THE HIGH COURT

[RECORD NO. 2019/378JR]

BETWEEN

GORDON ELDER

APPLICANT

AND

THE MINISTER FOR DEFENCE, THE ATTORNEY GENERAL, AND IRELAND

RESPONDENT

Written note of the ex tempore judgment of Ms. Justice Ní Raifeartaigh delivered on the 22nd day of July, 2019

1. This case was run primarily on the basis of legitimate expectation and I propose to deal with it on that basis. I have reached the conclusion that it has edged over the line - but only just - from what might be described as a "bare" expectation to what in law amounts to a "legitimate" expectation. First, I will speak about the reasons for that conclusion and then I will discuss the reliefs to be granted.

2. The case concerned the procedure by which the Defence Forces selected individuals for participation in a two-year paramedic course run by an external body, the National Ambulance Service College ("NASC"). First of all, I should say that I accept that the qualification of a paramedic is a useful career-enhancing qualification and that it is a benefit in that sense without my necessarily having to find that it would inexorably lead to certain promotions or postings, as there was some dispute about the precise effect of having the qualification.

3. The sequence of events was as follows. A course notification was published on 7th May, 2019. Following that, interviews were held. There was a notification of a decision on 5th June, 2019 as to who the successful candidates were (which included the applicant) and then there was a subsequent notification on 11th June, 2019 which stated that the respondent would re-conduct the interviews because an anomaly had been discovered. In due course, there was a new course notification and this indicated that there was a change in relation to the minimum academic qualification that was required for applicants. In other words, this was the issue relating to the Leaving Certificate versus the Level 5 NQF requirement. (Originally, only applicants with a Leaving Certificate were permitted to apply; now, however, the pool of applicants was being expanded to those who might have a Leaving Certificate or a Level 5 NQF.)

4. The background to the decision to re-conduct the interviews, as appears from the affidavits, is that after the interviews were held, it was realised that a new set of weighted criteria had been used to assess candidates. I call those weighted criteria 'the matrix'. It is clear from what I have seen that there was a document setting out how each applicant would be scored during the interview and it contained twelve categories, with each category carrying a weighting such as 10% or 5%. The weighting of each category is very important to the overall score that the person receives. A lot of work had been put into devising a particular matrix, which was used in a similar set of interviews in 2018, and I will call that the '2018 matrix'. What, in fact, happened was that a slightly altered one -

where the weighting was different in relation to one factor in particular - was used for the interviews in May 2019. I will call that the '2019 matrix'.

5. The evidence before me on behalf of the respondents was that this change, the use of a different matrix, was unintended and that the intention had been to use the 2018 matrix. When it was realised that, from the respondent's points of view, the wrong matrix had been used, the decision was made to re-conduct the interviews and use the 2018 matrix. This apparently was what led to the email to the applicant referring to an "anomaly" within the process.

6. Later, and separately, it seems that it was also realised that the requirement of the external body, the NASC, as regards minimum academic qualifications was that they would accept not only a Leaving Certificate but also a Level 5 NQF. Therefore, it was decided to expand the pool of applicants to include people who had a Level 5 NQF as well as those who had a Leaving Certificate (minimum six subjects). In other words, it was decided that in re-conducting the interview, there would be an expansion of the minimum academic criteria, arguably lowering them, leading to a potential expansion of the pool of candidates.

7. At this point in time, and in my view the sequencing is important, the applicant obtained leave to bring judicial review proceedings; the order granting which is dated 14th June, 2019. He also obtained a stay on the process which, in effect, has prevented any subsequent interviews taking place. There are various reasons as to why the matter did not get a hearing until Friday 19th July, 2019 which was the last working day before the course was due to start. As a matter of practicality, therefore, either these three applicants are permitted to do the course or nobody gets to do this particular course. I understand there is a different one starting in September but there are some other differences in that it is a longer course (it is a three-year course) and there are various other aspects of difference. At the moment, the next course starts on 22nd July and because it was not possible to re-conduct the interviews because of the stay imposed by the High Court, either the applicant (and his fellow applicants) do it or nobody does it. But that, I hasten to add, does not influence me in the decision I have reached because it seems to me that I have to decide the case on the basis of legal principle and I need to consider the legal position on the date when the leave and the stay were granted and not to be influenced by this practical reality.

8. Quite a number of authorities were opened to me including the case of *Glencar Exploration plc v. Mayo County Council (No. 2)* [2002] 1 IR 84 which featured considerably with regard to the three criteria for satisfying the doctrine of legitimate expectation, as set out by Fennelly J. at page 162 as follows:

> "In order to succeed in a claim based on failure of a public authority to respect legitimate expectations, it seems to me to be necessary to establish three matters. Because of the essentially provisional nature of these remarks, I would emphasise that these propositions cannot be regarded as definitive. Firstly, the public authority must have made a statement or adopted a position amounting to a promise or

representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However, the propositions I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine."

9. The case of *Lett & Company Ltd v. Wexford Borough Corporation et al* [2007] IEHC 195 was also opened to me in which Clarke J. (as he then was) made reference to "positive" criteria and "negative" criteria which set the parameters of the doctrine.:

> "In the light of those authorities it seems to me that, on the current state of the development of the doctrine of legitimate expectation, it is reasonable to state that there are both positive and negative factors which must be found to be present or absent, as the case may be, in order that a party can rely upon the doctrine. The positive elements are to be found in the three tests set out by Fennelly J. in the passage from *Glencar Exploration* to which I have referred. The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in *Wiley*, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in *Hempenstall*, legitimate changes in executive policy to take place. I therefore propose to approach the contentions of the parties as to the existence of a legitimate expectation in this case by first considering the positive elements of the test."

10. In a general sense, reflecting on the various authorities that were opened to me including but certainly not limited to those particular authorities, it seems to me that the doctrine of legitimate expectation is fundamentally concerned with holding a public body to a statement it has made in the past about a decision that it is going to make in the future, this being a statement either about *what decision* it will make (in terms of its substance), or a statement *about how the decision will be made* (in terms of the process).

11. The doctrine is distinguishable from the doctrine of promissory estoppel in at least one important respect, namely that the person does not have to act to his detriment on foot

of a promise or representation, and that was clearly set out by O'Hanlon J. in *Fakih v. Minister for Justice* [1993] 2 IR 406 and was also stated by the Supreme Court in *Carl Daly v. Minister for the Marine & Ors* [2001] 3 IR 513. Therefore, it seems to be a well-established aspect of the doctrine, and the absence of such a requirement is something that is important in the present case in my view.

12. The underlying thinking seems to be that it would be unfair to allow a public body to renege on what it has said to a person or a class of persons if it has made a statement of intent or communicated something in connection with a decision it will be taking in the future. The communication, as is clear from the authorities, can arise if something is said orally, or written down in a letter or other document, but sometimes it can be implied, for example, from a previous practice. Here I am thinking, for example, of the case of *Wiley v. Revenue Commissioners* [1994] 2 IR 160. It seems to me that the communication can arise by a variety of methods but the doctrine is about communication; it is about the public authority *communicating something* about the decision it is going to take in the future, be that the content of the decision, or the manner in which the decision will be arrived at.

13. Under *Glencar*, the first issue the Court must address is whether or not there was a representation or promise to the applicant (individually or as a member of a group). In this case, therefore, the question is whether there was a representation or promise as to how the interviews for the paramedic course would be conducted, including what criteria would be applied and/or what the eligibility parameters were for applying in the first place. This first ingredient of the doctrine has seemed to me at all times to be the most problematic aspect of the applicant's case.

14. When I asked the applicant's counsel to identify the source of any representations, he identified two documents: the first course notification of 7th May, 2019, and the document of 5th June, 2019 which was the notification as to who had been successful. This means that the Court had to carefully consider the content of each of those documents. The notification of 5th June followed the interviews and indicated that three persons had been successful, that another had been selected as a substitute, and that nine had been unsuccessful. The first course notification of 7th May provided the following:

"COURSE NOTIFICATION PARAMEDIC COURSE

1. D COS Sp has provisionally authorised the selection of four (4) members of the CMU to undergo a Paramedic Course in the National Ambulance Service College (NASC) – BALLINSASLOE subject to funds becoming available. This course will be conducted on a full-time basis commencing on 22 July 2018 and is of TWO years duration.

2. A board convened by OC CMU will conduct interviews in the Medical School DFTC on Tues 28 May 2019 for suitable applicants. The criteria will be based on;

    a. Academic suitability for the course as listed by NASC,

b. Relevant Military Suitability,

c. General/Practical Suitability.

d. Undertaking to the DF as per Ref A.

3. Essential Requirement required by NASC;

a. Applicants require at a minimum passes in six (6) Ordinary level Leaving Cert Examinations […],

i. Successful completion/certification of a recognised PHCC EMT course is an acceptable substitute for a Laboratory Science subject […],
ii. OR a degree from a recognised third level institution is acceptable in Lieu of the six (6) Ordinary Level Leaving Cert Examinations […],

b. Educational qualifications obtained from other jurisdictions will be assessed on an individual basis in accordance with NASC/UCD admission policies,

c. All original certificates will be reviewed and validated by OC Medical School,

d. Note: A certificate of Garda Vetting Clearance must be submitted to NASC prior to the commencement of the course and DF students must have additional vaccinations (if required)."

15. In relation to the matrix issue - this is the issue of the weighted criteria which applied to the actual selection of the person - it may be noted that the course notification is entirely silent on the specifics of what criteria would be used in the interview process. Further, the evidence on behalf of the respondent would suggest two things to me. First of all, if he had any expectation as to what criteria might be applied, it might have been that the 2018 matrix would apply again, since he had been given a copy of it the previous year and it had been discussed with them. Or, secondly, at most he might have expected that a different matrix would apply without knowing anything about the details of that matrix. As we know, the 2019 matrix was in fact used. But I do not think the evidence supports a finding that the applicant expected that the 2019 matrix would be used. Indeed, the applicant did not aver that he had any particular expectation as to any particular matrix being used and counsel said that it was not something that he particularly relied on. Instead, as he pointed out, the issue of the matrix had been raised by the respondent as an explanation as to why they wanted to re-run the interview process. Accordingly, I do not think a case of legitimate expectation can be supported on any ground based upon any expectation that a particular matrix would be used. It seems to me that the common thread in the various authorities cited to me is that the public body has communicated a statement of intent as to how it will make a decision or what criteria it will apply in making the decision. But here, the public body did not say anything specific in the course notification as to what matrix it would use and therefore I do not think the applicant can rely on the fact that a different matrix was used than that which was used in 2018 or any suggestion that he was told anything about the matrix because there was simply no

communication on that point. What is in the course notification, in my view, is very general and does not reach the level of detail that he would need in order to rely on a promise or representation as to a particular matrix having been offered.

16. On the academic qualification issue - and by this I am referring to the Leaving Certificate versus the Level 5 QTF issue - I take a different view. The sequence here was that it was indicated in the original course notification that the pool of eligible people were those who had Leaving Certificate only. The proposed expanded pool of people would include those who had the Level 5 NQF, which is a wider pool. It seems to me that the original course notification, therefore, did contain what I would describe as a communication of intent that only those with a Leaving Certificate would be considered and I think there has been a changing of the goalposts here, to use the terminology used by MacGrath J. in the case of *Morrissey v. Minister for Defence* [2018] IEHC 672.

17. I wish to make some additional comments. First of all, I am keenly aware that the applicant did not do anything in order to come into those goalposts after the goalposts had been set. For example, unlike the *Morrissey* case, he did not engage in a course of action in order to come within the published criteria. In *Morrissey*, the applicant had repeated his Leaving Certificate, thinking that he could combine his previous year's results with the present year's results, had dropped maths as a subject, and then the goalposts were changed. Here, the applicant did not do anything like that. He apparently already had a Leaving Certificate before the Course Notification was published, so it is not like the *Morrissey* case in that respect. However, the authorities, as already noted, establish that it is not necessary to show that a person has done something in reliance on the communication or that he or she acted to your detriment (in contrast to the doctrine of promissory estoppel). Undoubtedly, it would strengthen a person's case if he or she had done so, but it is, as I understood the doctrine, not a necessary requirement in order to fall within its parameters.

18. I have also taken into account that the eligibility criteria in relation to the academic qualifications are set by the external body, the NASC, and not the respondent itself. But on the facts of this particular case, it seems to me that the Defence Forces would be at liberty to make the pool of eligible applicants *smaller* than the pool considered eligible by the NASC, if they wanted to. Here they seem to have done it by mistake, but they could also have done this if they wanted to. They could not, I would emphasise, make the pool of eligible candidates *bigger* in a way which contravened the external body's criteria. So, for example, if they had advertised the post or the placement in such a manner as to allow for people to apply if they had not only a Leaving Certificate but a Junior Certificate, that would not satisfy the NASC requirements, and the case would raise different issues to those in the present case. It might perhaps raise an issue similar to cases such as *Palmer v. Minister for Defence* [2014] IEHC 446, where the applicant, who had already embarked upon the course in question, had his submission of a legitimate expectation rejected because of the requirement that he be under 40 years of age, which he was not. Here, however, the NASC actually does accept people with Leaving Certificates and the applicant has a Leaving Certificate. Insofar as the respondent may have mistakenly

narrowed the pool of eligible applicants, those who fall within the narrower pool were eligible to do the paramedic course and so there is no obstacle of that kind to the respondent being held to its communication of intent that it would only select from the pool of people who had Leaving Certificates.

19. I also wish to make a comment about the relationship as I understand it between mistakes and the doctrine of legitimate expectation. The position of the respondent, insofar as it had a desire to re-conduct the interviews and re-select people for the course, arose from two mistakes that were made by the respondent itself; the first relating to the matrix weighting, and the second relating to the minimum academic qualification of eligible applicants. The doctrine of legitimate expectation seems frequently to involve statements or communications which were made on foot of mistakes. It seems to me in the limited time I have had to read the authorities that the presence of a mistake does not determine of itself whether or not the doctrine will succeed in any particular case. It is simply a frequently observed phenomenon in these cases for the obvious reason that often a public body may want to change its position on a decision precisely because a prior decision or a provisional view was made on a mistaken basis. Sometimes a public body cannot be held to a previous communication of intent where it was based on a mistake such as the *Wiley* decision or *Palmer*; and sometimes it can. The outcome depends on the other factors in the case.

20. A separate point I want to deal with is whether or not the legitimate expectation argument could have been successful in this case solely on the ground that the applicant *had been told* he was entitled to the position. In other words, whether he could have relied solely on the communication of 5th June, 2019 (telling him he had the place) *simpliciter*. In other words, if a public body, having interviewed someone for a position, tells the person they have successfully obtained the position, would that in itself mean that the person had a legitimate expectation to take up the position in all circumstances? This would seem to me to be a very far-reaching finding and one which would go considerably beyond any previous authority on the doctrine of legitimate expectation. It seems to me in principle that if the doctrine is about holding a public body to a prior communication about what decision it will make (or how it will go about making the decision), then the decision of the public body itself cannot be the means for generating the legitimate expectation, as it becomes something of a circular argument.

21. Accordingly, if it were not for the academic qualification or Leaving Certificate/Level 5 issue referred to earlier, I would have found against the applicant. In particular, if the respondent had decided to re-run the interview process on the basis of a different matrix but with the same pool of applicants, I would not have quashed that decision or granted relief to the applicants, but the additional factor of changing the criteria for eligibility from Leaving Certificate to Leaving Certificate or a Level 5 seems to me to draw in the doctrine of legitimate expectation. It seems to me to move the case across the line from a bare expectation to a legitimate expectation that the candidates would be drawn from a particular pool of applicants (those with a Leaving Certificate), as originally communicated to prospective candidates by the respondent. I must say that I think the case is borderline

and it has caused me a lot of reflection but, on balance, I do think that it creeps over the line between mere expectation and legitimate expectation within the meaning of the doctrine.

22. I also wanted to mention the negative factors identified by Clarke J. in the *Letts* decision. It seems to me that what he was expressing there was something about the delicate relationship between holding a public body to a promise where it changes its mind, on the one hand, and various requirements of statute or questions of *vires* or questions of policy, on the other. It is a difficult balance to hold but I do not think in the present case that there are any of those negative countervailing reasons which would prevent the applicant from getting the relief sought. For example, there is no issue of cutting across any policy of the respondent. It was a simple mistake (in connection with the Leaving Certificate/Level 5 issue). The next time around the respondent can use whatever matrix it wishes to use, and it can also ensure that it adheres closely to the criteria employed by the NASC itself and that there is no slippage in this regard. I do not think there is any interference with policy, nor does any issue arise in relation to forcing a public body to do something unlawful or *ultra vires* simply because it had previously represented that it would do something. There is no such issue here. The example was raised in argument before me of a board member making a decision and it subsequently emerging that he or she was not entitled to sit on the board. There can be very difficult issues in such cases in balancing the various issues involved; on the one hand, holding a public body to what it has said it will do, and on the other, having regard to the various constraints within which a public body operates. I do not think those countervailing considerations arise here.

23. As I say, I am not convinced by any argument that the applicant was entitled to a place on the course simply because he had been told he had achieved the place, nor on any implicit argument about the fact that the matrix was going to be changed in the new interviews, but I am persuaded by the Leaving Certificate/Level 5 argument that a legitimate expectation had arisen and in the absence of negative countervailing factors, it seems to me that the applicant should be successful.

24. On a final note, I should say that there was argument at the outset of the hearing (which took place on the Friday before the Monday on which the paramedic course was due to start) as to the admissibility of affidavits (on both sides) which would have raised significant additional issues concerning the circumstances in which the 2019 matrix came to be used in the interview process. This would have prevented the case from concluding on the Friday itself. The sequence of events in this regard had been commenced with the late filing (on the Wednesday) of an affidavit on behalf of the applicant, which led to a robust response by way of affidavit(s) on behalf of the respondent. The respondent submitted that the affidavits should be received and the additional issues should be aired in order that the Court would hear the full extent of the factual background to the case. However, the respondent had originally filed a Statement of Opposition and affidavits in the full knowledge of the alleged circumstances and had originally chosen not to ventilate them in Court. It only sought to do so when the applicant sought to introduce the additional material at the last minute. In those circumstances, and given the time-frame

between the hearing and the course commencement, I ruled against the admissibility of the additional affidavits (from all sides - both applicant and respondent), and I heard and decided the case on the basis of the affidavits and pleadings as they had stood three days before the hearing. Accordingly, my finding that the use of the 2019 matrix was a mistake was based upon the limited evidence before me.