

**THE HIGH COURT**

[2021] IEHC 702

**RECORD NO. 2020/318JR**

**BETWEEN**

**MICHAEL DELANEY**

**PLAINTIFF**

**AND**

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

**DEFENDANTS**

**EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 5 November 2021**

**Introduction**

1. This is an application for *certiorari* by way of judicial review quashing the decision of the Irish Prison Service, refusing to treat the applicant's absence from work arising from an incident on 30 August 2019, as occupational injury related.
2. In fact, there are two separate decisions made in this respect by the Irish Prison Service. The first is a decision of 31 October 2019 authored by Maria Sheridan where she finds that the terms of circulars 1/82 and 6/97: sick leave arising from occupational injury or disease, do not apply in the applicant's case.
3. The second is a decision on appeal against the first decision dated 9 December 2019 whereby Ms. Ciara Neilon higher executive officer, human resources directorate, upheld the original decision. The effect of these decisions is that the applicant is not entitled to be paid while on leave arising from the incident.

**Facts**

4. In brief, the applicant is a prison officer, rank assistant chief officer, and he carried out his duties at Limerick prison at the relevant time. On 30 August 2019 he was instructed to transport a prisoner from his cell to court in Limerick. The prisoner became violent. The applicant attempted to restrain the prisoner. In so doing, the applicant was assaulted by the prisoner. The applicant was bitten and head-butted by the prisoner and sustained an injury to his right shoulder. This required surgery involving a subacromial decompression and a lateral clavicle excision. He was out of work until he returned to work as a prison officer in the spring of 2020.
5. In an email of 8 October 2019 to the assistant governor in Limerick prison, Theresa Beirne, the applicant requested that the injury sustained in the incident be treated as an occupational injury under the relevant prison service policy.
6. On 10 October 2019 the assistant governor advised the applicant that correspondence was being furnished to him with regard to an appointment for review by the chief medical officer ("CMO"). However, no review was conducted with the CMO who instead corresponded directly with the applicant's doctor.
7. On 31 October 2019 a decision was made to refuse the application. Following an appeal by the applicant, that decision was upheld on 9 December 2019. The applicant was invited to a review by the CMO on 27 January and attended with her on 6 February 2020. The

applicant received a further letter from the Irish Prison Service on 7 February 2020. Correspondence was exchanged between the applicant's solicitor and the Prison Service, and ultimately leave was sought and granted from this court on 12 May 2020.

8. I describe those events in more detail below. First, however, I must deal with the question of delay in bringing these proceedings.

## **Delay**

### **Respondent's Arguments**

9. The respondent has put forward an important argument in relation to delay. It is argued that in this case the applicant was informed by letter of 9 December 2019 that his appeal had been unsuccessful. It is submitted that it was quite clear at this point that his application had been rejected and that no further appeal would be considered. It is said that time started to run from the date of that letter and that the subsequent letters of 7 February and 25 March 2020 are a mere confirmation of the earlier decision prompted by correspondence from the applicant's solicitors in that regard. The respondent refers to the decisions of *Finnerty v Western Health Board* [1998] IEHC 143 and *Sfar v Revenue Commissioners* [2016] IESC 15 where it was identified that time may not be prolonged by an applicant's correspondence or a respondent's confirmation of its earlier decision. I fully accept that case law and its applicability in the instant circumstances.
10. On that basis, it is argued that the applicant's application for leave is out of time, being made some five months after the decision in December, in circumstances where an application for leave to apply for judicial review must be made within 3 months from the date when grounds for the application first arose under Order 84, rule 21 of the Rules of the Superior Courts.
11. A further point made is that Order 84, rule 21(5) requires that an application for an extension of time be grounded upon an affidavit setting out the reasons for the failure to apply within time and verifying the facts upon which those reasons are based.
12. It is argued that the applicant has not deposed to the reasons for his failure to apply within the time prescribed. It is also observed that he had advice both from his union and his legal advisers prior to the expiry of the relevant time.
13. Finally, it is said that the letter of 7 February 2020 to the applicant, from Ms. Neilon, ought to have been disclosed at the leave stage and was not so disclosed.

### **Applicant's Arguments**

14. The applicant argues that time did not begin to run until the letter of 25 March 2020 when the respondent affirmed the earlier determination notwithstanding the content of Dr. Moloney's report. He further argues that in his evidence to the court he had made it clear that he had intended to seek legal advice arising out of the refusal, but when he received the letter of 27 January, referring him to the CMO, he decided to await the outcome of that process. Heavy reliance is also placed upon the letter of 7 February 2020 by Dr. Moloney, where she recognised the incident as an OID and he says that he believed the process was continuing because of that letter.

### **Analysis on existence of delay**

15. I must decide first the date from which time began to run and then whether an extension is required, and if so, whether the case for an extension has been made out.
16. In respect of the date upon which time began to run, I am satisfied that the relevant date is 7 February 2020.
17. The date of the appeal decision was 9 December 2019, and ordinarily time would have begun to run on that date. However, on 27 January 2020, before time had expired, the applicant was invited to a medical examination by the CMO. I consider that the letter inviting him was neutral in that it was not clear whether the invitation was for the purposes of the occupational injury assessment or for a standard sick leave review. I also fully accept the point made by counsel for the respondent that the referral document that was sent by the Irish Prison Service was not sent for an OID review but rather for long-term sick leave purposes and that this may be seen from the ticking of the relevant box in the referral form.
18. However, what is relevant here is the applicant's understanding of what was happening when he was referred. I think it was reasonable for him to decide to wait to contact his solicitor until he had gone to the CMO appointment. This was particularly so where he had not in fact been examined by a CMO in the context of his application in October and where the relevant policy, which I will describe below, clearly identified at paragraph 4.5 the potential relevance of the advice of the CMO. However, the letter inviting him did not make it clear, one way or another as to whether the purpose of this visit was for his OI assessment or whether it was a long-term sick leave review.
19. Moreover, the letter from Dr. Moloney of 7 February 2020 treats his visit as one for the purposes of an occupational injury assessment and she goes so far as to conclude that the applicant's absence from September, until his return to work, is OID related.
20. The lack of clarity of the purpose of the CMO intervention is reflected in a subsequent letter from Ms. Neilon of 25 March 2020. In that letter, she identifies the referral of the applicant in January 2020 and says that the CMO advice forms only part of the decision-making process together with other criteria. In fact, one would have expected her to state clearly that the CMO advice is not part of the review process in this particular instance given that it happened in February, after the decision on the appeal but there is no such clarification in that letter. That clarity only comes in the pleadings and submissions in this case.
21. However, despite this lack of clarity as to the purpose of the referral, I fully accept the submission of the respondent's counsel that it is not for the CMO to make a determination on an occupational injury and I also accept that there was no evidence of a decision by the respondent to reopen or review the applicant's case at this point in time and that the CMO letter cannot be treated as evidence of same. Its only relevance in this case is that it interrupts the date from which time would normally begin to run and is therefore relevant to my decision that the time began to run from 7 February. The reason I have identified 7

February is because it was on that day, after the visit to Dr. Moloney, that the applicant received a letter where Ms. Neilon refers to his recent telephone call regarding a refusal of an occupational injury and reminds him that in the letter of 9 December 2019 he was advised that no further appeal would be considered, and that decision still stands.

22. From that time on, the applicant could have been under no illusions about the finality of the respondent's decision despite his visit to Dr. Moloney and her subsequent furnishing to him of the letter that she wrote to Ms. Neilon, also on 7 February 2020.
23. The further correspondence between the applicant's solicitor and the Prison Service on 26 February, 25 March, 2 April and 23 April was of the type referred to in the case law above, i.e. it was a confirmation of the original decision, save that in the letter of 23 April, as identified below, a new reason for the decision was identified.
24. Given my conclusion in that respect, it is clear that the applicant is outside the three-month time limit by 5 days since leave was not sought until 12 May 2020 and the letter was provided on 7 February 2020.

#### **Extension of Time**

25. I must therefore turn to the question of whether there ought to be an extension of time. First, I must deal with the argument that there is insufficient evidence in this respect. I do not find that to be the case. The applicant avers on affidavit that it was not clear to him following his receipt of the medical report of Dr. Moloney why his application had been refused and that he therefore instructed solicitors to write on 26 February seeking a reversal of the decision. He says he wanted to know the reason for the refusal and this was not furnished finally until he received the letter of 23 April and following this he consulted with his solicitors and instructed them to bring the application (see paragraph 17 of the first affidavit of Mr. Delaney sworn 7 May 2020.) He has therefore clearly indicated that the reason he waited was because of an insufficiency of reasons and his counsel has made the case that constitutes good and sufficient reason for an extension.
26. The law on extension of time, in this type of application in the context of judicial review, is well set out in the decision of *M. O'S v Residential Institutions Redress Board* [2018] IESC 61 by Finlay Geoghegan J. She observes that the court must have regard to all the relevant facts and circumstances, including the decision sought to be challenged, the nature of the claim and any relevant facts and circumstances and she identifies that a court must decide in accordance with the balance of justice whether or not the extension should be granted.
27. Having regard to these factors, I must look at the question of whether good and sufficient reasons have been established for the extension of time. In this respect I wish to make reference to a decision in relation to the duty to give reasons of the Supreme Court in *Connelly v An Board Pleanála* [2018] 2 I.L.R.M. 453. In that decision, Mr. Justice Clarke, having looked at caselaw, in particular *Mallak v Minister for Justice* [2012] 3 I.R. 297 and *EMI Records (Ireland) Limited v Data Protection Commissioner* [2013] IESC 34 concluded as follows;

*"6.15. Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."*

28. I conclude below that in this case, the reasons were not adequate, indeed they were woefully inadequate in both the decision of 31 October and the decision of 9 December. The applicant was hindered in his ability to instruct solicitors and to decide whether or not to take proceedings by this failure. He sought to understand the decision and no explanation of same was given until 23 April 2020. It was at that point, when he obtained an explanation of sorts, that he instructed his solicitor. After that there was no delay in seeking leave.
29. In all of those circumstances, I am satisfied that the applicant has identified good and sufficient reasons to extend the time by a period of 5 days.

**Applicable Policy**

30. I turn now to the substantive application and before looking at the legal grounds, I consider the applicable policy.
31. The relevant policy is the occupational injury or disease policy document of 12 February 2015 and it must be read together with the relevant civil service circulars, being circulars 25/75, 1/82, 5/86 and 6/97.
32. Circular 1/82 provides that a period of leave from work due to occupational injury or disease suffered by an officer and which was not caused by the negligence of the officer will not normally be combined with a period of absence due to ordinary illness so as to adversely affect sick pay.
33. Paragraph 4.2 of the 2015 policy identifies that decisions on an application to have absences deemed to be OID related shall be made taking account of all information available including;
1. Reports including witness statements;
  2. Governors confirmation that the incident occurred;
  3. Governors recommendation;
  4. CCTV evidence, if any;

5. The advice of the CMO;
  6. Whether there is any evidence or information to suggest negligence on the part of the officer.
34. Paragraph 4.2 explicitly states that where an application has been unsuccessful the applicant will be informed of the reasons for the refusal.
  35. At paragraph 4.4 it is provided that where an applicant is not satisfied with the outcome of his or her application, the applicant may appeal the decision in writing to the personnel officer within 14 days of receipt of the decision.

**Decision of 31 October 2019**

36. Because of the importance of the terms of the refusal, it is appropriate that I quote the decision in full;

*"Dear ACO Delaney,*

*I refer to your application to have your current sick leave absence from 30 August 2019 treated under the terms of Circulars 1/82 and 6/97. Sick Leave arising from Occupational Injury or Disease.*

*Governor Beirne is unable to provide a recommendation in this instance due to inconclusive evidence, therefore, regrettably having considered the information available to me I have decided that the terms of Circulars 1/82 & 6/97 do not apply in this case.*

*Please note that you may appeal this decision within 1 month of the date of receipt of this letter in writing, through your HR Governor. Should you wish to appeal please outline the reason(s) for which you are appealing."*

37. This letter was signed by Maria Sheridan, Human Resources Directorate.

**Adequacy of Reasons**

38. From the terms of this letter, it appears that the sole reason for the refusal is the lack of recommendation of the governor. It does not appear from the policy document that the recommendation or absence of same should be determinative. Nonetheless, it appears to have been treated as such in this case. The reason for the failure to issue a recommendation is identified as *"inconclusive evidence"*. In my view it is not possible to understand why the governor did not issue a recommendation – accepting for the moment that the respondent is entitled to treat a governor's recommendation as determinative.
39. The mere reference to inconclusive evidence does not for example permit a reader to understand whether it is the view of the governor that the incident did not take place, or did not take place in the way described, or that it occurred but no injury has been proved, or that the officer was negligent.

40. Moreover, the statement that the governor is unable to provide a recommendation due to inconclusive evidence suggests that no decision could be made. However, the reality is that a decision not to issue a recommendation is clearly treated as a relevant factor – in this case apparently as the only relevant factor - in deciding whether or not an absence OID would be provided. It is not open to a decision maker to sit on the fence and seek to have her decision characterised as anything other than what it is – a refusal to make a recommendation in favour of the absence being deemed OID related.
41. Accordingly, the obligation to give reasons kicks in in respect of the decision not to give a recommendation, even where it is characterised as being an inability to provide a recommendation because of inconclusive evidence.
42. As identified above, the reader, or more importantly the recipient of such a decision, in this case the applicant, cannot understand the basis for this decision. A long line of case law, including the decision in *Connelly* that I have just identified, sets out that one of the purposes of requiring why administrative decisions must be reasoned is so that a person can decide whether or not to challenge them. Here, the applicant was not in a position to make an informed decision in that respect because it was not possible to identify the reasons for the decision.
43. The respondent has suggested in response to the applicant’s argument on this point that the applicant must have known that the reference to inconclusive evidence meant that the governor was of the view that he had been negligent and therefore she was refusing to make a recommendation on that basis. That argument appears to me quite unsustainable.
44. First, an applicant ought not to have to guess the basis for an administrative decision affecting his or her legal entitlements. Second, in this case the reference to inconclusive evidence could, as I have identified above, have meant a number of things. Even accepting the respondent’s argument that the applicant was an experienced prison officer, it is hard to see the basis upon which it is suggested the applicant could infer the true reason from the decision of 31 October 2019. A textual analysis of the words used by the governor simply does not support that argument.
45. I explain below why reasons cannot be given in pleadings for the first time. But if one were to transpose paragraphs eight and nine of the statement of opposition into the decision of 31 October, one could not conclude there was an inadequacy of reasons. The relevant facts are identified, as is the cause of the issues for the respondent. No applicant reading those paragraphs could fail to understand why the application had been refused. That is the type of reasoning that is required.
46. One of the points made by the respondent is that this is an informal process and that therefore it should not be expected that detailed reasons should be given. It is important to acknowledge that administrative officers have to deal with many matters in the course of their work and cannot and should not be expected to write decisions that are akin to those that a lawyer might write. However, there is a difference between being required to

produce a lengthy quasilegal document on the one hand, and giving reasons that are intelligible to a layperson on the other. The latter is expected, the former is not. The informality of the process cannot be used to excuse a complete failure to give any comprehensible reasons.

### **Appeal**

47. The applicant submitted an appeal against this decision on 27 November 2019. That appeal document was prepared with the assistance of his union and it included supporting documentation including statements from his fellow prison officers. It is a one-page appeal but sets out in some detail the nature of the incident, the impact of the incident on other staff members, and the medical consequence of the incident. It refers to the NIMS form. Finally, the applicant offers to meet the CMO or to answer any queries that the governor may have.

48. A decision was made on his appeal on 9 December 2019. That letter was sent by Maria Sheridan who had authored the original decision and she states as follows in relevant part;

*"In this regard, the investigating officer report associated with this matter together with your submission letter which were referred to Ms Ciara Neilon, Higher Executive Officer, Human Resources Directorate. Having considered all documents available, I regret to inform you that Ms Neilon has decided that your appeal is refused as there is no Governor recommendation in this case.*

*Therefore the original decision to refuse the terms of the Circulars 1/82 & 6/97 for this absence was correct, and the original decision of the Executive Officer is upheld, any allowances paid during this period will be recouped.*

*No further appeal will be considered."*

49. The critical part of this decision is that Ms. Neilon has refused the application as there was no governor recommendation in the case.

50. The Irish Prison Service have committed under paragraph 4.4 of the policy to provide an appeal. An appeal in this type of situation would generally be understood as encompassing a fresh look at the original decision by a person other than the person who made the original decision. If no new person is involved, then it cannot be properly described as an appeal.

51. However, it seems to me that in this case that the appeal was one in name only and did not involve a substantive review of the first instance decision. This is because the basis for Ms. Neilon's refusal appears to be that there was no governor recommendation in this case. I note that again, the presence or absence of a governor recommendation is being treated as determinative.

52. Even accepting that this is a permissible approach, because the appeal simply refers back to the governor recommendation at first instance and concludes that in the absence of



same the appeal must fail, there is no fresh look at the matter. There is no new look by anybody at the refusal to issue a governor's recommendation. In those circumstances, it appears that all Ms. Neilon did was to confirm that there was no governor's recommendation at first instance and having done so, she upheld the appeal. It is difficult to view that as a substantive appeal.

53. However, the applicant's statement of grounds does not identify the lack of an appeal as a ground of challenge and therefore I must review this document by reference to the identified grounds and in particular the alleged failure to give reasons.
54. I am satisfied that as with the first decision, there has been a failure to give adequate reasons. I have identified above why the governor recommendation was deficient in reasons. Because, as set out in the comments on the appeal, the second instance decision simply refers back to that recommendation, precisely the same line of reasoning applies.
55. In conclusion, I find that the respondent has failed to give adequate reasons for both the first decision and the appeal.
56. I should add that the question of adequacy of reasons was further confused by the attempts by the respondent to identify reasons after the decisions had been made. The first example of this is in the letter of 23 April 2020 where for the first time a reason was identified as follows;

*"I wish to clarify that the primary reason for the refusal of your client's application was that his Governor could not be satisfied that there was no negligence on the part of your client during the incident in question."*
57. This was further expanded in the statement of opposition at paragraphs eight and nine, as referred to above, where quite detailed reasons were given that related to the applicant apparently failing to utilise the relevant control and restraint training he had received.
58. Finally, in the legal submissions, the respondent goes so far as to identify that the applicant's actions suggested negligence on his part and that in light of the contributory negligence the governor was not in a position to issue a positive recommendation (at paragraph 45).
59. This is an entirely different justification from that identified in the original decision, being that the governor considered there was inconclusive evidence. It is difficult to understand how that submission could have been made in the face of the letter of 31 October 2019.
60. In any case, it is well established that reasons must be given at the time of the decision and not at a later date. The justification for this is obvious: a person cannot decide whether or not to take further action unless the reasons are given at the appropriate time. It goes without saying that giving reasons for the first time in the pleadings is entirely unsatisfactory. I turn now to the next legal ground raised by the applicant, an alleged breach of the right to be heard.

### **Right to be Heard**

61. The principle of *audi alteram partem* means that each person has the right to be heard in respect of a decision that is likely to affect their legal rights or entitlements. The precise content of that right will vary from case to case. It is not always the case that a person is entitled to have a draft decision put to them before the decision is made so that they can comment on the proposed approach of the decision-maker.
62. In this case, given the fact that there was provision for an appeal, I do not think that the applicant was necessarily entitled to be alerted, prior to the first instance decision, to the fact that there was a concern about whether there was negligence on his part (if indeed that was the case here since nothing in the material exhibited nor the decision of 31 October 2019 suggests that). The applicant was aware of the relevant criteria to be taken into account having been set out at paragraph 4.2 of the policy, which include the question of negligence on the part of the officer, who was therefore in a position to address this in his original application.
63. However, following that original application, the applicant was, as I have identified above, entitled to a reasoned decision. Any such reasoned decision would and should have met the criteria I have identified, which would have meant in the instant case, if the respondent wished to rely on negligence, that decision would have had to identify the nature of the negligence and explain why same had disentitled the applicant to the relief that he was seeking.
64. Accordingly, had the obligation to give reasons been observed, the applicant would have been able to address this issue in his appeal and put forward any arguments he wished in relation to the question of alleged negligence on his part.
65. Instead, he was forced to make his appeal entirely on the blind. Moreover, raising these issues in the pleadings and legal submissions, or in one line in a letter many months after the decision, could not possibly allow him an opportunity to be heard on the matter.
66. Therefore, if the reason for the decision of the Irish Prison Service was that the applicant was negligent in failing to deploy the control and restraint procedures, then he was not given an adequate opportunity of being heard in respect of that issue, certainly at the appeal stage.
67. However, because of the lack of reasons in this case, I cannot even conclude that this was indeed the basis for the decisions in October and December and therefore I do not propose to rule on this aspect of the case.
68. There is another limb to the applicant's argument in this respect, namely that there was a failure to afford him fair procedures in that the decision was made without speaking to him or obtaining or considering the statements of other officers involved in the incident and other evidence.
69. The extent to which a decision-making body is obliged to engage with the person the subject of that decision will depend on the circumstances. In this case I do not propose to

determine this argument given that I am already quashing the decision for failure to give reasons. It is sufficient to observe that if the Irish Prison Service decides to make a new decision on the application, it must ensure that the applicant has an opportunity to be properly heard and that he has an opportunity to put all material that he considers relevant before the decision-maker.

#### **Reasonableness of the Decision**

70. I turn now to the third ground, i.e. that the decision in question was in fact unreasonable as that term is used in judicial review.
71. Both parties have sought to make arguments in relation to the substantive issue as to whether or not the applicant was indeed negligent and whether he had failed to comply with control and restraint procedures and it has been sought to be argued on behalf of the applicant that the decision of the respondent in this respect was irrational.
72. However, as I have identified above, there was no decision in this respect at first instance or at appeal stage by the respondent and in those circumstances, I simply cannot engage with any of those arguments. I do not need to determine this issue and nor indeed could I do so because of a lack of a first instance decision in this respect.

#### **Lack of Equal Treatment**

73. Next, an argument was raised in relation to lack of equal treatment, i.e. that the applicant was not treated equally *vis-à-vis* the treatment of another prison officer who was also involved in the same incident. I do not consider it necessary or appropriate to decide upon this question. First, I have already resolved the matter by reference to the failure to give reasons. Second, there is insufficient information in relation to the situation of the comparator and therefore I would not be in a position to decide whether the situations are sufficiently comparable so as to attract an obligation for equal treatment. In those circumstances, I decline that relief.

#### **Alternative Remedy**

74. An argument was made that in the exercise of my discretion, even if I consider the applicant is otherwise entitled to relief, I should not grant same because he had an alternative remedy open to him *i.e.* under the Criminal Injuries Compensation Scheme. In fact, the evidence appears to be that unless the applicant is granted OID, he is not entitled to avail of the Criminal Injuries Compensation Scheme. Therefore, this is not an alternative remedy. In those circumstances, I do not consider this argument any further as it does not in fact appear to be based in fact.

#### **Consequences of my Decision**

75. Finally, I should say that, as is clear from the terms of this judgment, my decision to grant *certiorari* is based on the failure of the respondent to provide reasons in both the original and appeal decision. My decision is not concerned with the substance of the decision made by the Irish Prison Service. Nothing in my decision constrains the Irish Prison Service in respect of any substantive decision they may ultimately take on the application. I express no view as to whether the incident is one that comes within the

terms of the scheme or whether there was any negligence or contributory negligence on the part of the applicant.

76. Finally, in respect of the arguments made regarding the nondisclosure of the letter of 7 February at the leave stage, raised by the respondent, that seems to me a matter best dealt with at the costs hearing in this matter, I will adjourn that hearing in order to give the parties time to consider my judgment.

**Conclusion**

77. In conclusion, I will quash the decision of 31 October 2019 and the decision of 9 December 2019 and remit the matter back to the Irish Prison Service. I make that decision on the basis of the failure to give reasons. I make no orders as to declaratory relief as I consider same is not necessary.