

Neutral Citation No. [2006] NIQB 15

Ref: **MCCC5488**

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

Delivered: **10/03/2006**

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

BETWEEN:

—————
CHRISTINE McCULLOUGH

Applicant;

and

POLICE SERVICE OF NORTHERN IRELAND

Respondent.

—————
The Rt Hon SIR LIAM McCOLLUM

[1] The applicant is a Chief Inspector in the Police Service of Northern Ireland (PSNI) and she brings this application for judicial review of a decision made on 24 April 2005 by Mr Michael Cox, Director of Human Resources for PSNI, in which he declined to accept an absence from duty by the applicant from 26 June – 22 December 2003 as caused by an injury on duty.

[2] The decision has consequences for the applicant's prospects in relation to pension, promotion and transfer within PSNI.

[3] At all material times the applicant was Deputy Head of Foundation in the Faculty of the Police College at Garnerville, Belfast. Dr Jim Drennan was Director of Training Education and Development in the college and was effectively the applicant's superior in management.

[4] They were involved in a series of exchanges in June 2003 the details of which are in dispute.

[5] The applicant's case is set out succinctly in the Order 53 statement which is in the following terms.

“IN THE MATTER of an application by Christine McCullough for leave to apply for Judicial Review of a decision whereby it was determined that her

absence from work was not due to an injury on duty for pay purposes.

STATEMENT

Pursuant to 0.53(3) of the Rules of the Supreme Court(Northern Ireland) 1980

1. The applicant Christine McCullough is a Chief Inspector in the Police Service of Northern Ireland.
2. The applicant seeks relief in respect of a failure by Michael Cox, Deputy Director of Human Resources, Police Service of Northern Ireland, to accept that the applicant's absence from work was due to an injury on duty for pay purposes.
3. The applicant seeks the following relief:
 - (a) An Order for certiorari to remove into the Court and to quash the said decision.
 - (b) A Declaration that the decision reached by Michael Cox is wrong in law.
4. The applicant was off work on sick leave from 26th June 2003 until 22 December 2003. In respect of this period she was medically certified as being unfit for work due to stress. It is the applicant's case that the stress was caused by the behaviour of her superior during the weeks prior to her going off sick and that she was exposed to such behaviour during the course of her duty as a police officer and that this should have resulted in her absence from work being determined as being due to an injury on duty for pay purposes.
5. The sick pay regime in respect of members of the Police Service of Northern Ireland is provided for at Reg.42 of the Royal Ulster Constabulary Regulations 1996 No.473 which provides inter alia:

- (1) Subject to paragraphs (2), (3) and (4), if on any relevant day, a member has, during a period of twelve months ending that day, been on sick leave for one hundred and eighty-three days he ceases for the time being to be entitled to full pay and becomes entitled to half pay while on sick leave.
- (2) Subject to paragraphs (3) and (4), if on any relevant day, a member has been on sick leave for the whole of the period of twelve months ending with that day, he ceases for the time being to be entitled to any pay while on sick leave.
- (3) The Chief Constable may in a particular case determine that for a specified period –
 - (a) a member who is entitled to half pay while on sick is to receive full pay or
 - (b) a member who is not entitled to any pay while on sick leave is to receive full pay or half pay and may from time to time determine to extend that period.
- (4) The Chief Constable, if he is satisfied after consultation with a registered Medical Practitioner appointed or approved by the police authority that a particular case is exceptional, shall determine in consultation with the said Medical Practitioner that for a specified period –
 - (a) a member who is entitled to pay while on sick leave is to receive full pay or....

- (b) a member who is not entitled to any pay while on sick leave is to receive either full or half pay.

An exceptional case is a case in which the members being on sick pay is directly attributable to an injury received in the execution of his duty as defined in the Pensions Regulations.

- 6. Therefore in respect of the applicant's entitlement to be paid sick pay different considerations apply if the injury is sustained in the execution of her duty as defined in the Pensions Regulations.
- 7. The Pensions Regulations referred to are the Royal Ulster Constabulary Pensions Regulations 1988 No.374. The relevant provisions in the Regulations are:

A10 – (1) A reference in these Regulations to an injury received in the execution of duty by a member means an injury received in the execution of that person's duty as a member.

A10 – (2) For the purposes of these Regulations an injury shall be treated as received by a person in the execution of his duty as a member if

- (a) The member concerned received the injury while on duty or while on a journey necessary to enable him to report for duty or return home after duty or..
- (b) He would not have received the injury had he not been known to be a member or..

(c) The Police Authority are of the opinion that the preceding condition may be satisfied and that the injury should be treated as one received as aforesaid.

A10 - (3) For the purposes of these Regulations an injury shall be treated as received without the default of the member concerned unless the injury is wholly or mainly due to his own serious and culpable negligence or misconduct.

8. Therefore, when the applicant went off work and made the case that her absence was due to an injury on duty as defined in the Pensions Regulations the Chief Constable or the person to whom he had delegated this responsibility was required to consult with a registered Medical Practitioner and to make a determination whether or not the absence was received in the execution of the applicant's duty.
9. In this case the initial decision was made by Heather Richardson, Head of Personnel, Urban Region. She consulted with the registered Medical Practitioner Dr Courtney who indicated that he accepted that the applicant was suffering a stress related illness attributable to the incidents at work as described by her. She then considered the matter and refused to accept that the absence should be classified as being due to an injury on duty.
10. The applicant was then entitled to an appeal and this appeal was determined by Michael Cox, Deputy Director of Human Resources on 24th April 2005. Again he accepted that there was a causal link between the applicant's absence and the events complained of by her. However in his view it was not sufficient for the applicant's medical problems to have arisen due to

problems arising between her and her superior even if those problems occurred during the course of the applicant's duty. He considered that the applicant was also required to establish that the applicant's superior had acted unreasonably and he was not so satisfied. Therefore he rejected the applicant's appeal.

11. On behalf of the applicant it is alleged that the test applied was wrong in law and that the correct test as set out in the legislation required that the applicant suffered an injury either in the execution of her duty or whilst on duty and that there was no further requirement that she establish that her superior had acted unreasonably.
12. The applicant has been adversely affected by the decision in that she is now at a disadvantage in applying for promotion or transfer within the police."

[6] The statement was supported by an affidavit of the applicant which was in the following terms:

"I, Christine McCullough of Banbridge Police Station make Oath and say as follows:

1. I am a Chief Inspector in the Police Service of Northern Ireland and am now serving as Chief Inspector, South Belfast District.
2. In June 2003 I was serving as Deputy Head of Foundation Faculty, Police College, Garnerville, Belfast. At that time Dr Jim Drennan was the Director of Training, Education and Development at the College. Between 2nd June 2003 and 25th June 2003 I was involved in a series of incidents with Dr Drennan. All of these incidents occurred whilst I was on duty and carrying out my duties as Deputy Head of Foundation Faculty. As a result of these incidents I suffered anxiety, poor sleep and tearfulness. I attended the Police Occupational Health

Unit and I was advised that I was suffering from anxiety related symptoms and that these were brought about by the incidents occurring at work. I was deemed to be medically unfit and I was certified as being medically unfit for work. For the purposes of this application I do not understand there to be a dispute regarding the fact that the incidents occurred. Nor do I understand there to be a dispute that the incidents occurred whilst I was on duty and carrying out my duties as Deputy Head of Foundation Faculty. Also for the purposes of this application I believe that it is accepted that my health problems and hence my absence were caused by the incidents. However I am aware that there is a dispute between myself and Dr Drennan regarding what precisely occurred between us. Whilst I remain of the view that Dr Drennan was at fault I am advised that the determination of who was at fault should not be necessary for the determination of whether or not my period off work should be deemed to be due to an "injury on duty".

3. I now beg leave to refer to a series of documents relating to the determination of my application to have my absence deemed to be due to an "injury on duty".
 - (a) My statement of 8th December 2003 setting out the circumstances leading to my health problems and my period of absence from work.
 - (b) Report from Chief Superintendent Wilson of 8 October 2004 who was required by the Police Service of Northern Ireland to investigate the circumstances leading to my application.
 - (c) Decision of Heather Richardson of 17th November 2004 rejecting my application.
 - (d) My Notice of Appeal against this decision dated 16th February 2005.

- (e) Decision of Michael Cox, Deputy Director of Human Resources of 24th April 2005.
- (f) Letter from Heather Richardson of 26th Apr 11 2005 to Linda Haire, Personnel Officer, Banbridge DCU.
- (g) Letter from Linda Haire of 29th April 2005 to me.

These documents are exhibited hereto and marked "CMcC1". I have signed my name thereon at the time of swearing hereof.

- 4. As appears from the decision of Mr Cox he was of the view that it was necessary to determine whether or not Dr Drennan was at fault or whether he was acting reasonably. If the latter he was of the view that my absence could not be held to have been due to an injury on duty. It is my belief that he has introduced a requirement which does not appear in the relevant statutory Regulations and that his decision-making process was therefore flawed.
- 5. The failure to accept my absence from work as being due to an injury on duty for pay purposes has affected me adversely in that I am now at a disadvantage in applying for promotion or transfer within the police. This arises out of the operation of the "Managing Attendance Policy" 2003 General Order No: 2512003 and the "Guidance for Promotions, Appointments and Transfers Appeals" General Order No: 3 1/2003. I beg leave to refer to copies of these Orders which are exhibited hereto and marked "CMcC2". I have signed my name thereon at the time of swearing hereof.
Essentially unless the period of absence is accepted as being due to an injury on duty I am now excluded from applying for promotion or transfer for a 2 year period. There is an appeals process whereby I could attempt to have the period of absence

discounted in the event that I apply for promotion or transfer. However the outcome of an appeal is at best discretionary whereas the classification of my absence as being due to an injury on duty results in a mandatory discounting. Further in November 2004 I applied for promotion to the rank of Superintendent. This was at a stage when a decision was still awaited in respect of the determination of whether my absence was due to an injury on duty. Even then, despite the fact that no decision had been made, the appeal panel refused to discount my period of absence. This resulted in me being excluded from the promotion process. Therefore the chances of now persuading the appeal panel to discount the period in respect of any subsequent application would appear to be remote."

[7] The medical reports which supported the plaintiff's claim were provided by Dr D Courtney, one reported 1 June 2004 and a second undated report and Dr D I W Hamill dated 29 September 2004. The reports are in the following terms:

"This officer self referred to Occupational Health and Welfare and was seen by myself on 2 June 2003. She advised that she was having considerable problems related to work and had a number of quite specific symptoms, including poor sleep, anxiety and tearfulness. She, at that stage, ventilated at length as regards the difficulties within the work place and stated that she hated coming to work. These difficulties were of relatively recent origin and related to how she felt she was being treated at Work. She was advised appropriately as regards coping mechanisms.

She was seen again on 8 August 2003. She told me that she had recently returned from holiday but had experienced a difficult time, because of a conversation she had with her line manager, prior to going on holiday. When seen she was in fact on sick leave. She continued to experience a number

of symptoms, including anxiety, poor sleep and tearfulness. At that stage he was considered medically unfit for duty and advice was given as regards progressing towards a resolution of the ongoing difficulties.

She was next reviewed on 8 September 2003. Whilst she had suffered an up and down course since last seen, she felt in general that she was much improved. It appeared, at that stage, that matters were progressing towards a resolution. She was continuing to exercise, as recommended, and with agreement, specialist referral was made.

On the information available to me, I am not aware of any other issues outside the work place which would have a bearing on her symptoms at that time."

"This officer came to see me on 2 June 2003. She was experiencing considerable work difficulties at that stage and had a number of typical anxiety related symptoms. Support and advice was given at that stage.

She was next seen on 8 August 2003. There had been further problems, again relating to the work situation and her symptoms had increased. At that stage my view was that it was appropriate that she should be on sick leave and this was recommended and confirmed.

She was reviewed on 8 September 2003. In the interim there was evidence of improvement in her medical condition and she had clearly been taking all steps to progress. At that stage she was working towards an early return to duty.

I would therefore confirm that, in my view, the sickness absence period in 2003 was entirely justified and necessary, to allow the member's health to improve and in my view the period of absence was reasonable, in view of the circumstances."

“Mrs McCullough has enjoyed good health through her adult life and has really had no time off work apart from her pregnancies. However in 2002/2003 there arose particular and specific problems at work and these resulted in Mrs McCullough suffering from work related stress. As a result of this Mrs McCullough was off work from July 2003 until 23rd December 2003. I would stress that this long period of absence was specifically related to work related stress and the situation now seems to have resolved itself and I would hope that Mrs McCullough’s previous excellent work record would be maintained.”

[8] When the applicant sought classification of her period of absence as having been caused by an injury on duty a report was prepared by Chief Superintendent W W Wilson who expressed the view that the period of sickness should be classed as an injury on duty.

[9] The matter was considered by Heather Richardson, Head of Personnel for the urban region and she set out her conclusions and decision in the following terms.

[10] The applicant appealed the decision and the appeal was considered by Mr Michael Cox, Deputy Director of Human Resources, whose decision I set out hereunder:

- “1. I am writing to set out my decision (and reasons behind it) in Chief Inspector McCullough’s appeal against your decision to refuse to accept her absence from 26 June 2003 to 22 December 2003 as an injury on duty for pay purposes. I am replying to you in your role, although the case was submitted to me in your stead by Mrs McSparron as you stated (in the final paragraph of your minute of 22 March) that it would be better for ‘an independent person to reconsider this IOD’. I consider this reasonable in the circumstances, although it varies from the prescribed process set out in the General Order.
2. At the outset I believe it is important to set out my role under the current instructions. It is my responsibility to give a final

determination on the appeal after it has been re-considered. I make this point as other issues in the papers are seemingly confusing the appeal, how the case has been handled and dissatisfaction in the line management relationship. My role is to consider the merits of the case. Local management should consider whatever action is appropriate in respect of how the case has been handled. Any grievance is separate to the appeal.

3. For completeness, I record that I had sight of these papers in October 2004 when I set aside a previous decision on the appeal as it had not been taken within the terms of the current instructions. My previous involvement has no bearing on the current consideration.

Background

4. Chief Inspector alleges that contact with her line manager, Dr Jim Drennan, resulted in the period of absence starting on 26 June 2003. Examples are given in support (the requirement of a development plan after an APR, the case of a Student Officer and the involvement of an officer subordinate to the Chief Inspector and a series of phone calls culminating in one on 25 June 2003).

The test to be applied

5. The key question to be answered is whether the absence was a direct result of an injury sustained in the execution of duty. If so, the appeal will succeed. If not, it will fail.
6. Broadly speaking, there is no dispute between the parties on the specific incidents cited actually taking place. There is a dispute, however, around the intent behind incidents (APR and Student Officer examples) and the content (and conduct) of

the exchanges between Chief Inspector McCullough and Dr Drennan.

7. Taking the Court of Appeal's judgement in the 'Stunt' case into account there are two separate aspects to be considered in reaching a decision in cases of this type. Firstly, the injury must be directly and causally linked with service as a police officer in the execution of duty. This is primarily a medical test. Secondly, the case must show that the absence was directly in the execution of duty. The 'Stunt' case gives some helpful guidance on this aspect, albeit specifically about the application of the police complaints procedures.

Considering the appeal

8. Chief Inspector McCullough has submitted an opinion in support of her appeal from Dr Courtney on 1 June 2004, in which he reviewed her case. In his final paragraph he states:

"On the information available to me, I am not aware of any other issues outside the work place which would have a bearing on her symptoms at that time."

The question for me is whether this statement represents a 'direct and causal link' to her role. While not explicitly stated in those terms, I have concluded that this is implicit in Dr Courtney's statement.

9. The second part of the test is more problematic. The question to be answered is whether the management action was reasonable in the circumstances and similarly the response to it. In this regard the Court of Appeal's decision on 'Stunt' is helpful in reaching a determination on what comes within the ambit of 'execution of duty'. I believe there is a reasonable analogy between the application of the police

complaints procedures (in the 'Stunt' case) and management actions in the circumstances of any particular case.

10. Dr Drennan has explained what he did and why in respect of the requirement of a personal development plan and the case of the Student Officer. Chief Inspector McCullough perceived them in a significantly different negative way. There will also be significant scope for differentiation between intent and perception and all reasonable steps should be taken to minimise the risk, but this may not always be practicable depending on other circumstances.
11. Reaching a conclusion on what happened during the telephone calls is even more difficult. There can be little doubt that the exchanges were robust and are acknowledged as such. Whether Dr Drennan overstepped the mark as claimed by Chief Inspector McCullough is impossible to say. I make this point as the calls took place at the end of a period during which the working relationship between both parties was deteriorating. Therefore, in such a set of circumstances the perceptions of the parties will be heightened and it is a small step to arrive at where we now are. I cannot reach a conclusion in either party's favour in this aspect, only they know what was intended, said or heard.
12. All of this is background as to whether the actions - real or perceived - amounted to an injury in the execution of duty as defined in the Regulations. My view is that if a manager reacts reasonably to circumstances then it could not be regarded as an injury in the execution of duty. In cases where there are disputed circumstances such as this one, an assessment of what is 'reasonable management action' is problematic to say

the least. It is not, however, adequate to go simply with an individual's perceptions or the consequences for them. To do so would open the door to any individual who did not like management action to claim absence as 'an injury in the execution of duty' (albeit subject to medical confirmation). I do not believe this is a reasonable interpretation and would not to my mind sit comfortably with the Court of Appeal's judgement in the 'Stunt' case. The practical effect would be to establish a precedent which could stop management managing.

Conclusion

13. This is a difficult case. The medical opinion has established (implicitly) a casual link between Chief Inspector McCullough's absence and the workplace. I have concluded, however, for the reasons set out that the absence cannot be accepted as an injury on duty for pay purposes.
14. Please have Chief Inspector McCullough informed accordingly."

[11] The applicant attributes the commencement of her problems to the conversation with Dr Drennan on 2 June 2003.

[12] However it appears from Dr Courtney's report of 1 June 2004 that he had seen her on 2 June 2003 and that she was already having "considerable problems related to work".

[13] It appears to have been on his second consultation with her on 8 August that she added to her original complaints that she had experienced a difficult time on holiday "because of a conversation she had had with her line manager prior to going on holiday".

[14] Since according to a statement made by her the telephone conversation with Dr Drennan was at 4.50pm on Monday 2 June. It appears to be very likely that that telephone call was made after her first consultation with Dr Courtney.

[15] However that may be the issue is whether her exchanges with Dr Drennan on and after 2 June 2003 were such as to entitle her to a finding that her subsequent health problems were due to an injury at work.

[16] Mr Colm Keenan for the applicant has presented a well researched and well presented skeleton argument in which many of the leading cases are reviewed.

[17] I do not find them all easy to reconcile with each other but I have saved the task of analysis because of the comprehensive review of the cases by Lord Reed in Lothian and Borders Police Board v MacDonald [2004] SLT 1295 to which I refer anyone who seeks guidance through the various decisions.

[18] I agree with him that the truly authoritative decision in the matter is that in the case of Stunt v Mallett [2001] ICR 989.

[19] In my view the principle applicable to this issue is that expressed by Lord Phillips then Master of the Roles:

“There is one common element in each case in which the injury was held to have been sustained ‘in the execution of duty’. An event or events, conditions or circumstances impacted directly on the physical or mental condition of the claimant while he was carrying out his duties which caused or substantially contributed to physical or mental disablement. If this element cannot be demonstrated it does not seem to me that a claimant will be in a position to establish that he has received an injury in the execution of his duty.”

[20] I would add one further element to explain the scope of Lord Phillips’ comment.

[21] In my view the event or events conditions or circumstances must carry some element of departure from the ordinary course of duty and must contain some traumatic or harmful element of the kind that can be recognised as liable to cause injury or disease.

[22] There is no question of fault the injury may be caused by some entirely accidental occurrence.

[23] However on the other hand an officer who succumbs to the ordinary pressures of his duties or to events connected with them which are not in themselves traumatic or naturally injury inducing is not therefore entitled to

claim that any injury or disease suffered by him has been suffered as injury on duty.

[24] I find myself in entire agreement with Lord Reed's remarks in paragraph 47 of his judgment in Lothian and Borders Police Board v MacDonald:

"The development of the legislation so as expressly to enable an injury award to be made where the officer's inability to perform the ordinary duties of a police officer is occasioned by infirmity of a purely psychological nature, which is the result of an injury itself of a purely psychological nature, gives rise to a number of difficult issues. One issue is whether a given mental state or condition should be regarded as constituting an "injury". In the context of the law of delict, where the same problem arises, that issue has been resolved (however imperfectly) by requiring that the claimant must have suffered a recognisable psychiatric illness or abnormality. A second issue is the difficulty of making reliable predictions as to the claimant's long term prospects where the disabling condition is entirely psychological. A third issue is the difficulty of establishing the aetiology of a psychology condition. In addition, cases of this type can give rise to certain concerns: for example, as to whether a person who cannot cope with stress at work should be compensated or ought simply to find less stressful work, and as to the effect on the morale of the rest of the workforce if people are given, in the form of a pension or compensation, the wages they are insufficiently robust to earn. The strength of such concerns may of course depend on the width of the circumstances in which "stress at work" is regarded as entitling a person who cannot cope to receive such a pension. These issues and concerns are reflected to some extent in the authorities which were cited to me concerning the 1987 Regulations, all of which involved claims arising from purely psychological conditions."

[25] This issue in this case therefore is whether Mr Cox correctly addressed the issues in his determination of the matter.

[26] Paragraph 11 of his ruling makes it clear that he was unable to reach a conclusion as to whether Dr Drennan's behaviour "overstepped the mark".

[27] In my view he was applying the right test and was correct in focussing on the conduct of Dr Drennan rather than on the applicant's reaction to it.

[28] If the applicant's adverse reaction was to the legitimate exercise of the management function by Dr Drennan then in my view she has not suffered "an injury".

[29] If on the other hand if Dr Drennan had pursued an unreasonable campaign of harassment or maintained an unreasonable level of criticism and this had affected the applicant's health then she could legitimately claim an injury on duty.

[30] For the exercise of procedures of management including discipline in a police force to be deemed to cause injury or disease of the mind it would have to be established that some injurious element was involved in that procedure beyond the normal stress that might be caused in the course of the imposition of any management requirement.

[31] Mr Cox as indicated in paragraph 12 of his ruling that the issue for him was to consider whether there was an assessment of what is "a reasonable management action".

[32] In my view he applied the right test.

[33] It is not for me to consider whether his decision on the facts was one which I agree with provided that decision cannot be shown to be one that no reasonable person in his position would have reached. That case has not been made and hold that Mr Cox applied the right principles to the findings of fact which he made and that he has adequately explained his reasoning.

[34] Having regard to those circumstances the application must be refused.