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(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BARRY WHITTLE
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE
NORTHERN IRELAND PRISON SERVICE

Mr Michael Wilson (instructed by RJW Law) for the Applicant
Mr Terence McCleave (instructed by the Departmental Solicitor's Office) for the
Respondent

COLTON J

Introduction

[1] The court is obliged to counsel in this matter for their focussed written and oral submissions. As a consequence the court was able to deal with this matter on an expedited basis.

Factual Background

[2] The applicant is a serving prisoner in HMP Magilligan.

[3] On 15 September 2017 the applicant was sentenced to an Extended Custodial Sentence ("ECS") for the offence of wounding.

[4] The court ordered that the sentence would comprise of 4 years in custody and 2 years on licence.

[5] On 30 November 2017 the applicant received a further ECS for an offence of assault occasioning actual bodily harm. The court ordered that the sentence would comprise of 3 years in custody and 2 years on licence. The court further ordered that

the ECS was to be served consecutively to the sentence that had been imposed on 15 September 2017.

[6] The effect of the sentences imposed means that the applicant has a total effective sentence of 7 years in custody and 4 years on licence. As a result, the applicant has a Custody Expiry Date (“CED”) of 6 October 2022 and a Sentence and Licence Expiry Date (“SLED”) of 6 October 2026.

[7] In January 2019 the applicant applied before a Single Parole Commissioner for early release under Article 18 of the Criminal Justice (Northern Ireland) Order 2008 (“the 2008 Order”). Since that application he has applied for parole release on a number of occasions before a Single Commissioner and on appeal to a panel of Commissioners. To date he has been refused release on the grounds that the Commissioners have not been satisfied that it is no longer necessary for the protection of the public from serious harm that the applicant be confined.

[8] In preparation for his release from custody either on his CED or as a result of any decision of the Parole Commissioners the applicant has been considered for Pre-Release Testing (“PRT”). This is a scheme which permits a prisoner to be temporarily released from custody with a view to assisting him in his transition from prison to outside life. PRT can comprise accompanied and unaccompanied temporary releases (“ATRs” and “UTRs”).

[9] Mr David Nicholl is the Governor responsible for determining the applicant’s suitability for PRT and any conditions associated with such a release. In order to discharge this function he chairs case conferences with representatives from the Probation Service of Northern Ireland (“PBNI”).

[10] Such a case conference was held on 7 June 2021. At that stage it was agreed that the applicant should be permitted to avail of ATR. According to the affidavit sworn by Mr Nicholl the applicant was to avail of four ATRs over a 6 month period. In accordance with the plan, the applicant, who has been on the enhanced regime for prisoners since 4 November 2020, completed successful ATRs on 16 June 2021, 6 July 2021 and 8 September 2021.

[11] On 17 September 2021 the applicant was being administered medication at the healthcare centre at the prison by a qualified nurse employed by the relevant Trust. The medication was being administered as part of an opiate substitution programme being undertaken by the applicant. It was later to emerge that the nurse administering the medication alleged that in the course of so doing the applicant sought to conceal the medication in question.

[12] I say this was to emerge later because this information was only passed to Governor Nicholl on 27 September 2021.

[13] On receipt of this information Mr Nicholl avers as follows at para 7 of his affidavit filed in this matter:

“7. In light of this information, I spoke to the lead nurse in the HMP Magilligan’s Healthcare Centre on 28 September 2021. I inquired with her as to whether it was indeed correct that the applicant had attempted to conceal his medication. I also asked if I could speak with the nurse involved. The lead nurse informed me that it was she who witnessed the incident. The nurse clearly stated that the applicant had attempted to conceal his medication. I further inquired as to why no discipline alarm had been activated. The lead nurse indicated that the incident had been formally dealt with by referring the applicant to the resident Doctor for review. I was advised as a result of the incident that the applicant’s medication was reduced in line with South Eastern Health and Social Care Trust policy. As a consequence of the SEHSCT’s actions, no uniformed discipline staff was made aware of this incident at the time and as a result no disciplinary procedure could be taken.”

[14] The final sentence is a reference to the fact that under Rule 35 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 *“a charge involving an offence against prison discipline shall be laid in writing within 48 hours of the discovery of the offence, save in exceptional circumstances.”*

[15] Although Governor Nicholl did not instigate formal disciplinary procedures under the prison rules he considered that as the person responsible for the applicant’s multi-disciplinary case conferencing and his future progress concerning PRT that the applicant be suspended from PRT. This decision was conveyed to the applicant on 29 September 2021.

The Impugned Decision

[16] The decision of the Governor to suspend the applicant from PRT on 29 September 2021 is the impugned decision.

[17] By these proceedings lodged on 7 December 2021 the applicant seeks the following relief:

“(a) An Order of Certiorari to bring up into this Honourable Court and quash a decision of 9 November 2021 (subsequently amended to ‘29 September 2021’) of the Northern Ireland Prison Service to suspend the applicant from the respondent’s pre-release testing scheme.

(b) *A declaration that the said decision is contrary to Article 6 of the European Convention on Human Rights acting in compatibly with the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 and contrary to Section 6 of the Human Rights Act (1998) (subsequently amended to add the following – ‘as well as being procedurally unfair and irrational in the Wednesbury sense’).*

(c) *An Order of Mandamus requiring the Northern Ireland Prison Service to revoke the outlined suspension on the applicant from custody.*

(d) *By reason of the extreme urgency of this matter, an expedited hearing, and an order abridging time for service of the Notice of Motion.*

...”

Events subsequent to the impugned decision

[18] Before further considering the application it is necessary to set out events subsequent to the 29 September 2021.

[19] On 6 October 2021 the applicant instructed his solicitor via a telephone attendance to challenge the decision to suspend the applicant from the respondent’s PRT scheme. The applicant was particularly concerned about the impact this suspension would have on the upcoming decision of a Single Parole Commissioner scheduled for 13 December 2021 to consider his application for release under Article 18 of the 2008 Order.

[20] Acting on those instructions Mr Rodgers wrote to the respondent in the following terms:

“Dear Sir

Prisoner – Barry Whittle – Prison Number C1993

We have been consulted by the abovenamed client, who is concerned that as an enhanced prisoner, a recent decision by the prison authorities concerning what appears to have been a private medical issue or question of fact as between his appointed medical practitioner dealing with the dispensation of his medication, has resulted in his being prevented from parole, notwithstanding, on his instructions when being appraised of the determination, a reference that the issue was ‘too late for a charge’ but still was resulting in his parole opportunity being withdrawn forthwith, without any opportunity for a review of

the offence or alleged circumstances giving rise to such sanctions.

If these instructions are found to be factually correct, such a process leading to said sanction, is clearly flawed and contrary to natural justice as our client was not informed of any alleged offences nor provided with any opportunity to a fair hearing or a hearing at all ..."

[21] At this juncture it should be noted that the applicant denies the allegation made against him in relation to the alleged concealment of his medication. He puts the matter this way in his supporting affidavit at para 12:

"12. In terms of my perspective of the circumstances of 17 September 2021, I was being administered my daily dosage of drugs for my epilepsy condition. As part of this administration, I am always asked once placing tablets of drugs in my mouth to open after swallowing to ensure that I have taken them and not concealed them. On this date, one of the tablets stuck to the top of my mouth and upon opening my mouth at the nurse's request the tablet fell from the top of my mouth and broke into two pieces. The nurse upon seeing this accused me of concealing drugs and despite my protests and explanation given, outlined that she would be reporting this to the Prison Governor."

[22] The applicant has sworn a further affidavit pointing out that the medication was not for his epilepsy condition but was part of medication relating to an opiate substitution programme.

[23] On 8 October 2021 there is a note retained by the Prison Service recording a complaint by the applicant. The complaint details a recorded interview conducted by Richard Moore, SO (discipline). The complaint was raised on 8 October 2021 and the interview was conducted on 9 October 2021. The note of the interview is as follows:

"Barry is unhappy at being suspended from pre-release testing for allegedly attempting to conceal his medication. He says if that was the case why was an alarm not activated at the time, why was the discipline officer not informed or the house SO of what had supposedly happened and why was he not charged?"

[24] On 9 October Mr Moore writes to Governor Nicholl in the following terms:

"Governor, Barry believes there are no grounds for a suspension from Pre Release Testing and would like to have the

UTR which he has merited otherwise he intends to seek legal advice."

[25] The response from Mr Nicholl on 12 October 2021 is as follows:

"I have spoken to the lead nurse and she confirmed you attempted to conceal your medication in her presence. The doctor subsequently reduced your dose as a result of this incident. An alarm does not necessarily need to be activated in such a circumstance. What is disappointing is the fact that you did not disclose this to your co-ordinator. This shows a lack of honesty and integrity on your part. You therefore have been suspended from temporary release at this time. Barry this suspension has come about by your actions and an obvious lack of consequential thinking on your part."

[26] The applicant engaged a stage 2 complaint on 12 October 2021 to which the response was *"You have received a full and comprehensive response from Gov Nicholl"* on 19 October 2021.

[27] On 13 October 2021 the respondent wrote to the applicant's solicitors in reply to the letter of 8 October 2021 in the following terms:

"Dear Sir

Thank you for your correspondence regarding Mr Whittle.

Your client's pre-release testing has been suspended as a result of him trying to conceal medication in Magilligan Healthcare Centre. I spoke to the lead nurse and she confirmed that she witnessed Mr Whittle attempting to conceal his medication. This matter was dealt with by SET. Your client's behaviour demonstrated a lack of consequential thinking, impulsivity and risk taking within a controlled custodial environment. To participate in pre-release testing an individual has to demonstrate appropriate good behaviour. This is clearly not the case.

A further period of assessment is required before any further decisions can be made. As the PDU Governor his behaviour does not reassure me that he can be safely managed in the community. I have encouraged and supported Mr Whittle over the past few months and was disappointed to hear of this incident.

I hope this has been of assistance."

[28] Returning to internal documentation retained by the respondent, a further complaint is noted on 16 October 2021 in the following terms:

"I spoke with Barry with regards to his complaint – he is aggrieved that healthcare shared what he feels are personal medical details with the PDU Governor and probation staff which he believes stopped his progression. Barry indicated that whilst in healthcare a member of staff thought he had two tablets in his mouth which was not the case and he was not charged or adversely. He said that this and information relating to the levels of medication he was on were related to the PDU via healthcare. It is his understanding that information relating to his medical details was asked for by the PDU."

[29] By way of response on 18 October 2021 it is recorded that:

"The PDU did not request this information from healthcare. If Barry has a concern relating to healthcare he should use their complaints procedure."

[30] The applicant pursued this to a stage 2 complaint and on 27 October 2021 the following response was provided by a Gareth Murphy, Unit Manager:

"Barry in the absence of Governor Nicholl I will respond to your complaint. As you have involved your legal team in regards to this matter a full response was provided to them by Governor Nicholl addressing the reasons for your current situation. I note that you have also been informed to utilise the healthcare complaint process if you have an issue with a member of their staff. I cannot make comment on the details of what happened in regards to the incident and will reiterate that the governor chairing your case conference will consider all information presented to him prior to making any decision regards your pre-release testing."

[31] For completeness the applicant made a telephone call to the Prisoner Ombudsman to consider his complaint. On 27 October 2021 the Ombudsman replied to the effect:

"We currently have a backlog which is causing some delay and we introduced a new process on 21 July 2020 to help address this issue. Your claim will now be assessed and we will contact you in due course to advise you of the outcome of that assessment."

[32] On 28 October 2021 the applicant's solicitor wrote a further letter to the respondent seeking a more detailed response with regard to the issues raised in its

previous correspondence. On 9 November 2021 the respondent replied in the following terms:

“... I spoke to the lead nurse and she confirmed to me that your client did indeed attempt to conceal his medication and as a result the doctor reduced his medication. This behaviour does not suggest to me that Mr Whittle is fully engaged in this process. All your inquiries should be addressed to the legal team representing the South Eastern Trust. Your client may not have been charged under prison rules as the incident occurred in the healthcare unit and not witnessed by prison staff but it is clear to me that action was taken by SET in this matter.

Mr Whittle has been temporarily suspended from pre-release testing and as such will be considered for further testing once he has demonstrated a period of good behaviour.”

[33] A pre-action protocol letter was sent on 10 November 2021. On 11 November 2021 the respondent replied as follows:

“Dear Sir

Reply to pre-action protocol letter regarding Mr Whittle.

I am required to continue to review your client’s participation in the temporary release scheme. Following information I received as a result of a conversation I had with a lead nurse your client was temporarily removed from the scheme to allow me to conduct further inquiries.

I have reviewed all available information and your client will resume temporary release testing in December 2021.”

The Applicant’s Case

[34] Although the applicant has pleaded a breach of Article 6 ECHR, and irrationality in his Order 53 Statement the real issue in this case relates to procedural fairness. There is ample authority that Article 6 is not engaged in the decision involved in this case, something which Mr Wilson realistically accepted in the course of his submissions. Properly analysed the court does not consider that irrationality in the Wednesbury sense arises here. The court’s focus is on procedural fairness. In short form the applicant’s case is that at no stage was he consulted about Governor Nicholl’s decision. He was suspended without being approached for his version of events. Governor Nicholl from the outset clearly accepted that the applicant had attempted to conceal drugs. This acceptance by him resulted in the suspension and, indeed, the continuation of the suspension without any opportunity for the applicant

to participate in the decision-making process. I will return to this issue shortly. Before doing so it is necessary to consider key elements of the respondent's arguments.

[35] The primary submission on behalf of the respondent is that the central relief sought by the applicant has in fact been obtained. In these proceedings he seeks an order quashing the decision of 29 September 2021 to suspend him from the PRT. In fact, the applicant was reinstated to PRT on 11 November 2021, and has since availed of a period of release. Mr McCleave submits that the challenge is therefore entirely academic.

[36] Developing this theme and as a consequence of the academic nature of the challenge Mr McCleave points out that the applicant has in fact availed of all the PRT that was anticipated when Governor Nicholl first assessed the applicant as suitable for such testing at the case conference meeting in June of 2021. He argues therefore that there is absolutely no utility in the court granting any relief to the applicant.

[37] On the face of it these are strong arguments against the granting of any remedy to the applicant. In response the applicant contends that the suspension has had, and continues to have, an adverse impact on his application for parole. In his affidavit he says in respect of his suspension:

"I inevitably knew that this would be disclosed in my parole dossier for my upcoming application before the single/panel of commissioners and have an adverse effect on my prospects of success, which has clearly come to fruition as evidenced at Exhibit BW2 and paragraph 8 therein."

[38] The exhibit refers to the decision of the single commissioner dated 13 December 2021 refusing the applicant parole.

[39] The court's view is that the applicant has overstated the impact of the suspension, as opposed to the allegation on the outcome of the commissioner's decision.

[40] The decision itself is a lengthy reasoned decision in which the commissioner properly applies the legal test for parole and takes into account relevant factors in relation to the assessment of risk to the public should the applicant be released on parole.

[41] The issue of the incident on 17 September 2021 is dealt with at paras 32, 33 and 38 of the decision which the court sets out in full:

"32. A further report from PBNI dated 7/10/2021 was provided with an update that 'on 29/09/2021 the senior officer for Mr Whittle's landing was advised that he was discovered

concealing his medication by Health Care staff on 17/09/2021. He subsequently had his medication reduced. As this information was not provided in a timely manner, Mr Whittle was not charged or adjudicated. However, he was suspended from Pre-Release Testing until a Case Conference could be convened to discuss this matter on how to move forward. It is anticipated that the Case Conference will be held in the next four weeks. Mr Whittle was spoken to on 29/09/2021 by his Case Co-ordinator and Support Officer, he adamantly denies the allegation and reports that he did not feel that this information needed to be shared to PBNI. At the time of the decision of the report Mr Whittle denies attempting to conceal his medication, he reports that he has no need to divert his medication and is disappointed that he is not trusted. Mr Whittle became visibly agitated, raised his voice and advised PBNI he would not accept the contents of the report and then left the meeting abruptly.

33. *In response to a direction a brief memo was received from a PDU Governor on 19/11/2021. This memo informed that:*

'Following information I received as a result of a conversation I had with a lead nurse, Mr Whittle was temporarily removed from the scheme to allow me to conduct further enquiries. I have reviewed all available information and Mr Whittle will resume Temporary Release Testing in December 2021.'

...

38. *However, the most recent information that Mr Whittle was secreting some of his medication has raised some concern and Mr Whittle's temporary release programme has been paused. The issue poses questions in relation to his ability to be open and honest with the professionals supporting him and his ability to work within the rules of the custodial environment. These are concerns and questions raised and I have reflected on them in the context of the positive progress that has been sustained up to this point. I take note of Mr Whittle's response to explain that he denies the matter and that the system is not able to proceed by way of formal adjudication due to the time that has passed. I have a greater degree of concern that his comments were such that he felt the matter did not need to be reported to PBNI, which reflects a lack of insight into the importance of multi-disciplinary working in risk management now and in the future if on conditional release. Mr Whittle has not yet been able to engage fully in a review of the matter with*

PBNI and his ability to contain emotions and undertake this work will be essential. It will also be important that PBNI are aware of the plan going forward in relation to OST and how reductions in prescription will take place in the context of a programme of greater exposure to unsupervised time on unaccompanied release in the community. I note the most recent information from the PDU Governor which does not shed a great deal of light on the matter but does reflect that the prisoner is content that he can at least resume temporary releases. In any event Mr Whittle has not progressed beyond the early stages of testing and has not reached the stage of unaccompanied periods of release."

[42] A proper analysis of the decision reveals that the commissioner was fully aware of the applicant's denial. Whilst obviously expressing concern about the allegation the commissioner placed a greater degree of concern on the applicant's failure to understand that this matter did need to be reported to the PBNI. A full reading of the decision does not support the contention that this issue was determinative in the decision to refuse the applicant parole.

[43] The applicant further argues that he has been adversely affected by the suspension because had he completed a PRT at an earlier date he had the opportunity to move to URT prior to the commissioner's decision of 13 December 2021, which if completed successfully would have enhanced his prospects of being released.

[44] He says that in the absence of a decision in his favour in these proceedings those two potential adverse consequences are still in play in respect of the appeal before the full commissioners to be heard on 3 February 2022.

[45] The court considers that this issue is finely balanced. As indicated the applicant overstates the extent of any adverse implications arising from the suspension. Nonetheless, the court is persuaded that the impact of the suspension has acted to the applicant's detriment and there is a potential utility in this court finding in his favour should it be persuaded on the merits.

[46] Another preliminary issue raised by the respondent is that the applicant enjoys an alternative remedy in the form of a complaint to the Prisoner Ombudsman. However, in light of the correspondence from the Ombudsman referred to above and the imminence of the panel hearing on 3 February 2022 the court is not persuaded that this is an effective remedy in the circumstances.

[47] The court therefore turns to the substance of the complaint.

[48] The discretionary power to order periods of temporary release, including periods of Pre-Release Testing which lie at the heart of the current challenge is

provided for in Rule 27 of the Prison and Young Offenders' Centre Rules (Northern Ireland) 1995 ("the 1995 Rules"). Rule 27 provides:

"27.-(1) A prisoner to whom this rule applies may be temporarily released for any period or periods and subject to any conditions.

(2) A prisoner may be temporarily released under this rule for any special purpose or to enable him to have health care, to engage in employment, to receive instruction or training or to assist him in his transition from prison to outside life.

(3) A prisoner released under this rule may be recalled to prison at any time whether the conditions of his release have been broken or not.

...

(5) In considering any application for temporary release under this rule previous applications, including any fraudulent applications, may be taken into account."

[49] It is clear that by its nature the power to order temporary release is a wide one and engages a wide range of considerations including issues such as risk, public safety and the potential impact on prison escorts. The court must respect that the respondent has been identified by the legislature as the appropriate decision-maker and has an expertise in managing offenders and risk. As was said in the case of *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 referred to below, by Lord Mustill:

"The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made."

Mr McCleave correctly points out that it is against that backdrop that the requirements for procedural fairness must be assessed.

[50] It is well-established that the requirements of procedural fairness are very much dependent on context. The principles of what is required by procedural fairness have been authoritatively set out in the case of *Doody* (see above) to the effect that whether a procedure is deemed to be fair depends on the context on the particular facts of the case. As Lord Mustill said in that case:

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained

what is essentially an intuitive judgment. They are far too well known. From them, I derive that:

- 1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.*
- 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.*
- 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.*
- 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*
- 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*
- 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

[51] In this case the respondent points to the temporary nature of the decision in question. The court is not dealing here with a determination of formal charges that were of lasting effect. The applicant was informed of the reason for his suspension on 29 September 2021 by his Personal Development Plan Co-ordinator (PBNI staff member) and his Support Officer (prison staff member). Having been informed of the decision the applicant was able to instruct his legal representatives who took the steps set out previously commencing in the original letter to NIPS on 8 October 2021. In addition, he was sufficiently appraised of the issues to be able to make a formal complaint to the Prisoner Ombudsman on 27 October 2021.

[52] It is the respondent's case that the suspension was by definition a temporary one pending further enquiries by Governor Nicholl. It is asserted that when it became clear that no formal statement was forthcoming from SET Healthcare

following the enquiries from Governor Nicholl an immediate review of the applicant's case was undertaken on 11 November 2021 and he was reinstated to PRT.

[53] The court takes the view that any proper analysis of the context here indicates that from the outset Governor Nicholl accepted the version of events put forward by the nurse. He imposed a suspension before giving the applicant an opportunity to give his account of what happened. Whilst a suspension may be justified in certain circumstances at the very least it should be followed up with an opportunity to permit the subject matter of the suspension to give his version of events.

[54] The first occasion upon which there is any record of the applicant's complaint is on 8 October 2021, coincidentally the same date upon which his solicitor wrote to the respondent complaining about the suspension. There is no evidence that by this stage any attempt had been made to obtain an account of what happened from the applicant. The response to the solicitor's letter of 8 October 2021, which is also reflected in the internal prison service notes indicates that Governor Nicholl was still accepting the version of events put forward by the nurse. Having set out the complaint he says:

"Your client's behaviour demonstrated a lack of consequential thinking, impulsivity and risk taking within a controlled custodial environment. To participate in Pre-Release Testing an individual has to demonstrate appropriate good behaviour. This is clearly not the case."

[55] The letter then goes on to refer to the applicant's "behaviour" which "does not reassure me that he can be safely managed in the community."

[56] In the subsequent letter of 9 November 2021 Governor Nicholl is, again, standing over his acceptance of the allegation.

[57] The respondent suggests that a review of the applicant's case was undertaken on 11 November 2021 when it became clear that no formal statement was forthcoming from SET Healthcare following enquiries from Governor Nicholl.

[58] The circumstances in which the decision to end the suspension and reinstate PRT are not entirely clear. It may well be that the threat of legal proceedings played a part. What is clear, however, is that at no stage did the Governor obtain an account from the applicant about the circumstances of the incident. The first note of any account from the applicant about the circumstances of the event relate to an interview conducted on 17 October 2021. This does not seem to have resulted in any change of approach. As late as 27 October 2021 the applicant was informed that a full response had been provided to the applicant's legal advisers. As indicated that response does not suggest that any consideration was given to the applicant's account of what occurred on the day in question.

[59] Bearing in mind the principles to which the court has referred and looking at the requirements of procedural fairness in this case the court does have a concern about the impugned decision. That concern relates to the failure by the respondent to seek an account from the applicant of his alleged misconduct on 17 September 2021. The decision to suspend the applicant and maintain it in the circumstances of this case are such that the applicant was denied any right to participate in the decision making process. It is a fundamental principle of fairness that a person who may be adversely affected by a decision should have the opportunity to make representations on his own behalf concerning material upon which the decision maker is acting. The court recognises that what is required will be less demanding in circumstances involving a temporary suspension as occurred here but nonetheless it seems to the court that there has been a basic and fundamental unfairness in the decision challenged.

[60] The only fair interpretation of the correspondence and records in this case is that the respondent took the view that the applicant was guilty of the offence of attempting to conceal drugs. It was not possible to deal with this under a formal adjudication because of the delay in reporting the matter. Ultimately, it appears the matter was not pursued because of a failure of the nurse to provide a formal written statement. Thus, the respondent formed and maintained the view that the applicant had indeed acted as alleged. At no stage was he interviewed about the circumstances of the offence but rather the respondent acted on the basis of his guilt. When the Governor wrote to the applicant's solicitor on 13 October 2021 it was indicated that "*a further period of assessment is required.*" In the respondent's letter of 11 November 2021 it was indicated that the applicant had been removed from the PRT Scheme "*to allow me to conduct further enquiries.*" Crucially, neither the period of assessment nor the further enquiries involved a consideration of the applicant's account of what took place on 17 September 2021. In these circumstances the court considers that the applicant has established a significant procedural unfairness which vitiates the decision to suspend the applicant and maintain that suspension until 11 November 2021.

[61] The court therefore, grants a declaration that the decision to suspend the applicant from the respondent's Pre-Release Testing Scheme between 29 September 2021 and 11 November 2021 was unlawful as being procedurally unfair.