Neutral Citation: [2015] IEHC 101

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 896 J.R.]

BETWEEN

LINDA NOLAN

APPLICANT

AND

THE IRISH PRISON SERVICE AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 18th day of February, 2015

1. The applicant is a prison officer employed by the first respondent, an executive agency of the second respondent. These proceedings challenge a decision made by the respondent refusing benefit of a scheme for the treatment of occupational injury for a period when she was absent from work, from the 28th February, 2010 to the 25th November, 2010. Three earlier periods of absence had been certified as suitable for certification under the occupational injuries scheme and the applicant challenges the exclusion of the later period from that scheme.

Background facts

2. On the 26th December, 2005 the applicant was injured as a result of an assault perpetrated on her in the course of a riot which occurred in St. Patrick's Institution while she was on duty. She suffered quite a traumatic and violent assault when she found herself isolated from her colleagues and locked into a small area between the exit of the prison and the entrance to the yard. As a result of the attack she suffered injuries to her face, head, neck and body. It is the injury to her back that has given rise to these proceedings, and in summary the applicant complains that ongoing pain in her lumbar spine is a direct result of the incident and can properly be classified as an occupational injury. The respondent denies this causative connection, and argues that some of the conditions of which she complains and the treatments that she has received, are more properly attributable to a pre-existing condition.

3. The applicant was absent from work for a period from December 2005 immediately after the accident to June 2006, for a short period between August 2006 and September 2006 and then from the 19th January, 2007 to the 6th November, 2007, each of which period of absence was accepted by her employer as arising due to the injury caused to her in the assault, and each was certified by the first respondent as being an occupational injury.

These proceedings

4. By order of Peart J. made on the 2nd December, 2013 the applicant was given leave to apply for *certiorari* quashing the decisions of the first respondent made on the 25th April, 2013, the 30th May, 2013, and the 13th November, 2013 refusing her application for a certificate that her absence from February 2010 to November 2010 arose as a result of an occupational injury. Leave was also given to seek a declaration that the first respondent failed to determine the application for the certificate in accordance with law, that the decision was unreasonable and irrational, was made contrary to fair procedure and that the procedures employed were ultra vires the agreed occupational procedures established by various circulars issued by the second respondent.

5. Leave was given to seek judicial review on all of the grounds pleaded and because these run to 22 grounds in all, and overlap to a great degree, I will consider them as they arise in the course of this judgment.

The scheme

6. The application made by the applicant that her period of absence be recognised for the purposes of the occupational injuries scheme was made pursuant to Circular 6/1997, one of a series of circulars issued by the Department of Finance that govern entitlement and procedures in this area. The relevant provision of the Circular states as follows:-

> *"If the Personal Officer is satisfied that a period of sick leave arose as a result of an occupational injury or disease, and that the injury or disease was not due to negligence on the part of the officer, that period will not normally be combined with a period of absence due to ordinary illness so as to adversely affect sick pay entitlement…"*

7. The purpose of the scheme, as set out in the elaborate circulars that have issued from time by the Minister for Finance, is to permit the management of sick leave in the civil service, for the purpose of *inter alia* pay, promotion and pension entitlements, such that a period of absence certified as having arisen from an occupational injury is discounted when calculating the total amount of sick leave that a person has had in a given relevant period

The procedures

8. The applicant argues that the scheme for the certification of occupational injury requires that the decision to award a certificate must be made by the personnel officer, and that in doing so he or she must consider all reports and other material before him or her. That proposition cannot be controversial, and the scheme clearly sets out the role as being one for the personnel officer. It scarcely bears repeating that the personnel officer will not have any sufficient medical expertise to determine the question of whether a particular injury or sequelae therefrom arises as a result of an incident or injury that occurred during the applicant's employment, and the replying affidavit , sworn on the 18th February, 2014, of Sean O'Sullivan, an assistant principal officer in the Staff and Corporate Services Directorate (formerly the HR Division) of the Irish Prison Service, the first respondent, avers that the decision to refuse to certify the applicant's absence was "based on" the advice received from the Chief Medical Officer (the "CMO").

The role of the Chief Medical Officer

9. The affidavit of O'Sullivan explains the process for the determination of applications for the certification of occupational injury on application by an employee of the Prison Service. He states that the majority of applications require the assistance and advice of the CMO who provides a service to the public service in general.

10. The Office of the CMO has a number of functions, explained in an affidavit of Dr. Thomas Donnelly sworn on the 17th February, 2014, a member of that Office. The Office carries out a number of functions including the function of advising on applications for certification of occupational injuries. It employs a number of doctors and other medically trained personnel, and Dr. Donnelly himself was a specialist in occupational medicine. The CMO conducts what is described as "face to face assessments" of applicants, reviews their medical history, carries out medical examination of employees and forms a conclusion on the basis of clinical assessment and documentation whether an injury alleged to render an employee unfit for work was caused in the course of the employee's duty. The focus, having regard to the purpose of the assessment, is to ascertain whether an applicant has an inability to work, whether there is some functional limitation on his or her ability and whether such inability or limitation arises from an injury at work.

11. Dr. Donnelly in his affidavit describes the actual process by which he engaged with the application by the applicant. He had the benefit of her own medical reports, in particular the reports of her general practitioner, her consultant neurologist and her consultant neurosurgeon, as well as a long report entitled "The functional capacity evaluation prepared by a Chartered Physiotherapist in Occupational Health and Ergonomics". He says he had "attendances" with the applicant, although he does not say that he clinically examined the applicant, but he did have the substantial evidence of her medical advisors and assessors containing their description of clinical tests, X-rays and an MRI scan, all of which supported the applicant's application for occupational injury.

12. The primary focus of the application in respect of which this judicial review arises is the event that occurred in August 2010 which resulted in a disc prolapse as a result of which the applicant was obliged to have surgery, and which has caused her to be absent from work for a significant time. Earlier absences from work had been certified without difficulty as arising from the assault which occurred in the prison in December of 2005, but there can be no doubt that the focus of the assessment in regard to the 2010 medical condition of the applicant was primarily the causative connection between that injury in 2005 and the conditions of which she complained. Dr. Donnelly swears in his affidavit that he came to the conclusion that the lower back injury or incident which occurred in 2010 could not be attributed to the injury sustained on the 26th December 2005. Importantly, he identifies the source of this view, being his review of the file and his attendances with her, the history of the applicant's condition and her attendances with various colleagues in the Office of the CMO. He explains in particular the early characterisation of the applicant's injury as being to her scalp, left hand finger and cervical spine. He noted that the first reference in a medical report, or the first noting by a treating doctor, that lower back pain had developed was on the 18th April, 2006. The consultant neurosurgeon had put the time of the development of the lower back pain at five weeks after the incident, but also referred to the fact that MRI analysis had identified significant degenerative changes which pre-dated the incident, although he took the view that the disc prolapse arose as a result of the incident at work and that the degenerative changes progressed following an operation to deal with the prolapse.

13. Dr. Donnelly takes the view that an acute disc prolapse could not have been caused by an injury which the applicant herself describes as arising from an assault on her upper body, and that the prolapse and therefore that the subsequent pain and disability did not flow from the injury at work.

Does judicial review lie?

14. Counsel for the respondent seeks to characterise the decision of the deciding body as one which is outside the ambit of judicial review. The applicant sought certification of her injury for the purpose of an occupational injury scheme, and the result of the process had significant consequences for her income, pension rights, and her claim for compensation in the Criminal Injuries Compensation Board. Her claim is one made as of right, albeit she may not be found to have a right to have her absence characterised as arising form an occupational injury. In *Mallak v. Minister for Justice Equality and Law Reform* Fennelly J, noted that Costello J in *Pok Sun Shum v. Ireland* [1986] I.L.R.M. 593 accepted that a person may still be entitled to apply for judicial review in respect of failure of due process in regard to a claim for a privilege and made the following dicta:-

> *"The mere fact that a person in the position of the applicant is seeking access to a privilege does not affect the extent of his right to have his application considered in accordance with law or to apply to the courts for redress."*

15. I reject the argument that the applicant is not entitled to seek judicial review doing so following expressly the reasoning in particular of Fennelly J. in *Mallak v. Minister for Justice Equality and Law Reform* that if a privilege is to be conferred by an administrative decision of an organ of State, that organ of State must act fairly, within constitutional parameters and those arising from the rule of law, the various Conventions and the Irish Human Rights Act, 2003 and of course the Constitution itself. Judicial review lies to challenge any decision made by an administrative body when that administrative body is deciding on whether a particular applicant is entitled to a privilege under a scheme of which that applicant is a part.

16. The respondent further argues that if judicial review does lie, that reasons were not required to be given, as argued by the applicant. I turn now to consider this argument. It is important to stress that this case is not one where my function is to consider the extent of the injuries suffered by the plaintiff, and to come to a conclusion whether these were caused by or contributed to by the assault which took place while she was at work. My function is limited by the test of judicial review well established in the courts from which the following can be gleaned.

Was there a duty to give reasons?

17. The applicant first urges upon me the proposition that the deciding body was obliged to give reasons. Whether this is a stand-alone right is a matter of some controversy in the case law and the clearest statement of principle is found in the *dicta* of Barron J. in *Manning v. Shackleton* [1994] 1IR 397 where he said at p. 403, having reviewed the authorities:-

> *"These cases indicate that the giving of reasons by a person or body required to act judicially may be compelled by this court when such reasons are necessary to determine whether such a power has been validly exercised. It is not an essential obligation and arises only when required to prevent an injustice or to ensure that not only has justice been done but is seen to have been done."*

18. This *dicta* suggests that there is no stand-alone duty on an administrative body to give reasons for its decision, but rather that the duty to give reasons flows from the more general obligation on a deciding body to act reasonably, and more importantly to be seen to act reasonably. The giving of reasons makes it easier for a person aggrieved by a decision to understand the nature of the decision, and whether an appeal might lie. Without reasons, a decision may have the appearance of being irrational, or may sometimes be a decision which is difficult to understand, merely on account of the fact that the reasoning process was not explained. Fennelly J. explained the link and the first principles of fairness at para. 68 of the judgment in *Mallak v. Minister for Justice Equality and Law Reform* as follows:-

> *"In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded."*

19. If judicial review lies then the duty to give reasons is part of and flows from the right of fairness in the decision making process. This right flows from the imperative of the rule of law and the obligation on the State to act constitutionally and in accordance with law, but more concretely because a person must know the reasons for a decision before being in a position to judge whether an appeal or judicial review might lie or might succeed. The duty to give reasons is part of the process, or the landscape, which imports various obligations that protect the right of the citizen under the rule of law in that the duty to give reasons itself imports a concrete constraint on the State or administrative body.

20. I do not find it helpful for the purposes of this case to resolve the question of whether a duty on the part of an administrative body to give reasons always arises, because the respondent has given some reasons for its decision, albeit the applicant is not satisfied that the reasoning process and the reasons are fully explained. The CMO stated a general view as to causation but it is not correct to say that he stated the view baldly and without some explanation. His reason was stated in general terms, namely that the medical condition which caused the prolapse pre-existed the injury and could not for that reason be attributed to the assault. He did not go into a detailed analysis of the various elements of the injury, nor explain the relative weight given to the different reports and other evidence before him. This particular reasoning process, and the explanation for the reasons, arose as a result of the obligation of confidentiality, and an obligation which was imposed upon the CMO *inter alia* as a result of the understanding reached with Ms Nolan before she submitted to CMO examination and assessment

21. The matter of doctor/patient confidentiality arises for comment in this context.

Confidentiality
22. Dr. Donnelly in his affidavit explains the nexus of confidentiality he states arises as a result of the doctor/patient relationship, and his particular obligation of confidentiality as a doctor arising under his professional code of practice. He exhibits a consent form used in the civil service generally for the purpose of ensuring confidentiality when a member of staff attends at the Office of the CMO. The applicant signed this document on the 31st May, 2012, the 18th September, 2007 and the 1st November, 2010 and two later forms contained the following statement:-

> *"I Linda Nolan understand that I am attending the Civil Service Occupational Health Department at the Office of the Chief Medical Officer for the Civil Service at the request of my personnel section to confidentiality discuss my medical condition in relation to work.*
>
> *I agree to my Department/Office being advised of the outcome of the review and being issued by a report on my fitness to work. I understand that no confidential medical details will be discussed in this report without my prior consent.*
>
> *If the CSOHD needs to refer my case to an outside health professional, I agree to any submitted medical reports being confidentiality forwarded to them."*

That part of the form is then signed and continues as follows:-

> *"I also consent to CMO Office medical staff contacting my treating Doctor (s) to confidentially discuss my case if they feel this would be helpful."*

That part of the form is also signed.

23. The 2007 form was less fulsome but also contained a provision for the retention of confidentiality, and contained the following important statement:-

> *"I agree to my Department being advised of the outcome of the interview. I understand that no confidential medical details of my condition will be contained in the report without my consent."*

24. Matters of confidentiality as between a treating physician or a physician undertaking a medical examination for the purposes of carrying out an assessment, or evaluating or commenting on another assessment, are important to the doctor/patient relationship and equally have importance in the context of the employer/employee relationship. Certain confidential information will become available to a doctor which a member of staff would not wish to have transmitted to her employer and that is understandable. Confidentiality is mandated as a matter of contract between the applicant and her employer, and protected by the process at the Office of the CMO, and is one in respect of which the applicant herself sought assurances as is clear from the consent forms that she signed. Put simply she expected and demanded that confidential medical and personal information that would have come to light in the course of the investigation by the CMO would not be transmitted back to her direct employer.

25. Dr. Donnelly explains the system as one of "Chinese walls", and the contractually mandated confidentiality imported a number of constraints as he explains in a letter of the 11th November, 2013 to Michael Stenson in Human Resources at the Irish Prison Service, and I quote in full from the relevant extract as it appears in the letter:-

> *"My comments are restricted by my duty of medical confidentiality to Ms Nolan as is all of my correspondence to you in my role as occupational physician, it is not therefore possible to provide you with back up evidence for my decisions and advise with detailed medical information, rather my advise is usually restricted to conclusions as to fitness to work, unfitness or fitness to work with accommodations. In this case Ms Nolan's solicitor has provided you with some detailed extracts which I would not otherwise be able to provide you with unless Ms Nolan gives her consent."*

26. The complaint of the applicant that the process lacks transparency, and that full and detailed reasons for the decision of the respondent to refuse her the certificate for the relevant period, must be seen in that context.

27. Ms Nolan makes the point with regard to the issue of medical confidentiality that at no point during the process leading up to her application for judicial review was the question of confidentiality raised, and she said this in particular in the context of correspondence that occurred between her solicitors where an explanation was sought as to the reasons for the rejection of her

application. She said that if medical confidentiality were a "genuine issue", that her consent ought to have been sought for the release of her medical data in order that reasons could be provided to her, or that the CMO could have sent his reasons to her directly. I cannot see that the release of medical information to the personnel officer would have advanced the application nor indeed that the personnel officer would have been in a position to make any judgement on the issue of causation, he himself not having a medical background.

28. I accept that the CMO could have sent a statement of his reasons directly to Ms Nolan, but that brings me back to the question of what class of reasons, or what level of detail is required in order for an aggrieved applicant to understand the reasoning process which leads to the rejection of his or her application. The CMO has stated a reason, namely that he found no causative link between the 2010 back spasm and the injury suffered in 2005, and the focus of his report was the fact that the early complaints were primarily related to the applicant's upper back and to an understandable element of post traumatic stress following a very traumatic incident at work. Thus expressed, the reason was intelligible and sufficient to enable the applicant to assess its merits and whether she might consider an appeal from the decision, and was sufficient to meet the requirements to give reasons as outlined above.

Duty to act reasonably

29. I now turn to consider the argument that the deciding body failed to act reasonably. This imports certain individual and separate obligations, and a duty to act on what one might call credible reasons, as explained by the Supreme Court in *O'Keeffe v. An Bord Pleanala* [1993] 1IR 39, as a duty not to act irrationally, and not to come to a decision wholly unsupported by the facts, and may be described as a duty on a deciding body to engage fully with the facts. This imports certain elements: a duty to consider the evidence, to weigh that evidence and if necessary to explain the weight given to certain elements of the evidence, a duty to hear all evidence that is proffered, and in certain circumstances an obligation to require, or at least permit, further evidence when a conflict of fact arises. This is particularly apposite in the instant case as the issue between the parties is whether the CMO has properly weighed the facts adduced by the applicant in support of her contention that her lower back injury was caused or contributed to by the assault. Equally, the requirement to engage with the facts can import not merely an obligation to weigh those facts and to properly interrogate those facts, but may also import certain obligations of fair process, including for example in certain cases that an oral hearing is mandated to resolve a conflict of fact. This particular factor is apparent in certain decisions of these courts arising from decisions of administrative bodies such as the Financial Services Ombudsman and in *Lyons v. Financial Services Ombudsman* [2011] IEHC 454, Hogan J. explained the requirement to hold an oral hearing as arising in that case as a result of a clear conflict of evidence which could not be resolved other than on a true consideration of the facts after hearing evidence on oath.

30. My function in the judicial review is to look at the process as a whole and I have already outlined a general view that there is no stand-alone right to reasons in the administrative decision-making process, but that the right to be given reasons is an element of and arises from the overriding obligation of fairness. It would patently have been unfair if the CMO had come to a decision and relayed this to the personnel officer, without reading or weighing up the evidence adduced by the applicant and without a personal consultation or consultations with her to more fully understand and assess her medical condition. That is not what happened and there can be no complaint about the process engaged in by the CMO who had the full cooperation of Ms Nolan, which cooperation was circumscribed at all times by the obligation of confidentiality arising from the nexus which I have explained above.

31. No direct complaint is made that the decision of the CMO itself is flawed whether for lack of a proper engagement with the facts or for lack of due process. It seems to me having read the documentation exhibited that no such complaint could be made, and that the evidence adduced to the CMO over the length of the process was primarily the evidence presented by Ms Nolan herself, through her solicitors and personally. I consider that ample evidence and indeed submissions and conclusions in support of Ms Nolan's application with regard to the 2010 absences had been made on her behalf, by her own medical advisors and treating doctors who were supportive of her application and in the argument by her solicitor who urged that a direct causative link could be made. I consider that Ms Nolan was aware that the issue of causation was a live one and the doctor's reports and other documentation that she furnished with her application had the intention of establishing that connection. In those circumstances I do not consider that the CMO had an obligation to address specifically the question of causation with Ms Nolan in the course of consultation with her, and indeed the question of causation was at the heart of the matter, it was precisely the question that he had to consider, and precisely the question that Ms Nolan had addressed in the documentation that was submitted. The causative connection between the 2005 incident and the 2010 disc prolapse and subsequent absence from work was precisely the basis on which she made application for certification in regard to the absences from 2010 onwards.

32. I do not consider that there is any irrationality or failure to properly engage with the facts and evidence apparent from the mere fact that the personnel officer relied on an opinion from a medically trained person or persons, provided that these persons do have all the information purported to be relevant. It can scarcely be doubted, having regard to the excellent and careful legal representation of which the applicant had the benefit during the process, that such was before the CMO.

33. It is important in that context to remember that a considerable amount of detailed correspondence had been sent on the applicant's part by her solicitors and that correspondence pointed to the relevant factual nexus and cogently argued a causative connection between the 2005 assault and the 2010 acute episode. I can find no gap in the correspondence and no gap in documentation which would suggest that the CMO ought to have taken the view that the documentation was incomplete or that he ought to have sought further documentation or argument. The applicant was well represented by her solicitors.

34. To correctly look at the decision-making process one must not fail to have regard to what question was precisely being asked of the deciding body. The question was essentially a question of medical causation, one that could only be answered with the assistance of a medical expert or experts. The reason for the refusal to certify the absence in 2010 must be seen in this context, and it must have been, and was correctly in my view, identified as being one arrived at based on the medical view of causation. The question of whether a decision is rational or whether the decision maker engaged with the facts must depend on the facts with which engagement is required and if those facts require expert input, understanding and analysis, then that input and analysis is part of a properly conducted reasoning process.

35. I do not accept the argument of the applicant that the decision arrived at by the personnel officer was irrational. It was based, and in my was required as a matter of good reasoning to be based, on the analysis of the CMO and on the view of the CMO that causative connection could not be made. Professional opinion and judgement was required in order to fully inform the decision. Because the decision required to be made was primarily, if not wholly, one of causation, and was a medical question, the proper way to engage with that evidence was to take a medical opinion and that medical opinion was in those circumstances largely determinative of the question. There might, for example, have been other issues of fact upon which the personnel officer had to adjudicate, such as whether the incident in the prison had happened in December 2005 as asserted, but that was a matter which had long since been resolved in the applicant's favour and which had lead to certification of previous periods of absence.

36. The decision made on the 25th April, 2013 was one which has to be further seen in the context of earlier determinations in regard

to earlier periods of absence and the applicant argues that the fact that earlier periods had been certified ought to have expressly been reconciled with the refusal to certify the later period. I accept that the applicant is correct in this assertion but do not accept the argument that there was no coherent or rational basis on which the treatment of the respective periods could have been different. It was precisely the time lapse between the incident in 2005 and the acute onset of a disc prolapse in 2010 that gave rise to the need to consider the question of causation, and that question was dealt with adequately in my view, and adequately explained.

Non delegation of power?

37. The applicant also makes the argument that the personnel officer, the person charged with the decision making power and duty, had delegated his power by relying on the advice of the CMO "as to the medical facts of any case", as stated in the replying affidavit of Mr O' Sullivan. It is argued by the applicant that the decision making process was tainted and I am urged to follow the judgment of Barrett J. in *B. v. Minister for Social Protection* [2014] IEHC 186 where he remitted for further consideration the decision of the respondent which he held had arisen as a result of a general policy to defer to the opinion of a medical assessor.

38. I do not find the judgment of Barrett J. helpful in the analysis of this case, primarily because it seems to me that the evidence of Mr O' Sullivan is not that the personnel officer always makes a decision in conformity with or following the advice of the CMO, but rather that when "medical facts" are required to be considered in the mix, that those medical facts are determined on the advice of a qualified doctor. There is no evidence before me to suggest that the deciding officer had a policy, or that a policy could be said to exist as a result of the statistical evidence relating to outcomes of such applications, and I consider that there is adequate evidence before me to suggest that the personnel officer did require medical assistance in this case, and did correctly take it on board. The fact that the question was almost wholly medical was incidental, and did not flow from a policy decision made by the respondent that all applications for certificates would be decided on the basis of medical evidence, or indeed that the applicant's application would be so decided.

39. I do not read the affidavits submitted by the first respondent to amount to an assertion that the only matter that will determine the application for a certification of occupational injury is the view of the CMO, but in this particular case as there was no doubt that the applicant was injured, that she was injured at work, or that she had had periods of absence due to that injury at work, the question that arose with regard to the absence in 2010 was a medical question as to whether her injury which presented in an acute form some five years after the accident was and could be causatively linked to the injury at work.

40. The affidavit evidence of the respondent avers to the fact that the refusal was "as a result of the advice" of the CMO, and was "always based" on that medical evidence. This latter phrase appears at paragraph 9 of the replying affidavit of Mr O' Sullivan. I am not quite sure what Mr O'Sullivan means to say, save that he does in a later paragraph say that the decision was "based on the advice" received from the CMO. The use of the word "always" in the replying affidavit does not it seems to me suggest a policy, but rather perhaps an infelicitous phraseology and throughout the affidavit what Mr O'Sullivan asserts is that the decision of his Office was based on the CMO's advice. It could not have been otherwise, the CMO was an essential part in the process of understanding and judging the application, the decision was not a rubber stamping but was based on that advice and in my view that was proper both procedurally and as a matter of good reason.

41. The personnel officer had no medical expertise on which to base a view. The question was a question which was wholly medical, and came down to the net question of causation as I have described above. Because the question was a medical question and I do not consider it to be a derogation of the obligations of the personnel officer, the body ultimately deciding the application, to rely on the medical view of causation expressed by the CMO in correspondence and reports. The medical evidence had to be weighed by a person sufficiently qualified to understand, assess and give an informed and professional view on the question of causation. The reliance by the respondent on the CMO's view was rational and necessary. Whether the reliance was exclusive, to the extent that it blinkered the decision making process, is not in my view apparent, and the expression used throughout by Mr O'Sullivan was that the decision was "based on" the CMO's view, rather than an assertion that the decision was made by the CMO. It could scarcely have been otherwise

42. This is the structure with which Ms Nolan engaged and to my mind it was a structure well understood by her, and one which is rational in the circumstances. An employer has to have some system of dealing with an application for the characterisation of absences from work, and as a matter of law and good practice the requirement on the State to have such a practice can be no more than a requirement that the system be rational, based on a balancing of the rights of the respective parties, and sufficiently understood to enable an applicant to furnish and submit for consideration all documentation and other evidence proposed as relevant.

43. Accordingly, I reject the argument made by counsel for the applicant that the personnel officer ought to have himself considered the medical reports and made a judgement himself on the primary material. That primary material was almost wholly, medical and the scheme does not envisage, nor does it in my view require, that the person who makes the decision be medically trained. To consider otherwise would involve the first respondent being required to employ in his Personnel or HR division medically trained staff with sufficient degree of knowledge and expertise in the area of occupational medicine akin to that of a physician or to consultant level, to understand and evaluate medical reports. This is not a requirement of due process, it would be unduly burdensome and could in fact itself lead to an argument that the Personnel Office ought not to see medically sensitive or confidential documentation.

The appeal and review process

44. The decision at first instance was communicated to the applicant by letter dated the 25th April, 2013 and she wrote on the 7th May, 2013 asking whether she had a right to appeal the decision, and how she might process an appeal if such were available. She heard nothing. This letter was treated by the first respondent as an actual appeal and by letter of the 30th May, 2013 she received notification from the then Director of Human Resources saying that he had "reviewed her case and documentation associated with the application and which upheld the original decision, described by him as 'based on' advices received from the Chief Medical Officer."

45. No documentation was submitted by Ms Nolan at the appeals process, and indeed the appeals process did not involve any new information at all. She was not given an opportunity to even know that the process was in being.

46. Ms Nolan was understandably concerned that she had not been permitted to take part in this appellate process, and her solicitor on her behalf wrote a letter of the 14th June, 2013 stating that she wished to challenge the decision and asking for advice on any further appeal mechanism available. The reply was in the negative and contained the following statement:-

> *"Unless new information becomes available, that was not furnished, either in the first instance or at the appeal stage, then it is considered that the appeal has concluded and the matter is closed."*

47. Her solicitors then sent a seven page letter of the 12th August, 2013 setting out in full detail not merely the extracts from

medical reports and conclusions argued as relevant to the factual matter to be resolved, but also the legal basis on which it was suggested that the decision of the 30th May, 2013 be set aside. The letter did achieve the result sought and an email followed shortly thereafter on the 23rd August, 2013 from the HR Department, when the application for a further consideration was acceded to and where it was proposed to refer the matter to the CMO "for further medical advices". It is of importance to note that her solicitor, Mr Keane, was asked to confirm that all, and the word 'all' was emphasized in bold print, the information that he wished to be considered by the CMO and the Irish Prison Service had been provided, and left open the possibility of confidential information being provided directly to the CMO.

48. The correspondence that ensued for a number of days following this email was directed by Mr Keane to his concern that time might run for the bringing of a judicial review and he sought confirmation that the decision of the 30th May, 2013 be withdrawn. This seems to have been resolved to his satisfaction because by letter of the 30th September, 2013 he noted that the first respondent "will now make a fresh decision on Ms Nolan's application" and asked for an assurance that all documentation had been referred to the CMO for his advices. A copy of a report from a physiotherapist/occupational therapist was added to the documentation. Mr Keane noted that, as he put it, "the final decision in this matter rests with the Irish Prison Service".

49. The first respondent, while it did not agree to withdraw the decision of the 30th May, 2013, confirmed that it was under review and this process was impliedly accepted by the applicant as sufficient to give her protection from any argument of delay or that she was out of time for bringing a judicial review. No argument of delay has been raised before me in the case.

50. The consequence of this it seems to me is that while the applicant seeks to challenge all three decisions, that of the 25th April, 2013, the 30th May, 2013 and the decision on review of the 13th November, 2013, the judicial review ought properly be focused on the last decision, and I say this because it seems to me that Ms Nolan did accept the review process could proceed and submitted what she presented as adequate and fulsome documentation for the purposes of that review. Ms Nolan submitted to the process of review, and the review was conducted with voluminous documentation reports and correspondence to the extent that it could not be said that there was insufficient information or documentation on which a decision could be made.

51. I can see no failure in this part of the process in that the respondent did permit Mr Keane to make substantial submissions and to submit documentation to the review body. There was thus no failure to give an opportunity to be heard and to submit the documentation the applicant regarded as relevant. I have more difficulty however with the proposition that the process was fair in another way, in that the review was carried out by the same body or person that had heard the decision at fist instance.

52. The process of appeal or review is opaque to say the least and this is borne out by the correspondence from Ms Nolan and her solicitor which on two occasions asked for clarification as to what process of appeal or review existed. Nonetheless a review did take place and it seems to me that it had to accord with due process and fair procedures. There is no dispute between the parties that the review was done by a person in the Office of the CMO, maybe even by the same CMO who initially decided the matter. The review then was done at the same level of the structure as the decision at first instance. This cannot amount to a correct review process on any understanding of a review. I read the correspondence as containing an agreement to conduct a review and occurred in August 2013 when it was suggested that all relevant documentation and the first respondent knew from that documentation that one key question remained, and that was the question of medical causation. In those circumstances to remit the matter for review to a body or person at the same level in the structure was not a review either of the decision or of the decision making process at first instance.

53. Kelly J in *Prendiville v. The Medical Council & Ors* [2008] 3 I.R. 12 states at para. 123:-

> *"It was inappropriate that legal advice be tendered by the very officer who presented the case against the applicants before the Fitness to Practice Committee. I cannot see how such advice can be seen to be objective. I am not saying that the advice was in fact biased but there is the perception of bias arising from the role played by the advice giver when the cases where before the Fitness to Practice Committee."*

54. Accordingly and because of the possible perception of bias, and because the review ought to be seen to be sufficiently robust, I accept the argument that the review is flawed in process and once a review process is conducted, and once it is conducted formally as the one here was purported to be conducted, it must comply with natural and constitutional justice and must be conducted in a way that enables the person submitting to review to know that the review is sufficiently independent to protect his or her interests. I am not satisfied that the process engaged in by the first respondent for the review of the decision taken at first instance in regard to Ms Nolan's application was sufficiently robust and sufficiently independent of the deciding body to either satisfy the requirement that the process give the appearance of independence, or to actually be independent in the circumstances.

55. The relevant circular for the operation of the critical illness protocol within the public service provides for, if necessary, the appeal or review of a medical decision by a panel of specialist occupational physicians. No such provision exists in the circulars governing the certification of occupational injury. The fact that other processes, appeals and reviews in public service entitlements are capable of being the subject of a review by a panel would suggest that certain such decisions warrant a review by a person other than a person with the same functions and personnel as the deciding body at first instance.

56. It is not for me to say how fairness is to be achieved in the review but I am not satisfied that the review process was robust nor am I satisfied that it was in accordance with natural justice. An ample opportunity was given to Ms Nolan to submit documentation for review, but no adequate process was put in place to ensure that the review was carried out by a person who objectively speaking could be perceived to be independent, or who subjectively speaking had a *de facto* independence from the deciding body.

The true test?

57. Another factor came to have some significance through the correspondence in August 2013, and that is whether the deciding body at first instance was correct to apply the test that it did, namely that all of the symptoms of the applicant were attributable to the incident in December 2005.

58. One question remains unresolved, and that is the question not addressed either by the CMO or by the personnel officer, namely that of the true test that ought to be applied and whether the injury had to entirely flow from the incident at work, or whether some degree of causation was all that the system required.

Decision

59. Accordingly, I make an order for certiorari quashing the decision of the first respondent of 13th November, 2013, on the following grounds:

(i) The review process does not comply with principles of natural justice as it was carried out by a person at the same level in the structure as the person or body which made the decision at first instance.

(ii) The question before the deciding body was clear, it was a question of causation, and a proper characterisation of that question, whether the causation had to be total or partial, was one that had to be considered on review and was a live one for determination.

60. I make an order remitting the matter for further consideration by an independent body or persons and remitting for consideration also the question of whether all or some of the injuries complained of were required to flow from the incident at work in order to achieve certification.