THE HIGH COURT

Record No. 2016/285 CA

Báile Átha Cliath – Dublin Bus

Plaintiff/Appellant

And

Claire McKevitt

Defendant/Respondent

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 29th day of January, 2018

Nature of the case

1. This matter came before the Court by way of appeal from the Circuit Court, which in turn was an appeal against the determination of the Employment Appeals Tribunal determination that Ms. McKevitt was unfairly dismissed by Dublin Bus. Ms. McKevitt was dismissed on the ground that she did not have the capability to perform the work she was employed to perform, namely driving a bus. This was against the background of a multiplicity of health problems that she had suffered over a number of years, between 2009 and 2014. Her dismissal took effect in April 2014. The case raises questions about the necessary procedures in a dismissal case where the issue is not one of misconduct but rather medical capability to perform one's job.

The evidence in the case

2. The court heard evidence from Mr. O'Donohue, the head of human resources for Dublin Bus, Dr. Loftus, an occupational physician for the CIE Medical Department, Dr. Whelan, the Chief Medical Officer of Dublin Bus (hereinafter referred to as the CMO) and Ms. McKevitt. Dr. Loftus' notes of his interactions with Ms. McKevitt were available, although Ms. McKevitt maintained that they should not have been admitted at any of the hearings without a court order, and also, in correspondence, had refused to allow her GP records to be made available. In broad terms, the evidence of each of the witnesses was as follows.

3. Mr. O'Donohue, head of Human Resources and Development in Dublin Bus, gave evidence of the importance of safety to the organisation, saying that it was their "number one priority" and was at the top of their agenda at all times. He said that they had a duty to protect employees, the general public and the travelling public using the buses. He explained the role of the CMO in interacting with sick employees, and clarified that his department would not be given the details of an employee's illness, and that the opinion that an employee was unfit for duties was that of the CMO, and that the HR department would not second-guess it. He said that there was no formal appeal in relation to such decisions such as there would be with a disciplinary matter. He was taken through the chronology relating to Ms. McKevitt, which is discussed below.

4. Dr. Loftus was the doctor in the office of the CMO who had interacted with Ms. McKevitt. His speciality was occupational medicine, and he was a fellow, member, and licentiate of the faculty of occupational medicine at the Royal College of Physicians of Ireland and held a higher diploma in occupational health from UCD. He indicated that a doctor in his field is also required to do 50 extra hours per year to stay abreast of professional developments in the area. He said that he was an examiner and a specialist trainer in the area of occupational medicine. He has been working with Dublin Bus since 2003. He also emphasised the importance of safety in Dublin Bus and said that they, the medical department, would be watching out for someone who might be prone to a sudden incapacity, such as heart attacks or faints. He said that he and Dr. Whelan collaborated closely and had offices only a few feet apart from each other. He said that among the various things they consider as to someone's suitability as a bus driver include not only matters such as co-ordination and cognition, but also "tolerance" for the job on a long-term basis. He said that if someone has multiple psychosomatic signals and multiple absences this could be an indication that their tolerance is less than might be required. He was taken through the chronology relating to Ms. McKevitt, discussed below. His repeatedly expressed view was that his conclusion regarding Ms. McDevitt's fitness to drive buses was a multi-factorial conclusion, based on the overall profile that she had presented, rather than in relation to one particular issue (that of blackout or "syncope") alone.

5. Dr. Whelan, the Chief Medical Officer of the CIE Group, also gave evidence. His speciality was also occupational medicine and he had previously been Dean of occupational medicine of the Royal College of Physicians of Ireland from 2014-2016, and was chair of the working group which had devised the Road Safety Authority's guidelines on medical fitness. He explained the role of the CMO with regard to the assessment of medical fitness of CIE employees, particularly those involved in the front-line duties of bus or training driving. Safety was, understandably, the paramount concern and in that regard, the issue of an individual's "tolerance" was carefully monitored. This was the capacity of the individual to deal with the various aspects of the role; in bus driving, this would encompass not merely the physical function but the stressors involved in aspects such as dealing with the public, shift work, scheduling, coping with traffic and driving hazards such as cyclists and pedestrians. He indicated that the passing of Ms. McKevitt's file to him (which will be seen from the chronology below) was more by way of the procurement of a second opinion, rather than a formal appeal. They did not have a formal appeal process. He did not think it was necessary to meet Ms. McKevitt in person because there was such a volume of contemporaneous medical information on her file.

6. Ms. McKevitt gave evidence as to her age and personal circumstances, and the reasons for her having applied for the Dublin Bus job. She had been working at home, raising her three children up to that point, but one of the children was a teenager daughter with cerebral palsy, and it was becoming difficult for her to manage her physically, so she and her husband decided that he would stay at home and she would go out to work. She was taken through the chronology, discussed below. Overall, her views were:

- that she had not been given sufficient notice that her retirement on grounds of ill-health was imminent when that point was reached;

- that the main reason for her retirement was the "syncope" issue, and that this was unfair because her own expert doctors had cleared her in relation to that particular problem;

- that the CMO had taken into account various medical conditions she had previously had which were not problematic any more;

- that they wrongly attributed the stress of the job to her problems whereas her main stressor, for a limited period only, was being separated from her daughter at home, having cared for her full-time up to that point

- that she had not been properly heard during the process, particularly in the course of the appeal process in which Dr. Whelan was involved.

Chronology
Probationary Period

7. Ms. McKevitt began working for CIE as a bus driver on the 23rd September, 2007. According to a log shown to the Court provided by the appellants, she took 3 days of sick leave during her initial probationary period, which lasted for some 14-15 months until she was employed permanently in January 2009.

2009-2012

8. Soon after she was made permanent, a pattern started of her being absent from work on sick leave. In 2009, she took 33 days sick leave/occupational injury; in 2010, she took 74 days; and in 2011, 33 days. Her medical complaints over this period included stress and anxiety, depression, pain in her right hand/thumb, irritable bowel syndrome and gastritis, and breathing difficulties and tightness in her chest. In January 2012, she had 12 sick days. In February 2012, she had 8 sick days. From February 2012 onwards, she was on permanent sick leave until her retirement in April 2014, a period of two years and two months.

9. In addition to seeing her own doctors and various specialists in relation to the above complaints, she also attended with Dr. Loftus in the CMO of CIE on numerous occasions, perhaps in the region of 15-20 times. The regime within CIE was that an employee was entitled to paid sick leave for 6 months; for 4 weeks at 100% pay, for 8 weeks at 70% pay, and for the remaining 14 weeks at 60% pay. While an employee is out sick, there is a line of communication between the employee, the CMO and the HR department, and the employee may be required to attend appointments with the CMO, as happened with Ms. McKevitt.

10. Dr. Loftus' recollection was that a problem with Ms. McKevitt's wrist was why she originally went out on sick leave in 2009. Her reports to him in that regard were that holding the steering wheel had caused pain in her wrist.

November 2011: Ms. McKevitt reports a blackout

11. In November, 2011 Ms. McKevitt suffered a blackout in her home and was referred to the Falls and Blackout Unit (hereinafter "the FABU") in St. James' Hospital. The first FABU report dated the 5th June, 2012 states that the appellant presented at her first appointment with symptoms of what was almost certainly a condition known as "vasovagal syncope". It noted that she had reported to them at that time that "she had been getting syncope events once a year for the last 10 years" and that "it started in pregnancy 19 years ago". Ms. McKevitt in her evidence denied that she had a syncope episode once a year in every 10 years but that she had "dizzy spells".

12. The second report dated 23rd July confirmed a diagnosis of "vasovagal syncope type 1 with asystole and depression". This diagnosis came after a test for syncope (or blackout), known as a "head up tilt test", was performed upon her in July 2012, which positively confirmed syncope upon Ms. McKevitt losing consciousness for 10 seconds. The report went on to say that she had been advised that she should not drive and that she should inform the HR department in her workplace about her condition. She was advised to drink at least 2 litres of fluid in order to manage her condition. The appellant was also told that she would need a "reveal device" to be inserted. This device was required so as to correlate her syncope symptoms as they arose day to day in real time. It appears this device was physically inserted into her body in the weeks following this second appointment at the FABU.

13. In 2012, the plaintiff did not work at all, by reason of the advice given by the FABU. As matters turned out, she was in fact on permanent sick leave from February 2012 until her retirement in April 2014. She continued to see doctors about a variety of matters such as pain in her right hand, back pain, depression, irritable bowel syndrome, breathing difficulties/palpitations.

14. On the 1st of November, 2012, Dr. Loftus' notes indicate that he received a phone call from Ms. McKevitt's GP Dr. McKeogh, who explained that her depression had improved and that he believed that a return to work would be beneficial. Dr. Loftus notes indicate that he said he would request non-driving alternative duties and also that he was awaiting the reports from the FABU at this stage.

15. Ms. McKevitt then saw Dr. Loftus on the 7th November, 2012. The following day Dr. Loftus wrote a memo to the Head of the HR Department for Dublin Bus, Mr. Philip Donohue, asking him if there were any "non-driving, non-physical" duties available to assign Ms. McKevitt, and requesting that her sick leave be extended until the 7th February, 2013.

16. Ms. Kevitt did not work at all during the year 2013. A report from the FABU dated 21st January 2013 refers to her third appointment at the FABU. The reveal device, which had been inserted in November 2012 (two months before), was examined and it indicated that she had suffered no blackouts since its installation and that her surgical wound had healed. She was advised to drink more fluids. An appointment was set for one year's time at FABU and she was told not to drive.

17. She continued to attend Dr. Loftus periodically to update him as to her medical situation and her various complaints. As of August 2013, his notes indicate that she was continuing to complain of back pain which was not relieved by steroid injection.

August 2013-December 2013

18. On the 22nd August, Dr. Loftus wrote to the FABU (specifically to Professor Rose Anne Kenny, director of the unit) and stated he had been sent the previous reports from the FABU, and understood that she was due back in the unit on 16th December next. He said: "If there is no foreseeable date for her return to work as a bus driver and in the absence of alternative duties she may be subject to ill health retirement recommendation to management". Ms. McKevitt gave evidence that this was not discussed with her.

19. In a memo to Mr. Donohue dated the 23rd August, 2013 Dr. Loftus similarly stated that this may be a permanent restriction, though she was due to have another appointment on the 2nd October, 2013. He asked once again whether there were any non-physical non-driving type duties available and requested that her sick leave be extended until the date of her next appointment. Apparently, there were no non-physical non-driving duties available at any time during the relevant period.

20. On the 2nd October, 2013, Dr. Loftus informed Mr. Donohue that he had seen the Ms. McKevitt that day and that she remained unfit for duty as a driver, though he had not seen the relevant medical reports yet. His notes from the appointment indicate that her depression and anxiety had resolved though she still had "some hypochondria" but was not "clinically anxious or depressed" and was unfit to drive. He recommended an extension of sick leave until the appellant's next appointment on the 23rd December, 2017. This was granted and the appellant was informed of this by Mr. Donohue by letter dated the 8th October, 2013.

21. On the 17th December, 2013, there was a report from the FABU which referred to Ms. McDevitt's fourth appointment at the Unit. It was sent to both Dr. McKeogh and Dr. Loftus. In it, Dr. Helen O'Brien (Specialist Registrar to Professor Kenny) stated that "she reports that her last episode of syncope was 2 years ago after she had gotten out of bed quickly and usually occur on an annual basis". It reported that she had two pre-syncopal episodes and was able to overcome them easily by lying or sitting down. She was advised of physical manoeuvres which could counter her condition, the importance of fluids and that she should not return to driving until the ongoing investigations into her condition were complete and her symptoms were well managed.

Appointment with Dr. Loftus on 23rd December 2013

22. On the 23rd December 2013, Dr. Loftus again saw Ms. McKevitt. His notes mention her syncope symptoms, a slight dizziness when she stood up, back pain, and an upset stomach. The notes also indicate that Dr. Loftus had formed an impression at this stage that her unfitness to drive was likely to be a permanent restriction and the term "so advised" is added beneath these words, indicating that he told Ms. McKevitt on this date. In her evidence in chief, Ms. McKevitt gave evidence that there was no discussion of retirement or permanent restrictions and she thought the next appointment would be just another 4-week review appointment. In cross-examination, she said she did not remember, that he probably mentioned it, but that she did not remember. I am satisfied that she was so advised (orally) by Dr. Loftus on that date.

23. According to Dr. Loftus' notes she also complained of hip and back pain if she sat for 15-20 minutes and that she was unable to drive. Ms. McKevitt denied that she reported this to Dr. Loftus on that date.

24. Dr. Loftus sent a memo to Mr. Donohue on the same date, the 23rd December, 2013. Again, he was of the opinion that the appellant remained unfit for duty and asked for alternative duties and an extension of sick leave until the 30th January, 2014 (her next appointment). He also added that, at this stage, her restriction from driving may well be permanent.

25. Ms. McKevitt was sent a letter informing her of the extension of sick leave until her next appointment. Nothing was stated in this latter about the possibility of her being considered permanently unfit to drive.

26. By letter dated the 30th December, 2013, Mr. Donohue responded to Dr. Loftus and informed him that there were no "non-driving, non-physical type" duties available. Ms. McKevitt was again informed by Mr. Donohue of the extension of her sick leave the same day.

27. By letter dated the 3rd January, 2014, Dr. Loftus wrote to GP Sarah Beth Hooper, saying that she had recently attended him for occupational medical review. He noted that her depression had resolved and she was no longer on anti-depressants, but he said that "she continues to complain of light-headedness, dizziness and increased heart rate, orthostatic symptoms, GI upset, hip and back pain radiating to left leg". He also said that "It is our practice to extend sick leave for a reasonable period to see if there is a reasonable prospect of her becoming fit again to return to work. As there is no foreseeable date for her safely to return to work, she is likely to be subject to an ill health retirement recommendation to management in the near future".

Appointment with Dr. Loftus on the 30th January 2014

28. On the 30th January 2014, Dr. Loftus again saw Ms. McKevitt. His notes refer to the position that no alternative duties were available for the appellant, and noted that the patient was "disappointed at prospect" of ill health retirement. Dr. Loftus recorded his impression that she was permanently unfit and recommended an ill-health retirement for the 10th April, 2014. Ms. McKevitt in her evidence that she was told by him of his recommendation at this appointment, and that he mentioned not only the syncope, but also the history of depression and irritable bowel syndrome. The notes also record that she reported hip pain or spasm was ongoing. She denied in her evidence that she mentioned this.

29. A memo to Mr. Donohue was also sent on the same day in relation to Ms. McKevitt. It indicated that she had attended the medical department on that date, and that she was unfit to drive and that this was a permanent restriction. It was stated that since no alternative duties existed, the recommendation was to retire Ms. McKevitt on grounds of ill health from the 10th April, 2014. It was also recommended that there be an interview between Ms. McKevitt and management informing her of her entitlements under the welfare scheme and that her sick leave be extended until the April date.

30. By letter dated the 7th February, 2014, Ms. McKevitt was informed by Mr. Donohue of the CMO's recommendation for retirement and her pension entitlements..

The final FABU report

31. By letter dated the 13th February, 2014, Dr. Helen O'Brien wrote to Dr. Loftus. She stated that she had discussed the case with Professor Kenny, who agreed with her diagnosis of vasovagal syncope. She said that since attending the clinic, Ms. McKevitt had not experienced any further episodes of syncope and had today reported that her last syncopal event was three years ago. She said that: "she has had episodes of presyncope" and that the reveal device had detected no abnormalities since insertion in November 2012. She said that she had discussed the case with Professor Kenny and they agreed that Ms. McKevitt was considered to fall into "category 3 of the DVLA guidelines" and so was of "low risk of recurrence therefore allowing her to drive". The letter said that the FABU was "happy for Ms. McKevitt to return to driving both for personal use and commercial use". The Court was told by Dr. Whelan in oral evidence that the DVLA guidelines are the UK guidelines for assessing fitness to drive. The letter concluded with the somewhat standard formula: "If you have any further concerns please feel free to contact us".

32. It appears from an email dated 21st February, 2014 that Ms. McKevitt met with her Dublin Bus area manager, Ms. Rosemary Darker. The email outlines a request by Ms. McKevitt to have another appointment at the medical department, in light of the FABU telling her that she was fit to drive again.

Appointment with Dr. Loftus on 4th March, 2014

33. On the 4th March, Dr. Loftus saw Ms. McKevitt again. The plaintiff gave evidence that she was hopeful of being allowed back to work because of the FABU report, but he said that he remained of the opinion that the appellant was unfit to drive. She gave evidence that he told her that it was not simply because of the syncope, but because of her history of depression, irritable bowel syndrome and other matters. She was very upset at his decision.

34. Dr. Loftus' notes of this meeting indicate that Ms. McKevitt was still experiencing symptoms of dizziness and had to lie down from time to time; and that she was suffering from hip pain, but said that this had never interfered with her duties as a driver. The notes finally record that Dr. Loftus had a long discussion with Mrs. McKevitt about the retirement recommendation and explained how the

recommendation was made not only due to her syncope symptoms, but also because of "multi-system complaints" such as her depression also. Mrs. McKevitt accepted that but appears to have stated that the stress and depression came not from her work but from the challenges presented by her wheelchair-bound daughter. Dr. Loftus recorded his impression that Ms. McKevitt was "well now but not likely to be in a position to give regular + satisfactory service in future as RPDr - tolerance of symptoms likely to be an issue if were to return to work. No alt duties available".

35. During the hearing before me, when asked about his view of Ms. McKevitt around this time, Dr. Loftus said that it was a complex case; that she did not suffer from one medical condition but rather from multiple conditions and had attended many specialists. He thought the whole pattern was of someone who, under pressure or stress, was not able to tolerate the demands of her situation. Even though the FABU said "low risk", this was not "no risk". He thought that she was showing a stressed personality which was coming through in the physical complaints. For example, her distress in relation to her thumb complaint seemed to be out of proportion to the actual problem, as compared with other people with severe arthritis who might be waiting for operations; but if a person is stressed, they tolerate things less well.

36. By Memo dated 5th March 2014, Dr. Loftus communicated to the Area Manager, North West, Phibsboro and Head of Human Resources at Dublin Bus stating that Ms. McKevitt had attended the medical department on the previous day, that the issues raised in the email had been noted, and that medical reports had been received. It then said: "Following assessment, Ms. McKevitt remains unfit for duty as a road passenger driver and this is a permanent restriction" and "As per my memo of the 30th January 2014, it is recommended that she be retired on grounds of ill health, with effect from Thursday, 10th April 2014". A handwritten note dated 11th March, 2014 indicates that a telephone call was received from Helen Byrne inquiring if the CMO had received her letter dated 13 Feb 2014, to which the answer was yes.

Dr. Hooper's report of 28tH March 2014

37. On the 2nd April 2014, Ms. McKevitt then sent a letter to the CMO on the 2nd April, 2014 stating that she was attaching "further medical documentation which was not available prior to this point". She requested that the CMO reconsider the retirement decision as she wished to return to work. The attached documentation was a letter dated 28th March, 2014, from Ms. McKevitt's GP, Dr. Sarah Beth Hooper of the Errigal Surgery. This arose out of a visit that Ms. McKevitt had made to Dr. Hooper after her discussion with Dr. Loftus on the 4th March. Dr. Hooper's letter/report stated that "there have been several issues preventing her from work including syncope, depression and irritable bowel syndrome but she has recovered well and she is keen to return to work". She said that she (the doctor herself) felt she was now fit to return to work. With regard to depression, she said that she initially complained of this in March 2012, and that she had been off all antidepressant medication since April 2013 and that she (the doctor) did not feel that she was currently depressed and therefore considered her fit to drive. She was still under active follow up for irritable bowel syndrome in St. James's hospital but her symptoms were stable and under control and should not pose a difficult to driving. The letter continued that "she reports intermittent back pain and non-cardiac chest pain and attends occasionally with complaints of same but is not currently complaining of pain". The letter concluded by saying that Ms. McKevitt was "keen to return to work" and that Dr. Hooper believed that she would benefit both physically and psychologically from returning to work.

38. On the 9th April 2014, Ms. McKevitt wrote to Mr. Donohue stating that she was appealing the decision of the CMO regarding her retirement.

39. On the 10th April 2014, Mr. Donohue wrote to Ms. McKevitt indicating that the CMO had recommended her retirement on health grounds effective from the 10th April 2014, and advising her of her financial entitlements.

40. On the 17th April, 2014, Mr. Donohue wrote to Ms. McKevitt stating that within Dublin Bus, under the CIE Welfare Scheme for Regular Staff, the decision to retire an employee on the grounds of ill health rested solely with the CMO and that Dublin Bus was obliged to accept that an employee should be retired on health grounds.

Dr. Whelan's letter of 22nd May 2014

41. By letter dated the 22nd May, 2014 (apparently dictated on the 9th April, 2014, as appears on the face of the letter), Dr. Whelan wrote to Ms. McKevitt, acknowledging her letter and medical report. He said that he had reviewed her medical file and formed the opinion that the decision to find her permanently unfit for public service bus driving and a consequent recommendation of ill health retirement was correct.

42. By letter of the same date, 22nd May 2014 (also apparently dictated on 9 April 2014), Dr. Whelan wrote to the GP Dr. Hooper, referring to her own letter and the fact that Ms. McKevitt file had been passed onto him by way of an appeals process. He continued as follows:

> "I have reviewed the file and note that she has an extensive range of both somatic and psychological symptoms across many domains including vasovagal syncope type 1, history of depression, chronic low back pain requiring attendance at the Pain clinic, symptomatic early osteoarthritis of her first right metacarpal phalangeal joint, Irritable Bowel Syndrome symptoms, positive helicobacter pylori symptoms, chest pain and weight loss.
>
> The impact of these symptoms on her ability to attend work varies with the level of distress caused by such symptoms. As a consequence, Ms. McKevitt tolerance for onerous physical and psychological demands of Public Service Vehicle driving is markedly impaired and this was why she was permanently unfit and thus the reason for her retirement."

43. Ms. McKevitt gave evidence that her doctor never said anything to her about the above letter.

44. Dr. Whelan in his evidence said that he did not think it was necessary to meet Ms. McKevitt in order to form an opinion as to the case, because there was so much contemporaneous medical evidence on her file. He said that their relationship to reports from treating doctors was that they needed those reports to receive those doctors' diagnosis, investigations and proposed treatment; but that, armed with that information, it was their own role as occupational specialists to make a decision as to whether the individual was fit to return to driving duties. He said he had considered the final FABU report carefully, but it was his view that they had not sufficiently weighted her reported history of transient loss of consciousness, together with her history of various complaints, many of which could act as triggers for syncope. Also, while they were satisfied she had not had any episodes for a number of years, she had not been working during that period and so the major stressor of driving had been taken out of the picture, whether she appreciated that or not. Among the matters he took into account in reaching his conclusion was the risk of her becoming impaired while performing her duties, and the fact that even a very short period of loss of concentration can lead to serious consequences when driving around the streets of Dublin. This view was based upon what bus drivers tell them from their own experience; the challenges of driving made

them "hypervigilant". It was a unique job. He looked at the total range of her complaints and the 23 certificates submitted by her. The pattern was of a recurrent short-term sickness absence. This phenomenon was well documented in the literature; there is usually something behind it, and in this case, it was apparent that it was stress and distress.

45. In cross-examination, he was pressed on why he had, in effect, "disregarded" the view of the FABU and why he had not contacted them to discuss. He replied that the FABU had an investigative and treatment function, and none in relation to certification of professional drivers. It was his job to critically assess any report that came into him, and driving a bus was the most safety-critical position there was in Dublin Bus. He had no reason to contact the FABU; they had expressed their opinion and his job was to evaluate the opinion. It was put to him that the decision of the CMO would not have changed, no matter what they said, but he answered that this was not the case; for example, if they had identified a cardiac origin to the problem and decided to put in a pacemaker, there would then be a definite cause and an intervention which would reduce or remove the risk entirely. It would all depend on what they said.

46. After her retirement from Dublin Bus, Ms. McKevitt applied for sick benefit from social welfare, but was refused on the ground she was fit. She worked in various jobs, primarily shops or delicatessens, and these were part-time. She did not envisage that she would ever be able to secure a secure, full-time job like the one she had in Dublin Bus in the future. It was put to her in cross-examination that in one of her subsequent jobs, which she had for a year, she had an excellent attendance record, which was consistent with her being able to do a job which was less stressful, and she said she did not accept that bus driving was stressful at all, or more stressful than working in a delicatessen.

Legal aspects
47. Under s.6(4)(a) of the Unfair Dismissals Act, 1977, a dismissal is deemed not to be unfair if it results wholly or mainly from an employee's capability to perform work of the kind which he was employed by the employer to do.

48. It appears from the written decisions that the EAT found in favour of Ms. McKevitt on the basis that there had been several breaches of fair procedures: (1) that a third independent medical opinion should have been obtained in circumstances where there was a conflict of evidence as between the FABU and the opinion of Dr. Loftus and Dr. Whelan; (2) that the appeal process was flawed because it was merely a review, and because Dr. Whelan was involved in it when he had been involved in the original recommendation; and (3) that the HR department had merely rubber-stamped the recommendation of the CMO, in ignorance of the facts relied upon to support the recommendations. The EAT awarded Ms. McKevitt €17,500.00

49. On appeal to the Circuit Court pursuant to s. 11 of the Unfair Dismissals (Amendment) Act, 1993, the court also found in favour of McKevitt. From Counsel's note of the judgment, this appears to have been on one ground only, namely that Dr. Whelan did not re-examine, meet or hear from Ms. McKevitt. The judge reduced the award in favour of Ms. McKevitt to €10,000.00.

50. Under Ms. McKevitt's signed contract of employment, the Chief Medical Officer must determine whether an employee is permitted to return to work following an illness, regardless of whether they have been certified fit by another medical practitioner.

51. Ms McKevitt's legal team sought to rely on SI 146/2000-Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000. I am not satisfied that this has any application to the matters which arose in this case. Section 3(3) says as follows:

> "In the interest of good industrial relations, grievance and disciplinary procedures should be in writing and presented in a format and language that is easily understood. Copies of the procedures should be given to all employees at the commencement of employment and should be included in employee programmes of induction and refresher training and, trade union programmes of employee representative training. All members of management, including supervisory personnel and all employee representatives should be fully aware of such procedures and adhere to their terms."

Section 4(1) provides as follows:

> "The essential elements of any procedure for dealing with grievance and disciplinary issues are that they be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well-defined and that an internal appeal mechanism is available."

Section 10 sets out the penalties which may be imposed, ranging from oral warning to dismissal.

52. It seems to me entirely clear from these provisions that they are concerned with matters of an entirely different nature to the sickness of an employee, which in no sense could be described as a disciplinary matter. I think it would also be a strained and artificial interpretation of the term "grievance" as it used throughout the statutory instrument to interpret it as applying to an employee's "grievance" at being retired on grounds of capability due to sickness. It seems to me that what the statutory instrument has in mind is a grievance by an employee about the conduct of another person at work, such as a fellow employee. Hence the need for clear procedures of the type set out, as there may be a need to investigate contested allegations of fact. Therefore, it seems to me that Ms. McKevitt is not entitled to rely on the procedures set out in s. 6 of the statutory instrument.

53. However, what is clearly relevant to the present case is the decision of the High Court (Lardner J.) in *Bolger v. Showerings* [1990] ELR 184, where it was held that in a case involving dismissal for incapacity, the onus is on the employer to show:

> i. That it was the incapacity that was the reason for the dismissal
>
> ii. The reason was substantial
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> iii. The employee received fair notice that the question of his dismissal for incapacity was being considered; and
>
> iv. The employee was afforded an opportunity of being heard.

54. I note that in the *Bolger* case, the employee was unsuccessful in the High Court even though his medical condition was ultimately in fact corrected by surgery which took place after the dismissal decision, because he had been given notice and an opportunity to be heard (by sending in a letter from his GP) prior to that decision, and it was held that the decision not to await the outcome of the surgery before taking the decision on dismissal was not unreasonable, taking into account the history of absenteeism and the view expressed in the GP's letter.

55. There can be no doubt in the present case but that the perceived incapacity of Ms. McKevitt was the only reason for her dismissal, and that the reason was a substantial one. Accordingly, the key issues in the case are whether she received adequate notice and whether she had a fair opportunity to be heard on whether or not she should be retired on grounds of incapacity. These were the two issues upon which counsel for Ms. McKevitt put forward the case on her behalf.

Decision
Notice

56. I have found, on the evidence before me, that Ms. McKevitt was personally informed on the 23rd December, 2013 by Dr. Loftus that he intended to recommend her retirement on ill-health grounds. She was again advised of this by him at her appointment of 30th January, 2014. There was letter from the HR department to this effect on the 7th February, 2014, and again on 10th April, 2014. While there was no document from HR in December or January stating in a formal manner what Dr. Loftus was telling her at her appointments, the reality of the situation is that she had been told face-to-face by Dr. Loftus from as early as December 2013 that her retirement was under consideration. It seems to me that what is important is whether notice was given in substance, not whether the form of it was written or formal.

57. I cannot see how it can be said, having regard to the facts outlined above as to all the events between December and April 2014, that she did not have fair notice of her intended dismissal for incapacity. This is particularly so where, given the lengthy absences on the part of Ms. McKevitt, it can hardly have come as a surprise in any event that the issue of retirement would come up after a certain point. I did not find her evidence credible when she continued to maintain that she was shocked and surprised when the issue came up.

Opportunity of being heard

58. Ms. McKevitt had numerous consultations with Dr. Loftus. Further, there were 23 specialist reports on her medical files. Dr. Loftus communicated with the FABU, sending a letter to the Unit on the 22nd August, 2013 outlining the lack of alternative duties and the possibility of a retirement on grounds of ill-health and with her GP, and sending Dr. Hooper a latter on the 3rd January, 2014 outlining her ongoing condition and the likelihood of her retirement at this stage. Ms. McKevitt's manager in Phibsboro also contacted the HR department on her behalf which led to a further appointment with Dr. Loftus on the 4th March, 2014. In terms of medical reports, Dr. Loftus considered all of the FABU reports, including the final report dated 13th February, after which he had a further discussion with Ms. McKevitt at her appointment of the 4th March, 2014. Dr. Whelan then also examined the whole file, including those FABU reports, with the addition at that stage of the last of the medical reports that had come in, namely that of Dr. Hooper dated the 28th March, 2014. Both the FABU and Dr. Hooper had been advised that retirement was under consideration and they were under no illusions as to the context in which their opinions were being sought. In those circumstances, I cannot see how it could be said that Ms. McKevitt did not have an opportunity to put her case forward. Dr. Loftus obviously considered each of the reports as they came in; the mere fact that he reached the same conclusion on subsequent occasions does not mean that he had a closed mind in relation to the matter. Dr. Whelan reviewed the entirety of the reports. Again, considering the matter from the point of view of substance over form, it seems to me that there was an adequate opportunity for Ms. McKevitt to put forward all the medical reports she wished and for an alternative viewpoint to be heard.

59. Complaint was made that Dr. Whelan's review was not a properly conducted appeal. This is premised on a view that Ms. McKevitt had some right of appeal from the decision of Dr. Loftus. If there is such a right, then I would agree that the appeal may well have been deficient. However, I do not see where any such right of appeal arises. None is conferred under the legislation, and no authority has been cited to me in respect of which such an appeal is considered to be necessary as a matter of constitutional right, whether under the rubric of a right to fair procedures or otherwise, in the circumstances. None is mentioned by Lardner J. in the *Bolger* case, although he sets out what he considers to be the necessary procedural requirements. I think it is more appropriate to consider the two-stage process (Dr. Loftus' involvement, and Dr. Whelan's subsequent review of the file) as a process involving a decision followed by a second opinion in relation to the decision, rather than a hearing and an appeal. The latter model is that which applies in a case of alleged misconduct where witnesses may be called and findings of fact made. This does not appear to me to be the appropriate model when the situation calls for expert medical assessment of an employee's fitness.

60. Complaint was made on behalf of Ms. McKevitt that Dr. Loftus should have contacted the FABU again, or sought a third opinion, because there was "conflicting" medical evidence. I do not think that this was really a case of conflicting medical evidence. The evidence of Dr. Loftus was that the decision was taken on the basis of the multi-factorial nature of Ms. McDevitt's health problems. The range of her problems has been seen above, ranging from back pain, to hand pain, to irritable bowel syndrome, anxiety and depression, and respiratory/chest complaints, over a 5-year period. The issue of syncope was only one matter, albeit, of course, one which would raise serious alarm bells with regard to the job of bus driving, where public safety is paramount and the risk of blackout, even if very low, must be carefully considered and factored into the equation. However, it seems to me that the CMO's office was not so much disagreeing with the final FABU view, but rather weighing it differently in light of all the reports they had over the entire period and the reports made by Ms. McKevitt herself to Dr. Loftus.

61. Insofar as there was a suggestion that the decision was in effect made by the CMO and not the HR department, I cannot see that there was any flaw in the system used by Dublin Bus in that regard. The duty rests on the employer, Dublin Bus, to ensure that the dismissal was not unfair. In a case where a judgment call has to be made as to whether someone medical history renders them unfit for work, it seems to me sensible that the judgment call would be made by suitably qualified and experienced medical personnel. Again, it seems to me that this submission is based upon an attempted transplantation of the procedures that would be appropriate in investigating factual allegations of misconduct into a wholly different context.

62. In view of the foregoing, I will allow the appeal and vacate the order of the Circuit Court.