THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 338

Record Number: 2017/473

Edwards J.
McGovern J.
Donnelly J.

BETWEEN/

DIANE BYRNE

APPLICANT/RESPONDENT

- AND –

MINISTER FOR DEFENCE, IRELAND
AND THE ATTORNEY GENERAL

RESPONDENTS/APPELLANTS

JUDGMENT of Ms. Justice Donnelly delivered on the 20th day of December, 2019

Introduction

1. The respondent to this appeal qualified as a Mechanical Engineer in 2000 and on the 28th May, 2001, she was commissioned as an officer of the Permanent Defence Force (hereinafter "PDF"), as a direct entry officer in the corps of engineers with the rank of Lieutenant. On the 28th May, 2004 she was promoted to the rank of Captain on completion of three years' service. On the 26th November, 2012 she took maternity leave. She availed of unpaid maternity leave from the 27th May to the 15th September, 2013.

2. On the 28th August, 2013, while the respondent was still on maternity leave, four other (male) Captains who were direct entry officers in the same class as the respondent, were promoted to the rank of Commandant. The respondent was not aware of the promotions at that time. She had not been told of the convening of an Interview Board. The other officers were only told of the process after they had been selected for interview.

3. The respondent returned from maternity leave on the 15th September, 2013. She resigned her commission from the Permanent Defence Forces. She claims this was because of the negative and unprofessional way she was treated. She obtained employment elsewhere.

4. On the 28th July, 2014, the respondent was granted leave to apply by way of judicial review for various Declarations and Orders of Mandamus in relation to her qualification (as claimed) for fixed period promotion in compliance with para. 8(4) of the Defence Force Regulations (hereinafter "DFR") A.15. She also sought a Declaration and an Order of Mandamus in relation to a breach (as claimed) of various Articles of Directive 2006/54/EC on the implementation of the principle of equal opportunities and the equal treatment of men and women in matters of employment (hereinafter "the Equality Directive"). She also claimed damages for loss of earnings.

5. On the 24th July, 2017, the respondent was granted an order from the High Court, by way of judicial review declaring that she was qualified for promotion from the rank of Captain to Commandant in accordance with the relevant section of the Defence Force regulations. She also obtained a declaration that the appellants were in breach of Article 2(2)(c), Articles 14(2) to Article 15 of the Equality Directive. She was subsequently awarded damages for that breach. The judgment of the High Court can be found using the neutral citation as follows: *Byrne v. Minister for Defence & Others* [2016] IEHC 464.

6. The respondents/appellants (hereinafter "the State") have appealed those findings. For reasons unnecessary to go into in this judgment, it was agreed by the respondent that the specific award as to damages would have to be set aside and remitted to the High Court. Any such remittal is, however, subject to the determination of the substantive appeal.

Issues in this Appeal

7. There are three separate issues in this appeal.

   (1) An issue of breach of contractual and statutory duty, based upon an interpretation of the DFR, as to whether the respondent was qualified for promotion from the rank of Captain to Commandant;

   (2) An issue regarding exhaustion of statutory remedies, particularly with regard to the claim for breach of the Equality Directive; and

   (3) An issue as to breach of the Equality Directive by virtue of her claim to having been discriminated against on the ground of pregnancy/maternity leave.

Contractual and Statutory Breach Regarding Promotion?

Promotion under the Defence Force Regulation

8. The Defence Act, 1954 (hereinafter "the 1954 Act"), confers power on the first appellant, the Minister for Defence, to make regulations governing service in the Permanent Defence Force. Section 45(1) provides that "The Minister may in accordance with regulations made by him promote any officer to a higher substantive rank."

9. Section 2 of the Statutory Instruments Act, 1947, as amended by the Statute Law Revision Act, 2015 exempts regulations made, *inter alia*, by reference to s.45(1) from the usual requirements of printing, notice of making, gazetting in Iris Oifigiúil and dissemination. Therefore, although Defence Force Regulations do not have to be published in the same way as another statutory instrument, they are, in all other respect, statutory instruments.

10. DFR A.15 deals with, *inter alia* the appointment and promotion of officers. Para. 8 of DFR A.15 provides for fixed period promotions. Para. 8(4)(b) states as follows: -

> "On the recommendation of the Chief of Staff –
>
> (b) [A]n Engineer Officer who is in receipt of a rate of remuneration prescribed for officers of his rank by virtue of professional or technical

qualifications appropriate to the branch of the Permanent Defence Force in which he is serving may be promoted from Lieutenant to Captain on completing three years' service in the rank of Lieutenant and from Captain to Commandant on completing nine years' service in the rank of Captain, provided that –

(i) His service in the rank of Lieutenant or Captain as the case may be, is certified by the Chief of Staff to have been satisfactory;
(ii) he has satisfied an Interview Board appointed by the Chief of Staff as to his suitability for promotion;
(iii) in the case of promotion to the rank of Commandant, he has successfully completed a Standard Course or a course certified by the Chief of Staff as acceptable in lieu thereof or has otherwise reached a satisfactory standard as determined by the Chief of staff;
(iv) […]
(v) […]"

11. The above can be compared and contrasted with the appointment process for medical or dental officers. Para. 8(4)(a) states that on the recommendation of the Chief of Staff –

> "A Medical or Dental Officer may be promoted from Captain to Commandant on completing nine years' service in the rank of Captain."

The respondent's qualifications

12. The respondent's case is based primarily on the fact that, as a direct entry officer, she was entitled after nine years' service in the rank of Captain to be promoted to Commandant. Apart from para. 8(4) of DFR A.15, the respondent points to the contract she signed as an engineer officer. That contract said that: -

> "Subject to the terms of Defence Force Regulations promotions up to the rank of Commandant is assured after satisfactory service as follows:
>
> Lieutenant to Captain – After 3 years in rank of Lieutenant
> Captain to Commandant – After 9 years in rank of Captain."

It should also be noted that the contract stated under the heading "Courses": -

> "In order to ensure that he/she will be competent to carry out the duties of higher rank to which he/she may be promoted, an officer will be required to undergo such courses as may be laid down from time to time."

13. According to the affidavit of Commandant Daragh McKevitt, the Officer in Charge of the Commissioned Officers Management Office (hereinafter "COMO"), for the purposes of DFR A.15 para. 8(4)(b)(iii) a "'standard course or a course certified by the Chief of Staff as acceptable', includes in the context of Direct Entry Engineer Officer's completion of both the Engineering Standard Officer's Course and a Junior Command and Staff Course". It is common case that the respondent did not complete either of these courses. There is

disagreement between the parties as to whether the respondent was notified for these courses.

14. It was a requirement that an attendee on these courses had passed medical and fitness examinations. There is an amount of disagreement about whether medical examinations were even available to the respondent. The respondent accepted that she had never passed a fitness requirement, but it was her understanding that a specialist officer was not required to do so.

15. The respondent outlined a long list of courses that she had completed including an engineer young officer's course, operational firefighting, combat specialist search and clearance course and specialist search conversion course. The courses were a combination of internal Defence Forces and external Defence Forces courses including desk based and physically demanding courses. The respondent was also deployed to Liberia in 2003. She volunteered for several tours but was not selected. She has also been an acting Commandant on certain occasions.

The Commissioned Officers Management Office

16. According to Commandant McKevitt, COMO is responsible for the human resources management of commissioned officers, including management of fixed period promotions, within the Permanent Defence Force. He outlined that when an officer has reached or is approaching the date of a fixed period promotion, COMO conducts an evaluation of the eligibility of the officers concerned. Where an officer is found to be an eligible candidate for promotion, their name is forwarded to the Corps Directors Office for confirmation. A convening order is then processed to enable the Suitability Board to sit and assess the suitability of eligible officers during an interview process. Where an officer is found to be suitable by the Board, a promotion instrument is prepared and submitted for the signature by the Minister of Defence which results in the promotion of the eligible candidate of officers who are deemed eligible.

17. Responding to the respondent's complaint that she had not been informed about the interview or promotion process, Commandant McKevitt said that it was not the policy of the respondents or the PDF to contact officers who are not deemed to be eligible for assessment for promotion. It is only policy to notify officers when they are to present for interviews before a Suitability Board or when they are eligible to apply to compete in a promotion competition.

18. The respondent claimed that a number of other engineer officers who were promoted without having completed the Junior Command and Staff Course. Commandant McKevitt, said that the PDF was unaware of any Engineer Officer being promoted without successful completion of the course. On the other hand, Commandant McKevitt referred to a legal officer who was promoted in circumstances where he had been unable to complete the course due to the exigencies of service. He had otherwise qualified to undergo the course. Commandant McKevitt says that as he had other professional qualifications which the Chief of Staff deemed a satisfactory standard, he was promoted to the rank of Commandant in the legal section. That was an application made and submitted through

the chain of command to the Chief of Staff for ratification of the officer's professional qualifications in lieu of the required courses.

19. One of the issues in this appeal is whether COMO was entitled to carry out the promotion process as it did. The State also queried whether this issue was raised in the hearing in the High Court. The State now claims eligibility criteria were set by the Deputy Chief of Staff; that this was done through a power of delegation to the Deputy Chief of Staff pursuant to s.1(x) of the Ministers and Secretaries Act, 1924 and s.13(4) of the 1954 Act and by DFR A.15, para. 7(c). The State submits that COMO operates within the JI division of the Defence Forces, for which the Deputy Chief of Staff (Support) has overall responsibility, COMO provides administrative support to the Deputy Chief of Staff (Support) in relation to the exercise of his powers.

The High Court judgment

20. In the course of his judgment, the trial judge discussed DFR A.15 para. 8. He went through each of the separate requirements in para. 8(4). In relation to the requirement that the respondent's military service be satisfactory, he noted that there was no suggestion that it was not satisfactory. The trial judge also noted that under the regulations, she had to satisfy an Interview Board as to her suitability for promotion and said "*it was common case that [the respondent] was never invited to the interview board as expressly provided by para. 8.(4) of the regulations*".

21. The trial judge held in relation to the requirement as to the completion of courses, that in the event she did not complete a requisite course: "*there had to be a determination by the Chief of Staff as to whether she had reached a satisfactory standard. In this Court's view, this would have required some form of assessment, in which where the applicant had an opportunity to make her case.*"

22. The trial judge found that there was a failure by the State to comply with the provisions of DFR A.15 para. 8(4). He held that the applicant had been wrongly excluded from fixed period promotion by the State's failure to comply with its contractual and statutory duties. She was not informed as to the convening of any board assessing the suitability of officers for promotion and subsequently was not given an opportunity to put her case to the Chief of Staff or any interview board appointed by him. In respect of the eligibility requirement stipulated in the regulations which the appellants sought to indicate was determined by COMO, the Court held that there was no legislative basis for the Chief of Staff's delegation of his role to COMO to assess an Officer's eligibility for promotion.

The right to fixed term promotion

23. In the judicial review, the respondent claimed that she was entitled *as of right* to a fixed term promotion. In respect of this claim, the respondent relied upon the contract she had signed; she submitted the contract entailed restrictions in respect of other service benefits and required additional undertakings. In her statement of grounds, she claimed that because of the restrictions that were placed on her, there was a guarantee of fixed term promotion. This claim was reflected in the reliefs that she sought. These were declarations that she was qualified for promotion in accordance with para. 8(4) of DFR

A.15 having served nine years in the rank of Captain. She also sought an order of mandamus directing the first named respondent to comply with the provisions of para. 8(4) of DFR A.15. It is not clear how such an order of *mandamus* could have been sought as the respondent had already resigned her commission by the time she made her application for judicial review.

24. The trial judge made the declarations as had been sought by the respondent in her application. He did so however, even though he referred to para. 8(4) in a manner which recognised it as imposing conditions on the automatic right of promotion. The trial judge held that there had been a breach of the conditions by COMO as in his view, she had not been notified of the interview board and there had also been no assessment of her suitability by the Chief of Staff. As stated above, he did not accept that there was a legislative basis for the Chief of Staff's delegation of his role to COMO to assess an officer's eligibility for promotion. Thus, the trial judge held that there were conditions attached to the right to fixed term promotion, but that COMO had not applied or operated those conditions in a lawful manner.

25. At no point in his judgment did the trial judge explain how a failure to operate the conditions set for promotion under DFR A.15, could result in a declaration that the respondent was qualified to be promoted from Captain to Commandant. Based upon his findings, it may or may not have been appropriate to make an order of *certiorari* of the decision not to promote her, but his findings did not explain how it could be said that the respondent was qualified for promotion to the rank of Commandant in accordance with the relevant paragraph in A.15, when that paragraph required, *inter alia*, completion of certain designated courses or having otherwise reached a satisfactory standard as determined by the Chief of Staff. At best a declaration might have been made that she was entitled to be promoted in accordance with DFR A.15 para. 8(4) but that had not been the declaration sought.

26. In my view therefore, without being required to deal with the issue of whether the Chief of Staff was entitled to delegate his functions, the respondent was not entitled to the declarations that she had sought. This was not an automatic fixed term promotion as is provided to Medical and Dental Officers. Instead, as was implicitly acknowledged in the judgment of the trial judge, there were certain conditions that had to be met prior to qualification for promotion.

27. Even if it is accepted that Commandant McKevitt never gave any evidence that the issue of suitability by the Chief of Staff had been considered in the case of the respondent specifically or indeed generally by the provision of limits as to suitability, the remedy sought and obtained by the respondent was not one that was available under the 1954 Act and the regulations made thereunder. The legislative provisions require a determination by the Chief of Staff as to suitability or as to the completion of certain courses. In the absence of evidence that those conditions (and all other conditions) have clearly been met, it is not for the courts to make a declaration that a person is qualified to be promoted. If the failure to make such a determination as to suitability is sought to be

challenged, such a challenge must address that issue directly. It is noted that the Chief of Staff was not a party to these proceedings and there was no direct challenge to his decision (delegated or not) in respect of whether the respondent met the conditions set out in DFR A.15 para. 8(4).

28. Insofar as the trial judge referred to the contractual and statutory breaches which may have entitled her to promotion, in my view, the contract that she had signed stated that promotion was only *assured subject to the terms of the Defence Force regulations*. Those regulations were DFR A.15 and for the reasons set out above, these regulations imposed conditions which had to be met before promotion could be given. It was therefore not open to the High Court to make a determination that she was qualified for promotion, in circumstances where such qualification was not automatic. The regulations imposed such functions onto the Chief of Staff (through delegation or otherwise) and the Interview Board. At best, it was incumbent upon the appellants, through the DFR and management, to provide the respondent with a system that would permit her to achieve that qualification. Such a claim did not form the basis of the judicial review.

29. For the reasons set out above, I would allow the appeal in relation to the first two declarations.

The Claim for Breach of the Equality Directive - Exhaustion of Statutory Remedies

The relevant legal provisions

30. Section 114 of the 1954 Act, provides for, what is termed in the marginal note, "redress of wrongs." Section 114, insofar as is relevant, provides:

> "(1) If an officer thinks himself wronged in any matter by any superior or other officer, including his commanding officer, he may complain thereof to his commanding officer and if, but only if, his commanding officer does not deal with the complaint to such officer's satisfaction, he may complain in the prescribed manner to the Chief of Staff who shall inquire into the complaint and give his directions thereon.
>
> (2) If any man thinks himself wronged in any matter by any officer, other than his company commander, or by any man he may complain thereof to his company commander, and if he thinks himself wronged by his company commander either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof to his commanding officer, and if he thinks himself wronged by his commanding officer, either in respect of his complaint not being redressed or in respect of any other matter, he may complain thereof in the prescribed manner to the Chief of Staff who shall inquire into the complaint and give his directions thereon.
>
> (3) Every officer to whom a complaint is made in pursuance of this section shall cause such complaint to be inquired into, and shall, if on inquiry he is satisfied of the justice of the complaint so made, take such steps as may be necessary for giving full redress to the complainant in respect of the matter complained of, and shall in

every case inform the complainant in the prescribed manner as to what action has been taken in respect of the matter complained of.

(3A) The Chief of Staff shall cause every complaint seeking redress of wrongs under this section that is made in writing to be notified to the Minister and the Ombudsman for the Defence Forces as soon as practicable following the making of such complaint."

31. The Employment Equality Act, 1998 Act (hereinafter "the 1998 Act") as amended, in the submission of the appellants, makes provision for those in the employment of the Defence Force to access, the machinery set out in that Act for bringing a claim for redress. That access is restricted in relation to claims based upon age or disability discrimination. Section 77 insofar as it is relevant provides:

"(1) A person who claims —

(*a*) to have been discriminated against or subjected to victimisation,
(*b*) to have been dismissed in circumstances amounting to discrimination or victimisation,
(*c*) not to be receiving remuneration in accordance with an equal remuneration term, or
(*d*) not to be receiving a benefit under an equality clause,

in contravention of this Act may, subject to *subsections (3)* to *(9)*, seek redress by referring the case to the Director General of the Workplace Relations Commission.

(3) If the grounds for such a claim arise —

(*a*) under Part III, or
(*b*) in any other circumstances (including circumstances amounting to victimisation) to which the Equal Pay Directive or Equal Treatment Directive is relevant,

then, subject to *subsections (4)* to *(9)*, the person making the claim may seek redress by referring the case to the Circuit Court instead of to the Director General of the Workplace Relations Commission. […]

(9) Where a claim for redress under this Act (other than on the age or disability ground) —

(a) relates to employment in the Defence Forces, and
(b) is made by a member thereof,

the claim shall, in the first instance, be referred for redress under the procedure set out in section 104.

(10) Where subsection (9) applies to a claim for redress, the complainant shall not refer a case under subsection (1) or (3) unless—

(a) a period of 12 months has elapsed after the referral under section 104 to which the claim relates and the procedures under section 104(2)(a) have not been requested or have not been completed, or

(b) the complainant is not satisfied with the recommendation given under section 104(2)(b) on the claim,

and in a case to which paragraph (a) or (b) relates, the end of the period of time which is applicable under subsection (5) (including, where appropriate, applicable under that subsection by reference to subsection (6) shall be construed as—

(i) the end of that period, or

(ii) the end of the period of 28 days from the expiration of the period referred to in paragraph (a) or the date of the recommendation referred to in paragraph (b),

whichever last occurs."

32. Section 104 of the 1998 Act provides:

"(1) Save as provided for by *section 77(10)*, nothing in this Part shall enable a member of the Defence Forces to refer any case relating to employment as a member of the Defence Forces to the Director General of the Workplace Relations Commission or the Circuit Court or to exercise any other power conferred by the preceding provisions of this Part.

(2) If requested to do so by an officer, within the meaning of the Defence Act, 1954, who is authorised in that behalf, the Director General of the Workplace Relations Commission shall—

(*a*) investigate any matter which has been complained of in accordance with section 114 of that Act and which, apart from this section, would be a matter within the scope of an investigation by the Director General of the Workplace Relations Commission under this Part or of proceedings before the Circuit Court under *section 77(3)*, and

(*b*) make a recommendation in respect of that matter to the officer concerned.

(3) A recommendation under *subsection (2)(b)* shall be in writing and shall include a statement of the reasons why the Director General of the Workplace Relations Commission made the recommendation and, in deciding what action is to be taken on the complaint, regard shall be had to the recommendation.

(4) The Director General of the Workplace Relations Commission shall give a copy of any recommendation made under *subsection (2)(b)* to the member of the Defence Forces who made the complaint which gave rise to the recommendation."

The Submissions

33. The State's primary submission is that the interplay between s.114 of the 1954 Act and s.104 and s.77 of the 1998 Act provides for an exception to the preclusion of members of

the Defence Forces from referring complaints to the Workplace Relations Commission (hereinafter "the WRC") or to the Circuit Court. In the State's submission, the WRC may obtain jurisdiction to investigate a complaint where a request is made by an officer under s. 104(2) of the 1998 Act. The proper course of action where a member of the PDF wished to complain of discrimination contrary to the Equality Directive, was to make a complaint under s.114 and then a referral if that was required. In the absence of making a claim for redress under the 1998 Act, the respondent was precluded from making a claim for breach of the Equality Directive directly to the High Court.

34. The State submitted that the trial judge mischaracterised the redress of wrongs procedure. Counsel on behalf of the State also submitted that the trial judge erred in law in holding that the redress of wrongs procedure did not provide an adequate remedy.

35. The respondent submitted that the State's submissions were only directed towards the *possibility* that the respondent could make a complaint to the Workplace Relations Commission. This argument was based upon the State's written submissions which had also claimed that the WRC "may obtain jurisdiction to investigate a complaint where a request is made by an officer under s.104(2) of the 1998 Act."

36. It is certainly an unusual feature of the State's submissions that they do not make separate reference to s.77 of the 1998 Act. At the hearing of the appeal, counsel on behalf of the State, made her submission based upon the interaction of both s.77 and s.104 of the 1998 Act as well as s.114 of the 1954 Act. It seems to me therefore that it is right and appropriate that the Court must rely upon all three of the said sections in determining the effect on the respondent's rights.

37. The respondent submitted that there is an inescapable circularity to the pathway to the relief to the statutory employment equality scheme. Her counsel submitted that a member of the PDF has no entitlement to complain directly to the Workplace Relations Commission. She can only do so through s.104 which requires her to utilise the process under s.114 of the 1954 Act. Even then, the respondent has no control over the referral to the process as this is dependent on the officer's discretionary decision to make a request. This is in contrast to the State's submission that s.77(10) gives a direct entitlement to a complainant, such as the respondent, to apply for redress. The State accepted that the right to complain is time deferred but submitted that no challenge had been made to a particular aspect of the provision.

38. The respondent submitted that on its face, s.114 does not require an officer to make a complaint but instead uses the permissive phrase "may complain". In my view, the use of the word "may", indicates permission for a person who thinks they are wronged to complain to their commanding officer. No officer can be compelled to make a complaint even if they feel wronged. A failure to make a complaint however, may have implications for any other proceedings they may wish to bring. Since *the State (Abbenglen Properties Ltd) v Dublin Corporation* [1984] I.R. 381, it is an accepted tenet of the law of judicial review that where an alternative remedy exists, the courts will exercise its discretion not to grant relief by way of judicial review unless the interests of justice otherwise dictates. I

will return to the issue of judicial review later. I will now turn to its impact on the right of the respondent as a member of the PDF to make a claim for redress under the 1998 Act.

The claim for redress under the 1998 Act

39. Having considered the relevant sections of the 1998 Act together with s.114 of the 1954 Act, I consider that they do not represent the finest example of parliamentary drafting. The interpretation requires moving between one Act to another Act, from one section to another section and from one sub-section to another sub-section. These preliminary remarks do not imply that the interpretation of the legislative provisions is therefore other than clear; rather, the point is made that the particular drafting style requires those seeking to understand the legislation to make a determined and sustained effort to ensure that they remain on the right path within the legislative labyrinth. It is not too much to ask that Acts of the Oireachtas be readily accessible to all without the need for multiple cross-referencing.

40. I will start the process of interpretation with s.104 of the 1998 Act. At the outset, I note that the section applies to those in employment of the Defence Force. For ease of reference, I will simply refer to PDF members as this is the relevant employment situation of this respondent.

41. Section 104(1) prohibits PDF members making references of cases to the Director General of the WRC or the Circuit Court, save as provided for by s.77(10) of the 1998 Act. By virtue of how it is phrased, s.104 is therefore subject to the earlier provision in s.77. This reference in itself is hardly objectionable. However, when turning to look at s.77(10) the first words are, "where subsection 9 applies to a claim for redress…". This necessitates returning to ss.9. As can be seen above, ss.9 states that the claim for redress in the first instance be referred for redress under the procedure set out in s.104 of the 1998 Act.

42. Turning back to s.104, and taking a closer look at its provisions, it provides that if requested by an officer within the meaning of the 1954 Act who is authorised in that behalf, the Director General of the WRC shall investigate any matter which is complained of within s.114 of that Act. The reference to "officer" in this subsection is understood by both parties to this appeal to mean an officer dealing with the s.114 complaint rather than a complainant.

43. The crucial issue therefore, is whether the legislation actually provides the respondent with a right to claim redress under the 1998 Act in her own capacity or if her access to the mechanism of redress is subject to another officer's discretion. In my view, it is important to bear in mind that the substantively relevant provisions under s.77 and s.104 of the 1998 Act were provided under the 1998 Act as enacted. The long title to that Act demonstrates that it was, *inter alia*, an Act to make further provision for the promotion of equality between employed persons and was implementing Council Directive No. 76/207/EEC on the implementation of the principle of equal treatment for men and women in employment (hereinafter "the Equal Treatment Directive"). The Equal Treatment Directive has been held by the Court of Justice to apply to the armed forces (e.*g Kreil v. Germany (Case C-285-/98)* [2000] E.C.R. I-69).

44. Further amendments to s.77 and s.104 were made by the Equality Act, 2004. The long title to that Act provides that it was, *inter alia*, an Act to amend the 1998 Act to implement the Equal Treatment Directive. That Directive applies to military personnel as Article 3(4) gave permission to Member States to provide that the Directive, insofar as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces. That exemption was availed of by Ireland in amending the 1998 Act by the enactment of the Equality Act, 2004.

45. Section 77(9) provides that a claim for redress relating to PDF members must be made in the first instance under s.104 of the 1998 Act. As outlined above, the first subsection of that section states that, "[s]ave as provided for by s. 77(10), nothing in that part shall enable a member of the Defence Forces to refer any case relating to employment as a member of the Defence Forces to the Director General of the Workplace Relations Commission or the Circuit Court […]".

46. Subsection 2 of s.104 is the section which provides the mechanism for referral by an authorised Defence Forces officer that the Director General of the WRC investigate any matter complained of within s.114 of the 1954 Act and which would, apart from this section, be a matter otherwise within the scope of investigation by the Director General of the WRC or of proceedings under the Circuit Court under s.77(3) of the 1998 Act. Turning back to s.77(10), this makes express provision for those complaints that come within ss.9, *i.e.* a complaint for redress of a PDF member. A PDF complainant must wait a period of 12 months after the referral under s.104 to which the claim relates and the procedures under s.104(2)(a) have not been requested or have not been completed, or the complainant is not satisfied with the recommendation given under s.104(2)(b) on the claim, to make the claim for redress.

47. Much time at the hearing of this appeal was spent addressing the meaning of "referral under section 104" as contained in s.77(10)(a) of the 1998 Act. The State submitted that this meant the referral under s.114 of the 1954 Act i.e. the complaint by a member to a superior officer. The respondent submitted that the phrase meant the referral by the authorised officer under s.114 of the 1954 Act or, in the alternative, that the phrase was so unclear that it could not be interpreted in a manner which provided a Defence Force member with a clear pathway to making a claim.

48. From those submissions, the issue can be narrowed down to whether "referral under section 104" in s.77(10)(a) means, (i) referral by the authorised officer or (ii) links back to "referred for redress under the procedure set out in section 104" as set out in ss.9 which refers to the commencement of a s.114 complaint.

49. In interpreting the sections, it is necessary to read the 1998 Act as a whole and to bear in mind that they are implementing EU Directives on equality and non-discrimination. The sections interplay with each other and it is important to understand the effect of that interplay. The references to "complainant" in s.77(10) and in s.77(9) to the "claim in the first instance be referred under the s.104 procedure", envisage a complainant having a right to make a claim for redress that is independent of others, albeit that it is a claim

subject to certain procedural limitations. Moreover, s.77(9) envisages a claim for redress under the Act that is wider than simply the right to refer to the Director General of the WRC save for the exclusion of the age and disability ground. Therefore, on issues such as breach of equality between men and women and victimisation, s.77(9) gives a right to refer to the Circuit Court. It is noteworthy that s.104 only permits the authorised officer to refer the claim to the Director General of the Workplace Relations Commission.

50. Furthermore, s. 77(10) provides for a time deferred aspect to a complainant's right to claim for redress. These time deferrals refer specifically to the procedures under s.104(2)(a) not being requested or not being completed. The reference to the procedures not being requested implies that the claim may still be made where the authorised officer has not used his or her power to refer the matter to the Director General. In light of the above, it seems to me that the referral for redress under the procedure set out in s.104 cannot be restricted to the authorised officer's right to refer to the Director General.

51. Indeed, even if the sections cannot be interpreted as providing for a clear right for a member of the PDF to make his or her own claim for redress, then in my view, the provisions are ambiguous as they provide either for a referral by an individual member of the PDF or only for a situation where an authorised officer has already made a referral under s. 104 of the 1998 Act. It could also be, however, the provisions are obscure because they apparently provide for a personal complaint but appear to engage in circular reasoning without providing for a clear path to redress. Additionally, if one was to hold that a claimant did not have a right of direct access to the redress provisions of the Act, then the provisions of s.77(9) and s.77(10) would be entirely otiose as the complainant would never have the right to refer and the time limits would not matter. That would be an absurdity.

52. Section 5 of the Interpretation Act, 2005 (hereinafter "the 2005 Act") requires a provision which is either obscure or ambiguous or which on a literal provision would be absurd or would fail to reflect the plain intention of the Oireachtas, must be given a construction that reflects the plain intention of the Oireachtas where that can be ascertained from the Act as a whole. As stated above, the Act as a whole was intended to implement various EU Directives on equality and non-discrimination, including the Equality Directive. The Act itself intended to provide access to the redress provisions (save for age and disability grounds) for members of the Permanent Defence Forces. The Act, when combined with the provisions in s.114 of the 1954 Act, intended to set up a particular pathway for members to claim such redress. It is worth noting that in a hierarchical structure such as the PDF, reliance on an internal complaints system built into the command structure for the commencement of a claim may serve a particular function *vis à vis* the maintaining of good order and discipline. That is not the basis of my interpretation of the relevant sections of the 1998 Act and the 1954 Act however.

53. In my view, the plain intention of the Oireachtas in enacting the 1998 Act as amended by the 2005 Act, was that a member of the PDF, who had a complaint covered by the scope of the 1998 Act and who wished to claim redress under the Act, was obliged to make a

claim under s.114 of the 1954 Act. If the authorised officer did not make the referral under the 1998 Act or the referral was not complete, the member of the PDF had a right to make her own complaint after a period of 12 months elapsed from the date she made her s.114 complaint or, if she is not satisfied with the recommendation, she can make a complaint within 28 days from that recommendation.

54. It is also of some importance that even if the ordinary principles of statutory interpretation do not permit the interpretation I have given to these provisions, the principle of conforming legislation under EU law requires an interpretation of national law in the light of the wording and the purpose of the Directive to achieve the result envisaged by the Directive. This conforming interpretation must be made as far as possible, but a conforming interpretation cannot be given if it breached the principle of legal certainty or if it would be *contra legem* to so interpret the national legal provisions. Thus, if the construction of the Act does not bear any such conforming interpretation, it cannot be so construed. I am of the view that where I have identified the issue as to whether the phrase in s.77(9) "be referred for redress under the procedure set out in section 104" can be interpreted as meaning the claim under s.114, I am satisfied there is nothing in the 1998 Act which prohibits such an interpretation. For the reasons set out above, I am satisfied that a construction of the Act which is in conformity with the objectives of the Equal Treatment and Equality Directives, namely the provision of redress for those persons including members of the armed forces, whose rights under the said Directives are violated, means that a complainant member of the PDF who has made a complaint under s.114, is entitled to claim redress under the Act in her own right provided certain procedural rights are met.

Exhaustion of Statutory Remedy

55. In the course of their submissions, the State argued that the redress of wrongs mechanism set out in s.114 of the 1954 Act was the appropriate mechanism for disputes for member of the Defence Forces by the Oireachtas. Counsel submitted that no claim had been made by the respondent in her proceedings that there had been a failure to transpose the regulation nor was there a claim that s.114 did not provide her with an effective remedy. There was no evidence on affidavit as to any alleged shortcoming within the regime. The position this Court finds itself in, is that there is no evidence as to how the WRC views this piece of legislation, *i.e.* does the relevant body tasked with adjudicating on claims for redress for breaches of employment equality legislation accept direct complaints from members of the PDF provided certain time limits have been breached?

56. In my view, the point made by the State is a valid one and goes towards the question of whether judicial review was the appropriate remedy. If the WRC had accepted jurisdiction as to a complaint from the respondent, the respondent would have had full access to the redress mechanism set out under the 1998 Act. Moreover, as the State has pointed out, the recent ruling of the CJEU in the case of *The Minister for Justice and Equality and Commissioner of An Garda Síochána v. Workplace Relations Commission (Case C-378/17)*

demonstrates that the WRC has wide powers, even permitting it to disapply Irish legislation if it finds it conflicts with EU law.

57. In the High Court, the trial judge held that s.114 was an internal Defence Force dispute mechanism and that it offered little to the respondent by way of adequate remedy. That finding was made as the trial judge held "*there exits only a possibility of a complaint such as the applicants [sic] being referred on to the Workplace Relations Commission under s.114*". In my view, this is a problematic finding not least because it did not address the issues of interpretation as set out above. Moreover, it is a finding amounting to a failure to transpose the Equality Directive without that having been expressly addressed by way of pleadings or evidence.

58. The State submitted that the High Court did not have jurisdiction to deal with the substantive merits of the complaint raised by the respondent as a member of the Permanent Defence Forces. The place for such a claim they submitted is via the mechanism provided for by statute. They rely upon the following dicta of Charleton J. in the High Court in *Doherty v. South Dublin County Council (No. 2)* [2007] 2 I.R. 695: -

> "*Where, however, an Act creates an entirely new legal norm and provides for a new mechanism for enforcement under its provisions, its purpose is not to oust to the jurisdiction of the High Court but, instead, to establish new means for the disposal of controversies connected with those legal norms. In such an instance, administrative norms, and not judicial ones are set: the means of disposal is also administrative and not within the judicial sphere unless it is invoked under the legislative scheme. In the case of the Planning Acts, in employment rights matters and, I would hold, under the Equal Status Acts, – , these new legal norms and a new means of disposal through tribunal are created. This expressly bypasses the courts in dealing with these matters. The High Court retains its supervisory jurisdiction to ensure that hearings take place within jurisdiction, operate under constitutional standards of fairness and enjoy outcomes that do not fly in the face of fundamental reason and common sense.*"

59. The respondent submitted that the mechanism only provided her with the possibility of claiming redress under the Act and therefore she could not be restricted in her access to the courts in claiming redress for a breach of her rights under the Equality Directive. Furthermore, she submitted that the Directive was directly effective and that they were entitled to rely upon it in the High Court. She relied upon a series of cases which made reference to the principle of "effective judicial protection" as protected under EU law.

60. In my view, the respondent as a member of the PDF was provided with a mechanism to claim redress under the 1998 Act. The only difference between an ordinary employee and a member of the PDF in claiming redress, was that in order to make a claim for redress a member of the PDF has to engage in the s.114 complaint procedure under the 1951 Act. A member of the PDF potentially will be time-delayed in making a complaint under the 1998 Act, if the authorised officer did not refer her case to the Director General of the WRC or there was a delay in adjudicating on that complaint.

61. In her judicial review proceedings, the respondent made a claim for redress directly to the High Court. It was not claimed that the time limit meant that there was a failure to transpose the Equality Directive, which was unsurprising as the respondent's contention was that she had no right to make any complaint. Indeed, in her proceedings, she did not make a claim that there was a failure to transpose the Equality Directive, again that may have been on the basis that in the absence of any right to claim under the Act, they wanted to rely on the direct effect of the Equality Directive.

62. This judgment has established that the respondent had access to the redress mechanism under the 1998 Act. Once that has been established, she can no longer claim that she had no effective judicial protection other than by access to the High Court. Therefore, she was subject to the ordinary rules of seeking relief by judicial review; if she has an adequate alternative remedy then unless the interests of justice otherwise dictate she was obliged to utilise that remedy in the first place. The only potential aspect of her submission is that the 1998 Act provides lack of effective judicial protection reliefs to the time-deferred nature of the right to claim. In that regard it is noted that the respondent did not make any claim in her proceedings that there was a failure to transpose the Equality Directive because of the time delay inherent for a member of the PDF making such a claim.

63. In my view the respondent has not established in her case that the remedy was inadequate or inappropriate. A complaint under s.114 might have resolved the entire matter without the necessity for either the authorised officer or the respondent to make a referral/claim under the relevant provisions of the 1998 Act. In addition, an authorised officer could easily have made his or her own referral in a speedy manner and thus there would be no time delay on access to a least part of the mechanism set out under the 1998 Act. Importantly however, if a challenge to the time limit had been expressly made, it would have permitted the State to present a case in the High Court which would have addressed issues as to why the State contends that the imposition of a requirement to make a complaint under s.114 together with a time-delay on access to the 1998 Act mechanism was required in the situation of persons in the employment of the Defence Forces.

64. I am satisfied however that the respondent has not made out that there has been a breach of her right to effective judicial protection in the scheme set out in the Act. She was entitled to make a claim under the 1998 Act, to do so however, she had to follow the procedures laid out in s.114 of the 1954 Act and thereafter follow the procedural requirements under the 1998 Act. Given her access to a specialised mechanism for redress for an alleged breach of the Equality Directive, the interests of justice do not require her to be permitted to take these proceedings by way of judicial review.

65. The State's argument that there was a mandatory obligation on a member of the PDF or indeed any person claiming for redress under the 1998 Act, to utilise the mechanism provided in the 1998 Act and therefore, there was an absolute bar on claiming by way of judicial review or otherwise, does not require to be adjudicated in the context of the

finding that I have made in respect of the failure to utilise an alternative remedy prior to making the application for judicial review.

The Claim for a Breach of the Equality Directive

66. In circumstances where I have held that the respondent ought to have made a claim under the provisions of the 1998 Act which required a complaint to be made under s.114 of the 1954 Act and that judicial review was not the appropriate forum, the finding of the trial judge that there had been a breach of the Equality Directive cannot stand.

Conclusion

67. In the course of this judgment I have held that the provisions of DFR A.15 do not allow for automatic fixed term promotion for engineering officers of the rank of Captain to the rank of Commandant. There were certain conditions that a candidate for promotion had to fulfil before promotion could be achieved. In those circumstances, the trial judge was not entitled to make the declarations sought by the respondent.

68. I have also held that the provisions of the 1998 Act permitted the respondent to make a claim for redress once she had made a complaint under the provisions of s.114 of the 1954 Act. In the absence of utilising that alternative remedy the respondent was not entitled to apply for a declaration that her rights under the Equality Directive had been breached.

69. Accordingly, I would allow this appeal.