[2020] IEHC 460

THE HIGH COURT

RECORD NO. 2018/963 JR

BETWEEN

GERALD DOWLING

APPLICANT

AND

IRISH PRISON SERVICE, THE 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. The applicant seeks to quash the contents of a report prepared by a person fulfilling the role of "designated person" under the Dignity at Work policy currently operating within the Irish Prison Service ("IPS"). The report was prepared after a complaint of bullying was made against the applicant and after certain steps had been taken by the designated person in accordance with the Policy, which sets out the procedures to be followed upon a complaint of bullying being made. In her report, the designated person recommended that the complainant and the applicant should engage in mediation.

2. The case was heard by me at the same time as the case of *McDonald v. IPS* and *Buckley v IPS*. Unlike those cases, there was never any question of *transferring* this applicant, Mr. Dowling, from one position to another within the IPS. Also, unlike the McDonald case, no question of any *further investigation* of a bullying complaint arises. What happened in the present case was simply this: a complaint of bullying was made against the applicant; a designated person was appointed; having carried out her duties, she wrote a report recommending mediation which was accepted by the Director of Human Resources; and that was where matters rested until this judicial review was commenced. The applicant takes issue with her report and, in particular, her view that the complaint was made in good faith, and its recommendation as to mediation, as well as the acceptance of the report by the Director. The applicant says that she failed to take certain crucial matters into account and that these might have affected her conclusion. It has to be said that the submissions on behalf of the applicant frequently came close to the proposition that the Court itself should view the bullying complaint against the applicant as being without merit. Of course, the Court can express no view whatsoever on this matter as this would be to enter into the merits of the complaint which this Court in exercising its judicial review function is not entitled to do.

The Dignity at Work policy

3. The Dignity at Work policy ("the Policy") is a document which was developed in partnership between civil service management and staff unions. It replaced a previous policy and came into effect from 20th February, 2015. As part of the revised procedures, a new role, that of the "designated person", was introduced into the process for the first time. The introduction of this role was required by the *HSA Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work*. The Dignity at Work policy states that the role of the designated person is to oversee each complaint which is

referred to the Human Resources ("HR") Unit and a detailed description of the role is set out in Appendix B, to which I will return shortly.

4. The Policy states that its intention is to encourage the use of informal resolution methods and the use of mediation as often and as early as possible during disputes, and that complaints should only proceed to formal investigation once efforts to utilise local resolution methods or mediation have been exhausted or are considered unsuitable due to the nature of the complaint.

5. The Policy sets out detailed procedures to be followed when allegations of bullying, harassment or sexual harassment are made. One method of resolving complaints is described as 'local resolution' whereby the complainant approaches the respondent and/or the line manager and the matter is resolved at that level.

The Designated person

6. Another approach is that the complaint is raised with HR, in which case a "designated person" is appointed to oversee the complaint. The designated person is required to consult with the complainant within 10 days, and then to consult with the respondent within 10 days, having furnished them with the detail of the complaint. The designated person provides certain documents to the complainant and respondent (including the Policy itself and the Disciplinary Code) and explains the various procedures available for resolution, including mediation in particular. The designated person is required to produce a written report for HR which records all stages of the process that took place; an indication of whether the alleged behaviour may constitute bullying, harassment or sexual harassment; examples of alleged behaviour provided by the complainant including time, dates, location, names of witnesses; and a copy of the written complaint signed by the complainant. Interestingly, the policy states that "[t]hese records should not include comprehensive details of what was discussed" (emphasis added). It also states that "[t]he purpose of the records is to provide evidence of an organisational response and an attempt at resolution".

7. Appendix B provides that the designated person will be a senior member of staff who will "oversee complaints which have been referred to the Human Resources Unit" and says that "[t]his individual will play a pivotal role in ensuring that complaints are dealt with in a timely and efficient manner". It says that the designated person shall:

    - Ensure that all parties have copies of this policy and other relevant information;
    - Ascertain the details relevant to the complaint, the context, and advise on the potential resolution methods which may be explored;
    - Provide information on mediation to all parties involved in a dispute;
    - If complaints are in a verbal format, make a written note of what is complained of, and give a copy to the complainant; and

- Make a record of steps which have been taken in the process such as records of meetings, actions agreed, and the final report to the HR Manager. The purpose of these records, which do not include details of the discussions, are to provide evidence of the complaint being met with an organisational response and attempt at resolution.

Investigation

8. Upon receipt of the designated person's report, the HR Manager may decide to assign the matter to investigation. The investigator is to receive and consider all of the evidence. Within 10 working days of the receipt by the Manager of the investigation report, the complainant and respondent should be informed in writing of the findings of the investigation. They then have 10 days within which to comment upon them. Within 10 working days of the receipt of comments, the manager is required to consider the findings of the investigation and comments provided by both parties; decide upon the outcome of the process; and inform both parties if the matter is to be further pursued as a disciplinary issue.

Disciplinary Process

9. Following investigation, complaints which are upheld may be pursued by the HR Manager as a disciplinary issue, in accordance with the provisions of the Disciplinary Code. Equally, complaints which are found to be malicious or vexatious may also be pursued as a disciplinary issue, in accordance with the Code.

Review of decision

10. There is also provision within the Policy for applications for review of the decision. Where the complainant or respondent is dissatisfied with the conduct and/or outcome of an investigation, he or she can apply in writing (clearly indicating the specific grounds for review), within 10 working days of receipt of the decision, to the HR manager to review the process. A suitable senior manager from outside of the organisation will be appointed within 10 working days of the application to conduct a review. The role of the reviewer is not to re-investigate the incidents which gave rise to the complaint but rather to consider whether the investigation followed the correct procedures outlined in the Policy and whether the investigator's conclusions could reasonably have been drawn from the evidence on the balance of probability. Once the reviewer has completed the review, he or she should detail his or her findings in a report for the HR manager who, in turn, will consider the findings and decide upon a course of action.

11. From all of the above, it is clear that a complaint which is not resolved by mediation or local resolution moves through a number of different phases, and that the investigative phase is an entirely separate phase in the process from the earlier phase during which the designated person is involved. The phase during which the designated person is involved appears to be a preliminary one, designed to enable the designated person to gather some basic information and to make the parties aware of the various resolution options including mediation in particular, before reporting back to the HR Manager who then decides upon next steps. This phase is described in the Policy itself as being for the

purpose of demonstrating an organisational response to the complaint and an attempt at resolution. It is not only a *pre-decision-making phase* with regard to the complaint but is in fact a *pre-investigation phase*.

12. I turn now to the events giving rise to the present proceedings.

Chronology of Events in the Present Case

The meeting of the 30th May, 2018

13. The applicant is a prison officer holding the rank of Chief Officer who is attached to the Operational Support Group. He has twenty-eight years of service within the system. On 30th May, 2018, the applicant conducted a meeting at which two prison officers were admonished in respect of an administrative matter. Assistant Chief Officer McDonald was present for the admonition. One of the prison officers being admonished was a prison officer to whom I will refer as "prison officer M". When the admonishment had taken place, prison officer M was asked to stay on while the other prison officer left the room. Assistant Chief Officer McDonald was asked by the applicant to remain present for this conversation also. A conversation then took place, of which the Court has two different accounts. One account comes from the affidavit evidence filed on behalf of the applicant. The other comes from the subsequent written complaint of prison officer M as part of his bullying complaint; this of course did not form part of the affidavit evidence in the case because officer M was not a party to these proceedings. The affidavit evidence on behalf of the applicant puts forward the following account of the meeting. It narrates that Chief Officer Dowling said that it had been reported to him that prison officer M was making slanderous comments about a Chief Officer Buckley (who was not present at the meeting), which prison officer M initially denied, and that he (Chief Officer Dowling) then said that he himself had overheard prison officer M making such comments. He also said that he had heard that prison officer M was making slanderous comments about himself (Chief Officer Dowling) and was advised to cease doing this. It is said that prison officer M ultimately accepted that he had done this and tendered an apology.

14. On the same date, Chief Officer Dowling sent an account of the meeting to three persons by email. Governor Patrick Kavanagh, Chief Officer James Ben Buckley; and Assistant Governor June M. Kelly. This document set out Chief Officer Dowling's account of the meeting as described above, and says that while officer M initially denied the allegations, he then "said that he may have said both things as a joke" and ultimately apologised:

> "He apologized to me in regards to the other Chief Officer whereby I informed him that I would not accept the apology on behalf of the other Chief Officer and that he would be better served apologizing to that person himself. He apologized to me in regards to any offence caused stating again that it was only a joke. I informed him that I would accept his apology on this occasion and that I would be (sic) a record of this meeting on his file."

The email concludes by saying:

> "Governor Kelly, I would ask that a copy of the Dignity at Work policy be forwarded by email to Officer M and a record of same be kept. It is essential that staff are aware of the standards expected of them."

During the hearing, counsel on behalf of the applicant maintained that this constituted a "report" while counsel on behalf of the respondents described it is a mere "email"'. I do not think that anything turns on the description of the document and I will refer to it in this judgment as "the email/report of 30th May 2018". Its significance in the case (if any) lies in its content; it provided a contemporaneous account of the encounter with prison officer M from the point of view of Chief Officer Dowling on the same day as the meeting itself.

21st July 2018 – A complaint of bullying is made by prison officer M

15. On 21st July, 2018, prison officer M submitted a complaint against both the applicant and Assistant Chief Officer McDonald, alleging bullying and harassment arising from the meeting of 30th May, 2018.

A Designated Person is appointed

16. In accordance with the Dignity at Work policy, a Ms. Caroline O'Hara of the Prison Service Human Resources was appointed as the designated person in respect of the complaint of prison officer M. She met prison officer M on 17th August, 2018.

Meeting of 28th August, 2018 between the designated person and the applicant

17. On 28th August, 2018, Ms. O'Hara interviewed the applicant in respect of the complaint of prison officer M. This is one of the steps which the designated person is required to undertake under the Dignity at Work policy.

The Designated Person's minutes of the meeting are sent to the applicant

18. By email dated 6th September 2018, Ms. O'Hara sent the applicant her record of her meeting with him on 8th August, 2018. Her report dated 6th September, 2018 was submitted to the Human Resources Manager, Don Culliton, and approved by him on 11th September, 2018. The applicant recorded the dates and other details concerning her meetings with the complainant and applicant. It stated that the applicant told her that the complaint of prison officer M was not an accurate account of the meeting on 30th May, 2018, that he explained the context of the meeting, and said that he had made some critical comments in an honest and constructive manner concerning prison officer M's work. He said that the matter of rumours and inappropriate behaviour towards chief officers was raised by him. The report also discussed the attitude of the complainant and the applicant to engaging in mediation. The report went on to record that the designated person was of the opinion that the complaint was made in good faith. It continued: "While the Designated Person cannot comment on whether the allegation constituted bullying but as it is a once-off incident it is not considered bullying under the policy". She also referred to discrepancies in their accounts of the meeting and that the applicant did not agree with officer M's account. She "strongly recommended" mediation between the parties.

Leave granted to bring (first set of) Judicial review proceedings

19. On 19th November, 2018, leave to bring judicial review proceedings was granted by the High Court (Noonan J.)

The reliefs sought

20. The reliefs sought by the applicant at the hearing of this action were as follows:

i. An order of certiorari by way of Application for Judicial Review quashing the decision/finding/ opinion of the designated officer that the complaint made by prison officer M against the applicant was made in good faith.

ii. An order of certiorari quashing the decision of the Director of Human Resources made on to approve the above decision/finding/opinion.

iii. A declaration that the failure to submit the applicant's report of 30th May, 2018 was in breach of the applicant's right to natural and constitutional justice.

iv. A declaration that the failure of the designated person, the Director of Human Resources and the Personnel Officer to seek and consider the applicant's report of 30th May, 2018 was in breach of the applicant's right to natural and constitutional justice.

v. A declaration that the respondents had failed to comply with the requirements and procedures of the Dignity At Work policy.

vi. A declaration that the respondents were in breach of the applicant's right to fair procedures, natural and constitutional justice, in failing to afford weight to the applicant's account at the meeting with the Designated Person, or to the fact that the complaint was exactly the same, word for word, as made against ACO McDonald or to the fact that the admonition complained of by prison officer M related to his own breach of duty, insubordination and spreading of derogatory and slanderous rumours about Chief Officer Buckley.

vii. A declaration that the respondents were in breach of the applicant's right to fair procedures, natural and constitutional justice, in that when the Designated Person met with the applicant on 28th August, 2018, she knew or ought to have known that a decision had already been made by the Personnel Officer on or before 24th August, 2018 to transfer ACO McDonald of OSG Portlaoise and Chief Officer Buckley for the stated reason in relation to ACO McDonald to protect all staff (namely the complainant prison officer M) from any potential risk to their safety, health and welfare.

viii. A declaration that the respondents were in breach of the applicant's right to fair procedures, natural and constitutional justice in recommending that the applicant participate in mediation with a prison officer who was admonished by the applicant for failure to comply with the orders of a superior officer and for making derogatory and slanderous remarks about superior officers, where such participation could only be deemed to affirm the bona fides of the complaint of prison officer M.

ix. An order for damages for abuse of process, breach of duty, breach of the Dignity At Work Policy, negligence, inconvenience and loss.

The issue of amenability to Judicial Review

24. At paragraph 26 of the Statement of Opposition, the respondent pleaded that having regard to the circumstances of the case, there was no substantive dispute between the parties and the issues pleaded by the applicant were "not justiciable before this Honourable Court". It was also pleaded that the proceedings were an attempt to have the Court engage with the merits of the complaint of prison officer M and to interfere in the ordinary employment relationship between the applicant and the respondent. In the written submissions on behalf of the respondent, the Court's attention was drawn to *Hosford v. Minister for Social Protection* [2015] IEHC 59, *Beirne v. Garda Commissioner* [1993] ILRM 1, *Becker v. Board of Management, St. Dominic's Secondary School, Cabra [*2005] IEHC 169, and *Murtagh v. Board of Management of St. Emer's School* (unreported, Supreme Court, 7th March 1991).

25. During oral argument, counsel on behalf of the applicant submitted that, notwithstanding the above, there had been no plea that the case was not amenable to judicial review and that the applicant had not understood the reference to 'non-justiciability' at paragraph 26 of the Statement of Opposition to amount to such a plea.

26. It seems to me that the issue of non-amenability to judicial review was clearly raised by the respondent in the Statement of Opposition and in the written submissions, first by means of the language of 'non-justiciability' in the Statement of Opposition and secondly, by reason of the authorities relied upon in the submissions together with the submissions thereon. Further, that the issue of non-amenability to judicial review should have been raised should have come as no surprise to the applicant, given the facts of the case. In *Bloxham (in liquidation) v Irish Stock Exchange* [2014] 4 IR 91, Cooke J. identified in broad terms two types of cases in which there are controversies about amenability to judicial review. The first is a situation where the decision is, on its face, one of an entity which is a purely private body and the applicant seeks to establish that it has nevertheless been endowed with some public loss status which renders the particular decision amenable to judicial review. The second situation described by Cooke J is precisely that arising in the present case, which he described in the following terms:

> "The second situation is one in which the decision impugned is one made by a body established, either directly or indirectly, by statute and the body is exercising public authority powers conferred on or delegated to it, so that its jurisdiction is clearly derived from a public law source, but as respondent, the body seeks to resist the judicial review application by maintaining that the particular decision challenged is based upon a distinct contractual relationship with the applicant." (per Cooke J. at paragraphs 19).

27. The dispute in the present case concerns a report of a person who conducted a preliminary exploration (to use as neutral a term as I can find) of a bullying allegation made against an employee under the procedures agreed between the employee trade

unions and the employer. There was no investigation, there was no adjudication, there was no finding, and there was no sanction. On its face, the procedure would seem to fall squarely within the contractual relationship between the employer and employee rather than the parameters of a public law matter and the most obvious, and preliminary question, which had to be addressed was whether judicial review was an appropriate form of proceeding at all.

28. As was recently stated by Charleton J. in Shatter v. Guerin [2019] IESC 9 -

> "Simply because some emanation of the State is involved in making a decision that an applicant feels aggrieved by does not mean that a public law remedy is available. The State can, after all, behave as a private individual." (para 4)

Or as O'Donnell J. said in the same case:

> "The good name of the citizen is one of the personal rights the State is obliged to defend and vindicate. However, there is no rule that before any statement is made which is critical of an individual, and which may be thought to reflect on their good name, he or she must be afforded a hearing and an opportunity to make representations." (para 45)

The issue of whether or not the report of the designated person fell within the parameters of judicial review was, in my view, an obvious hurdle that the applicant needed to overcome in this case before the Court could even consider questions of the application of principles of natural and constitutional justice. Accordingly, I now propose to address the issue of whether or the report of the designated person in this case was amenable to judicial review as a preliminary issue.

Discussion and Decision on Amenability to Judicial Review

29. First, from the numerous authorities on the interaction between judicial review and decisions affecting employees within various forms of public service, I note the following broad contours:

a) *Dismissals or terminations of contract* have tended to attract the principles of judicial review; *Beirne v. Garda Commissioner* [1993] ILRM 1 and O'Donnell v. Tipperary (SR) County Council [2005] 2 IR 483;

b) *Investigations* which have not yet reached a conclusion but may lead to disciplinary outcomes have sometimes also been held to fall within judicial review; *O'Donoghue v. South Eastern Health Board* [2005] 4 IR 217, *Geoghegan v. Institute of Chartered Accountants* [1995] 3 IR 86;

c) *Demotions and warnings* may attract judicial review (see *Kelly v. Board of Management of St. Joseph's National School Ballymount, Co. Wicklow* [2013] IEHC 392; and *Dillon v. Board of Management of Catholic University School* [2018] IECA 292;

d) At the other end of the spectrum, *recommendations* such as the recommendation in issue in *Mullally v. Labour Court* [2016] 3 IR 245 (as well as the cases cited therein) do not fall within judicial review because they are not binding determinations.

e) The issue of suspending an employee has attracted quite a lot of attention within the authorities and may or may not fall within judicial review, depending on the purpose of the suspension; *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,

30. Secondly, it is also useful to consider the nexus (if any) between the impugned decision and the statutory background to the body in question, as advised by Peart J. in in *Becker v. Board of Management, St. Dominic's Secondary School, Cabra* [2005] IEHC 169, a case involving a teacher. He said that simply because a school is established, and its functions and obligations set forth in the education legislation, is not of itself sufficient to bring every dispute emanating from the school's activities within the reach of judicial review. He said that there would be a range of functions or obligations at the Board of Management which, to a greater or lesser degree, come within the public law domain but the fact that the Board of Management was empowered to appoint, suspend or dismiss a teacher in accordance with procedures agreed between the Minister, the school and other bodies such as trade unions and staff associations did not mean that "any dispute arising out of the invoking of such a disciplinary procedure" was taken out of "the private law domain applicable to such disputes in other areas of life". Similarly, in my view, the fact that the Irish Prison Service performs certain functions which undoubtedly attract some public law principles does not necessarily mean that every step it takes vis a vis its employees is automatically subject to judicial review.

31. Thirdly, a number of authorities have discussed the issue of whether preliminary phases in multi-phased investigative or decision-making processes are amenable to judicial review and/or require fair procedures (and if so, of what kind and content). These authorities were carefully analysed by O'Donnell J in *Crayden Fishing Company Ltd. v. Sea Fisheries Protection Authority* [2017] IESC 74, [2017] 3 I.R. 785, after which he said that, although he would not venture to suggest any "bright-line" rule which would reflect all the previous decisions, he would approach such cases "on the basis that the default position is that a person conducting a preliminary investigation, which itself does not lead directly in law to a binding and adverse decision, is not normally under an obligation to comply with a requirement of a fair hearing'. He returned to this theme in *Shatter v Guerin* [2019] IESC 9, where he said (at para 52)-

> "Where a preliminary inquiry is established to consider if a further formal inquiry is necessary... the closest analogy in law may be those cases which consider whether the procedural steps are necessary before a decision is made which has the consequence of initiating a process which itself is required to be conducted in accordance with elaborate procedural guarantees. Some examples include a

decision by the Director of Public Prosecutions as to whether or not to initiate a prosecution, or the decision of a regulatory or disciplinary body that there is a sufficient basis to commence disciplinary proceedings. Such a decision can in itself be said to be damaging to a person's reputation, but it is understood to be only part of a process which will include proceedings which offer an opportunity to the affected person to have a full hearing, with all attendant procedural guarantees, and therefore a comprehensive opportunity of vindicating their reputation. A decision is made that an inquiry, trial, or some other procedure is necessary. I consider that the general principle is well expressed at para. 8-055 of the latest edition of De Smith's Judicial Review (8th edn., Sweet & Maxwell, 2018): -

> '[a] person conducting a preliminary investigation with a view to recommending or deciding whether a formal inquiry or hearing (which may lead to a binding and adverse decision) should take place is not normally under an obligation to comply with the rules of fairness.'

32. Fourthly, it is important to note that the designated officer in the present case did not purport to make any determination nor is she empowered to do so under the Policy. This is a matter which is often of importance in deciding whether or not a case falls within the parameters of judicial review. Again, to quote O'Donnell J said in *Shatter v. Guerin:* -

> "In most contexts, the legal protection of a person's good name as required by the Constitution is to be found in the law of defamation… When, however, steps are taken by the State or one of its organs, in public or otherwise, which *result in a determination* adverse to the reputation of a citizen in a manner which is immune from action, then it may be said that the Constitution requires certain procedures to be followed before the State or anybody exercising power under or by authority of the State comes to a conclusion and makes a *determination adverse* to a person's good name. (para 45, emphasis added)

And-

> "One useful test applied in the Court of Appeal as to whether a particular process falls into this category, or rather is a form of inquiry which itself requires the procedural guarantees, is whether the process can be said to be *"decisive" or "determinative". … Where a process makes a binding decision in relation to some rights or interests*, it will be clear that the test is satisfied. It is more difficult, however, in the context of the right to a good name of a citizen. *It is rare to seek to impose upon a bare report the procedural obligations which are familiar where determinative decisions are made*. However, where the report resolves a dispute of fact which, as a matter of law, or even practicality, involves a determination of rights, whether by a statutory or other decision-maker, as in T*he State (Shannon Atlantic Fisheries Ltd.) v. McPolin* [1976] I.R. 93, the report may be subject to the requirement of fair procedures and will be amenable to judicial review if it fails to afford them. The same conclusion may also perhaps be arrived at where the report has the status of a "determination" by reason of being, and being intended to be,

the only official and accepted account of a disputed matter. This appears to be the basis of the High Court decision in *De Róiste v. Judge-Advocate General* [2005] IEHC 273, [2005] 3 I.R. 494." (para 54, emphasis added)

33. Taking all of the above into account, I have reached the conclusion that the present case does not fall within the parameters of judicial review. The Irish Prison Service is undoubtedly a body which carries out many functions of a public law character, but what is impugned in the present case is a step taken in respect of an employee which is neither an adjudication on a disputed fact nor a sanction of any kind, such as dismissal, demotion, or warning. Nor is it a finding in the course of an investigation preliminary to a disciplinary process. There is little or no nexus between the statutory or public law context of the respondent and the matter impugned, being a report of a designated person into an allegation of bullying as a preliminary exercise under the Dignity at Work procedure. The applicant was not removed or suspended from his position. The height of the applicant's case is that the designated person formed the view that a complaint had been made in good faith against him; an opinion which was embedded in a report to her superior, the Director of Human Resources, and which would not have been generally publicised if he had not brought these judicial proceedings. The designated person was performing functions in the most preliminary phase of a phased structure set out in a policy agreed between the employer and the trade unions. I cannot see how, on any of the tests described in the authorities, the applicant can bring himself within the parameters for judicial review and I therefore conclude that the applicant should be refused the reliefs sought on this preliminary basis.

34. In the event that I am wrong to refuse the reliefs sought on this preliminary ground, I should say that I would in any event refuse the reliefs sought on the ground that the rules of natural and constitutional justice were not breached on the facts of the case. It is a well-established principle of judicial review that the precise content of what is required by principles of natural and constitutional justice varies according to the context. Here, even if the situation attracts principles of judicial review, it is highly relevant that the designated person was operating within a preliminary phase of the procedures under the Dignity at Work Policy, which involved no more than the gathering of basic information about the complaint, exploring whether mediation might be appropriate, and providing the parties with information. This phase was not intended to be a full investigation where each party's side is fully explored leading to a considered conclusion. Put simply, I do not think that a preliminary procedure which is not meant to be a comprehensive evidence-gathering exercise can be criticised for failing to gather all the evidence comprehensively. The applicant's primary complaint about procedures was that the designated person had not received the email/report of 30th May, 2018 before she wrote her report. However, the applicant had an opportunity to give his response to the allegation of bullying to the designated person orally when she interviewed him. At its height, his complaint about what she did not have before her by way of additional evidence was a contemporaneous document which might be viewed as corroborative of his oral account of the meeting of 30th May, 2018. This is the kind of complaint which might appropriately be directed towards a person or body conducting a full investigation or making an adjudication on

disputed facts, but neither of these functions fell within the role of the designated person, and I do not think it appropriate to hold her to the standards that would apply in those other contexts.

35. As regards the complaints that the designated person failed to take account of the context from which the bullying allegation arose (i.e. a meeting at which prison officer M was being admonished) and the similarity of the complaint against the applicant to that against Assistant Chief Officer McDonald, these complaints in essence invite the Court to reach the conclusion that the complaint was not made in good faith. They therefore do not consist of procedural complaints about the process but instead amount to an invitation to the Court to adjudicate on the merits of the bullying complaint. It would be entirely inappropriate for this Court to cross that line in a judicial review application.

36. One might question whether it is necessary or appropriate for a designated person to express any view on whether the complaint was made in good faith or not, when she has no role in adjudicating on the complaint and her role is simply to perform the various other functions laid upon her by the Policy. I note that the Policy provides that complaints which are *found* to be "malicious or vexatious" may themselves be pursued as a disciplinary issue in accordance with the provisions of the Disciplinary Code. This phrasing, as well as its location within the Policy which sets out a sequence of phases, suggests that this is a conclusion that can only be reached at the end of the process, not one that should be reached at its early stages. There is, of course, a difference between a preliminary opinion that a complaint looks to be a *bona fide* one and a more formal conclusion, at the end of a process, that a complaint was frivolous and vexatious, such that it could ground a disciplinary proceeding. Many procedures contain a filter of some kind whereby cases which seem to be entirely without merit are screened out. The Dignity at Policy does not currently contain an explicit reference to this, and this may reflect a view, perhaps, that if an employee feels aggrieved enough to make a complaint, this is in itself is an issue to be addressed, perhaps by mediation, irrespective of the merits or substance of the complaint. People need to work together in an employment situation and the Dignity at Work policy appears to be directed at trying to provide mechanisms for facilitating harmonious relationships rather than, more narrowly, simply providing for formal investigative and adjudicative mechanisms.

37. In any event, while I wonder whether a designated person should express any opinion on whether a complaint was made in good faith or not, when the procedures do not expressly require her to do so, that is a long way from a finding that her expression of this opinion constituted a breach of constitutional and natural justice. Her report simply grounded a recommendation that the case be referred to mediation, and her conclusion was never going to be made public. The applicant can apparently choose whether to participate in mediation or not. That being so, matters with regard to the complaint of prison officer M would appear to be at an end concerning the applicant and the opinion of the designated person would never have been given more general circulation had it not been for these proceedings.

38. Accordingly, I will refuse the reliefs sought.