

**THE HIGH COURT
JUDICIAL REVIEW**

[2022] IEHC 370
[Record No. 2021/712JR]

BETWEEN

TARA WOLFE

APPLICANT

AND

PERSONAL INJURIES ASSESSMENT BOARD

RESPONDENT

AND

MATER MISERICORDIAE HOSPITAL

NOTICE PARTY

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 17th day of June, 2022

Issues

1. The within applicant seeks to quash a decision of the respondent (PIAB) of 25 June 2021 in respect of the applicant's claim for personal injuries which was made under the provisions of the Personal Injuries Assessment Board Act 2003 (the 2003 Act). The relief also seeks a declaration that in fulfilment of PIAB's obligation to "have regard" to the personal injury guidelines, PIAB must provide reasons in writing based on its use and application of the guidelines in accordance with the express terms of the guidelines, and/or provide a written assessment recording how the specific headline principles of the guidelines are applied by reference to the medical evidence available, in accordance with the express terms of the guidelines.
2. The statement of grounds sets out that the applicant suffered a personal injury at work on 26 December 2018, when she was an employee of the notice party. In the accident she suffered soft tissue injuries to her left shoulder, lower back and right leg and made an application to PIAB on 20 February 2020. The applicant submitted her own medical report with her PIAB application and also attended an inspection by two independent doctors commissioned by PIAB.
3. The guidelines came into force on 24 April 2021 and on the same day s.31 of the Family Leave and Miscellaneous Provisions Act 2021 had the effect of amending s.20(1) and (4) of the 2003 Act and adding a subsection 5 thereto.
4. PIAB made an assessment on 25 June 2021 in the sum of €11,000 for general damages. Such assessment was furnished to the applicant and was accompanied by a letter of 25 June 2021. The applicant claims that neither document gave details or reasons as to how the considerations in the guidelines were applied, and there was no reason as to how and why the dominant injury was assessed as being her back, and why the injury was categorised as minor. Nor, it is complained, were there details or reasons as to how the considerations in the guidelines were applied. It is argued that the guidelines themselves mandate a much more sophisticated and detailed level of analysis than that provided, and it is suggested that detailed reasons for the award are required.
5. It is further complained that it is not known how the presence of other injuries were taken into account, how the relevant subcategory of injury in the guidelines was identified, what, if any, uplift was afforded to the applicant because of her multiple injuries, how PIAB had regard to the applicant's pre-existing condition, or how the specific provisions of the guidelines at pp. 28 to 32 thereof were applied.
6. On the basis of the foregoing, it is argued that the reasons provided are entirely inadequate and that this inadequacy occasioned the applicant real and serious prejudice as she was obliged to accept, if she was going to do so, the award within twenty-eight days of the assessment.

7. It is argued that because s.51A of the 2003 Act (inserted by the amending act of 2007 on 11 July 2007) provides that where a claimant rejects or is deemed not to have accepted an assessment, and the respondent either accepts or is deemed to have accepted the assessment, in subsequent proceedings before the court there should be no award as to costs to the claimant where there is a settlement of those proceedings which does not exceed the amount of the PIAB assessment, and where there is an amount of damages awarded by those proceedings that does not exceed the amount of the PIAB assessment, the court in such proceedings may in its discretion order the claimant to pay all or a portion of the costs of the defendant.
8. It is further argued that the applicant's solicitor is unable to advise her and unable to properly review the assessment by reason of the failure to provide proper reasons in accordance with the guidelines, and this failure coupled with the prospect of an adverse costs order has a very real "chilling effect" on the applicant's constitutional right of access to the courts.

Preliminary

9. During the course of the hearing an issue arose between the parties as to cross-examination of the applicant and her solicitor in relation to the assertions made by them as to the inadequacy of reasons provided, in circumstances where there is affidavit evidence on behalf of the respondents to the effect that reasons were adequate. The parties agreed the following:

"We agree that it is an objective question of law as to whether adequate reasons were provided in respect of the assessment made by the Board on 24 June 2021 and that the assertions/views referred to in the passages in the affidavits on both sides on the issue as to whether adequate reasons were provided in respect of the assessment made by the Board on 24 June 2021 are not relevant to the determination of this issue in the case."
10. In answer to the query as to where the express terms of the guidelines require the provision of reasons based on PIAB's use and application of the guidelines, or where the requirement to give an assessment in writing concerning the specific headline principles in the guidelines is contained, the applicant acknowledged that in the circumstances of the within matter there were no such specific provisions.
11. By reason of the foregoing it is clear that there is no statutory provision by which reasons are mandated and therefore the complaint of the applicant falls to be assessed in accordance with the general constitutional principles of fair procedure and the provision of reasons, in accordance with jurisprudence.

Relevant legislative provisions

12. The respondent board was set up under the provisions of the 2003 Act, and under s.21 thereof PIAB is to make an assessment by reference to the information, records and other documents available. There is no hearing. The assessment is made on the basis that the respondent or respondents bear full liability for the injuries the subject matter of the claim (s.20(1)).

13. Subsections 4 and 5 of s.20 of the 2003 Act are as follows:

"(4) Subject to subsection 5, an assessment shall be made on the same basis and by reference to the same principles governing the measure of damages in the law of tort and the same enactments as would be applicable in an assessment of damages were proceedings to be brought in relation to the relevant claim concerned.

(5) In making, on or after the date of coming into operation of section 99 of the Judicial Council Act 2019, an assessment in relation to a relevant claim of the

amount of damages for personal injuries the claimant is entitled to, assessors shall –

- (a) have regard to the personal injury guidelines (within the meaning of the Act) in force, and
- (b) where they depart from those guidelines, state the reasons for such departure and include those reasons in the assessment in writing under section 30(1)."

14. It is common case that no reasons for departure from the guidelines were set out either in the assessment or in the accompanying letter of 25 June 2021.
15. In the introductory portion of the Personal Injury Guidelines it is recorded that same were adopted by the Judicial Council under s.7 of the Judicial Council Act 2019 (the 2019 Act) on 6 March 2021, and contain a catalogue as to the level of damages which it considered might fairly and justly be awarded in respect of varying types of personal injury.
16. It is recorded that it is widely accepted that the making of an award of general damages for pain and suffering is a somewhat artificial task which has historically led to judges making widely varying awards of damages which offends the principle of equality and results in unnecessary appeals, additional costs and an additional burden on the court's own scarce resources.
17. The guidelines seek to promote a better understanding of the principles governing the assessment and award of damages for personal injury with a view to achieving greater consistency. It was noted that s.99 of the 2019 Act amends s.22 of the Civil Liability and Courts Act 2004, so as to provide that the court shall, in assessing damages in personal injury action, have regard to the personal injury guidelines and, where it departs from those guidelines, state the reasons for such departure in giving its decision. Accordingly, it is mandatory for the court to make its assessment having regard to the guidelines and if the court chooses to depart from same it is mandatory that the court sets out in its judgment, the considerations which warrant such departure. The general principles of the guidelines incorporate a requirement that awards of damages be fair and reasonable, and proportionate.
18. As is clear from the current provisions of s.20 of the 2003 Act, an assessment by PIAB must also have regard to the guidelines and state reasons in its assessment if it departs from same.
19. Under the heading "Use of Guidelines" there is a provision which clearly applies to courts as opposed to PIAB on the basis that such requirement of the court is said to arise at the conclusion of every case and incorporates an inquiry of each of the parties, which of course would not occur in a matter before PIAB (PIAB assessment as aforesaid does not incorporate a hearing nor does it involve findings of fact).
20. Under the heading "Multiple injuries" it is noted that this would involve special difficulty as the guidelines value each injury separately and there would usually be a temporal overlap of injuries. If each injury was to be valued separately the claimant would be overcompensated to the point that it would be unjust to the defendant and disproportionate. The question therefore arises as to how to ensure that the award would be just in light of the overlap of the injuries. The guidelines state that the appropriate approach for the trial judge is where possible to identify the injury and bracket of damages within the guidelines that best resembles the most significant of the claimant's injuries, and the trial judge should then value that injury and thereafter uplift the value to ensure that the claimant is fairly and justly compensated.
21. Insofar as a pre-existing condition is concerned if the claimant has a pre-existing condition that is aggravated by the injury then the assessment should have regard only to the extent to which the condition has been made worse, and the duration of any increased symptomology.
22. Back injuries are catered for in s.7(B) of the guidelines, which commence with the considerations affecting the level of awards for all back injuries apart from those

specifically identified in respect of any particular bracket. Nine considerations are set out commencing with age and concluding with prognosis. Thereafter four subcategories (of back injuries) are set out ranging from most severe back injuries to minor back injuries. Save for most severe back injuries the subparagraphs are further subdivided affording the assessor a particular range of damages which might be awarded depending on the particular details of the claim.

23. Previously under the book of quantum, which the guidelines replaced, s.3(a) deals with back injuries and same are also subdivided into four categories with a separate category for spinal cord injuries. Currently under the guidelines the spinal cord injuries are now incorporated in the most severe back injuries. It is clear from comparing the detail in the book of quantum and detail in the guidelines that the guidelines contain more detail to identify the correct category which a particular claim might fall within.

Documents

24. The letter accompanying the assessment, dated 25 June 2021, is two pages in length and identifies an award of €11,000 to be paid to the applicant by way of general damages. There follows what is described by the applicant, in my view correctly, as two generic paragraphs identifying that the assessment was made with reference to the guidelines, thereafter setting out that the assessors:

“considered the dominant/most significant injury sustained and the relevant damages bracket in the Guidelines having regard to the medical and other evidence available. The assessors also considered where appropriate the presence or absence of other lesser injuries. The assessors considered the range and severity of other injuries and the additional pain, discomfort and limitations arising from the Claimant’s lesser injury/injuries. The assessors having regard to the guidelines have considered an uplift if appropriate.”

25. The letter then identifies that having regard to the guidelines the assessors considered the dominant injury as the back, the severity category as minor and the subcategory as substantial recovery one to two years.
26. Available to the assessors making their assessment was the application to PIAB made by the applicant together with a medical report of Dr. McDermott of 17 December 2019 furnished by the applicant with her application. In the relevant bracket Dr. McDermott indicates that there was no aggravation of an existing condition, that her back was normal but symptoms were ongoing, and an MRI was taken of her back for un-resolving pain.
27. By reason of the ongoing symptomology PIAB commissioned a report of Dr. Lee of 5 November 2020, being an independent medical practitioner. In his report he identified soft tissue injuries to the lower back, left shoulder and right thigh. The right thigh had resolved within two weeks with the applicant recording that she still had some lower back pain and her shoulder was occasionally painful, especially in cold weather. She had not resumed running. On examination it was noted that there was tenderness in her lower back with limitation of movements and the applicant had full and pain free movement of her shoulder. Dr. Lee recommended a specialist orthopaedic opinion because of the lower back ongoing pain.
28. A further report was commissioned from an orthopaedic surgeon namely Mr. Mark Quinn which is dated 27 April 2021, in which he noted a pre-existing lower back injury which was asymptomatic at the date of the accident. It was noted that the applicant had ongoing pain and stiffness to her lower back and mild discomfort lying on her left shoulder. Mr. Quinn expected a full recovery by three years and indicated that there was a substantial recovery by two years post the injury. Mr. Quinn also identified that the injuries suffered in order of dominance and severity were the applicant’s lower back soft tissue injury classified as moderate, and secondly her left shoulder soft tissue injury which was classified as mild.

Jurisprudence

29. The parties do not differ substantially on the relevant jurisprudence dealing with the need to give reasons in an administrative decision. It appears that the matter of controversy on the case law between the parties might be considered as the judgment of Mr. Justice Kelly in the High Court in *Deerland Construction v. Aquaculture Licenses Appeals Board* [2008]

IEHC 289. In his judgment Mr. Justice Kelly referred to the case of South Buckinghamshire District Council v. Porter (No. 2) [2004] 1 I.W.L.R. 1953 where it was stated:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the ‘principal important controversial issues’, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision...”.

30. Kelly J. cited the said decision with approval and expressed the test to be that set out by him in *Mulholland v. An Bord Pleanála* [2006] I.L.R.M. 287, reasons should be sufficient to:
- (1) Give the necessary information to the applicant to consider whether there is a reasonable chance of success in an appeal or a judicial review application;
 - (2) Arm the applicant for the hearing; and,
 - (3) Know if the decision maker has directed his mind adequately to the issues.
31. There is extensive Irish jurisprudence following this decision particularly from the Supreme Court. Insofar as it might be suggested by the applicant that the test identified by Kelly J. aforesaid was more extensive than that identified by the Supreme Court, it is clearly the Supreme Court decisions that must be followed and indeed those decisions are more recent in time.
32. In *O’Brien v. Personal Injuries Assessment Board* [2008] IESC 71, the issue involved the entitlement of an applicant to PIAB to be legally represented in dealing with PIAB. Macken J. found that the nature of the scheme was sufficiently similar to court proceedings to justify legal representation, quoting that essentially an authorisation issues only if the scheme does not dispose of the issue of quantum, the scheme being intended to ensure the final disposal of personal injury actions and not merely preliminary to court proceedings or a type of mediation. The outcome was described as of considerable significance, and the scheme is inevitably closely similar to court proceedings. Denham J. in her judgment indicated that the proceedings before PIAB were not an adjudicative process.
33. In *Plewa and Giniewicz v. Personal Injuries Assessment Board* [2010] IEHC 516, Ryan J. indicated that a discursive judgment was not required with the adequacy of reasons being assessed in the context of the claim put forward. Ryan J. found that the adequacy of the somewhat general explanation provided by the Board on their assessment on fees had to be assessed in the context of the claim put forward on behalf of the applicants. The challenge was therefore rejected.
34. In *EMI Records (Ireland) Ltd. v. Data Protection Commissioner*, [2012] IEHC 264, Charleton J. indicated in his judgment that reasons are assessed by reference to what a reasonable person with full knowledge of the background would conclude by reading the relevant text, and at para. 11.2 indicated that sometimes the requirement for reasons can be met in terse terms. Clarke C.J. in his judgment in the Supreme Court, *EMI Records (Ireland) Ltd. v. Data Protection Commissioner* [2013] IESC 34, indicated that reasons must actually be ascertainable and capable of being determined. Express reference in the decision itself to some other source outside of the decision document meets that test.
35. In *Connelly v. An Bord Pleanála* [2018] IESC 31, Clarke C.J. indicated that it was difficult to be specific in the manner in which the obligation to give reasons could be specified. The nature of the decisions and the processes involved vary enormously. When dealing with broad considerations involving general concepts a degree of judgment or margin of appreciation is afforded (para 5.3). The Court referred to *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59, to the effect that the reasons must enable the person to understand the decision to ascertain if there are grounds for appeal. At para. 6.15 Clarke C.J. indicated that an applicant must know in general terms the reasons for

the decision to afford fairness to the applicant affected by a binding decision. A box-ticking exercise will not fulfil a requirement to give reasons. Clarke C.J. held at para. 10.1 that it was rarely sufficient to simply indicate the factors taken into account and assert as a result that the decision goes one way or another, as this provides no enlightenment.

36. In *Olaneye v. Minister for Business, Enterprise and Innovation* [2019] IEHC 553, Donnelly J. expressed the view at para. 46 that in assessing the process the court has to be cognisant of the level of information available to an applicant. Insofar as this decision is concerned the applicant says it is not relevant as the issue before Donnelly J. was straightforward with the applicant either coming within an identified statutory bracket or not. In the context of the issues before Donnelly J., an argument that the documents didn't contain reasons was rejected by the court.
37. In *NECI v. The Labour Court* [2021] IESC 36, Mr. Justice MacMenamin helpfully set out at para. 156 of his judgment the summary of principles applicable to the duty to give reasons as follows:

"The questions applicable in this case are, therefore:

- (a) Could the parties know, in general terms, why the recommendation was made?
- (b) Did the parties have enough information to consider whether they could, or should, seek to avail of judicial review?
- (c) Were the reasons provided in the recommendation and report such as to allow a court hearing a decision to actually engage properly in such an appeal, or review?
- (d) Could other persons or bodies concerned, or potentially affected by the matters in issue, know the reasons why the Labour Court reached its conclusions on the contents of a projected SEO, bearing in mind that it would foreseeably have the force of law, and be applicable across the electrical contracting sector?"

The Court was of the view that the test must be dispassionate and detached.

38. In *Lidl Ireland GmbH v. Chartered Accountants Ireland*, [2022] IEHC 141, Ferriter J. granted certiorari on the basis that it was unknown as to what key factors the independent review committee relied on to ground its decision.

Submissions

39. The applicant's submissions might briefly be summarised as follows:

- (1) The reasons proffered are manifestly deficient and they are inadequate to enable the applicant to know whether she should appeal or pursue judicial review.
- (2) The decision does not resemble the comprehensive analysis required by the guidelines, which themselves contain criteria only and not reasons.
- (3) There are no reasons as to how the considerations identified in the guidelines to guide the assessor as to the relevant bracket were applied by reference to the medical evidence.

- (4) There are no reasons as to: how the dominant injury was identified; why it was classified as minor; the existence, if any, of an uplift in respect of minor injuries; if minor injuries were taken into account at all; or, indeed if the pre-existing injury was considered.
- (5) Section 51A of the 2003 Act provides a chilling effect on the applicant in pursuing the matter beyond PIAB because of a potential adverse costs order.
- (6) The applicant is not seeking a discursive text on reasons but the middle ground advocated by Clarke C.J. in Connelly.
- (7) The respondent did not have regard to the changed background i.e. the fact that guidelines were substituted for the book of quantum, and same have a statutory status. Because of this background the respondent should have said why it held as it did.
- (8) It is not known why the respondent did not depart from the guidelines, or what test was applied by them not to depart from the guidelines.
- (9) It is not clear if regard was had to anything other than the guidelines and no rationale for the figure of €11,000 is given.
- (10) The decision making process of the respondent engages constitutional rights.

40. The respondent's submissions might be summarised as follows:

- (1) In regard to the content of the statement of grounds the "express terms of the guidelines requiring reasons" is what is engaged in the within judicial review matter.
- (2) Regard must be had to the process generally which is non-adjudicative, findings of fact are not made, it is a type of conciliation system for resolution of personal injury claims, there is no hearing, the adjudication on quantum is based on an assumption that the employer is fully liable.
- (3) All documents were furnished to the applicant and the assessment is not binding on the applicant.
- (4) The reasons given are adequate and the statutory requirement to give reasons is confined only to when the respondent is departing from the guidelines.
- (5) The guidelines do not require additional reasons.
- (6) There is sufficient information available to enable the applicant to either accept or reject the assessment.
- (7) The applicant knows in general terms the basis for the assessment.

- (8) The process was fair, open and transparent with the applicant fully participating and reasons would be obvious to an objective observer.

Conclusion

41. I am satisfied that as reasons departing from the guidelines were not in fact incorporated, either in the assessment or the accompanying letter, then it is clear that the guidelines were applied rather than departed from and in those circumstances there is no statutory requirement for the respondent to give reasons. The general test therefore identified by the case law aforesaid is the test to be applied where there is no statutory requirement to give reasons.
42. The only effective issue involved for determination by the respondent in its decision was the level of quantum to be afforded to the applicant for the personal injury suffered by her accident at work. The applicant has available to her all documents relied on by the respondent in making its assessment.
43. Insofar as the "chilling effect" argument is concerned it is clear from the terms of s.51A of the 2003 Act that there is the potential, which is not absolute, that if a claimant does not achieve an award greater than the PIAB award in court costs of the defendant may be awarded against her in respect of such court proceedings. Such a status is not novel or exceptional, for example, a similar risk would be run by a litigant seeking damages where during the course of proceedings, a without prejudice offer of settlement is made but rejected and the claimant did not achieve a greater sum as contained in such offer.
44. A similar risk arises under court procedures in litigation concerning damages, if a lodgement is made in court and same is not accepted but later the award to the claimant is less than the lodgement figure. Section 51A therefore does not place a claimant in a worse position than a claimant might be by virtue of the without prejudice offer of settlement or a lodgement, which matters are available generally in any litigation seeking damages.
45. The applicant's own medical practitioner in his medical report identified that there was no aggravation of her pre-existing back injury.
46. Insofar as the applicant suggests that it is unknown whether or not the applicant's shoulder and thigh injuries were taken into account, it appears to me that a dominant injury was identified and this by definition acknowledges that the lower back injury was not the only injury suffered by the applicant.
47. There was ample medical evidence before the respondent to come to a rational conclusion on the dominant injury being the lower back injury.
48. The expert report was only required in respect of the back injury and the orthopaedic surgeon identified the back injury as the dominant injury.
49. An objective observer, having all necessary details (aside from the general generic statements made in the letter of 25 June 2021), would be informed that: (i) the dominant injury was the back injury; (ii) because reference was made to dominant injury that there was more than one injury; (iii) that the category of the injury was determined as minor; and, (iv) the sub-category was substantial recovery one to two years. By reasons of these details an objective observer would then be able to review the relevant page of the guidelines which contain the further details identified by the respondent as being relevant in the instant matter.
50. In my view the details in the letter applicable to the applicant only, together with the details contained in the relevant portion of the guidelines, having regard to the nature of the process as herein before identified, the fact that the decision of the respondent is not binding (for example, not only could the applicant reject the award but it was also open to the employer to reject the award) and that there is no statutory obligation to state reasons in the circumstances, an objective observer would be aware in general terms the reasons for the award.
51. Given that there was only a singular issue involved in the respondent's assessment, namely, the level of damages to be awarded to the applicant for her pain and suffering arising from the incident at work assessed in accordance with the guidelines, no significant difference arises as between the applicable law identified in South Buckinghamshire District Council and the Irish jurisprudence aforesaid relative to the within claim, in particular,

when one bears in mind that no findings of fact were being made by the respondent nor did the respondent make any determination on any issue of law. Accordingly, therefore in accordance with South Buckinghamshire District Council one must bear in mind that the degree of particularity of the reasons depends entirely on the nature of the issues falling for decision.

52. Insofar as the reliefs sought in the statement of grounds are concerned relief 3(a) and (b) are not available to the applicant as there is no express term in the guidelines themselves requiring written reasons based on the respondent's use and application of the guidelines or requiring an assessment in writing of how the specific headline principles of the guidelines were arrived at.
53. The instant claim for an order of certiorari quashing the decision of 25 June 2021 is based on an application of the jurisprudence aforesaid having regard to the non-statutory requirement to give reasons, the nature of the process as a whole, and the information available to the applicant and the extent of the reasons actually furnished.
54. I am satisfied that the respondent's obligation to give such reasons in the light of all the foregoing has been complied with.
55. The reliefs sought are refused.