

# Public servant should be promoted, expiry of panel irrelevant, AO finds

## MARTIN FRAWLEY

**A WRC AO recommended that a public servant be promoted to a higher position he had initially secured through a competition but which had previously had to defer due to illness.**

In 2020 the complainant applied for a promotional position within the public service but was initially unsuccessful and placed on a reserve panel. In May 2022, he was offered the position. However, due to illness he sought a deferral until he was well enough to take up the position and this was agreed by the employer.

On his return to work in September 2022, there was a delay in the transfer to the position due to the requirement for medical certification for the role. There were further delays in getting a medical consultation and when he got one in December 2022, the doctor wished to refer him for a further opinion which didn't take place until February 2023.

In the meantime, the employer informed him that the panel on which he had been placed was deemed to have expired and he was no longer deemed eligible for the transfer.

The complainant said he was surprised at this and went through the grievance procedure on two occasions. However, the employer said it could not reverse a decision in relation to the expiry of the panel and his promotion fell.

The complainant argued that panels, normally operational for 2 years, have been extended before.

### **'NUB OF THE MATTER'**

The employer argued that it was a case of medical certification and they could not act in the absence of such certification. It said it could not allocate the complainant on or before the closing date of the panel on December 31, 2022 "as to do so would have been contrary to occupational health advice". It said no medical evidence contrary to the consultant opinion was produced and that it had to rely on that.

AO Pat Brady said that while there were disputes over delays in medical certification, delays in the grievance procedure and whether a panel can be extended, the "nub of the matter" appears to be the true position surrounding the complainant's appointment in May 2022.

The AO said there was no doubt he was offered the position and it was clear this was a firm offer and even a confirmation of the position.

Mr Brady continued that the complainant had accepted the offer and when he sought a deferral on medical grounds this was accepted by the employer and therefore “did not, in my opinion, interfere with the essential character of his appointment.”

AO Brady noted that the letter acknowledging the application for deferral referred to the complainant’s ‘allocation’ to the promotional position and this word also appeared in the heading of the letter.

The AO said it was clear the complainant was appointed to the position, subject only to being certified to be fit enough to take it up which is somewhat analogous to any worker whose contract is interrupted by sick leave. The AO added that at this point the complainant also ceased to be on the panel so the expiry of the panel was of no consequence to him.

The AO also noted that the letter to the complainant in May 2022 when he was successful in securing the position referred to his “allocation” to the position. As such the employer was not required to resurrect the panel as the complainant was no longer on it. The AO also noted that the position had never been filled.

## **LIMITATIONS ON JURISDICTION**

The AO then addressed the employer’s submission with regard to “the Labour Court’s acceptance of the limitations on its jurisdiction, and thereby on that of an Adjudicator, in respect of ‘directing a management as to how they manage’ ”.

“However, I distinguish that general principle (which I fully accept) from a situation in which a determination is sought on the rights of a complainant, which is what arises in this case, and which has, since the establishment of the Rights Commissioner jurisdiction nearly sixty years ago, been within the legitimate exercise functions under this Act.

“What I am doing is making a finding that the respondent’s conclusion (or assumption) that the valid appointment it has made in 2022 was subsequently annulled or rendered invalid by the expiry of the panel was erroneous and not well founded on the facts before me.

“Rather than ‘directing a management on how to manage’ I am recommending that the respondent management act to implement a decision it has already made, having regard to its erroneous interpretation of subsequent events, the equity of the case and the rights of the complainant”, the AO outlined. (*IR – SC – 00001966, AO: Pat Brady*)