



THE HIGH COURT

[2024] IEHC 533

[Record No. 2023/ 709 JR]

BETWEEN

EDMOND HOLLAND

APPLICANT

AND

**HEALTH SERVICE EXECUTIVE AND MIDLAND LOUTH MEATH MENTAL HEALTH
SERVICES**

RESPONDENTS

**JUDGMENT of Ms. Justice Marguerite Bolger delivered on the 30th day of August
2024**

1. This was a telescoped application for judicial review. The applicant is a consultant psychiatrist who represented himself. He has had some medical difficulties in the recent past which he said made it difficult for him to conduct what was a complex and involved claim. One of the reliefs he had sought claimed that the HSE was "*discriminating illegally against the applicant solely on the grounds of the applicant's age*" but grounds for this relief were not fully scoped out in his pleadings. In order to ensure that the issue of age discrimination as identified by the applicant was properly before the court, and particularly having regard to the binding nature of European law provisions on domestic age discrimination law, I gave leave to the HSE to amend its statement of opposition in circumstances where the HSE asserted the applicant had not pleaded a case of age discrimination. The HSE filed a further affidavit and written submissions to which the applicant replied by swearing a replying affidavit, which did assist in narrowing the issues and clarifying the applicant's position.

The impugned decision of 2 November 2022

2. By letter dated 2 November 2022 from the applicant's Clinical Director, the applicant was advised that he had reached the maximum retirement age of 70 applicable to his employment status on 28 January 2022 and was asked to fill out the form for his retirement. The applicant had not attended at work since the outbreak of COVID-19 in March 2020 and had not performed work duties since August 2020, due initially to his personal medical concerns and subsequently to what the applicant described as clinical difficulties. The applicant remained on salary throughout that time and was on salary when he was sent the letter of 2 November 2022.

3. The applicant said he did not read the letter until March 2023, although he did not seem to dispute that it was sent to him by WhatsApp in November 2022 after the Clinical Director had tried unsuccessfully to hand deliver it to him. The applicant was taken off salary on 21 January 2023, at which time he was a week off 71 years old. He said he did not notice he was off salary until March 2023. He issued these proceedings in June 2023.

The applicant's claims

(i) The applicant's right to be paid after age 71

4. The applicant initially sought declaratory and injunctive relief and damages. In his most recent affidavit of 29 July 2024, he said he was no longer seeking restoration to his job as he had originally hoped for at the initiation of the proceedings. He advised the court in his oral submissions that he was seeking damages in the amount of 18 months' salary on the basis of his asserted entitlement to work until in or around July 2024, i.e. an entitlement to be paid salary up to age 72 and a half. Significantly, in that affidavit, the applicant also confirmed, for the first time, that he was not challenging the State's right to implement and apply appropriate age-based retirement legislation.

5. The Public Service Superannuation (Age of Retirement) Act 2018 increased the compulsory retirement age for pre-2004 State employees to 70 with effect from 26 December 2018 by inserting s. 3A into the Public Service Superannuation (Miscellaneous Provisions) Act 2004 which provided for a mandatory retirement age of 70 for "relevant public servants". The applicant did not challenge the HSE's contentions that he was a "relevant public servant". That legislation gave the HSE a statutory entitlement to retire the applicant at the age of 70 (albeit he was not required to retire until he was nearly 71). The legal basis for his assertion to be paid to age 72 in spite of the clear provisions of the Act

which he did not challenge, were not clear. The applicant did not make out any case, in fact or in law, for the non-application of that statutory provision.

6. If there was or is any doubt about the HSE's statutory entitlement to retire the applicant after his 70th birthday pursuant to the 2018 Act, then consideration would have to be given to whether there was objective justification for his compulsory retirement. The HSE's deponent, Martina O'Byrne, in her affidavit sworn on 23 July 2024 identified the following as objective justification for the compulsory retirement of consultants at age 70:

- The need for long term succession planning of staffing levels locally and nationally which she said was particularly important in respect of consultant doctors;
- The need to plan for the long term supply of consultant doctors;
- The HSE's policy aim of creating an age balance amongst its consultant workforce to ensure the long term delivery of services by the HSE because of the vital role played by consultants;
- The achievement of intergenerational fairness at the consultant level.

Those matters establish the necessary legitimate aims and proportionality of a compulsory retirement age of 70, as has been endorsed by Collins J. in the decision of *Mallon v. Minister for Justice, Ireland and the Attorney General* [2024] IESC 20. There is, therefore, no unlawful age discrimination in how the applicant was treated or in the HSE's requirement that he retire at nearly age 71. He has no entitlement to further salary from the time his employment was terminated by reason of his having passed the mandatory retirement age of 70 for his employment.

(ii) The HSE's superannuation pension scheme

7. The main focus of the applicant's case was what he said was his unlawful exclusion from the HSE's superannuation pension scheme. He pleaded a legitimate expectation that he would receive a gratuity and pension on his retirement. Whilst the applicant is not and never was a member of the HSE's pension scheme, he is entitled to a non-pensionable gratuity payment of €141,508.71. This has not yet been paid to the applicant as he has not filled out and returned the necessary forms. However, the applicant has not been given the benefit of the HSE's pension scheme because he is not and never has been a member of that scheme and was, therefore, unable to make any contributions to it.

8. The applicant asserts a legitimate expectation to a gratuity and pension scheme and relies on Circular 14/2003 which confirms the entitlement of all HSE staff, including

temporary and part-time employees, to membership of the HSE superannuation pension. He says he should have been included in the pension scheme from August 2005 when he became entitled to a contract of indefinite duration after a number of years of fixed term employment, pursuant to the Protection of Employees (Fixed Term Work) Act 2003. He acknowledges that he was invited to join a pension scheme in the past but he says that was the wrong scheme for him as he says it was for temporary and part-time staff whereas he was, by then, a permanent employee, albeit he had not signed a permanent contract due to a dispute about the description of his work location and work title in the written contract offered to him to sign. Despite disagreement about his status and pension entitlements, he continued to work as a consultant psychiatrist throughout those years and was paid a consultant's salary without deductions for pension contributions.

9. The HSE's deponents have averred that there is and always was only one pension scheme, access to which was offered to the applicant on a number of occasions since 2009 (having been incorrectly not offered the opportunity to join in 2003) arising from his written requests for same including by way of correspondence from his solicitors. Any challenge to the applicant's exclusion from the HSE pension scheme between 2003 and 2009 is out of time but, in any event, the offers made to him since 2009 to join the pension scheme would have required him to pay contributions back to the commencement of his employment, so he would not have been prejudiced by his delayed entry to the scheme had he taken up the offers made to him as far back as 2009.

10. A number of letters offering the applicant entry to the pension scheme in 2009, 2014 and 2016, were exhibited. None of those offers were responded to or taken up by the applicant. Eventually in 2016, the applicant was given a final deadline to join the pension scheme but, once again, did not respond. It is clear that the applicant knew he was not in the pension scheme and was seeking to challenge that. He seems to have been of the view that he was offered admission to the wrong pension scheme, but that is not so. There is and always was only one HSE pension scheme and the applicant was invited to join that scheme on a number of occasions between 2009 and 2016 and declined to do so.

11. The applicant now claims an entitlement to participate in the HSE's pension scheme upon his retirement. Payment of a pension would normally require the person in receipt of the payments to be a member of the pension scheme albeit an employee can challenge an exclusion from a pension scheme as, for example, unlawful treatment. This applicant's

challenge must be to his non-membership of the HSE pension scheme. He was clearly aware that he was not in any HSE pension scheme throughout his long period of employment and had been taking steps to try address that situation, as he perceived it, for many years before the institution of these proceedings. He is undoubtedly out of time, pursuant to Order 84 rule 21 of the Rules of the Superior Courts, to challenge his non-membership of the HSE's superannuation pension scheme and there is no basis for extending that time.

12. If I am wrong on that and the applicant is within time by virtue of the non-payment to him of a pension upon his removal from payroll in January 2023 and since then, I am satisfied that he was never unlawfully excluded from the HSE pension scheme. He was offered access to the scheme on a number of occasions and for various subjective and incorrect reasons pertaining to what he thought was an incorrect pension scheme and/or vague and irrelevant concerns about his contractual status, he did not reply to or accept the offers made to him by the HSE to join the pension scheme and commence paying into it. His claim to an entitlement to be paid a pension now, whether by legitimate expectation or contract or otherwise, has no basis in fact or in law, even if it was brought within time.

Contract of indefinite duration

13. The applicant has sought to rely on his entitlements to a contract of indefinite duration and to equal treatment between him as a fixed term or former fixed term employee and a comparable permanent employee, pursuant to the Protection of Employees (Fixed Term Work) Act 2003. His claims in that regard are statutory claims and, on the facts of this case, are not amenable to judicial review. Any concern he had about his treatment as a former fixed term employee, could have been brought before the Workplace Relations Commission pursuant to the 2003 Act, which would have been the more appropriate redress process for him. The applicant said he did not pursue that statutory complaint because the WRC refused to deal with the pension aspect of his complaints. That does not validate his decision to seek to litigate issues relating to his contract of indefinite duration and statutory entitlements arising therefrom before this court by way of an application for judicial review.

Conclusions

14. I refuse the applicant's application. The matter is in for mention before me for 10.30am on 13 September 2024 to hear the parties in relation to final orders, including costs.

The applicant represented himself.

Counsel for the respondents: Mairéad McKenna SC, Colmcille Kitson BL