the Equality Act 2004 came into force on 18th July, 2004. Thereafter, S.I. No. 749 of 2004, fixing the age limit for trainee Gardaí, was passed on 23rd November, 2004. The explanation provided by the first named applicant in fixing that age is, on the basis of the papers before me, one of justifying it within the terms of the Equality Act 2004. Although that statutory instrument was passed pursuant to s. 14 of the Police Forces Amalgamation Act 1925, it is claimed in evidence, by way of correspondence, that the first named applicant expressly had regard to his obligations under the Act of 2004.

10. Since the Equality Act 2004 implements the relevant Directive; since it came into force on 18th July, 2004; since the Garda Síochána (Admissions and Appointments) (Amendment) Regulations 2004 (S.I. No. 79 of 2004) came into force on 23rd November, 2004; and since the first named applicant claimed that this upper age limit was set in accordance with those, then existing, statutory powers and had regard to his obligations under the Act of 2004, the respondent was obliged to accept that as a matter of law.

Conclusion
11. There is no doubt that the respondent acted from a proper zeal against age discrimination. Underlying its decision to proceed to investigate this matter, despite a clear provision in statutory instrument form that pre-determined the result, was a laudable determination that it should exercise its powers. However, the respondent could not make a ruling in breach of a statutory instrument. Elsewhere in the legislation, it is specifically mandated to do so, but not in this instance.

12. The correct response of the respondent to the complaint by the notice parties should therefore have been to point out to them that by legislation it could not seek to remedy the complaint which they had made. The complainants would then have been put on notice that their only remedy was to seek a declaration from the High Court that national law had purported to overrule a European law obligation. I express no view as to this matter since this judgment is solely concerned with the legal limit of the authority of the respondent.