

## THE HIGH COURT

[RECORD NO. 2018/831 JR]

BETWEEN

JAMES BEN BUCKLEY

APPLICANT

AND

IRISH PRISON SERVICE, MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE  
ATTORNEY GENERAL

RESPONDENTS

**JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 3rd day of March, 2020****Nature of the Case**

1. In this case the applicant challenges by way of judicial review a decision of the Irish Prison Service ("the IPS") dated 24th August, 2018 to transfer him from the Operational Support Group ("OSG") in Cork to the Prison Service Escort Corps ("PSEC"). The applicant had not applied for the transfer, did not wish to be transferred, and was given short notice (seven days) of the transfer. The applicant took early retirement from the IPS after and as a consequence of the transfer. He claims that the decision to transfer him was taken in breach of principles of natural and constitutional justice. It is important to note this; his case is based upon a claim of constitutional (and not merely employment law) entitlement. A central part of the respondents' opposition to the case was mootness; it was submitted that because the applicant had retired, the issue of whether the transfer was valid or not was no longer a live issue. The respondent also pleaded that the transfer of the applicant within the prison service was expressly permitted by the terms of his employment contract and made a number of submissions arising out of that fact.
2. This case was heard at the same time as the cases of applicants Mr. McDonald and Mr. Dowling, in respect of which I am also giving judgments today. Mr. Buckley's case is different from the other two in some important aspects; first, he was in fact transferred (unlike Mr. McDonald whose transfer decision was never implemented), and secondly, he was never the subject of any allegation of bullying (unlike Mr. McDonald and Mr. Dowling). Accordingly, the Dignity at Work Policy, which sets out procedures to be followed in the event of an allegation of bullying or harassment and which is relevant in the other two cases, simply does not arise in this case.
3. A striking feature of the case is that the reason for the transfer of the applicant on 24th August, 2018 was in dispute between the parties. The respondent maintained that the transfer was for ordinary operational purposes, namely that an officer of the applicant's rank was required in the position to which he was assigned in the PSEC, because of increases in the number of prisoners requiring transport that had taken place over a number of years. The applicant, however, did not accept this explanation and, in a series of affidavits, put forward various alternative theories as to why he had been transferred. Common to all of them was his view that the motivation for his transfer was not one of simple operational need and that the true purpose (whatever it was) had been concealed from him and from the Court, and further, that the transfer was in substance or in effect a sanction. In some of his affidavits, he maintained that there was an inextricable link

between his transfer and the events which had given rise to Mr. McDonald's transfer, and this contention was vigorously pursued at the hearing before me.

4. The factual dispute about the reason for the transfer is interlinked with legal questions about the role of this Court in reviewing the circumstances of the transfer. Accordingly, I will set out the evidence in the case in some detail below before addressing the legal issues.

#### **The Reliefs Sought and the Statement of Opposition**

5. When the proceedings were instituted, the reliefs sought included an injunction staying the transfer of the applicant and an order of *certiorari* quashing the transfer decision. However, as the applicant has since retired from the IPS, those particular reliefs are now clearly moot.
6. The applicant also sought the following reliefs and the applicant's counsel disputes that any mootness attaches to them. These are:
  - A declaration that the order of transfer of 24th August, 2018 was *ultra vires* the powers of the Personnel Officer of the respondents in circumstances where they failed to notify him in advance of the transfer and afford him an opportunity to make submissions in relation to and/or in opposition to the said transfer.
  - A declaration that they failed to comply with the requirements and procedures of the Dignity at Work policy in circumstances where the applicant had formally notified the respondents of his objection to the transfer.
  - A declaration that the respondents were in breach of his right to fair procedures, natural and constitutional justice.
  - An order for damages for abuse of process, breach of duty, breach of Dignity at Work policy, negligence, inconvenience and loss.
7. The references to the Dignity at Work Policy are puzzling in view of the fact that no allegations were made against the applicant and no procedure under the Policy was set in train.
8. In the Statement of Grounds, the applicant simply set out a narrative of the events in question and then asserted that the respondents were in breach of his right to natural and constitutional justice; that the order of transfer was an abuse of process; that the respondents had knowingly and recklessly damaged the applicant's reputation, integrity and credibility pending a genuine and thorough investigation of "the complaints"; and that he had suffered loss and damage and would continue to suffer loss and damage unless protected by the Court. Again, in circumstances where no complaints had been made against the applicant, the reference to "complaints" is puzzling.
9. In the Statement of Opposition, the respondents raised a preliminary objection on grounds of mootness by reason of the fact that the applicant had retired from the Irish

Prison Service. Another significant plea was that the IPS had a contractual entitlement to transfer the applicant and it was denied that the respondents were in breach of his rights to natural and constitutional justice and/or that there had been an abuse of process. They also denied that they had damaged the applicant's reputation, integrity and credibility "pending a genuine and thorough investigation" as alleged and pointed out that no complaints had ever been made in respect of the applicant under the Dignity at Work policy nor were any investigations pending at the time of his transfer.

### **The Mootness Issue**

10. The first matter to be addressed is the question of mootness, which was raised on behalf of the respondents as a preliminary legal issue.
11. It was submitted on behalf of the respondents that there was no longer any live issue in dispute because the applicant was no longer working within the IPS, having retired, and therefore the issue of transfer was of historical interest only. The parties referred the Court to the usual authorities in relation to mootness, including *PV v. The Courts Service* [2009] 4 IR 264, *Goold v. Collins* [2004] IEHC 38, *Lofinmakin (A Minor) & Ors v. Minister for Justice & Ors* [2013] IESC 49 and *Godsil v. Ireland* [2015] IESC 103.
12. In contrast to the decision I have reached in relation to the McDonald case, I am not prepared to dismiss the case of Mr. Buckley on grounds of mootness. This is not a case where the transfer never happened, like Mr. McDonald's case. Moreover, there was a causal connection between the applicant's retirement and the transfer decision which is alleged to have been invalid or unlawful. The position would no doubt be different if the applicant's retirement had little or nothing to do with the impugned transfer, but what seems to me to be important is that it appears undisputed that the transfer was precisely the cause of his resignation. If a public body makes an otherwise judicially reviewable decision in respect of an employee which causes that person to leave his or her employment, it seems to me that it could not invariably be said that the case is moot. This may err slightly on the side of a generous interpretation of when a decision still has some 'live' content such that it is not moot but I am prepared to err on this side of the line rather than dismissing the applicant *in limine*, and proceed to consider other issues in the case.

### **The Evidence in the Case**

13. Eleven affidavits were filed in this case and I do not propose to deal with every point in those affidavits, but I do hope to capture the essentials in the following narrative. As noted earlier, a striking feature of the case is that the reason for the transfer of the applicant on 24th August, 2018 was in dispute between the parties. It will be seen from the description below that the respondents consistently maintained that the applicant was transferred for operational reasons, whereas the applicant disputed this and put forward a number of alternative theories as to why he was transferred.

#### *The applicant's employment history*

14. The applicant joined the IPS in 1986. He initially worked at Spike Island, Cork and was subsequently promoted to Assistant Chief Officer in 1993. In 2000, he requested and

obtained a transfer to Cork Prison. In 2005, he was promoted to Chief Officer 1 at Arbour Hill Prison in Dublin. In 2008, he was promoted to Chief Officer 1 in the OSG (Operational Support Group) at St. Patrick's Prison in Dublin. The OSG is a specialised task force requiring specialist training within the Irish Prison Service. It is responsible for carrying out sensitive and confidential activities for the purposes of gathering intelligence, disrupting gang activities and preventing the entry of contraband into prisons. In 2010, the applicant was transferred on request to Cork OSG with responsibility for Limerick, Portlaoise, Midlands, St. Patrick's, Mountjoy and Dóchas Prisons. In 2012, he was given additional responsibilities for Castlerea, Wheatfield and Cloverhill. Following a transformation process within the IPS, he became the operational manager for all sites with three Class 2 Chief Officers assigned on a regional basis. He remained at Cork physically with his post at the OSG headquarters in Dublin and travelled to all sites including Headquarters on a regular basis.

15. The applicant averred that he had served under four different Governors at the OSG and that he had maintained a good relationship with the Director General and all Directors. He said that he had engaged regularly with advising on parliamentary questions and reports to the Minister for Justice and to the press. He said that he had appeared on television on numerous occasions for the IPS and had represented the IPS in Europe at conferences. He said that he had given key evidence in many legal actions taken against the IPS by staff, prisoners and visitors. He said that he had been involved in multiple investigations relating to staff, visitors and prisoners and had been involved in many cases that led to convictions of staff. He said that he had also liaised directly with the Inspector of Prisons, particularly in relation to the allegations of recording of solicitors' phone calls to prisoners. He said that he liaised with An Garda Síochána on a weekly basis at Garda Headquarters.

*The applicant's first affidavit and the transfer decision*

16. In his first affidavit, the applicant averred that he had applied for a vacancy for Governor 1 of Operations in early summer 2018. He was not short-listed and, being dissatisfied with the shortlisting process, made a formal request for an internal review. He was informed in August 2010 that his overall score had been amended upwards but that he was still not qualified for invitation to interview. In his affidavit he gives details of further efforts he made to enquire about the shortlisting process including an application under the Freedom of Information Act, which he made on 8th August, 2018. He averred that he believed that his request in this regard (for review of the selection for interview and his request for freedom of information documentation) were inextricably intertwined with the decision to transfer him.

*The transfer decision of 24th August, 2018*

17. The applicant says that on 24th August, 2018, he was informed by email that a transfer order had been made transferring him from the OSG to the Prison Service Escort Corps ("PSEC"). The notification said as follows:

"This transfer has been actioned in the interests of insuring risks are reduced in the service delivery at the PSEC where a significant increase on the demand of the

service has been identified and in accordance with the exigencies and in the interest of the entire Prison Service. Please note that all allowances except Operational will be stopped automatically on the date of transfer. Effective Saturday 1st September 2018. Trevor Jordan, Personnel Officer, Human Resources Directorate.”

18. The applicant averred that no grade of Class 1 Chief Officer in the PSEC existed at the time of this communication. He said that if it did exist and was available, it would first be offered to all suitably qualified officers and if no officer wanted to avail of it, the position would be advertised, followed by interviews, but that none of this occurred in this instance.
19. The applicant says that he immediately emailed the Director of Human Resources, Mr. Don Culliton, on 24th August, 2018 as follows: -

“Was there some specific reason why this non-requested transfer was ordered. Have I done something wrong, is this a disciplinary transfer? I am surprised that a post I was not aware existed has been created and I am being forcibly transferred into it”.
20. He received a communication from Mr. Culliton to the effect that he was transferring his email to Mr. Trevor Jordan and he then received an email from Mr. Trevor Jordan on 27th August, 2018 stating:

“The rationale for this transfer has been set out in the letter of transfer which issued to you. I would also highlight that we have taken other additional measures in terms of the assignment of management resources to PSEC. I can confirm that this transfer has not arisen as a result of any disciplinary matter”.
21. The applicant said that he was not notified of any proposed transfer prior to the email nor was he afforded the opportunity to make submissions in relation to the transfer and that it came as a shock because this had never happened before. He also said that he was not aware of any study, request for survey information, discussion or otherwise in relation to a significant increase in the demand of the PSEC, nor was he aware of any identification of risks or of a requirement for the reductions of such risks. He says that as of the date he received the email (on 24th August, 2018) there was no vacant appointment for an officer of his rank and that the duties were of an administrative nature. He said that he believed that “such an unrequested transfer could be regarded as a demotion and a punishment”. The applicant averred that he believed “that it is quite rare in the Prison Service for officers to be transferred without their request”. He acknowledged that such a situation “can arise where the exigencies of the service provide for transfer, but this is rare in practice and usually of a temporary [nature] and always well flagged in advance”.
22. He said that after receiving the transfer order he immediately contacted the Governor of PSEC and was informed by that Governor that the first he knew of any such post was when he had seen the email of the applicant’s transfer.

23. The applicant said that he was extremely shocked, disturbed and upset by the transfer itself as well as the short notice of the date within which it was to take effect.
24. The applicant referred to the case of his colleague, Mr. McDonald, and stated that he was aware that an order of *certiorari* had been granted by the Court on 9th October, 2018 on the basis that Mr. McDonald had not been given an opportunity to make submissions in advance of a transfer decision.
25. The applicant said that "there is and would be widespread perception within the Prison Service that I had done something wrong" and that he had been approached by other officers and asked how he was, and that "I know by their queries and comments that my transfer is considered something unusual and that somehow I must be responsible for something happening within the Prison Service". He also said that he decided to retire and that the "main reason" for this decision was the manner in which he had been treated.
26. From an examination of the above, it can be seen that although the applicant was very clear in his expression of dismay at the transfer and the absence of prior consultation with him, he was not able to shed light on the reason for the transfer beyond speculating that it might have been something to do with his unsuccessful application for promotion and his raising of questions in relation to that.

*The evidence of Trevor Jordan in his affidavit of 25th October, 2018*

27. Mr. Trevor Jordan is Personnel Officer in the IPS and made his affidavits on behalf of the IPS. He referred to the following contractual provision in the applicant's employment contract:

"A successful candidate may be assigned to any prison or place of detention or to any other place attached to the Prison Service by direction of the Minister for Justice and is liable to transfer from time to time according to the requirements of the service".
28. Mr. Jordan said that he believed that the IPS was entitled to transfer staff between prisons and between different units within the IPS. He said that "as a matter of custom and practice", the IPS had transferred staff between prisons and within units of the IPS on a regular basis. He said that transfers could be effected either by an application being made by an individual prison officer to be transferred pursuant to a protocol agreed between the IPS and the Prison Officers Association, or by the exercise of the IPS of its entitlement to transfer staff in accordance with the terms and conditions of their employment. He referred to the written protocol (described earlier in this judgment) in respect of transfers but averred that this applied only to voluntary transfers and did not limit the contractual entitlement of the IPS to transfer staff in accordance with the needs of the service.
29. Mr. Jordan explained that the PSEC is the unit within the IPS responsible for carrying out criminal escorts, in particular between jails and courthouses. He said that the past

number of years had witnessed a significant increase in the demand for escort activities. In 2016, a total of 29,459 escorts were carried out; in 2017, the figure was 31,001, and so far in 2018, the figure was 39,892. He said that there had been a significant increase in Munster in particular for a variety of reasons, including the opening of a new prison in Cork, and the opening of three new court buildings (Limerick, Cork and Wexford). He said that the increasing demands placed on the PSEC in the Munster region had been raised with IPS management internally by the Governors of the PSEC, Cork Prison and Limerick Prison. Further, the Department of Justice and Equality had raised with the management of IPS a concern in relation to the staffing of courthouses. Mr. Jordan then said:

“As a result of the increased demands on the PSEC, and in particular because of the needs of the Munster region, it was the view of the IPS that it was necessary to assign additional management resources to the Munster region. There was a particular need for management resources to be assigned to the unit owing to the significant level of inter-agency working and management of the PSEC function in the context of the opening of the new courthouses. For these reasons a decision was taken that it would be appropriate to assign a Chief Officer Grade One to the PSEC for the Munster region, who would be based in Cork Prison but who would have a broader management responsibility for the Munster region.”

30. Mr. Jordan accepted that it was true that no Chief Officer Grade 1 had previously been assigned to the PSEC in the Munster region, but said that it was determined, given the additional demands on the service, that there was a need for additional senior management resources to be assigned to that unit. He did not accept that there was any requirement to carry out interviews for that post. He said that this grade of officer was a well-established grade within the IPS, and this was simply a decision relating to the deployment of appropriate management resources in accordance with the needs of the IPS. He said the IPS considered that it was appropriate to transfer the applicant to the PSEC in light of his general experience and his particular experience of engaging with different agencies on behalf of the IPS. The applicant would remain attached to Cork Prison and his main place of work would remain the same as would his salary, allowances and pension entitlements. He would continue to serve as Chief Officer Grade 1, fulfilling the duties attached to that role but within a different unit of the Prison Service.
31. Mr. Jordan said that his transfer was simply a response to the “operational and management requirements of the Prison Service” and was not “a demotion or punishment of the applicant and does not arise from any disciplinary matter”. He did not believe that there was any evidence to support the contention that transfer “could be seen as a demotion or punishment” because staff at the IPS were regularly moved between units and prisons for a variety of reasons. He believed the applicant’s concerns in relation to the views of other members of staff were “unfounded”. He was also “surprised” to hear that the applicant believed that the transfer would be an obstacle to further promotion and said there was no evidence to support that belief.

32. Mr. Jordan then went on to address the issue of the applicant's failure to make the shortlist for promotion, as raised in the first affidavit of the applicant. He noted the review that had been sought by the applicant and said that it was currently in the hands of the Commission for Public Service Appointments. He referred to the request for information which the applicant had made and said that he himself had no involvement with the processing of requests made under those Acts and was not aware of this request prior to the commencement of the proceedings. He averred that he could "confirm that it played no role in the decision to transfer the applicant".
33. Mr. Jordan said that he was surprised to see a reference to Mr. McDonald's proceedings and that those proceedings arose in very different circumstances. He said that the situations that arise in the two cases were very different and the decisions taken by the IPS in Mr. McDonald's case did not alter the position that the IPS are entitled to transfer members of staff including the applicant in accordance with the requirements of the IPS, as expressly provided for in their contracts.

*Second affidavit of the applicant dated 4th November, 2018*

34. The applicant acknowledged that transfers take place between prisons and units but said that over his thirty years within the IPS, the transfer of staff, and in particular officers, had normally been carried out on a consultative basis with the person concerned and that it was "highly irregular and unusual firstly, that a transfer would take place without prior notification to and consultation with the person concerned and secondly, with immediate effect". He said that within the IPS, where an officer was transferred with immediate effect, this would normally be construed as a punishment or sanction being imposed upon that officer for reasons relating to the officer's ability or trustworthiness to carry out his or her duties. He again referred to the Staff Transfer Protocol.
35. In response to Mr. Jordan's assertions regarding the increased pressure on the PSEC in the Munster region, he repeated that the Governor of PSEC was unaware that any new post was being created until he saw a note relating to the applicant's transfer, and averred that the Irish Prison Officers Association ("POA") advised him that no discussions had taken place between the IPS and the POA in relation to any increased demands in the Munster region.
36. The applicant observed that Mr. Jordan had failed to give any detail, such as when the request was made for the appointment of a Chief Officer of his grade to the PSEC; who made such a request; when this requirement was identified; when an application was made for the restructuring of the PSEC to create a new appointment; to whom the application was made for sanction and approval; who sanctioned the decision; and other such matters.
37. With regard to the belief of Mr. Jordan that there was no evidence to support the contention that the transfer could be seen as a demotion or punishment, he said that because of the circumstances of the communication of the transfer and it being of immediate effect, it "was and has been viewed by fellow officer colleagues and prison staff generally as a demotion and/or a punishment" and that "my reputation has



effectively been destroyed within the IPS and that it was for that reason alone I furnished notice of my intention to resign as I was disgusted and appalled by my treatment”.

38. The applicant then introduced a new matter. He said that he was present on one occasion in May or June of 2018 in the office of Mr. Don Culliton, Director of the IPS, when a transfer order was made relating to another person (an Assistant Governor) and his Governor was so advised by phone of the pending transfer. The applicant said that he was surprised that such a conversation would have been conducted in his presence and that the reason given by Mr. Culliton for the transfer was “because I can”. He said that Mr. Jordan, who was also present, did not object to or comment on what had occurred and accepted the statement of Mr. Culliton. He believed that such an attitude was present in his own transfer for reasons of which he was totally unaware. It is not entirely clear to me why this was introduced into evidence, except perhaps to suggest that decisions about transfers were (according to the applicant) being made on an entirely arbitrary basis for reasons unconnected with operational matters. In any event, his account of the meeting became a matter of dispute, as will be seen below.

*Second Affidavit of Trevor Jordan dated 6th November, 2018*

39. In this affidavit, Mr. Jordan did not accept that transfers were normally carried out on a consultative basis and repeated that there was a voluntary transfer protocol in place for voluntary transfers but that separately the IPS was entitled to transfer members of staff in accordance with the terms and conditions of their employment. Mr. Jordan said that the circumstances in which any such transfer would occur would depend on the factors in a particular case. Mr. Jordan repeated that the decision to transfer the applicant was not taken in the context of any disciplinary proceedings and was not of a punitive nature. He said that the issue of increased demand being placed on the PSEC in the Munster region was raised by the Prison Officers Association with him on a number of occasions in 2018
40. Mr. Jordan clarified that the decision to transfer was taken by himself as Personnel Officer in the Human Resources Directorate, which was responsible for the proper management of staff throughout the Prison Service and had responsibility that staff were appropriately deployed and that staffing levels were managed in different prisons and business units in accordance with the needs of the IPS. He said that the decision was taken as part of an ongoing review of staffing requirements of different units within the IPS and was taken “proximately to the decision to transfer Mr. Buckley to the PSEC”. He repeated that there was no evidence to support the assertion that the applicant’s reputation had been destroyed or that the transfer was not undertaken as a punishment or part of a disciplinary process.
41. He also specifically denied that a meeting had taken place with the applicant and Mr. Culliton in May or June of 2018 at which any transfer of an Assistant Governor was discussed.

*Affidavit of Don Culliton sworn on 6th November, 2018*

42. Mr. Culliton swore an affidavit in response to the allegations of the applicant concerning a meeting in May or June 2018. He said that the statements of paragraph 17 of the

applicant's affidavit were "entirely incorrect and had no basis in fact". He said that he had not met with the applicant in his office which was based in Longford, either in the presence of Mr. Jordan or without him, and that he did not hold a meeting with the applicant in his office in May or June 2018. He denied that he had been involved in the transfer of any Assistant Governor in May or June of 2018 and that he had ever said to the applicant that a transfer was made "because I can".

*Third Affidavit of the applicant dated 1st December, 2018*

43. The applicant repeated certain points made in his earlier affidavits but said the following in relation to the alleged meeting with Mr. Culliton. He said that, having checked his diary, he acknowledged that Mr. Jordan was not present at the meeting and also that the meeting took place in the Stack House, Portlaoise in March 2018. He gave an account of the alleged meeting and named various people in connection with it. I do not propose to do so here as in my view this was a collateral matter which did not assist in advancing the applicant's case.

44. Interestingly, he said at paragraph 17 of this affidavit:

"I have been trying to discover the reasons for my sudden transfer from the OSG and cannot understand those advanced by the defendants."

45. He said he believed that part of the reason for his transfer was as outlined in his grounding affidavit, but also that the other part of the reason was to prevent him "having continued access to records including payment, surveillance and tracking records" to which he always had access prior to his transfer.

46. In connection with his application for a promotion, he referred to an anonymous letter he had received, which advised him that a member of the interview board had brought information to it which wrongly influenced the board and involved a particular comment or rumour that I do not propose to set out here. Again, it was not clear to what purpose this information was set out on affidavit except perhaps to speculate about there being some generalised attitude or campaign to discredit the applicant within the prison service.

*Third Affidavit of Trevor Jordan dated 24th January, 2019*

47. With reference to the matters raised in connection with the promotion, he said that he was not aware of those allegations prior to them being included on affidavit in this case and was not aware of them at the time that the decision was taken to transfer the applicant; therefore, they had played no role to the decision impugned in these proceedings. He repeated that the decision to transfer the applicant was made in light of the specific operational needs of the IPS and observed that since the applicant's retirement, a different officer of the same rank had been assigned to the PSEC because the requirement for a person in that grade to be assigned to that unit remained in place.

*Affidavit of Gerard Dowling*

48. Mr. Dowling, who is the applicant in a different judicial review proceeding which was heard at the same time as that of Mr. Buckley, also swore an affidavit in these

proceedings. He explained that Mr. Buckley was his superior officer and then proceeded to narrate events 30th May, 2018, when he met prison officer M and admonished him for spreading malicious rumours, including a rumour about the applicant Mr. Buckley. This meeting is more fully described in my judgment in Mr. Dowling's case. He described his interactions with Ms. O'Hara, the person designated to investigate a complaint of bullying made against him by prison officer M (also more fully described in my judgment on his application). He averred that he was "dumbfounded" to discover that the applicant and Mr. McDonald had been served with transfer orders on 24th August, 2018 and believed that this was no mere coincidence. He believed that rumours were being spread within the IPS that Assistant Chief Officer McDonald, Chief Officer Buckley and himself were subject to complaints about bullying and that the IPS had deemed it appropriate to transfer Assistant Chief Officer McDonald and Chief Officer Buckley. He said the fact that snide remarks were being passed about him openly and in his presence reflected the fact that the transfer orders made in relation to Assistant Chief Officer McDonald and Chief Officer Buckley were widely viewed in the IPS as punishment for alleged bullying. He said that he believed the transfers of Mr. McDonald and the applicant were "inextricably linked with the incident of May 2018".

49. He also said that as Senior Chief Officer of the OSG in Portlaoise with responsibility for both Portlaoise and Midlands Prisons, he would have expected to be consulted about the implications of the loss of the Chief Officer of OSG who was being removed from a specialist area to become, in effect, a transport manager. He said that it simply did not make sense and was wasting Mr. Buckley's particular skill set by moving him into a different unit where someone from the same unit would have been ideally suited on grounds of knowledge and experience.
50. Thus, this affidavit on the events of 30th May, 2018 sought to link the transfer of the applicant on 24th August, 2018 with those events. The two connections appear to be: (i) that the applicant was mentioned at this meeting insofar as prison officer M was admonished for spreading rumours about the applicant (although the applicant himself was not present at that meeting); and (ii) both the applicant and Mr. McDonald were the subject of transfer decisions on the 24th August 2018, in circumstances where Mr. McDonald was transferred after and in connection with bullying allegations made by prison officer M about the meeting on 30 May 2018.

*Fourth Affidavit of the applicant dated 23rd February, 2019*

51. In this affidavit he referred to the affidavit of Mr. Gerard Dowling and says that it had since then become readily apparent to him that his transfer was associated "in time" with that of Assistant Chief Officer McDonald and the subsequent treatment of Chief Officer Dowling. He laid emphasis on a meeting held on 22nd August, 2018 and said that he believed that he was deliberately excluded. He repeated his view that compulsory transfers within the IPS are almost unheard of and added that they only normally occur when a member of the IPS is suspected of some form of criminal behaviour.

52. He described his feelings in connection with the transfer and subsequent to his retirement, and spoke again about “many adverse comments and observations from colleagues who naturally were of the opinion that something untoward had occurred as a result of which I was transferred immediately from a post I had held for so long”.

*Fourth Affidavit of Trevor Jordan dated 5th March, 2019*

53. In this affidavit Mr. Jordan denied that the matters averred to by Mr. Dowling were in any way connected with the decision to transfer the applicant. He said that at the time he made the decision to transfer the applicant, he was not aware of the matters averred to by Mr. Dowling and they played no role in his decision. He said they were “entirely unrelated” to the transfer of the applicant. He also rejected the suggestion that Mr. Dowling ought to have been consulted about the transfer of the applicant and said that he had no role in the assignment of staff within the prison service. He reiterated that the transfer of the applicant was made because of a specific operational need.

*Affidavit of Martin O’Neill dated 19th June, 2019*

54. Mr. Martin O’Neill swore an affidavit filed on behalf of the applicant on 19th June, 2019, which was a few days before the hearing. He explained that he joined the IPS twenty-six years previously and been promoted over the years up to the position of Governor 1 and then his current position as Campus Governor, of which there is only one post in existence within the IPS. He said that in his previous roles as Governor 3 and Governor 1, he was involved in the introduction of rationalisation measures in the IPS. He said that he was assigned to the Human Resources Directorate of the IPS and between 2011 and 2015 and was involved in a Task Review Process which related to staff management and the review of processes and procedures for the allocation of staff within the IPS. He said he was involved in the development of processes for the assessment and consideration of staff appointments and transfers which generally involved the making of a business submission for the various appointments proposed and then a discussion of the merits of the proposed appointment or transfer.
55. Mr. O’Neill said that the post of Chief Officer 1 for PSEC had previously been identified during the Transformation Process as no longer required and had been extinguished as a post within the IPS.
56. He said that, based on his examination of the documents in the present case, the recognised and accepted procedures for the transfer of officers within the IPS had not been complied with. He listed the following factors to support this conclusion:
- a. The applicant did not apply for the transfer.
  - b. He was permanently assigned to his then permanent location.
  - c. No application was placed on a list of applicants for transfer to a chosen location.
  - d. The transfer did not occur where there was a post available.
  - e. Skill sets are not a determining factor in the transfers of Chief Officers.

- f. The creation of posts within the IPS requires approval of the Executive Management Team of the IPS.
- g. No proposal to establish a Chief Officer Grade 1 post in PSEC Munster was brought to the Executive Management Team either prior to or subsequent to the transfer.
- h. There are no minutes of the meeting at which the proposed transfer was discussed.

*Don Culliton affidavit of 21st June, 2019*

57. This late affidavit of Mr. O'Neill led to a response from Mr. Don Culliton, Director of Human Resources in the IPS, by way of a second affidavit dated 21st June, 2019. He made complaint about the late service of the affidavit of Mr. O'Neill but briefly addressed some of the points made in the short time available before the hearing of the case. He said that Mr. O'Neill's understanding of how transfers are effected within the IPS was not correct and that the position relating to transfers had been explained in previous affidavits filed in the proceedings, which he did not propose to repeat. He said that Mr. O'Neill had been assigned to the Human Resources Directorate between 2011 and 2015 but was not familiar with current operation or practices because he had not worked there since that date. He said that he believed Mr. O'Neill had conflated the issues of individual transfer of staff with policy development. He also said that Mr. O'Neill was not correct in his statement that the creation of posts within the IPS requires the approval of the Executive Management Team of the IPS.

**The cross-examination of Trevor Jordan**

58. As can be seen from the above, there were numerous conflicts of fact between the parties within the affidavit evidence, including: (a) the scope of application of the Staff Transfer Protocol; (b) the normal practice (consultation, notice) with regard to non-voluntary transfers of prison officers and/or whether the circumstances of the applicant's transfer were unusual; (c) whether a short notice transfer would be seen as a punishment for wrongdoing; (d) whether or not there was a genuine need for an officer of the rank of the applicant in the PSEC as of August 2018; (e) whether or not there was a connection between the bullying allegations made against Mr. McDonald and Mr. Dowling and the transfer decision in respect of Mr. McDonald, on the one hand, and the transfer of the applicant, on the other; (f) whether the true reason for the applicant's transfer was as claimed by the respondent (operational reasons) or something else.
59. The applicants had not served notice of intention to cross-examine but the Court was mindful of the warnings given by the Supreme Court in *RAS Medical Ltd v. Royal College of Surgeons in Ireland* [2019] IESC 4 about making factual findings in the absence of appropriate cross-examination. The Court was also conscious that a senior officer of more than 30 years service had resigned from the IPS because of the disputed transfer and wished to give the applicant the opportunity to put his judicial review case as best he could without departing unduly from the confines of the case as it was presented to me in terms of time. Accordingly, the Court with reluctance acceded to a late application on behalf of the applicant to cross-examine Mr. Trevor Jordan.

60. I caused a transcript of the cross-examination to be produced in order to carefully review the evidence of Mr. Jordan. Mr. Jordan said that he had been a personnel officer in the IPS since July 2018, that is to say, a month before the transfer of Mr. Buckley. Prior to that he was assistant principal officer in IPS headquarter for four years, and before that he was in the Department of Public Expenditure and Reform. Mr. Jordan was cross-examined for more than two hours and throughout, maintained the following: (i) that the decision to transfer the applicant was based on the needs and demands of the prison service at that time in the context of the increased demands on the escorting requirement in Munster; (ii) that there was no connection between the events on 30th May, 2018 and the applicant's transfer on 24th August, 2018; (iii) that there was no connection between the transfer of the applicant and the transfer of Mr. McDonald albeit that they had been decided upon at the same meeting on the 22nd August, 2018; and (iv) that the transfer of the applicant was a "lateral transfer" and that it was not part of any demotion, admonishment or disciplinary process.
61. Mr. Jordan said that the IPS had a staffing complement of 3,000 and that because they regularly assign and transfer staff all over the country it was entirely possible that staff members from the same prison on the same business unit could receive a transfer on the same day but that the rationale behind the two transfers (that of the applicant and that of Mr. McDonald) was entirely different.
62. He said that the insofar as he had said on affidavit (which I note was filed in the McDonald case) that a meeting had taken place on the 22nd August between himself, Don Culliton (Director of Human Resources), Governor Pat Kavanagh and Assistant Governor June Kelly "to discuss staffing within the OSG in Portlaoise *in the context of*" the complaints that had been submitted, this related to a portion of the meeting only and did not relate to that portion of the meeting at which the applicant's transfer was discussed. He said that this meeting had nothing to do with the procedures under the Dignity at Work Policy and was a meeting taken in the context of normal Human Resources engagement with line management. Insofar as the meeting had discussed the complaints against Mr. McDonald, this was to discuss the staffing implications, if any, of the complaints having been made but had nothing to do with discussing the details of the complaints or interfering in the Dignity at Work process. Moreover, Mr. McDonald's situation was not the sole focus of the meeting and there had been a number of issues discussed, including the increased prison escort demand in Munster which led to the decision to transfer the applicant.
63. He gave evidence about the increasing demands in the prison escort contexts in the Munster region partly as a result of the opening of Cork Prison which created an increase of approximately 35% in capacity, as well as the opening of new courts, and he referred again to the figures he had set out in his affidavit. He also gave evidence that additional staff (other than the applicant) had been assigned to Cork (four in Cork prison) as well as thousands of hours in overtime (approximately 10,000 hours over the last year or 18 months) to help cope with the increased escort demands in Munster.

64. He said that the applicant had been chosen because of his competencies as an established chief officer. He also said that it would not necessarily be the custom to consult with a prison officer before they are transferred. He said the transfer would issue to their governors and the governors they were transferring to. He said there was no business submission in relation to the post to which the applicant was transferred nor any advertisement for the post. One document was put before the Court entitled the "Cork Action Plan" dated 23rd August, 2018 which listed six different areas of action, one of which was "Increase in Escort Requirements across Munster", described as being the responsibility of HR Directorate, with a timeline entry of "Immediate", and the narrative: "It was noted that this task has seen a significant increase in activity with comparisons on Q1 2016, 2017, and 2018 discussed. Additional management resources identified for PSEC Cork and existing PO transfer requests for the areas actioned".
65. There was much questioning about whether the transfer of the applicant was in effect the creation of a new post or an assignment and Mr. Jordan insisted that this was not the kind of situation in which the Executive Management Team would have an involvement as they were concerned with the implementation of the strategic objectives of the organisation, whereas this was simply within the ordinary purview of the Director of Human Resources across the estate. He said that they kept the staffing requirements under constant review, had meetings with local management in order to keep abreast of demands being faced, and that it was not unusual that the Governor of PSEC did not have prior knowledge of the transfer and was merely advised after it had been decided upon.
66. Mr. Jordan did not accept that the post in PSEC was any less complex than the applicant's previous post. He said it was of a different complexity rather than a reduced complexity and involved significant logistical planning across a wide geographical area as well as inter-agency working with partners such as the Courts Service and An Garda Siochana, which would have mirrored the applicant's experience in OSG in terms of interagency work. He also confirmed that the IPS had maintained the post at PSEC Munster with a new staff member in that post currently.

#### **The Staff Transfer Protocol**

67. There was a dispute between the parties as to the effect of a document entitled the "Revised Staff Transfer Protocol". This document was issued by the Staff and Corporate Services Directorate of the IPS in October 2013 and sets out certain procedures relating to the transfer of prison officers. The applicant maintained that its terms governed all transfers, while the respondent maintained that it governed voluntary transfers only and that the employer was still free to transfer officers on a non-voluntary basis in accordance with their employment contracts. It may be helpful to examine the terms of the document itself to see what inferences, if any, can be drawn from the document's terms on this issue.
68. The document includes the following:

- All transfers where possible are to take place on the start date of each quarter.
- Transfers may be effected on dates other than the start of a quarter in response to an urgent requirement of the IPS or to facilitate promotions.
- Notice of at least thirty days will generally be given for transfers. However, for transfers in response to an urgent requirement of the IPS or to facilitate promotions, a shorter period of notice may apply.
- Para 3.2 provides that “[w]hen a transfer is approved, a written Directive will issue to the officer concerned notifying him/her of the transfer date and new location”.
- If an officer had a change of mind, he or she must withdraw the application as a matter of urgency.
- Three weeks prior to the last day of a quarter, a general transfer list will issue to all Prison Governors, outlining the transfers authorised for the start of the next quarter.
- Where it is not possible for an officer’s request for transfer to a particular location to be considered, the officer shall be notified of same, and the reason, at the earliest possible opportunity (para 5.1).
- Requests by any officer for information regarding his or her place on transfer lists or on the status of any transfer should only be made through the Prison Pay/Personnel Office (para 5.2).
- Where an officer has been granted a transfer, all other transfer applications on record for that officer will cease on that date (para 5.3).
- As an exception to the general rule, where a number of transfers are being arranged for the same date and an officer is on top of the transfer list for two or more locations, then the officer may choose his or her preferred location for transfer.

### **Legal Issues**

69. I note that the respondents did not formally plead non-justiciability in relation to the applicant’s transfer but counsel on their behalf drew the Court’s attention to a number of cases, including *Earley v. Health Service Executive* [2017] IECA 158, *Hosford v. Minister for Social Protection* [2015] IEHC 59, *Morgan v. Trinity College* [2003] 3 IR 157, and *Higgins v. Bank of Ireland* [2013] IEHC 6, which authorities in fact discuss the borderline between cases which are amenable to judicial and cases which are not. The respondents also argued in their written submissions: (a) that the transfer was not a sanction (see para 39); (b) that the transfer was undertaken in accordance with the applicant’s contract (para 40); and (c) that he was *not entitled* to fair procedures in respect of the transfer (not merely that there had been *no breach of fair procedures*) (paras 40 and 44). This places the Court in a somewhat difficult position because it was in effect being asked to



address an issue which arguably had not been explicitly pleaded, namely, whether or not the decision to transfer in this case was amenable to judicial review.

70. I propose in the first instance to examine the relevant authorities before deciding how to address this problem.
71. It is important to start by recalling that the fact that the applicant is an employee of a body which exercises important public functions does not in and of itself necessarily mean that every decision affecting an employee within the organisation falls within the sphere of public law encompassed by judicial review procedures and principles (see Peart J. in *Becker v. Board of Management, St. Dominic's Secondary School, Cabra* [2005] IEHC 169). On the face of it, a transfer decision would appear to be one which would normally fall within a matter of contract between employer and employee. Further, not every decision which an individual (subjectively) feels has caused damage to his reputation necessarily falls within judicial review procedures and principles, nor indeed does an explicit statement made by someone (including an employer) about an individual or his conduct which is obviously (from an objective point of view) adverse to his reputation, unless it falls within particular parameters: see *Shatter v. Guerin* [2019] IESC 9. It is imperative to closely examine the particular context in which the issue arises.
72. I was referred to two decisions in which employee transfers were discussed. In *Hosford v. Minister for Social Protection* [2015] IEHC 59, the High Court (Noonan J.) dismissed an application for judicial review in respect of the transfer of a public servant from one section in the Department of Social Protection to another. The applicant was a Higher Executive Officer in that Department who alleged that he had been transferred for an improper purpose. He said that the purpose of the transfer was to discipline him for upholding the law and to prevent him from interfering further in the perpetuation of what he said were unlawful policies by the respondent. He alleged that the circumstances of the transfer amounted to a public rebuke and humiliation of him, which was defamatory and caused great damage to his reputation and standing. The respondent submitted that she had the statutory right to transfer officers within her Department at her absolute discretion and that such a transfer was a purely administrative action which did not engage any of the rights under the Constitution or the European Convention on Human Rights invoked by the applicant.
73. The factual background was unusual. Noonan J. observed that the applicant had developed a very definite and perhaps even a passionate view of the law on a particular issue (regarding the appropriate classification of individuals working in companies of which they were directors and shareholders and whether in certain circumstances they might be classified as self-employed for PRSI purposes). The applicant alleged that the Department operated a policy which was unlawful and expressed that view on numerous occasions to his superiors and other parties both inside and outside of the Department. This became a source of considerable conflict and friction between the applicant and his superiors within the Department. In the interest of the smooth running of the section, a request was made for his reassignment and this was duly carried out. His pay and

conditions and promotion prospects were unaffected by his reassignment. No disciplinary action had been taken against him. There was a conflict between the parties as to whether his new role was a demotion and whether it would enhance his experience and promotional prospects. The applicant was subsequently transferred a second time to what he himself described as a 'key position' in another unit and made no complaint about this.

74. Noonan J. at paragraph 19 of his judgment said as follows: -

"The applicant accepts that he was and remains liable to transfer at the sole discretion of the respondent. It could not realistically be suggested that every decision to reassign a civil servant to different duties engages the full panoply of Constitutional and Convention rights and that the party thereby affected must be afforded fair procedures including for example the right to make submissions or be given reasons. That would be evidently absurd. *There is clearly a range of decisions in the context of employment that may be taken which are merely administrative or managerial in nature and do not give rise to such rights or which are amenable to judicial review. The position may be different where the decision complained of is disciplinary in nature and involves the imposition of a penalty or perhaps dismissal.* On occasion, a civil servant may not like being transferred from one role to another but that is an incident of the job and not a matter for judicial review. It is debateable whether there is any public law element arising in such circumstances." (*emphasis added*).

75. The above passage contains what I consider to be a very helpful distinction between decisions to transfer an employee which are "administrative or managerial" and decisions to transfer which are "disciplinary".

76. Interestingly, in the *Hosford* case, like the one before me, there was also a factual dispute as to the true reason for the applicant's transfer. The Court noted that the applicant had advanced his own belief as to the real reason, and that the respondent's senior officers had sworn to a number of reasons for the transfer which, taken at face value, were entirely valid and legitimate, and he concluded that the applicant had not satisfied the necessary burden of proof.

77. Another similarity in *Hosford* to the case before me also concerned the question of whether the applicant had suffered any damage as a result of his transfer. Having concluded that the applicant had not established that the reason for his transfer was improper, Noonan J added at paragraph 22:

"Even if that were not the case, there is no evidence that the applicant has suffered any detriment whatsoever. Whilst he suggests that his standing and reputation have been damaged, the only evidence of this is his own belief that it is so and that is quite inconsistent with subsequent events which show that he has now been reassigned to a highly responsible position which he himself describes as "key". Indeed, given his subsequent transfer, about which he makes no complaint, the

proceedings are effectively moot and the only issue that could arise is that of costs even were it the position that the applicant had a good case to start with.”

78. In one of his affidavits, Mr. Buckley had averred that he was approached by other prison officers and asked how he was, and how he felt, and that “knew” by their queries and comments that his transfer was considered unusual and that somehow, he must have been responsible for something that caused it. There was therefore perhaps slightly more evidence in the present case than there had been in the *Hosford* case, but it is also true that no other witnesses were called on the issue and the evidence rested primarily upon the applicant’s subjective view.
79. *Earley v. Health Service Executive* [2017] IECA 158 concerned the temporary transfer of an Area Director of Nursing. The case was brought by plenary summons and proceeded by way of a plenary hearing, although among the reliefs sought was a declaration that the decision of the defendant to temporarily reassign her was unlawful. The background to the case was that the HSE had received a series of anonymous complaints to the effect that a number of incidents had occurred at HSE facilities in the Galway/Roscommon area and that they had not been dealt with appropriately by senior staff. A protected disclosure detailing certain complaints was also made by an identified member of the HSE staff. It was decided that an investigation would be conducted in relation to the alleged incidents and the manner of their handling. The HSE decided to commission a review of all aspects of the service in that county, including work place culture and governance and also decided to put a number of interim measures in place. The plaintiff received a formal letter informing her of the HSE’s decision to reassign her temporarily without prejudice and which stressed that it was not a disciplinary process or investigation. A key factor in the case was that the plaintiff was reassigned from a clinical role to a non-clinical role, albeit that her pay and other conditions were not otherwise affected.
80. On appeal from the High Court, the Court of Appeal allowed the appeal and granted a declaration that the reassignment of the plaintiff constituted a breach of her contract of employment. It held that the trial judge fell into error in concluding that the HSE had not breached her contract of employment by reassigning her from her operational and clinical duties specified in that contract to non-operational duties. The Court examined the detailed provisions contained in her contract of employment and concluded that her job specification had been changed in a material fashion and that there had been a “plain breach of her contract of employment”.
81. Counsel on behalf of the respondents sought to distinguish the *Earley* decision on the basis that the applicant’s contract specifically envisaged his transfer in accordance with operational needs (“in accordance with the requirements of the service”); that no complaint or allegation had precipitated his transfer; and that he remained at the same level of seniority and at the same level of pay. I think it is also important to note that the *Earley* decision was not a judicial review and does not assist the Court in identifying when this public law proceeding is appropriately invoked to deal with a dispute between an employee and an employer.

*Other authorities concerning measures taken in respect of employees*

82. In my decision of today's date in the Dowling case, I have mentioned some authorities on the interaction between the judicial review procedure and employers' decisions affecting employees, including *Beirne v. Garda Commissioner* [1993] ILRM 1; *O'Donnell v. Tipperary (SR) County Council* [2005] 2 IR 483; *Kelly v. Board of Management of St. Joseph's National School Ballymount, Co. Wicklow* [2013] IEHC 392; *Dillon v. Board of Management of Catholic University School* [2018] IECA 292; *Becker v. Board of Management, St. Dominic's Secondary School, Cabra* [2005] IEHC 169; *Morgan v. Trinity College Dublin* [2003] IEHC 167; *Higgins v. Bank of Ireland* [2013] IEHC 6 (O'Keefe J.) and *Bank of Ireland v. Reilly* [2015] IEHC 241.
83. The latter three cases, which examine the question of employee suspensions are the most relevant in the present context of employee transfer. A distinction has been drawn by the courts between a 'disciplinary' and a 'holding' suspension. In *Morgan v. Trinity College Dublin* [2003] IEHC 167, a case relied upon by the respondents, the plaintiff, a university professor, had been suspended on full pay pending an investigation into complaints relating to his behaviour by colleagues. Kearns J. (as he then was) refused to grant the injunction sought. He said that there was a distinction between two types of suspension; (i) punitive, which constituted a disciplinary sanction where the person affected should be afforded natural justice and fair procedures and (ii) a holding suspension, where a person is suspended so that an inquiry can be undertaken and where the rules of natural justice may not apply. He said that whether a suspension amounted to a sanction such that it would involve concepts of natural justice was a question of fact and degree involving a reference to the particular occupation of the person affected, the manner and nature of the suspension and whether the person had been fully informed of the complaint against him. A holding power of suspension had to be construed as permitting a suspension to continue only for the period of time which it would not be reasonably practicable to hold a full hearing into the matter. It had been made clear to the plaintiff that his suspension was not an end in itself but rather a stage in a process. Kearns J. also quoted from the judgment of Lord Denning in *Lewis v. Heffer* [1978] 3 All ER 354, where this distinction between different types of suspension had been drawn.
84. The principles were accepted in the case of *Higgins v. Bank of Ireland* [2013] IEHC 6 (O'Keefe J.) were they were succinctly summarised in the following terms:
- "The cases draw a distinction between suspension where a disciplinary action has been taken and suspension which has made as a holding operation pending inquiries and to investigate a matter. In these latter circumstances, the rules of natural justice do not apply".
85. More recently, in *Bank of Ireland v. Reilly* [2015] IEHC 241, a case brought by a bank employee who had been suspended without notice and eventually dismissed for an alleged breach of the email policy of the bank, the High Court (Noonan J.) said at paragraph 40:

“The suspension of an employee, whether paid or unpaid, is an extremely serious measure which can cause irreparable damage to his or her reputation and standing. It is potentially capable of constituting a significant blemish on the employee's employment record with consequences for his or her future career. As noted by Kearns J. (as he then was) in *Morgan v. Trinity College Dublin* [2003] 3 I.R. 157, there are two types of suspension, holding and punitive. However, even a holding suspension can have consequences of the kind mentioned. Inevitably, speculation will arise as to the reasons for the suspension on the premise of there being no smoke without fire. In Mr. Reilly's case, his evidence was that rumours and reports circulated about him ranging from possibly being involved in fraud to participation in a tiger kidnapping.

Thus, even a holding suspension ought not be undertaken lightly and only after full consideration of the necessity for it pending a full investigation of the conduct in question. It will normally be justified if seen as necessary to prevent a repetition of the conduct complained of, interference with evidence or perhaps to protect persons at risk from such conduct. It may perhaps be necessary to protect the employer's own business and reputation where the conduct in issue is known by those doing business with the employer. In general, however, it ought to be seen as a measure designed to facilitate the proper conduct of the investigation and any consequent disciplinary process. Indeed, this is explicitly recognised by the bank's own disciplinary procedures in force at the relevant time. [He goes on to describe the procedures in respect of “special paid leave”].

The corollary presumably therefore is that an employee ought not be suspended where suspension is not necessary to facilitate these matters.”

86. The distinction between a punitive suspension and a ‘holding’ suspension in the above ‘suspension’ cases seem to me to resonate with the distinction drawn by Noonan J. with regard to transfer in the *Hosford* case, namely between an administrative or managerial transfer, and a disciplinary transfer. I note that the *Reilly* case was not a judicial review proceeding; rather, it was, as one might ordinarily expect in this area, a claim for unfair dismissal. Therefore, while one could not quibble with the comments made by Noonan J about the need to be careful in the context of employee suspensions about the possibility of reputational damage, the decision does not in any way advance the applicant's case that there was a breach in his case of natural and constitutional justice.

#### *Conclusion on the law*

87. Having regard to all of the above, it seems to me that the transfer of an employee by an employer in accordance with an express condition in his contract permitting such a course of action, even where the employer carries out functions of a public nature, would not ordinarily fall within the scope of judicial review, particularly if the transfer maintained certain conditions such as pay and seniority. It would not be practical to run a prison service, or indeed any other public service, on the basis that every transfer of an employee attracted certain procedures as a *matter of constitutional justice*, such as a

right on the part of the employee to be consulted, a right to have adequate notice, or a right to make representations as to whether and where of any transfer. Certainly, there is nothing in the authorities cited to me that would suggest that the Constitution requires any such bundle of rights, and it must be recalled that the applicant sought to advance his case on the basis of a constitutional right. However, I am prepared to accept that an employee transfer might fall within judicial review principles in certain limited circumstances. By analogy with the 'employee suspension' cases and as suggested in *Hosford*, such a case might arise if the transfer amounted in substance to a sanction for some kind of identified wrongdoing. Has the applicant established that his case falls within these parameters? I turn now to that question of fact.

*Application of the principles to the facts*

88. Mr. Jordan, the Personnel Officer responsible for the transfer of the applicant, steadfastly maintained the position that the transfer of the applicant was for operational reasons, namely that there was a need for an officer at this level of seniority in the PSEC due to increased demands on the service arising from the opening of new courthouses and prisons in the Munster area. On its face, therefore, the transfer of the applicant was a simple and straightforward transfer for operational reasons. The transfer certainly was not, on its face, imposed as a sanction for some kind of wrongdoing.
89. The applicant, however, sought to persuade the Court that there was more to this transfer than a simple transfer for operational need. I am prepared to go down that road to some degree with the applicant as I must confess that I have some reservations about the evidence put forward on behalf of the respondents. These reservations arise from the following:
- i. The evidence of Mr. O'Neill, described above;
  - ii. The absence of any documentation concerning the need for and the creation of the post at level Chief Officer Grade 1 in the Prison Service Escort Corps;
  - iii. The coincidence in time between the transfer of the applicant and the transfer decision made in respect of Mr. McDonald, which suggests some kind of possible connection between the transfer of the applicant and the circumstances in which the bullying allegations made by prison officer M had arisen, which involved prison officer M being admonished for (*inter alia*) spreading rumours about the applicant;
  - iv. The absence of any minutes of or documentation relating to the meeting of 22nd August, 2018;
  - v. The short notice period given to the applicant before the transfer was to take effect; and
  - vi. The absence of consultation or discussion of any kind with the applicant, a senior officer in the OSG, which would have given him any indication that this transfer was being considered.

90. I am left with an impression that there may be more to the transfer of the applicant than a simple transfer for operational need without regard to any other considerations. However, it is only fair to say that there were many conflicts of fact in the case (as described above at paragraph 58) and this was not a plenary hearing, therefore the evidence on a number of key issues was not sufficiently explored for the Court to reach definitive conclusions. In particular, there was no cross-examination of Mr. Culliton, Director of Human Resources, nor of Martin O’Neill, who raised doubts about the process surrounding the applicant’s transfer. In these proceedings, the onus of proof is on the applicant to establish matters on the balance of probabilities. It is for the applicant to satisfy the Court that his transfer was within the ambit of judicial review. I am of the view that the applicant has failed to reach the necessary standard of proof in this regard. Even taking his case at its height, none of his theories support the view that his transfer was imposed as a punishment:
- a) His grounding affidavit put forward the theory that the transfer was linked with his having questioned the process of shortlisting for a promotion when he failed to make the shortlist, together with his request for information under the Freedom of Information and Data Protection legislation;
  - b) A later affidavit put forward a theory based on an anonymous letter he received in which it was alleged that there were rumours about him which had impeded his promotion;
  - c) The same affidavit put forward the theory that a supplementary reason to the transfer was a desire to prevent him from having continued access to records of OSK undertakings.
  - d) A further affidavit put forward the theory that the transfer was connected with the bullying allegations made by prison officer M arising out of the meeting on 30th May, 2018 between that officer and officers Dowling and McDonald.
91. No matter which of these explanations one takes, none of them involves the applicant being transferred as a sanction for some specific wrongdoing. At its height, the applicant’s case is that the circumstances of his transfer were odd, that he subjectively felt that he had been demoted, and that his reputation had suffered among his colleagues because of the transfer. In my view, the evidence before me is not sufficient to justify a conclusion that his transfer had the quality of a sanction for the purposes of the application of judicial review principles, or that it should attract the principles of natural and constitutional justice for any other reason. The transfer did not follow from any adjudication on contested facts or the determination of any dispute. No allegations were ever made against the applicant under the Dignity at Work policy. The transfer did not result in any change in the applicant’s level of seniority or pay-related entitlements.
92. I accept that the applicant was deeply hurt at the absence of consultation prior to the transfer and the shortness of notice given to him, and that is entirely understandable, particularly after decades of devoted service as a prison officer. However, judicial review

is a very particular remedy concerning decisions of a particular nature and an applicant must satisfy the Court that he falls within the scope of judicial review. While, as I mentioned earlier, the respondent did not clearly plead non-amenability to judicial review but rather raised the issue implicitly by way of submissions, it ultimately seems to me to matter little whether one characterises the present situation as one which is not amenable to judicial review or one in which there was no breach of fair procedure because the two issues seem to me to stand or fall together in the present context. Either the transfer was of a type which necessitated certain procedural rights, or it was not; and I conclude – on the evidence before me – that it was not of a type which necessitated rights of notice or opportunity to make submission in the sense in which those rights are normally understood in the context of natural and constitutional justice.

93. I wish to emphasise again that the case was brought by way of judicial review and was advanced on behalf of the applicant on the basis of principles of natural and constitutional justice. This judgment does not address what the position might have been if the case had been brought in some other form concerning the rights of an employee pursuant to his contract of employment or under employment law more generally. Nor does the judgment endorse any particular practice concerning transfers as a matter of industrial relations. My judgment is limited in scope to a consideration of whether the applicant has successfully established that certain constitutional principles applied to his situation and were breached by his employer. I am satisfied that the evidence in this case does not warrant the granting of the reliefs sought by the applicant in these proceedings because he has not succeeded in establishing that his transfer was of a type which either fell within the scope of judicial review or attracted entitlements under natural and constitutional justice.
94. I make a final comment about the Staff Transfer Protocol. It has not been suggested that this Protocol document has any statutory underpinning or any legal status as such. On its face, it appears to be an administrative document setting out the practical arrangements concerning transfers. As noted, there is a dispute between the parties as to whether it applies to all transfers or voluntary transfers only. On its face, it does not define its own scope of application although I would lean towards an interpretation that it applies to voluntary transfers. The applicant maintains that it applies to all transfers. Counsel on behalf of the applicant did not explain precisely why, even if the Protocol did apply to *all* transfers, it necessarily grounds a constitutional right on the part of every prison officer to make submissions before he or she is transferred or how it speaks to constitutional principles of the giving of notice. The case was presented on the basis that if the Protocol applied to non-voluntary transfers, a failure to give the proposed transferee an opportunity to make submissions prior to transfer and/or to give him adequate notice was a breach of constitutional principles of fairness. With respect, this appears to me to jump from one step in an argument to a conclusion without paying attention to several intermediate steps, such as whether the Protocol speaks to any right to make submissions; whether constitutional standards have any application in this area; and even if they do, whether constitutional standards would necessarily be co-extensive with the content of this administrative document. As I have noted, this was not a plenary hearing



and many evidential matters remained unresolved. I find myself unable to conclude on the evidence before me that the Protocol applies to all transfers, as submitted by the applicant, and therefore would not hold his transfer invalid on any ground of breach of the Protocol.

95. I refuse the reliefs sought.