THE HIGH COURT

Record No: 2018/309MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 90(1) OF THE EMPLOYMENT EQUALITY ACT 1998 AS AMENDED

Between:

ROBERT CUNNINGHAM

Appellant

-AND-

IRISH PRISON SERVICE

Prison Service

-AND-

THE LABOUR COURT

Notice Party

OUTLINE SUBMISSION ON BEHALF OF THE APPELLANT

Contents

I. Introduction

1. The point of law in this appeal arises from the Labour Court ('the Notice Party') overturning a first instance decision in favour of Mr Cunningham ('the Appellant') for refusing him reasonable accommodation of his disability pursuant to the Employment Equality Acts 1998-2015 ('the Acts'). The Appellant suffered a back injury in the course of his employment limiting his ability to engage in some physical aspects of his job as a prison officer. The Notice Party's decision is based on its interpretation of s.37(3) of the Acts. The decision is **Exhibit AJC6**, Grounding Affidavit of Andrew Cody sworn on 31 July 2018 to the Notice of Motion herein. The Notice Party ruled that s.37(3) provides that because the employer is a 'prison service' under the Acts, no duty of reasonable accommodation arises.

II. Summary submission

2. It is respectfully submitted that this appeal concerns the net question of whether the Notice Party correctly construed the provisions of sections 16 and 37 of the Acts to provide a complete exemption to the Respondent from the obligation to reasonably accommodate employees with disabilities.

3. The prohibition on disability discrimination in the Acts and EU law serves multiple needs. It serves the values of respecting the right to work and dignity at work of those with disabilities. It requires, as a matter of law that employers try to find ways to ensure that workers with disabilities can stay at work, even if this means adapting the workplace to accommodate them. The prohibition on disability discrimination serves to increase the proportion of the workforce which has a disability and allow persons with disabilities to

take part in employment. As of April 2016, 6.5% of the people at work in Ireland had a disability.[1]

4. All of these values were diminished by the perfunctory decision of the Notice Party that the Respondent had no obligation, in law, to reasonably accommodate its workers.

5. The Respondent indirectly discriminated against the Appellant on the ground of disability. Indirect discrimination is only permitted under law if it is objectively justified, which in settled law means that any difference in treatment must correspond,

    a. to a real need of the undertaking,
    b. be appropriate to that need, and
    c. be necessary for achieving that need.

6. The Respondent seeks to justify the discrimination by stating that the Appellant is not fit for work, despite the Chief Medical Officer stating otherwise, and that unlike all other employers in Ireland, with the exception of the defence forces, it does not have to measure fitness for work as fitness **after** reasonable accommodation has been provided. It relies on section 37(3) of the Acts to give it this complete exemption from providing equality to workers with disabilities.

7. The position of the Appellant is that no such blanket exemption exists. Section 37(3) simply deems that the requirement to be fit to carry out the functions required to the keep the prison service operational may be a real need of the organisation. This is the first element of the objective justification test. Accordingly, the Respondent is not exempt from completing the remainder of the three part test. Therefore, the Acts require the Respondent to prove the rule on fitness it has adopted – namely the requirement that **all** employees of the prison service be fully fit to perform prisoner contact duties - is appropriate to preserving its operational capacity and is necessary to achieving that end.

[1] Currently published Central Statistics Office data https://www.cso.ie/en/releasesandpublications/ep/p-cp9hdc/p8hdc/p9chs/. These people are described as part of the labour force, which does not necessarily mean they are being paid. To be clear, in Ireland there were 643,131 people with disabilities. Of these, however, only 176,445 were in the labour force (https://www.cso.ie/en/releasesandpublications/ep/p-cp9hdc/p8hdc/p9d/).

III. Background

i. Facts[2]

8. The Appellant is a 40-year old man who has worked for the Respondent since 5 March 2005 as a prison officer working in Cloverhill Prison. He has an excellent work history with the Respondent. During the period of his employment as a prison officer the Appellant has carried out a range of duties including the following:-

    - Class officer, charged with the direct care of up to 62 prisoners.
    - Escorts to and from courts and hospitals.
    - Control room duties.
    - Postal censoring and phone systems.
    - Reception officer duties.
    - Main gate duties.
    - Assisting class officer.
    - Teaching colleagues on I.T. systems.
    - Supervision of visits including professional and enhanced visits.
    - Carrying out internal and external key room duties.
    - Assisting on all divisions, carrying out relief class officer duties as required.
    - Supervision of recreation areas and exercise yards.
    - Assisting prisoners with requests and carrying out as required Governor's parade duties.
    - Supervision of visitors entering and exiting the main door to visits, ensuring security precautions are met at all times.
    - Ensuring all security standards are met and reported as required.
    - Driving of prison vehicles as required.
    - Supervising prisoners on grounds cleaning.
    - Waiting room supervision.

9. The Respondent is responsible for the operation of fourteen detention centres which include eleven traditional closed prisons, two open centres and one semi-open facility. In addition

[2] See **Appendix A** for the chronology of this appeal.

to these prisons, the Respondent operates support units to all prisons consisting of the Building Services Division, the Prison Service Escort Corps and the Operational Support Group consisting of the Security Screening, Canine Units and the Prison Service Training College.

10. On 9 December 2007 the Appellant was injured while relocating a violent prisoner. He damaged a disc in his back (L5/S1) and this disc continued to slowly cause further issues until August 2010 when surgical intervention was required. He was absent on sick leave from 25 September 2010 to 21 February 2011 inclusive (5 months).

11. In late January or early February 2011 Governor Quigley contacted the Appellant and said he would be more than happy to allow him return to work. The Appellant reported for duty on 21 February 2011 after getting clearance from his GP. He remained on non-contact duties for 4 to 5 months. This included working in,

    - the control room,
    - the waiting room and
    - the censors office.

12. The Appellant retained his status as prison officer during this period. He was then transferred to the Midlands Prison on 18 June 2011 where he was assigned general duties.

13. On 11 December 2011 the Appellant sustained a further injury while moving a prisoner who became violent and was required to be restrained. The Appellant suffered disc bulges at L4/L5 and L5/S1. He underwent a series of treatments including three surgeries, the most recent of which was completed on 17 February 2015, where part of the injured discs and part of a facet joint were removed.

14. As a result of the second injury, the Appellant was absent from work from 11 December 2011 to 18 May 2012. On 16 April 2012 the Respondent's Chief Medical Officer ('CMO') advised that when the Appellant was in a position to resume work that he should do so with non-prisoner contact duties. This is confirmed in a letter from Jason Keogh of the Human Resource Directorate to the Governor of the Midlands Prison on the 16th April 2012. Mr. Keogh quotes the CMO as follows, Mr Cunningham *"is now medically fit to resume work*

on restricted duties if Management are able to accommodate this. I recommend that he resumes work with non-prisoner contact duties. He is unable to lift loads at the moment and so I would further recommend that he does not engage in Tuck Shop duties, or participate in night duty for a short number of weeks. If Management are unable to accommodate these restrictions, I suggest he remains out of work until he attends his next appointment on the 30th May".

15. On 16 April 2012 Governor J. Malone of the Midlands Prison responded by email to Mr. Keoghs query stating, "*... In considering whether Officer Cunningham can be facilitated with restricted duties in a manner that will not negatively impact on the operational capacity of the Midlands Prison, I would so advise, at present we have one female Officer who is on restricted duties because of pregnancy, and we have a further four Officers who are on long term restricted duties following serious illnesses. We do not have any more rotational posts which could be classified as restricted duties. Given our current situation we are not in a position to accommodate Officer Cunningham with the restricted duties as requested by the CMO." (emphasis added)*

16. This (mis)use of the concept of operational capacity, in that it is almost casually applied without consideration of the broader implications of equal treatment and disability discrimination, is at the heart of the appeal herein.

17. The Appellant wrote and emailed Governor Mullins of the Midlands Prison requesting a return to work as he was eager to do so. He was eventually sanctioned accommodation postings and returned to work on 18 May 2012.

18. The office of the CMO advised the Respondent on 12 of March 2013 that the Appellant would not be able to involve himself in control and restraint in the medium to long term. This turned into what management locally deemed to be 'lower risk duties' going forward from 21 February 2013, as the Appellant had requested to try to reintegrate himself to a wider range of duties. This worked very well and he carried out all his assigned duties in full and with no query or question from his supervisors or indeed senior management.

19. From 8 May 2013 the Appellant was assigned to a full range of duties slowly over a period of 3 to 4 weeks, effectively being taken from the locally agreed duties. This was done without consultation with the Appellant or the CMO. The Appellant queried this at the time

with Governor Mullins and he was advised that it would be looked at and he would be notified in due course. Having not heard back the Appellant applied for a transfer to the Security Screening Unit ('SSU') and Operational Support Group ('OSG') or the Canine Unit as there is no prisoner contact in the roles within these Units.

20. The Appellant was approached in the staff canteen by Governor Mullins in or around October /November 2013 and was told he was to be assigned to Portlaoise OSG/SSU in a few weeks and he would call him to his office to finalise the paperwork. This transfer never happened. Governor Mullins said that there was some sort of issue with the number of staff being assigned to the area.

21. Prior to the Appellant's Foraminotomy Decompression at L5/S1 carried out in 2015 the Appellant spoke locally to Governor Baker a few weeks prior to taking sick leave for the surgery and sought his approval to return to work on restricted duties with the assistances of a colleague Officer J. Coleman who had agreed to exchange duties with the Appellant upon his return from surgery. This agreement would allow the Appellant not to have prisoner contact or at least very minimal contact, at most. Governor Baker agreed that he had no issue with the Appellant returning and agreed that he had no issue with the exchanging of duties with Officer Coleman, to facilitate a return a work.

22. Following his 2015 surgery the respondent was advised by its own Medical Advisor that the Appellant was fit to return to work on condition that he would be assigned to non-contact duties and that if this could be facilitated he would be fit to resume work within three to four weeks from 11 May 2015.

23. In a letter dated 11 May 2015 from Dr. Sharon Lim of the Civil Service Occupational Health Department she advises the Respondent as follows *"Mr. Cunningham just had his third back surgery performed on the 17th February 2015. He is recovering well from this but his activities of daily living are still slightly restricted. He is keen to resume work as soon as possible. I have discussed this case with the CMO and we feel that for the initial three months, Mr. Cunningham should be assigned to non-prisoner contact duties to allow for an adequate rehabilitation period following his surgery. All going well, if this can be facilitated, he should be fit to resume work within the next three to four weeks. Going forward our opinion is that Mr. Cunningham should be excluded from all control and*

restraint duties/training. As I mentioned in my previous correspondence to you (5/11/13) I understand that Mr. Cunningham has a mutual understanding with the Governor regarding limiting his control and restraint duties."

24. It would appear that the Human Resources ('HR') Department of the Respondent had a query in relation to this as Dr. Lim replied to the Respondent on 23 July 2015 as follows *"[f]urther to your query regarding Mr. Cunningham, regarding his return to full duties, I have addressed this point in my letter dated the 11th May 2015. The CMO has previously advised that going forward, our opinion is that Mr. Cunningham should be excluded from all control and restraint duties/training".*

25. Dr. Lim in her letter of 11 May 2015 also advised *"my opinion is that back pain, by its nature tends to recur and therefore, he is likely to have future absences. He may also require further surgery".*

26. The Respondent issued a letter to the Appellant on 28 May 2015 in which Ms Caroline McWeeney states *"this office will be in contact with you in the next few weeks regarding your proposed return to work*". No contact was made by the Respondent in relation to a return despite the Appellant seeking updates.

27. After pressing the issue several times, the Appellant got through to Governor Baker who met with him on 12 June 2015. At that meeting Governor Baker informed the Appellant that he had been contacted via email by the HR Department who sought his opinion on allowing the Appellant return to work given the CMO advice. Governor Baker advised the Appellant that he was unable to facilitate a return to work due to a policy document ('Accommodations (Rehabilitative/Restricted Duties'' – see **Exhibit SS4** to Affidavit of Sean Sullivan sworn on 6 December 2018 below) on restricted duties and a recalculation of restricted postings available to him.

28. At a meeting arranged at the Appellant's request on 13 July 2015 the Appellant spoke at length with Governor Baker and Mr. Sean Sullivan (Assistant Principal). The Appellant felt that this meeting was helpful and left under the impression that Mr. Sullivan and Governor Baker would discuss and prepare a plan for the Appellant to get back to work and have a long-term plan to facilitate the Appellant's future employment with the

Respondent. Mr. Sullivan mentioned that the merits of the Appellant's case were more deserving than others in which he had dealt with before. Mr Sullivan gave an undertaking to the Appellant that he would contact him no later than 30th July to advise him as to if and any progress being made, either way he would make contact. Governor Baker gave a similar undertaking to keep the Appellant updated. At that meeting Mr. Sullivan asked the Appellant was he considering ill-health retirement and the Appellant said he was not, and that he was totally against the idea. Mr Sullivan said he was pleased to hear that the Appellant was opposed to ill-health retirement. The Appellant pointed out his excellent work record and in particular his attendance record taking out any sick leave related to his occupational injury, being a total of 28 days in a 10 year period this equates to an average of 1.23 days absence per year over the period, and well below the Respondent's absence range for promotion purposes of 56 days or 25 instances over a 4 year rolling period.

29. Despite Mr. Sullivan giving an undertaking to contact the Appellant before the 30th July, no contact was made by Mr. Sullivan until 20 October 2015. After several attempts to contact Governor Baker he received a reply and arranged a meeting on 4 September 2015. Governor Baker informed the Appellant that the only options available to him were to remain out on sick leave, or else return for a period of three months and if there was no improvement in his control and restraint abilities he would have to go back out on sick leave again. Governor Baker was asked about the undertakings that he had given at the July meeting. He responded that he had not heard anything and it was up to the Respondent to find a long term solution. Furthermore, when again asked about the agreement he had made with the Appellant prior to him taking absence in regard to the exchanging of duties with his colleague, Governor Baker replied he was not in a position to allow this now due to the placement panels changing.

30. On 15 October 2015 Governor Baker advised the Appellant in writing that *"the only option that is available is for your return to work under the terms and conditions of the accommodation's policy."*

31. The Appellant finally met with Mr. Sullivan on 29 October 2015 when Mr. Sullivan advised the Appellant that there seemed to be some sort of confusion as to what the Appellant's understanding of what was said in relation to finding a long term solution. He said that there simply is not any such solution, that all that he could see despite looking at it from

every angle and possible solution was ill-health retirement or consideration may be explored to transfer to Prison Administration Staff Officer ('PASO') grade. If the Appellant was accepted for the role of PASO he would lose all current terms of employment and would have to start on the bottom on the PASO pay scale under new terms and conditions including pension arrangements. This would lead him to lose in the region of €48,000 per annum gross. Mr. Sullivan said that the only option was to return to work for a period of three months and if there was no improvement in his condition within three months and he was not in a position to carry out control and restraint then he would have to go back out on sick leave.

32. The Appellant said he felt that this is simply unfair of them to do such a thing, as others had been accommodated. The Appellant told Mr. Sullivan he was extremely frustrated with the process that the Respondent were putting him through and that it was in his opinion totally unacceptable. The Appellant told Mr. Sullivan that he felt the Respondent was trying to frustrate the whole matter, by the failure to engage with him and the failure to respond when requested twice or to put in writing the reason why he was not being allowed to return to work. The Appellant said he found it unfair that he was left in suspension, as nobody wanted to make a decision and to put their name to it, in relation to his case. All the while the Appellant was at a substantial loss of income. Mr. O'Sullivan said that he was bound by the *"policy documents."*

33. The Policy Document referred to states in section 2.4 that "*Each period of Rehabilitative/Restricted duties should not exceed 3 months. Only in the most exceptional circumstances will accommodation of this nature extend beyond 3 months and only on the recommendation of the CMO having regard to the operational needs of the Irish Prison Service."* Mr Sullivan agreed in an earlier meeting that the Appellant's case had considerable merit and the CMO advised that longer accommodations should be considered in this instance.

34. On the 6 November 2015 the Appellant received an email from Mr. Sullivan stating, *"[i]n your case, the CMO has advised that you are unlikely to return to full duties. It is therefore not possible for you to return to duty under the current policy. I can explore the potential for you to return as a PASO grade with PASO terms and conditions, if you wish,*

or I can forward you the Ill-Health Retirement forms. I regret I do not see that we have any other options. "

ii. Other prison officers benefited from reasonable accommodation

35. It will have been noted that the Respondent's position with respect to reasonable accommodation of the Appellant has been, to say the very least, inconsistent. Evidence was also given in written submissions that there are numerous persons across the prisons service who are being accommodated long-term, by the Respondent and are exempt from carrying out control and restraint duties in a prison setting. There are two officers whom have had serious back surgery and have in fact been permitted to return to work in the past 12 months and while the Appellant is not privy to their exact arrangements some form of accommodation must have been afforded to them. They are Martin Galligan and Conor Donnellan. Other officers who have been accommodated are as follows:-

Officer Denis Phelan in the Midlands Prison, works on the visiting gate and has been working there for a period of five years despite a serious medical condition.

Officer Greg O'Connell has been working at Cloverhill Prison despite a shoulder and back injury for a period of ten years.

Officer Declan Kirwan has been working at Cloverhill Prison despite a heart complaint and working on the main gate for the last five to ten years.

Officer Stephen Connolly has been working at Cloverhill Prison despite a hip complaint and has been working in the control room for the last six to twelve months.

iii. Mr Cunningham's current status and his WRC and Labour Court claims

36. In 2013 the Appellant earned €73,901 gross and approximately €43,000 net. The Appellant is now in receipt of pension rate sick pay since July 2015 of €357 per fortnight or €9,282 per annum.

37. The Appellant issued a complaint form to the WRC on 4 May 2016 claiming discriminatory treatment as against the Respondent. By decision dated 2 February 2017 an Adjudication Officer of the WRC found that the Respondent had failed to consider the provision of reasonable accommodation to enable Mr Cunningham to return to his duties as a Prison Officer. Mr Cunningham was awarded €40,000 compensation. The Adjudication Officer also ordered the Respondent to review its Accommodation Policy in light of Section 16(3) of the Acts, and to allow the Appellant to avail of said policy in his employment.

38. The Respondent submitted an appeal form on 28 February 2018 against the decision of the Adjudication Officer of the WRC. The Notice Party's hearing of this appeal took place over two days, 17 October 2017 and 22 May 2018. On 17 July 2018 the Notice Party overturned the decision of the Adjudication officer of the WRC, finding for the Respondent.

39. In the course of the proceedings before the Notice Party the Respondent made the submission that the Appellant was offered potential reasonable accommodation by exploring the possibility of him being permanently moved to an administrative role, (PASO). This suggestion did nothing but exacerbate the Appellant's grievance as in order to become a PASO, the Appellant would have had to resign his position as a prison officer, and then take a chance on being appointed a PASO with virtually half the salary, half the gratuity and half the pension. Reasonable accommodation clearly refers to an employee being accommodated in their existing position.

40. The Respondent also submitted in those proceedings that the Appellant has maintained a position where he wishes to be paid his maximum potential without carrying out his full duties or attending as required. It is evident from all the correspondence that the Appellant is hard working and committed to returning to work to his full potential and to carry out every duty within his ability.

IV. Legal Argument

41. The question for the Court is whether the Labour Court erred in law in deciding that section 37(3) of the Acts provides a complete exemption to the obligation to reasonably accommodate employees with disabilities.

42. Indirect Discrimination is prohibited unless it can be objectively justified.

43. A three-stage test for objective justification is set out in the *Bilka Kaufhaus* decision (Case-170/84, *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607([1986] IRLR 31)). In essence, the objective justification test requires, in relation to a difference of treatment by an employer, that any difference in treatment must correspond to a real need of the undertaking, be appropriate to that need, and be necessary for achieving that need.

44. A potential objective justifications is that an employee is not fit to do the work.

45. However, the Acts under section 16 provides that fitness for work means fitness after reasonable accommodation has been provided. Thus, lack of fitness or competence to do the work is only an objectively justifiable reason to discriminate against a person with a disability if reasonable accommodation cannot be put in place to make the person fit or competent.

46. The relevant portions of section 16 provide:

> *(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual—*
>
> > *[…]*
> >
> > *(b) is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed.*
> >
> > *[…]*
>
> *(3)(a) For the purposes of this Act a person who has a disability is […] fully capable of undertaking, any duties if the person would be so fully […] capable on reasonable*

accommodation (in this subsection referred to as "appropriate measures") being provided by the person's employer.

(b) The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability—

(i) to have access to employment,
(ii) to participate or advance in employment, or
(iii) to undergo training,

unless the measures would impose a disproportionate burden on the employer.

(c) In determining whether the measures would impose such a burden account shall be taken, in particular, of—

(i) the financial and other costs entailed,
(ii) the scale and financial resources of the employer's business, and
(iii) the possibility of obtaining public funding or other assistance.

(4) In subsection (3)

"appropriate measures", in relation to a person with a disability—

(a) means effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned,
(b) without prejudice to the generality of paragraph (a), includes the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but
(c) does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself;

[...]".

47. The relevant portions of section 37 provide,

> *"[…]*
>
> *(2) For the purposes of this Part a difference of treatment which is based on a characteristic related to any of the discriminatory grounds (except the gender ground) shall not constitute discrimination where, by reason of the particular occupational activities concerned or of the context in which they are carried out—*
>
> *(i) the characteristic constitutes a genuine and determining occupational requirement, and*
> *(ii) the objective is legitimate and the requirement proportionate.*
>
> *(3) It is an occupational requirement for employment in the Garda Síochána, prison service or any emergency service that persons employed therein are fully competent and available to undertake, and fully capable of undertaking, the range of functions that they may be called upon to perform so that the operational capacity of the Garda Síochána or the service concerned may be preserved.*
>
> *[…]*
>
> *(5) In relation to discrimination on the age ground or disability ground, nothing in this Part or Part II applies in relation to employment in the Defence Forces.*
>
> *[…]."*

48. Before turning to section 37, it is necessary to consider the context in which it must be interpreted.

i. Irish law must be interpreted in conformity with EU Law

49. Employment equality law as far as it relates to disability is governed by EU law. In this

respect, the Acts give effect to *Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation* (hereafter "the Framework Directive"). The primacy of EU law is well settled, and was most recently confirmed by the Court of Justice of the European Union ('the CJEU') in *The Minister for Justice and Equality, Commissioner of An Garda Síochána v. Workplace Relations Commission*.[3] In this case the CJEU reaffirmed the primacy of EU law stating that national courts must, when applying provisions of EU law, give full effect to those provisions, and if necessary dis-apply national law where it conflicts with EU law.[4]

50. Accordingly, for the purposes of the present case, it is submitted that the primary consideration for this Court is whether the Notice Party's interpretation of section 37(3), that the Respondent prison service is under no legal requirement to provide reasonable accommodation, is consistent with the Framework Directive.

51. The relevant Articles under the Framework Directive are:

Article 2(2)(b)(ii);

> *"(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice."*

Article 4(1);

> *"Occupational requirements*
>
> > *Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a*

[3] [2019] 30 E.L.R. 57.
[4] At paragraph 50.

characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. (Emphasis added)

Article 5;

"Reasonable accommodation for disabled persons

In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned"

52. There is no operative provision under the Framework Directive that is the same as, or similar to section 37(3) of the Acts, nor is there a provision which expressly states that prison services are not required to provide reasonable accommodation to persons with disabilities. This is, for example, in contrast to Article 3(4) of the Framework Directive, which finds expression under section 37(5) of the Acts, which states that Member States may provide that, in so far as it relates to disability and age, the Directive shall not apply to armed forced.

53. The only permitted derogation that finds expression under the Framework Directive that can be linked in any way to section 37(3) is Article 4(1) which concerns the justification based on an *"occupational requirement"*.

54. Article 4(1) of the Framework Directive should be read in light of Recitals 16, 17, 18, 19 and 23 of the Framework Directive:

"(16) The provision of measures to accommodate the needs of disabled people at the workplace plays an important role in combating discrimination on

grounds of disability.

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services.

(19) Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation.

…

(23) In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission."

*Emphasis added.

54. The purpose of recitals are to set out concise reasons for the chief provisions of the enacting terms. However, they have no normative, or operative function and

accordingly they have no legal basis.[5] Thus recitals are a method of interpreting the normative provisions under a relevant law, such as a directive or regulation, that have no weight or, meaning in isolation to the relevant operative provision(s). Both the EU legislator and the CJEU have provided the guidance on the nature and scope of recitals as an interpretative tool –

i. They are used to interpret the enabling provision of an act,[6]
ii. They cannot be relied on as a ground for derogating provisions of the act,[7]
iii. The terms of a recital cannot be used to give a particular construction to a provision which the terms of that provisions would not otherwise bear.[8]

55. In respect of the present case, the enabling provision for a derogation under the Framework Directive is Article 4(1) – which concerns justification for difference in treatment on the ground of occupational requirements. Article 4(1) does not provide for a complete derogation for prison services, or other emergency services.

56. However, the above cited recital can provide guidance in terms of Article 4(1) interpretation. Recital 16 confirms the importance of the provision of reasonable accommodation in context of addressing disability discrimination. Recital 17 expressly states that Article 4(1) is to be provided *"without prejudice to the obligation to provider reasonable accommodation for people with disabilities".* The words 'without prejudice' should be understood as preserving and endorsing the principle and practice of reasonable accommodation. MacMenamin J (with whom the Supreme Court agreed on the point) in *Cahill -v- The Minister for Education and Science* [2017] IESC 29 said that 'without prejudice' clearly meant to supplement, not to subtract. He said that these words as used in section 4(5) of the Equal Status Acts

[5] The EU Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation, at pages 31-37.
[6] Manual for Precedents for Acts Established Within the Council of the European Union, Office of Official Publications of the European Communities, 2002, clause 4.1.4.
[7] Case C-162/97, Nilsson et al, paragraph 54, 1998, ECR I-07477, and Case C-344/04, IATA, ELFAA v. the Department for Transport, paragraph 76.
[8] Case C-412/93 Société d'Importation Édouard Leclerc-Siplec v. TF1 Publicité SA and M6 Publicité SA, at paras 45-47.

"...provided for "without prejudice", in the sense of not derogating from ministerial functions and duties enumerated elsewhere. [...] to be viewed as supplementing, rather than subtracting from, the protections imposed by the Act." (Id. Para 70).

In the same case Laffoy J, delivering the leading judgement, O'Donnell J specifically concurring on the specific point, said

"...the proper interpretation of subs. (5) is open, that is to say, to identify the plain meaning of the words "without prejudice to" in subs. (5). The Oxford Dictionary of English (http://www.oxforddictionaries.com/) defines "without prejudice" as meaning "without detriment to any existing right or claim". What subs. (5) says is that s. 4, including subs. (2), is not to be read as being prejudicial or detrimental to the rights and claims of beneficiaries of the exercise of the statutory functions of the Minister, or of recognised schools and boards of management as specified in the provisions of the Act of 1998 identified in subs. (5). (Id, para 50).

57. Recital 18 cannot be construed as a standalone derogation and has no operative effect. This is in contrast to Recital 19 (which can be clearly linked to Article 3(4) which relates to the armed forces). Recital 18 does not have a similar operative provision. Instead, Recital 18 simply aides in the interpretation of Article 4(1) by stating that prison services, and other emergency services can have regard to *"the legitimate aim"* of *"preserving the operational capacity of those services"* within the meaning of Article 4(1). This was affirmed by the CJEU in *Wolf v. Stadt Frankfurt am Main*[9]

"38. In this respect, it must be pointed out that the professional fire service forms part of the emergency service. Recital 18 in the preamble to the Directive states that the Directive does not require those services to recruit persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the occupational capacity of preserving the operational capacity of those services.

39. It is thus apparent that the concern to ensure the operational capacity and proper

[9] C-229/08, at pars 38 and 39.

function of the professional fire services constitutes a legitimate objective within the meaning of Article 4(1) of the Directive."

58. Finally, Recital 23 provides that Article 4(1)-type derogations must be strictly construed and applied in *"limited circumstances"* to justify difference in treatment where a characteristic relates to disability. Moreover, it states that where such a derogation is relied upon such circumstances should be reported to the European Commission, giving rise to a requirement that such a derogation requires transparency.

ii. The Charter

57. Article 6 of the Treaty on European Union confirms that the Charter of Fundamental Rights of the European Union ('the Charter') has the same effect as if it were part of the Treaty itself.[10] Thus a finding that the Article 4(1) and section 37(3) of the EEA remove any obligation on a State body, such as the Respondent, from providing reasonable accommodation to employees would result in a breach of the Appellant's Charter rights.

58. The requirement to respect fundamental rights is binding on Member States when they act within the scope of EU law.[11] In respect of the Appellant it is submitted that any derogation under Article 4(1) (and section 37(3)) must be considered in light of Appellant's Charter rights, primarily – Article 15 (right to work), Article 21 (principle of non-discrimination) and Article 26 (Integration of Persons with Disabilities). Article 52(1) of the Charter sets out the scope and interpretation of limitations on the exercise of Charter rights as follows:

> *"Any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may only be made if there are necessary and genuinely meets objectives of the general interest recognised by the union or the need to protect rights and freedoms of*

[10] Art. 6(1) provides "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties."
[11] Article 51(1) of the Charter.

others."

59. The Notice Party's interpretation that section 37(3) creates a standalone derogation to prison services from providing reasonable accommodation would amount to an unjustified interference with the Appellant's Charter rights. First, such a derogation is not provided for under law (*i.e.* the Framework Directive) and second, a blanket exemption such as this does not respect the principle of proportionately and is not necessary or, genuine to meet the objective of preserving the operational capacity of the Respondent.

iii. **The UN Convention on Rights for Persons with Disabilities**

60. The UN Convention on the rights of persons with Disabilities (the 'CRPD') was ratified by Ireland on 7 March 2018. Moreover, it was ratified by the EU on 26 November 2009 in accordance with Council Decision 2010/48/EC. While the CRPD has been ratified in Irish law it has not been incorporated and therefore has no direct effect (although it can be relied upon as an interpretative guide). However, the CRPD has direct effect in respect of EU law, and the CJEU has confirmed that the Framework Directive is to be interpreted in light of the CRPD:

> *"71 It must be borne in mind that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions and, consequently, they prevail over acts of the European Union (Case C-366/10 Air Transport Association of Merica and others [2111] ECR I-13755, paragraph 50, and Joined Cases C-355/11 and C-337/11 HK Danmark [2013]ECR, paragraph 28).*
>
> *72. The primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements (Joined Cases C-320/11, C-330/11, C-382/11 and C/383/11 Digalnet and Others [2012] ECR, paragraph 39, and HK Danment, paragraph 29).*

73. It is apparent from Decision 2010/48 that the European Union has approved the UN Convention. The provisions of that Convention are thus, from the time of its entry into force, an integral part of the European legal order (see Case 181/73) Haegaman [1974] ECR 449, paragraph 5, and HK Danmark paragraph 30).

74. Moreover, according to the appendix to Annex II to that decision, which concerns independent living and social inclusion, work and employment, Directive 2000/78 is on the European Unions acts relating to matters governed by the UN Convention.

75. It follows that, in the present case, the UN Convention is capable of being relied on for the purposes of interpreting Directive 3000/78, which must, as far as possible, be interpreted in a manner that is consistent with that Convention (see HK Danmark, paragraph 32).

62. The following CRPD articles are relevant in context of interpreting the Framework Directive in this specific case, and accordingly Article 37(3) of the Acts: Article 2 (prohibits disability discrimination and extends this to the denial of reasonable accommodation) Article 27 (the right of persons with disabilities to work on an equal basis to others, for employers to provide reasonable accommodation in the workplace and provides for an express obligation on the public sector employer to employ persons with disabilities).

63. The CRPD does not provide for any derogation in respect the requirement to provide reasonable accommodation to employees in respect of prison services, or other emergency service. Quite the opposite in fact, it places a clear obligation on public sector bodies, such as the Respondent, to employ people with disabilities (Article 27(g)).

The social model of disability on which UNCRPD is based

64. The interpretation of Article 4(1) of the Directive, and accordingly section 37(3) should be considered through the social model of disability, as is set out in the preamble of the CRPD at (e);

> *"…disability is an evolving concept and that disability results from the inter between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".*

65. Article 1 of the CRPD provides that its purpose is to

> *"promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*
>
> *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."*

66. The social model of disability, approved in both *Ring* and *Z v A Government Department* (C-363/12), recognises that it is not a person's physical or intellectual impairment which is the disability. Instead, the interaction between the impairment and possible barriers which may give rise to the disability (the social and environmental factors). The Notice Party's interpretation of section 37(3) is wholly inconsistent with the social model of disability as it fails to recognise that the environmental barriers to employment are an essential element to the disability. The Notice Party's interpretation has the effect creating a blanket exclusion on people with disabilities (who may require reasonable accommodation) from accessing or continuing to work in these areas of employment.

iv. S.37(3) is simply a deeming provision establishing that preservation of the operational capacity of the Prison Service is an occupational requirement

67. Whilst the Oireachtas does not always achieve perfect coherence in statutory language, with logical and sequential structure, s.37(3) is an example of a provision which follows naturally and logically from the preceding provision, s.37(2). The Appellant agrees with the Notice Party that the proper interpretation of s.37(3) is to be found in reading that provision in conjunction with s.37(2) but it is submitted that the Notice Party, in so doing, arrived at an erroneous conclusion. The provision in s.37(2) concludes by dealing with occupational requirements. It provides that in order to qualify for the purpose of derogation from the protection afforded under the Acts, the occupational requirement in question must be,

    (i) genuine and determining, and
    (ii) objectively justified.

68. The criteria of 'genuine and determining' and the 'objective justification' analysis are now standard ways of qualifying or limiting employer defences to worker protections provided for in employment law statutes implementing EU law.[12] They are the means by which proportionality in the application of EU norms is ensured.

69. S.37(3) makes perfect sense when read in conjunction with s.37(2). It immediately confirms that one occupational requirement that may attract the derogation (it has just dealt with occupational requirements) is full capability to carry out the range of functions an employee may be called upon to perform in the prison service. It does not, however, deem it to be a 'genuine and determining' occupational requirement in every case. These two words - 'genuine' and 'determining' from s.37(2) are dropped in s.37(3). The Notice Party erred in this regard. Twice in its decision it refers to s.37(3) as deeming or declaring that full capacity is a *genuine and determining* occupational requirement in the prison service.[13]

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[12] See *Bilka-Kaufhouse op cit.* A version of the principle is enshrined in Article 4(4) TEU, which provides that the content and form of Union Action shall not go beyond what is necessary to achieve the objectives of the Treaty.

[13] This point appears to have lead to an error in the Labour Court's decision where it decided *"... Subsection (3) can properly be construed as a declaratory provision which makes clear that for the purposes of Subsection (2) physical capacity to perform the full range of duties which he or she may be called upon to perform is a genuine an determining occupational requirement of a prison officer."* The Court repeats this error in the ultimate paragraph of the 'discussion' section of its decision: "*Section 37(3) of the Act provides that full physical capacity to undertake all of the functions which a Prison Officer may be called upon to perform is a genuine and determining occupational requirement for employment in the prison service within the meaning of Section 37(2)*

70. S.37(2) simply deems that in the prison service, full capability to perform the range of functions the employee may be called upon to perform, is an occupational requirement, not a genuine and determining one. All this means is that the employee or the prison service, the court or tribunal, do not have to consider whether this occupational requirement will qualify *in principal* as an occupational requirement for the purpose of the Acts. Rather they can assume that it does and get on with the business of assessing whether, in any particular case, this is a (i) 'genuine and determining' occupational requirement and (ii) it is 'objectively justified' so as to apply the derogation.

71. The point is that an assessment of whether the occupational requirement is, in a given case, genuine and determining, and whether it is objectively justified, obviously involves the question of reasonable accommodation. It is inextricable from it. It cannot sensibly be considered without referring to reasonable accommodation or 'appropriate measures' under s.16(3). This is part of the proportionality analysis which is expressly woven into the Directive and the Acts. In the present case it is ultimately a simple question of whether it is *necessary* (proportionate) to ask a worker such as the Appellant to take the option of ill-health retirement or resign to take up a PASO role at drastically reduced terms and conditions. This will not be objectively justified where the Respondent has not engaged in a reasonable accommodation analysis and considered whether it must first take appropriate measures under s.16(3).

72. It is submitted that the intention of the Oireachtas in its provision in s.37(3) is to apply in a manner consistent with EU law and to confirm that preservation of the occupational capacity of the prison service (and the other stated services) is a legitimate aim which may be the subject of the standard objective justification. Whether that aim is pursued appropriately and whether the chosen means to achieve that aim are necessary must still be considered in assessing the measure applied, namely the requirement that all prison officers be capable of performing control and restraint. The Notice Party erred in law in finding that Section 37 absolved the Respondent from any scrutiny of whether or not a particular prison officer could be reasonably accommodated.

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of the Act." In fact subsection (3) provides only for 'occupational requirement' not 'genuine and determining occupational requirement'.

v. Operational Capacity of entire Prison Service not just prison officers

73. It must be emphasised that the reference in s.37(3) is "the Prison Service" and not "Prison Officers". Operational capacity must therefore be interpreted in light of the requirements of the Respondent's prison service and not an individual occupation or person within that organisation. From annual reports of the Respondent that approximately 1/3 of staff in the prison service including civilian grades and headquarters staff are not prison officers. It can hardly be suggested by the Respondent that those non-prison officers, to include administrative and headquarter staff, could be discriminated against simply because they were employees of the Respondent. The same position applies to those prison officers who are in non-contact roles, such as the senior management team in each of the Prison Institutions or officers assigned to the Respondent's HQ, Building Services Division, Security Screening Unit, and Canine Unit.

74. As set out above, section 37(3) must also be read in light of Article 4(1) of Framework Directive which prescribes that the occupational activities must constitute a genuine and determining occupational requirement and the objective must be legitimate and the requirement proportionate.

75. Returning to Section 37(3) it is therefore clear that the Respondent do not have a blanket exemption, and the operational requirement must be read in the context of the Directive which refers to a *"genuine and determining occupational requirement".*

76. The Respondent must therefore look at the functions of each occupation within the Service and decide whether it is necessary to ask the worker to resign (to take up the PASO role on drastically reduced terms) to achieve the aim of ensuring that the operational capacity of the prison service or the service concerned may be preserved.

77. The procedural component of the reasonable accommodation duty is that an employer would take "*appropriate measures*" by way of reasonable accommodation. This duty is proactive in nature and includes an obligation on an employer to carry out a full

assessment of the needs of the person with a disability and the measures necessary to accommodation that person's disability. It will be unnecessary to ask the Appellant to resign if reasonable accommodation can be provided. It is only necessary where reasonable accommodation is not available within the terms of s.16(3).

vi. Defence forces entirely excluded from EEA whereas Prison Service is not

78. In interpreting the meaning of Section 37, it is clearly very significant that the Acts provide a complete immunity from the reasonable accommodation obligations to the defence forces. There is no complete immunity for the Respondent. Moreover, there was a complete immunity prior to 2004. It was removed.

79. The Oireachtas implemented this provision in the Framework Directive (or rather, Ireland availed of the partial derogation permissible under Article 3(4)) in two very different ways. The *'armed forces'* were treated in one fashion and the *'police, prison or emergency services'* were treated in another. The former was entirely excluded (indeed, possibly in breach of the partial derogation) and the latter were clearly not excluded, not fully. The Oireachtas clearly contemplated the question of full exclusion and did so with the defence forces. Therefore, the Oireachtas must be taken to have expressly *included* the Respondent to some extent. This raises the question: to what extent do the Acts apply on the disability ground to the Respondent? It must apply to some extent. Otherwise the formula in s.37(5) would have been used. The Oireachtas would simply have added 'Prison Service' to the list of applicable occupations as it does at s.37(3).

80. The Oireachtas is presumed not to waste words. The Oireachtas must therefore have demonstrated its intentions by the provisions it has chosen to include in s.37. It is clear from s.37(5) that only the defence forces have been excluded entirely from the duty of reasonable accommodation.

81. S.16 itself expresses no full exceptions (entirely excluded categories of workers) save insofar as it does not apply to those who are unwilling. Those who may not be *'fully competent'* and those who may not be *'fully capable'* are assisted by s.16 in the

obligation to provide reasonable accommodation through appropriate measures. Where no other provision makes any specific reference to s.16 to limit it or exclude it, and where s.16 does not itself contain any excepted or excluded employment, s.37(3) cannot be taken as implicitly doing so. Exceptions are to be construed strictly, which does not allow for interpreting the implicit over what should be express.

82. S.25 of the Acts is the parallel gender provision to s.37 (a provision dealing with all discriminatory grounds except gender). It does not have an equivalent to s37(3). It has been determined by the Equality Tribunal that it must be construed strictly. In *M v A Language School* DECE2004-028, an Equality Officer ruled that, because the section as previously enacted excluded discrimination in certain employments, it must be strictly construed. The same rationale applies to ss.16 and 37, both of which have been the subject of significant and successive amendments. It is also an Act, and these are general sections (albeit not under the current analysis), that have passed muster under referral pursuant to Article 26 of the Constitution (*In re the Employment Equality Bill 1996* [1997] 2 IR 321).

vi. Section 35(1) does not allow lower pay for persons with a disability instead of reasonable accommodation.

83. The Appellant emphatically rejects the Respondents expected attempts to rely on Section 35(1) as somehow justifying the lesser rate of remuneration they had offered to make available to the Appellant in the context of him resigning and making an application for a clerical position. The position is an entirely different job from that which the Appellant has been doing and which he is entitled to continue to do with the provision of reasonable accommodation being made to him. It is difficult to understand the Respondent's approach in suggesting that they are acting in accordance with their obligations pursuant to equality legislation in offering the Appellant an opportunity to apply for a significantly less paid job in discharge of their obligations of equality.

84. Section 35(1) provides for a situation whereby a person with a disability might be employed in the understanding that they could not perform the same work as a person without a disability, for example in what is called 'sheltered employment'. While the legitimacy of this exception is disputed elsewhere as incompatible with EU law, there

is no question whatsoever that it could apply to the Appellant who is not seeking sheltered employment of any kind. Section 35 does not justify the provision of a different job to a person in employment as a means of not providing reasonable accommodation.

vii. Derogations must be strictly construed and must be transparent

85. In addition, the Appellant relies on the general proposition of employment equality law that any derogation from the principles of equality must be construed strictly (Case C-222/84, *Johnston v Chief Constable RUC* [1986] ECR 1651 ([1986] IRLR 263). The equivalent occupational requirement provision in relation to gender (namely Section 27 of the Acts) was considered by the Equality Tribunal in relation to the similar statutory exemption for the Prison Service, was considered in the case of *Hunt and Doherty v Irish Prison Services* [2006] ELR 354. The Complainants claimed they had been subjected to gender discrimination in relation to their access to annual leave, rotation of posts and compulsory assignments which they said were less favourable than was given to their male colleagues. The Prison Service argued that maintaining an adequate female officer presence in a women's prison required a certain number of female prison officers. Whilst the argument was accepted by the Equality Officer in terms of the requirements of privacy and decency, the Equality Officer did make it very clear that any deviation from the principle of equal treatment, such as that under Section 27, must be construed strictly.

85. Under, EU law, if a Member State wishes to rely on a derogation to equal treatment, such a derogation must be transparent. This principle was established in *Commission v France.*[14] This case concerned separate systems of recruitment for men and women within the police force so that different percentages of male and female employees could be recruited in order to achieve an appropriate balance of male and female officers. The CJEU held that this procedure lacked transparency, and accordingly was contrary to Council Directive 76/207/EEC, in two ways: first there was no objective criteria for fixing of percentages; and second the lack of transparency surrounding the fixing of percentages meant that it was impossible for the Commission to monitor the

[14] Case 318/86, *Commission v. France,* 30 June 1988, at paras 24-27.

process and impossible for an aggrieved person to verify whether or not the percentages set corresponded to specific activities for which a genuine occupational requirement could be claimed. Although this case relates to a different Directive than the present, given the ratio as set out under the *Commission v France* and the similar role of Member States in terms of their obligation to report on derogations to the Commission (as per Recital 23), it is submitted that the same requirement must apply to the Framework Directive. The procedure by the Respondents from the outset in terms of how it has dealt with the Appellant's requests for reasonable accommodation, and how other employees, with disabilities lacks any form of objective or transparent criteria.

V. Conclusion

86. The Appellant requests this Honourable Court to find;

(i) That section 37(3) does not give the Respondent a complete exemption from its equality requirements for its workers with disabilities

(ii) That the Respondent is obliged by section 37(3) of the Acts to prove that the requirement adopted that **all** employees of the prison service must be fully fit to undertake prisoner contact is necessary and proportionate to achieve its legitimate objective of preserving the operational capacity of the Prison Service and that its requirement is proportional to the end to be achieved.

(iii) That the matter be remitted to the Notice Party for a consideration, on the facts, as to whether the requirements of the Respondent is proportionate to its needs and the end to be achieved.

Clíona Kimber SC
Cathal McGreal BL
11 July 2019

THE HIGH COURT

Record No: 2018/309MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 90(1) OF THE EMPLOYMENT EQUALITY ACT 1998 AS AMENDED

Between:

ROBERT CUNNINGHAM

Appellant

-AND-

IRISH PRISON SERVICE

Prison Service

-AND-

THE LABOUR COURT

Notice Party

CHRONOLOGY

Appendix A

- **5 March 2005** Appellant commenced working as a prison officer at Cloverhill Prison
- **9 December 2007** Appellant's first injury in the course of duty
- **September 2010** to **28 February 2011** Appellant's first lengthy absence on sick leave
- **21 February 2011** Appellant worked non-contact duties (control room, waiting room and the censors office)
- **18 June 2011** Appellant was transferred to Midlands Prison, assigned to general duties
- **11 December 2011** Appellant's second injury at work
- **11 December 2011** to **18 May 2012** Appellant's second lengthy period of sick absence
- **16 April 2012** Respondent first makes mention in correspondence of *'impact on operational capacity'* but refers to four prison officers on 'long term' restricted duties
- **18 May 2012** Appellant sanctioned accommodation postings by the Respondent
- **8 February 2013 - 8 May 2013** Appellant engaged in *'lower risk duties'*
- **8 May 2013** Appellant was returned, without consultation, to full range of duties

- **October/November 2013** Appellant told he was to be assigned to Portloaise Prison Security Screening, or Canine Units or Operational Support Group. This never materialised
- **January/February 2015** Gov. Baker said he was agreeable to a restricted-duty role to which Officer J. Coleman was agreeable to exchange for the Appellant's role
- **12 June 2015** Gov. Baker told Appellant he would not be assigned to restricted-duties due to a policy document
- **13 July 2015** Appellant met with Respondent, given impression that a long-term plan to facilitate the Appellant's employment with the Respondent would be put in place
- **4 September 2015** Appellant told by Gov. Baker that the only options available were sick leave, 3-months non-contact after which, if no improvement, a return to sick leave
- **29 October 2015** Appellant told by Andrew Sullivan, Assistant Principal, that the only possible solution was ill-health retirement or possibly resigning and transferring to Prison Administration Staff Officer ('PASO') grade at a loss of €48,000 per annum
- **6 November 2015** Mr. Sullivan stated by email that *"In your case, the CMO has advised that you are unlikely to return to full duties. It is therefore not possible for you to return to duty under the current policy."*
- **4 May 2016** Appellant lodged complaint with the WRC
- **2 February 2017** WRC issued decision of Adjudication Officer in Appellant's favour
- **28 February 2018** Respondent submitted an appeal to the Labour Court
- **17 October 2017** and **22 May 2018** Labour Court hearing dates
- **17 July 2018** Labour Court reversed decision of WRC
- **1 August 2018** Appellant's Notice of Motion filing the appeal herein

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