Neutral Citation: [2013] IEHC 545

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 947 J.R.]

BETWEEN

PATRICK GORMAN AND THE PERMANENT DEFENCE FORCE OTHER RANKS REPRESENTATIVE ASSOCIATION

APPLICANTS

AND

THE OMBUDSMAN FOR THE DEFENCE FORCES AND OTHERS

RESPONDENTS

JUDGMENT of Mr. Justice Hedigan delivered on the 21st day of November 2013

1. The Office of the Ombudsman for the Defence Forces (hereafter the DFO) was established by the enactment of the Ombudsman (Defence Forces) Act 2004 (hereafter the 2004 Act). The Ombudsman provides military personnel with access to an independent and impartial external statutory authority for the resolution of complaints.

1.2 The applicants challenge the appointment of Patrick Anthony McCourt to the position of DFO. Mr. McCourt was appointed on 7th November, 2012, by the President of Ireland in accordance with s. 2(2) of the 2004 Act. Mr. McCourt is a former member of the Defence Forces, having served between 1963 and 2010. From February 2001, until his retirement in 2010, Mr. McCourt served in roles outside of the military chain of command, first, as Judge Advocate and, latterly, as Military Judge.

1.3 By order of Mr. Justice Peart dated 19th November, 2012, the applicants were granted leave to seek judicial review of the decision to appoint Mr. McCourt as DFO. The applicants seek declarations that Mr. McCourt is not lawfully entitled to hold the office because he is a former member of the Defence Forces, in consequence of which, they claim, the office remains vacant. They further seek a permanent injunction restraining Mr. McCourt from carrying out any of the statutory functions, duties or responsibilities of the DFO.

1.4 The issues that arise for determination by the Court in this case are as follows:

(i) Has the second named applicant herein sufficient *locus standi* to bring these proceedings?

(ii) Is a former member of the Defence Forces precluded from holding the office of Ombudsman?

(iii) Does the appointment of a former member of the Defence Forces as DFO give rise to an apprehension of bias?

(iv) Has the Minister acted *ultra vires* the Act of 2004, by deciding that the Office of DFO should be a part-time office?

2. Locus Standi of Second Applicant

I expressed some hesitation as to whether the respondents can argue this objection. In their notice of opposition, whilst the matter of *locus standi* is raised at paragraph 41, the objection is grounded upon the proposition that the second applicant does not have a sufficient interest in the matters raised herein to maintain a challenge to the Act. At the outset of the case, it was made plain by Senior Counsel for the respondents that their challenge on *locus standi* was not, in fact, based upon this but upon two other bases *i.e.* firstly, that the second applicant had no specific power under its governing Regulations to litigate, and secondly, that it was granted certain representative powers, but specifically excluded from these powers were matters relating to the "Constitution" and "organisation" of the Defence Forces. In his first affidavit herein, at paragraph 32, Mr. McCourt, the DFO, makes the statement that because the second applicant is neither a serving or former member of the Defence Forces, it is not entitled to make a claim to him under the 2004 Act, and thus has no interest in these proceedings. Martin Luby, in his affidavit at paragraph 37, makes exactly the same objection to the *locus standi* of the second applicant. Mr. McCourt, in his second affidavit at paragraph two, reiterates that the second applicant's channels of representation are defined by the Regulations. It seems to me that the respondents have not clarified and specified the grounds on which they base their *locus standi* argument. They have failed to do this in their notice of opposition. The fleeting reference made in the affidavits to differing grounds of objection do little to enlighten either. For this reason, I do not think that they have succeeded in establishing in a clear, unambiguous manner just what their objection is, and I therefore feel constrained to refuse them the right to raise the issue at this hearing.

3. Is a former Member of the Defence Forces precluded from holding the Office of DFO?

3.1 Section 2 of the 2004 Act, establishes the DFO and sets out the criteria for appointment to that office, which is made by the President on the recommendation of the Government pursuant to s.2 (2) of the 2004 Act. In accordance with s. 2(5) of the 2004 Act, a person appointed to be DFO shall hold office for "*such term as may be specified in the Instrument of appointment, which term shall not exceed seven years*". A person appointed to be DFO may be eligible for reappointment. In fact, the current and past DFO were appointed to terms of three years.

3.2 Section 2(6) of the 2004 Act, provides as follows:

"(6) If the person holding the office of the Ombudsman is—

(a) nominated as a member of Seanad Éireann, or

(b) elected as a member of either House of the Oireachtas or to the European Parliament, or

(c) regarded, pursuant to Part XIII of the Second Schedule to the European Parliament Elections Act 1997 , as having being elected to the European Parliament, or

(d) becomes a member of a local authority, that person shall thereupon cease to hold the office of Ombudsman"

3.3 Section 2(7) of the 2004 Act provides as follows:

"(7) A person who is for the time being entitled under the Standing Orders of either House of the Oireachtas to sit therein, or who is a member of the European Parliament or a local authority shall, while he or she is so entitled or is such a member, be disqualified from holding the office of Ombudsman."

3.4 Section 2(9) of the 2004 Act provides as follows:

"(9) A person who holds the office of Ombudsman shall not be a member of the Defence Forces or a civil servant."

3.5 It follows, therefore, that the following persons are specified as not entitled to hold the Office of Ombudsman:

(i) A member of Dáil Éireann;

(ii) A member of Seanad Éireann;

(iii) A member of the European Parliament;

(iv) A member of a Local Authority;

(v) A member of the Defence Forces;

(vi) A Civil Servant.

It is to be noted that no provision excludes a past member of any of these categories one to six.

3.6. It is argued by Mr. Maguire S.C. that I should look at this wording "shall not be a member of the Defence Forces" and find that "member" includes "former member" and should be thus understood so as to exclude any former member of the Defence Forces such as the first named respondent from the position of DFO.

3.7 The term 'member of the Defence Forces' is not defined by the 2004 Act. Some assistance may, however, be found in the Defence Act 1954, which provides at s. 19 as follows:

"The Permanent Defence Force shall consist of—

(a) persons who are appointed thereto as officers and are for the time being officers of the Permanent Defence Force,

(b) persons who are enlisted therein as men under section 53 or 54 and are for the time being men of the Permanent Defence Force,

(c) persons who, having enlisted therein as men under section 53 and having been transferred to the Reserve Defence Force under section 70, re-enter the Permanent Defence Force under subsection (3) of section 63 and are for the time being men of the Permanent Defence Force, and

(d) persons who are for the time being members of the Army Nursing Service."

"Man" is defined at s. 2(1) of the Defence Acts 1954 to 2011, as follows:

"A person who is for the time being a member of the Defence Forces, but does not include an officer."

It seems clear, therefore, that as both definitions refer to "for the time being", the phrase "member of the Defence Forces" must exclude those who are not presently serving officers or men. Thus, what, on its face, appears the clear meaning of s. 2(9) is further buttressed by the above definitions. Mr. Maguire has argued persuasively and with some ingenuity that other sections of the Act would be rendered absurd or tautologous were this apparently clear meaning to be accepted. He refers to s. 9(2), s. 4(7), s. 6(1) and section 6(2). In the first, he argues that "any member of the Defence Forces" must be interpreted to include former members because, otherwise, the DFO would be favouring a serving over a former member who was the subject of a complaint. Where, in the former case, he would be obliged to furnish an opportunity to comment on the complaint, in the latter, this would only arise where, in his opinion, it was appropriate to allow such an opportunity.

3.8 It seems to me that the court is being asked to introduce here the same condition as is sought to be introduced in section 2(9). The court is being asked to adopt an interpretation of this section so as to support another interpretation. It is, at the very least, an unconvincing argument. It is also unnecessary because s. 9(2) seems to make sense as it seems to clearly read. Serving members, in connection with complaints made against them, shall be given the right to comment thereon, whereas others, including former members, may, where appropriate, be given that opportunity. The serving member may be subject to disciplinary action within the Defence Forces, others are not. It is a difference of treatment that seems to me to make sense. As to s. 4(7), this section precludes a member of the Defence Forces from making a complaint against a Civil Servant about the same matter to both the general Ombudsman and the DFO. Civil Servant means one in the Department of Defence. The argument raised is that this restricts serving members to just one complaint, whereas former members, if not included in the phrase "member of the Defence Forces" are free to make a complaint to either or both. Again, it seems to me, that the distinction makes sense and is a choice open to the legislator. The serving member is part of a small cohort somewhat restricted as to what he may do with a complaint. The former member, on the other hand, is a civilian and may not be so restricted.

3.9 Finally, as to s. 6(1) and s. 6(2), these provisions refer to complaints made by a serving member against, *inter alia*, a former member and, correlatively, by a former against a serving member. The argument raised is that were the phrase "member of the

Defence Forces" to bear the meaning "serving" member of the Defence Forces as argued by the respondents in relation to s. 2(9), then it would be unnecessary for the legislator to have included the word "serving" since this meaning would have been clear without using that qualification. It seems to me that the use of "serving" to distinguish "former" in the context was necessary because a comparison was necessary to specify exactly the rights adhering to both. No comparison is made in s. 2(9) and therefore the possibility of confusion does not arise. It could, in s. 6(1) and s. 6(2) and thus, in the interests of caution and to avoid doubt, it was logical to qualify member with the word "serving". It might amount to an abundance of caution but the use of the word is not superfluous.

3.10 In my judgment, these other provisions of the Act to which I have been referred do not support the argument of the applicant that s. 2(9) must be interpreted so as to import a meaning that includes former members. Indeed, it seems to me that I am not so much asked to interpret this section, but rather to amend it. This, of course, I cannot do.

3.11 Nothing in the authorities opened to me support such a radical re-reading of the Statute as I am asked to make. I can readily accept that even where words seem clear on their face, a court should consider them in the context of the rest of the Statute, and thus do so in a holistic manner. See *The People (Attorney General) v. Kennedy* [1946] I.R. 517. Nonetheless, the clearer the meaning of the words, the harder the court will find it to interpret them in any way other than that which seems clear. Where they appear completely clear and nothing contrary appears in the Act, then the application of complex canons of construction are not needed. See *Crilly v. Farrington Ltd.* [2001] 3 I.R. 251.

3.12 It seems to me that the wording of s. 2(9) is clear as to its meaning. Only serving members are precluded from holding the office of DFO. A former member, such as the first respondent, is thus qualified to hold the office.

4. Does the appointment of a former member of the Defence Forces as DFO give rise to an apprehension of bias?
4.1 I think I can deal with this ground only in the context of the present case. In this regard, the legal principles are clear. Does there exist herein a reasonable perception by the first applicant of bias on the part of the first respondent in the hearing of his complaint? The applicant must be taken as a reasonable person apprised of all relevant information. His reasonable perception must be that he will not receive an impartial hearing of his complaint. See *Orange Communications v. Director of Telecommunications* [2000] 4 I.R. 159 at p. 252; *Bula Ltd. v. Tara Mines Ltd.* [2000] 4 I.R. 412 at pages 441 and 510, and *Kenny v. Trinity College Dublin* [2006] ILRM 241 at page 245. The only reason proffered for this fear is because the first respondent is a former member of the Defence Forces, and in particular, an Officer thereof. This is a proposition that is unsupported by any evidence or by any authority. It is based on an assertion that enlisted men or women in the Defence Forces have a reasonable fear that they would not have a fair, impartial hearing of their complaint from someone who had previously been an Officer in the Defence Forces. This proposition is dealt with in the uncontradicted evidence of Mr. Martin Luby at paragraphs 13 to 18 of his affidavit. He states there is no stark distinction between Officers and others. He states that there are a total of 8,034 enlisted personnel and a total of 1,279 Officers in the Defence Forces. He observes the existence of the Non-Commissioned Officer grade. He describes this as a highly regarded and important grade within the Defence Forces. This, at the very least, shows that there is not a division into two parts within the Defence Forces. He states further that between 2006 and 2012, there had been 194 cases referred to the DFO by enlisted personnel. Of these, 44 were made against Officers and 150 raised systemic complaints. In the same period, 57 complaints were made by Officers against other Officers. Mr. Luby also states that the largest elements of complaints from enlisted personnel are from Non-Commissioned Officers. Thus, he argues, and I accept, that it is unreal to suggest a simple division between Officers and all others in the Defence Forces. Whilst I can readily accept the existence of a healthy, dynamic tension between the different cadres comprising the Defence Forces, this is very far removed from raising a reasonable doubt per se in the minds of enlisted personnel that they could obtain a fair or impartial hearing from a DFO was formerly an Officer.

4.2 In the instant case, the first respondent, following a long and distinguished career in the Defence Forces, was appointed Judge Advocate in 2001, a post regarded as independent of the chain of command. In 2007, he was appointed by the President of Ireland as Military Judge of the Defence Forces. No issue has ever arisen concerning his independence in these twelve years. There is no concrete basis adduced whereby such a question might arise in connection with his holding the office of DFO. As to the argument raised that there might be complaints arising against him, thus creating a conflict, I consider such a claim to be unreal. He has been out of the chain of command for twelve years. Any complaints against him would thus be out of time. In regard to his role as Judge Advocate or Military Judge, these functions fall outside the remit of the DFO in accordance with s. 5(1)(b) of the 2004 Act.

4.3 As to the possibility of future DFOs being former members of the Defence Forces and the subject of complaint, s. 40(4) of the Act provides a 'coping' mechanism for this scenario, permitting such a DFO to delegate all relevant functions. I am satisfied this saving provision on its face would be adequate to assure a fair and impartial hearing for any complainant.

4.4 Thus, it seems to me that the appointment of a former Officer of the Defence Forces does not give grounds for fear of bias.

5. Has the Minister acted ultra vires in deciding that the Office of DFO should be a part-time office?
5.1 Section 2(3) of the 2004 Act provides as follows:

> "Subject to this Act, a person appointed [to the Office of Ombudsman] shall hold office on such terms and conditions as the Minister may, with the consent of the Minister for Finance, determine."

5.2 Section 4(1) of the 2004 Act further provides:

> "The Ombudsman shall be independent in the performance of his or her functions, and shall at all times have due regard to the operational requirements of the Defence Forces."

5.3 It should be noted, as the applicants have submitted, that the Ombudsman post created by the 1980 Act, the Ombudsman for Children post created by the Children Act 2002, and the Pensions Ombudsman post created by the Pensions Act 1990, all forbid the holding of any other office or employment in respect of which emoluments are payable. The DFO, by contrast, has no limitation on holding other office or other employment, save that any such employment or office should not be incongruent with the performance of the duties of office. The clear implication from this absence of limitation is that the legislator conceived of the office of DFO as potentially a part-time one because it provided that the holder might hold other offices or have other employment. However, from 2005 until 2012, the post of DFO was filled on a fulltime basis. The Minister made the decision, in 2012, at the time when the post was being advertised, to make it a part-time one of three days per week and remunerated at a rate of 60% of fulltime entitlements. It is envisaged that it might be necessary to work more than three days upon occasion. Flexibility in this regard is required of the DFO. No extra remuneration will be made, however, for working extra hours. Staffing levels in the office have remained the same and the office has been provisionally allocated a budget for 2013 of €450,000. This budgetary allocation was down from €510,000 for 2012. This decision, according to Mr. Martin Luby, was made on the basis of a decrease in the number of matters being referred to the DFO

coupled with an increase in the number of complaints being resolved internally by the Defence Forces without the need for reference to the DFO. He states that in 2009, 21% of complaints were resolved internally. By 2011, this number had risen to 46%. It is assumed this reduction in numbers is due to the development of a "body of caselaw" from the office of DFO.

5.4 All the other attributes of an independent office are preserved in this new part-time regime. It seems to me that there remains to any member of the Defence Forces the same independent arbiter of complaint that has existed since 2005. Nothing in the reduction of the post to part-time status should impact upon the DFO's ability to investigate and determine complaints as heretofore. If the need arises, provision is made for the DFO to sit additional hours, albeit without extra remuneration. I am satisfied that in making this decision, the Minister has acted within his powers under the Act.

5.5 To summarise, I cannot allow the issue of the *locus standi* of the second applicant to be argued because I do not believe it was raised in the notice of opposition with sufficient specificity. I consider that nothing precludes a former member of the Defence Forces from holding the post of DFO. The appointment of a former member of the Defence Forces does not give rise to a reasonable apprehension of bias. Finally, I consider that the Minister did not act *ultra vires* in deciding that the office of DFO should be a part-time one.

The reliefs sought must be refused.