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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY HM FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

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The Applicant appeared as a Litigant in Person
Ms Rachel Best (instructed by the Crown Solicitors) for the Respondent

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<u>COLTON J</u>

In the ongoing family proceedings (referred to below in paragraph [1]) it has been ordered that nothing must be published which would identify the applicant's children or their family and such family proceedings have been anonymised to protect the interests of the applicant's children. The applicant's name has been anonymised in this judgment to deter jigsaw identification of his children and nothing arising from these proceedings must be published which would identify the applicant's children or their family.

Introduction

[1] The applicant represents himself in these proceedings. He is originally from Scotland. As a result of a protracted and difficult dispute with his wife about the custody of his children, which is the subject matter of ongoing family proceedings, he decided to move to Northern Ireland and applied to join the PSNI. He was accepted as a student officer in or around October/November 2017. Because he did not have any accommodation in Northern Ireland he was allocated a room in the Police College in Garnerville, Belfast. He expected that he would remain there for the duration of his course as a student officer.

[2] On 19 December 2017 he was placed on sick leave as a result of a stomach injury he suffered during the physical education part of the course. On 7 January

2018 he had a meeting with two police officers, a Sergeant Murray and an Inspector Hamill. In the course of the meeting he was told that he would be required to leave his accommodation. The applicant was particularly aggrieved at this decision. Despite his representations he was compelled to leave the college accommodation on 19 January 2018.

[3] On 31 January 2018 the applicant received a phone call from Sergeant Murray informing him that a complaint had been received by a police officer in relation to his alleged conduct at a family proceedings hearing.

[4] On 1 February 2018 he was informed by a police officer that he was under investigation for the offence of harassment arising from a complaint made by his wife.

[5] On 5 February 2018 he was informed via a phone call from Sergeant Murray that he was suspended from duty. He attended a meeting on that day at the police college and was formally suspended. In the course of that meeting he was also informed about an allegation from Inspector Hamill concerning the applicant's conduct at the meeting of 7 January 2018. The notice of formal misconduct investigation referred to the harassment complaint, the complaint from the police officer and the complaint from Inspector Hamill.

[6] The suspension was reviewed regularly in accordance with the Student Officer Conduct Procedures.

[7] At a review on 10 May 2018 it was confirmed that the PPS had directed no prosecution in relation to the harassment investigation. However, continued suspension was deemed necessary in light of the other two misconduct allegations.

[8] On 11 May 2018 a fresh allegation was made against the applicant by a Ms Killen, a PSNI call handler, in relation to the contents of a telephone conversation between her and the applicant.

[9] Ultimately, the applicant faced a disciplinary hearing under Regulation 6 of the Police Trainee Regulations (Northern Ireland) 2001 on 24 September 2018. The hearing was conducted by a Chief Inspector Keers. Chief Inspector Keers was satisfied that the applicant's alleged behaviour constituted gross misconduct and that as such, on the balance of probability, he was not likely to become an efficient or well conducted constable on completion of his period of service as a police trainee (Regulation 6(1)(a) Police Trainee Regulations (Northern Ireland) 2001).

[10] He therefore determined the outcome of the disciplinary hearing to be that the applicant be dismissed from the Police Service of Northern Ireland without notice.

[11] The applicant appealed this decision. The appeal was conducted by ACC Todd. It appears that the substantive hearing took place before ACC Todd on 5 November 2018 and that there were follow-up conversations involving the applicant on 9 January 2019 and 31 January 2019.

[12] On 4 February 2019 the applicant received formal notice that his appeal was unsuccessful. The determination letter concludes:

> "I have concluded that there is insufficient evidence that would persuade me to reconsider or set aside the finding of Chief Inspector Keers and that, therefore, your appeal is not upheld."

The Challenge

[13] Leave to challenge:

(a) the decision of Chief Inspector Keers to dismiss him as a police trainee on 24 September 2018; and

(b) the decision of Assistant Chief Constable Todd that his appeal was not upheld.

Preliminary Issues

[14] At the leave hearing the proposed respondent raised a number of points, two of which require consideration at this stage. The first relates to the question of delay and whether the proceedings have been brought promptly or within the prescribed time limit. The second relates to what I term the "justiciability" argument. Are the decisions of Chief Inspector Keers and ACC Todd amenable to judicial review?

[15] In relation to delay to a large extent this issue arises from a lack of clarity as to when the papers initiating the proceedings were served. The application bears the date of 30 April 2019. However, the papers did not receive the official court stamp until 4 July 2019. On investigation it emerges that the papers were sent electronically by the applicant to the High Court on 3 May 2019 and also sent electronically to the Crown Solicitor on behalf of the proposed respondent on the same date. Hard copies were subsequently posted on 7 May 2019. Thereafter, the applicant was in contact with the office. It transpired there had been a delay in processing the applicant's fee exemption application (as he was representing himself). A collateral issue had also arisen in relation to the formalities surrounding the applicant's supporting affidavit. The fee exemption application issue was resolved and the papers were officially stamped on 4 July 2019.

[16] Although the applicant was informed in writing on 4 February 2019 of ACC Todd's decision he was orally informed of the decision in the telephone

conversation with ACC Todd on 29 January 2019. In my view this is the point at which time began to run.

[17] In addition to the account of the issuing of the proceedings I also note that a pre-action protocol letter was sent by the applicant on 19 March 2019 with a response from the proposed respondent received on 12 April 2019.

[18] It is axiomatic that expedition is an essential ingredient of judicial review proceedings. This is reflected in the narrow time limit within which applications must be made under Order 53 of the Rules of the Supreme Court.

[19] However, whilst the timeframe is narrow the rule provides flexibility and the court can extend the period within which the application shall be made if there is "good reason."

[20] Having heard the applicant and considered the matter on balance I have decided to extend the time limit to permit the applicant to proceed with the leave application. I do so for a number of reasons. Firstly, the period beyond the 3 month period is small – a matter of days. Secondly, I am conscious that the applicant does not have representation and I accept his account to me that he has made efforts, so far unsuccessful, to obtain legal representation. Thirdly, there are no third parties who will be affected by any decision of the court. The dispute is entirely inter partes. Fourthly, the issues at stake involve very serious consequences for the applicant – in effect the potential end of a career in the PSNI. Finally, whilst there is always prejudice in delay, I consider that the proposed respondent is in a position to properly defend any proceedings should leave be granted.

Justiciability

[21] The proposed respondent argues that the decisions under challenge are not amenable to judicial review. In this regard it is important to note the distinction between the intensity of any review and the ability of the court to carry out such a review. The proposed respondent made what I consider meritorious submissions in relation to the former issue. In respect of whether or not a decision of the nature challenged in this application is amenable to judicial review I consider that there are a number of factors which are relevant. The first relates to the source of the power exercised by the PSNI in this matter. In this case the decision maker is exercising powers which have their source in statutory regulations, namely the Police Trainee Regulations (Northern Ireland) 2001. This is a strong pointer in favour of support for the applicant's argument that the matter challenged is amenable to judicial review.

[22] Notwithstanding that the proposed respondent is a public body exercising statutory powers, Ms Best argues that the function being performed in respect of the applicant was in essence a private one. Relying on the decision in **RE McBride's Application** [1999] NI 299 she argues this is essentially a private law dispute.

[23] The boundary between public law and private law is not capable of precise definition. There have been a number of cases in this jurisdiction in which the courts have considered the issue of whether or not decisions by PSNI in relation to individual officers are amenable to judicial review. Thus, in the case of **JR26** [2009] NIQB 101, relying on the judgment of the English Court of Appeal in **R (Tucker) v the National Crime Squad Director General** [2003] EWCA Civ 3 the court held that the transfer of an applicant from the crime team to new duties within the PSNI did not raise a "public law" matter.

[24] In the case of **Farrell, (Constable Sean) and another** [2008] NIQB 159 Gillen J dealt with decisions relating to applicants who had been transferred from duty at one PSNI station to other stations. He considered the decision in **Tucker** and stated at paragraph [16] of his judgment:

> "[16] … I consider the current case is distinguishable from Tucker's case because of the disciplinary element present. These men are not being transferred because of operational needs as opposed to organisational requirements in a disciplinary setting."

[25] In the course of his judgment Gillen J also referred to the decision of the English High Court in **R (O'Leary) v Chief Constable of Merseyside** [2001] EWHC Admin 57. In that case an applicant successfully judicially reviewed a decision to transfer him to uniform duties arising from disciplinary charges.

[26] I consider that this case can be distinguished from the circumstances in JR26. I note the disciplinary element of the decision under challenge here. I also note that the decision is justified by the proposed respondent on the basis of the requirement for public confidence in the PSNI. The exercise being performed by the proposed respondent is a public one and one which has an impact upon the public generally. I also note that it is common case that the applicant cannot proceed with industrial tribunal proceedings he lodged claiming unfair dismissal simultaneously with this judicial review application. He is excluded from doing so.

[27] I have therefore reached the conclusion that the applicant has established that there is an arguable case that the decisions under challenge are amenable to judicial review.

The Substantive Claim

[28] The applicant's grounds of challenge are extensive and diffuse. It is clear to me from the extensive written submissions and the two days of oral hearings that the applicant feels an intense grievance about the way he has been treated by the proposed respondent. He is deeply unhappy about the initial decision to remove him from his accommodation and the subsequent misconduct investigation and

proceedings. It is also clear that the process, including these proceedings, have been distressing and difficult for him.

[29] In my view, properly analysed from the perspective of a public law review, the applicant's challenges resolve in substance to complaints about the procedural fairness of the decision making process culminating in the impugned dismissal decision.

[30] I understand that the applicant is not legally represented and that it can be difficult to disentangle his feelings of grievance about a number of decisions by the proposed respondent from matters which can be subject to the court's review.

[31] Therefore, it is important for the court to make it clear what is not capable of challenge by way of judicial review. It is clear from the applicant's submissions that he remains deeply dissatisfied with the decision to remove him from his accommodation. Whilst it may be that it was this decision that triggered subsequent events the court will not examine the merits or the rights or wrongs of that decision.

[32] Furthermore, in relation to the dismissal decisions it is important for the applicant to understand that the judicial review court cannot act as an appeal court. A major contention of the proposed respondent in resisting leave is that properly analysed the applicant is seeking a merits review of a decision, something which is impermissible in judicial review proceedings. Therefore, I make it clear to the applicant that it is not the role of this court to substitute its views as to what amounts to the merits of the complaints or to gross misconduct in the context of Police Trainee Regulations. That is a matter for the expertise and experience of the decision maker.

[33] That said, the court is persuaded that leave should be granted in this case arising from concerns about potential procedural unfairness leading to the decision under challenge.

[34] In so deciding the court however reminds the applicant of the well-established principle set out in **Doody v Secretary of State for the Home Department** [1994] 1 AC 531 (a decision to which the applicant refers in his submissions). The applicable standards of fairness are those of the common law, a duty described by Lord Mustall in that judgment as an "intuitive judgment" having regard to all the material circumstances of the situation. The requirements for procedural fairness will vary according to the context. This is not a circumstance in the words of Kerr LCJ in **Re Mullan's Application** [2007] NICA 47 which "requires the deployment of the full adjudicative panoply."

[35] Given that this is a leave hearing I do not propose to deliver a detailed judgment. At this stage the court is considering only the issue of arguability.

[36] Having considered the matter I have determined that leave should be granted on the grounds of illegality and procedural unfairness on the following grounds:

(a) The pre-hearing investigation was inadequate. In particular, the investigator failed to interview the persons who made the complaints against the applicant. There was an inadequate investigation of the complaints made by the applicant in response to the allegations.

(b) The applicant was given an inadequate opportunity to present his case at the disciplinary hearings on 24 September 2018 and 5 November 2018.

(c) The applicant was given inadequate opportunity to challenge those who made the complaints against him.

(d) ACC Todd should have recused himself from the hearing on 5 November 2018 because he had received information concerning the applicant which was prejudicial and which it was agreed should be removed from the papers relating to the hearing.

[37] I consider that all of the above matters meet the modest threshold of arguability for the purposes of judicial review and accordingly leave is granted in respect of these grounds.