Neutral Citation no. [2008] NIQB 64 | *Ref:* **GIL7168**

Judgment: approved by the Court for handing down | *Delivered:* **27/05/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY IRWIN MONTGOMERY FOR JUDICIAL REVIEW

GILLEN J

Application

[1] This is an application by Irwin Montgomery ("the Applicant") for judicial review of a decision by the Pensions Branch of the Police Service of Northern Ireland and the Northern Ireland Office ("the Respondents") whereby the Applicant's entitlement to a lump sum payment under the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Full-Time Severance) Regulation 2003 ("the Severance Regulations") was held to be unaffected by the increase in his compulsory retirement age. Leave was granted to bring these proceedings on 7 February 2008.

Background

[2] The Applicant was born on 25 October 1953. He served as a police officer from 15 September 1974 until 24 October 2006 retiring just before his 53rd birthday under the Severance Regulations.

[3] As outlined by Mr Steven McCourt, the Head of Policing Policy Branch with the Northern Ireland Office in an affidavit of 29 March 2008, the Severance Regulations introduced a severance scheme to operate for a finite period (until in or about 2010 or until the Secretary decides otherwise). Funds have been allocated to be distributed under the scheme in accordance with the provisions set out in the schedule to the Severance Regulations. The net effect of this scheme will be to reduce the numbers of police officers aged 50 years and older. The purpose is to permit greater recruitment at the bottom end (on a 50/50 cross community basis) and also generally assist in the overall reduction of police officer numbers.

Severance Regulations

[4] Where relevant the Severance Regulations provide, inter alia, at regulation 2 that "compulsory retirement age" means the age at which the member would be required to leave the Force by reason of age as defined by Regulation A16 ("A16") of the Royal Ulster Constabulary Pension Regulations 1988 ("the 1988 Regulations") or expiry of a fixed term agreement. The Schedule of the 1988 Regulations, determines the benefits under the scheme for severance lump sums. Part II of the first Schedule calculate the basis upon which an applicant under the Severance Regulations shall be entitled to a lump sum by multiplying his annual pensionable pay at the date of leaving by the appropriate lump sum factor set out in tables. The relevant tables for the applicant, whose compulsory retirement age ("CRA") would have been 55, is therein set out.

Employment Equality (Age) Regulations

[5] The Employment Equality (Age) Regulations (NI) 2006 ("the Age Regulations") came into effect on 1 October 2006 and provided for a default retirement age of 65 years albeit this is not applicable to police officers. The CRA operated by the Police Service is fixed in statute under Regulation A16. In anticipation of the Age Regulations, there occurred a series of consultations with the police negotiating board. The conclusion of these discussions was agreement that the CRA for the federated ranks i.e. those who are below Chief Constable rank should be 60 years. In other words the CRA was being changed from 55 under A16 to 60 years of age for those officers.

The Joint Guidance on the New Compulsory Retirement Ages and Retirement Policy

[6] At the date of this hearing, and at all times relevant to the issues that have arisen, the 1988 Regulations have not yet been amended to reflect the introduction of the Age Regulations or the new compulsory retirement age of 60 years for the federated ranks. Mr McCourt avers that this amendment will occur in due course.

[7] However the "Joint Guidance for Police Authorities on New Compulsory Retirements Ages and Retirement Policy for Police Officers with effect from 1 October 2006" ("the Guidance") was issued to introduce new procedures pending the amendment of the relevant legislation.

[8] In paragraph 4.3, the Guidance deals with the intended amendments to the 1988 Regulations (including Regulation A16) so that officers retiring from PSNI after the 1 October 2006 would obtain the same pension and lump sum

as would have been the case had they retired prior to 1 October 2006. It is couched in the following terms:-

> "**Pension Ages under the RUC Pensions Scheme 1988**
>
> 4.3 When making amendments to regulation A16 of the RUC Pensions Regulations 1988 (which sets out the pre-October CRAs) we will also be amending other parts of the regulations as necessary. Changes to the RUC Pensions Scheme 1988 enable officers to retire with the same pension and lump sum they would have received had they be non compulsorily retired at their CRA under the pre-October arrangements. All these changes will also be backdated to 1 October 2006."

[9] The Guidance is silent as regards the Severance Regulations. Mr McCourt contended at paragraph 17 of his affidavit that this was intentional as it had never been intended that the change in CRA should have any effect on the amount payable to an officer under the Severance Regulations. This was regarded as an entirely separate scheme introduced for the reasons I have previously set out in paragraph 3 of this judgment.

[10] It was Mr McCourt's contention that the only commitment given under the Guidance was that the 1988 Regulations would be amended so that officers would not be prejudiced by the fact that the Regulations were not amended by 1 October 2006. Deliberately no representation was made concerning the Severance Regulations.

[11] The Guidance makes it clear that the 1988 Regulations will eventually be amended to take account of the new CRA. Pending that amendment the Respondents will apply the CRA of 60 as if the 1988 Regulations had been amended to reflect this change. Mr McCourt exhibited to his affidavit draft amendments for the Severance Regulations and to the RUC Pension Regulations in the Police Service of Northern Ireland and Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Full-Time) (Severance) (Amendment) Regulations 2008 which make clear that the compulsory age under the Severance Regulations would remain as before i.e. 55 years of age so far as persons at the rank of the applicant is concerned. Moreover the Police Service of Northern Ireland Pensions (Amendment) Regulations 2007 at Regulation 6 make clear that on compulsory retirement on account of age, A16 will be amended to set the age of 60 for those up to the rank of Chief Inspector whilst those holding a higher rank will be able to reach 65 years of age before compulsory retirement. On the other hand Regulation 6, dealing with voluntary retirement, sets a different age under the

1988 Regulations namely 60 years for those at the rank of superintendent or inspector and 55 for those at the rank of sergeant or constable. It is clear therefore that there is not going to be an across the board change of the compulsory retirement age under the 1988 Regulations.

[12] Ms Karen Todd, Head of Pensions Branch within the Police Service of Northern Ireland, in an affidavit of 20 March 2008 exhibited an email of 6 October 2006 sent to "All Organisations" which made it clear there would be no change in the Severance Regulations as a consequence of the Age Regulations. She avers that "All Organisations" meant that it was sent to all staff both police and agency staff working for the Respondent. All staff has access to email and are required to check their emails regularly. This is regarded, according to her, as the main method of communication with the Police Service of Northern Ireland. That email records, inter alia, as follows:

> "**Employment Equality (Age) Regulations 2006 (Supervisors are asked to bring this message to the attention of officers currently absent).**
>
> Above regulations were due to come into effect on 1 October 2006 and the current position regarding implementation and the issue of advice and guidance is as outlined in E-mails of 2 October and 15 September.
>
> Specifically with regard to severance the Northern Ireland Office has advised Police Pensions Branch and the Voluntary Severance Support Unit that there will be no change to the PSNI (Severance Regulations) 2003 as a direct consequence of the introduction of the new regulations."

[13] Mr McCourt avers in his affidavit that the Northern Ireland Office advised Police Pensions Branch that there would be no change to the Severance Regulations by email dated 3 August 2007.

[14] When the Applicant applied to the severance scheme he was advised of his entitlement calculated in accordance with the CRA applicable to him of 55 years. Exhibited before me was a form entitled "Request for Estimate of Pension and Voluntary Severance Package – year 7" together with an estimate of the severance lump sum, additional lump sum, pension and commutation which would be paid to the Applicant under the severance package dated 6 October 2005. Those documents all made clear that the compulsory retirement age would be 55. I have also before me a document dated 25 October 2006 which indicated to the Applicant that he had been awarded a

PSNI severance lump sum, additional lump sum, pension and commutation calculated on that basis.

The Applicant's case

[15] Mr Keenan, who appeared on behalf of the Applicant, and presented his case with commendable skill and economy, contended that the Applicant had a legitimate expectation that the guidance document would be widely applied and that his compulsory retirement age would be calculated on the basis of 60 yeas and not 55 years. Counsel argued therefore that the Applicant had a legitimate expectation that the Severance Regulations would operate so as to take into account his compulsory retirement age as provided for in the guidance document.

[16] Counsel submitted that the representation in the guidance regarding the implementation and of a new regime in relation to the CRA was "clear, unambiguous and devoid of relevant qualification".

[17] Whilst Mr Keenan conceded that the guidance document was silent regarding the Severance Regulations, it was his submission that once the CRAs were to be changed in the manner proposed certain consequences naturally flowed from those changes. These included the alteration in the manner in which the applicant's entitlement was to be assessed. In short the guidance document had to be seen, not in isolation, but in the context of the implementation of the Age Regulations to implement European Council Directive 2000/78/EC.

[18] In the alternative counsel advanced the argument that the decision to refuse to determine the Applicant's entitlement on the basis of the increase in the CRA as set out in the guidance document was Wednesbury unreasonable.

[19] Finally Mr Keenan, in the course of his skeleton argument, asserted that the applicant had not been provided with any reasons why the changes in the compulsory retirement ages would not affect his entitlement under the Severance Regulations other than the bald assertion that the Severance Regulations were not affected.

LEGAL PRINCIPLES

Legitimate Expectation

[20] For some time now the principles of legitimate expectation have evolved and crystallised. Without embarking on an analysis of all the recent authorities, I consider the following principles should now be invoked by a court.

[21] The two ways in which a legitimate expectation may arise are either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. See the seminal exposition of Lord Fraser in Council of Civil Service Unions v Minister for the Civil Service ("the GCHQ case") [1985] AC 374 at 401b.

[22] In order to found a legitimate expectation, the conduct or representation must be "clear, unambiguous and devoid of relevant qualification". (See Bingham LJ in R v IRC ex parte MFK Underwriting [1990] 1 WLR 1545).

[23] More recently in Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363 ("Nadarajah's case") Laws LJ set out certain principles at paragraph 68 and 69 as follows:

> "68. The search for principle surely starts with a theme that is current through the legitimate expectation cases. It may be expressed thus. Where a public authority has issued a promise or adopted a practice which presents how it proposes to act in a given area, the law will require the promiser practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition. It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistent with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights ECHR, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a new familiar vocabulary, a

> proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to hold with their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as proportionate measure in the circumstances.
>
> 69. This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration . . . proportionality will be judged, as it is generally to be judged by the respective force of the competing interests arising in the case. Thus where the representation relied on amounts to an unambiguous promise, where there is detrimental reliance, where the promises are made to an individual or specific group, these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure . . . On the other hand where the Government decision-maker is concerned to raise wide-ranging or `macro-political' issues of policy, the expectations of enforcement in the courts will encounter a steeper climb. All these considerations whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim in the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact."

[24] Although this refusal to distinguish between procedural and substantive expectations and the emphasis on proportionality has not been without critical analysis (see for example lecture by Philip Sales QC for ALBA 7 March 2006), I discern these principles from this judgment to be crystallised as follows:

(1) Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require

the promise or practice to be honoured in the absence of good reason not to do so.

(2) A public body's promise or practice as to the future conduct might only be denied in circumstances where to do so is the public body's legal duty or otherwise a proportionate response having regard to a legitimate aim pursued by the public body in the public interest, and

(3) The approach appears to make no distinction between procedural and substantive expectations.

[25] This approach by Laws LJ revisits the general debate about whether the proportionality principle should replace Wednesbury as the central principle of substantive review in domestic administrative law. This case does not require me to venture beyond the appropriately cautious approach already adopted in this jurisdiction pending any firm resolution of the issue by the House of Lords (see Re McQuillan's Application (2004) NIQB 50 at paragraph 38.)

Conclusions

[26] I have found nothing in this case in the nature of a representation amounting to an unambiguous promise in clear, unqualified or unambiguous terms made to any individual or specific group that the Guidance was to apply to the Severance Regulations. Consequently it is unnecessary for me to consider any assessment of proportionality irrationality or unlawfulness on the part of the Respondents.

[27] Good administration requires that a public authority be permitted to introduce a specific scheme such as the Severance Regulations for a time limited period with finite funding in the public interest. (See also R (London Borough of Hillingdon) v Secretary of State for Education and Skills [2007] EHWC 514).

[28] Such was the distinct nature of this scheme that I consider the Respondents were objectively justified and acting proportionately in not specifically referring to it in the course of the Guidance. In my view it was unnecessary to do so in circumstances where not the slightest indication had been given that the Severance Regulations were to be affected by the proposed amending legislation.

[29] The silence of the Guidance document on the Severance Regulations echoes the earlier unequivocal representations made by email on 6 October 2006 (see paragraph 12 of this judgment) and the email of 3 August 2007 (see paragraph 13 of this judgment) to the effect that the Employment Equality (Age) Regulations 2006 would have no effect on the Severance Regulations. I

find no evidence that the Applicant could ever have understood by virtue of any express representation much less any practice that such an eventuality was to occur.

[30] Obviously the proposed legislative amendments will have to comply with appropriate consultative processes. However their existence in draft form illustrate that it was not the intention of the Respondents to have altered the CRA relative to the Severance Regulations

[31] In this case the Applicant relies on what he asserts is a substantive legitimate expectation. It must be recognised that it is desirable for public authorities to do what they have declared they will do. That is a feature of good administration so that public bodies "deal straightforwardly and consistently with the public" (see Laws LJ in Nadarajah's case at paragraph 68). I consider that it has been made perfectly clear to the public in general and police officers such as the Applicant in particular that the Severance Regulations were introduced as an entirely separate scheme from the 1988 Regulations for Pensions, intended to operate for a fixed period and with finite funds allocated to be distributed under the scheme. Moreover I find no evidence that the Respondents have ever wavered from a determination that the amount due and the mechanism for calculating it under the Severance Regulations would remain unchanged in consequence of the introduction of the Age Regulations. This, together with the information given to the Applicant on 25 October 2006 of his actual entitlement under the Severance Regulations and the proposed amending legislation all constitute a clear policy that the Severance Regulations would be treated differently from the 1988 Regulations. That pattern has served to satisfy me that any suggestion of an express undertaking to the contrary is wholly without foundation. I find no basis upon which the applicant formed an expectation to the contrary.

[32] I have been persuaded that the use of Regulation A16 of the 1998 Regulations was no more than a calculation tool for the purposes of the Severance Regulations. Any amendment to Regulation A16 of the 1988 Regulations does not dictate that it would spill over into the calculation of severance payments under the Severance Regulations. Were it to be otherwise, a situation could arise whereby an unfair distinction would emerge between officers who had availed of the severance facilities prior to 25 October 2006 (when the Guidance came into effect) and those who had availed of the Severance Regulations thereafter. It would serve to foist a contextual meaning on the Guidance and constitute an unwarranted departure from the original scheme. Good administration demands the scheme should operate fairly, consistently and equally during its lifespan. It is this which assists police officers to plan their affairs and fosters trust and confidence in the severance scheme.

[33] I am satisfied that appropriate reasons were given to the Applicant for the refusal to change the relevant CRA in his case. A terse declaration that the Severance Regulations will continue to be treated as a discrete scheme separate from the 1988 Regulations is in my view fully sufficient to underline and explain the continuing difference between the two areas.

[34] I commence by indicating that I was not satisfied that there had been undue delay on the part of the Applicant in bringing these proceedings promptly before the court. The Guidance document did not come into effect until 7 June 2007 and the Applicant, legitimately in my view, was entitled to take time to digest this and obtain appropriate advice. Whilst the first correspondence in this issue may not have been received until 4 October 2007, I consider that no prejudice has accrued to the Respondents. It is a matter of public interest that this issue be clarified. Hence delay has played no part in my decision to dismiss this application.

[35] I invite counsel to address me on the question of costs.