[2020] IEHC 282

THE HIGH COURT

[Record No. 2018/309MCA]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 90(1) OF THE EMPLOYMENT EQUALITY ACT 1998 AS AMENDED

BETWEEN

ROBERT CUNNINGHAM

APPELLANT

AND

IRISH PRISON SERVICE

RESPONDENT

AND

THE LABOUR COURT

NOTICE PARTY

JUDGMENT of Mr. Justice Barr delivered electronically on the 9th day of June, 2020.

Introduction

1. This case concerns a discreet issue of law, which arises in the following circumstances: The appellant has at all material times been employed as a prison officer by the respondent. In the course of his duties he suffered two assaults by prisoners, which resulted in him suffering a serious back injury, which has required three operations.

2. In 2015, the Chief Medical Officer for the Civil Service (hereinafter "the CMO") certified that the appellant would not be fit to carry out any restraint and control duties in the medium or long term.

3. After a number of meetings and correspondence between the parties, the respondent informed the appellant that it could not offer him a position with restricted duties. They could only offer him the opportunity to resign and apply for employment as a Prison Administration Staff Officer (hereinafter "PASO"), or he could apply for ill-health retirement.

4. The appellant brought a claim under the Employment Equality Act 1998 (as amended) (hereinafter "the Act") claiming that the respondent had discriminated against him on ground of disability and in particular had failed to make any reasonable accommodation for him as required by the Act. The appellant argued that there were a number of posts within the grade of prison officer in the Irish Prison Service, which did not involve interaction with prisoners, such that the capability to carry out control and restraint duties was not an issue.

5. The respondent argued, *inter alia*, that s.37.3 of the Act meant that they did not have to provide reasonable accommodation to the appellant. The sole issue was whether the appellant was capable of performing the range of duties that he may be called upon to perform as a prison officer, so as to preserve the operational capacity of the Prison Service. It was submitted that as he was clearly incapable of performing control and restraint duties, he therefore failed the test provided for in s.37.3 and the respondent was relieved of the obligation to provide reasonable accommodation for him to enable him to continue as a prison officer in the Prison Service.

6. Section 37.3 of the Act provides as follows:

> *"(3) It is an occupational requirement for employment in the Garda Síochána, Prison Service or any emergency service that persons employed therein are fully competent and available to undertake, and fully capable of undertaking, the range of functions that they may be called upon to perform so that the operational capacity of the Garda Síochána or the service concerned may be preserved."*

7. The appellant succeeded before the Adjudication Officer, but the Labour Court found against him on a preliminary issue; holding that the combined effect of ss.37.2 and 37.3 of the Act provided a complete defence to the appellant's claim and further held that questions relating to the provision of reasonable accommodation did not arise. The Labour Court held that s.37.3 of the Act provided an exemption to the respondent from a complaint of discrimination in circumstances where the complainant was not capable of carrying out the full range of duties that are required of prison officers.

8. The issue before this court is whether the Labour Court was correct as a matter of law to dismiss the appellant's claim, because they found that the provisions of s.37.3 exempted the respondent from providing reasonable accommodation for the appellant.

Background to the appellant's claim.

9. The appellant is approximately 40 years of age. He is a married man with a young daughter of 6 years of age. Having worked in the hospitality industry, he joined the Irish Prison Service on 5th March, 2005. It was common case between the parties that prior to the injuries suffered by the appellant, his performance as a prison officer had been exemplary.

10. On 9th December, 2007, while serving as a prison officer at Cloverhill Prison, he was injured while relocating a violent prisoner. Medical examination revealed that he had damaged a disc in his back at L5/S1. The injury to the disc deteriorated over the following years and on 12th November, 2010 a discectomy was carried out at the L5/S1 level. After the surgery scar tissue formed and a nerve root block was carried out on 21st January 2011.

11. The plaintiff returned to duties in Cloverhill Prison, but was put on non-contact duties for 4-5 months, working in the control room, manning the gate, working in the waiting room and in the censor's office.

12. The appellant was transferred to the Midlands Prison on 18th June, 2011, where he was assigned to general duties. On 11th December, 2011 he sustained an injury while moving a prisoner who became violent and then required to be restrained using control and restraint techniques. As a result of this, the appellant suffered a further injury to his back. He was out of work for a period of five months until 18th May, 2012.

13. On 16th April, 2012, Governor Malone of the Midlands Prison sent an email to the Human Resource Directorate of the Irish Prison Service in relation to facilitating the appellant with restricted duties. In that email he stated as follows:

"At present we have one female officer who is on restricted duties because of pregnancy, and we have a further four officers who are on long-term restricted duties following serious illnesses. We do not have any more rotational posts which could be classified as restricted duties. Given our current situation we are not in a position to accommodate Officer Cunningham with the restricted duties as requested by the CMO."

14. Subsequently, the appellant returned to work in the Midlands Prison on 18th May, 2013. On 12th March, 2013 the CMO had advised the IPS that the appellant would not be able to involve himself in control and restraint (C&R) in the medium to long- term. The appellant was assigned to restricted duties upon returning to work. In a letter dated 25th March, 2013, the Governor of the Midlands Prison was instructed by the Human Resource Directorate that the CMO had stated that while the appellant was medically fit for work, she did not believe that he would be medically fit to be involved in control and restraint duties. That restriction was likely to be in the medium to long-term. However, on 18th May, 2013, the appellant was assigned a full range of duties slowly over a period of 3-4 weeks.

15. It appears that the appellant had a further operation to his back in or about August 2013, because in his statement he refers to returning to work from his second surgery after a period of sick leave from 20th August, 2013 to 29th September, 2013. The court is not aware of the nature of this surgery.

16. The appellant had a third operation to his back carried out on 17th February, 2015 in the form of a foraminotomy decompression at L5/S1 level. The appellant has not returned to work as a prison officer since that time. In a letter dated 11th May 2015, Dr. Sharon Lim, on behalf of the CMO, stated that following the third back surgery Mr. Cunningham should be assigned to non-prisoner contact duties to allow for an adequate rehabilitation period following his surgery. She stated that, if that could be facilitated, he should be fit to resume work within the following 3-4 weeks. However, she went on to state:

"Going forward, our opinion is that Mr. Cunningham should be excluded from all control and restraint duties/training. As I mentioned in my previous correspondence to you (5/11/13), I understand that Mr. Cunningham has a mutual understanding with his Governor regarding limiting his control and restraint duties. I would also suggest that Mr. Cunningham is excluded from night shift duties. He tells me he is rostered for night shifts but swaps out of them with his colleagues and has not worked nights since 2011. He does not intend to work night shifts going forward."

17. Thereafter, there was an exchange of correspondence and meetings concerning the question of the appellant's return to work. Ultimately, in an email dated 6th November, 2015 Mr. Sean Sullivan, Assistant Principal Officer in the Staff and Corporate Services Directorate with responsibility for attendance management, informed the plaintiff:

"In your case, the CMO has advised that you are unlikely to return to full duties. It is therefore not possible for you to return to duty under the current policy. I can explore the potential for you to return as a PASO grade with PASO terms and conditions, if you wish, or I can forward you the ill-health retirement forms. I regret I do not see that we have any other options".

18. The appellant did not wish to resign his position as a prison officer and apply for a job at the PASO grade, as that would have meant a drop in income of circa. €48,000 gross per annum. In addition, his retirement benefits would have been seriously affected, in that he would have had to have worked an extra ten years in order to obtain same and his pension and lump sum gratuity would have been reduced. The appellant brought a claim under the Employment Equality Act 1998 (as amended) claiming that he had been discriminated against on grounds of disability.

The appellant's core claim.

19. The essence of the appellant's claim under the Act, was to the effect that he was entitled to have reasonable accommodation under the provisions of the Act by being given duties as a prison officer, which did not have prisoner contact. He maintained that there were many such posts available to prison officers within the IPS. In respect of the Midlands Prison, the applicant gave the following posts which did not entail C&R duties and gave the number of officers involved in brackets after each posting: Operational Support Group (2/3); security screening units (3); canine unit (2/3); postal censoring (2); prisoner phones/staff keys (1); internal numbers and keys (2); main gate assist (1); visitor reception/booking (2/3); control room, CCTV, radios, phones (2/3); visits entrance/exit (1); prison business/local driver (1) and detail office (3). In addition, the appellant stated that the Probation Service and the Prison Service Community Return Supervision Scheme, which had been based in Smithfield, Dublin, were due to roll out to more locations including the Midlands Prison and these would be ideal for him.

20. The appellant was also able to furnish the names of a number of prison officers, who he stated had been carrying out restricted duties on a long-term basis as follows: Mr. D. P who had been working on the visiting gate in the Midlands Prison for a period of five years despite having a serious medical condition; Mr. G. O'C had been working at Cloverhill Prison despite a shoulder and back injury for a period of ten years; Mr. D. K had been working at Cloverhill Prison despite a heart complaint and working on the main gate for the previous 5-10 years and Mr. S. C had been working at Cloverhill Prison despite a hip complaint and had been working in the Control Room for the previous 6-12 months. In addition, the appellant was aware of two officers, Mr. M. G and Mr. C. D, who each had had serious back surgery and had been permitted to return to work in the previous 12 months. While the appellant was not privy to their exact arrangements, he stated that some form of accommodation must have been afforded to them.

21. In these circumstances, it was submitted that there was an established practice within the IPS, whereby officers who were injured or otherwise disabled, had been accommodated in the past by being assigned to long-term posts which involved restricted duties. It was the

appellant's case that he was entitled to be given a similar accommodation by his employer.

The respondent's core argument.

22. The respondent argued that under Irish Law and in particular having regard to the provisions of s.37.3 of the Act, they were not obliged to make reasonable accommodation for the appellant because, due to his inability to perform control and restraint duties, he was not capable of performing the duties that he may be called upon to perform as a prison officer.

23. It was submitted that control and restraint duties were fundamental to the role of a prison officer. An officer had to be able to act as a first responder to acts of violence so as to protect and assist both colleagues and other prisoners, who may be the subject of assault or violence.

24. The respondent had indicated to the Labour Court that it would call evidence from a number of witnesses, in particular from Mr. Seán Sullivan, Governor Ethel Gavin of the Midlands Prison and Assistant Governor Fran Baker, also of the Midlands Prison, who would state that it is a fundamental requirement that all prison officers be capable of performing C&R functions in the course of their duty. To that end, the evidence would be that all prison officers are required to undertake and pass an annual C&R test. It was submitted that if an officer could not carry out C&R duties, that would adversely affect the operational capacity of the Prison Service, as it was absolutely essential that all prison officers were in a position to carry out such duties if the need arose.

25. It was pointed out that the IPS had an Accommodations Policy, which had been introduced in 2015. This was designed to allow for a phased return to work for prison officers who were returning from illness or injury, or who were otherwise unfit for full duties, for example due to pregnancy. The policy provided that officers could return on restricted duties for a period of up to three months, provided that thereafter they would be fit for full duties. The appellant did not come within that cohort, as the CMO had certified that he was permanently unfit to perform C&R duties.

26. It was submitted that the IPS had made reasonable accommodation for the applicant in that the option of resigning and applying for a PASO position had been suggested to him. It was denied that this would cause him a loss of €48,000 gross per annum; it was stated that the loss would only amount to circa. €10,000 gross per annum. Alternatively, he had been given the option of seeking early retirement on ill-health grounds.

The hearing in the Labour Court.

27. The appellant succeeded at first instance in his application before the Adjudication Officer, who delivered a ruling on 2nd February, 2017. The respondent appealed that ruling to the Labour Court. The Labour Court decided the appeal on a preliminary issue, without hearing any witness evidence in relation to the feasibility of providing reasonable accommodation. In particular, the Labour Court did not hear any evidence as to whether any prison officers are being, or have been, accommodated with restricted duties on a long term basis.

28. The Labour Court held that s.37.3 provided a complete exemption to the respondent due to the fact that the appellant was not capable of performing C&R duties. The essential reasoning of the Labour Court is set out in the following paragraphs of its Determination:

> *"The only reasonable explanation as to why the legislature considered Section 37(3) necessary is that it was considered that the Police Force and the Prison Service is different to the generality of employment and should be specifically legislated for. Where a situation is covered by a general provision and also by a particular provision it must be assumed that the Oireachtas intended the particular provision to apply. It follows, that while Section 16 deals with the general rights and duties of employees and employers in respect to a disability, Section 37(3) deals specifically with the Garda Síochána and the Prison Service and that it does so differently. It was, of course, open to the Oireachtas to have included in Section 37(3) a provision similar to that of Section 16(3). Neither subsection (2) or (3) of Section 37 are qualified by the requirement to provide reasonable accommodation. However, the Oireachtas chose not to include such a provision and the court cannot import into that provision words that are not there.*
>
> *Section 37(3) of the Act provides that full physical capacity to undertake all of the functions which a prison officer may be called upon to perform is a genuine and determining occupational requirement for employment in the Prison Service within the meaning of Section 37(2) of the Act. Consequently, the combined effect of both subsections provides a complete defence to the within claim and questions relating to the provision of reasonable accommodation do not arise.*
>
> *Determination*
>
> *For all the above reasons the court is satisfied that Section 37(3) of the Act should be interpreted as a standalone provision which is not qualified by or conditional on Section 16(3).*
>
> *Therefore, the court finds that Section 37(3) of the Act provides an exemption to the respondent from a complaint of discrimination in circumstances where the complainant is not capable of carrying out the full range of duties that are required of prison officers.*
>
> *Accordingly, the respondent's appeal succeeds and the Adjudication Officer's decision is overturned.*
>
> *The court so determines."*

The issue before this Court.

29. The sole issue before this Court is whether as a matter of law the Labour Court was correct in holding that the provisions of s.37.3 did not require the respondent to make reasonable accommodation for the appellant, once they asserted that because he was not capable of performing C&R duties, he was therefore not capable of performing the range of duties that he may be called upon to perform as a prison officer and consequently the

respondent was not guilty of discriminating against the appellant in failing to provide him with reasonable accommodation so as to enable him to continue in his job as a prison officer.

Legal submissions on behalf of the appellant.

30. On behalf of the appellant, Ms. Kimber SC made a number of general submissions at the outset. Firstly, she submitted that the court had to have regard to the fact that the Employment Equality Act 1998 (as amended) was enacted to implement in Irish law Council Directive 2000/78/EC of 27th November establishing a general framework for equal treatment in employment and occupation (hereinafter "the Framework Directive" or "the Directive").

31. It was submitted that the court should have regard to the provisions of Art. 1 of the Directive which set out its purpose as being to lay down a general framework for combatting discrimination on a number of grounds, including disability, as regards employment and occupation, with a view to putting into effect in Member States the principle of equal treatment. She also referred to Art. 2 which dealt with the concept of discrimination and in particular Art. 2.2(b) which provides that indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice, would put persons having a particular religion or belief, a particular disability, a particular age or a particular sexual orientation, at a particular disadvantage compared with other persons unless: (1) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (2) as regards persons with a particular disability, the employer or any person or organisation to whom the Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

32. Counsel further submitted that the provisions of Art. 4 were relevant in the context of this case. Art 4.1 provides as follows:

> *"(1) Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."*

33. It was submitted that it was well settled in law that in interpreting an Act that was designed to implement a particular Directive, the court should do so in a way that would give effect to the terms and objectives of the Directive, which are sought to be implemented by the Act.

34. Counsel also referred to the provisions of Art. 5 of the Directive which relate to reasonable accommodation for disabled persons and provide as follows:

"In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned."

35. The provisions of the Directive insofar as they relate to disability within the workplace were transposed into Irish law in s. 16 of the Act.

36. It was submitted that the court also had to have regard to the fact that both the European Union itself and Ireland have become signatories to the UN Convention on the Rights of Persons with Disabilities (hereinafter "the CRPD"). And in particular the court was urged to have regard to the provisions of Art. 27 thereof. It was submitted that recognition of this background to the interpretation of the Act was set out in the decision of MacMenamin J. delivering the majority judgement of the Supreme Court in *Nano Nagle School v. Marie Daly* [2019] IESC 63, where at paras. 22-28, the court looked at the interaction between the 1998 Act, the Directive and the CRPD and held that following from the decision in *HK Danmark, acting on behalf of Jette Ring (applicant) v. Dansk Almennyttigt Boligselskab (respondent)* (case C-335/11 and case C-337/11 2013 IRLR 571) it followed that the Directive insofar as it related to disability, thereafter had to be interpreted in harmony with the CRPD.

37. In the course of his judgment, MacMenamin J. had noted that Advocate General Whal had described the judgment in *Ring* as marking a "paradigm shift" in CJEU case law, whereby, departing from a narrower definition, the EU concept of disability was explicitly aligned with the UNCRPD (para. 88), noting that the court's definition of disability only covered professional life, as opposed to society at large. While not referred to in *Ring*, Article 27(1)(b) CRPD provides that: "States Parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation to *inter alia*…(b) protect the rights of persons with disabilities on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value…"

38. Counsel submitted that the Supreme Court had made it clear in the *Nano Nagle* case that the duty to provide reasonable accommodation was not infinite. The court had clearly stated that the test was one of reasonableness and proportionality; an employer cannot be under a duty to re-designate duties so as to create a different job to facilitate an employee. It was the duty of the deciding tribunal to decide, in any given case, whether what was required to allow a person continue in employment was reasonable accommodation in the job, or whether, in reality, what was sought was an entirely different job; s.16(1) of the Act refers specifically to "the position" not to an alternative

and quite different position; see para. 89 of the judgment. MacMenamin J. had gone on to reiterate the concept of proportionality or reasonableness at para. 106 in the following terms:

> *"But I would again wish to emphasise these conclusions are not to be understood as requiring a situation where the duty of an employer is understood as having to provide an entirely different job. The duty of accommodation is not an open-ended one. There is no obligation to re-define the employment of an airline pilot as an airline steward, or vice-verse. The question is, rather, to consider whether the degree of redistribution, or "accommodation", is such as to effectively create a different job entirely, which would almost inevitably impose a disproportionate burden on an employer. Even within the scope of compliance, a situation may be reached where the degree of rearrangements necessary, whether by allocation of tasks, or otherwise, might be such as to be disproportionate. It is a matter of degree, capable of being determined objectively."*

39. Counsel submitted that while the decision in the *Nano Nagle* case did not specifically deal with s.37.3 it was nevertheless a very important decision, which set out the general approach which should be taken to the interpretation of the 1998 Act, in particular, having regard to the terms and objectives contained in the Directive and in the CRPD.

40. Counsel also referred to the decision of the CJEU in case C-229/08, *Colin Wolf v. Stadt Frankfurt Am Main* (12th January 2010), where the court looked at whether it was permissible to have an age bar on recruitment to the Fire Service to remove applicants over the age of 30 years. In analysing whether such provisions were contrary to the Directive, the court had the benefit of a substantial amount of statistical and medical evidence as to the physical capabilities of persons generally over the age of 45 years. In effect, the evidence was that above that age peoples' physical capacity diminished substantially and in particular their capacity to carry out the type of emergency work that would be carried on by firefighters. For that reason, the age bar was put at 30, so that the Fire Service would obtain at least 15 years' service from firefighters at this level. The court noted as follows at paras 37 et seq:

> *"37. As regards, first, the objective pursued by the national legislation, the German Government's statements show that the aim pursued is to guarantee the operational capacity and proper functioning of the professional Fire Service.*
>
> *38. In this respect, it must be pointed out that the professional Fire Service forms part of the emergency services. Recital 18 in the preamble to the Directive states that the Directive does not require those services to recruit persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services. 39. It is thus apparent that the concern to ensure the operational capacity and proper functioning of the professional Fire Service constitutes a legitimate objective within the meaning of Article 4(1) of the Directive.*

41. The court went on in the following paragraphs to note that there was un-contradicted evidence in relation to the tasks that had to be performed by persons in the intermediate career of the Fire Service and in relation to studies that had been carried out in the field of industrial and sports medicine, which showed that respiratory capacity, musculature and endurance, diminish with age. Therefore, it was possible to conclude that very few officers over 45 years of age had sufficient physical capacity to perform the firefighting duties/aspects of their activities. As for rescuing persons, the evidence was that at the age of 50 years, the officers concerned no longer had that capacity. The court went on to state that in considering whether the limit of 30 years as the maximum recruitment age was proportionate, it must be examined whether that limit was appropriate for achieving the objective pursued and did not go beyond what was necessary to achieve it. Having regard to the evidence before the court, it held that the legislation which set the maximum age for recruitment to the intermediate career posts in the Fire Service at 30 years, may be regarded first as appropriate to the objective of ensuring the operational capacity and proper functioning of the professional Fire Service and second, as not going beyond what was necessary to achieve that objective.

42. Counsel submitted that the significance of Recital 18 to the Directive and the provisions of s.37.3 of the Act, were that in the decision which had to be reached, where there was a three limbed test, the respondent was relieved of the obligation to prove that capacity to carry out the range of functions that they may be called upon to perform was an occupational requirement for employment in the particular emergency service. However, it was submitted that they were still obliged to prove the other elements in the test as set out in the *Wolf* judgment.

43. It was submitted that it was clear from the decision of the CJEU in *Egenburger v. Evangelisches Werk fur Diaknoie und Entwickling eV* case C-414/16, which dealt with the partial exemption provided for religious institutions in Art. 4(2) of the Directive, the CJEU had held that where there was a dispute as to whether or not there was a permissible discrimination, there could be no self-certification by the employer or other such body. The court stated at para. 46:

> *"46. Clearly, if review of compliance with those criteria where, in the event of doubt as to that compliance, the task not of an independent authority such as a national court but of the church or organisation tending to practice a difference of treatment on grounds of religion or belief, it would be deprived of effect."*

44. Counsel pointed out that the court had elaborated on the requirement of objective oversight at paras. 51-53 of the judgment, where it held that the objective of Art. 4.2 of the Directive was to ensure a fair balance between the right of autonomy of churches and other organisations and the right of workers when they are being recruited, not to be discriminated against on grounds of religion or belief, in situations where those rights may clash. To that end, that provision sets out the criteria to be taken into account in the balancing exercise which must be performed in order to ensure a fair balance between those competing fundamental rights. The court stated that in the event of a dispute,

however, it must be possible for the balancing exercise to be the subject if need be of review by an independent authority and ultimately by a national court.

45. At para. 61, the court set out the requisite test stating that by virtue of Art. 4(2) the purpose of the examination was to ascertain whether the occupational requirement imposed by the church or organisation, by reason of the nature of the activities concerned or the context in which they are carried out, was genuine, legitimate and justified, having regard to that ethos. The court outlined at paras. 65-67 what was meant by the criteria being "genuine", "legitimate" and "justified". The court further stated that the requirement in Art. 4(2) of the Directive must comply with the principle of proportionality. The national courts must ascertain whether the requirement in question is appropriate and does not go beyond what was necessary for attaining the objective pursued.

46. Ms. Kimber SC submitted that it was of relevance that the IPS had had a complete exemption under the original Employment Equality Act 1998. This was changed in the amending Act of 2004, which inserted s.37.3. Thus, it was clear that the IPS did not have a complete exemption as was contended for by the respondent. It was submitted that the correct interpretation of s.37.3 was that the respondent was relieved of the obligation of proving the first part of the test, namely that it was an occupational requirement that the persons employed in the emergency service should be fully capable of undertaking the range of functions that they may be called upon to perform, so as to preserve the occupational capacity of the service. However, it was submitted that having regard to the provisions of the Directive and the CRPD and the case law outlined above, the appellant was still entitled to make submissions on the other aspects which had to be proved as set out in the *Wolfe and Egenburger* cases, namely that the restriction or discriminatory act was legitimate and justified or proportionate.

47. It was submitted that if the court accepted the interpretation placed on the subsection by the respondent, which had been accepted by the Labour Court; such interpretation was incompatible with the terms of the Directive and as such, must be disapplied by the Irish Courts: See decision of CJEU in case C-378/17 *Minister for Justice and Equality, Commissioner of An Garda Síochána v. Work Place Relations Commission* [2019] 30 ELR 57 (paras. 45, 50 and 52); *Egenburger* case at para. 79.

48. Counsel submitted that the interpretation proposed on behalf of the appellant permitted s.37.3 to be interpreted in a way that was in compliance with the Directive. This was to the effect that the section only permitted an exemption for the respondent from establishing the first part of the test, but the court could still look at the remainder of the questions and could ask whether a person could do the job after reasonable accommodation had been made for them, without adversely affecting the operational capacity of the emergency service concerned.

49. It was submitted that in this case, if reasonable accommodation was made for the appellant, which would include the division of tasks, so that the appellant would be assigned to one of a large number of duties as detailed by him, which did not involve control and restraint, then he would be capable of performing the duties required of him

as a prison officer, without any adverse effect on the operational capacity of the Prison Service.

50. It was submitted that the Labour Court had been wrong to deal with the matter by way of preliminary issue without hearing any evidence, thereby preventing the appellant from calling witnesses to establish that there were indeed long term posts available which did not include C&R duties. In relation to the assertion that there was an annual C&R test that had to be taken by all prison officers, the appellant would dispute that that was a requirement within the Prison Service. It was submitted that he should be given the opportunity to put his evidence before the Labour Court and to challenge the assertions made by the respondent's witnesses. It was submitted that it was unfair and contrary to the objectives of the Directive and of the CRPD that the subsection should be interpreted in such a way as to allow the respondent to effectively self-certify that the appellant was incapable of performing the functions that he may be called upon to perform as a prison officer and therefore they did not have to make reasonable accommodation for him. It was submitted that the court should allow the appeal and remit the matter back to the Labour Court for a full hearing and determination on the facts.

Legal submissions on behalf of the respondent.

51. It was submitted by Mr. Ward SC on behalf of the respondent that this case involved a case of statutory interpretation of Irish law, namely the interpretation of s.37.3 of the 1998 Act. He drew attention firstly to the notes at the side of the section which provided that it was a section dealing with the exclusion of discrimination on particular grounds in certain employments. Secondly, he stated that the words in their plain and ordinary meaning clearly excluded people who were not capable of carrying out the range of functions that they may be called upon to perform. The key word he submitted was the word "may". It was submitted that in this case there was no dispute that the appellant was not capable of performing C&R duties. It was submitted that this was a fundamental aspect of the duties that are carried out by prison officers. In these circumstances it was submitted that it could not be contended that the appellant would be able to carry out the range of functions that he may be called upon to perform as a prison officer.

52. It was submitted that the provisions of s.37.3 were entirely in accordance with the Directive, because those provisions were specifically catered for in Recital 18 to the Directive. Furthermore, what Recital 18 and s.37.3 did, was to have regard to the fact that the services provided by An Garda Síochána, the Prison Service and other emergency services, were just that – emergency services. They were activities that had to be carried out sometimes in situations of great danger to either members of the public at large, or to those who were receiving the emergency services. In such circumstances, it was reasonable to have a requirement that those who are employed in such emergency services should have the capacity to carry out the range of functions that they may be called upon to perform in the course of their work.

53. In relation to the functions of a prison officer, it was submitted that it was fundamental to their role that they should be able to step in and carry out control and restraint functions as and where necessary. This was due to the fact that prisoners due to their incarnation

and due to their often dysfunctional backgrounds, or other factors such as drug use or mental health issues, were often volatile individuals, who were prone to violence. It was submitted that it was a fundamental requirement that a prison officer would be able to step in, to either protect his colleagues, or to protect another prisoner, who may be the subject of an assault at the hands of a violent prisoner. It had to be remembered that the prison officer owed a duty of care to protect both the public at large, his colleagues and other prisoners from violent attack. He could only do that if he was in a position to carry out control and restraint techniques as and where necessary.

54. It was submitted that the fact that the ability to carry out C&R was a fundamental requirement of the job was clearly set out in the affidavit of Mr. Seán Sullivan sworn on 6th December, 2018 where he stated at para. 11:

> *"The CMO's report explicitly states that the appellant should be excluded from duties which involve "control and restraint". The evidence before the Labour Court was that the requirement that a prison officer is capable of engaging fully in control and restraint should the need arise in the course of his/her duties is fundamental to the role of prison officer. Serving prison officers have to pass a control and restraint examination each year in order to demonstrate that they are capable of restraining prisoners when problems with prisoners arise. The evidence before the Labour Court was that the appellant herein, due to his medical condition, was not capable of taking part in control and restraint duties."*

55. It was submitted that once it was established that the ability to carry out C&R duties was an essential part of the role of a prison officer and where it was accepted that the appellant was not capable of carrying out those duties, then it was clear that he would not be capable of carrying out the range of duties which he may be called upon to do as a prison officer and therefore he clearly fell within the provisions of s.37.3. It was submitted that the provisions of Recital 18 were very clear. The Recital clearly stated that the Directive "does not require" the Prison Service to maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services. Those provisions were clearly and unambiguously transposed into the provisions of s.37.3 of the Act.

56. It was submitted that the interpretation proposed by the appellant would effectively interpret s.37.3 out of existence. The appellant wanted the court to give it such a restricted interpretation whereby only the first limb of the test was satisfied and the court was being asked to hold that the respondent still had to provide reasonable accommodation and then justify the requirement on grounds of legitimacy and proportionality. It was submitted that by so doing, the appellant was trying to take his case out of the ambit of s.37.3 and bring it within the general provisions of s.16 of the Act. It was submitted that that flew contrary to both the terms of the Act and the terms of Recital 18 to the Directive.

57. It was submitted that the respondent had attempted to make reasonable accommodation for the appellant by giving him the option to resign as a prison officer and apply for a PASO position, or in the alternative, he could apply for ill-health retirement. However, what the appellant wanted was a different role, where he would not carry out any control and restraint duties, but where he would continue to be employed on the terms and conditions of a prison officer. It was submitted that that was simply not possible if one was to maintain the operational capacity of the Prison Service, which required that all officers should be in a position to carry out C&R functions.

58. It was pointed out that the IPS did have an Accommodations policy, which was designed to provide for the gradual reintroduction of staff to full-time working in the IPS after injury or illness. It provided for such persons to be reintegrated on restricted duties, but this was limited to a period of three months, where it was envisaged that after that period the person would return to full duties. Such positions were also available on a temporary basis for female officers who were pregnant.

59. It was submitted that what the appellant wanted in this case were the terms and conditions of a serving as a prison officer, but without any prisoner contact. This was clear from his submissions to the Labour Court. Counsel submitted that that state of affairs was incompatible with preserving the operational capacity of the IPS.

60. It was submitted that the decision in the *Nano Nagle* case, while very important in relation to the interpretation of s.16 of the Act, had no relevance to this case, because it did not deal with the provisions of either Recital 18 to the Directive or s.37.3 of the Act.

61. It was submitted that where the wording of an Act was clear, the court had a duty to give the words their ordinary and natural meaning, so as to give effect to the intention of the Oireachtas. Here the wording of s.37.3 was clear and unambiguous. It clearly provided that persons employed in the emergency services had to have the capability of carrying out the range of functions that they may be called upon to do, so so as to preserve the operational capacity of the emergency service. The appellant was clearly not in a position to do that. That was the end of the matter and the Labour Court had been correct in reaching the decision that it had done in this case.

62. It was submitted that the appellant had been forced to adopt a contrived interpretation of s.37.3 in order to effectively do away with the exemption and bring his claim within the ambit of s.16 of the Act in the ordinary way. It was submitted that to do that, would be to fly in the face of the clear words of the section and that was not permitted at law. What the appellant wanted was for the Labour Court to examine whether it was necessary and proportionate to require prison officers to be capable of doing control and restraint functions. It was submitted that to do that would be to interpret s.37.3 out of existence. It was submitted that the section carved out an exemption for essential public services, which carry out difficult and at times dangerous duties on behalf of the public. The subsection carved out an exception to provide that other sections of the Act do not apply to it because of the nature of the duties they are called upon to perform. This was recognised by the clear wording of Recital 18 to the Directive. The interpretation

proposed by the appellant would render both the section and Recital 18 meaningless. Accordingly, it was submitted that as s.37.3 and Recital 18 were clear in their terms, the Labour Court had been correct in the approach that they had adopted and in the result that they had reached. Accordingly, it was submitted that the appellant's appeal should be dismissed.

Conclusions

63. It is clear from the decision in the *Nano Nagle* case that there has been a paradigm shift in the way that disability is to be viewed in European and Irish law. This has been brought about by the implementation in Irish law of the Framework Directive in the Employment Equality Act (as amended) and in particular, by the general duty of providing reasonable accommodation which is placed upon the employer by s.16 of the Act. The judgements of the CJEU referred to earlier and the judgement of the Supreme Court in the Nano Nagle case, make it clear that the provisions of the Framework Directive and of the Act provide rights of real substance to persons of disability, who wish to enter or remain in work. In addition, the Nano Nagle case makes it clear that the provisions of the CRPD are also relevant to the question of the correct interpretation of the Act. The court must interpret s.37.3 of the 1998 Act in light of Art. 27 of CRPD to which both the EU and Ireland are signatories.

64. If possible, the court must also interpret s.37.3 in a manner that is consistent with both the wording and the objectives sought to be achieved by the Framework Directive, which was implemented in Irish law by the Act.

65. Having regard to the provisions of the CRPD and the Directive, Irish Law recognises the dignity of persons with disability and that fundamental to their dignity is the right to work. This is the background against which s.37.3 must be interpreted. However, Mr. Ward SC was correct when he said that if the words of the section were clear and unambiguous, this Court was obliged to give effect to them.

66. In approaching s.37.3 the court is mindful that in the Employment Equality Act as originally drafted the IPS had a complete exemption. That was removed by the amendment made in the 2004 Act by the insertion of s.37.3. It is relevant that while the Oireachtas removed the complete exemption that had existed for the respondent, they did not simply remove it, which would have had the effect of bringing the respondent within the general provisions of s.16 of the Act, like any other employer. Instead, the Oireachtas recognised the particular function of An Garda Síochána, the Prison Service and other emergency services by providing that it is an occupational requirement for employment in the Prison Service that persons employed therein are fully competent and available to undertake and fully capable of undertaking the range of functions that they may be called upon to perform so that the operational capacity of the Prison Service may be preserved.

67. I accept the submissions made on behalf of the appellant that the correct interpretation of s.37.3 does not mean that the respondent can self-certify that the appellant is incapable of performing the range of functions that he may be called upon to do as a prison officer

due to the fact that he cannot perform C&R functions and that they are therefore relived of the obligation to make reasonable accommodation for him. To allow such self – certification by the IPS would deprive the appellant of an effective remedy in seeking to enforce his rights under the Directive and the Act: see Egenburger judgement supra.

68. It may well be that a particular disability will in fact render a person incapable of performing the necessary functions in a particular emergency service. Everything will depend on the circumstances of the case. For example, if the emergency service involved a small unit, for example, if the Kerry Mountain Rescue Service was a full-time or part-time paid position and if it only had a relatively small number of employees, if one of them suffered an injury whereby they were confined to a wheelchair, there would be no accommodation which could be made to enable them to continue to act as part of the team, because a rescuer would have to be able to climb and hike considerable distances to reach an injured climber; they would have to be able to administer first aid and then assist in carrying the injured person to the nearest pickup point, for collection by vehicle or helicopter. The person who was confined to a wheelchair clearly would not be able to perform the range of functions which they would be called upon to perform as part of a mountain rescue team. In such circumstances the employer would be relieved of the obligation to make reasonable accommodation for them and they would not be the subject of discrimination if they were not retained in employment.

69. However, in a larger organisation there may not be a single characteristic function, which is essential should be performed by all employees so as to preserve the operational capacity of the particular emergency service. For example, in An Garda Síochána, most Gardaí would have to be able to chase and apprehend suspected criminals, intervene in situations of violence and carry out searches of buildings and other locations. A person in a wheelchair would not be able to perform these functions. However, if the Garda was employed in the Forensic Document Section, or in the Cyber Crime Section, he or she could probably be relatively easily accommodated if they had an accident and had to use a wheelchair, because their work is completely deskbound. In these circumstances, they could be accommodated in their use of the wheelchair, without in any way compromising the operational capacity of An Garda Síochána.

70. While the court can see the force in the argument put forward on behalf of the respondent, that control and restraint is an important requirement generally within the Prison Service; given the size of the service and the range of duties performed by prison officers, there may be duties which could be undertaken by the appellant within the role of prison officer, which would not involve control and restraint, yet which would not adversely affect the operational capacity of the Prison Service.

71. The appellant has put forward evidence that there are such posts in existence and that some prison officers have been given them on a long-term basis due to ill-health or other reasons. The email sent by Govenor Malone on 16th April 2012 supports this contention. On the other hand, the respondent has indicated that its witnesses will give cogent evidence that control and restraint is a fundamental requirement of the role of a prison

officer and that all prison officers have to undergo an annual test in C&R techniques. There is clearly an issue of fact to be determined in this regard.

72. In addition, the case law makes it clear that the employer does not have to create a job for the person with the disability, nor do they have to provide measures that are unduly burdensome. This is the test of proportionality or reasonableness: see Nano Nagle judgment at paras. 89 and 106. That includes a consideration of the financial and other costs entailed in providing appropriate measures, the scale and financial resources of the employers' business and the possibility of obtaining public funding or other assistance. It would also include a consideration of the operational capacity of the organisation. In a prison, it may be that some posts are more sought after than others for any number of reasons; perhaps because they are regarded as easier or "cushy" posts; while other posts may be more demanding, but may attract better allowances. The Governor may decide for good reason, that he or she will rotate officers among various roles within the prison, so as to share out the more sought after roles fairly and also to provide some variation in duties to the prison officers. Similar considerations would also apply in the prison service nationally.

73. In addition, it would be reasonable for the Governor to retain a role which did not involve control and restraint for officers who may need temporary access to restricted duties when they are coming back from injury or illness, or in the case of a female officer, because of pregnancy. It could be argued that it would be unreasonable and unfair to other officers, if the appellant where to be given one of the restricted duties posts on a permanent basis. In addition, if there are already officers who have been allocated such roles on a long-term basis perhaps for medical reasons, it would not be fair that they should be put out of such roles solely to accommodate the appellant. Obviously there would only be a given number of restricted duties roles within a particular prison. All of these are considerations that can be legitimately raised by the respondent.

74. I also note that the appellant is not able to undertake night duty, but he has apparently found another officer or officers willing to do his night shifts. That poses a problem in the longer term, because if the other officer changes his mind for personal or other reasons, or simply because he gets tired of doing extra night shifts, the Governor cannot force him to do the appellant's shifts. So that may well cause a problem in the longer term.

75. Normally where a court decides an issue by way of a preliminary issue, it does so either on the basis of a statement of agreed facts, or it makes the necessary findings of fact as part of the hearing of the preliminary issue. While it may be possible for a court to interpret a particular section in the absence of agreed or determined facts, it is not possible for the court to decide a dispute between the parties, on the basis of its interpretation of section, without applying that interpretation to the facts as found by it.

76. I am satisfied that the Labour Court was in error due to its failure to hear evidence and make findings of fact in this case. The only fact that was agreed between the parties was the fact that the appellant is no longer able to do control and restraint duties. However, he did not accept that the capacity to carry out such duties was essential for all prison

officers. He maintained that there were a number of posts available within the prison service which only required officers to carry out restricted duties. A point of law, such as the interpretation of a particular section in a statute, does not exist on its own; it has to be applied to the facts in order to reach a particular determination in a particular case. It is the application of the decision reached by the court on the point of law to the facts as found by the court, which gives the ultimate decision. It is a fundamental requirement of justice that both parties to the dispute are given an opportunity to assert their version of the facts and to test the propositions put forward by the opposing party. That was not done in this case. The Labour Court did not hear any evidence, but determined the matter on the assumption that the proposition put forward on behalf of the respondent, to the effect that the capability of all prison officers to carry out control and restraint duties was a fundamental requirement of the job, was correct. They then proceeded to apply section 37.3 of the Act to that state of affairs, notwithstanding that the appellant wished to contest the assertions that had been put forward by the respondent in this regard. But he was not afforded the opportunity to call evidence and test the evidence put forward on behalf of the respondent. That rendered the hearing unsatisfactory and unfair.

77. All of the matters outlined above, had to be considered. The applicant's core complaint is that the Labour Court held that on a true interpretation of s.37.3 that once it was established that the appellant could not do C&R duties, which the respondent maintained was fundamental to the role of a prison officer and therefore to the operational capacity of the Prison Service, that the respondent did not have to provide reasonable accommodation to the applicant and that was the end of the matter, without engaging in an evaluation of the evidence and the practical considerations as outlined above. It should be noted that in the Wolf case the national court had extensive evidence, mostly uncontroverted, of the physical capacity of persons of differing ages to deal with the demands of the job of a firefighter at the intermediate grade.

78. I am of the view that the exception in s.37.3 does not go as far as contended for by the respondent. Everything depends on the circumstances of the particular case. If it can be established that notwithstanding his disability, a person is capable of performing the functions that they may be called upon to perform in their particular role within the Prison Service, and that that can be done without adversely affecting the operational capacity of the Prison Service, it seems to me that the requirements of the Directive mandate that he be given the reasonable accommodation, if not unduly burdensome and thereby be permitted to continue in employment.

79. Accordingly, I find that the Labour Court was wrong in law to interpret s.37.3 in the way that it did. The subsection merely provides that it is an occupational requirement that an employee in the Prison Service be fully capable of undertaking the range of functions that they may be called upon to perform so that the operational capacity of the Prison Service may be preserved. However, the correct interpretation of the subsection does not relieve the employer of the obligation to attempt to make reasonable accommodation for the person if it is not unduly burdensome for them to do so and if having done so, the operational capacity of the service is not adversely affected.

80. I am satisfied that such an interpretation is in accordance with the terms and objectives of both the Directive and the CRPD. It is appropriate that if possible, the Act should be interpreted in a way that is consistent with the provisions of EU law.

81. Furthermore, I am satisfied that the use of the pronoun "they" in s. 37.3, makes it clear that what is being referred to is the competence of the particular person to perform the range of functions that *they* may be called upon to perform as part of the relevant emergency service. As noted earlier, in a larger organisation, different duties involving different levels of physical capacity, will be performed by different operatives at the same level, e.g. some Gardai will perform active duties in the community, whereas others will perform specialised investigations from an office. The section makes it clear that there is no "one size fits all" requirement, which must be attained by all the operatives within a particular emergency service. It is necessary to look at the range of duties that a particular person may have to perform in his or her role within the emergency service concerned.

82. I accept the submission of counsel on behalf of the appellant that s.37.3 does not exempt the emergency services from providing reasonable accommodation, but merely enables them to satisfy the first limb of the test set down in cases such as Egenburger and Wolf, that capacity to carry out the range of functions required is an occupational requirement for employment in the particular emergency service, in this case in the IPS. However, the section does not absolve the IPS of the duty of providing reasonable accommodation for the disabled person, if that can reasonably be done and while at the same time preserving the operational capacity of the prison service.

83. While acknowledging that s. 37.3 is a standalone provision, this interpretation is consistent with the provisions of s. 37.2, which effectively establishes in Irish law the three-strand test set out in the European cases referred to above. When read with s. 37.2, s.37.3 gives clarification as to what constitutes an occupational requirement for the purposes of employment in An Gaqrda Siochana, in the Irish Prison Service and in emergency services generally. This can be contrasted with the provisions of s. 37.5, which gives a complete exemption to employment in the Defence Forces. Thus, I am satisfied that the interpretation which the Court has given to s. 37.3, is consistent with the provisions of the section generally, when read as a whole.

84. However, as stated before, everything will turn on the facts of a particular case and the size and nature of the emergency service concerned. Justice requires that the person suffering from the disability be given the chance to make his/her case that they could perform the functions required of them if reasonable accommodation were made for them, which was not unduly burdensome to the employer and did not impair the operational capacity of the emergency service concerned.

85. As the appellant was not given that opportunity, I will allow the appeal and remit the matter to the Labour Court for a consideration of all the factual evidence outlined above.