[2020] IEHC 458

THE HIGH COURT

[RECORD NO. 2019/27JR]

BETWEEN

DAVID MCDONALD

APPLICANT

AND

IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

[RECORD NO. 2018/785JR]

BETWEEN

DAVID MCDONALD

APPLICANT

AND

IRISH PRISON SERVICE, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 3rd day of March, 2020

Nature of the Case

1. This case has its origins in a decision made within the Irish Prison Service ("the IPS") to effect a temporary transfer of the applicant out of one particular unit within the prison service following complaints of bullying made by two prison officers and while investigation of those complaints was underway. The applicant is a prison officer of the rank of Assistant Chief Officer and the unit out of which it was intended to transfer him is the Operational Support Group ("the OSG"). The question of whether the entirety of the case is now moot is now a central issue because the temporary transfer of the applicant did not take place and is no longer envisaged. This is because the prison officers who had made the complaints of bullying voluntarily agreed to a change in the rostering arrangements, with the result that the complainants and the applicant would no longer be working together, and the transfer was then deemed by the IPS to be unnecessary. The applicant, who had instituted these proceedings after the transfer decision had been made but before it had been implemented, refused to discontinue the proceedings when the new rostering arrangement was arrived at, and contended at the hearing before me that although certain reliefs were moot, the other reliefs that he had sought were not.

2. For the avoidance of doubt, it should be noted that all references in this judgment to the proposed transfer of the applicant relate to a transfer which was always intended to be temporary in nature; that is to say, a transfer pending the outcome of the investigation into the allegations of bullying made against him.

3. The chronology of relevant events will be set out in further detail below. At the outset, it may be noted that the timeline is slightly complicated because there were two successive decisions to transfer the applicant and two sets of judicial review proceedings, one in respect of each proposed transfer. The first decision to transfer the applicant was made on 24th August, 2018. The applicant brought judicial review proceedings to prevent this transfer and to quash the decision. The IPS then accepted that the applicant should have been allowed to make submissions concerning the fact of, and potential location of, any

transfer, and consented to *certiorari* being granted in respect of that transfer. This was dealt with by the High Court (Noonan J.) on 9th October, 2018. A second decision to transfer the applicant was subsequently reached after a process during which he was given an opportunity to make submissions (but about which he also makes complaint) and this decision was communicated to the applicant by letter dated 19th December, 2018. The applicant then commenced a second set of judicial review proceedings (record number 2019/27). However, following the applicant's return to work on 22nd December, 2018 after having been on sick leave for some months, the prison officers who had made the allegations of bullying agreed to work on a different side of the roster to the applicant. The IPS then decided that it was not necessary to transfer the applicant and he was so notified. The respondent contends that in those circumstances, the entire case is moot. The applicant, however, maintains that certain parts of the case remain live, including his challenge to the procedures employed thus far in the process dealing with the allegations of bullying, as well as certain declarations relating to the procedures leading up to the transfer decision(s).

4. I will turn first to the Dignity at Work policy, which is part of the background to the present case.

The Dignity at Work policy

5. The Dignity at Work policy is a document which was developed in partnership between civil service management and staff unions. It replaced a previous policy. The new policy came into effect from 20th February, 2015. As part of the revised procedures, a new role, that of the "designated person", was introduced into the process for the first time. The introduction of this role was required by the *HSA Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work.* The Dignity at Work policy states that the role of the designated person is to oversee each complaint which is referred to the Human Resources ("HR") Unit and a detailed description of the role is set out in Appendix B, to which I will return.

6. The policy states that its intention is to encourage the use of informal resolution methods and the use of mediation as often and as early as possible during disputes, and that complaints should only proceed to formal investigation once efforts to utilise local resolution methods or mediation have been exhausted, or are considered to be unsuitable due to the nature of the complaint.

7. The policy sets out detailed procedures to be followed when allegations of bullying, harassment or sexual harassment are made. One method of resolving complaints is described as 'local resolution' whereby the complainant approaches the respondent and/or the line manager and it is resolved at that level.

The Designated Person

8. Another approach is that the complaint is raised with HR, in which case a designated person is appointed to oversee the complaint. The designated person is required to consult with the complainant within 10 days, and then to consult with the respondent within 10 days, having furnished them with the details of the complaint. The designated

person provides certain documents to the complainant and respondent (including the Policy itself and the Disciplinary Code) and explains the various procedures available for resolution, including mediation in particular. The designated person is required to produce a written report for HR which records all stages of the process that took place; an indication of whether the alleged behaviour may constitute bullying, harassment or sexual harassment; examples of alleged behaviour provided by the complainant including time, dates, location, names of witnesses; and a copy of the written complaint signed by the complainant. Interestingly, the policy states that "[t]hese records should not include comprehensive details of what was discussed" (emphasis added). It also states that "[t]he purpose of the records is to provide evidence of an organisational response and an attempt at resolution".

9. Appendix B provides that the designated person will be a senior member of staff who will "oversee complaints which have been referred to the Human Resources Unit" and says that "[t]his individual will play a pivotal role in ensuring that complaints are dealt with in a timely and efficient manner". It says that the designated person shall:

- Ensure that all parties have copies of this policy and other relevant information;
- Ascertain the details relevant to the complaint, the context, and advise on the potential resolution methods which may be explored;
- Provide information on mediation to all parties involved in a dispute;
- If complaints are in a verbal format, make a written note of what is complained of, and give a copy to the complainant; and
- Make a record of steps which have been taken in the process such as records of meetings, actions agreed, and the final report to the HR Manager. The purpose of these records, which do not include details of the discussions, are to provide evidence of the complaint being met with an organisational response and attempt at resolution.

Investigation

10. Upon receipt of the designated person's report, the HR Manager may decide to assign the matter to investigation. The investigator is to receive and consider all of the evidence. Within 10 working days of receipt by the Manager of the investigation report, the complainant and respondent should be informed in writing of the findings of the investigation. They then have 10 days within which to comment upon them. Within 10 working days of the receipt of comments, the manager is required to consider the findings of the investigation and comments provided by both parties; decide upon the outcome of the process; and inform both parties if the matter is to be further pursued as a disciplinary issue.

Disciplinary Process

11. Following investigation, complaints which are upheld may be pursued by the HR Manager as a disciplinary issue, in accordance with the provisions of the Disciplinary Code. Equally,

complaints which are found to be malicious or vexatious may also be pursued as a disciplinary issue, in accordance with the Code.

Review of Decision

12. There is also provision within the Policy for applications for review of the decision. Where the complainant or respondent is dissatisfied with the conduct and/or outcome of an investigation, he or she can apply in writing (clearly indicating the specific grounds for review), within 10 working days of receipt of the decision, to the HR manager to review the process. A suitable senior manager from outside of the organisation will be appointed within 10 working days of the application to conduct a review. The role of the reviewer is not to re-investigate the incidents which gave rise to the complaint but rather to consider whether the investigation followed the correct procedures outlined in the Policy and whether the investigator's conclusions could reasonably have been drawn from the evidence on the balance of probability. Once the reviewer has completed the review, he or she should detail his or her findings in a report for the HR manager who, in turn, will consider the findings and decide upon a course of action.

13. From all of the above, it is clear that a complaint which is not resolved by mediation or local resolution moves through a number of different phases, and that the investigative phase is a separate phase in the process from the earlier phase during which the designated person is involved. The phase during which the designated person is involved appears to be a preliminary one, designed to enable the designated person to gather some basic information and to make the parties aware of the various resolution options including mediation in particular, before reporting back to the HR Manager who then decides upon next steps. This phase is described in the Policy itself as being for the purpose of demonstrating an organisational response to the complaint and an attempt at resolution. It is not only a *pre-decision-making phase with regard to the complaint, but is in fact a pre-investigation phase*.

The applicant's employment with the IPS prior to the proposed transfer

14. The applicant in these proceedings joined the IPS in 1989. He initially worked in Mountjoy Prison for a period of two years before he was transferred to Portlaoise Prison where he worked for a further eight years. In 1999, he was promoted to the rank of Assistant Chief Officer and was tasked with the responsibility of running the Protection Wing and Punishment Block of the newly opened Midlands Prison. In 2008, he joined the OSG and remained operating out of the Midlands Prison until 2016 when he began operating out of Portlaoise Prison where he remained until the proposed transfer.

15. I turn now to the chronology of events concerning the proposed temporary transfer of the applicant out of his unit, which involves some background facts as well as a description of the instigation of the first judicial review after the first transfer decision, the second transfer decision, the instigation of the second judicial review, and the decision of the IPS in February 2019 that the proposed transfer was unnecessary as a result of a particular development described below.

Chronology of events in the applicant's case

Part 1 – Events prior to the Order of the High Court dated 9th October, 2018

The meeting of the 30th May, 2018

16. On 30th May, 2018, a meeting or incident took place involving the applicant and Chief Officer Dowling, together with a prison officer ("prison officer M"). The applicant was asked by Chief Officer Dowling to attend a meeting at which two prison officers were to be admonished in respect of an administrative matter. When the admonishment had taken place, prison officer M was asked to stay on while the other left. A conversation then took place, of which the Court has two different accounts. One version comes from the affidavit evidence filed on behalf of the applicant. The other comes from the subsequent written complaint of prison officer M submitted as part of his bullying complaint. The affidavit evidence in the present case puts forward the following account of the meeting. It narrates that Chief Officer Dowling said that it had been reported to him that prison officer M was making slanderous comments about a Chief Officer Buckley (who was not present at the meeting), which prison officer M initially denied; that Chief Officer Dowling then said that he himself had overheard prison officer M making such comments and also that he had heard that prison officer M was making slanderous comments about himself (Chief Officer Dowling). Chief Officer Dowling is said to have advised prison officer M to stop making these slanderous comments. It is said that prison officer M ultimately accepted that he had done so and tendered an apology.

17. The subsequent written complaint of prison officer M records a different version of events. It narrates that once the other prison officer had left the office, Chief Officer Dowling began accusing prisoner officer M of making derogatory remarks about himself and Chief Officer Buckley and informed prison officer M that both officers would be issuing legal proceedings against him. The complaint records that prison officer M replied that *if* he had made any comments of that nature, he would have "no problem apologising"; however, he had not made any such remarks and therefore would not be apologising. He said that Chief Officer Dowling accepted this position but informed him that Chief Officer Buckley would be proceeding with legal action. Following that, prison officer M said he returned to Portlaoise Prison where he immediately reported the incident.

18. On the same date, Chief Officer Dowling sent his account of the meeting to three persons by email. The three addresses of the email were Governor Patrick Kavanagh, Chief Officer James Ben Buckley; and Assistant Governor June M. Kelly. This document set out Chief Officer's Dowling's account of the meeting and described how he had raised the spreading of rumours by prison officer M. He recorded in the email: "He [M] initially denied this asking who had made the reports…". Later in the email he says that "Officer M then said that he may have said both things as a joke" and then:

> "He apologized to me in regards to the other Chief Officer whereby I informed him that I would not accept the apology on behalf of the other Chief Officer and that he would be better served apologizing to that person himself. He apologized to me in regards to any offence caused stating again that it was only a joke. I informed him that I would accept his apology on this occasion and that I would be (sic) a record of this meeting on his file."

The email concludes by saying:

"Governor Kelly, I would ask that a copy of the Dignity at Work policy be forwarded by email to [M] and a record of same be kept. It is essential that staff are aware of the standards expected of them."

During the hearing, counsel on behalf of the applicant maintained that this constituted a "report" while counsel on behalf of the respondents described it is a mere "email". I do not think that anything turns on the description of the document and I will refer to it neutrally in this judgment as "the email/report of 30th May, 2018". Its significance in the case (if any) lies in its content rather than its description; it provided a contemporaneous account of the encounter with prison officer M from the point of view of the senior officers at the meeting. It may be noted that the email did not request that anything be done in respect of prison officer M other than the sending of a copy of the Dignity at Work policy to him.

21st July 2018 – A complaint of bullying is made by M

19. On 21st July, 2018, prison officer M submitted a complaint against the applicant and Chief Officer Dowling, alleging bullying and harassment arising from the incident of 30th May, 2018. He also complained of interactions between them on the following day, 31st May, 2018.

August 2018 - A complaint of bullying is made by prison officer O'C

20. In August 2018, another officer ("prison officer O'C") submitted a complaint against the applicant, alleging bullying and harassment. There had already been an attempt at mediation between this particular officer and the applicant in May 2018, but this had been unsuccessful. This complaint listed a number of dates on which alleged bullying had taken place (ranging from October 2017 to May 2018) and particulars of each incident.

Appointment of a designated person

21. In accordance with the Dignity at Work policy, Ms. Caroline O'Hara of the Prison Service HR was appointed as the designated person in respect of both complaints against the applicant. She sent copies of both written complaints to the applicant as required by the policy.

Meeting of 17th August, 2018 between the designated person and the applicant

22. On 17th August, 2018, Ms. O'Hara interviewed the applicant in respect of the complaints of prison officers M and O'C. This was part of the process envisaged by the Dignity at Work policy in response to the complaints of bullying.

Events leading to the first transfer decision

23. On 22nd August, 2018, a meeting took place between members of the OSG management and the HR Directorate. The meeting was attended by Mr. Trevor Jordan, (Personnel Officer, HR), Mr. Don Culliton (Director of HR), Governor Pat Kavanagh and Assistant Governor June Kelly. No minute of the meeting was taken.

24. On 24th August, 2018, Mr. Jordan made a transfer order in respect of the applicant relocating him to the Midlands Prison. The email sent to the applicant, which accompanied the transfer order stated:

> "I am writing to you in relation to a number of complaints which have been received under the IPS Bullying and Harassment policy. which have raised serious concerns about health. safety and welfare issues for staff within Portlaoise OSG.
>
> Accordingly, I am guided by my responsibility to protect the health, safety and welfare of all staff and as such I am obliged to put protective measures in place that either eliminates risk or minimises any risk to the health and wellbeing of all staff. This is *to protect you, your colleagues and the Organisation*. In this regard the following transfer has been approved pending the outcome of the investigation of complaints made under the IPS Bullying and Harassment policy."

The order gave 24 hours' notice as it set out that it was due to take effect from 25th August, 2018. It may be noted that the applicant takes grave exception, among other things, to the suggestion that it was necessary to transfer him for "protective reasons".

25. By email dated 26th August, 2018, the applicant protested against the making of the transfer order and formally requested that the transfer order be rescinded with immediate effect. This email was forwarded to Mr. Jordan by Governor Kavanagh on 27th August, 2018. By email of the same date, Mr. Jordan replied to the applicant stating that the rationale for the transfer had already been set out in the letter of transfer issued to him on 24th August, 2018 and added that it was as a "protective measure to ensure the welfare of all staff, including yourself in the OSG Portlaoise." Again, the applicant takes grave exception to the suggestion that his transfer was required as "protection" for anybody, including others as well as himself.

26. On 27th August, 2018, the applicant left work on sick leave and did not return to work until 22nd December, 2018.

The designated person's minutes of the meeting are sent to applicant

27. By email dated 30th August, 2018, the designated person sent the applicant her record of her meeting with him on 17th August, 2018 in respect of both complaints. It was submitted to the Court that he had been told at the meeting (a) that he would be entitled to correct the minutes if he did not consider them to be accurate; and (b) that he would not be required to file a response to the complaints until the minutes of the meeting were corrected. In other words, he understood that there would be a particular sequencing, involving his correction of the minutes and a subsequent filing of a response. The applicant considers the minutes to be an inaccurate record of what took place at the meeting and complains that the designated person later completed her report for HR without awaiting either his corrections to the minutes or his response.

28. The meeting note of the designated person on its face provides as follows. It records that she explained the role of the designated person, that an open mind would be kept in relation to the allegations, and "that it was not an investigation". It records that "details of the complaint may be ascertained, what has been done to date and to explore next steps". She explained the confidentiality of the process. She explained that the possible options arising from her report could be mediation or investigation and other avenues.

She explained that the designated person's report and recommendations would be given to the personnel officer for his decision. She told the applicant that the note of the meeting would be compiled and sent to him for verification. He was then asked "to outline his response" to the M complaint. She then set out the account the applicant gave by way of response to the allegation. Without going into the details of what she records, it is clear that he gave an account which was entirely different to the account given in the written complaint of prison officer M, and in particular he said that prison officer M had admitted everything and "apologised profusely" at the meeting of 30th May, 2018. He also responded to prison officer O'C's complaint in a manner which makes it clear that he was vigorously disputing the facts as alleged.

29. The meeting note then records that the applicant was asked by Ms. O'Hara whether he would consider the option of a temporary transfer application to "get away from the situation" and that he refused, saying that he had "support from [Chief Officer] Dowling and [Chief Officer] Buckley".

30. The note concludes with the final heading "Next Steps" which were said to be that the record would be sent to the applicant "to agree same"; that the applicant "was asked to consider the option of compiling a written response to the complainants which the designated person will then forward to the relevant complainants"; that extracts from "this record" may be used for the designated person's report which would be shared with the relevant parties; that the designated person's report outlining the position, steps to resolve matters and recommendations would be sent to the personnel office by mid-September 2018; and that recommendations could include mediation; investigation; complaint withdrawn; parties agreeing to talk to each directly and provide explanations to clarify matters to resolve the complaint in a cordial manner; or "other recommendations as appropriate".

31. Ms. O'Hara's cover email of 30th August, 2018, which enclosed the minutes of the meeting, asked the applicant "to review the note of the meeting and revert over the next 7 days" and said that "no substantive changes can be made to the notes, but corrections and small amendments can be made". It may be noted that neither the cover letter nor the minutes themselves envisaged that there be a sequencing of minutes correction followed by written response from the applicant, as he submits he understood to be the required process. Further, a clear deadline of 7 days for (minor) corrections of the minutes is set out in writing. The applicant did not respond within 7 days by suggesting corrections to the minutes, nor did he file a written response to the complaint itself at that stage.

Solicitor's Letter of 4th September, 2018 and the beginning of litigation

32. The applicant's solicitor sent a lengthy letter dated 4th September, 2018 to the IPS regarding the transfer order made on 24th August, 2018. The letter contained numerous complaints, including that the applicant had not been given an opportunity to make submissions in relation to the proposed transfer, that he had concerns regarding his transfer to the Midlands Prison because he had previously received death threats while working there, and that the actions of the IPS had compromised and destroyed his

reputation among his fellow officers and staff in the Service. The letter called upon the IPS to rescind the transfer order and to take other related steps, and threatened to bring High Court proceedings

Designated person's report is approved on 11th September, 2018

33. The designated person's reports in respect of the each of the complaints of bullying were submitted to the HR Manager and approved on 11th September, 2018.

34. As regards the complaint of prison officer M, the designated person recommended that the complaint be referred for mediation. As regards the complaint of prison officer O'C, the designated person recommended that the complaint be referred onwards for investigation.

35. In her report in relation to the complaint of prison officer M, the designated person described the meetings she had conducted with both the applicant and prison officer M. She noted that part of prison officer M's complaint concerned the meeting of 30th May 2018. She noted that the applicant told her "that he was present in the Chief's office and the complaint was not an accurate account of the meeting on 30th May, 2018 and that he did enter the OSG office in Portlaoise on the same day but the account in the complaint of this interaction between him and Mr. [M] was not accurate". She noted that prison officer M had indicated that "he had no interest in mediation as he felt it would have no benefit in the circumstances". The applicant "said he had nothing against mediation to resolve issues between staff". Under the heading "Recommendations, next steps, outline for recommendation", she stated "[t]he Designated Person is of the opinion that the complaint was made in good faith. While the Designated person cannot comment on whether the allegation constitutes bullying but as it is a once-off incident, it is not considered to be bullying under the policy. There are discrepancies between [M's] account of what happened and Mr. McDonald's account of this." She then went on to recommend a process of mediation.

36. In her report in relation to the complaint of prison officer O'C, the designated person described the meetings she had conducted with both the applicant and prison officer O'C, in which each complained of the other's conduct, and included the comment "during my meeting with [the applicant] he said that 95% of the allegations made were untrue or inaccurate". She referred to the unsuccessful attempts at mediation earlier in the year and noted that the complainant was "not open to re-entering mediation at the moment". Under the heading "Recommendations, next steps, outline for recommendation", she stated:

> "The Designated Person is of the opinion that the complaint was made in good faith. While the Designated person cannot comment whether the allegations constitute bullying the complainant feels the behaviour has undermined him. It is clear from Mr. McDonald that he does not agree with this view point, accordingly there is discrepancies (sic) in the working relationship and versions between the complainant and response. The issues were not resolved in previous attempts, on

this basis the Designated person recommends an investigation to deal with this complaint…".

37. I note that the applicant takes serious objection to her comment in each of the reports that the complaint was made "in good faith". Counsel on his behalf submitted that this constituted a prejudgment on her part. Other complaints included that the designated person had not been furnished with Chief Officer Dowling's contemporaneous email/report of the meeting of 30th May, 2018, which, it was submitted, was crucial for any proper understanding of the situation.

38. The designated person's report was sent by email to the applicant on 11th September, 2018. It now appears that the applicant did not receive this for some time because he was on sick leave and did not have access to the work email address to which the report had been sent.

Leave granted to bring (first set of) Judicial review proceedings

39. On 1st October, 2018, leave to bring judicial review proceedings was granted by the High Court (Noonan J.) including liberty to seek the interim relief sought (an interim injunction staying the order of transfer made pending the hearing of the judicial review) on 9th October, 2018.

40. On 8th October, 2018, the day before the date of the interim application (i.e. for a stay on the transfer), the Chief State Solicitor's Office ("CSSO" - for the IPS) wrote to the solicitors for the applicant outlining that it was accepted that prior to the decision to transfer being taken, the applicant "was not given an opportunity to make a submission on either the fact of the transfer or the location to which he was to be transferred". It went on to say that in those circumstances:

> "…the Irish Prison Service is willing to set aside the transfer and remit the matter to another senior Officer at the same level of seniority as the Director of Human Resources for a fresh determination on whether your client ought to be transferred and, if so, the location of his transfer. We can confirm that prior to any new decision being taken, your client will be given an opportunity to make a submission to the Director of Human Resources on whether he ought to be transferred and the location of any proposed transfer."

The letter then said that the applicant would be notified of his entitlement to make a submission once he was certified as fit to return to work. It concluded as follows:

> "Given the approach of the Irish Prison Service, we do not believe that it is necessary for any application for interlocutory relief to proceed before the High Court. It is our intention to bring this letter to the attention of the High Court and to confirm to the High Court the course of action proposed by the Irish Prison Service."

Events in Court on 9th October, 2018

41. On 9th October, 2018, the High Court (Noonan J.) quashed the transfer order of 24th August, 2018. There was a dispute before me as to what precisely was said to and by the Court on this occasion. Therefore, I listened to the digital audio recording of what took place before Noonan J. and propose to set out what happened as recorded on the day.

42. Counsel on behalf of the applicant referred to the letter received from the CSSO the previous day (described above) and said that he would be proceeding and that the matter would take 30 minutes. Counsel on behalf of the respondent said that the applicant was looking for an order setting aside a transfer that her client was not going to pursue and that she accepted that "procedures in relation to the transfer were not as good as they should have been". She said that they were putting a "new transfer process in place, along the lines of the O'Reilly decision, about what should happen in a suspension" and that the transfer that the applicant was seeking to set aside was not being pursued. Noonan J. then observed "[s]o the case is really moot then, Ms. Bolger isn't it?" to which she replied that her client was "proceeding to consider the transfer" and that they were setting aside this process, at which point Noonan J. said "[w]ell, that's a new process which may require a new claim if he's not happy with it". In my view, that made it clear that the Court was not expressing the view that there should be no further consideration of a transfer of the applicant, but rather that if there was a further process and transfer, the applicant might not be happy with the new one, in which case he might have to bring fresh proceedings.

43. Later in the day, the case was mentioned again, and the judge asked counsel for the respondents whether they were consenting to a quashing order to which she replied "I have no issue with that whatsoever". She then added "I do want to make it clear and I don't want to be accused of being disingenuous at any stage but we are moving to a fresh process". Noonan J. then said to counsel for the applicant that there was "new process in train now to consider your client's transfer which you may take exception to – I don't know – but it hasn't been completed yet and if you want to bring another judicial review obviously that is a matter for yourself and your client". Counsel replied by saying that he was concerned about the documentation they had not received, and the judge again indicated that insofar as the case concerned a decision made on 24th August, "the white flag has been hoisted and that's the end of it". The issue of costs was then discussed and counsel on behalf of the respondents said that the applicant was making his case on two fronts; the transfer which was now moot, and the procedures in the Dignity at Work investigation. She said "he's looking for various documentation" and "we will deal with that if it's necessary". The judge then said that counsel was "perfectly free to continue with your other claims for relief" and inquired about opposition papers from the respondent on the remaining aspect of the case. Noonan J. then made the order of *certiorari* in respect of the order of 24th August, 2018 and awarded the costs of the interim application seeking the stay of that transfer order to the applicant, and said that insofar as the balance of the case was concerned, it would proceed in the normal way. He then set a timetable for opposition papers.

44. What seems clear to me from all of the above is as follows: the transfer order of 24th August, 2018 was quashed and the part of the judicial review concerning that particular decision was considered to be moot; the remaining part of the case was left open without the Court inquiring into the details of what that remaining part was; and the Court, having been told that a fresh transfer process would be initiated, did not express any view on that matter other than to say that if the applicant was unhappy with that future process, he could initiate additional judicial review proceedings. It is also plain that the only concession being made by the respondents at that stage about the procedures leading up to the transfer order of 24th August, 2018 was that the procedures were somehow lacking ("procedures…not as good as they should have been"), although they did not clarify precisely in what respect they accepted that they were deficient.

Part 2 – Events subsequent to 9th October, 2018

A new transfer process is set in train

45. On 12th October, 2018, the applicant received a letter from Ms. Marie Flynn of the Legal Unit within the IPS which confirmed that the transfer order of 24th August ,2018 had been "rescinded" (a word with which the applicant takes issue, because of the existence of a High Court order quashing the decision) and stated that a Mr. Fergal Black, Director of Care and Rehabilitation at the IPS would now be carrying out a new assessment regarding whether a new transfer should take place and if so, the location of the transfer. The letter invited the applicant to make written submissions within seven days to Mr. Black on whether or not he ought to be transferred and if so, to what location.

46. The applicant's counsel complained before me that the setting in train of a new process regarding transfer was reprehensible and "brazen" given the existence of the first set of judicial review proceedings, but I cannot agree. It had been made entirely clear to the Court that a new process in respect of a transfer would be set in train and that all that was being accepted by the IPS was that the *procedures* on the first occasion had been wanting. There would therefore be nothing reprehensible at all about commencing a new process if appropriate procedures were in place. However, applicant also complains that the new procedures were deficient.

47. There was then a further exchange of correspondence in which the solicitor for the applicant complained to the CSSO that they had yet to receive a copy of the designated person's reports and there had been no reply to "a substantial number of queries". The designated person reports had in fact been sent to him previously on at least one, if not two occasions, but because he was on sick leave, he had not accessed his work email, as mentioned above. On 24th October, 2018, the CSSO wrote to the solicitors for the applicant enclosing all previous correspondence, including the designated person's report.

48. By letter dated 2nd November, 2018, the CSSO wrote to the solicitor for the applicant, stating that all relevant documents had now been provided to the applicant, and proposing that the (first set of) proceedings be resolved with an order striking out the proceedings and an order for the applicant's reasonable costs to be taxed in default of agreement. On 5th November, 2018, solicitors for the applicant rejected this suggestion

and said that there were "quite a number of further issues still to be resolved" and therefore the respondents should file their opposition papers. In this letter, the applicant's solicitor did not specify what issues were "still to be resolved".

49. By letter dated 13th November, 2018, the applicant was advised that Mr. Black would be commencing the process relating to the assessment of the possible transfer and that the applicant would be given 7 days in which to make a submission on the question of whether he should be transferred and, if so, the location of the proposed transfer.

Response to Fergal Black and Decision regarding Transfer

50. By two documents dated 16th November, 2018 and entitled "Response", the applicant set out his position. In the first one, he described his own professional history, including that fact that he received warnings in 2013 from An Garda Síochána about death threats made against him which were believed to have come from prisoners in the Midlands prison, and then went on to deal with events on each of the dates in respect of which prison officer O'C had made complaints. In the second "Response", he set out his own professional history and then addressed the complaints of prison officer M. He gave his account of what happened on 30th May, 2018 and described it as a "proper exercise of authority by management, involving constructive and fair criticism of a staff member's conduct or work performance" and submitted that it did not fall within the definition of bullying or harassment. He also addressed the complaint concerning events on 31st May, 2018 and said it was "a fabrication and mendacious", and that it "must be seen within the context of the fact that this had to be admonished by Chief Officer Dowling the previous day in relation to the standard of his work and his making of derogatory remarks about Chief Officers in management". He also submitted that the conduct alleged did not fall within the definition of bullying or harassment. He said that he had prepared the response in circumstances where he had not been afforded the opportunity to review and correct inaccuracies in the record of meeting with the designated person on 17th August, 2018, and that no proper assessment had been of the complaint, which was in reality a complaint about "administrative matters, which have been magnified out of all proportion... ".

Fergal Black's report

51. The report prepared by Fergal Black was completed on 12th December, 2018. It noted the sources of information available to him, which consisted of: the written complaints of prison officers M and O'C; the responses of the applicant; and an email from Mr. Jordan addressing "the issue of the contractual entitlement of the IPS to transfer" the applicant as well as the request "for his subsequent assignment to a low security area pending assessment of the concerns raised". Counsel on behalf of the applicant heavily criticised the fact that Mr. Jordan had provided any information to Mr. Black, submitting that this tainted the process further. Mr. Black noted particular passages in the materials, including the applicant's submission that "any new process for dealing with the proposed transfer…is merely a face-saving device" and that the decision to temporarily transfer him "occurred…without any in depth evaluation being conducted…and more particularly as to the credibility of the complainants". He then noted the Dignity at Work policy and the definition of bullying therein. Mr. Black said:

"My role in this process is to determine whether the decision to temporarily transfer ACO McDonald is reasonable on the basis of the submissions received and reviewed by me. I am not concerned with the rights or wrongs of the allegations submitted by the parties."

52. He concluded that the HR Directorate had the authority to temporarily transfer the applicant in line with his contract and said that the proposed temporary transfer was "reasonable as a protective measure for ACO McDonald" and would "ensure that he is not impeded in the execution of his duties as an ACO" and that the complainants "will be in a position to discharge their duties without any fear (whether founded or not) of retribution".

53. By letter dated 19th December, 2018 from Mr. Jordan, it was indicated that on foot of the assessment conducted by Mr. Black, it was the intention of the HR Directorate to transfer the applicant from OSG Portlaoise Prison on a temporary basis pending the outcome of the investigations of the complaints and that this transfer was being implemented "as a protective measure, having regard to the interests of ACO McDonald and those of the who have made complaints". It then invited the applicant to nominate a location from a list of vacancies at the grade of ACO by 4th January, 2019. This has been referred to in these proceedings as the second transfer order.

The investigative agency (Raise a Concern) writes to the applicant concerning their investigation

54. It is clear from the materials submitted to the Court that an agreement was entered into on 14th November, 2018 between the IPS and the company, Raise a Concern, in order to carry out an investigation into the complaint of prison officer O'C pursuant to the terms of the Dignity at Work policy.

55. By email dated 10th January, 2019, a Ms. Trisha Glancy of Raise a Concern sent an email to the applicant referring to the appointment of Raise a Concern to carry out an investigation into the complaint made by prison officer O'C. She indicated that she and a Mr. Philip Brennan were the dedicated investigators and attached a copy of the terms of reference. She invited the applicant for interview a week later and said that the purpose of the interview was to give him an opportunity to expand on any information he might have in relation to the complaint and to enable them to question him in order to get a clearer understanding of the facts. She said that it would be a "formal process" and that a colleague would draft a file note of the interview which would be sent to him for review after the interview. If he wished to modify the record of facts, he would be entitled to do so. It was indicated that a copy of the file note would be made available to prison officer O'C., and that he would have the right to comment on its content prior to completion of the Investigation Report. Her letter also attached a copy of prison officer O'C's file note of interview together with exhibits referred to. She requested written comments on this file note by 25th January, 2019. She indicated that he would be given copies of the file notes of interviews of any witnesses and afforded the same opportunity. She indicated that he could be accompanied at interview by a trusted work colleague or a legal or Trade Union

advisor. She also indicated that he should advise them of any persons who might be in a position to corroborate the facts.

56. By letter dated 16th January, 2019, the solicitor on behalf of the applicant replied. The letter pointed out that the designated person's report had been completed on 10th September, 2018, and approved by Don Culliton on 11th September, 2018, and asserted that the IPS was not entitled to proceed with any proposed investigation by reason of paragraph 27 of the Dignity at Work Policy which provided for a 10-day time limit between the receipt of the designated person's report and the appointment of an investigator. The letter also stated that the applicant had previously made detailed submissions to the IPS in relation to the formal complaint made by prison officer O'C to which no reply had been received. The letter went on to say that the applicant was "most concerned" at the fact that the IPS seemed "intent on pursuing the investigation of a complaint" and referred in some detail to the history of the judicial review proceedings. It was stated that the IPS was seeking to "intimidate and /or harass our client and to create a situation under and by virtue of which he can no longer continue in his position within the OSG or indeed the IPS".

Leave to issue second set of judicial review proceedings

57. On 21st January, 2019, the applicant sought and obtained leave to bring (a second set of) judicial review proceedings. These proceedings concerned the second transfer order communicated by letter dated 19th December, 2018 and the process undertaken by Mr. Black, about which the applicant had numerous procedural complaints. In essence, he submitted that the second process concerning the transfer was a sham, in which the decision to transfer him had already been made from the beginning, that the involvement of Mr. Jordan had contaminated the process which was supposed to be independently conducted by Mr. Black, that the bullying complaints had been prejudged against him, and that there was an underlying and entirely unfounded assumption that either he or the complainants needed to be "protected". The applicant also sought an interlocutory injunction in order to prevent the transfer.

Letter of 11th February saying there would be no transfer

58. By letter dated 11th February, 2019, Mr. Jordan on behalf of the IPS wrote to the applicant's solicitors stating that following the applicant's return to work (on 22nd December, 2018), prison officers M and O'C had voluntarily agreed to be transferred to the opposite side of the roster pending the outcome of the Dignity at Work process and that in light of this arrangement, Mr. Jordan had determined that it was no longer necessary to transfer the applicant.

59. By letter of the same date, the CSSO wrote to solicitor for the applicant referring to the letter from the IPS indicating that it was not proposed to transfer the applicant because the rostering arrangements had changed and saying that in those circumstances there was no requirement for the interlocutory injunction to proceed.

60. By order dated 12th February, 2019, the High Court (Noonan J.) noted that the motion for an interim injunction staying the order of transfer dated 19th December, 2018 was now moot, and made no order as to costs.

The reliefs sought

61. The High Court granted *certiorari* of the first transfer decision and the IPS decided not to proceed with the second transfer decision because of the complainants' agreement to work on the other side of the roster to the applicant. The injunctions sought are obviously moot. However, the applicant at the hearing maintained that the remaining reliefs were not moot. It is therefore necessary to carefully examine the remaining reliefs actually sought in each set of proceedings. I have re-numbered the reliefs sought across both sets of pleadings for present purposes and paraphrased in places in order to achieve brevity.

62. *Reliefs sought in the first judicial review other than injunction and certiorari in respect of the transfer order:*

(1) A declaration that the order of transfer dated 24th August, 2018 was *ultra vires* the powers of the personnel officer of the respondents where the respondents failed to comply with the requirements and procedures of the Dignity at Work Policy and were in breach of the applicant's right to natural and constitutional justice.

(2) A declaration that the respondents failed to comply with the requirements of and procedures of the Dignity at Work Policy.

(3) A declaration that the respondents were in breach of the applicant's right to fair procedures natural and constitutional justice.

(4) An order for damages for abuse of process, breach of duty, breach of Dignity at Work Policy, negligence, inconvenience and loss.

(5) An order of injunction staying the investigation into the complaints made against the applicant by prison officers O'C and M, pending the delivery by the applicant of –

(a) the applicant's list of the inaccuracies and matters not noted in the designated persons record of meeting of 17th August, 2018;
(b) the applicant's submission of a response to the complaints of prison officer M; and

(6) An order of injunction staying the investigation into the complaints made against the applicant by the, pending the delivery by the applicant of –

(a) an agreed amended designated person record of the meeting of 17th August, 2018; and
(b) a clear statement of the alleged bullying and harassment in relation to each of the complaints.

63. *Reliefs in the second judicial review other than injunction and certiorari in respect of the transfer order*

(1) A declaration that the order of transfer dated 19th December, 2018 was ultra vires the powers of Personnel Officer, Mr. Trevor Jordan and/or the Director of Human Resources and/or, Mr. Fergal Black, Director of Care and Rehabilitation, where the respondents failed to comply the requirements of and procedures of the Dignity at Work Policy, the Rules for the Government of Prisons, and were in breach of the applicant's rights to natural and constitutional justice.

(2) A declaration that the respondents failed to comply with the requirements and the procedures of the Dignity at Work Policy.

(3) A declaration that the respondents were in breach of the applicant's rights to fair procedures, natural and constitutional justice.

(4) A declaration that the respondents failed to comply with the requirements and procedures of the Dignity at Work Policy insofar as the appointment of the investigator was not within ten working days of the receipt of the designated person's report.

(5) That the failure by the respondent's Governor and Deputy Governor to provide the report of Chief Officer Dowling of 30th May, 2018 to Human Resources for consideration in association with the complaints against the applicant has tainted the Dignity at Work process and rendered it flawed and in breach of the applicant's right to fair procedures, natural and constitutional justice.

(6) A declaration that the failure by the Governor and Deputy Governor of OSG and/or the Director of Human Resources and/or Mr. Trevor Jordan Personnel Officer to provide the report of Chief Officer Dowling to Mr. Fergal Black for consideration has tainted the review as conducted by Mr. Fergal Black in relation to the transfer of the applicant pending the outcome of any investigation.

(7) A declaration that the failure by the respondent, Director of Care and Rehabilitation, Mr. Fergal Black to seek and ensure that all documentation in relation to the complaint from junior officers against the applicant, to include the responses of the applicant to those complaints, the report of Chief Officer Dowling of 30th May, 2018, and the report of the designated person, rendered the review of a requirement for an alleged temporary transfer of the applicant flawed and an abuse of process.

(8) A declaration that a decision to transfer the applicant on the grounds that the complainants would be in a position to discharge their duties without any fear of retribution was *ultra vires* the respondent where there were no grounds to find or infer that the applicant would commit acts of retribution against either of them.

(9) A declaration that a decision to transfer the applicant on the grounds that the junior officers would be in a position to discharge their duties without any fear of retribution pending investigation was ultra vires the respondent where no investigation was recommended by the designated person and no investigation will take place in respect of the complaint of prison officer M.

(10) A declaration that the assessment of the decision to transfer the applicant by the respondent was negligently made, flawed, partial, biased and made "under dictation".

(11) A declaration that the respondent cannot treat the finding of an assessment by the Director of Care and Rehabilitation dated 12th December, 2018 as an order for transfer issued by the HR Directorate.

(12) An order for damages for abuse of process, breach of duty, breach of Dignity at Work Policy, negligence, inconvenience and loss.

The Statements of Opposition

64. Again, I think it may be helpful to summarise the issues pleaded by the respondent across both statements of opposition as many of the issues are common to both documents:

- *Mootness* - that the proceedings were moot insofar as the applicant sought to challenge two transfer orders, one of which was quashed by the High Court in the first judicial review, and the second of which was rescinded following the decision of the complainants to work on the opposite side of the roster to the applicant;

- *Contractual Entitlement* - that the IPS is entitled to direct the transfer of an employee in accordance with the terms and conditions of his or her employment;

- *Misunderstanding by the applicant of the designated person stage of the process* - that the assessment undertaken by a designated person is a preliminary assessment to identify the best process by which a complaint may be resolved, either by way of mediation or investigation, and that it was not a formal investigation of a complaint nor did the designated person reach any findings in respect of the complaint made;

- *Conflation of transfer process with the procedures for dealing with the allegations of bullying* - that the applicant had conflated the procedures concerning the applicant's temporary transfer to another prison with the procedures concerning the complaints of bullying and harassment made against him, each of which was conducted by different personnel;

- Prematurity - that insofar as the applicant sought to challenge views taken in relation to the complaints, the proceedings were premature as the process was not yet finalised, no findings had been made, and no determination of any substance had been reached in respect of either complaint; and that the forthcoming

investigation into a complaint by one was to be carried out by an independent external company;

- *Misunderstanding of the mandatory nature of the Dignity at Work policy* - that he IPS is obliged to consider complaints made by members of staff in respect of superior officers; and

- *Attempt to have the court adjudicate on the merits of the complaints* - that the proceedings were an inappropriate attempt to have the court consider the merits of the complaints of bullying and harassment made against the applicant.

65. It is of note that the respondent did not plead that the transfer decision was not amenable to judicial review in these proceedings. This is in contrast to the position of the respondent in the case of *Dowling v. Irish Prison Service*, in which I also give judgment today.

Categorisation of the reliefs sought

66. I think it would be helpful if I were to group the reliefs sought, as enumerated above, into more general categories as follows:

(i) *Certiorari* and injunctive relief regarding the transfer decisions;

(ii) Declarations relating to the procedures leading up to each of the transfer decisions;

(iii) Declarations relating to the procedures concerning the complaints of prison officer M and prison officer O'C;

(iv) Damages.

The declarations sought with regard to the procedures leading up to each of the transfer decisions

67. I am of the view that the reliefs sought in category (ii) above, i.e. declarations with regard to the unfairness and invalidity *of the procedures leading up to each of the transfer decisions*, are moot for the same reasons as the reliefs sought in category (i), i.e. certiorari and injunctive relief in respect of the *transfer decisions themselves*. I cannot see any basis upon which the Court could conclude that although reliefs relating to the transfer decision themselves are clearly moot, it is somehow appropriate to consider the validity of the procedures leading up to the now historical-only transfer decisions which were never and will not be implemented. The pronouncing of a view upon the procedures leading up to a decision which no longer has or will have practical effect would be futile where there is no longer any live legal dispute between the parties concerning the transfer decision itself.

68. In reaching this view, I have taken into account what was said about mootness in the leading decisions of *P.V. v. Courts Service* [2009] 4 IR 264, *Goold v. Collins* [2014] IEHC 38, and *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] IESC 49. Hardiman J in *Goold v. Collins* [2014] IEHC 38 said as follows:

> "A proceeding may be said to be moot where there is no longer any legal dispute between the parties. The notion of mootness has some similarities to that of absence of locus standi but differs from it in that standing is judged at the start of the proceedings whereas mootness is judged after the commencement of proceedings. Parties may have a real dispute at the time proceedings commence, but time and events may render the issues in proceedings, or some of them, moot. If that occurs, the eventual decision would be of no practical significance to the parties."

69. Clarke J (as he then was) in *P.V. v. The Courts Service* [2009] 4 IR 264 stated that the starting point in the consideration of mootness has to be a determination as to whether the issue sought to be litigated is still alive in any meaningful sense such that it is not 'purely hypothetical or academic'. He said that there may be circumstances that require the Court to consider the issues that arise even though the proceedings were strictly moot, such as where an issue of general application for a respondent, but that these cases "should be limited and the discretion to entertain moot proceedings should be sparingly exercised". In *Lofinmakin (A Minor) & Ors v. the Minister for Justice, Equality and Law Reform & Ors* [2013] IESC 49, McKechnie J. summarised the law of mootness in a number of principles, which included the principle that the rule is not absolute, and that the court retains a discretion to hear and determine a point even if otherwise moot. The process therefore has a two-step analysis, with the second step involving the exercise of a discretion in deciding whether or not to intervene, even where the primary finding should be one of mootness. However, he emphasised that the court should only disapply the general rule "reluctantly" and listed a number of factors which should be taken into account by a court in deciding whether or not to depart from the general rule of mootness.

70. The applicants in the present case did not seek to argue that they fell within an area of exception to the principle of mootness, but appeared to rest their submission upon the proposition that their case was not moot in the first place. In my view, this proposition must be rejected. The 'live' nature of the dispute concerning the proposed transfer of the applicant came to a clear end on the date when it was communicated to him that the proposed transfer would not be taking place because the complainants had agreed to work on the other side of the roster. It follows that questions relating to the correctness of the procedures leading up to that transfer are also moot. The mootness principle would be considerably eroded if it were interpreted to exclude the procedures leading to the decision which itself has become moot.

71. Accordingly, I take the view that the declaratory reliefs (as set out at (1) and (7) above) are moot and the Court will not express any view on the procedures adopted by the IPS in reaching either of those temporary transfer decisions. Accordingly, I do not propose to express any opinion on the respective roles of Mr. Trevor Jordan or Mr. Fergal Black, who were central to issues concerning the transfer.

Declarations relating to the procedures concerning the complaints of prison officers M and O'C

72. I think it is a fair characterisation of the applicant's position to say that at the core of his complaints is that he believes that his long and well-established professional reputation has been irreparably damaged within the IPS by reason of the above events in 2018. His position is that his employer behaved in a grossly unfair and damaging manner when it was decided to transfer him out of his own unit (the OSG) simply because two junior officers had made what he considers to be entirely unmeritorious complaints of bullying against him, particularly in circumstances where one of the complaints actually arose out of a meeting at which one of the prison officers (M) was himself admonished for spreading malicious gossip about senior officers. The applicant is indignant that his temporary transfer was considered to be necessary for anyone's protection, let alone his own, and he has a clear sense of grievance that the complaints were taken seriously enough for the designated person to consider them to have been made in "good faith", and that one of the complaints has been sent forward for investigation. Clearly, the applicant feels that he is the victim in all of this rather than the complainants, and that his unfair treatment by his employer has seriously damaged his reputation.

73. However, strongly held feelings of grievance and a sense that one's professional reputation has been damaged do not necessarily translate into the ingredients of a successful judicial review claim, which is a particular form of legal proceeding designed to ensure that certain decisions of a public nature are subject to the requirements of constitutional justice and fair procedures. When one strips away from this case the matters connected with the transfer of the applicant, there is in truth rather little left to be reviewed by the Court and a serious question arises as to whether what is left is amenable to judicial review at all. What is left in the case are the applicant's complaints about the manner in which the bullying complaints were dealt with by the designated person, Ms. O'Hara. It will be recalled that, having taken certain steps including the interviewing of the applicant and the complainants, she recommended that one complaint be dealt with by mediation and that the other proceed to investigation.

74. An obvious point bears stating: the Court is not entitled to take a view on the merits of the bullying allegations. The applicant's case at times came perilously close to inviting the Court to endorse the applicant's view that the complaint of prison officer M was utterly unmeritorious because of the context in which it arose, i.e. a meeting at which prison officer M had been admonished by a superior officer. For the Court to express a view on whether prison officer M's complaint was unmeritorious would in effect be the expression of a conclusion on the merits of the bullying allegation and would involve the Court in crossing a line which it should not cross in judicial review applications.

The Preliminary phase under the Dignity at Work process – Is it amenable to Judicial Review?

75. When considering the procedures employed by the respondent in response to the two allegations of bullying, it is notable that the procedural stage reached was the end of the preliminary stage set out in the Dignity at Work policy described above. There must be a question as to whether the process in question is amenable to judicial review at all.

Indeed, one might reasonably ask the question: what decision is being impugned? Arguably, the designated person made no decision; she merely imparted some information about procedures and options to the complainants and the applicant, gathered some preliminary facts from each of them, and wrote a report for her superiors with a recommendation. Her superiors(s) chose to accept her recommendation that one case go to mediation (which is voluntary and therefore cannot be imposed upon the applicant), and the other go onwards for investigation.

76. The respondent did not plead amenability as such but pleaded (1) that the proceedings were *premature* insofar as no findings had yet been made in respect of the bullying complaints, and (2) that the proceedings were *misconceived* because the respondent was under an obligation to consider the bullying complaints under the Dignity at Work policy. Counsel on behalf of the applicant, in oral argument, addressed the issue by submitting that the designated person had in effect made an adjudication when she expressed the view that the complaints of prison officers M and O'C had been made in good faith.

77. It is perhaps unfortunate that the question of the amenability to judicial review of the designated person's report was not clearly and explicitly pleaded and fully argued in this case. Amenability to judicial review is logically prior to the question of whether the applicant received 'fair procedures', and it seems to me that the question of whether the designated person's report could be amenable to judicial review looms large in this case, and it is a matter which I address in the *Dowling* judgment of today's date. It may be that the transfer issue so dominated Mr. McDonald's case at the inception of proceedings that the question of the designated person's report, and whether it was amenable to judicial review, was a little overshadowed. Whatever the reason, I would not be comfortable deciding a case against the applicant on the basis of a matter which had not been pleaded by the respondent. Accordingly, I will proceed to examine the complaints of unfair procedures although it is with some reluctance because, as will be seen from my decision in *Dowling*, I consider that the question of amenability is a relevant preliminary matter to be addressed when the Court is dealing with the transfer of an employee, which may not fall within the area of judicial review at all.

Was there a breach of fair procedures?

78. At this stage of the inquiry, namely whether there was any breach of fair procedures, the context is highly relevant. It is a well-established principle of judicial review that the content of what is required by fair procedures is context-specific. It would be entirely wrong of the Court to impose upon the designated person at the preliminary stage those standards of fact-finding and procedural fairness which would apply in later stages of the process (e.g. investigation, or disciplinary procedures following from investigation) under the Dignity at Work policy.

79. With regard to the procedural steps taken to date, I note the following:

    a. The complaints were referred to a designated person in accordance with the Policy.

b. The designated person interviewed both complainants and the applicant within a reasonable time.

c. The designated person was well aware, having interviewed the applicant, that the facts as described by the complainants were vigorously disputed by the applicant and she recorded this dispute in her document.

d. She explored a number of issues with the parties, and in particular whether mediation might be agreeable to them.

e. She invited the applicant in writing to correct her notes of meeting within 7 days, which she sent to him by email, but he failed to do so.

f. She reported to HR what information she had gathered to date and recommended that one case should go to mediation, and the other case onwards for independent investigation. This recommendation was accepted by the Director of HR.

g. The process got no further than that. An independent agency (Raise a Concern) has been appointed to conduct the investigation in respect of the complaint of prison officer O'C but has not proceeded because of these judicial review proceedings.

80. *The failure to provide the designated person with the email/report of 30th May, 2018* - A central complaint on behalf of the applicant was that the designated person had not been provided with, and therefore had not taken into account, the email/report of Chief Officer Dowling dated 30th May, 2018 which corroborated the applicant's account of what had taken place at the meeting on that date. In the first instance, it may be observed that this has nothing to do with the O'C complaint as prison officer O'C was not involved in that meeting, and the point is therefore limited in its relevance (if any) to the prison officer M complaint, which was recommended to go to mediation and is not going to investigation. Secondly, at a practical level, I fail to see why the applicant, when interviewed or subsequently, could not have himself furnished the designated person with a copy of the email of 30th May, 2018 or, alternatively, told the designated person that there was a contemporaneous email authored by Chief Officer Dowling which corroborated his own account of the meeting and asked her to seek it out. Thirdly, and most fundamentally, the complaint seems to me to be premised on a fundamental misunderstanding of the role of the designated person and/or that phase of the Dignity at Work process which, as described above, is merely a preliminary exercise in gathering basic information about the complaint, exploring whether mediation might be appropriate, and providing the parties with information. This phase is not intended to be a full investigation where each party's side is fully explored leading to a considered conclusion. I do not think that a preliminary procedure which is not meant to be a comprehensive evidence-gathering exercise can be criticised for failing to gather all the evidence comprehensively. At its height, his complaint about what Ms. O'Hara did not have before her by way of additional evidence was a contemporaneous document which might be viewed as corroborative of the applicant's oral account of the meeting of 30 May 2018. This is the kind of complaint which might appropriately be directed towards a person or body conducting a full

investigation or making an adjudication on disputed facts, but neither of these functions fell within the role of the designated person, and I do not think it appropriate to hold her to the standards that would apply in those other contexts.

81. *Failure to await corrected minutes and response before completing report* – Another of the applicant's central complaints was that the designated person had promised him that he would have an opportunity to correct the minutes of the meetings, and would only be required to respond in substance after that. In the first instance, it is difficult to see how the applicant could have remained of the view that this was the position when one considers the explicit wording of the email and letter dated the 30th August, 2018, where the designated person invited him to make corrections within 7 days but pointed out that they could not be changes of substance. Secondly, and more importantly, my view is that this argument is once again premised on a misunderstanding of the role of the designated person and/or that phase of the Dignity at Work process. What is clear from her report in the case of each of the prison officer's complaints is that Ms. O'Hara recorded that the applicant was vigorously and emphatically denying the allegations and putting forward a counter-narrative. That aspect was crucial, because it would of course inform both her and HR management as a whole as to how each of the complaints should be dealt with. Different issues might arise if, for example, she had failed to record the applicant's position at all, or inaccurately recorded it in a material manner e.g. by stating that the applicant accepted the narrative of the complainants. But that was not the position here; on the contrary, it would have been clear to anyone reading the designated person's reports, as it was to the Court, that there was a clear conflict of fact as between the narrative of the applicant, and the narrative of the complainants. Given that this was a preliminary phase of the process and not the investigative phase, I fail to see how it could be described as a failure of natural or constitutional justice for an employer's designated person to have the minutes of her meeting agreed with the person against whom the complaint was made before she made her recommendation. This is particularly so when the applicant was in fact offered the opportunity to do within 7 days and failed to do so. Again, the complaint seeks to transpose into this preliminary phase the type of rigorous standards that might apply, for example, to the signing of a statement during an investigative process.

82. *The view of the designated person was that the complaints were made 'in good faith'* - One might question whether it is necessary or appropriate for a designated person to express any view on whether the complaint was made in good faith or not, when she has no role in adjudicating on the complaint and her role is simply to perform the various other functions laid upon her by the Policy. I note that the Policy provides that complaints which are *found* to be "malicious or vexatious" may themselves be pursued as a disciplinary issue in accordance with the provisions of the Disciplinary Code. This phrasing, as well as its location within the Policy which sets out a sequence of phases, suggests that this is a conclusion that can only be reached at the end of the process, not one that should be reached at its early stages. There is, of course, a difference between a preliminary opinion that a complaint looks to be a *bona fide* one and a more formal conclusion, at the end of a process, that a complaint was frivolous and vexatious, such

that it could ground a disciplinary proceeding. Many procedures contain a filter of some kind whereby cases which seem to be entirely without merit are screened out. The Dignity at Policy does not currently contain an explicit reference to this, and this may reflect a view, perhaps, that if an employee feels aggrieved enough to make a complaint, this is in itself is an issue to be addressed, perhaps by mediation, irrespective of the merits or substance of the complaint. People need to work together in an employment situation and the Dignity at Work policy appears to be directed at trying to provide mechanisms for facilitating harmonious relationships rather than, more narrowly, providing for formal investigative and adjudicative mechanisms alone.

83. In any event, while I wonder whether a designated person should express any opinion on whether a complaint was made in good faith or not, when the procedures do not expressly require her to do so, that is a long way from a finding that her expression of this opinion constituted a breach of constitutional and natural justice. Her report simply grounded a recommendation that one case be referred to mediation, and the other to further investigation, and her conclusion was never going to be made public. The applicant can apparently choose whether to participate in mediation or not. That being so, matters with regard to the complaint of prison officer M would appear to be at an end concerning the applicant, while the full context of the complaint of prison officer O'C can be explored by Raise a Concern during its investigation. The designated person's opinion would never have received a wide circulation had it not been for these proceedings.

84. *The ten- day time-limit issue* - It was submitted on behalf of the applicant that because the investigator (in this case, Raise a Concern) was not appointed to investigate the complaint of prison officer O'C within 10 days of the designated person's report, this was a failure to comply with the Dignity at Work Policy. In fact, the Policy on its face suggests that the time limits are guidelines rather than a strict timetable:

> "2.4. The timelines outlined within this code should be treated as a *guide* to all parties involved in the complaints process. It is in the interest of all parties that complaints are progressed in a timely and efficient fashion, in compliance with the timelines in this policy." (*emphasis* added)

85. The evidence before the Court was that the appointment of an external investigator was subject to procurement procedures and was not due to any lack of diligence on the part of the HR Manager because it was necessary for the appointment to be subject to a mini-tender process, upon conclusion of which a contract must be completed between the IPS and the successful offeror. The Court was informed that this process can take between six to ten weeks. When the applicant was contacted by Raise a Concern in January 2019, he indicated that he would not be participating until the High Court proceedings were concluded. I am therefore not persuaded that the failure to comply with the 10-day time guideline for the appointment of an investigator in the circumstances of the present case should lead the Court to exercise its discretion to grant the declaration sought in this regard. I should note that this particular complaint of the applicant does not apply in

respect of the M case in any event, as the M case was referred by the designated person for mediation rather than further investigation.

The claim for damages

86. The claim for damages was briefly argued by counsel on behalf of the applicant, and no authorities were cited to the Court. In *Delargy v Minister for the Environment* [2006] IEHC 267, Murphy J. said:

> "There is no direct relationship between the power of the court to annul an administrative act and liability to pay damages or monetary compensation. When a court annuls an administrative act on procedural grounds, that decision is deemed to be ultra vires and void ab initio. However, it does not follow that a declaration of invalidity of an administrative decision in and of itself gives rise to a cause of action and damages."

There have been numerous and detailed discussions by the Superior Courts as to when an invalid administrative act may sound in damages, including such leading cases as *Pine Valley Developments Ltd v. Minister for the Environment*, *Ireland and the Attorney General* [1987] IR 23, *Glencar Exploration p.l.c. v. Mayo County Council (No. 2)* [2002] 1 IR 84, and *Cromane Seafoods v Minister for Agriculture, Fisheries and Food* [2017] 1 IR 119. The circumstances in which damages may flow from an invalid administrative decision have been carefully circumscribed and described in those and other authorities, but no attempt was made by the applicant to establish that he fell within those parameters. As it happens, it matters not that the finer points of a claim for damage were not explored in argument because I have held that there is no invalid decision by the designated person and accordingly, the first precondition to a claim for damages – the establishment of an unlawful and invalid decision – has not been satisfied and therefore the claim for damages must also fail.

Conclusion

87. In my view, once the second transfer decision had been rescinded or abandoned by the IPS in February 2019, the applicant should have terminated these legal proceedings and engaged with the investigation by Raise a Concern into the complaint of prison officer O'C where he could have set out his case fully before the investigators with a view to persuading them that the complaints of bullying made by prison officer O'C completely lacked substance. Instead, he chose to prolong and bring to trial proceedings which had originally been brought for a very different purpose (namely, to prevent his transfer) and sought to shoe-horn what was essentially a moot case into the remaining reliefs sought, most of which was attempted by conflating issues relating to the transfer decision and issues relating to the bullying complaints/Dignity at Work procedure, and by seeking to import into a preliminary procedure under the Policy standards of procedural rigour more suited to an investigative or disciplinary process.

88. For the reasons set out, I refuse the reliefs sought.