Neutral Citation Number: [2007] IEHC 416

THE HIGH COURT

[2006 No. 3870P]

BETWEEN

DAVID LARKIN

APPLICANT

AND
DUBLIN CITY COUNCIL

RESPONDENT

Judgment of Ms. Justice Clark delivered on the 7th day of December, 2007

1. David Larkin, the plaintiff makes an unusual case. He is a full time fireman attached to a busy city fire station. His father was a very senior fire officer and his only ambition in life was to follow in his father's footsteps. To move up the ranks in the fire service it is necessary to accumulate 7 years experience to be eligible to compete for a limited number of places for the position as sub officer. The successful candidates then form a pool from which sub-officers are drawn over the next two years or so. There is no other way to move up the ranks in the fire service. Every promotion starts from the position of sub officer so understandably, the places are very sought after and competition is keen. The competitions are held every three to five years with the number of candidates far exceeding the number of places available. The successful candidates are feted by other firemen in the station who are generally aware of the identity of those who succeed and those who fail to be considered as sub officer.

2. The plaintiff had suffered what he described as a setback in his personal life in that his marriage had broken down and his wife had gone abroad taking their only child to live with her. His access to this child was consequently limited by the very considerable distance between the two households. He had previously applied for the sub-officer competition but had been unsuccessful. It meant a great deal to him to become a sub officer.

3. In 2002 a competition was announced. There were approximately 160 applicants for 50 places. The plaintiff and two colleagues from the same station entered the very competitive process. They first obtained a study pack for home study and then engaged in a junior officer training course which lasted 13 months. They sat a written exam and were then assessed on the training course, their general experience, the written exam and their station performance. The points for each component of that assessment were notified to each candidate by letter and they then applied to be considered for interview.

4. Obviously candidates with high assessments before interview have an advantage as points are accumulated and those with the highest marks make the cut. Exam results which were produced show quite small differences between the points achieved by the first successful candidate at the top of the list and the first candidate declared unsuccessful.

5. On 16th. July the plaintiff was notified by phone that he had been successful and was included in the panel of the first 50 highest achievers. Another colleague, Ken Murray also received the good news while the third candidate Michael Moylan was told that he was unsuccessful. The Plaintiff was thrilled with his success and shared this good news with friends, colleagues and family. News of the results became common knowledge in the station. On the following Tuesday, he was officially notified by letter of his successful result. He felt elated and enjoyed a sense of personal professional achievement.

6. Two days later, rumours circulated in the fire station that two candidates had been removed for the list of successful applicants. Michael Moylan gave evidence that he received a phone call that day to say that a mistake had been made and that he had in fact been successful and would be included in the new panel of sub officers. On Friday, the following day, the plaintiff and his colleague Ken Murray were called into a meeting with the station third officer and the communications officer. They immediately suspected the worst. At the meeting, it was explained to them that a mistake had been made in the calculation of the points and that a recalculation and correction of the error now meant that they were not properly included in the fifty successful candidates. Mr. Kenny the third officer apologized for the mistake. The plaintiff was shocked and stunned by this information. He said he felt humiliated. His upset and disappointment were immediately visible and Mr. Kenny offered him time off to recover from the disappointment and organized for counseling to be made immediately available.

7. The plaintiff was so upset and distressed that he was unable to complete his shift and left work. He remained out of work on full pay for a period of six months. The fire service treated his absence as equating to accident leave and he suffered no financial consequences during his absence.

8. His evidence was that he had to stay away from the embarrassment of meeting with his colleagues. He could not face the questioning or the ribbing. He attended his GP who described his quite understandable upset and disappointment at the events which occurred and diagnosed an acute stress reaction. He was not referred to any specialist and in particular he was not referred to a psychiatrist. No medication of any kind was prescribed and apart from 5 or 6 sessions with the station counsellor he did not attend for any therapeutic treatments.

9. His employers offered him an unqualified apology in writing and offered an ex gratia payment of €5,000 for the blunder which occurred. The Plaintiff gave evidence that he felt that this offer was an insult and an attempt to sweep their mistake and his disappointment under the carpet. He felt that the appropriate remedy was to extend the pool to include the two disappointed applicants. This he said would have cost nothing as they would not receive their increased salary until actually put into position as sub officers. This was not done by the Fire Service and the offer of €5,000 was not increased and was never taken up by the plaintiff.

10. For much of the 6 months that he remained away from work, the plaintiff lived in a house which he was renovating and carried out repairs to that house. His girlfriend joined him at weekends and he was able to enjoy her company. After 6 months he returned to his full duties and has remained in work since. He described that although deeply disappointed and upset by what happened he loves his job and is a committed firefighter. He has since applied for the position of sub officer but has been unsuccessful.

11. One of his colleagues describes the plaintiff as giving 100% to the job but is now less prominent that he used to, less confident socially and just different.

12. It is agreed that this claim is not in the category of nervous shock cases as the plaintiff does not suffer from an identifiable psychiatric illness. He claims to be entitled to damages for the upset, emotional upheaval and distress caused by the negligent assessment of his marks and the consequent raising and dashing of his expectations.

13. Evidence was called on behalf of the defendant to explain the mistake which occurred. The experienced clerical officer in charge

of collating the marks from the assessments carried out in the applicant's particular fire station gave evidence. She received those results from another colleague who sent them to her by email. Normally she would prepare a spread sheet showing the categories of assessments and the marks obtained under each category and add the categories of subject under which interview marks were awarded. She explained that the junior officer course results were omitted from the categories on the spreadsheet and that this affected the overall total for each candidate. When the spreadsheet was received by the communications officer who had prepared the internal assessment results at the station, she noted that the overall totals seemed uniformly lower than usual and raised a query. The error was then identified and a reassessment took place. This unfortunately resulted in a correction in the placing of the three candidates from the Plaintiff's fire station. The difference between the points achieved by last candidate who made the cut and the plaintiff's total, is less than 2 points.

14. The defendant admitted that an error was made and that the plaintiff suffered upset, embarrassment and distress. Professor Patricia Casey, consultant adult psychiatrist gave evidence on behalf of the defendant. She found no psychiatric illness and was of the view that the plaintiff had never suffered from any identifiable psychiatric condition.

Legal submissions
15. Mr. Murray McGrath SC on behalf of the defendants accepts the bona fides of the plaintiff's distress following the miscalculation of the competition points but argues that the plaintiff has not suffered any injury which gives rise to damages in law. He argues that disappointment, embarrassment and distress are not injuries which attract compensation as specific stand alone injuries. A plaintiff must first suffer a recognisable psychiatric disorder in circumstances where a duty of care is owed and where the injury is foreseeable. He concedes that there have been cases where employment law allows for the award of damages for stress in circumstances where there has been bullying, excessive work load or similar breaches of the inherent obligations which an employer has to his employee, but that this is not one of those cases.

16. He adopts the reasoning in *Glencar Exploration v. Mayo County Council* where the Keane C.J. engaged in a lengthy analysis of the principles under which damages in tort arise and argued that foreseeability of the damage which occurs is no longer the test and that the more appropriate consideration is whether in all the circumstances, it is fair, just and reasonable to impose liability on a defendant for injuries sustained by the plaintiff. He argued that it was neither fair nor reasonable to impose such a liability on the defendant in the circumstances here where one of the defendant's employees, in a moment of inadvertence, pressed the wrong key on a computer. He also relied on the more recent decision of Denham J. in *Carroll v. National Maternity Hospital* which distinguished between nervous shock cases where the plaintiff suffers a psychiatric injury induced by the shock following actual or apprehended physical injury to the plaintiff or another person, cases where the plaintiff suffers foreseeable psychiatric illness following directly from the defendant's negligence and claims for grief and sorrow where no psychiatric illness is suffered. The first two categories can give rise to damages but the third category does not.

17. The plaintiff argued that the categories of tort were never closed and that justice required that the plaintiff should recover substantial damages for what were entirely foreseeable injuries sustained by the plaintiff in being elated and then dropped down and deflated by the negligence and breach of duty of his employers in their careless handling of vitally important competition results. He argued that there was no bar to the award of damages for the upset and disappointment suffered by the plaintiff. He relied on an unreported ex tempore judgment of Abbott J. in *DK v. Crowley & Others* (29.07.2005) which was a family law related case where the plaintiff sued the State for wrongful detention following a disputed breach of a barring order.

Decision
18. I have considered the authorities opened by the parties in what have been referred to as "aftermath cases" for claims for emotional distress and those which involve psychiatric injury in stress cases where the relationship between the parties is that of employer and employee. In particular I have considered the reported cases of *McGrath v. Trintech Technologies* [2005] 4 I.R., *Carroll v. Bus Átha Cliath* [2005] 4 I.R. and Kelly v. Hennessy [1995] 3 I.R. which were opened by the defendant. I have also considered the decision of *Fletcher v. Commissioner of Public Works* [2003] 2 I.L.R.M.

19. First, I am not at all convinced that no duty was owed to the Plaintiff not to present him with such crucially important examination results which were accurately collated. In other words it seems to me, in all the circumstances of the case that there was a duty to ensure that the results were not presented to candidates until their accuracy had been checked. This was not a case of a moment of momentary inadvertence where someone accidentally hit the wrong button. The mistake which occurred was multifaceted and required the omission of an entire set of written exam results from inclusion in the spread sheet in the final calculation of marks. There were only 4 headings for the calculation of marks for internal assessments by the fire brigade being the examination, course performance, station fire ground performance and experience and it is thus inexplicable, in the absence of culpable error, to understand how they were omitted in 105 cases. These brigade assessment results were notified to each applicant before that applicant decided whether to present himself for interview. Those marks must have been before the interviewing panel when conducting the interviews and were then added to the points obtained by each candidate under each heading at those interviews. It is difficult to see how the marks for the examination were omitted in ALL candidates' results. There had to be more than a slip in relation to the wrong button. In addition, there seemed to be no check on the accuracy of the results before they were notified to the candidate.

20. While I hold that a duty of care existed in this case and that there was a breach of that duty, I am not satisfied that this is a case where damages for nervous shock or psychiatric damage arise. The claim does not accord with the 5 preconditions outlined by the Supreme Court in *Kelly v. Hennessy* as being necessary for the recovery of damages for nervous shock. Hamilton J. held that in order to recover damages for nervous shock a plaintiff must establish:-

(a) that he or she actually suffered a recognisable psychiatric illness;

(b) that such illness was shock induced;

(c) that the nervous shock was caused by the defendant's act or omission;

(d) that the nervous shock sustained was by reason of actual or apprehended physical injury to the plaintiff or a person other than the plaintiff;

(e) that the defendant owed him or her a duty of care not to cause him or her a reasonably foreseeable injury in the form of nervous shock as opposed to personal injury in general.

This is not a nervous shock case under several headings.

21. The plaintiff did not and does not suffer from a recognisable psychiatric condition. He suffered undoubted upset, humiliation, sensitivity and disappointment but required no treatment or medical intervention. His employers quite correctly offered a full and unreserved apology as soon as the mistake was discovered and he was offered €5,000 as an ex gratia payment. Counselling was offered and availed of. A period of six months paid leave was permitted during which time he stayed away from work while leading a normal life. He then returned to the work which he loves and where the uncontroverted evidence is that he is an excellent and committed firefighter. He has not established any psychiatric illness such as depression or indeed any other illness. He is therefore akin to the person who suffers grief and distress who for public policy reasons is excluded from the recovery of damages.

22. While there was a breach of duty it did not give rise to any injury which entitles the Plaintiff to recover damages.

23. I would dismiss this claim