

# Civil servant wins probation ruling, Minister's decision 'unlawful'

**ANDY PRENDERGAST**

**A new rule on maximum probation periods was a key factor in a High Court decision for a principal officer in the Department of Transport, last week. It was found that the Department mishandled the matter in a number of ways - and that the Minister contradicted his own logic in seeking to revert the worker back to his assistant principal grade.**

In a rare case of its kind – and the first judgment of a superior court in which new rules on probation under the 2022 Regulations on Transparent and Predictable Working Conditions played a prominent part – Mr Justice Simons ruled that the Minister for Transport did not have the power to revoke the appointment of Jason Whelan to the position of principal officer in the Department, after his 12-month probation ended.

The Minister was correct in acknowledging there was a 12-month maximum probation period for the worker, but failed to use this logic when he sought to revert the plaintiff back to his previous position months after his probation had ended – a move he did not have the power to do.

## *Civil servants do not need a “positive” decision confirming appointment*

The Minister is the sole ‘appropriate authority’ who can make a decision on a principal officer’s probation, under the Civil Service Regulation Act. It has to be the Minister personally who makes the decision – a departure from the *Carltona* principle whereby officials of a department can make decisions in the name of a Minister.

The 2022 Regulations, which belatedly transposed the Directive on Transparent Predictable Working Conditions, now provide that the maximum probation period a public/civil servant endures is 12 months. There is no statutory discretion to extend this limit. (In the private sector, the general maximum is now six months, but exceptions are permitted).

The new decision in *Whelan v Minister for Transport* also confirms that established civil servants do not need a “positive” decision confirming their appointment (i.e. promotion) at the end of their probation; rather such an appointment is confirmed upon the expiry of a probation period, if it is not terminated before the end of the probation period.

## **BACKGROUND**

Mr Jason Whelan, a member of the Association of Higher Civil and Public Servants (AHCPs), was appointed as a principal officer in the Department, effective 13 December 2021, having been an assistant principal officer before then. He was told the period of probation (“acting

capacity”) was for a period “of not more than one year.” He also signed a form of acceptance stating he “shall not be finally appointed as principal officer unless [he has] proved satisfactory during the acting period ...”

Assistant principals in the Civil Service hold senior management positions (salaries starting at €75,822) while principal officers are in leadership positions (salaries starting at €98,665).

Mr Whelan had passed his earlier probation reviews, but for his nine-month review, his line manager said he had not met the principal officer standard. Mr Whelan then sought an extension to his probation to, as the judge put it, “prove his competence”.

His request was granted by an official in the Department – not by the Minister – with a new probation end date of 9 January 2023 (beyond 13 December 2022). However, on 10 January, Mr Whelan was informed that officials were to recommend to the Minister he be reverted back to assistant principal.

He invoked his right to use the Civil Service Appeals Board, a non-statutory process where the board can make a recommendation to the Minister. The Board concluded in May 2023 that Mr Whelan be granted a six-month extension to his probation.

However, Simons J pointed out that the Board “mistakenly” concluded that an extension of probation beyond 12 months was permissible.

Notwithstanding, the Minister rejected the extension of the probation, stating “as a matter of law [the] probationary period cannot exceed a period of 12 months”. This decision was communicated to Mr Whelan via letter of 13 July, with the worker then bringing a High Court challenge.

## **CEASED TO BE PRECARIOUS**

Judge Simons looked at the purported extension of Mr Whelan’s probation in October 2022, which was granted by a Department official, not the Minister.

The judge noted that it was surprising that the official issued the letter agreeing to the extension of Mr Whelan’s probation where it appeared from contemporaneous internal communications that the Department officials “were aware that only the Minister could extend the probationary period.”

But because the new rules as set out in the 2022 Regulations, amending the 1994 Terms of Employment (Information) Act, provide that a public servant cannot have a probation period exceeding 12 months, had the Minister accepted the recommendation of the Appeal Board it would have been incorrect to do so.

The new maximum limits on probationary periods came into effect on 16 December 2022. Mr Whelan began his probation as principal officer on 13 December 2021, therefore his

probation expired, at the very latest, on 16 December 2022 – and on that date his appointment “ceased to be precarious.”

## **NO CONFIRMATION NEEDED**

While it is only the Minister who can make a decision on terminating a principal officer’s acting appointment, the decision has to be made during the probation period, and the termination of the appointment has to be made prior to the expiration of the probationary period.

This, the judge noted, follows “both a literal and a purposive interpretation of Section 7 of the Civil Service Regulation Act 1956.”

The purpose of the probationary period is to allow the appropriate authority a reasonable time during which to assess performance “whilst ensuring that the civil servant is not subject to ‘prolonged insecurity’ (to borrow the language of the Working Conditions Directive)”, the judge said.

“The logic being that the appointment is only precarious until such time as the probationary period has expired. It is not necessary that there be a positive decision to ‘confirm’ the appointment. Rather, the appointment takes effect upon the expiration of the probationary period (unless, of course, the appointment has previously been terminated.)”

## **NOT TRUE TO OWN LOGIC**

As a result, Mr Whelan’s appointment as principal officer in the Department “took full effect from, at the very latest, 16 December 2022.”

However, the Minister “some seven months later [...] purported to terminate the appointment and to direct that [Whelan] revert to the grade of assistant principal officer.”

The decision-letter of 13 July 2023 “is not true to its own logic. Having acknowledged that the probationary period cannot exceed twelve months, the decision-letter fails to recognise that the inevitable consequence of this is that the probationary period had expired in December 2022.”

Once the probation period passed, the Minister no longer had the power to revoke the appointment. The decision to revert Mr Whelan back to assistant principal was, therefore, unlawful.

Mr Whelan was represented by Mairéad McKenna SC and Colmcille Kitson BL, instructed by Triona Cody and Luke Grady of O’Mara Geraghty McCourt solicitors. Mr Whelan was also represented by Billy Thompson, Assistant General Secretary of the AHCPS.

The Minister was represented by Joe Jeffers SC and Stephen Brittain BL, instructed by the CSSO. (*Jason Whelan v Minister for Transport, [2023] IEHC 586*)

