

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 824
[Record No. 2021/76 JR]

BETWEEN

B

APPLICANT

AND

HEALTH SERVICE EXECUTIVE

AND

■■■■ **HOSPITAL**

RESPONDENTS

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 1st day of December, 2021

Issues

1. The applicant is seeking to impugn a decision taken by the first named respondent on 5 November 2020, when the decision maker confirmed that he was not in a position to uphold the applicant's grievance. In this regard the applicant argues that the respondent failed to comply with HSE requirements, failed to apply fair procedures by reason of irrationality of the decision, and failed to give adequate reasons in breach of the applicant's rights including her rights, pursuant to her employment contract.
2. The grounds for the foregoing is the assertion that the applicant's doctors have recommended that she should not be attending work which exposes her to COVID-19 in the course of transporting patients (some with COVID-19) from the ■■■■ department to other areas of the hospital (■■■■) (being part of her work). The applicant states that her GP advised her to stay at home. She applied to work from home or in another area of the hospital. On 21 July 2020 the applicant's GP sent the respondents a letter enclosing two specialist reports respectively dated 21 May 2020 and 7 July 2020.
3. It is said that the decision maker ignored the experts' reports and relied on Dr. ■■■■ of the respondent's Occupational Health Department although the applicant was never assessed by Dr. ■■■■.
4. It is said that the respondent failed to apply "HR Circular 34/2020" the asserted relevant circular, adequately or at all, and the decision flies in the face of reason or common sense.
5. The claim is resisted in full including an argument to the effect that the proceedings are not amenable to judicial review.
6. There is no evidence at all of a claim against the Health Service Executive.

Background

7. The applicant commenced working at ■■■■ Hospital on ■■■■ as an Attendant Team Leader in the department of ■■■■. An employment contract was signed and provided "Disciplinary and grievance issues are subject to the Hospital Policies and procedures ...".

8. It is common case that [REDACTED] hospital board was established under [REDACTED] Hospital Board (Establishment) Order [REDACTED] S.I. no. [REDACTED] of [REDACTED]).
9. The applicant retired from her position on 19 October 2020, on her 65th birthday.
10. The applicant worked in the hospital up until 2 April 2020 when she was advised that she was in contact with a staff member who tested positive for COVID-19 and therefore she was obliged to self-isolate for fourteen days.
11. At the end of the above period Dr. [REDACTED] of the respondent's Occupational Health Department deemed the applicant fit for work although subsequently provided medical reports, for the benefit of the applicant. Dr. [REDACTED] throughout (insofar as COVID-19 is concerned) took the view that the applicant's medical status did not warrant cocooning and she did not qualify for the category of "very high risk".
12. It is argued by the respondent that the applicant was "high risk" and therefore where work could not be done remotely various precautions were mandated and were undertaken by the hospital. There is no contention in respect of the precautions taken by the hospital. Although the applicant was absent from work with valid sick notes issued by Dr. [REDACTED] it was not because she was at "very high risk" of COVID-19 which required cocooning. In the circumstances where the applicant had already exhausted her sick pay, the applicant was not remunerated while out of work. The applicant did not work between 2 April 2020 and the date of retirement being 19 October 2020 aforesaid.

The decision

13. In the letter of complaint (27 July 2020) leading to the impugned decision, the applicant quoted her employment number and advised that she was filing a grievance under [REDACTED] hospital grievance policy on the basis that *inter alia*, HR Circular 34/2020 gave rise to a duty of care which had not been fulfilled. The complaints in the letter of 27 July 2020 involved setting out a chronology between 1 April 2020 and 21 July 2020. The applicant refers to her GP letter enclosing the two expert reports aforesaid and states:

"They both supported my intentions to work from home. However, this was impossible given my position in the XXX department, where I would have had direct contact with Covid patients... despite the medical opinions of my GP, and my two consultants, the Occupational Health physician has chosen to deny me my rights".
14. Although the applicant in submissions suggests that the order or decision under appeal (in the aforesaid letter of 27 July 2020) was one of 14 April 2020 when Dr. [REDACTED] certified the applicant fit to return to work, nevertheless, it is clear from the letter of the applicant of 27 July 2020 that her complaint spanned from 2 April to 21 July 2020.
15. The affidavit of Mr. XXX of 19 April 2021 references a meeting in respect of the applicant's grievances between Mr. [REDACTED] (the decision maker), Mr. [REDACTED] of SIPTU and the applicant on 8 October 2020.

16. On 5 November 2020 Mr. [REDACTED] wrote to the applicant referencing the meeting and the applicant's appeal indicating that further information was sought from a number of sources relevant to the applicant's appeal. Following brief detail of the applicant's income status Mr. [REDACTED] concludes:

"I am satisfied, having spoken to your manager that given the conditions prevailing around Covid in the first half of 2020, it is reasonable to conclude that there was no suitable, alternative employment available for you over this period."

17. Mr. [REDACTED] clearly indicates that he also spoke to [REDACTED] (the applicant's manager), in reaching the conclusion aforesaid.

18. In respect of the evaluation of the applicant's condition by the Occupational Health Department, Mr. [REDACTED] indicated that he discussed the applicant's care with Dr [REDACTED] who confirmed that at all relevant times HSE guidance was followed and the applicant's external specialists' reports were considered but did not specify that the applicant's condition warranted cocooning. Mr. [REDACTED] concludes:

"I am satisfied that your case and concerns were appropriately and professional (sic) reviewed by occupational health. Based on this I am not in a position to uphold your grievance."

19. The decision aforesaid was copied to Mr. [REDACTED] of SIPTU.

Issue solely and exclusively arising from a private law contract

20. In *Beirne v. The Commissioner of An Garda Síochána* [1993] ILRM 1 Finlay C.J. stated:

"The principle which, in general, excludes from the ambit of judicial review decisions made in the realm of private law by persons or tribunals whose authority derives from contract is, I am quite satisfied, confined to cases or instances where the duty being performed by the decision-making authority is manifestly a private duty and where his right to make it derives solely from contract or solely from consent or the agreement of the parties affected."

Because the function was considered to be an exercise of a public statutory function regulated by statute, and by statutory order, it was held that judicial review lay.

21. In *Geoghegan v. Institute of Chartered Accountants in Ireland* [1995] 3 IR 86 the Supreme Court noted that the respondent is one of a limited number of bodies whose members may act as auditors. The respondent was founded under Royal Charter of 1888 with the amending legislation in 1996, The Institute of Chartered Accountants in Ireland (Charter Amendment) Act 1966, s.6 whereof provided that bye-laws made, altered, or amended by the respondent "shall not have effect until they have been submitted to and allowed by the Government". The issue involved a disciplinary matter. The Court was satisfied that the issue was amenable to judicial review.

22. In *Bloxham v. Irish Stock Exchange* [2013] IEHC 301 Cooke J. was satisfied that the relationship at issue was not in the realm of public law. The disciplinary nature of the issue derived from the memorandum and articles of association of the respondent and therefore was not a public law issue. The Court was satisfied that judicial review was only available against a decision of a respondent in exercise of public not purely private authority. Judicial review remedies are addressed to persons or bodies who can be held answerable in respect of the performance of their duty or function, the origins of such function, jurisdiction or authority deriving directly or indirectly from the State.
23. In *Eogan v. University College Dublin* [1996] 1 IR 390 the applicant was a statutory professor employed under the Irish Universities Act 1908. Judicial review lay as a remedy.
24. In *Quinn v. Honourable Society of King's Inns* [2004] IEHC 220, the issue involved a challenge to exam grading. The applicant had been provided with rules and regulations, including a number of provisions referable to appeals at the entrance stage which the applicant had agreed to abide by. Smith J. was satisfied having regard to the following that the remedy of judicial review was not available:
- (1) The examination board's jurisdiction derived solely from the educational rules of the respondent.
 - (2) The applicant was accepted as an applicant in the entrance examination on the basis of the rules of the respondent.
 - (3) The applicant's rights were determined by a contract and the matters were essentially private law rights and matters.
 - (4) The fact that the powers of the respondent initially derived from a charter was removed and indirect to the issues at hand.
 - (5) It was necessary to consider the nature of the power and its source.
 - (6) The issue was not a disciplinary matter.
25. In *O'Donnell v. Tipperary (South Riding) County Council* [2005] IESC 18 Denham J. in the Supreme Court was satisfied that the applicant, Station Officer of Clonmel Fire Station, might litigate the issue of his dismissal by way of judicial review based on the following:
- (1) The applicant was the Station Officer and had a tenancy agreement. Characterisation as Officer was not determinative but would be considered with other matters.
 - (2) The issue was the applicant's dismissal on 3 October 2000 for asserted fraudulent pay claims.

- (3) There was a public element to the County Council as it was the fire authority and this authority was manifestly public.
 - (4) The public nature of fire protection function.
 - (5) The applicant's seniority and responsibility were relevant, being the most senior person answerable only to the Chief Fire Officer.
 - (6) The burden was on the County Council to show there was a private law duty being performed. The Court approved the requirement of establishing that the issue was manifestly a private duty derived solely from contract or agreement if the duty of the decision maker would ordinarily come within the public domain. The issue can only be excluded from judicial review if it is shown to arise solely and exclusively from the individual contract and private law.
26. In *Becker v. Board of Management of St. Dominics Secondary School Cabra* [2005] IEHC 169, the Court was satisfied that the consequences of the decision was an important factor to be taken into account and in its judgment distinguished between the wider aspects of education and statutory provisions, with the narrower aspects of the applicant's contract of employment. The impugned decision was part of the school's disciplinary procedure.
27. In *Kelly v. Board of Management of St. Joseph's National School* [2013] IEHC 392, O'Malley J. was dealing with the decision to demote a principal of a school on the basis of serious misconduct where, on appeal, in the context of the disciplinary process employed, a recommendation was made which the Board of Management did not accept. Because the issue involved a disciplinary process in respect of principals, and the relevant circular (inviting applications for the role of principal) was issued under s.24(3) of the Education Act 1998, the Court was satisfied that the issue was amenable to judicial review.
28. In the instant circumstances I am satisfied that:
- (1) The decision maker in this matter might be considered to ordinarily come within the public domain and therefore the decision at issue could only be excluded from the remedy of judicial review if it is shown to derive solely and exclusively from an individual contract in private law (*O'Donnell*).
 - (2) It is the burden of the respondent to establish that the issue derives under a contract of private law (*O'Donnell*).
 - (3) The letter of complaint quotes the applicant's employment number and refers to the grievance procedures under the hospital's policy and identifies her issue as a grievance.
 - (4) The informal nature of the application of 27 July 2020 referencing a span of more than three months is a matter of relevance.

- (5) Although reference is made in the opening sentence of the decision of 5 November 2020 to “your appeal”, the final sentence was to the effect that Mr. ■■■ was not in a position to uphold “your grievance”.
 - (6) The applicant’s employment status is not statutorily governed but rather was referable to a contract duly executed.
 - (7) The grievance in respect of sick status classification and personal eligibility for pay while out of work for COVID-19 was removed from and not directly arising under S.I. ■■■/■■■, or the public function of the hospital.
 - (8) The issue did not involve a disciplinary matter.
 - (9) The loss to the applicant would be considered to be limited in monetary terms, at its height referable to the loss of income she would receive from 14 April 2020 to 19 October 2022 (the extent of the period the applicant indicated she intended to work, although the issue of the applicant’s intention to take early retirement is disputed in the affidavits before this Court. There was no notice to cross examine).
 - (10) The employment status of the applicant within the hospital was that of Attendant Team Leader.
29. I am satisfied that the respondent has discharged the burden of proof necessary to demonstrate that the within matter is manifestly private. The issue contained within the statement of grounds is shown to arise solely and exclusively from the individual contract in private law between the applicant and the hospital of 4 September 2006.

Substance of the applicant’s claim

30. The applicant’s claim is therefore not amenable to judicial review, however, if I am incorrect in that regard:

- (a) The applicant has not demonstrated that it was irrational or in breach of fair procedures for Mr. ■■■ to seek and secure input from Dr. ■■■. Clearly there was an in-person meeting between the decision maker, the applicant and the applicant’s SIPTU representative on 8 October 2020 without any involvement of Dr. ■■■. It is noted that Mr. ■■■ also spoke to Ms. ■■■ in advance of his conclusion vis-à-vis potential other roles which the applicant might fulfil within the hospital and no complaint is raised by the applicant in regard to this interchange.

I am satisfied having regard to the extracts of the decision of 5 November 2020 above, it has not been demonstrated that there was a breach of fair procedure by Mr. ■■■ in securing the views of Dr. ■■■ and indeed the views of Ms. ■■■ as to the availability of alternative employment.

- (b) Specific reference was made in the decision to a consideration of the external specialist reports – in this regard the reasons argument of the applicant is based upon the assertion that no reason was given as to why the respondent refused to

accept the expert reports. It is clear from the decision that the hospital took the view that the relevant expert reports did not in fact recommend cocooning. Professor [REDACTED], Oncologist, in his letter of 21 May 2020 refers to the applicant being diagnosed with breast cancer in September 2016 and states:

“Given that her chemotherapy was in the last few years it would be prudent if during her working day any possible exposure to Covid-19 could be minimised as she may well have some residual immunosuppression from her chemotherapy and under these circumstances it would be best if everything could be done to avoid possible contact with the virus at work.”

It appears to me that there was nothing irrational or unreasonable about the conclusion that the above letter did not provide a diagnosis of very high risk or that the applicant should cocoon.

In the letter of 7 July 2020 Professor [REDACTED] Endocrinologist states:

“This lady has a diagnosis of diabetes. It is my advice that in the current Covid-19 situation she should continue to self-isolate as much as possible in order to avoid contact as her immune status is compromised by her condition. I support her intentions to work from home.”

The decision maker had an in-person meeting with the applicant and her SIPTU representative on 8 October 2020.

The applicant has not established the burden of proof on her to demonstrate that the letter of Professor [REDACTED] of 7 July 2020 was to confirm that the applicant should cocoon or indeed self-isolate (“continue to self-isolate as much as possible”) or that the applicant was at a very high risk (as opposed to a high risk) of COVID-19 and therefore has not established that the expert reports were either not accepted or were ignored.

- (c) The Alama toolkit evaluation was introduced as part of the HSE guideline document on 5 January 2021 being post the decision of 5 November 2020. It was not therefore an evaluation identified in Circular 34/2020 and accordingly the complaints made by the applicant in this regard are misconceived.

Conclusion

31. In the events, I am satisfied that even if I was incorrect in the view that the issues raised herein solely and exclusively derive from an individual contract in private law, I am satisfied that the applicant in the above such circumstances has not discharged the burden of proof to secure an order of *certiorari*.
32. The reliefs claimed are therefore refused.