Neutral Citation Number: [2010] IEHC 75

THE HIGH COURT

JUDICIAL REVIEW

2009 1104 JR

BETWEEN

AOIFE MC CARTHY

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

RESPONDENT

JUDGMENT OF MR. JUSTICE HEDIGAN, delivered on the 19th day of March, 2010

1. By order of O'Neill J. dated the 29th day of October, 2009 the applicant was granted leave to apply for judicial review on the following grounds:

(i) An order of *certiorari* quashing the decision of the Respondent terminating the employment of the Applicant;

(ii) An interlocutory order restraining the Respondent from terminating the Applicant's employment;

(iii)A declaration that the Respondent has acted in excess of jurisdiction and otherwise than in accordance with law and/or in breach of the rules of natural and/or constitutional justice in which the Applicant's employment is to be terminated.

Factual Background

2. These proceedings arise in the following circumstances. The applicant is a radiographer and had been employed as such in the Orthodontic Services of the HSE based in the campus of St. James' Hospital, Dublin since June 2002. The applicant began this employment on a part-time basis as a Senior Radiographer with the South Western Area Health Board. The applicant, previously resident in England, had also qualified as a barrister in 2000 and subsequently began practise at the Irish bar in the 2004 term. The applicant did not continue to practise at the Irish Bar and, consequently, her hours of work as a radiographer were increased to full time in 2005.

3. When the Applicant commenced her employment with the HSE (then South Western Area Health Board) in 2002, the provisions of section 19 of the Health Act 1970 set the mandatory maximum retirement age for permanent officers of Health Boards at 65 years of age. In accordance with section 60 of the Health Act 2004, which established the Health Service Executive, the applicant was transferred to and became an employee of the HSE, as a temporary part-time officer. The applicant had sought a record of her contract of employment in June 2002, however no such statement was forthcoming. In April 2009 the applicant raised the issue of continued employment with Ms Mary Fitzpatrick, manager of Orthodontic Services. The applicant enquired as to whether she would have to retire in October 2009 when she would reach 65 years of age. Ms Fitzpatrick assured the applicant that she would "do [her] best" to keep the applicant in employment.

4. On Friday the 7th of August 2009, the applicant received a letter dated from the end of July in which Larry Bane, Assistant National Director of the HSE, stating that according to the respondent's records the applicant was due to retire on the 28th of October 2009. The following Monday the applicant again spoke with Ms Fitzpatrick concerning this letter. Ms Fitzpatrick again informed the applicant that she would make enquiries and see what could be done. Ten days later Ms Fitzpatrick informed the applicant that due to budgetary constraints there was nothing she could do.

5. The applicant had requested a written memorandum of her contract from Ms Fitzpatrick. Ms Fitzpatrick, having thoroughly searched for said contract, ascertained that no written contract had ever been furnished to the applicant. Ms Fitzpatrick was, however, able to access the details of other employees on similar contracts and furnished this contract, which would ordinarily have governed a person in the applicant's position in 2002. This contained a term providing for a retirement age of 65. The applicant subsequently engaged a solicitor and sought legal advice from counsel. By letter dated the 18th of September 2009, the applicant's solicitors wrote to the HSE explaining the applicant's position. No response was forthcoming and on the 20th of October 2009 solicitors for the respondent replied by letter advising that the applicant's employment would terminate on the 29th of October 2009. The applicant subsequently sought judicial review of this decision.

The Applicant's Submissions

6. The applicant's primary complaints in respect of the impugned decision are as follows. Firstly, the applicant submits that under section 19 of the Health Act 1970, the mandatory retirement age of 65 is solely stated as applicable to permanent officers. As the applicant was, at no time, a permanent officer, nor was any contract stating such in

existence, the applicant was under the impression that this retirement age was not applicable to her circumstances. In support of this contention, the applicant noted that she had previously worked with fellow radiographers who she knew to be above the age of 65. Further to this, the applicant submits that a legitimate expectation existed on the basis of Ms Fitzpatrick's assurances that she would assist in the matter.

7. Further to this point, the applicant noted the Public Services Superannuation (Miscellaneous Provisions) Act, 2004. One of the effects of this act was to abolish the compulsory retirement age for new entrants to the public service. Under Part 1 of Schedule 2 of the 2004 Act, section 19 of the Health Act 1974 was amended such that appointees subsequent to April 2004 would not be subject to the mandatory retirement age. Referring again to her status as a non-permanent officer, the applicant contends that this further supports her stance that the retirement age of 65 was not applicable to her, nor was she aware of same. Moreover, as it created the apparently irrational situation that one might have to retire at a younger age than a recent appointee, the effect of the old section 19 would be disproportionate and unfair in its effect.

8. The applicant further maintains that at all times she was unaware that 65 years of age was an applicable mandatory age of retirement in her circumstances. The applicant submits that it was not until August 2009 that she was made aware of this in communications from the respondent. Furthermore, the applicant highlights that in the "Terms and Conditions of Employment, Version: May 2009" on the respondent's website that at no point in the 84 pages is reference made to the compulsory/normal retirement age. The applicant therefore argues that at no point could she be deemed to have been aware of the retirement age as a result of communications from the respondent.

9. The applicant lastly claims that under Council Directive 2000/78/EC, any discrimination based on age is prohibited. Although the directive notes that this is "without prejudice to national provisions" and that "treatment in connection with age may be justified" there must be a proportionate method utilised to achieve this justification. The applicant cites the case of *Age Concern, England v Secretary of State for Business, Enterprise and Regulatory Reform* C-388/07 and the judgment of the ECJ in March 2009 in which it stated that the option to derogate operates "only in respect of measures justified by legitimate social policy objectives". There exists a "high standard of proof [to show that] the legitimacy of the aim relied on [is suitable] justification". Counsel for the applicant submits that these criteria have not been fulfilled nor has the standard of proof been discharged. It is on these grounds that the applicant submits that the decision of the respondent be quashed and the orders granted.

The Respondent's Submissions

10. The respondents reject the applicant's contention that she was unaware of the retirement age and maintain that the termination of the applicant's employment was lawful. The initial objection raised by the respondent was that there had been delay on behalf of the applicant in seeking judicial review, and that under Order 84 rule 21 of the Rules of the Superior Courts no relief could therefore be granted. In support of this contention, the respondent argues that the applicant commenced employment in June 2002. In her affidavit, the applicant remembers speaking with Ms Fitzpatrick in May 2009 in relation to the matter of retirement at age 65. Moreover correspondence confirming October 28th as the date of retirement was received in July 2009. The respondent first submits that the applicant was aware in 2002 that 65 was the applicable retirement age. In the alternative, the applicant was aware by May 2009 at the latest.

11. The respondent acknowledges that while this would technically fall within the maximum allowable 6 months, there is an onus to act promptly which it is claimed the applicant failed to do in the circumstances of the case. The respondent noted the dicta of McCracken J in *de Roiste v Minister for Defence* (High Court 28th June 1999) wherein the judge commented that "an application…must be made promptly, and it is only a secondary provision that…the application be made [within six months]". The respondent concluded this argument claiming no mitigating factors had been proffered to invoke the Court's discretion under Order 84.

12. The respondent's second submission focused on the lawful nature of the termination of employment. The respondent conceded that the applicant was not furnished with written terms and conditions of employment upon commencing work in 2002, however Mr Hogan for the respondent argued that the applicant was employed on foot of an oral agreement between the parties, the terms of which are enumerated in the written contract of employment given to the applicant in August 2009.

13. The respondent submits on this basis that there was an implied contractual term in the applicant's contract of employment that the retirement age of 65 was applicable to the applicant's position. The respondent contends that this term can be implied as a matter of fact and/or on the basis of custom and practice. On the contention that this term is implied by fact, the respondent highlights the ubiquity of the retirement age of 65 throughout the public service (in June 2002) and asserted that the applicant must have been aware of this fact. The respondent cited the "officious bystander test" enunciated in *Shirlaw v Southern Foundaries Ltd.* [1939] 2 KB 206 in support of this point:

> *"Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying that if, while the parties were making the bargain, an officious bystander were to suggest some express provision for it in the agreement they would testily suppress him with a comment "Oh of course"."*

14. The respondent further noted the adoption of the officious bystander test in this jurisdiction in *Carna Foods Limited v Eagle Star Insurance* [1997] 2 ILRM 99. In the circumstances of this case, the respondent insisted that the retirement age of 65 be implied into the contract of employment as a matter of fact.

15. Further, and in the alternative, the applicant's contract of employment was subject to the terms concerning retirement as implied by custom and practise. Such terms shall be implied where "practice [is] so well defined and recognised that the contracting parties must be assumed to have had it in their minds when they contracted". In the context of employment, Mr Hogan referred the Court to *O'Reilly v Irish Press* [1937] 71 I.L.T.R 194 wherein Maguire P formulated the test that the practice must be:

"…so notorious, well known and acquiesced in that in the absence of agreement in writing it is to be taken as one of the terms of the contract between the parties…it is necessary in order to establish a custom of the kind claimed that it be shown that it was so generally known that anyone concerned should have known of it or easily become aware of it."

16. The respondent concluded, therefore, that the retirement age of 65, virtually universal in the public sector, could readily be implied on the basis of custom and practice.

17. The respondent further stated that the retirement age of 65 was consistent with the applicant's superannuation scheme. The relevant scheme provides that benefits be paid to members having attained the normal retirement age of 65. In the absence of an awareness that 65 was the applicable retirement age, the respondent stressed that the applicant must surely have been aware that a retirement age was in situ at the very least. Furthermore, the respondent drew the Court's attention to a circular for employees of the respondent issued in 2005 wherein reference is made to the pensionable age of 65.

18. In response to the claim that a legitimate expectation was created by Ms Fitzpatrick's assurance to "do her best" the respondent cited Fennelly J. in *Glencar Exploration Plc v Mayo County Council* (No.2) [2002] IR 84:

"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 and 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.

19. The respondent claimed that no factual evidence supported that a representation had been made; indeed the applicant acknowledged in her second affidavit that Ms Fitzpatrick told her there was nothing more she could do. Moreover, Ms Fitzpatrick would not be the relevant decision maker per the above criteria.

20. The respondent concluded by rejecting that there had been a breach of Directive 2000/78. The Court was referred to the case of *Palacios de la Villa v Cortefiel Servicios SA* [2007] ECR I-8531, in which the ECJ held that it is "not unreasonable for the authorities of a Member state to take the view that a measure such as that at issue in the main proceedings may be appropriate and necessary in order to achieve a legitimate aim in the context of national employment policy". This case specifically dealt with the legality of terminating one's employment at 65 with an entitlement to a retirement pension. The Court further noted that although such persons may be inhibited in the further pursuit of their employment, the financial compensation (pensions) available as a consequence of retirement contradicted any claim that the legislation could be deemed unreasonable.

DECISION OF THE COURT

21. Dealing first with the delay ground raised by the respondent, Order84, rule 21(1) provides that any application for judicial review must be made promptly, and within either three or six months. An order for *certiorari* must be sought within six months from the event in question or upon gaining awareness that an issue arose, and must also be made promptly. In my view there was not sufficient delay to refuse the applicant's case. Whilst Order 84 does indeed require an applicant to act promptly in seeking judicial review, such promptness (or acquiescence as the case may be) must be viewed in light of the prevailing circumstances.

22. The applicant began employment in June 2002 and was not, nor has she ever been, furnished with a written memorandum of the terms and conditions of her employment. The issue of retirement was first raised with an agent of the respondent in April 2009. Despite the best efforts and intentions of Ms Fitzpatrick to accommodate the applicant, no further information was forthcoming until August 2009 when the applicant received a letter advising of her approaching retirement. Having regard to the applicant's subsequent actions in engaging legal advice and the respondent's relative failure to address the applicant's concerns promptly, I find there to have been no unreasonable delay on the applicant's part. I consider she acted with reasonable promptitude in all the circumstances.

23. In addressing the substantive issues raised, the crux of the application lies in whether the retirement age of 65 could be viewed as having been implied into the contract as submitted by the respondent. Two alternative approaches were suggested utilising the "officious bystander test" on the one hand and implication by custom on the other. It is my opinion that in the circumstances of the case, the former provides a more suitable formula to determine whether such a term has been implied, although there is necessarily a large degree of overlap.

24. The court is of the opinion that such a term should indeed be implied into the applicant's conditions of employment. The applicant is a highly intelligent woman who is legally qualified. It is difficult to accept that she had no knowledge of the retirement age applicable in that part of the public service in which she worked. Furthermore, irrespective of any actual knowledge of this fact, I would consider the dicta of Maguire P. in *O'Reilly* that anyone concerned "should have known of it or could easily have become aware of it" to be particularly apt in this case. Moreover in addition to the broad awareness of the retirement age among most working adults, the applicant may be deemed as "on notice" that there was an applicable retirement age by virtue of the superannuation scheme. The superannuation scheme, of which she was a member, made reference to the existence of a retirement age, and more specifically, a cut off for contributions at age 65. I therefore find that such a term can be implied into the terms and conditions of employment.

25. It is appropriate, lastly, to deal with two further issues raised by the applicant. I do not believe any legitimate expectation arises on the evidence adduced. As mentioned by the respondent, Ms Fitzpatrick was not in a position to make a representation which could give rise to a legitimate expectation. Moreover, no representation appears to have been given on the facts, and it would appear that Ms Fitzpatrick endeavoured as best she could to assist the applicant

and was forthright in her praise for the applicant's standard of work. As to the Council Directive 2000/78, the case referred to the Court of *Pallacio de la Villa* adequately affirms that a law providing for a retirement age of 65 could not be seen as discriminatory or unreasonable in its effect. Indeed such provision is almost universal throughout the European Union.

Conclusion

26. I am satisfied that in all the circumstances the applicant acted with reasonable promptitude in bringing these proceedings and I reject the respondent's argument in that regard. I am however satisfied that the applicant is not entitled to the reliefs sought. In my judgment a term providing for the applicability of the retirement age to the applicant's tenure as a term of her employment with the respondent may be implied for the reasons set out above. The test in *O'Reilly* permits the court to find that even were there an absence of direct knowledge of the retirement age, the applicant should have been aware of this information and could easily have obtained it had she looked. Consequently, the termination of the applicant's employment is lawful by reason of her having reached the retirement age relevant to her. I also find there was no representation made to the applicant which could give rise to a legitimate expectation that she would be kept on after her retirement. Finally, Council Directive 2000/78 does not prohibit the state from maintaining a retirement age of 65. I must refuse the reliefs sought.