

THE HIGH COURT

[2021] IEHC 672
[2019/935 JR]

BETWEEN

NIALL ROBINSON

APPLICANT

AND

**THE MINISTER FOR DEFENCE,
THE ATTORNEY GENERAL AND IRELAND**

RESPONDENTS

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 22nd day of October, 2021

Issues

1. In these proceedings the applicant is seeking to quash a decision of Brigadier General Rory O'Connor, General Officer Commanding of the Air Corps (the GOC) of 26 September 2019, which decision was made in response to an application of 24 September 2019 of the applicant, and two other persons who are not involved in the within proceedings.

Background

2. The applicant is a sergeant in the Defence Forces assigned to the Air Corps as a Senior Airborne Radar Operator (SARO) Instructor. He has worked with the Defence Forces for in excess of 21 years.
3. On 24 July 2019 the Defence Forces issued a competition document in respect of potential applications for promotion to certain positions within the Defence Forces. Under s.84 of the Defence Act 1954, the Minister, or a duly authorised officer may promote or reduce the rank of a soldier. Under the Defence Forces Regulations of 21 November 2007 the Defence Forces are entitled to *inter alia*, set out essential qualifications required for eligibility for interview for promotion as occurred in the instant matter.
4. The salient provisions for the purposes of this application are recorded in the circular Administrative Instruction (AI) A. 10, para.5, as follows:
 - “5. Essential Qualifications to be Eligible for Interview for Company Sergeant.
 - a. Qualifying Course
 - (1) Have successfully completed a Senior NCO Course approved by the General Staff.
 - OR
 - (2) Have reached a satisfactory standard of training as certified by the corps director concerned.”
5. The within applicant made an application pursuant to the foregoing in September 2019, and such application for promotion was not recommended by his Commanding Officer (CO). It appears from a perusal of the statement of grounds, which was verified by an affidavit of the applicant of 16 October 2019, that the CO advised the applicant that the only reason for his decision was that the applicant had not undertaken a Non Commissioned Officer (NCO) course, and the GOC would not certify any other level of training.

6. On 27 August 2019 Commandant O'Grady wrote to the CO to the effect that the applicant was not eligible as he did not meet the essential criteria.
7. On 23 September 2019 the applicant pursued independent redress of wrongs proceedings within the Defence Forces complaints process in respect of the decision of 27 August 2019, and the applicant was ultimately unsuccessful.
8. Independently of the formal process within the Defence Forces the within applicant and two other persons wrote to the GOC by letter of 24 September 2019, seeking clarification that a satisfactory level of training was reached by such persons, notwithstanding that they had not completed a senior NCO course.
9. This letter was sent to the GOC by Commandant Byrne, together with a cover letter of Commandant Byrne in which he expressed the view that the completion of a senior NCO course was an essential requirement for promotion to the rank of flight sergeant, and therefore, the applicant should not be permitted to enter the promotion competition.
10. The applicant at the time was unaware of the cover letter or content thereof which came to his attention subsequent to the impugned decision of 26 September 2019.

Proceedings

11. The applicant secured leave on 16 December 2019 to pursue the within claim on foot of the statement required to ground the application for judicial review of 16 December 2019. Although the applicant has in that statement of grounds sought interim and/or interlocutory injunction relief, no such relief was afforded then, or since, and it is now acknowledged that an injunction does not arise.
12. In the statement of grounds the applicant complains that he had reached a satisfactory standard for promotion, and that his individual level of training was not considered, which the applicant asserts is a breach of fair procedures.
13. It is also asserted that the cover letter of Commandant Byrne to the GOC aforesaid was taken into account by the GOC without informing the applicant, and this comprised a further breach of fair procedures by taking into account irrelevant factors.
14. The applicant argues that the GOC adopted a fixed and inflexible policy and unlawfully fettered his discretion in or about the application of para. 5a(2) (set out above) which comprised an error of law, and was therefore irrational and/or unreasonable. In this regard in para. E13 of the statement of grounds it is asserted that the GOC had determined that no training other than the completion of a senior NCO course is satisfactory for eligibility for promotion to the rank of flight sergeant. The argument set forth by the applicant thereafter in the statement of grounds is premised on this asserted determination of the GOC.
15. Finally, at para.E21 of the statement of grounds it is asserted that the promotion competition gave rise to an expectation, legitimately held by the applicant, that his eligibility for promotion would be assessed in accordance with the criteria set out in the

A1 A.10 and promotion competition documents, and that the applicant's extensive training and experience would be considered in determining whether or not he was eligible for promotion, regardless of the fact that he had not completed a senior NCO course. It is stated that in determining that the applicant was not eligible purely on the basis that the applicant had not completed a senior NCO course, the GOC acted in a manner contrary to the legitimate expectation of the applicant.

16. A statement of opposition of 21 December 2020 was filed on behalf of the respondents denying the allegations and assertions of the applicant. The statement of opposition runs to 44 paragraphs.
17. During the course of oral arguments, the respondent made submissions, for example, that the applicant, by virtue of the processes within the Defence Forces cannot make an application to the GOC without an accompanying letter of his CO and there is no input from the applicant in respect of that letter. Nevertheless, such a line of defence has not been incorporated within the statement of opposition.
18. I am satisfied that in accordance with O.84 r.22(5) of the Rules of the Superior Courts (RSC) these additional arguments should not be entertained by the Court. Further, any argument of the applicant not incorporated within the leave order of 16 December 2019, or the statement of grounds, is not before the Court as per O.84 r.20(3) RSC.
19. The applicant lays particular emphasis on para. 11 of the statement of opposition aforesaid. Therein it is admitted that the applicant's letter of 24 September 2019 was accompanied by a cover letter of the applicant's CO, Commandant Byrne, indicating his view that the completion of a senior NCO course is an essential requirement for promotion to the rank of flight sergeant. This first sentence within para. 11 then concludes with "which the GOC agreed with".
20. The paragraph continues: "Therefore, the GOC refused to certify the Applicant as having reached a satisfactory standard of training to be eligible for promotion to the rank of Flight Sergeant." The applicant argues that this is an admission that the GOC relied on and based his decision on the views of Commandant Byrne.
21. I cannot agree with this assertion on behalf of the applicant by reason of the inclusion of "which the GOC agreed with" in the paragraph.
22. I am further satisfied that para.11 of the grounding affidavit of Lieutenant Colonel Patrick Ridge of 21 January 2021, verifying the statement of opposition, stating that the GOC considered the advice from the CO, cannot be construed as an admission that the GOC did anything other than consider the advice of the CO in coming to his decision.

The impugned decision

23. In the applicant's letter of 24 September 2019 it is recorded that the applicant and two other persons have applied for an interview for promotion to flight sergeant SARO group three tech, and have received clarification that they meet eligibility requirements save for para.5a, and therefore cannot be deemed eligible for interview.

24. The three parties sought clarification that they had reached a satisfactory standard of training as certified by the GOC as per para.5a(2). It was requested that the letter be treated as a matter of urgency because the closing date for submissions was 27 September 2019.

25. In addition to the foregoing the following paragraph is included:

“The current F/Sgt. Senior SARO Instr 101 Sqn has completed 31 years’ Service within the Defence Forces and has signalled his intention to leave the DF in the near future.

If no SARO Sgt is afforded the opportunity to sit interview for promotion for this essential operational position it could potentially be left vacant for up to 5 years under the current promotion competition rules.”

26. In the response from the GOC of 26 September 2019, the GOC records that the essence of the application of 24 September 2019 is a request to be certified as having met a satisfactory standard of training which would permit the three sergeants to enter the promotion competition and compete for the rank of flight sergeant, notwithstanding that they have not completed a senior NCO course.

27. Eligibility requirements are set forth in the letter including the aforesaid para. 5. The letter acknowledges that the personnel meet the additional requirements but states that they do not meet the essential qualifications in Annex Y. The letter states:

“They have NOT completed a Senior NCO Course, nor have they been certified as having reached a satisfactory standard of training. It is my policy, that apart from those instances where the exigencies of the service require it, all personnel should complete the Senior NCO Course prior to promotion to senior NCO rank.”

28. At para. 4 the letter details the Brigadier General’s intention to run an Air Corps senior NCO course, and also includes the following sentence:

“I am cognisant of the valuable input of the SAROs in supporting and enabling the work of the Air Corps and I appreciate their high level of training and their specialised skill set.”

Jurisprudence

29. There is no great controversy between the parties as to the applicable jurisprudence to be applied, save for:

- (a) The respondent relies on the Supreme Court judgment of *Rowland v. An Post* [2017] IESC 20 suggesting that the courts are particularly slow to interfere with an employer/employee relationship. As indicated to counsel for the respondent, I cannot accept the meaning contended for by him in respect of *Rowland*. That decision related to the courts being particularly slow to interfere with an ongoing process, unless it had gone irremediably wrong. In the instant circumstances, as

indicated by the respondent, the communication of 24 September 2019 was not in fact in accordance with the Defence Force process, and I am satisfied that in any event such process did conclude with the response of 26 September 2019.

- (b) The respondent has argued that the case of *Abrahamson v. Law Society of Ireland* [1996] 1 IR 403, a decision of Mc. Cracken J. in the High Court, where it was held that the concept of legitimate expectation applies to procedures, does not apply in the instant circumstances because Abrahamson involved a change in circumstances. However, it does appear to me that the principles applicable to the concept of legitimate expectation as set out by Mc. Cracken J. in his judgment do not incorporate a rule or principle that legitimate expectation in respect of procedures will only apply if there was a change of circumstances. Furthermore, insofar as the respondent argues that there is a public policy interest in national security which overrides any legitimate expectation, a point considered by Mc. Cracken J., this argument cannot now be raised by the respondent, same not having been incorporated within the statement of opposition.
- (c) The respondent relies on two decisions of the Labour Court to the effect that where an interview board is properly constituted, and conducted its business in line with accepted good practice, the Labour Court in the absence of unfairness and manifest irrationality in the result will not seek to undertake its own assessment of the candidates. In fact, there is no question of the applicant asking this Court to make an assessment of the eligibility of the applicant, and as there is no evidence of a consideration of the superior court jurisprudence within the decisions identified. I am not satisfied that such decisions assist this Court's consideration of the matter.
30. In *Breen v. Minister for Defence* [1994] 2 IR 34, a decision of the respondent was considered wrong because it did not take into account the applicant's individual circumstances. If it had it would have come to a different conclusion.
31. *Carrigaline Community TV Broadcasting & Ors. v. Minister for Transport & Ors.* [1997] 1 I.L.R.M. 241 concerned the granting of a broadcasting licence where the Minister had determined that only MMDS systems would be eligible. In his judgment, Keane J. in the High Court considered *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] IR 642 to the effect that the court will interfere if the conclusion of a tribunal is such that no reasonable authority could come to such a conclusion, insofar as it flies in the face of fundamental reason and common sense.
- 31.1 The decision also found that when exercising a discretion, a party must take into account matters expressly, or, implication ought to be taken into account. Insofar as a policy guiding such discretion is concerned, there would be a wide range of circumstances where on the one end the discretion would not be considered to be fettered, and the other, the discretion would be considered to be fettered.
- 31.2 The judgment did approve of policies to achieve consistency provided they were not applied in an inflexible manner resulting in a countervailing injustice. The Court

acknowledged there is a difficulty in balancing competing values in determining whether a policy fetters or not a discretion. The Court said the decision maker must not refuse to listen.

32. In *Fairleigh Limited v. Temple Bar Renewal Limited* [1999] 2 IR 508 Morris J. in the High Court found that guidelines cannot fetter a discretion, and consideration must be given to the applicant's individual circumstances. That judgment also considered Kelly J.'s decision in the High Court in *Mishra v. Minister for Justice* [1996] 1 IR 189 which held that there was nothing to forbid a discretionary power being guided by means of policy, which policy must not disable discretion in individual cases.
33. Similar jurisprudence arises from *McAlister v. Minister for Justice* [2003] 4 IR 35 and *Holland v. Governor of Portlaoise Prison* [2004] IEHC 208, being two further High Court judgments.
34. In *McCarron & Ors. v. Kearney & Ors.* [2010] IESC 28 it was held that a discretion must be exercised properly in each individual case, and it is unlawful to lay down a rigid policy from which the decision maker does not permit himself to depart, and that a rigid inflexible policy is not permitted.

Application of the law to the current circumstances

Fixed and inflexible policy

35. I am satisfied that in reviewing the decision of the GOC of 26 September 2019, same must be looked at in context. In particular, regard must be had to the query which arose in the letter of 24 September 2019.
36. The decision stated that it was the author's policy that apart from those circumstances where the exigencies of the service require it, all personnel should complete a senior NCO course prior to promotion.
37. In this regard the statement of grounds does not in fact mention or otherwise consider "the exigencies of the service", notwithstanding that it does appear that the request of the applicant of 24 September 2019 had its sights on this policy. The letter addresses "the exigencies of the service" insofar as it refers to the potential retirement of the existing flight sergeant, and the potential consequences of a vacancy of such an essential operational position.
38. Paragraph E13 of the statement of grounds incorrectly records the decision of 26 September 2019 by failing to make any reference whatsoever to the actual policy identified. It appears to me that this lapse is such that it is not possible in the context of the within proceedings to determine whether or not the policy actually recorded could be considered a rigid inflexible policy or not.
39. Furthermore, it is clear from the letter of 24 September 2019 that there is no submission as to how the training and experience of the three personnel involved could be certified, nor does it highlight any differential in training as between the three applicants. In this regard therefore it appears that the application made was on the basis that the training

and experience speaks for itself without requiring additional submission or argument. There is no engagement as to the possibility of such training and experience being of a standard which might equate or closely mirror the senior NCO course.

40. For the reasons above it does not appear to me to be the case that the applicant has discharged the burden on him to establish that it was a fixed and inflexible policy operated by the GOC in the current circumstances, or that the decision might be considered irrational or unreasonable.

Irrelevant considerations

41. Insofar as it is complained that the GOC followed or was otherwise influenced by the CO's cover letter there is no evidence in the decision of 26 September 2019 to support such a contention. Such decision refers to the GOC's policy.
42. Furthermore, it is clear from the statement of grounds that in advance of the communication of 24 September 2019 the applicant was aware of his CO's views and indeed the fact that the GOC shared such views as to the necessity of having a senior NCO course (although clearly the NCO's views were tempered by "...apart from those instances where the exigencies of the service require it..."). In these events I am not satisfied that the applicant has established that the GOC took into account irrelevant considerations.

Individual circumstances

43. In respect of the applicant's complaint that his individual circumstances were not taken into account there is no distinction in the letter of 24 September 2019 as to any differential in the individual circumstances of any of the three applicants. Nor as aforesaid was there any representation made by the applicant as to his training.
44. Furthermore, at para.4 of the decision, the GOC states, relative to SARO's position, "I appreciate their high level of training and their specialist skill set."
45. Accordingly, in the context of the matter as it comes before the Court it does not appear to me that the applicant has discharged the burden of establishing that his circumstances were not taken into account.

Legitimate expectation

46. The applicant argues that under the principles of legitimate expectation, relative to procedures, the argument is to the effect that as there is an "or" between para.5a(1) and 5a(2). Paragraph 5a(2) by definition should be otherwise than a senior NCO course requirement, and should in fact relate to a standard referable to the training and experience of the individual applicant's experience as opposed to referable to exigencies of the service.
47. Given both the content of the application by letter of 24 September 2019, in particular the only argument raised being that of the possible forthcoming retirement of the current flight sergeant, and further given the fact that the concept of the "exigencies of the service require it" does not arise at all on foot of the within statement of grounds, the

applicant has not discharged the burden of establishing that it was in fact a breach of any legitimate expectation in respect of procedures.

Conclusion

48. The reliefs claimed are refused.