

**AN ARD-CHÚIRT****2006 6311 P****IDIR****ÍDE de BÚRCA****GEARÁNAÍ****AGUS****AN tAIRE IOMPAIR, AN tAIRE AIRGEADAIS, ÉIRE AGUS****AN tARD-AIGHNE****COSANTÓIRÍ****Judgment of Miss Justice Laffoy delivered on the 29th day of October, 2010.****1. Factual background**

1.1 The plaintiff is an established civil servant. She joined the Civil Service in 1985. Having been promoted on a number of occasions and having moved department on a number of occasions, by June 2006 she held the position of a Higher Executive Officer in the Department of Transport (the Department). In June 2002 she received recognition from *Gaeleagras na Seirbhíse Poiblí*, which was under the aegis of the Department of Finance, that she had achieved the appropriate standard in written and oral examinations for proficiency in Irish conducted in May 2002.

1.2 On 6th June 2006 Staff Notice 11/2006, which had been preceded by Staff Notice 8/2006 to which I will refer later, was issued by the Personnel Officer of the Department to all "Assistant Principal Officers, Higher Executive Officers and Administrative Officers" in the Department informing them that it was proposed –

"... to assign an Assistant Principal Officer, or a Higher Executive Officer/Administrative Officer on a Higher Duty Allowance to AP for the duration of the assignment, to the Permanent Representative in Brussels to work with the Department's Counsellor ... on EU transport matters."

It was stated that the term would cease in autumn 2010. In other words, it was to be a four year assignment. It was also stated that the post would be filled by means of "semi-structured competitive interview". The duties attached to the position were set out in Appendix 1, which described the post as "AP/Attaché Post (Brussels)". The allowances which were attached to the post (e.g., a local post allowance) were outlined in Appendix 2. The notice stated that it was desirable, but not essential, that the Officer selected should have a good working knowledge of French. In Appendix 1, which contained the job description, it was indicated that the candidates should have the competencies listed: self confidence; communications (both oral and written); decision making and judgment; networking and influence (including the ability to relate to the political process); and information seeking and management.

1.3 Crucially for present purposes, in contradistinction two Staff Notices issued the previous year – Staff Notice 8/2005 issued by the Department on the 28th April, 2005 and Staff Notice 14/2005 issued by the Department eight months earlier on 6th October, 2005, Staff Notice 11/2006 did not contain a provision that marks for proficiency in Irish would be taken into consideration in the competition thereunder.

1.4 The plaintiff applied for the post the subject of Staff Notice 11/2006. There were five other candidates for the assignment. Interviews were held in July 2006. On the interviews, marks were allotted out of a maximum of 600 in aggregate. First, marks were allotted out of a maximum of 80 in respect of each of the five competencies referred to in Appendix 1. Secondly, marks were also allotted out of a maximum of 100 in respect of a written submission. Finally, marks were allotted under the heading of "service of value" out of a maximum of 100. While, as I understand it, there is no controversy in relation to the allotment of the "service of value" marks, those marks are allotted in accordance with a formula based on length of service and performance assessment during service. What is significant for present purposes is that no marks were allotted in respect of proficiency in Irish.

1.5 On the basis of the marks allotted, there were two candidates with higher marks than the plaintiff. The candidate with the highest marks (423) was offered the assignment but did not take it. The candidate with the second highest marks (422) was then offered the assignment and took it. The plaintiff was the candidate with the third highest marks (420). Her case is that she should have been awarded a 6% increment on the marks allotted to her in accordance with the rules in force in the Civil Service in relation to awarding bonus marks for proficiency in Irish on promotion. If that had happened, she would have had the highest mark, because it is clear on the evidence that the candidates who achieved 423 marks and 422 marks respectively would not have earned the 6% increment for proficiency in Irish if it had been applied in relation to the competition.

1.6 By e-mail dated 24th July, 2006 to the Personnel Officer of the Department, the plaintiff contended that she was entitled to marks for proficiency in Irish and required that the markings and the placement be adjusted accordingly. In late July 2006, the staff association of which she is a member, Public Service Executive Union (PSEU) took up the cudgels on her behalf. In a letter dated 28th July, 2006 to the Personnel Officer of the Department, the Assistant General Secretary of PSEU made the point on behalf of the plaintiff that marks for proficiency in Irish were applicable to all competitions in the Department and, while acknowledging that discussions relating to such marks had taken place with PSEU and other unions, a change in the departmental policy had not been formally agreed. The point was also made that any such change would have to be communicated to the staff and could not be made retrospective. In the circumstances, the Personnel Officer was requested not to make an appointment to the post until the plaintiff's issue had been resolved.

1.7 In support of the statement that bonus marks for proficiency in Irish were applicable to all competitions in the Department, reference was made in the PSEU letter to what was posted on the Department's "StaffNet". The StaffNet in question, as I understand it, is the Department's intranet. A print-out of the "Human Resources' page", dated 20th July, 2006, referring to promotion policy has been put in evidence. For the sake of clarity, I will refer to it as the StaffNet statement. The process, as of 10th March 2006, as

stated there under the heading "Competitive Merit Based Promotion System", set out the Department's policy objectives. It identified five competencies for promotion to each of the following levels: Higher Executive Officer, Assistant Principal and Principal Officer. It reserved to the Department the option of including two specialised competencies in any competitive process. It also outlined the approach to be adopted in making assessments for promotion purposes. It provided that for "competitive interviews" the overall score available would be 600 marks, of which 400 would be available in respect of the demonstration of the possession of the required competencies and 100 marks would be available in respect of the written submission. The remaining 100 marks would be awarded in respect of "SOV", i.e. service of value. There followed an explanation in italics of how the marks in respect of "SOV" would be allocated. Then there followed, also in italics, the following statement:

**"Marks for Proficiency in Irish**

*Marks for Proficiency in Irish will be awarded for all elements of the competition."*

1.8 The response of the Personnel Officer to the PSEU on 3rd August, 2006 was that the competition in which the plaintiff had participated was "for a temporary assignment for a HEO or AO with a higher duty allowance for a period of 4 years to serve in Brussels" and it was not a promotion. Further, it was stated that, even if the competition had been in respect of a promotion, it was at the Department's "entire discretion" whether or not to apply bonus marks for proficiency in Irish. The letter stated that the Department had elicited the views of all staff associations following receipt of a letter from the Department of Finance in November 2005 whether marks for proficiency in Irish should continue to apply to internal promotion competitions and all staff associations, including PSEU, had intimated that the bonus marks should no longer apply. A similar line was adopted in a letter of 25th August, 2006 from the Personnel Officer to the plaintiff.

1.9 The response of the PSEU in a letter of 8th September, 2006 was to "take exception" to the intimation that the Department could decide whether or not to apply bonus marks without informing the candidates of the change in the departmental policy, particularly in the light of the departmental policy as set out in the Department's intranet, which had not been changed prior to the competition. Further, the PSEU did not accept that it was not a promotion competition. As I understand it, that was the end of the involvement of the PSEU, although the Assistant General Secretary did testify at the hearing of the action.

1.10 By letter dated 25th September, 2006, the solicitors acting for the plaintiff in these proceedings wrote to the Department. In that letter it was contended that the Department had acted *ultra vires*, exceeded its functions, breached the legitimate expectations of the plaintiff and her contractual rights in the failure to uplift her marks in the competition by 6% for proficiency in Irish. Proceedings were threatened, if the position was not redressed.

1.11 These proceedings were initiated by a plenary summons which issued on 18th December, 2006.

**2. Applicable conditions in relation to allocation of marks for proficiency in Irish on competitions for promotion in the Civil Service.**

2.1 Regulation and control of the Civil Service is still governed by s. 17 of the Civil Service Regulation Act 1956, which provides, in subs. (1), that the Minister for Finance shall be responsible for, *inter alia*, -

"(c) the fixing of—

(i) the terms and conditions of service of civil servants, and

(ii) the conditions governing the promotion of civil servants."

Sub-section (2) of s. 17 provides that the Minister may, for the purposes of subs. (1), make such arrangements as he thinks fit and may cancel or vary those arrangements. In practice, the cancellation or variation of such arrangements is notified by circular letter. During part of the period under consideration in this case, the statutory functions regulated by s. 17 were performed by the Minister for the Public Service.

2.2 Circular 9/74 dated 12th November, 1974 from the Department of the Public Service (the 1974 Circular) gave notice of fundamental changes in relation to "Irish requirements in the Civil Service" in relation to recruitment, establishment and promotion. In relation to promotion, it was stated in paragraph 1(d) that, except where Irish is essential for the performance of the duties, a knowledge of Irish would not be obligatory for eligibility for promotion where the requirement previously applied. Paragraph 1 (d) continued:

"A knowledge of Irish will, however, be one of the factors which will be assessed in selecting staff for promotion. The formal promotion tests hitherto conducted by the Civil Service Commission will continue to be available to give staff an opportunity of having their knowledge of Irish assessed. The courses provided by Gaeleagras na Seirbhíse Poiblí which enable staff to acquire a knowledge of Irish or to improve their existing knowledge will be expanded. Successful completion of these courses will continue to be accepted as the equivalent of passing the Civil Service Commission promotion tests."

It was provided in paragraph 4 that the arrangements at (d) in paragraph 1 would come into operation as soon as detailed procedures for their application had been determined.

2.3 The detailed procedures were promulgated just over a year later in Circular 43/75 issued on 20th November, 1975, by the Department of the Public Service (the 1975 Circular), which, subject to some amendment, still governs "Irish requirements" in the Civil Service. Having recited paragraph 1(d) of the 1974 Circular, the provisions governing the implementation of the new arrangements were then set out. It was envisaged that, as regards promotions, the arrangements in the 1975 Circular would be transitional and that new arrangements "in fully developed form" would come into operation not earlier than 1st April, 1976. That never happened. Circular 17/76 issued on 30th April, 1976 by the Department of the Public Service (the 1976 Circular) continued the provisions of paragraph 5 of the 1975 Circular in force "in relation to confined interview competitions and departmental promotions for grades which were subject to the Irish requirements which previously applied" pending the issue of a comprehensive circular. The comprehensive circular never came.

2.4 There was considerable controversy at the hearing of this action as to the true meaning and application of paragraph 5 of the 1975 Circular. More surprisingly, over the following 30 years there was uncertainty in the Civil Service generally, and even in the Department of Finance, as to the scope of its application. Paragraph 5 dealt with "confined interview competitions and departmental promotions for grades which have been subject to Irish requirements", whereas paragraph 6 dealt with "confined written

competitions", and paragraph 7 dealt with "promotion to posts not previously subject to Irish requirements". My understanding from the totality of the documents put before the Court is that paragraph 5 related to general service grades in relation to which, before the 1974 Circular was promulgated, knowledge of Irish had been obligatory for eligibility for promotion and paragraph 7 related to professional and technical grades in relation to which knowledge of Irish had not been obligatory for eligibility for promotion.

2.5 The manner in which credit for proficiency in Irish was to be given was set out in sub-paras. (1) and (2) of paragraph 5. Satisfactory attendance at an appropriate Gaeleagras course was included. Sub-paragraph (3) provided:

"Officers whose proficiency in both Irish and English has not been established will not, of course, be excluded from consideration for promotion. Where selection for promotion is made on a formal basis the credit for proficiency in both Irish and English will be 10% of the total marks available otherwise. A weighting on similar lines will be applied where selection is made on a less formal basis. Proficiency in Irish will continue to be a requirement for assignment and promotion to positions in certain departments e.g. assignments under the Higher Executive Officer Promotion Scheme to Roinn na Gaeltachta."

In other words, in the case of competitions in which the candidates were marked, a 10% bonus was to be allocated in recognition of proficiency in Irish established in the requisite manner.

2.6 The 1975 Circular was subject to clarification or variation twice subsequently. Circular 17/81 would appear to have no relevance to the issues in this case. However, Circular 30/90 (the 1990 Circular) is of relevance.

2.7 The 1990 Circular was issued by the Minister for Finance on 20th November, 1990 arising out of acceptance of an agreed recommendation of the General Council under the Scheme of Conciliation and Arbitration, and provided for a revised credit system. Its effect was summarised as:

(a) assimilating the system for awarding credit under para. 5 (interview competitions) and para. 6 (written competitions) of the 1975 Circular;

(b) reducing the level of the bonus; and

(c) requiring that continued entitlement to the proficiency bonus would entail periodic re-testing of a candidate's proficiency.

The 1990 Circular went on to provide that in future there would be in place, in substitution for paras. 5(3) and 6 of the 1975 Circular, provisions under which -

(i) no credit would be awarded unless proficiency had been established within ten years of the closing date for applications for the relevant competition,

(ii) a credit amounting to 6% of the marks available for the competition would be awarded where proficiency had been established within five years of that date, and

(iii) a credit amounting to 3% of the marks available would be awarded where proficiency had been established more than five years but less than ten years before that date.

2.8 I surmise that the source of the controversy in relation to the scope of the current application of para. 5 of the 1975 circular is the 1990 Circular, which expressly linked the acceptance of the agreed recommendation to "the credit to be awarded for proficiency ... in confined promotion competitions" (para. 1). It provided that the revised arrangements would apply prospectively to "all confined promotion competitions", whether by way of interview or written examination (paras. 4 and 5). It did not mention "departmental promotions", even though it would appear to have been intended to substitute the new provisions for paragraph 5(3) of the 1975 Circular as it then applied. If it was intended to remove departmental promotions from the ambit of para. 5 of the 1975 Circular, it would have been a simple matter to so provide in the 1990 Circular. In the absence of such a provision, in my view, it is not unreasonable to construe the combined effect of the 1975 Circular and the 1990 Circular as continuing the application of para. 5 (3), as revised, to departmental competitions.

2.9 Thirty years after the 1975 Circular came into existence, an issue arose as to the application of bonus marks for proficiency in Irish "in internal promotion competitions". By way of clarification, an e-mail was issued from the Department of Finance to Personnel Officers across the Civil Service on 4th November, 2005 (the November 2005 e-mail) in which it was stated:

"Following consideration of the relevant Circulars (43/75 and 30/90), it is the interpretation of this Department that these do not have directive effect in requiring bonus marks for Irish to be applied in internal promotion competitions - in contrast to clearly doing so in the case of inter-Departmental competitions."

Given that paragraph 5 of the 1975 Circular was expressed to be applicable not only to "confined interview competitions" (which, as I understand it, were inter-departmental competitions which were then conducted by the Civil Service Commission for promotion to posts across the Civil Service, but which were confined to existing civil servants), but also to "departmental promotions for grades which have been subject to Irish requirements" (which, as I understand it, were internal departmental competitions for promotion to posts within a particular department), it is difficult to reconcile that statement with the actual wording of the 1975 Circular.

2.10 At the risk of stating the obvious, as a matter of construction, it does not seem to have been the intention that the expression "departmental promotions for grades which have been subject to Irish requirements" in the 1975 Circular was to be interpreted as meaning promotions for grades which remained subject to "Irish requirements" (which I understand to mean promotions for which Irish was compulsory) following the implementation of the Government decision in the 1974 Circular, for example, promotion to Higher Executive Officer in what was Roinn na Gaeltachta in 1975. The basis for that conclusion is that paragraph 5(3) of the 1975 Circular makes a clear distinction between promotions for which proficiency in Irish was to remain a compulsory requirement, such as the example given, on the one hand, and departmental promotions which had been, but were no longer, "subject to Irish requirements", being one of the two categories to which paragraph 5(3) was expressed to apply, on the other hand. The silence in the 1990 Circular as to the future application of para. 5 of the 1975 Circular to "departmental promotions" or internal promotions has been commented on in the next preceding paragraph and I have concluded that para. 5(3) continued to apply to such promotions.

2.11 In any event, the interpretation of the Department of Finance as set out in the November 2005 e-mail was different. The e-mail

went on to state:

"A large degree of discretion is left with Departments in relation to the arrangements for internal promotion competitions and procedures are agreed with the individual staff sides at Departmental Council. Departments have adopted different criteria, in consultation with staff sides, and in the light of their particular circumstances. This has led to considerable custom and practice covering all aspects of internal promotion including, for instance, marking schemes and the application of marks for proficiency in Irish. This is borne out in a survey carried out some time ago by Personnel and Remuneration Division which found that about half of Departments gave such marks in their internal promotions."

2.12 The receipt of the November 2005 e-mail in the Department had an impact on the conduct of the competition in which the plaintiff participated in June/July 2006.

### **3. Policy in the Department**

3.1 The position in the Department up to late 2003 was that credit for proficiency in Irish was not given in internal promotion competitions by local agreement with staff associations. That policy was challenged in early 2003 by a staff member. The view of the Department of Finance at the time was that the 1975 Circular and the 1990 Circular required to be implemented in the cases then at issue. In consequence, two candidates were promoted. Subsequently bonus marks for proficiency in Irish were awarded in internal competitions in the Department. However, following receipt of the November 2005 e-mail, staff associations, including the PSEU, were asked for their views. In fact, the PSEU balloted its members at its annual general meeting early in 2006. By letter dated 11th May, 2006 from the PSEU, the Personnel Officer of the Department was informed that, following a consultation with its members in the Department, it was the view of the PSEU that the award of bonus marks for proficiency in Irish should no longer apply to internal promotion competitions in the Department. The prevailing practice in the Department thereafter was not to apply bonus marks. That was the practice that applied in relation to the competition under Staff Notice 11/2006.

3.2 As the correspondence from the PSEU to the Personnel Officer, which I have outlined in paragraph 1 above, indicates, the position of the PSEU was that the change in departmental policy had not been formally agreed, that the change had not been communicated to staff, and that it could not be made retrospective.

3.3 Throughout the Civil Service generally, the issue of allocation of bonus marks for proficiency in Irish in internal competitions remains unresolved. There has been correspondence to the Minister for Finance in 2006 from An Coimisinéir Teanga, who has expressed the opinion that the 1975 Circular did not make any distinction between internal departmental competitions and inter-departmental competitions. A survey conducted by the Department of Finance at the time demonstrated that approximately fifty per cent of Departments awarded credit for proficiency in Irish and approximately fifty per cent, including the Department, did not. It was agreed at General Council in October 2006 to establish a sub-group to examine the application of credit for proficiency in Irish at internal promotion competitions. It appears, however, that there has been no formal resolution of the issue.

### **4. The claim as pleaded**

4.1 The plaintiff's claim arising from the failure of the defendants to accede to the plaintiff's request to redress the alleged wrongdoing on their part in not awarding her bonus marks for proficiency in Irish in the competition on foot of Staff Notice 11/2006, which would have resulted in her being the candidate with the highest marks, is for the following reliefs:

(a) declarations that –

(i) the defendants did not give proper effect to the Irish Circulars in that competition, and

(ii) the competition was not implemented in accordance with law and with the plaintiff's constitutional rights; and

(b) damages, including aggravated and exemplary damages.

4.2 The basis on which the plaintiff pleads that she is entitled to those reliefs is that it was a term and/or condition, express or implied, of her employment that the 1975 Circular, the 1976 Circular, the 1981 Circular and the 1990 Circular (which, for the sake of brevity, I will refer to collectively as the Irish Circulars) would be applied by the Department. It is further pleaded that she had a legitimate expectation that it would do so. It is specifically pleaded that the plaintiff read the representation in the StaffNet statement in relation to awarding marks for proficiency in Irish before she applied to be considered for the assignment to Brussels and that she relied on it and on the Irish Circulars and on staff notices in connection with the competition in July 2006. It is also pleaded that the plaintiff was applying for promotion.

### **5. The defence**

5.1 The defence to the plaintiff's claim is posited on two broad propositions:

(a) that the competition the subject of Staff Notice 11/2006 was not a competition for promotion; and

(b) that the Irish Circulars do not apply to internal departmental competitions.

The defendant's position is that the Department had a discretion in June /July 2006 as to whether to provide for the allocation of bonus marks for proficiency in Irish in accordance with the Irish Circulars to candidates participating in the competition under Staff Notice 11/2006, and that it adopted the position advocated by the plaintiff's staff association, the PSEU, in not so providing. It conducted the competition properly and lawfully and is not guilty of any wrongdoing.

5.2 I will deal with each of those defences in turn. I will then consider the case based on the doctrine of legitimate expectation.

### **6. Promotion**

6.1 In common parlance, promotion, in the context of employment or office-holding, means advancement to a higher grade. The nub of the argument advanced by counsel for the plaintiff is that in the Civil Service one can have permanent promotion or temporary promotion. The filling of the post in Brussels by a candidate in the grade in which the plaintiff functioned at the time of the competition, the Higher Executive Officer grade, would have involved a temporary promotion, it was submitted. While the arguments advanced on behalf of the plaintiff were superficially attractive, in my view, they were flawed.

6.2 Before dealing with those arguments, however, it is appropriate to comment on the terminology used in Staff Notice 11/2006. The heading referred to "Assistant Principal Assignment" to Brussels and the operative part stated that it was proposed "to assign", as quoted in paragraph 1.2 above. The terminology used was clearly appropriate, as the post was open to Assistant Principal Officers. If

the successful candidate was chosen from that grade, filling the position would unquestionably have been an assignment.

6.3 The first argument advanced on behalf of the plaintiff was based on the wording of s. 28 of the Civil Service Commissioners Act 1956. That Act has been repealed by the Public Service Management (Recruitment and Appointment) Act 2004. In any event, the element of s. 28 upon which the plaintiff relied as being of assistance in construing the word "promotion" in the Irish Circulars was contained in subs. (1), which provided as follows:

"Where –

(a) a person serving in an established position is promoted in an acting capacity to another position, and

(b) ...

(c) ...

section 12 of the Superannuation Act, 1834, shall apply to him as if he had been appointed substantively to that other position from the date of his promotion in an acting capacity."

The argument advanced on behalf of the plaintiff by reference to the words to which emphasis has been added in the above quotation is misconceived. As another publication relied on by counsel for the plaintiff (Chapter 4 entitled "Employment in the Civil Service" being an extract from "Government of Ireland – Department of Finance") downloaded from Department of Finance website indicates at A.11, all promotions in the Civil Service in relation to grades up to and including Principal Officer level are initially made in an acting capacity and, after an agreed period, normally one year, an officer who has proven to be satisfactory may be made substantive in the grade to which he or she was promoted. That obviously is what s. 28 was addressing as regards pension entitlement. As was pointed out by counsel for the defendants, the next sentence at A.11 in that publication clearly draws a distinction between promotion, on the one hand, and the allocation of a higher duties allowance, on the other hand, in that it states that an "officer may also be given a higher duties allowance to carry out temporarily the duties of a higher grade". Section 28 does not support the plaintiff's contention that selection and assignment on foot of Staff Notice 11/2006 involved a promotion.

6.4 Nor does the reliance of counsel for the plaintiff on the plaintiff's own experience as an Officer in the Department of Arts, Heritage, Gaeltacht and the Islands. Having been offered and accepted appointment in an acting capacity as Higher Executive Officer with effect from 13th February, 2001, on 13th February, 2002 she received a notification confirming that her "appointment as Higher Executive Officer made in an acting capacity on 13th February, 2001 was made substantive" after a year. That, as I understand it, was a reference to the fact that, as explained at A.11 in the publication on the Department of Finance website, the plaintiff was promoted in an acting capacity, that is to say, on the basis that she would be probationary in the higher post for a period of one year.

6.5 As I have indicated at paragraph 1.3 above, the Department adopted an apparently inconsistent approach in Staff Notices 8/2005 and 14/2005 and in Staff Notice 11/2006, in relation to the allocation of marks for proficiency in Irish. It is necessary at this juncture to consider the earlier staff notices in some detail.

6.6 That closest in time to Staff Notice 11/2006, Staff Notice 14/2005, was addressed to all "Executive Officers" and it related to the filling of two posts, one being a promotion to a Higher Executive Officer post and the other being a temporary assignment to a "EO HDA post", by way of "competitive competency based interview". It was expressly provided that marks for proficiency in Irish would be taken into consideration and candidates were asked to indicate whether or not they would be claiming such marks. On the evidence it is clear that "EO HDA post" was an Executive Officer post to which there was to be attached a higher duties allowance for the duration of the assignment which would be for a two year period. Therefore, Staff Notice 14/2005 and Staff Notice 11/2006 demonstrate a difference of approach in the Department in relation to awarding bonus marks for proficiency in Irish in an internal competition which could result in the successful candidate being assigned to higher duties for a limited period. However, that, of itself, does not support the proposition that the assignment of a successful candidate in the grade of Higher Executive Officer or Administrative Officer on a higher duty allowance to the post in Brussels on foot of Staff Notice 11/2006 would have constituted a promotion, as counsel for the plaintiff contended. Staff Notice 14/2005 related to a genuine promotion on a permanent basis to Higher Executive Officer, as well as to a temporary assignment.

6.7 Staff Notice 8/2005 was addressed to all "Principal Officers and Assistant Principal Officers" and related to the assignment of "a Principal Officer or an Assistant Principal HDA" to the Permanent Representation in Brussels for a term from Autumn 2005 to Autumn 2009. It was stated that the post would be filled "by means of competitive interview under the new promotion policy of the Department". It specifically stated that the successful Assistant Principal Officer would receive "a HDA to Principal Officer" for the duration of the assignment but would return to the grade of Assistant Principal Officer on return from Brussels. As in the case of Staff Notice 14/2005, it was expressly provided that marks for proficiency in Irish would be taken into consideration and that candidates were asked to indicate whether they were claiming such marks. Even though the Department decided to adopt "a competitive interview under a new promotion policy" and to award marks for proficiency in Irish, in my view, that does not mean that, had an Assistant Principal Officer been successful and assigned to Brussels, that would have constituted a promotion as understood in the Civil Service generally.

6.8 It was common case that, had the plaintiff been successful in the competition under Staff Notice 11/2006, after two years in the position in Brussels she would have been eligible to apply for promotion to the next grade above the grade in which she would have been acting in Brussels, the Principal Officer grade. However, in my view, that does not mean that, had she been successful and appointed to the position in Brussels, the plaintiff would have been "promoted" to the position of Assistant Principal Officer. As counsel for the defendants submitted, it could hardly be the case that when the assignment in Brussels terminated, she would have been "demoted" to the grade Higher Executive Officer.

6.9 As a Circular on which counsel for the defendants laid considerable emphasis (Circular 30/2001: Revised arrangements for calculations of higher duties allowances in certain cases) illustrates, there is a clear distinction in the Civil Service between being "assigned to higher duties" and being promoted, although, as stated in paragraph 2 of that Circular, its objective was, for a period of two years "plus any initial accrual period where applicable", to treat a person assigned to higher duties as if he or she had been promoted, as reflected in the revised arrangements implemented therein. It also addressed the eventuality that he or she might be promoted while in receipt of an allowance for higher duties.

6.10 It is clear on the evidence that there are very complex rules in place in the Civil Service in relation to promotion, assignment to

higher duties, payment of higher duty allowances and suchlike and I would surmise that the Court has only got a flavour of that complexity. However, on the evidence, I am satisfied that the concept of temporary promotion is not recognised in the Civil Service and that acting up in a higher grade and being paid a higher duties allowance for a specific duration is not regarded as a promotion. Therefore, it is not possible to conclude that, had a person in a position below the rank of Assistant Principal Officer been assigned to the post in Brussels advertised in Staff Notice 11/2006, notwithstanding the benefits which would have accrued to such a person in terms of payment of a higher duties allowance where he or she was not already in receipt of such an allowance, leave, access to promotion and such like, it would have involved a promotion in the sense used in the Civil Service generally or specifically in the Irish Circulars. Nevertheless, having so found, that is not necessarily the end of the matter, as counsel for the defendants submitted. I make that observation notwithstanding a pleading point made on behalf of the defendants, which I will address later.

## **7. Application of Irish Circulars to internal departmental competitions**

7.1 The 1975 Circular, as amended by the 1990 Circular, was in force in June and July 2006. The interpretation of the Department of Finance as to the effect of those Circulars, as contained in the November 2005 e-mail, cannot, in my view, be determinative. It may, of course, have been based on information which was not before the court, e.g., the recommendation of the General Council referred to in the 1990 Circular. However, on the basis of the evidence before the Court, I conclude that, as a matter of probability, the interpretation that the Irish Circulars did not have "directive effect in relation to 'internal promotion competitions'", as stated in the November, 2005 e-mail, was incorrect on the basis of the reasoning set out in para. 2 earlier.

7.2 On that basis, I find that the Irish Circulars are applicable to internal departmental competitions for promotion. However, given the finding I have made at para. 6.10 that the competition in which the plaintiff participated in July 2006 was not a competition for promotion, that finding, on its own, does not really advance the plaintiff's case.

## **8. Legitimate Expectation**

8.1 In their written submissions, counsel for the plaintiff presented the factual basis of their reliance on the doctrine of legitimate expectation as follows: the plaintiff did not know that the Irish Circulars were not being applied in the competition under Staff Notice 11/2006; and she had a legitimate expectation, on the basis of practice in the Department from 2003, and, in particular, after reading the StaffNet statement, that bonus marks for proficiency in Irish would be awarded. That submission gives rise to two observations. First, it seems to be advanced, at least in part, to meet the defendants' argument that the Irish Circulars did not apply at the time to internal competitions for promotion. Secondly, it seems to be premised on the competition in issue being a competition in relation to promotion.

8.2 As regards the first observation, even if, contrary to the conclusion I have reached, the interpretation of the Department of Finance, as contained in the November 2005 e-mail, was correct, as the e-mail made clear, "custom and practice" based on procedures agreed with staff associations at Departmental Council level governed the marking scheme for internal promotion competitions, including the application of marks for proficiency in Irish. As is clear from the evidence, the custom and practice in the Department from 2003 to November 2005 was to allow marks for proficiency in Irish for all elements of a competition for promotion, as communicated to staff members via the Department's intranet, which I understand to mean that the total marks awarded would be uplifted in accordance with the provisions of the 1990 Circular. The entitlement to have that practice implemented in relation to a competition for promotion until varied in accordance with agreed procedures, in my view, formed part of the terms of employment of staff of the Department. The Department was entitled to vary or abandon the practice, but it was not entitled to do so unilaterally without regard to agreed procedures, or informally and without prior notice to the staff members affected.

8.3 As regards the second observation, having decided, at paragraph 6.10 above, that the assignment of an officer below the rank of Assistant Principal Officer to the post in Brussels the subject of Staff Notice 11/2006 would not have been a promotion, it remains to consider whether there is evidence before the court that the competition to fill that post should, in accordance with the custom and practice of the Department, have involved the allocation of marks for proficiency in Irish in the manner provided for in the 1990 Circular. In other words, was it the custom and practice in the Department prior to the circulation of Staff Notice 11/2006, or was it otherwise represented to staff members, for example, via the Department's intranet, that, in the case of a competition for selection for an assignment for a limited period to a post which would involve higher duties and would have the benefit of a higher duties allowance, bonus marks for proficiency in Irish would be allocated in the manner provided in the 1990 Circular?

8.4 I have already outlined the difference of approach in the Department as evidenced in Staff Notices 8/2005 and 14/2005, on the one hand, and Staff Notice 11/2006, on the other hand. However, as is clear on the face of Staff Notice 14/2005, as I have already noted, one of the two posts to be filled by the competition which was the subject of that notice involved a genuine promotion. In contrast, neither Staff Notice 11/2006, nor Staff Notice 8/2006, which preceded it, gave notice of a competition to fill a post on promotion. Staff Notice 8/2006, which was dated 12th May, 2006, gave notice of a competition to fill the post in Brussels at issue in these proceedings and it was in precisely the same terms as Staff Notice 11/2006, save that it was limited to "Assistant Principals and HEO/AOs on a HDA". It is clear on the evidence that the earlier notice did not produce a response from any candidate for assignment to the post to Brussels. Hence Staff Notice 11/2006 broadened the range of eligible candidates for the post in Brussels to include Higher Executive Officers and Administrative Officers who were not on higher duties allowance. If a candidate from the additional category were to be successful, he or she would have been assigned to the post in Brussels with the benefit of higher duties allowance for the duration of the assignment, but, as I have found, that would not have involved a genuine promotion.

8.5 The distinction which I have highlighted in the next preceding paragraph between Staff Notice 14/2005 and Staff Notice 11/2006 was not a distinction which founded the decision made in the Department not to provide for the allocation of marks for proficiency in Irish in the competition on foot of Staff Notice 11/2006. The evidence suggests that the decision was informed entirely by the November, 2005 e-mail and the attitude of the staff associations, including the PSEU, as subsequently communicated to the Personnel Officer of the Department. In cross examination the Personnel Officer acknowledged that the November, 2005 email was the "trigger", and the decision was clearly based on the assumption that the Department of Finance was correct. Her position was that the staff in the Department had been consulted via their staff associations and were in favour of the decision to discontinue the practice of awarding marks for proficiency in Irish in internal competitions. As I understand her evidence, if the competition which was the subject of Staff Notice 11/2006 had been notified to the eligible staff prior to the receipt of the November 2005 e-mail, the award of marks for proficiency in Irish would have been factored in. That would have demonstrated consistency of approach with that adopted in relation to the competition the subject of Staff Notice 8/2005, which did not involve a promotion.

8.6 The classic formulation of the doctrine of legitimate expectation in a public law context in this jurisdiction is to be found in the judgment of Fennelly J. in *Glencar Exploration plc. v. Mayo County Council (No.2)* [2002] 1 I.R. 84, where he 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 or 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. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

While in the context of the *Glencar* case that passage must be regarded as *obiter dictum*, it has been applied by the Supreme Court in *McGrath v. Minister for Defence* [2009] IESC 62.

8.7 The doctrine of legitimate expectation was considered by the High Court (Costello P.) in the context of promotion in the Civil Service in *Gilheaney v. the Revenue Commissioners* (Unreported, High Court, 4th October, 1995). The applicant in that case was employed as an Executive Officer in the Revenue Commissioners. In October, 1993, Circular E5158 headed "Vacancy for Press Officer (Higher Executive Officer)" was issued by the Revenue Commissioners. Higher Executive Officers and Executive Officers with a certain length of service were eligible to apply to fill the vacancy. The applicant was eligible and he applied. Subsequently he was informed that he was placed third on the panel created as a result of the process. A year later, in October 1994, a vacancy arose again for the post of Press Officer. At this point, the applicant headed the panel. However, he was not offered the post. Instead a decision was taken to re-advertise the position and to limit applications to "serving Dublin based Higher Executive Officers". The applicant was not eligible. He instituted judicial review proceedings in which he challenged the validity of the decision to re-advertise on the ground that, *inter alia*, it breached the legitimate expectation he had that the appointment would be made from the 1993 panel. In his judgment, Costello J. analysed the status of a civil servant from 1921 onwards. Having referred to s. 17 of the Act of 1956, he summarised its effect as follows:-

"As a result, the Minister for Finance is empowered, to fix the terms and conditions of service of civil servants and to vary the terms and conditions, to fix the terms governing their promotion and vary such terms and conditions. And this power is exercisable, not by ministerial Regulation but by an administrative act. This less formal way of exercising a statutory power in no way effects (*sic*) the legal consequence of its exercise. What is of particular importance to stress is the discretionary nature of the ministerial power to vary from time to time the terms and conditions of service which may previously have been established."

Later in his judgment Costello P. considered whether the appointment of a person as an officer in the civil service conferred rights and obligations enforceable in a court of law. He stated:-

"It seems to me that when a statute confers a power on a minister to grant a benefit to some person and that power is exercised it also confers a corresponding right on that person to receive the benefit. This means that there is a statutory right which the courts will enforce to the benefits contained in the terms and conditions of appointment of a civil servant (including, for example, those relating to remuneration) as well as to those benefits arising from the terms and conditions relating to promotion contained in administrative acts, until such time as the right is cancelled or varied by the valid exercise of a power in that behalf contained in section 17."

In relation to the applicant's challenge based on the doctrine of legitimate expectation, Costello J. stated:-

"So, this submission also founders on the rock of s. 17 of the 1956 Act. Under it the respondents have a statutory discretionary power not just to fix the conditions governing the promotion of civil servants but also to vary arrangements made to give effect to such conditions. This power cannot be fettered in the way suggested. No doubt the applicant had an expectation that he would be appointed to the vacancy that arose as he was next in line on the panel for promotion, and he must be keenly disappointed by what occurred. But he could not have had a 'legitimate expectation' because no restriction on s. 17 powers is permissible."

Accordingly, the applicant's challenge based on legitimate expectation was rejected.

8.8 The plaintiff in *McGrath v. Minister for Defence* successfully invoked the doctrine of legitimate expectation. His circumstances were that he had been a member of the Defence Forces with 26½ years service, when, prior to the expiration of a two year extension which he had been granted in 1994, following a medical examination, he was discharged from the army on the basis of medical reclassification in the absence of a significant change in his medical condition, thus depriving him of the opportunity to participate in a voluntary early retirement scheme. Fennelly J., in finding for the plaintiff, stated (at para. 29):-

"It is true that a legitimate expectation does not necessarily confer substantive rights. The authority which created the expectation may be entitled to correct it if it gives fair notice and an opportunity to respond. There is no doubt that the Army was entitled to adopt a new policy with regard to medically unfit personnel, based, as it was, on reports from experts. However, the plaintiff was in an exceptional situation. He had been granted an extension for the short period of two years in circumstances where his medical situation was as it had been for many years and was accepted without reclassification for that purpose. The Army were at fault only in failing to take account of such special situations."

Fennelly J. held that the plaintiff was entitled to succeed on the basis that his legitimate expectation to be allowed to continue in service until the expiration of the two year extension was infringed.

8.9 In assessing whether the pre-conditions to the right to invoke the doctrine of legitimate expectation, as expounded in the *Glencar* case, have been complied with in this case, at the risk of unnecessary repetition it must be emphasised that a premise underlying the plaintiff's invocation of that doctrine was that the competition in which she participated was competition for promotion. When that premise falls away, as it must on the basis of the finding that it was not a competition for promotion, the plaintiff's reliance on the practice in the Department in relation to promotions *per se* between 2003 and 2005 also falls away. The plaintiff's reliance on the doctrine of the legitimate expectation cannot be sustained unless it has been established on the evidence that it was represented by the Department that it would, or that the practice in the Department was to, consistently apply the assessment criteria set out in the StaffNet statement to competitions for short term assignments to positions, whether lateral or involving higher duties with the benefit of a higher duties allowance.

8.10 The evidence which can be pointed to in that regard is the following:

- (a) the evidence of the Personnel Officer to the effect that, but for the November, 2005 e-mail, bonus marks would have been awarded in the competition which was held on foot of Staff Notice 11/2006;
- (b) Staff Notice 8/2005, which expressly applied "the new promotion policy" to the competition thereby announced and expressly provided that bonus marks for proficiency in Irish would be awarded in the competition, which was not intended to give rise to a promotion; and
- (c) Staff Notice 14/2005, which expressly provided that bonus marks for proficiency in Irish would be awarded in the competition which had a promotion component and an assignment component.

8.11 On that evidence, I must conclude that it was the practice in the Department in 2005 to consistently apply the criteria set out in the StaffNet statements to the type of competition in issue in these proceedings, that is to say, to a competition for a position which did not involve a promotion. It follows that the question which must now be considered is whether the Department, to use the terminology used by Fennelly J. in the *McGrath* case, corrected the expectation to which such practice gave rise. In answering that question, the conduct which has to be assessed is primarily what the Department did not do, rather than what it did do. It omitted from Staff Notice 11/2006 the statement in relation to bonus marks for proficiency in Irish, which had been included in the 2005 Notices. Moreover, it made no reference to the promotion policy of the Department, nor did it refer candidates to the StaffNet statement. Nonetheless, apart from omitting the statement in relation to the allocation of bonus marks for proficiency in Irish, the marking scheme for the competitive interview process, as set out in the StaffNet statement, was adhered to, including the allocation of "SOV" marks, which were not alluded to in Staff Notice 11/2006. It is probable that the plaintiff was not aware of the difference between the contents of the 2005 Notices and Staff Notice 11/2006. She had no reason to scrutinise either Staff Notice 8/2005, which related to an assignment for which she was not eligible, or Staff Notice 14/2005, which related to a promotion to a grade which she occupied. Looked at objectively, the omission from Staff Notice 11/2006 of reference to the allocation of bonus marks for proficiency in Irish could not have corrected the expectation which had arisen from the practice prior to November 2005 in relation to competitions which did not involve promotion, which expectation was reinforced by the existence of the StaffNet statement.

8.12 In summary, the plaintiff's evidence, which I accept, was that she was not aware that the bonus marks for proficiency in Irish would not be awarded in the competition in which she participated. I am satisfied on the evidence that the Department did not take sufficient steps to negate her reasonable expectation, based on the combination of the practice after 2003 in relation to promotions and the practice in 2005 in relation to competitions which did not involve promotions and the StaffNet statement, that such marks would be awarded for the reasons outlined in the next paragraph.

8.13 As with variation or discontinuance of the situation addressed in para. 8.2 above (the assumption that the allocation of bonus marks for proficiency in Irish in promotion competitions was based on custom and practice within the Department, rather than compliance with the Irish circulars, as stated in the November 2005 e-mail), while the Department (in line with the decision of Costello J. in the *Gilheaney* case) was entitled to vary or discontinue the practice of allocating marks for proficiency in Irish in internal competitions which did not involve promotions, it was not entitled to do so peremptorily and without fair notice to the staff affected. In eliciting the views of the staff associations, the Department embarked on the process whereby it could discontinue the previous practice, but it had not completed that process when it decided in May 2006 not to comply with the practice in relation to the competition under which the assignment to Brussels was to be made.

8.14 Accordingly, I have come to the conclusion that the plaintiff's right based on her legitimate expectation of being awarded bonus marks in accordance with the Irish Circulars in the competition in which she participated was infringed.

8.15 Before leaving this topic, I want to elaborate on the comment I made in para. 6.10 earlier rejecting the contention of counsel for the defendant that, if the court were to find that the assignment of the position in Brussels was not a promotion, that was the end of the plaintiff's case. It is true, as counsel for the defendants submitted, that the Irish Circulars, in accordance with their terms, apply to promotion. However, as the evidence has established, prior to November 2005, the Irish Circulars were applied by the Department in relation to competitions to fill positions which did not involve promotion and custom and practice existed in that regard which was reflected in the 2005 Staff Notices considered earlier. As I understand it, the basis on which counsel for the defendants contended that the plaintiff could not base the case on custom and practice was that it was not pleaded in the statement of claim. In fact, in the particulars of the defendants' alleged wrongdoing, it was specifically pleaded (in para. 37(a)) that the defendants had not applied the Irish Circulars to the plaintiff's case, notwithstanding that they had applied them to other civil servants in the Department in the recent past in the case of similar competitions. Even though that similarity was represented as being that the relevant competitions were for promotions, I am satisfied that the plaintiff's claim based on custom and practice was sufficiently pleaded.

## **9. Damages**

9.1 Had the plaintiff been awarded marks for proficiency in Irish in the competition in July 2006, she would have scored the highest mark in the competition, and she would have been assigned to the position in Brussels. For the four years of the assignment she would have been in receipt of a higher duties allowance. It is common case that over the four year period her loss as a result of not receiving the higher duties allowance amounts to €28,800. The plaintiff is entitled to be compensated for being deprived of that money, because she wished to be assigned to Brussels and to perform the higher duties to which the allowance related.

9.2 The plaintiff is not entitled to be compensated, as she claimed, for not having received the various allowances which were payable on the assignment to Brussels (local post allowance, cost of living allowance and child allowance) which, given her family circumstances, would have amounted to €32,442 per annum and aggregated €129,768 over four years. The allowances in question, which are not treated as taxable income for tax purposes, are paid to offset additional expenditure incurred by an officer assigned abroad. As the actuary called on behalf of the plaintiff, Mr. Brendan Lynch, acknowledged, in assessing the plaintiff's loss, the additional expenditure which she would have incurred would have to be deducted from the allowances. There is no evidence whatsoever on the basis of which one could assess what the additional expenditure would have been. However, I think it is reasonable to assume that the quantum of each allowance is linked to the estimated additional expenditure which the assigned officer is likely to incur, insofar as that is reasonably practicable and that the allowance are not intended to provide a windfall for the assigned officer. On that basis, I consider it reasonable to assume that the plaintiff has incurred no loss by being deprived of those allowances.

9.3 Mr. Lynch also gave actuarial evidence on behalf of the plaintiff as to the capital value of assumed future losses in respect of certain matters, namely, salary, pension, lump sum on retirement and spouses pension, which he calculated in aggregate at €284,939. However, that evidence as to loss was based on the assumption that the plaintiff had been deprived of promotion by not being assigned to the position in Brussels and, accordingly, it was based on a false premise. There is absolutely no doubt that, had she



been assigned to Brussels, the plaintiff would have remained in the same grade but with the benefit of a higher duties allowance and she would have reverted to the salary applicable to the grade of Higher Executive Officer at the end of the four year term of the assignment to Brussels in 2010. No future loss has been established in respect of any of those matters.

9.4 I am also satisfied that there is no basis on the evidence for compensating the plaintiff for loss of opportunity to be promoted to the position of Principal Officer or higher by reason of her not having been assigned to the position in Brussels. The evidence discloses that in the interim since July 2006 she has applied for promotion and she has not been successful. As a matter of probability, the assignment to Brussels would not have changed that outcome.

9.5 Finally, no case whatsoever was made out for the award of exemplary or aggravated damages to the plaintiff. Like the position of the Army in the *McGrath* case, the Department was only at fault in failing to take account of the special circumstances created as a result of the reasonable expectation which had arisen in the Department in relation to the allocation of marks in competitions which involved temporary assignments on higher duties, when it had not properly discontinued the practice and notified staff likely to be affected of such discontinuance.

## **10. Orders**

10.1 Following the decision of the Supreme Court in *McGrath v. Minister for Defence*, there will be a declaration that the plaintiff's right based on her legitimate expectation to be awarded bonus marks for proficiency in Irish was infringed. There will also be an award of damages in the sum of €28,800 in favour of the plaintiff.