Neutral Citation [2013] IEHC 98

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 406 JR]

BETWEEN

CHERYL MELLETT

APPLICANT

AND

THE MINISTER FOR DEFENCE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Kearns P. delivered on the1st day of March, 2013

These proceedings arise from the order of discharge of the applicant from the Defence Forces on the 22nd March, 2012, and were commenced by leave of the High Court (Peart J.) granted on 10th May, 2012. The applicant herein is seeking an order of *certiorari* quashing the aforementioned order of discharge of the applicant from the Defence Forces on the following grounds:-

1) The applicant was not provided with the statutory reason for her discharge;

2) The applicant was not furnished with her Extension of Service file (hereinafter referred to as the "EOS file") which contained the grounds and associated documentation supporting the initial recommendation to discharge her from the Defence Forces made on the 19th January 2012. She did not have access to this information when making submissions in respect of the recommendation to discharge her from the Defence Forces;

3) The ultimate adjudicator on the recommendation to discharge the applicant from the Defence Forces did not have before him all relevant matters when making his decision to direct the discharge of the applicant. In particular he was unaware of a recommendation from an officer designated to review the initial recommendation, to the effect that the applicant be afforded a further period of time within which to achieve the requisite body mass index ("BMI"), in order to undergo her fitness test;

4) In the event that the ultimate adjudicator was aware of all relevant matters he failed to provide reasons as to why he did not follow the recommendation of the immediately inferior officer who recommended that the applicant be afforded further time to achieve the requisite fitness.

BACKGROUND FACTS

The applicant is currently serving as a private signal woman without engagement with the Defence Forces. She was admitted to the Defence Forces as a Naval Recruit in November, 2004 pursuant to article 8(1)(d)(ii) of A10 of the Defence Forces Regulations for a period of five years.

Members of the Defence Forces are required to achieve and maintain a certain minimum level of fitness. The applicant passed her fitness test in 2005, but having suffered what she described as a traumatic personal experience in the Defence Forces in 2006, she subsequently failed her fitness test. The applicant did not pass her fitness test in the years between 2006 and 2009 and gained a considerable amount of weight. Despite not passing her fitness test, the applicant was considered a valued member of the defence forces during this period, as reflected in her annual assessments.

The applicant's five year term of engagement expired in November, 2009. In early 2010, the applicant commenced a training programme outside the Defence Forces and in July 2010, she achieved the requisite body mass index (hereinafter referred to as "BMI")to undergo her fitness test. However, as a result of undergoing an operation to remove her gallbladder in September, 2010, she was not permitted to take this fitness test. Her recovery after the operation was slow and in January, 2011 the applicant suffered soft tissue injuries in an accident. In February, 2011 she was informed orally that she had four months within which to achieve the requisite BMI to undergo her fitness test.

As the applicant's term of engagement had expired in November 2009, an extension of service was necessary for her to remain within the Defence Forces. In terms of whether to recommend a particular applicant for an extension of service, s.64 of the Defence Acts 1954-2007 provides that for service to be extended, a recommendation from the particular applicant's commanding officer is required. Article 9 2(a) of the Defence Forces Regulations A10 sets out the criteria for an extension of service and maintains that a private will not have their term of engagement extended unless:

(i) they fulfil certain criteria, including the requisite fitness and medical standards;

(ii) they are recommended for an extension of service by their commanding officer; and

(iii) they are specially selected by a Selection Board established for that purpose.

Article 234 of Administrative Instruction A10 complements the provisions of Article 9(2)(a) outlined above, and clarifies that the medical grade of a person seeking an extension of service must be 77-23-524. The first two figures signifies year of birth, the third figure refers to her medical condition, the fourth to her physical condition and the final three figures denote vision, colour vision and

hearing. Article 234 further states that a person cannot be recommended for an extension of service where their medical category is below 77-23-524. As the applicant's medical grade was 77-34-111, she was deemed to have failed her fitness test.

On 19th July, 2011, the applicant was paraded by her commanding officer, in this case being Commandant Kenny (hereinafter referred to as "Comdt Kenny"), and informed of his decision not to recommend her extension of service as she had not passed her fitness test. Her medical and physical condition were below the requisite standard to permit her to have her term extended. As such, the applicant's file together with her medical classification of 77-34-111 were forwarded to the Selection Board by Comdt. Kenny.

Where a person is not recommended for an extension of service he or she can continue to serve without engagement, a status specifically provided for in s.78 (1) of the Defence Acts 1954-2007. The applicant herein lodged a submission to the Selection Board which outlined her circumstances, the difficulties she had encountered and enclosed a number of references relating to her period in the Defence Forces, all of which were extremely supportive of her position.

On 22nd December, 2011, the Selection Board refused to recommend the applicant's extension of service. On the 19th January, 2012, the applicant was informed by Comdt. Kenny that he was applying to discharge her from the Defence Forces and that she had a right to appeal that discharge within seven days. He did not furnish her with her EOS file.

On 26th January, 2012, the applicant lodged an appeal. On 5th April, 2012, she was paraded and informed that her appeal had been refused and that she was scheduled to be discharged on 11th May, 2012, as per the order of Major-General Boyle, the Adjutant General, Deputy Chief of Staff (Support), who in the applicant's case is the officer with statutory authority to order discharge, made on 22nd March, 2012. The applicant was also advised on 5th April, 2012 that if she had any further difficulty with this process, she could appeal the matter through the 'Redress of Wrongs' process. Also on this date, the applicant had achieved the requisite BMI to undertake the fitness test but her application to undergo this test was refused because the applicant was reported as suffering from a medical condition which required intervention.

On 12th April, 2012, the applicant lodged her redress of wrongs application which was refused on 2nd May, 2012. The applicant was thus furnished with a copy of the decision and all relevant documentation. The applicant noticed that the file prepared by the respondents revealed that Brigadier General Aherne, the applicant's General Officer Commanding, had, by letter dated 16th February, 2012, recommended that she be afforded a further period of time to achieve the requisite fitness.

On the 30th May, 2012, the applicant was advised by the respondents in writing that her appeal from the decision in respect of the redress of wrongs was being postponed pending the determination of these proceedings.

SUBMISSIONS OF THE APPLICANT
Counsel for the applicant submitted that the applicant was not formally informed of the statutory reason for her discharge on 19th January, 2012 by Comdt. Kenny, in that Part II of the Application for Discharge Form AF 97B was not read out to her in full advising her that her service was being determined by the Minister for Defence, in accordance with Defence Force Regulations Article 10 paragraph 58 (s), and that she had not been recommended for an extension of service. Counsel for the applicant contended that even if the applicant accepted the above did occur, she was not furnished with her EOS file or with the essential facts and findings supporting the reasons for her discharge, by Comdt. Kenny, thus amounting to a clear breach of the applicant's right to fair procedures.

It was further contended that there was no evidence before the court that the party responsible for the order to discharge the applicant from the Defence Forces, in the applicant's case Major-General Boyle, had cognisance of all relevant matters pertaining to the applicant when making his decision, in particular the views of Brigadier General Aherne, the applicant's General Officer Commanding and Major-General Boyle's immediately inferior officer, recommending that the applicant be given a further three months within which to achieve the requisite BMI in order to undertake her fitness test.

It was finally submitted by counsel for the applicant that in the event that Major General Boyle was aware of all such matters, he neglected to give reasons for not following Brigadier General Aherne's aforesaid recommendation, thus constituting a further breach of fair procedures.

SUBMISSIONS OF THE RESPONDENTS
Counsel for the respondents submitted that the applicant was not entitled to the relief sought, and her contention that the applicant was not informed of the statutory reason for her discharge by Comdt Kenny on 19th January, 2012, was refuted by the evidence of two officers who deposed to the contrary and no application to cross-examine either officer had been brought.

Counsel for the respondents did concede that the applicant was not furnished with her EOS file which contained the grounds supporting the decision to discharge her, but it was not required to do so by any provision of the Defence Acts 1954-2007 or associated regulations and the obligation to request this information rested with the applicant.

The respondents then argued that while the discharge form AF 97B, which was forwarded to the ultimate adjudicator, was in fact defective in that it did not record the recommendation from the officer designated to review the initial recommendation that the applicant be afforded further time to pass her fitness test, the officer in question had written separately to the ultimate adjudicator recording his position. Brigadier General Aherne did not initially complete Form AF 97B, but instead directed his Adjutant, Lt. Col. Buckley, to write and recommend a further three-month period during which the applicant might prepare for and pass, her fitness test. By reason of the aforementioned recommendation, it was contended, Part 4 of the form was left blank. Lt. Col. Buckley's letter together with Form AF 97B was then forwarded to Major-General Boyle for his consideration.

Major-General Boyle decided to discharge the applicant and completed Part 5 of Form AF 97B. In early April 2012, Form AF 97B was returned to Brigadier-General Aherne and he duly completed Part 4 thereof (dated 5th April, 2012) in order to effectively follow through administratively on Major General Boyle's decision to discharge the applicant. But, in error, it was recorded by Brigadier-General Aherne on Part 4 of Form AF 97B that he had actually recommended the applicant's discharge. This sufficiently explained, it was further contended by counsel for the respondents, why Part 4 of Form AF 97B is dated 5th April, 2012, and Part 5, containing the decision of Major General Boyle is dated 22nd March, 2012. Furthermore, it was submitted, as the said error was made *post factum*, it was therefore minor in nature and had no material effect on the ultimate decision to discharge the applicant.

It was submitted that this decision made by Major-General Boyle to discharge the applicant, notwithstanding the aforementioned recommendation by Brigadier-General Aherne, was the prerogative of Major-General Boyle in his capacity as the prescribed authority in respect of the decision to discharge, or not to discharge, the applicant.

Counsel for the respondents further submitted that in light of the foregoing, no breach of fair procedures had in fact occurred and the applicant was therefore not entitled to the relief sought or any relief.

DECISION
It is a well established principle in this jurisdiction that a person in statutory employment is entitled to the benefit of the principles of natural justice when engaged in a process which could have as its consequence his or her removal from such employment. *McGrath v. Minister for Defence* [2009] IESC 62 is authority for the proposition that a member of the Defence Forces is a statutory officer in the employment of the State. Thus, the applicant in the present proceedings is entitled to redress from the courts where a breach of natural justice has occurred.

Not only should the statutory reason for discharge be furnished to a member of the Defence Forces engaged in the process of being discharged, but he or she must also be provided with the grounds for discharge; in other words, the facts and findings which support that decision to discharge. As Henchy J. stated in *State (Gleeson) v. Minister for Defence* [1976] I.R. 280 in a case whereby a member of the Defence Forces was discharged for discreditable reasons without first being afforded a hearing to address the complaint upon which discharge was founded, at p. 295:-

> "In my judgment, the plea that the discharge was invalid because there was a breach of natural justice, in that the prosecutor should have been given an opportunity of being heard before being discharged is well founded. It is true that a few weeks before his actual discharge he was given notice that he was to be discharged; so he had both time and opportunity to make representations in regard to the proposed discharge. But, be it noted, he was never informed of the reason for his discharge until after he had actually been discharged; and he was given no information as to the facts or findings relied on to support that reason until the affidavits made on behalf of the respondent Minister were filed in the present proceedings. It is plain that before the prosecutor's discharge he was given no opportunity of meeting the case for discharging him for the prescribed reason relied on."

In the present case, the applicant was informed on 19th January, 2012, by Comdt. Kenny, her commanding officer, that he was recommending that she be discharged from the Defence Forces. Although there is a dispute as to whether what was communicated to the applicant amounted to a statutory reason for discharge, I am satisfied that such was given and the reason for same, as was averred to by Comdt. Kenny and Company Sergeant Tony Macklin, whose evidence was not challenged in cross-examination. Comdt. Kenny conceded that he never actually presented the applicant with her EOS file but I am satisfied there was no statutory obligation to do so and the applicant was not disadvantaged by this omission given that in this particular case she was well aware of the sole reason for the consideration of her discharge.

The applicant herself accepts that being a member of the Defence Forces necessitates that a required level of physical fitness be attained and that ensuring this minimum standard of physical fitness is achieved is especially important when a member is to be considered for an Extension of Service.

It is apparent from the facts of the present case that the applicant has not passed a physical fitness test since 2005. While it is accepted that she may be a valued member of the Defence Forces in some respects, the decision, not only to recommend her discharge, but, ultimately, the decision for her discharge, at all times rested on whether she had passed this fitness test or not. Article 9 2(a) of the Defence Forces Regulations A10 provide*, inter alia*, that a private will not have their term of engagement extended unless they meet the requisite fitness and medical standards. Therefore, very little discretion is afforded to the decision maker regarding this issue. It is also clear from the ample evidence before the Court that she was afforded every reasonable opportunity to reach the level of fitness required in order to be recommended for an extension of service.

While it is accepted that the applicant did not receive this EOS file, she can have been in no doubt as to the details of her fitness history contained therein. It is also clear from the facts of the present case that the applicant can have been in no doubt as to the consequences of her failure to meet this compulsory standard of fitness. It follows, therefore, that she can neither have been in any doubt as to the essential findings and facts supporting the reasons grounding the recommendation for her subsequent discharge. Furthermore, it was stated on the applicant's internal Annual Confidential Report, AF 667 for the reporting year 2010, not only that she must address her fitness level in 2011 and her physical fitness was graded 'inadequate', but also that "she does understand that her contract expired without her successfully passing her fitness test in 2010". As she had not only received a copy of this form, but also had herself signed it on 31st January 2011, thereby acknowledging its contents, she certainly was privy to the information upon which these essential findings and facts were grounded.

It appears from both the written submissions and the affidavits filed in the present case, that there is a marked divergence between the evidence of the applicant and that of the respondents regarding the practicalities of achieving the requisite fitness level during the four month period set for her to achieve the requisite BMI to undergo her fitness test. Although the applicant contested this evidence in her affidavits, it was at all times open to her to cross-examine the makers of the affidavits stating to the opposite effect that she had ample time and opportunity to get fit but this option was one she ultimately chose not to pursue.

As regards the third ground, I am satisfied with the explanation given by the respondents that the ultimate adjudicator, in this case being the Adjutant General, Deputy Chief of Staff (Support), Major-General Boyle, was, in fact, aware of all relevant matters when making his decision to direct the discharge of the applicant. Although it was admitted that an error was made in the process of completion of Part Four of the Applicant's AF 97B form, Major-General Boyle did, I am satisfied, by letter dated 16th February, 2012, actually have sight of the recommendation by Brigadier General Aherne, the applicant's General Officer Commanding and Major-General Boyle's immediately inferior officer, that the applicant be afforded a further period of time to achieve the requisite physical fitness. I am therefore satisfied that this error which occurred was, indeed, technical in nature and did not prejudice the applicant in any way.

On 4th May, 2012, following the refusal of the applicant's Redress of Wrongs application pursuant to s. 114 of the Defence Acts 1954-2007, the applicant received the Military Investigating Officer's report of 30th April, 2012. This disclosed the nature and extent of the representations, submissions and matters which were considered by Major-General Boyle in arriving at his decision to authorise the applicant's discharge. So, although Major-General Boyle did not give reasons to explain why he did not ultimately follow Brigadier General Aherne's said recommendation, I am satisfied that it was unnecessary for him to give a detailed exposition on why the recommendation was not followed in circumstances where he had all the relevant material and thus could make a properly informed decision.

Furthermore, such recommendation by a General Officer Commanding is not determinative of the process of application for discharge. The officer with statutory authority to order discharge in this instance is the Adjutant General, Deputy Chief of Staff (Support), being in this instance, the said Major-General Boyle. Therefore, it his prerogative to discharge the applicant in spite of a recommendation from an inferior officer that the applicant be afforded some additional time to achieve the required level of fitness.

In light of the foregoing and the fact that an unknown medical condition is a further complication to the applicant's case, I am refusing to grant the relief sought herein.