

BETWEEN

DEMING GAO

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENT

JUDGMENT of Mr. Justice Coffey delivered on the 20th day of April, 2018

1. The applicant is a serving member of An Garda Síochána. It is common case that on 1st November, 2016 he was wrongfully subjected to verbal abuse by a colleague, who has since been disciplined. On 2nd November, 2016 the applicant reported unfit for duty citing work related stress arising from the incident of the previous day. He remains out of work but it would now appear that he attributes his work related stress and its severity to bullying in the workplace which is alleged to have occurred prior to the incident of 1st November, 2016 and of which he first made a formal complaint to the respondent on 13th February, 2017.

2. In order to avail of its enhanced benefits, the applicant on 14th November, 2016 applied to have his sickness absence classified as being due to an "injury on duty" as opposed to "ordinary illness". On 17th January, 2017 the applicant's Divisional Officer issued a certificate pursuant to s. 11.37 of the Garda Síochána Code ("Code 11.37 certificate") with the result that the applicant's absence was recorded and treated as an "injury on duty". On 28th March, 2017 the respondent determined that the Code 11.37 certificate had been issued in error with the result that the applicant's injury was reclassified as "ordinary sickness" with effect from 27th April, 2017 and backdated to 2nd November, 2016.

3. The applicant was not informed of the decision and only became aware of it in the course of a telephone conversation that he made to the respondent's Human Resources Directorate ("HRD") on 10th May, 2017. Thereafter he made numerous attempts to seek an explanation for the alleged error and purported to appeal the reclassification of the status of his sickness/absence. At the request of the Chief Medical Officer ("C.M.O.") the applicant's case was reviewed at a case conference on 28th August, 2017, arising from which the Executive Director of the HRD made a "decision" on 11th October, 2017 that the applicant's sick leave should remain classified as "ordinary illness".

4. On 20th November, 2017 the applicant obtained leave to seek, *inter alia*, an order of *certiorari* quashing the reclassification of his sickness absence. As the application for leave to apply for judicial review of the said decision was not made within three months from the date when the grounds for the application first arose the applicant further seeks an order extending the period within which an application for leave to apply for judicial review may be made pursuant to O. 84. r. 23(3) of the Rules of the Superior Courts. The applicant also seeks an order of *certiorari* quashing such "decision" as was made by the respondent on 11th October, 2017, which the applicant characterises as a "decision refusing to restore the original classification of the applicant's injury."

5. The applicant challenges both decisions primarily on the basis of an alleged failure on the part of the respondent to give reasons for the decisions which are impugned.

6. The respondent opposes the application and contends as follows:-

(1) that no decision has or can be made on the classification of the applicant's sickness absence pending the completion of an investigation by the respondent of the applicant's complaints of bullying in the workplace;

(2) that the impugned decisions are not amenable to judicial review by reason of the fact that the alleged reclassification of the applicant's sickness absence was no more than the rectification of a prior error and that the alleged refusal to restore the original classification was no more than a reiteration of the fact that his sickness absence classification must await completion of an investigation into the applicant's complaints of bullying;

(3) that such decisions as were made were fully and properly explained to the applicant.

Sick Leave Entitlements and the Management of Absence From Duty

7. Sick leave entitlements for all members of the Public Service, including members of An Garda Síochána, are regulated by the Public Service Management Sick Leave Regulations 2014 ("the Regulations"). The Regulations provide for a basic entitlement to a maximum of 92 days sick leave on full pay in a year, followed by a maximum of 91 days sick leave on half pay, subject to a maximum of 183 days paid sick leave in a rolling four year period.

8. The application of the Regulations to An Garda Síochána is governed by the An Garda Síochána Code ("the Code") as supplemented and amended by HQ Directive 139/2010 (1st December, 2010) ("the Directive"). The Directive makes a distinction between "injury on duty" and "ordinary illness", the significance being that a member's absence due to "injury on duty" will entitle him/her to sick leave with full pay together with premium payments for a period that exceeds the basic entitlements attaching to sickness absence due to "ordinary illness".

9. Section 11.37 of the Code sets out the manner in which a "personal injury" is to be considered and provides as follows:-

"(1) If a member suffers personal injury, and is rendered non-effective or otherwise, a full report of the circumstances should be submitted immediately to the member's Divisional Officer. When non-effectiveness as a result of an injury exceeds 60 days in any period of 90 days, the report will be forwarded to Assistant Commissioner, Human Resource Management ["HRM"]. A decision regarding culpability will be made locally by the Divisional Officer except in cases where:-

(a) The Divisional Officer is of the opinion that the injuries were due to wilful default or negligence on the part of the member.

(b) The Divisional Officer has a doubt about the matter. In such cases the file will be forwarded to the Assistant Commissioner, Human Resources Management for directions."

10. The Directive provides for a marginal note to be made at s. 11.40 of the Code which provides for the classification of sickness absence as "injury on duty" as follows:-

"Injury on Duty Classification:

Where there is any doubt that an injury on duty occurred, Divisional Officers should refer the matter to Assistant Commissioner, Human Resources Management who will seek the advice of the C.M.O. The C.M.O. will take into account all relevant information arriving at his/her advice.

A decision regarding injury on duty will be based on:

- A complete investigation filed on to the incident;
- Management views and recommendations;
- The assessment and opinions of the C.M.O.;

Ordinary illness/injury on duty

Where there is a doubt as to whether the member's sickness absence is due to ordinary illness or an injury on duty the member's absence will be treated on ordinary illness pending a decision of the classification of the injury and in particular the C.M.O.'s advice. If it is determined that the absence does relate to an injury on duty, the member's pay will be retrospectively adjusted as soon as practicable".

11. The Directive provides for the making of a further marginal note at s. 11.37 of the Code which provides as follows:-

"Investigation

Where members report non-effective for duty as a result of injury on duty or work related stress, a thorough investigation should be carried out immediately and the outcome reported to the Assistant Commissioner Human Resources Management for the attention of the C.M.O. The member concerned shall be advised of the Employee Assistant Service Peer Support and any other support deemed necessary. Local management shall address the issues causing the member's stress."

Factual Summary

12. The applicant was born in China on 5th August, 1981. He is now a naturalised Irish citizen and married with an infant child. He was attested as a member of An Garda Síochána and allocated to Dun Laoghaire Garda Station on 12th June, 2009, from which he was transferred to Shankill Garda Station on 30th April, 2012.

13. On 1st November, 2016, whilst in the execution of his duties in the public office of Dun Laoghaire Garda Station, the applicant was subjected to verbal abuse by another member of An Garda Síochána. Later that day the applicant made a report of the incident to Sergeant Patrick Crown, Shankill Garda Station, and informed him that he was suffering from stress and depression so that he was unfit to work.

14. On 2nd November, 2016 the applicant reported unfit for duty citing work related stress arising from the incident of the previous day.

15. On 14th November, 2016 the applicant made an application in writing to his Divisional Office to have his absence from duty classified as an injury on duty from 2nd November, 2016. The application was made solely in respect of the incident which occurred on 1st November, 2016 and the stress and depression that he had suffered "as a result" of that incident. The application was supported by a medical certificate from his General Practitioner, who certified that the applicant was unfit for work due to "work related stress" from 1st November, 2016 until 17th November, 2016.

16. On 15th November, 2016 the application's Divisional Office transmitted his application for "injury on duty" classification to the HRD. On 16th November, 2016 the HRD wrote to the applicant's Divisional Officer noting that medical certificates in relation to the application cited work related stress as the reasons for his absence. The Chief Superintendent was directed to interview the applicant, establish the source of the stress and to provide a full report, a referral form and medical certificates in accordance with Code 11.34 (which relates to sick files).

17. On 18th November, 2016 the applicant submitted a formal complaint in writing to his Inspector in respect of the incident of 1st November, 2016 at Dun Laoghaire Garda Station. It is common case that a full investigation was carried out into the incident which concluded in January 2017, following which the relevant member received a warning pursuant to Regulations 10 of the Garda Síochána (Discipline) Regulations 2007, for displaying a lack of courtesy.

18. On 21st November, 2016 the applicant was referred to the Garda Occupational Health Service who subsequently referred him to the C.M.O. who examined the applicant on 19th December, 2016.

19. On 23rd December, 2016 the Assistant Chief Medical Officer ("A.C.M.O.") wrote to Ms. Monica Carr, the Head of the HRD, indicating that he considered the applicant "currently unfit for work on a temporary basis" and recommended that he should be reviewed by an independent specialist adviser. The letter noted that the applicant reported the incident of 1st November, 2016 together with "other incidents of concern to him over an extended period." The A.C.M.O. recommended that Garda Management should carry out an assessment of "these matters", the outcome of which, he said, should be communicated to the applicant "in early course". On 12th January, 2017 the Head of the HRD wrote to the applicant's Divisional Officer to inform him of the advice that had been given by the A.C.M.O. in his letter dated 19th December, 2016 and to further inform him that an appointment had been arranged for a medical review of the applicant by an independent specialist adviser on 9th January, 2017.

20. On 17th January, 2017 the applicant's Divisional Officer, Chief Superintendent Russell, issued a certificate pursuant to Code 11.37 which stated that:-

"There is no reason to believe or evidence to show that the injury sustained on duty by (the applicant) on November 1st 2016, was due to wilful default of negligence on the part of the member."

21. By letter dated 24th January, 2017 the A.C.M.O. wrote to the Head of the HRD to state that he had received a medical report from the independent specialist adviser in relation to the applicant who, he stated, considered the applicant to be "unfit for duty currently on a temporary basis". He also reported the independent medical advisor's concern of possible workplace circumstances acting as "aggravating and sustaining factors of his condition" and stated that it was "essential" that issues of concern surrounding the case were dealt with "expeditiously".

22. A subsequent letter dated 21st September, 2017 from the Head of the HRD to the Executive Director discloses that on 24th January, 2017 the applicant's file was further reviewed at the Garda Occupational Health Service, following receipt of the medical report from the independent specialist adviser in relation to the applicant. On the same day the HRD received a copy of the Code 11.37 certificate from the Garda Occupational Health Service, following which the applicant's absence was recorded and treated as an "injury on duty".

23. By letter dated 31st January, 2017 the Executive Director of the HRD wrote to Chief Superintendent Russell to inform him that the applicant's file had been reviewed by the C.M.O. on 24th January, 2017, following receipt of the medical report from the independent specialist adviser. He informed Chief Superintendent Russell that on 24th January, 2017 the C.M.O. advised that the applicant was considered unfit for duty on a temporary basis and requested him to inform the applicant accordingly and to ensure that he was notified of the confidential supports available to garda members. He further requested Chief Superintendent Russell to ensure that the provisions of Code 11.39 (which deals with visits to non-effective members) were "strictly adhered to".

24. On 3rd March, 2017 Superintendent Fitzgerald, Dun Laoghaire Garda Station, sent an email to the HRD stating that, despite being required to do so, the C.M.O. had failed to state in his initial report whether or not he had concluded that the applicant's absence was as a result of an "illness arising from duty".

25. On 13th February, 2017 the applicant made the first of two formal complaints of bullying, which are set out in greater detail below.

26. On 21st March, 2017 the A.C.M.O. wrote to the HRD to state his opinion that the applicant's medical condition related to workplace circumstances "of concern". He further stated that if on assessment Garda Management considered that such circumstances had arisen, it would be "reasonable" to classify the absence and illness arising from duty as been "validated (by) the medical circumstances".

27. A case conference was held on 28th March, 2017. The letter dated the 21st September, 2017 from the Head of HRD to the Executive Director discloses that during the conference it transpired that there was an "ongoing investigation" into the cause of the applicant's stress related absence and that it had been "determined" that the Code 11.37 certificate had been issued in error. As of 28th March, 2017 the only investigation that was extant was the investigation into the complaint of bullying that had been made by the applicant on 13th February, 2017.

28. On 29th March, 2017 the applicant's Divisional Officer, Chief Superintendent Russell, caused an email to be sent on his behalf in which he stated that the Code 11.37 certificate had been issued "in error". Without stating what the error was, Chief Superintendent Russell sought to explain the matter as follows:-

"I sought clarification in relation to the terms of Code 11.37 in relation to the stress related illness. I have been advised that "in all such cases involving stress related illness and in cases where a doubt exists a file should be submitted to Assistant Commissioner, HRM (Sick Section) for consideration by the C.M.O. The issue of a certificate under Code 11.37 has particular relevance to the payment of Premium Payments.

As per below email of the 3rd March this was the approach being undertaken by Local Garda Management in this Division, however, it appears that a certificate and a Code 11.37 was issued in error".

29. The letter dated 21st September, 2017 from the Head of the HRD to the Executive Director further discloses that on the 27th April, 2017 correspondence issued from the HRD advising that the applicant's absence was to be treated as "ordinary illness". During the course of these proceedings, the respondent denied that there was a "reclassification" of the status of the applicant's injury. However, in her letter dated 11th July, 2017 to the applicant, the Head of the HRD expressly stated that his absence was "reclassified" as being an ordinary illness as of 29th March, 2017 and that his local management had been informed accordingly in correspondence issuing from the HRD on 27th April, 2017.

30. The applicant was not informed of the reclassification until he rang the HRD on 10th May, 2017 and spoke to a supervisor who informed him that the status of his sickness absence had been reclassified from "injury on duty" to "ordinary illness" as of 27th April, 2017 and that the reclassification had been backdated to 2nd November, 2016.

31. It would appear from his letter of the same date to Superintendent Fitzgerald, Dun Laoghaire Garda Station, that at 9.38pm on the 10th May, 2017 the applicant's Inspector had a telephone conversation with the applicant in the course of which he stated to him that he did not know why the status of the injury had been changed on 27th April, 2017 or as to why he had not been informed.

32. Later the same date, the applicant sent an email to his Inspector at Dun Laoghaire Garda Station to complain that he had never been informed about the reclassification or provided with any reasons for the making of the decision.

33. By letter dated 11th May, 2017 the applicant wrote to his Divisional Office seeking an explanation as to why the status of his absence had been changed from "injury on duty" to "ordinary illness". Chief Superintendent McPartlin replied to his letter on the same date and sought to explain matters by referring the applicant to the Directive and asserting that under the Directive "the decision on the classification... rests with the Chief Medical Officer."

34. On 15th June, 2017 the applicant sent an email to the HRD seeking, *inter alia*, an explanation for the reclassification of his "injury on duty" to "ordinary illness" and the basis on which the decision was made. By letter dated 22nd June, 2017 the Head of the HRD replied to his email and stated that the Code 11.37 certificate was issued in error. She stated that the incident of "work related stress" which led to his absence was the subject of an ongoing investigation under the Garda Bullying & Assessment Policy and that the matter of the classification of his sickness absence "may" be revisited upon the conclusion of that investigation. The letter went on to further state that any salary which he had been overpaid for the relevant period where his absence was incorrectly classified as

"injury on duty" would be recorded as an overpayment and that the Overpayment Section would be in contact with him to make the necessary arrangements for "repayment of same".

35. By letter dated 23rd June, 2017 the applicant purported to make "an application for an appeal" to the HRD against the reclassification of his sickness absence to "ordinary illness" on 27th April, 2017. It is common case that there is in fact no appeal provided for under the Code or the Directive. The stated basis of the purported appeal was that at the time of the issuing of the Code 11.37 certificate, the respondent was "fully aware" as to the nature of the incident which had occurred on 1st November, 2016 and that the injuries had been sustained without wilful default or negligence on the part of the applicant. The applicant further relied on the fact that the member concerned had admitted his responsibility and had been disciplined for his actions. The applicant, however, went on to say that his absence from duty was due to "(severe) depression and anxiety as a result of harassment and bullying for the past number of years as well as the fact that I am taking medication for same." The letter concluded with a request to have the status of his illness reclassified from "ordinary illness" to "injury on duty" and backdated to 2nd November, 2016.

36. By letter dated 11th July, 2017 the Head of the HRD replied to the letter seeking a purported appeal dated 23rd June, 2017. In her letter, Ms. Carr reiterated what had already been stated by her in her letter dated 22nd June 2017, namely, that the Code 11.37 certificate had been issued in error and that there was an ongoing investigation into the matter. She concluded by stating that the HRD was awaiting further advices from the C.M.O. following the applicant's review by the independent specialist adviser on 19th June, 2017.

37. By letter dated 27th June, 2017 the applicant purported to make a further "application for an appeal" to his Divisional Office against the reclassification of his illness on 27th April, 2017. The letter made reference to the appeal that he had already made to the HRD on 23rd June, 2017 and went on to state that he had been suffering from severe depression and anxiety as a result of bullying and harassment for "the past number of years." The letter stated that the applicant had used his best efforts to facilitate the investigation into his allegations of bullying but complained that he had not been provided with a specific timeframe for its completion. The letter concluded with a request to senior management to change the status of his illness from "ordinary illness" to "injury on duty".

38. On 30th June, 2017 the applicant sent an email to the Head of the HRD stating that "over the past number of years I have been subjected to racial abuse, harassment and bullying by a number of colleagues in Shankill and Dun Laoghaire Garda Stations." The letter further stated that the applicant had presented with signs of depression and anxiety "up until" an incident occurred on the 1st November, 2016 in Dun Laoghaire Garda Station, in the course of which, he said, he was verbally abused and humiliated by another member and as a consequence of which he suffered "a mental breakdown". He complained that he had received no response to his appeals against the reclassification of the status of his illness and requested "help" so that "appropriate actions" would be taken.

39. By letter dated 30th June, 2017 Chief Superintendent McPartlin replied to the applicant's letter dated 27th June, 2017 in which he had made an "application for an appeal". The letter stated that no decision had been made as to the status of his absences. She referred to the Directive where it stated that where there is "any doubt" that an injury on duty occurred then the matter should be referred to the Assistant Commissioner, HRM. She stated that in accordance with the Directive the matter had been referred to the C.M.O. "to make his determination as to the certification of the absence. "

40. By letter dated 10th July, 2017 the A.C.M.O. wrote to the Head of the HRD to state that he had received a medical report from the independent specialist adviser and that based upon that report he considered the applicant to be "currently unfit for work". He went on to state:-

"The Independent Specialist Adviser indicates that the circumstances in this case are very complex. He indicates that there are cultural, mental health, and interpersonal issues present. He goes on to indicate that he feels that the situation is only going to be satisfactory resolved when there is greater understanding of cultural issues on both sides and a more cosmopolitan working environment created. This may be aided by Garda Welfare intervening both with the member and his unit."

41. The A.C.M.O. concluded his letter with a recommendation that the HRD hold:-

"an early Case Conference involving local management, i.e. the Member's Divisional Office and District Officer, the Head of HR Directorate, the Head of Employee Assistance Service, the OHP and the Independent Specialist Adviser."

42. On 26th July, 2017 the applicant wrote a further letter to his Divisional Office requesting that the error allegedly made by Chief Superintendent Russell be clarified and further requesting specified documents for transmission to the HRD.

43. On 27th July, 2017 the Head of the HRD wrote to the applicant's Divisional Officer to inform him of the advice of the A.C.M.O. given on 10th July, 2017 and his recommendation for an early case conference.

44. A further case conference was held on 28th August, 2017 which was attended by all of the relevant interested parties. As appears from the subsequent letter dated 21st September, 2017 from the Head of the HRD to the Executive Director, the conclusion of the conference was that:-

"whereas (the applicant) used to get along with his colleagues he now had a very black and white world view. It was hoped that the Employee Assistance Service, HR and local management could get together and assist with his return to work at a local of his choosing."

45. The Head of the HRD in her letter further recommended that the applicant's sickness absence should remain classified as ordinary illness and stated:-

"The issuing of a Certificate in accordance with Code 11.37, by Divisional Officer should only be in the event of a member being injured in the execution of their duties. This does not appear to be applicable in this case."

46. Ms. Carr appears to have given the following reasons for her recommendation:-

"As advised above the incident of 1st November, 2016, was dealt with in accordance with the Discipline Regulations. In relation to the 2 investigations under the Bullying & Harassment Policy, one had been finalised and not upheld, the second one is expected to be finalised in the near future."

In this regard the member's file is to be reviewed, if necessary, following the completion of the current Bullying & Harassment investigation."

47. By letter dated the 11th October, 2017 the Executive Director of the HRD wrote to the Head of the HRD to inform her of his "decision" that, taking all matters into account and the views of all relevant parties, he was "in agreement" that the applicant's sick leave should "remain" classified as "ordinary illness". It would appear from para. 53 of his written submissions that the applicant was advised of this decision by his Inspector on 14th November, 2017.

48. By letter dated 23rd January, 2018 the applicant's General Practitioner certified the applicant as fit to return to work. Upon receipt of the letter the applicant was referred to the C.M.O. for assessment on 8th February, 2018, following which the C.M.O. also certified the applicant fit to return to work with certain modifications.

49. By further letter dated 9th February, 2018 the applicant's General Practitioner certified him as being unfit to work for the period 9th February, 2018 to 12th March, 2018.

50. By letter dated 22nd February, 2018 the applicant was notified of the C.M.O.'s certification of fitness to return to work. On 24th February, 2018 the applicant met with his Inspector and expressed a wish to return to work but asked what plan would be in place to facilitate his return.

51. On 6th March 2018, Inspector Condon spoke with the applicant and informed him that, in accordance with the advice received from the C.M.O., he was to be assigned to administrative duties as part of the Divisional Continuous Professional Development Team. The applicant indicated an unwillingness to return to duty in Shankill Garda Station. By letter dated 9th March, 2018 the applicant wrote to his Divisional Office to reject the proposed arrangements on the basis that they did not reflect the medical advice which was to the effect that a transfer to a different Division was warranted to provide him with "a fresh start". The applicant contends that this is an essential condition to ensure his successful return to work.

Complaints of Bullying

52. On 13th February, 2017 the applicant made the first of two formal complaints of bullying in accordance with the Garda Bullying Policy "Working Together to Create a Positive Working Environment". The complaint was that he had been bullied by three named gardaí attached to his unit, Shankill Garda Station, over a three and a half year period. The complaint was investigated by Chief Superintendent McPartlin, following which on 4th July, 2017 a decision was made that there was insufficient evidence to uphold the complaint. On 10th August, 2017 the applicant appealed that decision to the Assistant Commissioner, Dublin Metropolitan Region.

53. On 22nd May, 2017 the applicant made a further complaint of bullying in accordance with the Garda Bullying Policy in which he alleged that whilst attached to Unit C. Dun Laoghaire he had been bullied and harassed by members of An Garda Síochána during the period 2009-2012. The allegation was investigated by Chief Superintendent Michael Daly, following which a decision was made on 25th October, 2017 not to uphold the complaint. On 27th November, 2017 the applicant appealed that decision to the Assistant Commissioner, Dublin Metropolitan Region. On 17th January, 2018 the respondent appointed an independent expert to carry out an audit of both investigations. The outcome of the audit is not as yet known.

54. There is a dispute between the parties as to whether the allegations of bullying, the subject matter of the formal complaints, had been informally disclosed to senior officers prior to the incident of 1st November, 2016.

55. The applicant alleges that in or about 2010/2011 he informally brought the allegations to the attention of his superior and a Welfare Officer within An Garda Síochána. He further alleges that when his disclosures were "uncovered" by his superiors within Dun Laoghaire Garda Station he was branded "a rat" and that his colleagues were warned by his superior to be careful as the applicant could not be trusted following which, it is alleged, his mistreatment intensified. He alleges that following this he was shunned, avoided and isolated by his fellow members of An Garda Síochána who refused to work with him and who refused to communicate with him in a courteous, professional and respectful manner. He further alleges that his religious beliefs, ethical background, personal and family values were ridiculed by a small number of his colleagues in Dun Laoghaire Garda Station.

56. The applicant asserts that he sought and obtained a transfer from Dun Laoghaire Garda Station to Shankill Garda Station in or around September/October 2012 but that despite his transfer he continued to experience mistreatment at the hands of his former colleagues in the Dun Laoghaire District and from a "select" number of his new colleagues in Shankill Garda Station.

57. The applicant's allegations are not admitted by the respondent who relies on the fact that, to date at least, the applicant's complaints of bullying have not been upheld and the fact that in or about March 2012, when he sought a transfer from Dun Laoghaire Garda Station to Shankill Garda Station, he did so for "family reasons".

Injury on Duty Classification

58. Both the applicant and the respondent have argued the case before this Court on the assumption that the issuing of a Code 11.37 certificate (provided it has not been issued in error) has the legal effect of classifying the sickness absence of a member of An Garda Síochána as an "injury on duty". In so arguing, the parties have referred to s. 11.37(1) of the Code, which is outlined above at para. 9.

59. Section 11.37(1) of the Code in fact makes no reference to "injury on duty" but instead refers to "personal injury" without restriction of such injury to injuries suffered or sustained in the course of duty. Moreover, the issue of "culpability", which is to be decided under the section, is not whether the relevant "personal injury" was suffered or sustained by a member of An Garda Síochána in the course of his/her employment but rather whether such injury was due to "wilful default or negligence on the part of the member". If he/she is of the opinion that the injury was due to wilful default or negligence on the part of the member or has any doubt about the matter the relevant Divisional Officer is required to forward the relevant file to the Assistant Commissioner, HRM for directions.

60. Insofar as there is any reference to "personal injury" which is suffered or sustained by a member of An Garda Síochána in the course of his or her employment, it is to be found in the wording of s. 11.37(4) of the Code (upon which neither the applicant nor the respondent have placed any reliance). Section 11.37(4) of the Code provides that where a member suffers or sustains a personal injury "in the discharge of duty" and where such an injury is "of a serious nature or likely to affect health or condition of health permanently or eventually to incapacitate (the member) in the performance of duty" and such injury is sustained without wilful default or negligence by a member, the injury must be "recorded" at headquarters. The reporting duty thus imposed is not for the purpose of classifying the status of the injury as an "injury in the discharge of duty" but rather because "only recorded injuries" can be considered in the event of the member ever applying for a "special pension" on the grounds that the member has been incapacitated

by an injury received in the execution of duty.

61. It is apparent from the foregoing that s. 11.37 of the Code in fact has no relevance to the classification of the status of a member's sickness absence where the only issue to be decided is whether the status of a member's sickness absence is to be classified as an "ordinary illness" or "injury on duty".

62. Provided that an injury was not due to wilful default or negligence on the part of a member within the meaning of s. 11.37(1) of the Code, the issue of the classification of the status of a member's sickness absence appears to be governed solely by the Directive and specifically the marginal note for which it makes provision at s. 11.40 of the Code. The relevant extracts from the Directive are set out at para. 10 above and their meaning and effect appear to be as follows:-

- (1) if there is no doubt that an injury on duty occurred, the injury can be so classified by a Divisional Officer without reference of the matter to Assistant Commissioner, HRM;
- (2) where there is any doubt that an injury on duty occurred, the Divisional Officer should refer the matter to the Assistant Commissioner, HRM;
- (3) upon such referral and pending the decision on the classification of the injury, the member's absence is to be treated as ordinary illness;
- (4) upon such a referral, the Assistant Commissioner, HRM, must seek the advice of the C.M.O.;
- (5) the C.M.O. must take into account all relevant information before arriving at "his/her advice";
- (6) the ultimate decision regarding the injury on duty is to be made by the Assistant Commissioner, HRM which he/she must base on:
 - (i) A complete investigation file into the incident;
 - (ii) Management views and recommendations;
 - (iii) The assessment and opinion of the C.M.O.;
- (7) if it is determined that the sickness absence does relate to an injury on duty, the member's pay is to be retrospectively adjusted as soon as practicable.

63. The Directive further provides for the carrying out of investigations in the marginal note provided for at s. 11.37 of the Code, which is referred to at para. 11 above. The requirement to carry out an investigation in such circumstances arises even where there can be no doubt but that the relevant injury/stress is work related. The requirement thus appears to be directed towards the promotion of garda welfare and is unrelated to the administrative classification of the status of the relevant member's sickness absence. This is made clear by the fact that the outcome of such an investigation is to be reported to the Assistant Commissioner without any requirement that he/she should seek the advice of the C.M.O. or make any decision which would in anyway affect the classification of the status of the member's sickness absence.

Discussion

64. Both the application of 14th November, 2016 for "injury on duty" classification and the Code 11.37 certificate relate solely to the incident of 1st November, 2016. Absent evidence that he was "in any doubt" that the applicant suffered or sustained an "injury on duty" on 1st November, 2016, it is not in dispute that Chief Superintendent Russell, in his capacity as the applicant's Divisional Officer, had the requisite authority (under the Code) to certify that the injury was not due to wilful default or negligence on the part of the applicant and (under the Directive) to certify that the injury was an "injury on duty" and thereby to classify the applicant's sickness absence as an "injury on duty".

65. There is no evidence to suggest that, at the time he issued the Code 11.37 certificate, Chief Superintendent Russell was in any doubt that the applicant's sickness absence at the relevant time was due to such injury as he had suffered or sustained on 1st November, 2016. It is further not in dispute that an investigation was carried out into the incident of the 1st November, 2016 which was fully concluded prior to the applicant's first complaint of bullying on 13th February, 2017.

66. On 13th February, 2017 the applicant made the first of two formal complaints of bullying. The bullying alleged was of a very significant nature insofar as it related to an alleged campaign of bullying by three named gardaí of the applicant over a three and a half year period. It is not in dispute that the respondent has carried out an investigation into that complaint and the applicant's subsequent complaint of the 22nd May, 2017, a process that remains ongoing.

67. The complaints of bullying are clearly relevant to the issue of causation and specifically the issue of whether the applicant's sickness absence since 2nd November, 2016 is solely due to the incident of the 1st November, 2016, the subject matter of the Code 11.37 certificate. On 21st March, 2017 the A.C.M.O. wrote to the HRD to state his opinion that there was medical evidence that the applicant's "current medical condition" related to "workplace circumstances of concern" and advised that it would be "reasonable" to classify the absence as "an illness arising from duty" but only "if" Garda Management on assessment considered that such circumstances had arisen.

68. This letter appears to have led to the Case Conference at the Garda Occupational Health Service on 28th March, 2017. The conference was not attended by Chief Superintendent Russell but was attended by Ms. Monica Carr, Head of the HRD. In her subsequent letter dated 21st September, 2017 to her Executive Director, Ms. Carr states that at the Conference it was "determined" that the Code 11.37 certificate was issued "in error" which she appears to relate to an "ongoing investigation" into the reason for the applicant's stress related absence. By contrast, the affidavits sworn on behalf of the respondent are unclear as to whether the relevant determination was made on the 28th or 29th March, 2017. There is no evidence as to who made the relevant determination, as to why the determination was made or as to the nature of the "error" that was made by Chief Superintendent Russell. Instead it is merely sworn that "it transpired" at the meeting that there was "an error in issuing the certificate" which was "confirmed" by Chief Superintendent Russell in an email of 29th March, 2017.

69. As of 28th March, 2017 the only "ongoing investigation" was the investigation into the bullying complaint that had been made by the applicant on 13th February, 2017. Manifestly that investigation was not in being as of 17th January, 2017 when Chief Superintendent Russell issued his Code 11.37 certificate.

70. In his email of 29th March, 2017 Chief Superintendent Russell states that he had been advised that in cases where "a doubt exists" a file should be submitted to the Assistant Commissioner, HRM for consideration by the C.M.O. With full knowledge of this procedure, however, he does not state that he had such a doubt or that he ought to have had such a doubt having regard to the circumstances that existed as of 17th January, 2017.

71. On the basis that an error had been made by Chief Superintendent Russell the applicant's sickness absence was reclassified on 27th April, 2017 from "injury on duty" to "ordinary illness" and backdated to 2nd November, 2016. As a result of the reclassification, the applicant is now required to repay all of the monies that were "overpaid" to him (€13,050).

72. The applicant first become aware of the reclassification on 10th May, 2017 and between that date and 20th July, 2017 has made numerous requests for an explanation for the "error" made by Chief Superintendent Russell.

73. The respondent contends that "ample reasons" have been given for the decision and that "the position" has been "fully explained" to the applicant by the respondent in the letters of 22nd June, 2017, 30th June, 2017 and 11th July, 2017. The correspondence so relied upon does not explain what error was made by Chief Superintendent Russell. Whereas the letters of Chief Superintendent McPartlin merely refer to the Directive and incorrectly states that the matter awaits determination by the C.M.O., the correspondence from Ms. Carr, the Head of the HRD, refers merely to an "ongoing" investigation into bullying which was not in being when the Code 11.37 certificate was issued.

74. At para. 5 of his written submissions, the respondent advances a further reason for the reclassification of the applicant's sickness absence which has no basis in the letters of 22nd June, 2017, 30th June, 2017 and 11th July, 2017. The respondent contends as follows:-

"Where a psychological injury may have arisen by reason of alleged bullying and harassment a decision as to the classification of such illness may not be made at Divisional level but will require a determination that the member in question has been bullied or harassed within the meaning of the policy of An Garda Síochána (on) Bullying And Harassment entitled "Working Together to Create a Positive Working Environment". In addition, the advice of the Chief Medical Officer... will be required in respect of the issue as to whether a member is suffering from a psychological injury. These are prerequisites that must have occurred prior to an injury being classified as resulting from an injury on duty.

75. It is difficult, if not impossible, to reconcile the above statement with the Directive. The Directive on its face does not make a finding of wrongdoing on the part of the respondent, his servants or agents a necessary prerequisite to the classification of sickness absence due to work related stress as an "injury on duty". The Directive in fact makes no reference to bullying, harassment or actionable occupational stress and expressly permits a Divisional Officer to classify sickness absence as "injury on duty" where there is no doubt about the matter.

76. More significantly, the submission overlooks the fact that the application made on 14th November, 2016 and the Code 11.37 certificate which was issued on 17th January, 2017 relate solely to the incident which occurred on 1st November, 2016 and to the stress and depression that the applicant suffered "as a result" of that incident. The application of the 14th November, 2016 did not include a complaint of bullying which by its definition and as a matter of law can never consist of a once off or single incident (see *Glynn v. Minister for Justice, Equality and Law Reform* [2014] IEHC 133 and *Quigley v. Complex Tooling and Moulding* [2009] 1 I. R. 349). The Code 11.37 certificate issued on 17th January, 2017 merely classifies the injury sustained by the applicant on 1st November, 2016 as an "injury on duty". The certificate thus cannot be read as a certification by Chief Superintendent Russell that the applicant was bullied and harassed or that he was subjected to such conduct prior to 1st November, 2016. Equally, insofar as the applicant has since 23rd June, 2017 sought to attribute his continuing absence from work to bullying and harassment that occurred prior to 1st November, 2016 it is not readily apparent as to how the Code 11.37 certificate could have any relevance to the applicant's incapacity to work either from that date or indeed for any period prior to that date during which the applicant's sickness absence was caused solely or predominately by events occurring prior to 1st November, 2016.

Decision

77. The respondent is entitled to review the applicant's sickness absence at all times in order to ensure that he does not receive payments to which he is not entitled under the Code, the Directive or the Regulations. What is at issue in these proceedings, however, is not whether the respondent is entitled to investigate the true cause of the applicant's sickness absence since 2nd November, 2016 but rather whether it can be properly said that Chief Superintendent Russell made an error when he issued his Code 11.37 certificate on 17th January, 2017 in the absence of any description or explanation of the "error" that was allegedly made.

78. It is common case that if an error was made, Chief Superintendent Russell was entitled to rectify his mistake. It is further accepted that the applicant ought not to be allowed to benefit from an error, if one was in fact made, provided that the error has been properly described or explained. What remains in issue is whether the respondent has met the legal requirement to give reasons for the reclassification of the status of the applicant's sickness absence by merely stating that an "error" was made.

79. This is not a case where, in the words of O'Donnell J. at para. 36 of his judgment in *Garda John Kelly v. Commissioner of An Garda Síochána* [2013] IESC 47, "the issue is so self-evident and narrow that the mere fact of the decision discloses the reason."

80. No reason has been nominated by Chief Superintendent Russell for the making of the "error". Insofar as the correspondence and written submissions have sought to advance *ex post facto* justifications for the reclassification of the status of the applicant's sickness absence, the explanations so offered are unsatisfactory, inconsistent and, critically, fall short of describing or explaining what error was in fact actually made.

81. The Code 11.37 certificate issued on the 17th January, 2017 appears to be regular on its face. It was issued by the applicant's Divisional Officer who, at the relevant time, had ostensible authority to certify all relevant matters under the Code and the Directive. The certificate in its wording reflects the wording of the application made by the applicant and the known facts and circumstances relating to the garda investigation into the incident of 1st November, 2016 which concluded in January 2017. As there can be no dispute in relation to any of these facts, the suggestion that the certificate was issued in error clearly calls for an explanation.

82. In *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59, Fennelly J. stated at para. 74 as follows:-

"The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal."

83. In the same judgment, Fennelly J. stated at para. 67:-

"Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."

84. Despite being requested to provide an explanation for the "error" in correspondence dated 10th May, 2017, 11th May, 2017, 15th June, 2017 and 26th July, 2017 the respondent has failed to describe or to explain the "error" so that it can be understood by the applicant or indeed by this Court. Such a failure is contrary to basic fairness because, if permitted, it would allow a decision maker to revoke a decision and thereby to circumvent judicial scrutiny, regardless of the consequences for those thereby affected merely by stating that the decision so revoked was made in "error". In the instant case, the failure to give reasons for the re-classification of his injury status has further deprived the applicant of a true understanding of his position and has thereby denied to him the clarity to which he is entitled in order to protect his interests by, for example, making a fresh application for "injury on duty" classification based on his complaints of bullying or otherwise. As matters stand, the applicant is compelled to await the outcome of an internal bullying inquiry following which the respondent "may" review the classification of the applicant's sickness absence notwithstanding the fact that his application of 14th November, 2016 for "injury on duty" classification makes no complaint of bullying and makes reference only to the incident of 1st November, 2016 and the injury he sustained on that date.

85. By reason of the foregoing, I am satisfied that the failure of the respondent to describe or explain the "error" made by Chief Superintendent Russell amounts to a failure to comply with the constitutional requirement of fair procedures and the principles of natural justice.

The "decision" of 11th October, 2017

86. The applicant contends that the "decision" of the Executive Director of the HRD on 11th October, 2017 was the culmination of an appeal process which the applicant sought to initiate by his letters dated 23rd June, 2017 and 27th June, 2017. It is common case that no appeal is provided for under the Code or Directive. I accept the respondent's submission that the mere writing of a letter applying for an appeal, where none exists, cannot of itself create an appeal even where the respondent subsequently fails to point out that such an appeal process does not exist. Moreover, I am satisfied on the balance of probabilities that the Case Conference which was held on 28th August, 2017 was convened by the Head of the HRD in response to the advices given by the A.C.M.O. in his letter dated 10th July, 2017 and was, therefore, not convened to consider a response to the applicant's purported appeals. In his letter dated 10th July, 2017 the A.C.M.O. recommended a case conference to resolve the "very complex" workplace issues that were involved in the applicant's case. It would appear that these issues were in fact considered at the Case Conference on 28th August, 2017 in the context of assisting the applicant with a return to work "at a locale of his choosing". It is also clear, however, that following the meeting, the Head of the HRD wrote a letter to the Executive Director in which she, inter alia, recommended that the applicant's absence should remain classified as "ordinary illness" pending a review of the applicant's file following the completion of the bullying investigation which was then in progress. This is the context in which the Executive Director made his "decision" that he was "in agreement" that the applicant's sickness absence should "remain" classified as "ordinary illness".

87. On these facts, I am satisfied that the "decision" of the Executive Director on 11th October, 2017 is not to be considered as a determination of the applicant's purported appeals but rather to be considered as no more than a confirmation by the Executive Director of the HRD of the position that was outlined to the applicant by the Head of the HRD in her letter dated 11th July, 2017. Accordingly, I am satisfied that the "decision" of 11th October, 2017 is not amenable to judicial review. Even if I am incorrect in this conclusion, I am nonetheless satisfied that the Code 11.37 certificate issued by Chief Superintendent Russell on 17th January, 2017 had ceased to have any relevance to the applicant's sickness absence as of 11th October, 2017 by reason of the fact that as and from 23rd June, 2017 even the applicant himself had ceased to attribute his incapacity for work to the incident of the 1st November, 2016 (to which the certificate relates) but rather attributed it to bullying in the workplace alleged to have occurred over a protracted period prior to that date.

Extension of Time

88. The issue that remains is whether the applicant is out of time to challenge the decision of the 28th March, 2017 to reclassify the status of his sickness absence of which he first became aware on 10th May, 2017. It seems to me that in order to decide whether there is "good and sufficient reason" to extend time pursuant to O. 84, r. 23(3) of the Rules of the Superior Courts, I ought to have regard to the following factors:-

(1) the fact that the impugned decision is challenged on the basis of a failure to give reasons;

(2) the fact that the applicant repeatedly sought reasons for the "error" up and until the 27th July, 2017;

(3) the fact that following his purported appeals, the respondent gave the applicant to understand that the matter would be resolved internally either following further advices from the C.M.O. arising from the applicant's review by an independent specialist advisor on 19th June, 2017 (per Chief Superintendent McPartlin) or following the conclusion of the process of inquiry into his complaints of bullying (per Ms. Carr, Head of the HRD).

89. In assessing these matters, I take account of the fact that in the continuum of correspondence between the parties it was reasonable for the applicant to seek an internal solution to his grievance and to believe that his request for reclassification of the status of his sickness absence was, at the very least, receiving active consideration. As a matter of fairness, I also take into account the fact that on the undisputed medical evidence the applicant was at all material times (and for whatever reason) suffering from depression and stress of such severity as to incapacitate him for work during the relevant period. In light of the foregoing, I am satisfied that it was reasonable for the applicant to await the outcome of events in the hope that the respondent would make a decision which would resolve the matter in his favour and thereby obviate the necessity for applying for judicial review. In all of the circumstances and absent evidence of prejudice to the respondent, I am satisfied that there is good and sufficient reason to extend time pursuant to O. 84, r. 23(3) of the Rules of the Superior Courts.

Conclusion

90. For the foregoing reasons, I will make an order of *certiorari* quashing the determination made by the respondent in or about 28th March, 2017 to the effect that the Code 11.37 certificate issued by Chief Superintendent Russell on 17th January, 2017 was issued in

"error" and will hear submissions from the parties as to the form of the order and as to such further consequential orders (if any) as may be required.

91. For the avoidance of any doubt, the above order is made without prejudice to:

- (1) the entitlement of the respondent to rectify any error that was in fact made in the issuing of the Code 11.37 certificate provided, of course, that the error is properly described or explained so that it is capable of being understood by the applicant;
- (2) such entitlement as the respondent may have, whether under the Code, the Directive, the Regulations or otherwise, to review the applicability of the Code 11.37 certificate of 17th January, 2017 to the applicant's sickness absence for whatever period is relevant insofar as such absence may have been caused or contributed to by psychological illness suffered or sustained by the applicant prior to 1st November, 2016.