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THE HIGH COURT

1998 NO. 11905 P

BETWEEN

JAMES McGRATH

PLAINTIFF

AND
THE MINISTER FOR DEFENCE, IRELAND AND
THE ATTORNEY GENERAL

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 7th April, 2006.

1. Members of the Defence Forces are medically graded on a scale from A1 to E. The objective of the grading, on the evidence, is to measure the fitness of the member from a medical perspective for what he may be called on to do. Category E indicates that the member is below the minimum standard required for service in the Defence Forces. Category C indicates a chronic disability.

2. The plaintiff, who was born on 18th July, 1953, enlisted in the Defence Forces on 29th October, 1969 and served for twenty-six and a half years until he was discharged on 12th May, 1996 in the circumstances which give rise to these proceedings. In 1977, while engaged in recreational exercise at the Glen of Imaal, he suffered an injury to his right knee. In 1982 he underwent a meniscectomy. Despite that, he was able to serve in the Lebanon in 1983. However, he continued to have problems with his knee and in 1987 he had surgery for the reconstruction of his anterior cruciate ligament. Following the surgery, the plaintiff was excused from regimental duties. Later, in November, 1988, he was medically re-

3. classified to category C and remained so classified until November, 1995. Between 1987 and 1996 the plaintiff performed a wide range of duties. His evidence was that he did everything except regimental duties, which he defined as guard duty with a weapon and ceremonial guard mounting duties involving marching.

4. In the summer of 1994, a review was initiated of all members of the Defence Forces of every rank in category C who were unfit for 24-hour armed security duty of their own barracks. The evidence indicates that this review followed on recommendations made in a report published in 1990 by Mr. Dermot Gleeson SC on a review he conducted into pay and conditions in the Defence Forces and a subsequent efficiency audit carried out by Price Waterhouse. The review was partly prompted by complaints from members of the Defence Forces who were classified above category C about the high incidence of 24-hour duty to which they were subjected, the inference being that they were "carrying" personnel who were classified as category C. The evidence indicates that this was the first such review every carried out of personnel classified as category C. The objective of the exercise was to improve the fitness profile of the army.

5. Around the same time, with broadly similar objectives, a scheme was being devised and negotiated for voluntary early retirement (the VER Scheme) from the army. The main objectives of the scheme were to reduce the number of personnel graded category C, to reduce the age profile of army personnel and to create scope for recruitment. The VER Scheme was launched on 22nd April, 1996. It was in place for three years, 1996, 1997 and 1998. In 1996 it was open for applications between 29th April and 7th June. In other words, it opened for applications before the plaintiff was discharged, but the plaintiff was not eligible to participate. In 1996 the main categories eligible to apply for early retirement included personnel graded category C and soldiers over the age of 50. In that year, there were applications from 1,119 members, of whom 500 were granted early retirement under the scheme.

6. At the time the review of category C personnel was directed, in mid-1994, the plaintiff, who had the rank of sergeant, was on a two-year service extension from October, 1992 to October, 1994. In April, 1994 he had sought a further extension for two years from October, 1994. He had the usual extension of service medical examination on 27th April, 1994 and the medical officer who examined him graded him category C and recorded that fact in his Medical Book (L.A. 30). His commanding officer recommended that he be continued in service and assessed his conduct as very good. In fact, a striking feature of the evidence is that there was unanimity that the plaintiff was an exemplary soldier, that he was dependable, reliable, conscientious and committed, that he was highly regarded by his superiors and his peers. The plaintiff was granted the extension he sought for a period of two years terminating on 29th October, 1996.

7. The manner in which the review of category C personnel was implemented was that some time after June, 1994 the Director of the Medical Corps was directed to assess the effectivity of category C personnel who did not carry out regimental duties. Lists of the relevant personnel in each command were prepared. In the case of the Curragh Command, where the plaintiff served, the Command Medical Officer, Commandant (now Lieutenant Colonel) Concannon, received the relevant list in 1994 and he started interviewing the personnel on the list in 1995. Lt. Col. Concannon recorded on the plaintiff's L.A. 30 the outcome of his interview with the plaintiff on 13th March, 1995 as follows:

> "Review re duties. No [regimental] duties since ? 1987. [Right] knee. [Anterior cruciate ligament] repair 1987. Physio at present. Feels knee is getting worse. Unfit barrack [regimental] duties. Situation explained to patient."

8. The evidence of Lt. Col. Concannon was that the purpose of this first meeting with the plaintiff was to explain to him that anyone not able to do 24-hour armed security duty would be subject to a Medical Board. All personnel who were interviewed were given the same explanation.

9. In the case of the plaintiff, a decision as to whether he would be subject to a Medical Board was deferred, in Lt. Col. Concannon's words, to see if the plaintiff had found his way of getting back to armed regimental duties. The plaintiff was re-interviewed by Lt. Col. Concannon on 11th August, 1995 and on that occasion the outcome was recorded as follows in the plaintiff's L.A. 30:

> "Review. No change. Definitely unfit [regimental] duties. Note some [right] leg shortening. To be reviewed by [Medical] Board."

10. I will consider later what the plaintiff's understanding of the review process was.

11. In any event, Lt. Col. Concannon set in train the convening of a Medical Board, the purpose of which was to determine if the plaintiff was unfit for further service in the permanent defence forces and his medical classification. On 17th October, 1995, the plaintiff's Commanding Officer, Commandant (now Lieutenant Colonel) Cullagh paraded the plaintiff and gave him notice that a medical board would assemble on 20th November, 1995 to determine his appropriate medical classification. The relevant form completed by Lt.

Col. Cullagh at the time certified, and his evidence was, that the plaintiff was informed that there was a possibility of his being reclassified category E, in which case the provisions of DFR A12, para. 74, a copy of which was furnished to him, would apply, namely that he would be discharged from the army. The plaintiff attended before the Medical Board on 20th November, 1995 and he was medically examined. The finding and recommendation of the Medical Board were recorded as follows:

> "(1) that the [plaintiff] be discharged from the permanent defence force in consequence of his not possessing the physical standard required for service with the permanent defence force
>
> (2) & reclassify [medical category] E".

12. It was also recorded on the certificate signed by the members of the Medical Board that the plaintiff was informed that he was re-classified to category C on the grounds which were set out as follows:

> "He suffers from chronic ineffectivity since 1987 due to [right] medial cartilage (?) injury and [right] anterior cruciate injury which has failed to allow him return to normal duties despite reconstructive surgery and physiotherapy."

13. The plaintiff was informed of his right to make representations to the Director Medical Corps against the finding and recommendation of the Medical Board. He was also informed that, as a result of re-classification, he was regarded as not possessing the medical standard required for service in the Defence Forces.

14. The plaintiff did not pursue the option of making representations against the finding and recommendation of the Medical Board. Instead, he appealed to the Adjutant General against the decision to discharge him and he requested to be continued in service up to the end of October, 1996, which was his existing engagement. In the letter of 18th December, 1995 in which he made this request he expressed the view that the decision to discharge him at that point, without any chance of availing of the VER Scheme, would be unfair. The plaintiff's application for retention received strong support from his Commanding Officer, Commandant (now Lieutenant Colonel) Kerton and from GOC Curragh Command. Lt. Col. Cullagh, who was replaced by Lt. Co. Kerton when he took up duties is Bosnia at the end of 1995, testified that he would have supported the plaintiff in a manner similar to the support given by Lt. Col. Kerton. It is clear from the evidence that no question arose as to the fitness and capability of the plaintiff to perform the duties he had been performing since 1987. Lt. Col. Cullagh acknowledged that nothing had happened between October, 1994 and November, 1995 which indicated that he was incapable of performing his duties. However, despite the recommendations of his superiors, the Deputy Adjutant General refused the request for retention and approved the discharge of the plaintiff from the Defence Forces (having availed of all his annual and pre-discharge leave entitlements) on 25th January, 1996. The effect of this was that the plaintiff was discharged with effect from 12th May, 1996.

15. I return now to the plaintiff's understanding of the review process. Lt. Col. Concannon explained that his own role was not to carry out a clinical examination of the plaintiff. It was to review the plaintiff's history and explain the process to him. The criterion for referral to a Medical Board was whether the plaintiff considered himself fit for 24-hour armed duty. The evidence of Lt. Col. Concannon was that the plaintiff's own assessment was that he was unable to perform such duty. His belief was that the plaintiff would have done it had he been able. Lt. Col. Cullagh testified that when the plaintiff was paraded on 17th October, 1995 he understood that there was a possibility that he would be re-graded by the Medical Board and the consequence of that – that he could be discharged from the army. While I accept the evidence of both officers, I believe that the plaintiff did not admit to himself the possibility of the outcome of the referral to the Medical Board being that he would be discharged from the army until he was told the Medical Board's determination on 20th November, 1995.

16. In these proceedings the plaintiff claims declaratory relief of a type usually pursued by judicial review: a declaration that the decision of Lt. Col. Concannon to refer him to a Medical Board was *ultra vires*; a declaration that the inquiry and/or the findings of the Medical Board were *ultra vires*; a declaration that his re-classification to category E was *ultra vires*; a declaration that the decision of the Adjutant General refusing his application for retention in service was *ultra vires*; and a declaration that the order discharging him from the permanent Defence Forces was *ultra vires*. A preliminary issue was tried in January, 2004 as to whether the defendant was entitled to an order dismissing the plaintiff's claim on the grounds that the cause of action was a matter which should have been brought within the time period provided by O. 84, r. 21 of the Rules of the Superior Courts, 1986 and that there had been inordinate and/or inexcusable delay in the commencement of the proceedings. I held that the defendant was not entitled to the order sought (*McGrath v. Minister for Defence* [2004] 2 I.R. 386).

17. The plaintiff also seeks an order prohibiting his discharge from the army until such time as he has an opportunity of making an application under the VER Scheme. As I stated in my judgment of 23rd January, 2004, that relief could never have been obtained because, when the plenary summons issued on 3rd November, 1998, two and a half years had elapsed since the plaintiff's discharge from the Defence Forces.

18. In his amended statement of claim the plaintiff also claims damages for breach of duty, breach of contract and unlawful interference with his rights. At the hearing, the matter proceeded on the basis that it was the claim for damages for breach of contract and failure to respect the plaintiff's legitimate expectation that he would be entitled to avail of the VER Scheme that was being primarily pursued. The components of the damages claim are the lump sum gratuity to which the plaintiff would have been entitled under the VER Scheme had he been entitled to avail of it in 1996, the quantum of which is agreed at €36,395.77, and interest at the court rate on that sum since 12th May, 1995, the calculation of which is not agreed. The plaintiff also claims exemplary damages.

19. The basis of the plaintiff's claim for breach of contract, as pleaded, is that the plaintiff had a fixed term contract for two years and was entitled, notwithstanding his knee condition, to remain in service until 29th October, 1996 with an entitlement to all benefits as would accrue from and in the course of that contract. By discharging the plaintiff from the army prior to the expiry of the two years' contract and unlawfully depriving him of his entitlement to participate in the VER Scheme, the defendant breached its contractual obligations. Those allegations are denied by the defendants.

20. In my view, the plaintiff's claim in contract is well founded. The continuance of the plaintiff in service for the two year term expiring on 29th October, 1996 created a contractual relationship between the first defendant and the plaintiff. That contractual relationship was, of course, subject to the provisions of statute law and regulations then in force governing the Defence Forces. It is undoubtedly the case that, if something had occurred during the two year extension which, in accordance with that regulatory regime, gave rise to an entitlement to discharge the plaintiff from the army, such discharge would not have constituted a breach of contract. However, on the evidence, nothing occurred other than the re-classification of the plaintiff to medical category E. That re-classification resulted from a change of policy rather than from any material change in the plaintiff's medical condition since his extension of service medical examination in April, 1994 and the continuance of his engagement in October, 1994. In my view, that is

the only reasonable inference to be drawn from the certificate of the Medical Board, which rationalised his re-classification on the ground that the plaintiff had been suffering from "chronic ineffectivity" since 1987. In those circumstances, I do not think that the discharge of the plaintiff prior to 29th October, 1996 was justified and, accordingly, I find it was in breach of contract.

21. In reaching that conclusion I have taken account of the provision of D.F.R. A12, which deals with the issue of re-classification and is quoted in the defendants' written submission, noting that a discretion is conferred to re-classify, *inter alia*, subsequent to a period of ineffectivity where the Command Medical Officer so recommends. In the plaintiff's case, the ineffectivity which was the ground of the Medical Board's re-classification had existed for seven years when he was medically examined in connection with his application for an extension of service in 1994 and when his service was so extended. It had not been a bar to his re-engagement for two years up to the end of October, 1996. Within four months of the extension of his service, when he was first interviewed by Lt. Col. Concannon, his ineffectivity had become an issue, not on the basis of the ordinary application of that regulation to the plaintiff, but because of a change of policy.

22. As I have stated, one of the bases on which the plaintiff's claim for damages was advanced at the hearing was that the alleged failure of the defendants to respect his legitimate expectation that he would be entitled to avail of the VER Scheme was actionable. As I understand the plaintiff's argument it is that, having been passed as fit at the extension of service medical examination in April 1994 for an extension of service on the basis of the duties he was performing and classified as category C, the plaintiff had a legitimate expectation that he would be maintained at that grade until October, 1996 and would be eligible for participation in the VER Scheme. Counsel for the plaintiff did not develop the argument beyond that or refer the court to authorities which supported that proposition. Counsel for the defendants, on the other hand, produced a comprehensive analysis of the doctrine of legitimate expectation in support of their contention that it is not applicable in this case.

23. I do not propose to address the various arguments advanced by the defendants on the invocation of the doctrine in this case, because, having found that there was a contractual relationship between the plaintiff and the first defendant and that that contractual relationship was breached so as to give rise to an entitlement to damages, the plaintiff did not have to rely on the doctrine of legitimate expectation. However, I think it may be helpful to explain why I consider that the plaintiff is in a different position to the litigants in some of the authorities which were cited by counsel for the defendants, whose positions might be regarded as analogous to the plaintiff's, who sought to base their claims on the doctrine of legitimate expectation.

24. The closest analogy, is, perhaps, *Egan v. The Minister for Defence Ors.* [1988] I.E.H.C. 174, in which judgment was delivered by Barr J. on 24th November, 1988. The applicant in that case was a Commissioned Officer in the Defence Forces. Barr J. held that the terms of his engagement as a commissioned officer did not, as a matter of law by virtue of the application of the relevant provision of the Defence Act, 1954, entitle him to do what he wanted to do, namely, retire early, without the permission of the Minister. When the Minister refused permission, he challenged the Minister's refusal on the ground, *inter alia*, that, on the basis of the Minister's past conduct in habitually acceding to such applications, he had a legitimate expectation that permission would be forthcoming. Barr J. rejected that argument, holding that, even if there had been a long established and universally recognised practice as contended, it would not derogate from the Minister's statutory right to refuse permission on reasonable grounds in any particular case. What distinguishes the applicant in the *Egan* case from the plaintiff, in my view, is that the former, as was held, did not have a contractual entitlement to do what he wished to do.

25. Similarly, in *Eogan v. University College Dublin* [1996] 2 I.L.R.M. 302, the applicant, who wished to continue in the office of Professor of Celtic Archaeology in UCD, having reached the age of 65, under the relevant statutory provision could only do so on the recommendation annually of the governing body and then only for a further five years. The governing body decided not to recommend his continuance in office in order to make financial savings and to reduce the average age of staff members. On the challenge to that decision, it was held by this Court (Shanley J.) that there were rational grounds for the decision and that the applicant had no legitimate expectation that he would continue in office.

26. It was submitted on behalf of the defendants that both the *Egan* case and the *Eogan* case establish that a contention of legitimate expectation will be defeated where there are objective public interest reasons for a change in prior practice. Be that as it may, a public body which is contractually bound to another cannot justify resiling from its contractual obligations on the basis of objective public interest reasons. It is to be assumed that the introduction of the VER Scheme was a recognition of the fact that existing contractual entitlements of members of the Defence Forces could not be interfered with.

27. I stated earlier that my understanding is that at the hearing it was the claim for damages that was being primarily pursued by the plaintiff. A line of argument was pursued on his behalf which, if correct, could lead to a declaration that the order discharging him from the Defence Forces was *ultra vires*. Indeed, in opening the case, his counsel submitted that the decision to discharge him cannot be allowed to stand. In my view, the argument pursued is wholly misconceived.

28. The plaintiff put in evidence a document which appears to be one chapter, chapter 6, of Administrative Instructions, which, on the evidence, is an instrument issued by the Minister for Defence for the general information and guidance of the Defence Forces. Chapter 6 deals with accidents and injuries and, in particular, with the completion of a form designated A.F. 482 which, in essence, is an accident report form, and is part of a complicated procedure for investigating accidents and injury to Defence Forces personnel. A section of the A.F. 482 requires to be completed by a Medical Officer, who is required to describe the injury and indicate whether it is serious or not serious. The relevant form in relation to the plaintiff put in evidence indicates, by means of an asterisk and footnote that, if the injury is considered to be serious, it is necessary to convene a Court of Inquiry. The provision of chapter 6 on which the plaintiff relied, in particular, was para. 5(e) which provides that under no circumstances (emphasis being added to the word "no") should an Officer, NCO or Private be struck off the strength of the Defence Forces with an outstanding A.F. 482. The plaintiff also relied on para. 9 which provides that a Court of Inquiry shall be assembled to investigate the maiming, mutilating or injuring otherwise of a person subject to military law, whether on duty or off duty where, *inter alia*, the injury is certified by a Medical Officer to be of a serious nature. Further, sub-para. (c) of that paragraph gives guidance as to when an injury is of a sufficiently serious nature to warrant the convening of a Court of Inquiry, one of the definitions of a serious injury being that the injury must be of such a nature and severity as to jeopardise the prospects of continued service or promotion or give rise to the likelihood of reduction in medical category.

29. The basis of the plaintiff's contention that there has been a breach of the Administrative Instructions is that, while an A.F. 482 was filled out in relation to the accident in which he injured his knee in 1977, the form was never "signed off" by a Medical Officer. As it was that injury, some eighteen years later, which was the cause of the downgrading of the plaintiff's medical category, it was argued that it should have been signed off by a Medical Officer and the plaintiff should not have been discharged without the convening of a Court of Inquiry.

30. A sensible reading of chapter 6, even in isolation, indicates that the A.F. 482 procedure is a means whereby the army records and

tracks the effect of accidents and injuries to personnel, which, of course, may have implications beyond the medical status of the injured party. The Court of Inquiry procedure seems to be directed to an investigation of the cause and circumstances of the accident or injury. The requirement that a completed A.F. 482 be filed before discharge seems to be no more than a means of ensuring that there is proper record keeping. I see no basis, on the evidence, for concluding that, because the A.F. 482 in relation to the injury incurred by the plaintiff in 1977 was never completed by a Medical Officer and a Court of Inquiry was not convened eighteen years later to investigate the accident, these omissions rendered the plaintiff's discharge in any way invalid.

31. Turning now to the measure of damages to which the plaintiff is entitled for breach of contract, it was submitted by the defendants that he cannot have any greater claim than to be entitled to finish his two year extension of service. It was argued that being deprived of the benefit of availing of the VER Scheme cannot be the measure of his loss, because of the discretionary nature of the scheme. If the decision had not been made to discharge the plaintiff, and if he had retained his category C grade, he would have been eligible to apply for early retirement under the VER Scheme in 1996. It is true that, having regard to the statistics put in evidence, he would have had less than a 50% chance of being granted early retirement under the scheme. It is stated in the defendants' written submission that in 1996 the main ages of those granted retirement were over 50 years of age, whereas the plaintiff was not. I may be wrong on this, but I do not think there is evidence before the court of the age profile of the persons granted early retirement in 1996. In any event, I do not think that the issue of determining whether, as a matter of probability, the plaintiff could have made a successful application under the VER Scheme, if he had been afforded an opportunity to do so, should be approached on the basis of a statistic analysis of what actually happened. I think the correct approach is to consider what decision the VER Board would have been likely to make on an assessment of the plaintiff's individual circumstances in the light of the objectives of the scheme and acting fairly. On that basis, I think I am entitled to find that it is probable that his application would have been successful. Therefore, the measure of his loss is the loss of the lump sum gratuity.

32. In support of a claim for exemplary damages, it was submitted that it is open to the court to make an award of exemplary damages because of the capricious manner in which the plaintiff was dealt with by the defendants and because what was described as the totally contrived nature of his discharge was an abuse of the executive function of the State. While I believe that the termination of the plaintiff's service was a breach of contract, I do not accept that the behaviour of the organs of the State were such as to give rise to a claim for exemplary damages.

33. However, I do consider that the plaintiff is entitled to pre-judgment interest at the court rate, which is 8% per annum.

34. Accordingly, there will be judgment for the plaintiff in the sum equivalent to €36,395.77 together with interest thereon at the rate of 8% for the period since 12th May, 1996.