

Neutral Citation no. [2007] NIQB 59

Ref: **WEAC5914**

*Judgment: approved by the Court for handing down
(subject to editorial corrections) **

Delivered: **06/09/2007**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

AN APPLICATION BY GARETH McAREAVEY FOR JUDICIAL REVIEW

AN APPLICATION BY JONATHON McAFEE FOR JUDICIAL REVIEW

WEATHERUP J

[1] The applicants each held the rank of probationer Constable in the Police Service of Northern Ireland ("PSNI"). They apply for judicial review of decisions of the PSNI dated 26 May 2006 that their appointments as probationers be terminated. Mr Dunlop appeared for the applicants and Mr Coll for the respondent.

[2] The Police Service of Northern Ireland Regulations 2005 (formerly the RUC Regulations 1996) at Regulation 13 provides for the discharge of probationers as follows:-

"(1) Subject to the provisions of this Regulation, during his period of probation in the Police Service the services of a constable may be dispensed with at any time if the Chief Constable considers that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable."

[3] The RUC Service Code 1995 set out the procedure for the discharge of probationers under the previous Regulations. The relevant part of the Code was revoked with effect from 3 November 2004. Joseph Martin Stewart, the Director of Human Resources in the PSNI, explained on affidavit that the

Code did not suit the new structures in the PSNI and was not workable. New procedures were introduced by General Order with effect from 9 February 2006. In the 15 months between the revocation of the Code and the introduction of the General Order, interim measures were put in place. In broad outline the interim measures provided the procedure for the discharge of probationers by a chain of recommendations from the relevant DCU Commander, the Head of Personnel, the relevant Assistant Chief Constable, the Director of Human Resources for decision and then by appeal to the Chief Constable.

[4] The applicants' grounds for judicial review resolved to the following complaints -

- (1) The lack of compliance with the interim measures.
- (2) The absence of delegation of the powers of the Chief Constable.
- (3) The lack of authority of the Director of Human Resources.
- (4) The lack of opportunity for the applicants to make representations.
- (5) The unfairness of the procedures adopted.

The lack of compliance with the interim measures.

[5] The applicants contend that the respondent did not comply with the interim measures in two respects, namely the absence of references to the relevant Assistant Chief Constable in the course of processing the recommendations for discharge and the absence of appeals to the Chief Constable.

[6] The procedure specified in the interim measures provided that the Head of Personnel would review the papers and would pass them to the relevant ACC with a recommendation and the relevant ACC would forward the papers to the Director of Human Resources for direction. In the case of McAreavey the Head of Personnel forwarded the papers to ACC McCausland on 21 February 2005 with a recommendation to dispense with the officer's services under Regulation 13. ACC McCausland returned the papers to the Head of Personnel on 1 March 2005 agreeing with the recommendation and requesting that the papers be forwarded to the Director of Human Resources. In the case of McAfee the Head of Personnel forwarded the papers to the Director of Human Resources on 16 December 2004. While all the police papers were not included in the Court papers, the covering memorandum of

16 December 2004 referred to the paper containing the DCU's recommendation of dismissal and the Assistant Chief Constable's recommendation to terminate. In his affidavit Mr Stewart avers that the recommendation in relation to McAfee was supported by the Assistant Chief Constable. I am satisfied that the interim measures were complied with in that both cases were referred to the relevant Assistant Chief Constable.

[7] Further, the interim measures provided for an appeal to the Chief Constable from the decision of the Director of Human Resources. It will be noted that Regulation 13 provides for the decision to determine the service of a probationer to be made by the Chief Constable while the interim measures provided for a "direction" by the Director of Human Resources and an appeal to the Chief Constable. In the event the Director of Human Resources made a decision to discharge both applicants and both applicants appealed Mr Stewart's decisions. The interim measures did not specify the manner in which appeals would be processed.

[8] It was decided that the process would follow the spirit of the former appeal process in the 1995 Code and the proposed appeal process in the forthcoming General Order. The Chief Constable appointed Chief Superintendent Deane, Chief of Staff in PSNI Command Secretariat, to examine the records in relation to the applicants' performances; interview the applicants' supervising officers as appropriate; make such further enquiry as was necessary; interview the applicants, making clear to them that he had power to consider whatever issues the applicants wished to raise, and to prepare a report on each applicant with appropriate recommendations. Chief Superintendent Deane examined both cases, interviewed McAreavey (McAfee did not avail of the opportunity to be interviewed) and reported to the Chief Constable on 12 May 2006 endorsing the original decisions to terminate the services of the applicants as probationers. The Director of Human Resources avers that the Chief Constable confirmed Chief Superintendent Deane's view of the appeals. The Chief Constable's Staff Officer informed the Director of Human Resources Staff Officer by telephone of the Chief Constable's decisions and the applicants were informed of the outcome by letters of 26 May 2006 from the Director of Human Resources. I am satisfied that the interim measures were complied with in that there were appeals to the Chief Constable in both cases and that ultimately the Chief Constable made the decisions to dispense with the applicants' services.

The absence of delegation of the powers of the Chief Constable.

[9] Regulation 13 provides for the discharge of a probationer "if the Chief Constable considers" that his services be dispensed with. The initial decision to discharge the applicants was taken by the Director of Human Resources.

The applicants contend that there was not and could not have been any valid delegation of the Chief Constable's power to determine their probationary service. Reference was made to Chief Constable of North Wales Police v Evans [1982] 3 All ER 141 and R (Lainton) v Chief Constable of Greater Manchester Police [2000] 1 ICR 1324. In Evans the House of Lords held that the Chief Constable did not have an absolute discretion to dispense with the services of a probationer Constable and that his power was to be exercised only after due consideration and determination of whether the probationer was fitted to perform the duties of his office or was likely to become an efficient and well conducted constable (these being the requirements that continue to apply under the regulations in England and Wales as well as in Northern Ireland). In addition, Evans makes clear that the ultimate decision of the Chief Constable must not be delegated, although part or all of the inquiry on the facts may be delegated to a subordinate official to report to the Chief Constable, being the process adopted in the present cases. In Lainton the Court of Appeal dealt with delegation of a decision to extend a probation period. Laws LJ stated that where the exercise of a power is entrusted to a named officer there can be no delegation unless that is either permitted by the language of the provision in question or there is a public interest in permitting administrative convenience to outweigh the desirability of the designated officer making the decision. In the latter case the designated officer should deal with matters of special substance, so that decisions on the discharge of probationers should be taken by the Chief Constable but decisions on extension of probation may be delegated.

[10] Initially, the Director of Human Resources purported to discharge the applicants. Mr Stewart asserts that he is authorised and entitled to make decisions regarding matters within his area of responsibility as a full member of ACPO and under the Chief Constable's authority pursuant to section 33 of the Police Act (Northern Ireland) 2000, which provides that the police force shall be under the direction and control of the Chief Constable. The functions of the Chief Constable under section 33 of the 2000 Act must be exercised under lawful authority and would not provide lawful authority for the delegation of a power that the Chief Constable was legally required to exercise personally. Each applicant appealed to the Chief Constable. Each case was examined on behalf of the Chief Constable by Chief Superintendent Deane. In the event I am satisfied that the decisions to discharge the applicants were taken by the Chief Constable. Accordingly no issue of delegation arises in these cases. While it is the position that the Director of Human Resources purported to discharge the applicants in 2005, they were discharged ultimately by the decisions of the Chief Constable in 2006.

The lack of authority of the Director of Human Resources.

[11] The applicants contend that Mr Stewart, the Director of Human Resources, is a civilian who does not have the powers of a constable and had no authority to make any decisions in relation to the discharge of probationers. Mr Stewart describes the post of Director of Human Resources as involving full membership of the Association of Chief Police Officers and of the PSNI Command Team, also comprising the Chief Constable, Deputy Chief Constable, Assistant Chief Constables and the Director of Finance and Support Services. The appointment was made by the Northern Ireland Policing Board and the holder is under the direction and control of the Chief Constable. The duties of the Director of Human Resources include responsibility for the recruitment, selection, development and promotion of all members of the PSNI, whether uniform or civilian and the dismissal of all civilian staff and uniformed officers during their periods as students and during the course of their probationary period. Within that area of responsibility the Director of Human Resources asserts that he enjoys full delegated authority from the Chief Constable. The issue raised by the applicants under this head is not that of delegation but of civilian involvement in the process.

[12] The applicants contend that the Director of Human Resources should not be part of the decision making process for the termination of probationary service. As set out in the affidavit of Mr Stewart, his role as Director of Human Resources involves the responsibilities of Assistant Chief Constable "B" Department under the previous regime. As a consequence of Recommendation 89 of the Report of the Independent Commission on Policing (the Patten Report) a senior civilian was to be appointed with responsibility for personnel and training matters within the PSNI. The post of Director of Human Resources was created in 2001 to implement that recommendation. The post of Director of Human Resources is an integral part of the policing structure. That is no less the case because Mr Stewart is a civilian and not a police officer. He has responsibilities that include matters that are exercised on behalf of the Chief Constable. A designated decision maker may delegate decisions, in the circumstances referred to above, to a suitable delegate. The Director of Human Resources is a suitable delegate in relation to matters concerned with the engagement of probationers. His status as a civilian would not affect the delegation of such powers that would otherwise be permitted. As noted above the final decisions in relation to the applicants were in the event made by the Chief Constable. I am satisfied that the Director of Human Resources had power to make decisions in relation to matters that were not of special substance as part of the process for the discharge of probationer Constables under Regulation 13.

The lack of opportunity for the applicants to make representations.

[13] The procedures for the discharge of probationer Constables reached the House of Lords in Evans. It was held to be necessary to observe the rules of natural justice, now usually referred to as the rules of procedural fairness. The particular instance of procedural unfairness considered in Evans was the failure to give the probationer the opportunity to refute the allegations on which the Chief Constable relied in making the discharge decision. The applicants contend that they did not have adequate opportunity to make representations.

[14] McAfee had problems with his performance as a probationer. At a meeting with the Chief Inspector and others in July 2004 the problems were discussed and McAfee had his probation extended, became subject to monthly reports and was warned that lack of improvement would result in him being referred for termination of services. At a further meeting with the Chief Inspector and others in August 2004 his performance was reviewed and a lack of improvement noted and McAfee was informed that he would be referred for discharge. When the papers reached Mr Stewart at Human Resources he interviewed McAfee on 2 February 2005, where McAfee was accompanied by a representative of the Police Federation. When the papers reached Chief Superintendent Deane he invited McAfee to interview but that opportunity was not taken up. There was no lack of opportunity for McAfee to make representations on the issues.

[15] Similarly, McAreavey had problems with his performance as a probationer. At a meeting with the Chief Superintendent and others in October 2004 it was noted that there had been some improvement in his performance but he continued on monthly assessment and was warned that if doubts remained about his performance he would be recommended for discharge. At a further meeting with senior staff in December 2004 it was concluded that his performance remained below standard and he was recommended for discharge. When the papers reached Mr Stewart at Human Resources he interviewed McAreavey on 6 April 2005, where McAreavey was accompanied by a representative of the Police Federation. When the papers reached Chief Superintendent Deane he interviewed McAreavey on 4 May 2006 when he was again accompanied by a representative of the Police Federation. There was no lack of opportunity for McAreavey to make representations on the issues.

The unfairness of the procedures adopted.

[16] Did the overall process involve procedural unfairness to the applicants? From 2004 the applicants had engaged in meetings to review performance, probationers had the opportunity to comment on the process, action plans were drawn up and assessments were made. When the

discharge process got under way the applicants were aware of the issues and had the opportunity to respond. When the process reached the Director of Human Resources he conducted interviews with the applicants. Written records of the interviews were retained. When the appeal proceeded to Chief Constable level there was the opportunity for further interview with the reviewing officer and minutes of the interview were retained.

[17] The applicants complained about the absence from the interim measures of aspects of the procedures under the 1995 Code. There the recommendation for discharge would have proceeded from the local command to the regional assistant chief constable (who would interview) to ACC 'B' Department (who would interview and who had power to appoint a delegate officer to interview the probationer and review the file) and finally to the Chief Constable (when a request could be made for interview to put forward new material). There were variations between the processes. It is not for the Court to define an appropriate scheme or to express a preference for one scheme over another. The task of the Court is to determine whether the scheme actually adopted was fair. I am satisfied that the procedures adopted were fair to the applicants. Further I am satisfied that, while the interim procedures were in place and the details were developed as the matters progressed, the applicants were not inhibited in addressing the substance of the complaints about their performances and there was no procedural unfairness in that regard. Accordingly, no element of procedural unfairness has been identified.

[18] As a result the applicants have not established any of their grounds and the applications for judicial review are dismissed.