

**THE HIGH COURT**

[2024] IEHC 218

[2024 No. 263 JR]

**IN THE MATTER OF COUNCIL DIRECTIVE 2014/24/EU**

**IN THE MATTER OF THE EUROPEAN COMMUNITIES (AWARD OF PUBLIC  
AUTHORITY CONTRACTS) REGULATIONS 2016 (SI 284 of 2016)**

**AND IN THE MATTER OF COUNCIL DIRECTIVE 89/665/EEC (AS AMENDED)**

**AND IN THE MATTER OF THE EUROPEAN COMMUNITIES (PUBLIC  
AUTHORITIES' CONTRACTS) (REVIEW PROCEDURES) REGULATIONS 2010  
(SI 130/2010) (AS AMENDED)**

**BETWEEN**

**CHC IRELAND DAC**

**APPLICANT**

**– AND –**

**THE MINISTER FOR TRANSPORT**

**RESPONDENT**

**– AND –**

**BRISTOW IRELAND LIMITED**

**NOTICE PARTY**

**JUDGMENT of Mr Justice Max Barrett delivered on 15<sup>th</sup> April 2024.**

1. At this time, CHC ('the Applicant') provides the Irish Coast Guard Aviation Service pursuant to a contract concluded between CHC and the Minister for Transport, ('the

Respondent’) on 22<sup>nd</sup> July 2010 and which is due to expire on 30<sup>th</sup> June 2025. In separate proceedings, CHC has challenged a decision of the respondent to award Bristow (‘the Notice Party’) a contract for the provision of the aviation service when CHC’s contract expires.

2. In the within proceedings, CHC challenges the decision of the Minister to modify impermissibly the new contract contrary to EU and Irish procurement law. However, no credible evidence has been provided which suggests that the alleged decision to modify has been made and/or that the respondent has entered into modified contract, whether expressly, impliedly, tacitly or otherwise. The Respondent, it emerges in the evidence, has not even received a proposal in respect of the supposed intended modifications. The claims of CHC arise from speculation and assertion all built on a foundation of mere belief.

3. As is clear from the evidence of Ms Cullen, (i) while the Respondent is aware that a proposal is due to be made by Bristow concerning a change of site for a new development at Shannon, but (ii) the respondent has not had sight of the nature and/or scope of any proposed change for Bristow’s obligations, (iii) the respondent is not otherwise aware of the nature and or scope of any proposed change, (iv) the respondent has no intention of agreeing in any shape or fashion to a proposal which the Minister has not seen and of which the Minister is not otherwise aware, and (v) the respondent has also received no proposal in respect of requisite authorisations, TUPE and/or alternative training, nor is the respondent aware that any such proposal may or may not be made.

4. As was noted in *Chakari v. Criminal Injuries Tribunal* [2018] IEHC 527, para.1:

*“An essential element of any judicial review application is that there is some form of action on the part of a respondent decision-maker for a court to review. Here there is nothing. There has been no decision, there has been no failure to make a decision; it is not alleged that anything has been done in excess of jurisdiction for the court to review.”*

5. Consistent variations on the *Chakari* theme are to be found, e.g., in *Donegal Fuel & Supply Co Ltd v. Londonderry Harbour Commissioners* [1994] 1 I.R. 24, *North East Pylon Pressure Campaign Ltd v. An Bord Pleanala* [2016] IEHC 300, *Spencer Place Development Co Ltd v. Dublin City Council* [2020] IECA 268, and *Habte v. Minister for Justice and Equality* [2021]

3 I.R. 627. What all of these decisions point to is that in the public law context it is clearly the case that judicial review proceedings can be struck out when brought before a decisionmaker who has not in fact made a decision.

6. The basis for the existence of the modification decision that has been offered by CHC is (here I paraphrase the affidavit of Mr Tatten, for CHC) that CHC has an understanding from its knowledge of anticipated developments (para.27), that no planning application has yet been submitted by Bristow in respect of any development at Dublin Airport (para.29), that an inspection has been done which CHC considers to be consistent with Bristow's intention to depart from the Shannon proposal (para.29), that CHC must assume (I am not sure why) that there has been a modification to the new contract (para.57), and that it is reasonable to assume that the (assumed) modified contract departs from the new contract. Respectfully, not only do these assumptions proceed on a foundation of assumption (that there has been a modification decision), and not only do they not amount in any way to direct evidence of the existence of the claimed modification decision/contract, but they also elide over the fact that it was expressly drawn to CHC's attention in pre-hearing correspondence from the respondent's solicitors that:

*“In the event that changes are proposed by Bristow regarding its basing proposal in respect of Shannon such proposals would be considered in accordance with the change control procedures in the New Contract. That procedure is in materially identical terms to the procedure provided for in the...Existing Contract [with CHC]. In this regard, we note that CHC invoked the change control procedure under the Existing Contract on many occasions and more than 30 separate amendments to the Existing Contract have been agreed since 2010”.*

7. Moreover, what brings one right back to *Chakari* territory is that even taking all of Mr Tatten's hearsay evidence (and it is hearsay evidence) at its very height, Mr Tatten (for CHC) completely fails to point to any action or statement of the Respondent which points to the Respondent having agreed to or tacitly approved a modification of its contract with Bristow. One cannot challenge a nothing: in this regard I refer again what I have stated at para.2.

8. As to CHC's proposition that the Respondent has decided to agree or tacitly approve a modification to Bristow's proposal concerning the obtaining of requisite authorisations, an

analysis of the evidence shows there to be no credible basis for the claim that the Respondent has agreed or tacitly approved any alleged modification to the contract. Thus, if I turn again to Mr Tatten’s evidence (for CHC) what do I find? He says and believes (I paraphrase) that the delay in obtaining the requisite authorisations means that there is no real prospect that Bristow will be able to provide the service from Shannon by 31<sup>st</sup> October 2024 (para.40). He “*understands*” that the contract has been agreed to on a particular basis in terms of 24-hour rostering (paras.412-42). He assumes that there has been a modification made to the new contract (para.57) and makes like assumption at para.58. And he offers a “*view*” that Bristow have underestimated the work arising. Mr Tatten is entitled to his assumptions, beliefs, and views. Respectfully, however, whether viewed singly or cumulatively, they do not offer a credible basis for the claim that the respondent has agreed or tacitly approve any alleged modification to the contract. One cannot challenge a nothing: in this regard I refer again what I have stated at para.2.

**9.** As to CHC’s proposition that the Respondent has decided to agree or tacitly approve a modification to the transfer of personnel and the application of the Transfer of Undertakings Regulations (SI 131/2003), an analysis of the evidence shows there to be no credible basis for the claim that the respondent has agreed or tacitly approved any alleged modification to the contract. Thus, if I turn again to Mr Tatten’s evidence (for CHC) what do I find? He “*understands*” that Bristow’s tender commits it to a certain course of action (para.48). He suggests that Bristow has been vague and evasive as to the application of the regulations aforesaid (para.51), suggesting that Bristow has changed its view in this regard (para.52), he mentions that he has flagged concerns in this regard with the Department (though notably in correspondence - of 20th February last – that does not allege the contract to have been modified), he states that CHC “*must assume*” that there has been a modification to the new contract (para.57), he states that he says and is even advised that the modified contract differs materially from the new contract. Mr Tatten is entitled to his assumptions and understandings. Respectfully, however, whether viewed singly or cumulatively, they do not offer a credible basis for the claim that the respondent has agreed or tacitly approve any alleged modification to the contract. One cannot challenge a nothing: in this regard I refer again what I have stated at para.2.

**10.** As to CHC’s proposition that the Respondent has agreed or tacitly approved a modification to provisions relative to alternative training, if I turn again to Mr Tatten’s evidence (for CHC)

what do I find? He expresses his understanding of Bristow's final tender (para.55), he "assumes" that a delay to Bristow's alternative training system was not part of Bristow's final tender (para.56), he "assume[s]" that there has been a modification to the new contract (para.57), and he considers it "reasonable to assume" that the modified contract differs materially from the new contract, such that Bristow (Mr Tatten maintains) is no longer required to apply its alternative training system from the outset of the contract. Mr Tatten is entitled to his assumptions and understandings but, with respect, they do not offer any credible basis for a claim that the respondent has agreed or tacitly approved an alleged contract in a context where Ms Cullen (for the Respondent) has confirmed in sworn evidence that no modification relating to alternative training has been agreed or even proposed. One cannot challenge a nothing: in this regard I refer again what I have stated at para.2.

**11.** As I have touched upon previously above, though it is perhaps worth noting again, the contract provides for what was described before me as a 'Change Control Procedure', in effect a contractual mechanism for agreeing changes to what was previously agreed. There is no evidence before me to suggest that this mechanism will not be followed. As to any suggestion of tacit approval/permission or related failure to act, the Respondent would have to be aware of the proposed departure to engage in such tacit behaviour or failure and the evidence of Ms Cullen is that the Respondent is aware that in one respect Bristow is presently minded to make a proposal, but that this should be so does not upset any of the observations I have made thus far.

**12.** The court cannot engage in an examination as to whether hypothetical modifications to a contract which have not been the subject of a proposal, still less agreed (and they may never be agreed even if proposed) are unlawful under the Public Authority Contracts Regulations (SI 284/2016). (See in this regard *Siemens Mobility Ltd v. High Speed Two Ltd* [2023] EWHC 2768 (TCC), para.687). Irish caselaw is clear that proceedings may be dismissed as bound to fail where the claim made would require determination of a hypothetical issue. (See *Dublin Cinema Group Ltd v. Balark Trading GP Ltd* [2019] IEHC 776).

**13.** One aspect of CHC's arguments raised which did give me cause for pause was the notion that it is entitled to test the evidence proffered in these proceedings and/or on the basis that it believes there to have been a tacit approval of amendments to the contract. Allied with this is a concern on my part not improperly to limit CHC's constitutional right to litigate. On balance,

any hesitation in striking out these proceedings that the foregoing prompted seems to me to be met and obviated by the following two points:

- First, CHC’s claim rests solely on argument, assumptions, hearsay, and speculation. There is simply no evidential conflict presenting which would require a hearing or cross-examination to resolve.
- Second, I am entitled to have regard to the evidence which CHC intends to advance on affidavit in considering whether there are truly disputed issues of fact; see in this regard *Hinde v. Pentire Property Finance DAC* [2018] IEHC 520, paras 27-28, *McAteer v. Friend* [2019] IECA 216 (paras. 52-53, 57), *TB v. HSE* [2022] IEHC 538, para.28, and (admittedly not in the context of a motion to dismiss but notable nonetheless) *RAS Medical Ltd v. RCSI* [2019] 1 IR 63, para.92 of Clarke CJ’s judgment. In the preceding pages I have had regard to the evidence which CHC intends to advance on affidavit in considering whether there are truly disputed issues of fact and concluded that in every respect CHC has not advanced a credible basis for its pleas.

14. Application has been made before me to strike out these proceedings on the basis, *inter alia*, that they are bound to fail. In their written submissions, counsel for the Minister submit, *inter alia*, as follows:

- “22. *The basis on which it is submitted that these proceedings are bound to fail...can be expressed simply:*
- 22.1 *CHC’s claim is expressly pleaded on the basis of an assumption that the Respondent has made a Modification Decision to enter into a Modified Contract with Bristow. That alleged Modification Decision is described at para.9 of the Statement of grounds as being ‘the subject of these proceedings’. CHC has alternatively pleaded its claim at para.47 of its statement of grounds on the basis of an assumption that the respondent ‘tacitly approved’ the said modifications and/or that the said modifications are ‘anticipated’.*

- 22.2 *However, as a matter of fact, the alleged Modification Decision has not been made and the respondent has not entered into a modified contract, whether expressly and/or impliedly and/or tacitly and/or otherwise. Indeed, the Respondent has not even received a proposal in respect of its modifications to the obligations of Bristow which CHC assumes are the subject of a Modification Decision and/or which have been tacitly approved. The claims of CHC are thus rooted in mere assumptions, speculation and assertions for which it has no credible evidence.*
- 22.3 *As appears from the evidence of Ms Cullen:*
- 22.3.1 *While the Respondent is aware that a Proposal is to be made by Bristow to change the site for a new development at Shannon Airport, the Respondent has not had sight of the nature and/or scope of any proposed change to Bristow's obligations and is not otherwise aware of the nature and/or scope of any proposed change. The Respondent has no intention of agreeing to, whether expressly or tacitly or otherwise, a proposal which the Respondent has not seen and of which he is not otherwise aware.*
- 22.3.2. *The Respondent has received no proposal in respect of Requisite Authorisations, [the Transfer of Undertakings Regulations]...and/or Alternative Training. The Respondent is not aware that Bristow intends to make a proposal in respect thereof.*
23. *The facts noted above are analogous to previous cases in which the courts determined that claims which were dependent on the existence of a contract were bound to fail because no contracts in fact existed. [Mention is then made in this regard of e.g., Barry v. Buckley [1981] IR 306 and Price & Lynch v. Keneghan Developments Ltd [2007] IEHC 190].”*

**15.** It will be clear from the observations that I have made in the preceding pages that I respectfully accept the just-quoted submissions to be correct.

**16.** O.19, r.28(1) RSC provides that the court may, on application by motion on notice strike out any claim or any part of a claim or part of a claim which, inter alia, is bound to fail. I consider, for the reasons stated, that these are proceedings which are bound to fail. Had I not

reached this conclusion I would have concluded that the proceedings had no reasonable chance of succeeding and likewise struck them out. The foregoing being so (and so clearly so), I do not see that I need to consider whether an abuse of process presents.

**17.** For the reasons stated, I will strike out these proceedings.