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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered* **07/06/2007**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY TREVOR PURCELL FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for judicial review of decisions of a police disciplinary Panel on 14 March 2006. In the first place the Panel decided not to recuse itself on the ground of apparent bias after having had access to a document known as Appendix C. Secondly, the Panel decided not to inform the applicant of the nature of the legal advice it had received before issuing a decision. By amendment the applicant raised a third ground of challenge in relation to the training of the Panel. Mr Simpson QC and Ms Doherty appeared for the applicant, Mr Maguire for the Panel and Mr McAllister for the police Internal Investigation Board (IIB), being the section of the police that investigates complaints and presents disciplinary charges.

[2] The applicant is a police officer who faces charges under the Conduct Regulations arising out of an incident that took place on 13 July 2001. A criminal prosecution followed, but was not successful. Disciplinary proceedings were served in July 2005. The matter was listed for legal argument before the Panel on 20 December 2005 on an application to stay the proceedings based on delay and on the principle of double-jeopardy. In particular, on the issue of delay in disciplinary proceedings, reliance was placed by the applicant on the case of R (Merrill) v Chief Constable of Merseyside Police[1989] 1 WLR 1077.

[5] On that date it transpired that the Panel had had access to a document entitled "Appendix C". This was a document prepared by the IIB in relation to the Merrill case and contained instructions on how the Panel should deal with submissions made on reliance of the case. An application was made to the Panel to recuse itself based on the concerns about apparent bias as a result of the Panel having sight of Appendix C. The Panel adjourned the hearing to take legal advice

and to ascertain from the records of the Panel members how many times they had had access to Appendix C.

[6] The hearing resumed on 14 March 2006. There is a transcript of the proceedings on that date and it appears that the Chairman of the Panel, Assistant Chief Constable McCausland, stated that he proposed to summarise the legal advice given by the Crown Solicitor's Office. However, before he did that, on the basis of that legal advice, he stated his intention to give judgment on the application and he stated the conclusion that the Panel would not dismiss itself. The advice given by the Crown Solicitor's Office the Chairman summarised as follows:

> "In this particular case it seems to me that the fact that the panel members have at some stage or other seen the notes and guidance on the case, where the Merrill point was not an issue, is altogether too remote and would not result in an impartial observer concluding that there was any risk of unfairness. Whilst there may be a tenable argument to the contrary, I would advise that no further concession should be made in this regard without the benefit of a court ruling. I would, therefore, suggest that the best approach would be to allow the proceedings to be heard with the presently constituted panel…."

[7] The Chairman then asked if there were any other applications and Counsel for the applicant stated that he would want to address the Panel on the ruling. In the event there were other matters discussed at that point but no representations were made in relation to the content of the legal advice that had been received.

[8] In an affidavit Inspector Emerson of the IIB stated that in 2005 the IIB formulated Appendix C in conjunction with David Mercier and Andrea Hopkins of the police Legal Advisers Office. He described Appendix C as an advice note written by Mr Mercier and Ms Hopkins dealing with delay and human rights issues in misconduct proceedings. He stated that the case of Merrill was dealt with in Appendix C and that it was in the nature of general advice and was not specific to any individual case being heard by the Panel. Appendix C was first included in papers supplied to Panel members hearing misconduct proceedings on 29 July 2005 and ceased to be included in their papers on 19 November 2005.

[9] By affidavit the Chairman of the Panel stated that when the point about delay and Appendix C came up at the hearing he could not recall the document nor could any other Panel member. Accordingly, he indicated that the question of contact with the document by members of the Panel would have to be researched. Pending receipt of that information the proceedings were adjourned. Investigations then revealed that the Chairman had received Appendix C as part of the papers in a previous case and it transpired that the same had occurred in relation to

Superintendent Harper and Superintendent McCombe, the other members of the Panel.

[10] The Chairman stated that at no stage were any submission made to the Panel that the Panel should recuse itself because of any other aspect of the training of Panel members. Further the Chairman stated that when the Panel informed those present at the hearing of the legal advice that had been received and of the decision of the Panel there was no application to receive argument as to the correctness of the advice.

[11] In relation to the issue of training, the Chairman stated that he had originally received a day's training some five or six years previously in respect of serving on a disciplinary Panel. This had been organised by the IIB. Then, again, in 2005 he received further training involving a half-day course, again organised by the IIB. He added:

> "I have always followed the advice I received in the course of all the above that it is important when faced with legal issues in the course of disciplinary proceedings to seek to obtain skeleton arguments and for these to be considered carefully together with oral argument on a case by case basis and individually."

[12] Inspector Emerson stated that there had been a training day on 17 October 2003 and he used the programme from that day as an example of training. Training on that occasion had been between 9.30 am and 4.30 pm and had been facilitated by Detective Superintendent Hughes of the IIB. A powerpoint presentation was given by Detective Superintendent Hughes and dealt with misconduct proceedings, the conduct regulations and Northern Ireland Office guidance. Ms Andrea Hopkins and Mr David Mercier of the Legal Advisers Office made presentations on human rights issues and on the Merrill decision. There was further input from Mr Wood of the Office of the Police Ombudsman for Northern Ireland on its involvement in disciplinary matters. There was also a mock hearing carried out and Sergeant Burnett, the Police Federation Defence Co-Ordinator, assisted and provided input from a friend's perspective. The printed programme sets out the work that was done during that day.

[13] The Police Service of Northern Ireland Conduct Regulations 2000, Part II, deals with supervision and investigation. Mr Maguire, on behalf of the respondent, was at pains to emphasise the nature of the statutory framework within which these particular proceedings took place. Under Regulation 5 the Chief Constable may suspend the member who is the subject of complaint and the Chief Constable may delegate his powers to a senior officer. Regulation 7 deals with investigation and with the appointment of a supervising member and there are restrictions on the officer who may be appointed. The supervising member may appoint an investigating officer to investigate a case and there are similar restrictions on the

person who may be appointed. Regulation 10 provides for an Investigating Officer's Report to be submitted to the supervising member or to the Ombudsman.

[14] Part III of the Regulations deals with the hearing and Regulation 13 provides that the supervising member shall be responsible for providing the requisite notice of any hearing. Regulation 16 deals with legal representation and provides that if the supervising member is of the opinion that the hearing should have available the sanctions of dismissal, the requirement to resign or reduction in rank, he shall cause the member concerned to be given notice in writing of the opportunity to have a legal representative at the hearing at the same time as he gives notice under Regulation 13. Regulation 18 provides for a hearing by three police officers appointed by the Chief Constable and who are not interested parties. Regulation 21 provides for the supervising officer to appoint a presenting officer for the hearing although if the member concerned has elected for legal representation the supervising officer may appoint Counsel and solicitor to present the case. Regulation 23 provides for procedures at the hearing.

[15] Part IV of the Regulations deals with the review of the decision of the Panel. Regulation 34 provides that where a sanction is imposed the member concerned shall be entitled to request the Chief Constable to review the finding of the sanction imposed in the case.

[16] O'Connor & Brodericks Application [2006] NI 114 dealt with police disciplinary procedures and identified certain conflicts of interest or manifest contradictions in the structures then in place. First of all, in relation to the head of the Legal Advisers Office there was a conflict of interest because the head of the Office advised the Panel while his Office also processed the case for the presenting officers against the officer who was the subject of the disciplinary charges. Secondly, the Chief Constable reviewed the decision of the Panel and the Chief Constable and the Panel both received advice from the Legal Advisers Office. Thirdly, the IIB, being the branch that presented the charges, received legal advice from the Legal Advisers Office, which also advised the Panel and the Chief Constable on a review.

[18] On the question of apparent bias the test was redefined by the House of Lords in Porter & Magill [2002] 2 AC 357. Having considered the test formulated by the House of Lords in R v Gough [1993] AC 646 and the more objective approach taken in Scotland and some Commonwealth countries and in the Strasburg jurisprudence, Lord Hope suggested what he described as a modest adjustment of the test. Accordingly the Court must first ascertain all the circumstances that have a bearing on the suggestion that the decision-maker was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility the Tribunal was biased. Lord Hope stated the test at paragraph 103 -

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased."

[19] In the present case there was debate about the nature of the informed and objective observer. In Gillies v Secretary of State for Work and Pensions [2006] UKHL 2 Lord Hope said at paragraph 17:

> "The fair-minded and informed observer can be assumed to have access to all the facts that were capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed, as Kirby J put it in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, that the observer is neither complacent nor unduly sensitive or suspicious when he exams the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."

In a similar vein at paragraph 39 Baroness Hale stated that:

> "The 'fair-minded and informed observer' is probably not an insider (ie another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded."

[20] Mr Maguire emphasised the different character of disciplinary procedures and referred to R (Bennion) v Chief Constable of the Merseyside Police [2001] EWCA Civ 638. The Court of Appeal in England was considering the issue of apparent bias in the context of a Chief Constable's role in police disciplinary proceedings and comparisons with criminal and civil proceedings. At paragraph 44 Judge LJ stated that the essential question was whether the position of the Chief Constable could be distinguished from that of the hypothetical judge. The immediate difference stemmed from operational responsibilities of the office of Chief Constable. The Chief Constable always had an interest, in its general sense, in the outcome of every set of disciplinary proceedings brought against any officer. Sitting as an adjudicator in disciplinary proceedings, the Chief Constable had a direct and continuing involvement in the consequences of his decisions. The conclusion was that care must be taken not to assume that the requirements which would be understood to

apply to any Judge inexorably applied to a Chief Constable conducting disciplinary proceedings in accordance with his operational responsibilities.

[21] In the present case the issue concerned the document known as Appendix C, an advice note on the decision in Merrill and on delay. It was produced by the IIB and drafted by the legal advisers. It was a general guide rather than case specific advice. It was part of earlier training that was undertaken by the officers and it was not in the case papers for the particular case. The contact which the members of the Panel had with the paper was uncertain. It was clear that they could not remember the content or the extent of their contact with the document. They had to ask for research to be conducted to determine what contact they had had. In all the circumstances would the informed and objective observer consider that there was a real possibility of bias in relation to Appendix C? I think not. It was general guidance, produced at an earlier training session, not produced in the case papers for a specific case and not a matter that the Panel members could be expected to call to mind after it ceased to be included in case papers.

[22] The applicant objects to the contents of Appendix C as well as to the circumstances of its existence. I have no reason not to accept that the members of the Panel had no recollection of the contents of the document or of the extent of their contact. The Chairman stated that each decision based on legal issues was case specific and I accept that that was the case. I am satisfied that the content was not in their minds and was not influencing them in dealing with this specific case.

[23] On the issue of training, again there was general guidance on the disciplinary system offered to those attending the training . There was participation by the IIB and by the Legal Advisers Office and as Mr Simpson accepted in the course of argument, their participation in a training programme, in itself, was not objectionable. The objection focussed on the identity of those organising or, to use a more neutral word that was adopted in the papers, "facilitating" the training. The respondent objects to this ground being relied on by the applicant as it was not raised before the Panel. Further the respondent emphasises the character of the process that was being undertaken under these Regulations.

[24] The training was undertaken by IIB. The IIB are the investigating and presenting branch in relation to disciplinary proceedings. The Legal Advisers Office contributed to the training and its members are the legal advisers to the IIB. As appears from O'Connor and Brodericks Application there was a conflict of interest where there was a common legal adviser to the IIB, the Panel and the Chief Constable. The present argument about apparent bias has developed out of O'Connor and Brodericks Application.

[25] Without the Police Federation involvement, as defence co-ordinator, and the Police Ombudsman's involvement the training structure would clearly fail the test and be unacceptable. The matter is balanced by the presence of the defence co-ordinator and the Police Ombudsman. It might have been preferable to include the

legal advisers to the Panel or other independent legal adviser, but it is necessary to have regard to all the circumstances and to make an overall assessment of the scheme to determine whether there is the appearance of the real possibility of bias.

[26] I am satisfied that on applying the test of the fair minded and informed observer there was no apparent bias in this case because of the balanced nature of the participation in the training programme, despite the description of the IIB as organising the event. Had I been against the respondent on this issue, I would not have been persuaded by the respondent's argument about the cost implications of an alternative scheme based on English officers having to be brought over to sit on Panels. Nor am I persuaded that such an argument could have saved a scheme that was found to be infected by apparent bias. In any event I should have thought that a further training session, properly composed if it had been decided that a change was necessary, could have been arranged to provide adequate training without the cost implications that are set out in the affidavits.

[27] The applicant's third ground relates to procedure. There were no representations on the legal advice before the decision was delivered. The guidance issued by the NIO in relation to these Panels at paragraph 3.57 states that:

> "In cases where there are to be legal arguments based on, for example, the way the procedures have been implied during the course of the investigation, it is normally advisable to dispose of those at the start of the hearing as far as is possible. The parties may find it helpful to submit written skeleton arguments to each other and to the officers conducting the hearing in readiness for this part of the proceedings. In the event that, whether in the light of the skeleton arguments or after hearing oral arguments, the presiding officer decides that he or she needs to obtain legal advice, this advice may be provided in private but should in due course be summarised to the parties concerned at the hearing."

[28] The Court of Appeal considered this matter in KD's Application [2006] NI 245. The case did not arise in a police discipline context, but in the school admissions context, but the general approach to legal advice to tribunals was discussed. First of all, the notes of guidance prepared for the Belfast Education & Library Board's School Admissions Panel Tribunals stated that:

> "The tribunal may request the presence, at a hearing, of a representative of the Joint Legal Service of the education and library boards.
> If the tribunal seeks the opinion of the Joint Legal Service, then the chairman will ask the two sides to hear that opinion and make comment on it."

[29] The above guidance on legal advice to the education tribunals indicates a different format for the receipt of legal advice than applies to police disciplinary panels and may be stronger than the guidance provided to the police disciplinary panels in that the former appears to envisage an exchange of views on the legal advice before it is acted on whereas the latter provides for a summary of legal advice in due course. However at paragraph 40 Kerr LCJ stated the position that might apply to all cases where tribunals receive specific legal advice on an issue calling for a ruling during a hearing -

> "…. as a matter of good practice, where tribunals have received advice from solicitors that might bear on how they approached the disposal of the appeal, the gist of that advice would generally be communicated to the parties to the appeal so that they may make any necessary submissions on it."

[30] What is the purpose of furnishing a summary of legal advice in accordance with the guidance? The applicant emphasised that it was in order to enable representations to be made. The respondent emphasised that it was for the purpose of reasons being provided for the decision and referred to Wade on Administrative Law, page 522, on the issue of reasons for decisions. It seems to me that the purpose is to allow representations to be made and such representations might be made in relation to the accuracy of the advice generally or in relation to the impact of the advice on the particular case.

[33] If the representations are made on the accuracy of the legal advice, the point is made that there might well be never-ending references between the Panel and the legal adviser. Obviously such references back and forward are to be avoided in the interests of proper and effective case management. In relation to representations on the impact of the legal advice, the application to the facts of the particular case obviously influences the decision of the particular Panel. It follows that in general the representations should be invited before the decision is made. R (Doody) v Secretary of State for the Home Department [1994] 1 AC 531 at page 560 provides:

> "5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification, or both.
>
> 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests

> fairness will very often require that he be informed of the gist of the case which he has to answer."

[34] Thus, it may be in order to receive representations after a decision to secure its modification. The respondent says that the Panel did not refuse representations, and the applicant did not make any attempt to make representations or to modify the decision. The transcript indicates that both sides proceeded on the basis that there would be no representations after the decision.

[35] The gist of the legal advice was given and indeed the legal conclusion seems to have been read out verbatim. There were no representations from the applicant and that is contrary to the NIO guidance and to the common law where it is the case that the applicant seeks to make representations.

[36] However, I have found for the respondent on the issue of Appendix C and the Merrill advice. Although there was not compliance with the guidance in relation to the opportunity to make representations in relation to the legal advice, I propose to exercise my discretion not to interfere with the decision of the Panel, having found against the applicant in relation to the use of Appendix C in the first place. The result is that I dismiss this application for judicial review and find against the applicant on each of the three grounds upon which reliance was placed.