APPROVED **[2023] IEHC 586**

THE HIGH COURT
JUDICIAL REVIEW

2023 No. 856 JR

BETWEEN

JASON WHELAN

APPLICANT

AND

MINISTER FOR TRANSPORT

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 10 November 2023

INTRODUCTION

1. These proceedings concern the promotion of a civil servant to the position of principal officer within the Department of Transport. The promotion had been subject to a probationary period of twelve months. In the event, an official within the Department purported to extend the duration of the probationary period by a further four weeks. Thereafter, following the exhaustion of a *non-statutory* review process, the Minister for Transport purported to terminate the appointment and to revert the Applicant to his previous grade of assistant

principal officer. This was done some six months *after* the expiration of the (extended) probationary period.

2. This judgment addresses the legality of these actions by the Department and the Minister. In particular, it considers the implications of Directive (EU) 2019/1152 on transparent and predictable working conditions. This Directive has been transposed into domestic law by way of amendments to the Terms of Employment (Information) Act 1994. Section 6D of that Act now provides that the probationary period of a public servant shall not exceed twelve months. This judgment also considers the provisions of the Civil Service Regulation Act 1956 which govern the appointment and promotion of senior civil servants.

LEGISLATIVE FRAMEWORK

SECTION 7 OF THE CIVIL SERVICE REGULATION ACT 1956

3. The Civil Service Regulation Act 1956 requires that employment decisions in respect of senior civil servants must be taken at either Ministerial or Governmental level. This requirement is achieved by providing that employment decisions must be made by the "*appropriate authority*" as defined under Section 2 of the Act. The "*appropriate authority*" in relation to a civil servant who is of the grade of principal officer is the relevant Minister. In this case, the relevant Minister is the Minister for Transport. The requirement that employment decisions be made by the Minister personally represents an exception to the *Carltona* principle, i.e. the principle that certain decisions may be made by an official acting as the *alter ego* of the Minister. The *Carltona* principle may be displaced where, as here, it is clear that the legislative intent is

that the decision should be made by a Minister personally: *A.S.A. v. Minister for Justice and Equality* [2022] IESC 49 (at paragraph 19).

4. The power to appoint a civil servant to a position in a probationary capacity is provided for under the Civil Service Regulation Act 1956. The legal effect of a probationary period is that the protection against dismissal, which would ordinarily apply, is temporarily suspended. This is to allow the appropriate authority a fixed period of time within which to assess the probationer's performance. Section 7 of that Act allows for the termination of the appointment in the event that the appropriate authority is satisfied that the civil servant has failed to fulfil the conditions of probation. In circumstances where, as in the present case, the probationer is an existing civil servant who had been *promoted* to the probationary post, then he or she will revert to the same or equivalent grade as their previous position in the civil service. Put otherwise, the termination of their appointment does not result in their dismissal but rather their reversion to the same or equivalent grade as before.

5. Insofar as relevant to the Applicant's circumstances, Section 7 of the Civil Service Regulation Act 1956 provides as follows:

> "Where, in respect of a civil servant who has been appointed to an established position (in this section referred to as his probationary position) and who under his conditions of service is serving in a probationary capacity, the appropriate authority is, at any time during the civil servant's probationary period or such (if any) extension thereof as the appropriate authority may from time to time fix, satisfied that he has failed to fulfil the conditions of probation attaching to his probationary position, then, subject to section 4 (where applicable), the following provisions shall have effect—
>
> […]
>
> (b) if the civil servant held, immediately prior to his appointment to his probationary position, an established position (in this paragraph referred to as

> his previous position), the appropriate authority shall terminate his appointment to his probationary position and, in that event, the civil servant may, if the Minister consents, forthwith be appointed to an established position (being a position which is, either, (i) in the same grade as that of his previous position, or (ii) in a grade or rank which, in the Minister's opinion, is equivalent to or lower than the grade of his previous position) to be designated by the Minister;".

6. As appears, the appropriate authority has an implicit power to extend the probationary period: "*such (if any) extension thereof as the appropriate authority may from time to time fix*". It should be emphasised that this power resides with the appropriate authority alone. It is not subject to the *Carltona* principle. Accordingly, only the Minister could decide to extend the probationary period. As will be explained shortly, this limitation assumes a crucial significance in the present proceedings.

7. One of the principal areas of disagreement between the parties is in respect of the duration of the probationary period. More specifically, there is a dispute as to whether it is permissible to extend the probationary period beyond the maximum period of twelve months prescribed under Section 6D of the Terms of Employment (Information) Act 1994. This section was introduced, with effect from 16 December 2022, in order to implement Directive (EU) 2019/1152 on transparent and predictable working conditions ("***Working Conditions Directive***"). The Minister contends that he has no discretion to extend the probationary period beyond twelve months. For the reasons explained at paragraphs 24 to 38 below, this is the correct interpretation.

8. The Minister, *qua* appropriate authority, may terminate the appointment at any time during the civil servant's probationary period. Put otherwise, the Minister does not have to await the expiration of the probationary period *before* deciding

to terminate the appointment. If, for example, the Minister has concluded at an early stage that the probationer has failed to fulfil the conditions of probation, the Minister may bring the appointment to an end.

9. Crucially, however, the Minister cannot terminate the appointment *after* the expiration of the probationary period. This is because the power to terminate the appointment is only exercisable "*during*" the probationary period. The appropriate authority must not only have made a decision during the civil servant's probationary period that the probationer has failed to fulfil the conditions of probation attaching to his probationary position, but the appropriate authority must also have implemented that decision by terminating the appointment prior to the expiration of the probationary period.

10. This follows on both a literal and a purposive interpretation of Section 7 of the Civil Service Regulation Act 1956. The statutory language makes it clear that the requisite decision must have been reached "*during*" the probationary period. Once that decision has been reached, the appropriate authority is obliged ("*shall*") to terminate the appointment. The purpose of the probationary period is to allow the appropriate authority a reasonable time during which to assess performance whilst ensuring that the civil servant is not subject to "*prolonged insecurity*" (to borrow the language of the Working Conditions Directive). The logic being that the appointment is only precarious until such time as the probationary period has expired. It is not necessary that there be a positive decision to "*confirm*" the appointment. Rather, the appointment takes effect upon the expiration of the probationary period (unless, of course, the appointment has previously been terminated).

11. An interpretation of Section 7 of the Civil Service Regulation Act 1956 which allowed an appropriate authority to lawfully terminate an appointment *after* the expiration of the probationary period would leave the civil servant in limbo. This would give rise to precisely the type of "*prolonged insecurity*" which the Working Conditions Directive is intended to prevent. It would render nugatory the introduction of a maximum probationary period.

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12. For completeness, it is necessary to refer to the judgment of the High Court (Blayney J.) in *Whelan v. Minister for Justice* [1991] 2 I.R. 241. This judgment addresses the interpretation of Section 7 of the Civil Service Regulation Act 1956. On the facts of *Whelan*, the appropriate authority, i.e. the Minister for Justice, had not reached a decision on the probationer's performance until *after* the probationary period had already expired. The High Court held that, in the circumstances, the Minister could not lawfully terminate the appointment. The High Court further held (at page 246) that a probationer civil servant who has completed his probationary period without being found to be unsatisfactory is entitled to continue on in his appointment once the probationary period is over. This holding coincides with the interpretation of the section posited under the previous heading above.

13. The High Court also rejected an argument to the effect that the probationary period must be "*deemed*" to have been extended as the applicant had never been formally appointed to the position. The High Court held that as the only extension referred to under the section is such "*as the appropriate authority may from time to time fix*", there could be no extension unless the Minister fixed one.

14. The judgment in *Whelan* contains *obiter dicta* to the effect that there is no requirement that the termination must occur *prior* to the expiration of the probationary period:

> "It seems to me that there are two separate parts to section 7 [of the Civil Service Regulation Act 1956]. The first is that the appropriate authority must be satisfied during the period of probation that the probationer has not fulfilled the conditions of his probation; the second is that the appropriate authority, on being so satisfied, shall terminate the services of the civil servant. But there is no requirement that the termination shall occur prior to the expiration of the period of probation. It seems to me, accordingly, that the section envisages that the appropriate authority, having been satisfied during the period of probation that the particular civil servant had failed to fulfil the conditions of his probation, would then have a reasonable time after the period had expired in which to terminate his services."

15. This observation is *obiter* in circumstances where the rationale of the judgment is that the Minister had failed to reach the requisite decision in respect of the probationer's performance within the probationary period. It followed that the Minister could not lawfully terminate the appointment, and thus it was not necessary for the High Court to make a finding on the *timing* of any termination relative to the expiration of the probationary period.

16. These *obiter dicta* do not represent a correct statement of the current law. The context has changed as a result of the enactment of the Working Conditions Directive. As discussed under the previous heading, an interpretation of Section 7 of the Civil Service Regulation Act 1956 which allowed an appropriate authority to lawfully terminate an appointment *after* the expiration of the probationary period would give rise to precisely the type of "*prolonged insecurity*" which the Directive is intended to prevent.

SECTION 5A OF THE CIVIL SERVICE REGULATION ACT 1956

17. There was some discussion at the hearing before me as to whether the insertion of a new section, Section 5A, into the Civil Service Regulation Act 1956 may have affected the interpretation of Section 7. Section 5A was introduced by the Civil Service Regulation (Amendment) Act 2005.

18. Section 5A of the Civil Service Regulation Act 1956 provides as follows:

> "(1) Notwithstanding any other provision of this Act, a person may initially be appointed to be an established civil servant on the basis of a probationary contract.
>
> (2) Where a civil servant to whom subsection (1) refers completes the probationary period concerned to the satisfaction of the appropriate authority, that civil servant shall be appointed as an established civil servant and subsection (1) shall cease to apply to that appointment.
>
> (3) Where a civil servant to whom subsection (1) refers does not complete the period of the probationary contract to the satisfaction of the appropriate authority, the provisions of section 7 shall apply.
>
> (4) Nothing in this section shall prevent the termination of an appointment under subsection (1) in accordance with the terms and conditions of the probationary contract prior to the expiry of the term of the contract."

19. Counsel on behalf of the Minister submitted that it is now a "*precondition*" to appointment that the probationer completes the probationary period to the satisfaction of the appropriate authority. Put otherwise, there must be a positive finding by the appropriate authority that the probationer has performed satisfactorily. The appointment cannot become permanent by default. It is further submitted that the judgment in *Whelan v. Minister for Justice* must be treated with caution having regard to this legislative amendment. It will be recalled that the High Court in *Whelan* had made a finding to the effect that a

probationer civil servant, who has completed his probationary period *without* being found to be unsatisfactory, is entitled to continue on in his appointment once the probationary period is over.

20. With respect, the Minister's reliance on the provisions of Section 5A is misplaced. As appears from the wording of subsection (1), Section 5A is addressing the specific contingency of the *initial appointment* of a person to be an established civil servant, i.e. it is concerned with a new entrant. The view had been taken, prior to the Civil Service Regulation (Amendment) Act 2005, that an entrant to the civil service could not be appointed to an "*established position*" on a probationary basis. This had led to the practice of entrants being appointed initially on a non-established capacity for a probationary period, and thereafter being appointed to an "*established position*". The new section clarifies matters by confirming that the initial appointment to an "*established position*" can be on a probationary basis.

21. The distinctive position of a new entrant is acknowledged in the "*Guidelines on the management of probation in the Civil Service*" which have been exhibited by the Applicant.

22. Section 5A has no application to the circumstances of the present case where the Applicant, at the time of his appointment as principal officer, had been an established civil servant for many years and the appointment was by way of promotion.

23. For completeness, it should be observed that it is not immediately apparent that Section 5A is intended to override the provisions of Section 7 by introducing a requirement for a "*positive*" act or decision confirming a probationer's appointment. The very fact that Section 5A states that the provisions of

Section 7 apply where the probationer does not complete the period of the probationary contract to the satisfaction of the appropriate authority suggests that the two sections are of a piece. At all events, Section 5A must now be read in the light of the Working Conditions Directive. As explained earlier, an interpretation of the Civil Service Regulation Act 1956 which allowed an appropriate authority to lawfully terminate an appointment *after* the expiration of the probationary period would give rise to precisely the type of "*prolonged insecurity*" which the Working Conditions Directive is intended to prevent.

MAXIMUM DURATION OF PROBATIONARY PERIOD

24. Directive (EU) 2019/1152 on transparent and predictable working conditions ("***Working Conditions Directive***") obliges Member States to ensure that, where an employment relationship is subject to a probationary period as defined in national law or practice, that period shall not exceed six months.

25. The rationale for the imposition of a maximum duration on probationary periods is explained as follows at Recital 27 of the Working Conditions Directive:

> "Probationary periods allow the parties to the employment relationship to verify that the workers and the positions for which they were engaged are compatible while providing workers with accompanying support. An entry into the labour market or a transition to a new position should not be subject to prolonged insecurity. As established in the European Pillar of Social Rights, probationary periods should therefore be of a reasonable duration."

26. The Working Conditions Directive provides that Member States may, on an exceptional basis, provide for probationary periods longer than six months where this is justified by the nature of the employment or in the interest of the worker. The recitals to the Directive indicate that a longer probationary period may,

exceptionally, be justified for public service posts by the nature of the employment.

27. Member States were obliged, pursuant to Article 21 thereof, to take the necessary measures to comply with the Working Conditions Directive by 1 August 2022. As to transitional provisions, Article 22 expressly provides that the rights and obligations set out in the Directive shall apply to all employment relationships by 1 August 2022.

28. In the event, there was a delay on the part of the Irish State in transposing the provisions of the Working Conditions Directive into domestic law. The Directive was, ultimately, implemented on 16 December 2022 by way of a statutory instrument, namely the European Union (Transparent and Predictable Working Conditions) Regulations 2022 (S.I. 686 of 2022). The obligation to prescribe the maximum duration of probationary periods was achieved by way of an amendment to the Terms of Employment (Information) Act 1994. More specifically, a new provision, Section 6D, was inserted into the Act.

29. The Irish State has chosen, in its transposition of the Working Conditions Directive, to draw a distinction between employees in general and public servants. Insofar as employees in general are concerned, the maximum probationary period is fixed at six months. This can, however, on an exceptional basis, be longer where such longer period (a) does not exceed twelve months, and (b) would be in the interest of the employee. The position in respect of public servants is less nuanced: Section 6D(2) simply provides that the probationary period of a public servant shall not exceed twelve months. It is apparent that the Irish State has sought to rely on the discretion, conferred by Article 8(3) of the Working Conditions Directive, to provide for a longer

probationary period for public servants than the default period of six months prescribed under the Directive. This extended maximum period applies to public servants universally. There is no requirement under the domestic legislation to demonstrate, on a case by case basis, that an extended period is in the interest of the individual public servant. Crucially, there is no provision to extend the period beyond twelve months.

30. The distinction between employees in general and public servants is also observed in respect of the transitional provisions under the domestic legislation. Express provision is made for the contingency where, on the commencement date of 16 December 2022, an employee *other than a public servant* is subject to a probationary period which exceeds six months, and the employee has completed at least six months. A longstop date of 1 February 2023 is prescribed by reference to which the probationary period must expire.

31. It follows from the fact that public servants are expressly excluded from these transitional provisions that the twelve month maximum duration had immediate effect on 16 December 2022. This had the consequence that, in the case of any public servant who had already completed twelve months or more probation, their probationary period expired by operation of law on 16 December 2022. There was no provision made for tapering off, whereby a probationary period in excess of twelve months might remain in force after 16 December 2022 subject to a longstop date.

32. For completeness, it should be noted that provision is made under Section 6D(5) for the extension of a probationary period where an employee is absent from work for specified reasons such as maternity leave, parental leave or sick leave.

Counsel on behalf of the Minister confirmed that this provision is not relied upon in the present case.

33. The parties are in disagreement as to the correct interpretation of Section 6D of the Terms of Employment (Information) Act 1994, and, in particular, as to its interaction with Section 7 of the Civil Service Regulation Act 1956.

34. The Applicant submits that the "*entire purpose*" of Section 6D is to benefit employees and that it is "*inconceivable*" that it should be read in a manner that "*imposes a definitive time-limit on a probationary period*" which operates to deny employees their rights and entitlements. The Applicant further submits that the "*broad discretion*" afforded to the Minister under Section 7 of the Civil Service Regulation Act 1956 has not been overridden or implicitly repealed by the introduction of Section 6D of the Terms of Employment (Information) Act 1994. Rather, on the Applicant's argument, the two sections operate in parallel as follows:

> "In the normal course, section 6D of the 1994 Act requires that a probationary period not exceed 12 months. However, where the Minister requires an extension of a probationary period in order that a fair and lawful assessment of a probationer's performance can be made, that can be facilitated by section 7 of the 1956 Act. The exercise of the power to extend a probationary period cannot be abused or [used] to circumvent section 6D of the 1994 Act because it must be exercised lawfully and rationally."

35. With respect, these submissions are not well founded. The meaning and effect of Section 6D of the Terms of Employment (Information) Act 1994 is clear and unambiguous. It is expressly stated that the probationary period of a public servant shall not exceed twelve months. No provision is made for any discretionary extension of this period. (The exception for maternity leave, parental leave or sick leave does not arise on the facts). This stands in

contradistinction to the approach taken under the same section in respect of employees in general. As explained above, provision is made for the extension of the default probationary period of six months to a maximum period of twelve months. It is apparent from the absence of a similar provision in respect of a public servant that there can be no extension beyond the default probationary period of twelve months applicable to that class of employees.

36. It is a principle of statutory interpretation that except insofar as the contrary intention appears, the general gives way to the specific. This principle is sometimes referred to by the Latin maxim *generalia specialibus non derogant*. Here, the appropriate authority is conferred, under the Civil Service Regulation Act 1956, with a general discretion to extend the probationary period of a public servant. This general discretion is now subject to a specific statutory provision which fixes the maximum duration of a probationary period for a public servant at twelve months. The proper interpretation of the interaction between the two provisions is that the general provision yields to the specific provision. On this interpretation, there is no conflict between the two provisions. The appropriate authority retains discretion to extend a probationary period, subject to an outer limit of twelve months.

37. The Applicant asks, rhetorically, why has there been no amendment to Section 7 of the Civil Service Regulation Act 1956 if the intention was to override the discretion to extend the probationary period. The answer to this rhetorical question is that, given the unequivocal statement under Section 6D that the probationary period of a public servant shall not exceed twelve months, it was not necessary to amend each and every statutory provision which refers to the probationary period of a public servant or a civil servant. It is apparent from the

definitions under the Terms of Employment (Information) Act 1994 that it is intended to apply to civil servants and public servants. A person in this class is deemed, under Section 1 thereof, to be an employee employed by the State or Government for the purposes of the Act. It follows that the Civil Service Regulation Act 1956 has to be read in the light of the Terms of Employment (Information) Act 1994.

38. It is correct to say, as the Applicant does, that the Working Conditions Directive affords the Member States discretion to provide for longer probationary periods, on an exceptional basis, where justified by the nature of the employment or in the interest of the worker. This discretion has to be seen in the context of the default position whereby the probationary period is not to exceed *six* months. Moreover, in order to avail of this discretion, a Member State must make express provision for same in domestic law. The Irish State has exercised the discretion afforded to it under the Directive by creating a blanket extension in the case of all probationer public servants. Domestic law does not allow for an extension beyond the twelve month period prescribed.

FACTUAL BACKGROUND

39. The Applicant was promoted to the position of principal officer within the Department of Transport in what was described as an "*acting capacity*". The appointment was effective from 13 December 2021.

40. The offer of appointment was made by letter dated 23 November 2021. The letter reads, in relevant part, as follows:

> "The promotion will be subject to you serving in an acting capacity for a period of not more than one year. If during that year it appears that you are unlikely to prove suitable for final appointment, this period may be terminated at any time.

> You shall not be finally appointed as Principal Officer unless you have proved satisfactory during the acting period as regards health, conduct, work performance and efficiency generally. If you do not fulfil the conditions, the appointment will be terminated and no extensions will be allowed. In that event you will be appointed to a position in your former grade."

41. The Applicant signed a form of acceptance which indicated his agreement to a number of conditions. These included, most relevantly, the following:

> "I shall not be finally appointed as Principal Officer unless I have proved satisfactory during the acting period as regards health, conduct, work performance and efficiency generally. If I do not fulfil the conditions, the appointment will be terminated and no extensions will be allowed. In that event I will be appointed to a position in my former grade."

42. The duration of the probationary period is described, variously, as "*a period of not more than one year*" and "*an initial minimum period of one year*".

43. In the ordinary course, the probationary period would have expired on 13 December 2022. In the event, the Applicant made a request in October 2022 that the probationary period be extended. This request was made in circumstances where the recommendation of the Applicant's line manager at the nine-month review had been that he had not satisfactorily met the principal officer standard. The Applicant was, in effect, seeking further time within which to prove his competence.

44. This request was purportedly acceded to by an official within the Department of Transport by letter dated 28 October 2022. The probationary period was purportedly extended up and until 9 January 2023.

45. The Applicant was notified by letter dated 10 January 2023 that the officials within the Department intended to make a recommendation to the Minister that his appointment to the position of principal officer should not be confirmed and that he should be "*reverted*" to the grade of assistant principal officer. The

Applicant was informed of his right to apply to the Civil Service Appeals Board ("*Appeals Board*") for a review of the proposed recommendation. The letter concluded by stating that if the Applicant did not seek a review of the proposed recommendation, same would be submitted to the appropriate authority, i.e. the Minister, for decision.

46. It should be explained that the review process is non-statutory and does not affect the procedures prescribed under the Civil Service Regulation Act 1956. The Appeals Board may only make a non-binding recommendation to the appropriate authority.

47. The Applicant duly applied for a review. It should be explained that the guidelines governing the review process expressly envisage that one of the possible outcomes is that the Appeals Board would make a recommendation to extend the probationary period for a specified period of time (See §3.1.9 *Outcome of the appeal process*). The Applicant was not informed by the Minister that this outcome would not, on the Minister's interpretation of Section 6D of the Terms of Employment (Information) Act 1994, be available to him.

48. The Appeals Board held an oral hearing on 28 March 2023. The Appeals Board issued its report and recommendation on 17 May 2023. The recommendation was that the appeal be allowed and that the Applicant's probationary period be extended for a further six month period.

49. It is apparent from the terms of the Appeals Board's report and recommendation that there had been some discussion at the oral hearing of the implications of the Working Conditions Directive. The Appeals Board concluded—mistakenly—

that an extension of the probationary period beyond twelve months was permissible. The Appeals Board's reasoning was as follows:

> "In considering the new EU Directive and subsequent Irish S.I. on probation, the EU Directive states that exceptions to the 12 month probation period can be made, when it is in the interest of the employee and in this case, the Board believes that this is the case, and the appellants Union Representative has cited the same. The Directive is intended in its purpose to assist workers and to contend that an extension cannot be allowed in an appeal context because that Directive requires this is to misread the Directive."

50. With respect, this conclusion is premised on an incorrect interpretation of the Working Conditions Directive and the implementing domestic legislation. The proper interpretation has been set out at paragraphs 24 to 38 above.

51. It seems from this passage that the Applicant's side had been contending for an interpretation which would allow for an extended probationary period. It is not apparent from the report and recommendation whether, as of the date of the oral hearing in March 2023, the Department of Transport had been advocating for a *different* interpretation. No evidence has been put before the High Court in these judicial review proceedings in this connection.

52. At all events, the Department of Transport ultimately settled on the position that no extension could be granted. This legal impediment was cited as the reason for the refusal to accept the Appeals Board's recommendation. The position is set out as follows in the decision-letter of 13 July 2023:

> "The Department received the report of the Appeals Board on 17th May 2023 and has carefully considered the recommendation of a six month extension to your probation but is satisfied as a matter of law your probationary period cannot exceed a period of 12 months (section 6D(2) Terms of Employment (Information) Act 1994, as amended).
>
> Notwithstanding the recommendation, in accordance with the Department of Public Expenditure & Reform's Probation Guidelines, the appropriate authority (the Minister for

> Transport, who is the decision maker under legislation in respect of your probation) has decided that your appointment to the post of Principal Officer should not be confirmed and that you should be reverted to the grade of Assistant Principal Officer. While you were not reverted to the Assistant Principal pay scale pending the outcome of this process, as this is now complete you will be paid from 21st July at point 6 of the AP Scale."

53. It is this decision of 13 July 2023 which the Applicant seeks to impugn in these judicial review proceedings.

54. These proceedings were instituted by way of an *ex parte* application for leave to apply for judicial review on 21 July 2023. The High Court (Hyland J.) directed that the leave application be heard on notice. The parties ultimately agreed that there should be a telescoped hearing of the leave application and the substantive application. The proceedings were given an early trial date of 26 October 2023. The Minister offered an undertaking not to revert the Applicant to the grade of assistant principal officer pending the hearing and determination of these proceedings.

CHRONOLOGY

55. The key dates in the chronology are summarised in tabular form below:

13 December 2021	Twelve-month probationary period commences
1 August 2022	Implementation date for EU Directive
28 October 2022	Purported extension of probationary period to 9 January 2023
16 December 2022	EU Directive transposed into domestic law
10 January 2023	Notice of proposed recommendation
28 March 2023	Oral hearing before Appeals Board
17 May 2023	Appeals Board's report

13 July 2023	Decision to terminate appointment
21 July 2023	*Ex parte* application for leave

DISCUSSION AND DECISION

56. The Applicant had been appointed to the position of principal officer with effect from 13 December 2021. The appointment was subject to a probationary period of twelve months. This probationary period would have expired on 13 December 2022.

57. The purported extension of the probationary period on 28 October 2022 was invalid for the following reasons.

58. First, the probationary period could only lawfully be extended by the Minister for Transport as the "*appropriate authority*" for the purposes of Section 7 of the Civil Service Regulation Act 1956. The official who purportedly granted the extension did not have power to do so. As explained in *Whelan v. Minister for Justice* [1991] 2 I.R. 241, in circumstances where the only extension referred to under the section is such "*as the appropriate authority may from time to time fix*", there could be no extension unless the Minister had fixed one. Indeed, it is surprising that the official issued the letter of 28 October 2022 in circumstances where it appears from the contemporaneous internal communications, which have been exhibited, that the officials were aware that only the Minister could extend the probationary period.

59. For similar reasons, the suggestion in the Minister's written legal submissions that the probationary period had implicitly been extended for such period as might be necessary to dispose of an appeal to the Civil Service Appeals Board is incorrect. The simple fact of the matter is that the Minister, as appropriate

authority, never made a decision to extend the probationary period. Nor does an extension arise by implication: the review process before the Appeals Board is *non-statutory* and cannot therefore displace the legislative requirements.

60. Secondly, Section 6D of the Terms of Employment (Information) Act 1994 provides that the probationary period of a public servant shall not exceed twelve months. It follows that even if the Minister for Transport had, counterfactually, made a decision to extend the probationary period same would be ineffective, at least from the date upon which the legislative amendments came into effect, i.e. 16 December 2022.

61. It is a moot point as to whether any extension which might have been granted prior to 16 December 2022 would have been effective until that date. Member States were obliged to take the necessary measures to comply with the Working Conditions Directive by 1 August 2022. It is at least arguable that the Minister for Transport, as an emanation of the State, would have been bound by the provisions of the Directive from 1 August 2022 onwards. At all events, once Section 6D of the Terms of Employment (Information) Act 1994 came into effect on 16 December 2022, the probationary period of any probationer public servant, who had already completed twelve months' probation, would have come to an end by operation of law. As explained at paragraphs 30 to 31 above, there are no transitional provisions under domestic law governing the position of probationer public servants.

62. It follows that by 16 December 2022, at the very latest, the Applicant's probationary period had come to an end. In circumstances where the Minister, *qua* appropriate authority, had not terminated the appointment within the probationary period, the appointment ceased to be precarious. As discussed at

paragraphs 8 to 11 above, it is not necessary that there be a positive decision to "*confirm*" the appointment. Rather, the appointment takes effect upon the expiration of the probationary period unless it has been previously terminated.

63. The Applicant's appointment as principal officer took full effect from, at the very latest, 16 December 2022. Notwithstanding this, some seven months later, the Minister for Transport purported to terminate the appointment and to direct that the Applicant revert to the grade of assistant principal officer. The decision-letter is not true to its own logic. Having acknowledged that the probationary period cannot exceed twelve months, the decision-letter fails to recognise that the inevitable consequence of this is that the probationary period had expired in December 2022.

64. Once the probationary period had expired, the statutory power to terminate the appointment ceased and the Minister did not have *vires* thereafter to revoke the appointment. It follows that the decision of 13 July 2023 which purported to terminate the appointment and revert the Applicant to the grade of assistant principal officer was unlawful. It was reached in breach of the provisions of Section 7 of the Civil Service Regulation Act 1956 and Section 6D of the Terms of Employment (Information) Act 1994.

NO WAIVER OR ESTOPPEL

65. There is some suggestion in the opposition papers and written legal submissions filed on behalf of the Minister that the Applicant is precluded from obtaining relief by waiver or estoppel. It is suggested that the Applicant, by seeking an extension in October 2022, may have voluntarily waived his right to insist on his probationary period having a maximum duration of twelve months. With

respect, there is no proper basis for asserting either a waiver or estoppel for the following reasons.

66. First, it is doubtful whether a public servant can waive the prescribed maximum duration of his probationary period. The language of Section 6D is unequivocal and does not admit of an extension of the probationary period.

67. Secondly, even if waiver were permissible, no waiver would be effective unless it was exercised on the basis of informed consent. (See, by analogy, *Board of Management of Malahide Community School v. Conaty* [2019] IEHC 486, [2020] 2 I.R. 394). The legislative intent in prescribing the maximum duration of a probationary period is to ensure that the probationer civil servant is not subject to "*prolonged insecurity*" (to borrow the language of the Working Conditions Directive). In order for any supposed waiver of this benefit to be binding upon a probationer civil servant, he must have actual notice that the maximum duration of a probationary period is prescribed by law. Here, both the Minister and the Applicant appear to have been labouring under a common mistake that there was no legal restriction on the extension of the probationary period. The Appeals Board were under the same misapprehension. The Minister ultimately acknowledges the correct legal position in the letter sent on his behalf on 13 July 2023. Having regard to this chronology, it cannot be said that any supposed waiver by the Applicant was exercised with actual notice of the nature of the benefit which he is said to have waived. Certainly, the Minister cannot rely on a supposed waiver in circumstances where he failed in his obligation *qua* employer to provide the Applicant with a statement in writing containing particulars of the duration and conditions of the probationary period as affected

by the Working Conditions Directive and Section 6D of the Terms of Employment (Information) Act 1994.

68. Thirdly, the Minister cannot approbate and reprobate. The Minister refused to accept the Appeals Board's recommendation precisely because the probationary period cannot exceed a period of twelve months. The Minister cannot now be heard to say that any supposed *ad hoc* prolongation of the probationary period between December 2022 and July 2023 was valid. It should be recalled that the review process before the Appeals Board is *non-statutory* and cannot therefore displace the legislative requirements.

69. Finally, it should be reiterated that the outcome of these proceedings turns, ultimately, on the fact that there was never any Ministerial decision to extend the probationary period. The probationary period could only lawfully be extended by the Minister for Transport as the "*appropriate authority*" for the purposes of Section 7 of the Civil Service Regulation Act 1956. The supposed extension agreed to by the Departmental officials in October 2022 was *ultra vires*. Such *ultra vires* action cannot be ratified by any supposed waiver on the part of a probationer civil servant.

DELAY, TIME-LIMITS AND PLEADING POINTS

70. It has been submitted on behalf of the Minister that the Applicant is not entitled to a declaration to the effect that he has been appointed to the position of principal officer. There are a number of strands to this submission. It is suggested, variously, that no claim for such relief has been pleaded and that the Applicant is out of time to seek same. For the reasons which follow, these submissions are not well founded.

71. It is expressly pleaded in the statement of grounds, at paragraphs (e) 1 and (e) 2, that the Applicant's probationary period was not permitted to exceed twelve months; that the period had exceeded twelve months on 13 December 2022; and that the Minister acted *ultra vires* Section 7 of the Civil Service Regulation Act 1956 in purporting to terminate the Applicant's appointment and revert him to the position of assistant principal officer. This elegant pleading neatly encapsulates the argument based on the maximum duration of a probationary period.

72. The first relief sought in the statement of grounds is an order of *certiorari* quashing the decision of 13 July 2023 to terminate the Applicant's appointment to the role and grade of principal officer. The effect of this relief, if granted, is that the Applicant's appointment as principal officer would stand. There was no need for the Applicant to seek an express declaration to the effect that he has been appointed to the position of principal officer. Rather, this follows as the inevitable consequence of an order of *certiorari*. This is because, on the correct interpretation of Section 7 of the Civil Service Regulation Act 1956, a probationer is appointed on a permanent basis once the probationary period has expired (unless the appointment has previously been terminated by the appropriate authority). There is no requirement for a positive act confirming the appointment.

73. It is correct to say, as counsel for the Minister does, that it might in theory have been open to the Applicant to institute declaratory proceedings within three months of 13 December 2022. However, the suggestion that the Applicant's claim in the present proceedings is defeated by delay is not well founded. The Department of Transport had invited the Applicant to engage in the review

process. It was indicated to the Applicant that no decision would be taken by the Minister until the review process had been completed. This review process represents a long established dispute resolution mechanism, and it was entirely reasonable for the Applicant to have exhausted this process prior to having recourse to legal proceedings. The review process might have resulted in a favourable outcome for the Applicant which would have obviated any necessity for legal proceedings. Having invited the Applicant to participate in the review process, it does not lie in the mouth of the Minister to criticise the Applicant for delay.

74. The review process only came to a conclusion with the Minister's decision to reject the recommendation of the Appeals Board. This decision was communicated to the Applicant by letter dated 13 July 2023. The present proceedings were instituted the following week, by way of an *ex parte* leave application on 21 July 2023.

75. Time runs for the purposes of Order 84, rule 21 of the Rules of the Superior Courts from the point at which there is a formal consequence adverse to the interests of an applicant (*Arthropharm (Europe) Ltd v. Health Products Regulatory Authority* [2022] IECA 109 (at paragraph 68)). Here, the Applicant was first notified of a decision purportedly terminating his appointment to the position of principal officer on 13 July 2023. This was the date upon which the grounds for the application for judicial review first arose. Thereafter, the proceedings were instituted well within the three month time-limit prescribed under Order 84, rule 21.

76. Lest this conclusion be in error, and time runs instead from 13 December 2022, I should add that the criteria for an extension of time would have been satisfied.

As already discussed, it had been entirely reasonable for the Applicant to engage in the review process at the invitation of the Minister before having recourse to legal proceedings.

77. The notion that the Applicant should be penalised for not having known as of January 2023 that the review process could not have resulted in an extension of his probationary period would be unfair. The guidelines governing the review process expressly envisage that one of the possible outcomes is that the Appeals Board would make a recommendation to extend the probationary period. It was not explained to the Applicant at the time that the Minister did not consider such an outcome was available to him. This was so notwithstanding that the Minister was obliged *qua* employer to provide the Applicant with a statement in writing containing particulars of the duration and conditions of the probationary period as affected by the Working Conditions Directive and Section 6D of the Terms of Employment (Information) Act 1994. These all represent circumstances "*outside the control*" of the Applicant. Moreover, the *volte face* whereby the Minister invited the Applicant to participate in the review process, only to declare months later that no extension could be granted, is not something which could "*reasonably have been anticipated by*" the Applicant.

78. The Applicant participated in the review process in good faith and if and insofar as this resulted in legal proceedings being deferred, this was entirely reasonable.

CONCLUSION AND PROPOSED FORM OF ORDER

79. The Applicant's probationary period had come to an end by 16 December 2022, at the very latest. In circumstances where the Minister for Transport, *qua* appropriate authority, had not terminated the appointment within the

probationary period, the appointment ceased to be precarious. It is not necessary that there be a positive decision to "*confirm*" the appointment. Rather, the appointment takes effect upon the expiration of the probationary period unless it has been previously terminated.

80. The Applicant's appointment as principal officer thus took full effect from, at the very latest, 16 December 2022. The subsequent decision of 13 July 2023 which purported to terminate the appointment and revert the Applicant to the grade of assistant principal officer was unlawful. It was reached in breach of the provisions of Section 7 of the Civil Service Regulation Act 1956 and Section 6D of the Terms of Employment (Information) Act 1994.

81. For completeness, it should be noted that the same result would occur even if one were, instead, to apply the narrower interpretation of the section suggested in *Whelan v. Minister for Justice* [1991] 2 I.R. 241 (prior to the Working Conditions Directive). As in that case, the Minister for Transport did not reach a decision on the probationer's performance until *after* the probationary period had already expired and thus could not rely on the power to terminate.

82. Accordingly, an order of *certiorari* will be made quashing the impugned decision of 13 July 2023. As the proceedings have been heard by way of a telescoped hearing, it is necessary first to make a formal order granting leave to apply for judicial review.

83. As to costs, my *provisional* view is that the Applicant, having been entirely successful in the proceedings, is entitled to recover his legal costs as against the Respondent. This would accord with the default position under Section 169 of the Legal Services Regulation Act 2015. If the Respondent wishes to contend for a different form of costs order, short written legal submissions should be filed

within 14 days of today's date. The Applicant will have 14 days thereafter to reply. The proceedings will then be listed before me on Monday 18 December 2023 at 10.45 AM.

84. If no submissions are received from the Respondent within 14 days, the order will be perfected in accordance with the provisional view expressed above.

Appearances

Mairéad McKenna SC and Colmcille Kitson for the applicant instructed by O'Mara Geraghty McCourt Solicitors
Joe Jeffers SC and Stephen Brittain for the respondent instructed by the Chief State Solicitor

Approved Garrett Simons