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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PAMELA COLVILLE FOR JUDICIAL REVIEW

and

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

MAGUIRE J

Introduction

[1] The facts of this case are not substantially in dispute and can be stated shortly. The applicant was and is an Inspector in the Police Service of Northern Ireland ("PSNI"). She has held this position for some 8 years.

[2] What is referred to as a "Vacancy Bulletin" came to her attention in or about 10 February 2015. This bulletin invited applications from existing Inspector ranks for the post of D/Inspector in Crime Operations Branch. The bulletin indicated that there were some 12 posts to be filled.

[3] The applicant decided to apply and completed her application form which she submitted on 19 February 2015. Thereafter it was expected that there would be a structured interview and perhaps other stages in the competition.

[4] On 12 March 2015 the applicant received an email from Colette Quinn, who was the Internal Selection and Promotions Manager within PSNI. It indicated that the vacancy bulletin had been withdrawn. Notably no explanation for this step was offered in the email.

[5] At a later date, the applicant avers that she found out that the positions in question had been filled by Sergeants who had been successful in obtaining promotion to the rank of Inspector. The successful candidates were taken from the Sergeant to Inspector promotion list in order of merit. In these circumstances there was no competition in the conventional sense of applications for the position being submitted; an assessment centre or subsequent interviews; and the development of a merit list.

[6] In fact the applicant, as an existing Inspector, due to the abandonment of the vacancy bulletin and its replacement aforesaid could not apply for one of the posts.

[7] In the above circumstances, the applicant took the matter up with the Police Federation. However, this was not done until 30 April 2015. Later she saw the Federation solicitor on 26 May 2015. Thereafter, a pre-action protocol letter was sent on her behalf on 28 May 2015. Unfortunately, there appears to have been no response to this within the time allowed. These proceedings were begun on 15 June 2015 three days after the expiry of three months from the date of the impugned decision.

[8] Leave to apply for judicial review was granted on 22 February 2016.

The Respondent's Position

[9] The respondent's position has been put before the court in the form of an affidavit from Christine Kerr who is the Head of Resourcing within PSNI.

[10] The deponent says that at the time of the withdrawal of the vacancy bulletin on 12 March 2015 the competition had not been progressed. Ms Kerr then provides the reasons for the withdrawal of the bulletin. In this regard, she referred to various matters. Firstly, she noted that a major restructuring within PSNI was due to occur on 1 April 2015. CID and the Public Protection Unit were due to become part of an enlarged Crime Operations Branch. She says that this caused a great deal of confusion as many Sergeants and Inspectors by reason of it were due to become part of Crime Operations Branch regardless of the vacancy bulletin. Secondly, Ms Kerr indicated that as a result of the re-organisation of local government brought about by the review of public administration in Northern Ireland district policing was being reorganised to ensure that police districts aligned with the new council structure. This, the deponent stated, was significant as it gave rise to the transfer of many officers. Thirdly, Ms Kerr offered the broad explanation that the vacancy bulletin was withdrawn at a time when there was "too much churn within the organisation". In this context it was thought unwise to start a new selection process when there was no immediate need to do so.

[11] Ms Kerr's affidavit, on any reading, is sparse in its reference to relevant detail. While she informs the reader that the Senior Executive Team (of which she was not a member) was the decision maker in respect of the withdrawal of the vacancy bulletin

there is no date provided as to when this reconsideration occurred. Moreover, in respect of the three factors referred to above the court has not been told for how long those factors were known about and/or whether they had been considered prior to the decision to publish the vacancy bulletin in the first place.

[12] It is, however, clear from Ms Kerr's affidavit that there were a large number of officers who formed the promotions list which became available in or around 23 February 2015. In fact, it is indicated by the deponent that all of the posts which form part of the original advertised vacancy bulletin have now been filled from the promotion list.

The Grounds of Challenge

[13] Mr Smyth BL appeared for the applicant. It was his submission that the applicant by reason of her answering the vacancies bulletin and making an application for one of the vacancies acquired a legitimate expectation of a substantive character that her application would be dealt with in accordance with the rules of the competition and that the competition would be processed to an end unless there was a good reason to the contrary. Consequently, he argued, the applicant's expectation was disappointed by the withdrawal of the vacancy bulletin. In his submission, the respondent had failed to adduce evidence of a good reason for the abandonment of the competition.

[14] As a fall-back position, Mr Smyth also argued that on the evidence before the court the decision to withdraw the vacancy bulletin was irrational.

[15] In contrast, Mr Sands BL for the respondent argued that on the facts of this case there was no promise to the applicant which could give rise to the legitimate expectation which the applicant claimed to exist. In the alternative, if such an expectation did exist, a rational reason had been provided to the applicant for the withdrawal of the vacancy bulletin.

[16] In any event, counsel argued that as a result of the affidavit of Christine Kerr the court could see that the decision to withdraw the bulletin lay well within the discretion of the Senior Executive Team and was plainly a valid exercise of that discretion.

Is the matter amenable to judicial review?

[17] An issue which has arisen in this application is whether on the facts of the case there is a matter of public law which is amenable to the court's jurisdiction. Mr Sands, for the respondent, contends that on a proper analysis, the issue before the court is a matter of private law. In support of his argument he has referred the court to a range of authorities including such cases as McClaren v Home Office [1990] ICR 82 and, in this jurisdiction, Re Phillips Application [1995] NI 322. While neither of these cases involved the position of police officers, they do establish some

general principles in this area. In McClaron Woolf LJ set out circumstances in which a Crown officer holder would have the right to bring a judicial review application in what would otherwise be a private employment dispute. As put in the respondent's skeleton argument these were:

> "a. If the appointment under a statutory or prerogative power was terminated;
>
> b. Review of the decision of any disciplinary body set up under statutory or prerogative powers which had a sufficient public law element;
>
> c. Where a decision of general application was made by the "employer" which could be challenged on Wednesbury grounds."

[18] Carswell LJ in the Phillips case, on the other hand, had indicated that the existence of some public law elements would not be enough to allow an applicant to proceed with judicial review citing R v East Berkshire Health Authority ex p Walsh where it was said that "disputes between an employer and employee over the latter's rights under the terms of his employment are not without more a matter of public law, even though the employee is a public authority" (see: [1985] QB 152). Ultimately, Carswell LJ offered the view that attempts to definitively classify the nature of the employment was an arid dispute and not the best way to approach the matter. He went on at page 334:

> "For my own part I would regards it as a preferable approach to consider the nature of the issue itself and whether it has characteristics which import an element of public law, rather than to focus upon the classification of the civil servant's employment or office".

[19] Since the date of those authorities, there has now become available a growing number of authorities dealing specifically with the position of police officers. As a result of such authorities as Re Chambers Application [2005] NIQB 27 there is, for example, no dispute now about the fact that a police officer is an office holder not an employee. But there is happily now a range of authorities dealing with whether various acts or omissions in the area of police administration relating to "employment" give rise to issues of public law. The court is not minded to set all of these out in this judgment but it has considered such cases as R (Tucker) v Director General of the National Crime Squad [2003] EWCA 2; Re Shields [2003] UKHL 3; Farrell and Wills Applications [2008] NIQB 159; JR 26's Application [2009] NIQB 101; R (Simpson) v Chief Constable of Greater Manchester Police [2013] EWHC 1858; and R (Woods) v Chief Constable of Merseyside Police [2014] EWHC 2764.

[20] Interestingly, in some of these cases, there is emphasis on how difficult it can be to define where the line should be drawn between issues of public and private law in this context. More than one case refers to the matter being one of "feel" and of the issue not being one which is capable of "precise definition". Inevitably, the case-law spans a wide range of factual circumstances.

[21] It appears to the court that the police administration cases are of particular value in the present case. While no categorisation will be perfect the court is inclined to think that most cases will fit within one of three broad categories. The first relates to cases concerned with discipline or quasi-discipline or with the operation of a statutory scheme, such as promotion. Generally, such cases have been viewed as ones relating to issues of public law because of their statutory foundations and the particular need for fairness which arise in these contexts. Examples would include such cases as Simpson, Woods and Farrell and Wills. The second category relates to cases which involve general policy where the policy is aimed at officers as a whole or particular classes of officers. Such broad initiatives will be likely to be viewed as capable of challenge as a matter of public law. This category might be exemplified in a case like Shields or the well-known Council of Civil Service Unions v Minister for the Civil Service case ([1985] AC 374) but its existence can also be identified from remarks in a variety of cases (see, for example, Weatherup J in JR26 at paragraph [20]). Thirdly, there is the sort of case where what is at issue are run of the mill administrative decisions which often concern a particular officer personally. Such decisions (sometimes referred to as "operational" decisions) may be about deployment of staff or transfers from uniform to CID. Generally such decisions will be viewed as ones not attracting the intervention of the court and of being issues of private rather than public law. The most recognisable exemplar of this category is the case of Tucker.

[22] With the above categorisation in mind, the court has sought to place the present case into an appropriate category. However not all cases are standard and fit simply and neatly into one category or another. The case-law is of help in discussing particular factors pointing in one direction or another.

[23] The significant factors in this case appear to include:

- The absence of any suggestion that the present is a disciplinary or quasi-disciplinary case.

- The absence of a direct connection between the decision and a particular tailor made statutory scheme such as one would find in a formal promotions case.

- The absence of the decision having any direct effect on the status or pay of the applicant.

- The presence of the fact that this decision was not aimed at the applicant personally. In fact, it appears that it affected a small group of persons who

were those who had made applications before the vacancy bulletin was withdrawn.

- The presence of the fact that the decision appears to have been particular to the circumstances of one competition, although it did have knock on effects, including those related to the filling of the places by another means with other officers.

- The absence of the fact that the decision was of general application or was one setting out a general policy.

- The presence of the fact that the decision (as it did not involve any alleged discrimination) would be unlikely to be remediable as a matter of private law.

[24] The above being so, it seems to the court to be clear that this case does not belong in category one. It is either a category two or three case. The court is inclined to the view that it is a category three case. The decision impugned is not one of general application though the court accepts it was not aimed at the applicant personally. However, its origins appear to arise from fact specific circumstances which one would struggle to view as matters of general or high policy. More likely the decision arose out of an assessment of day to day considerations. The subject matter was the need to deploy staff in one way or another and in the case of existing Inspectors any move was simply a lateral one which, while desired by those who applied as a result of the bulletin, involved no alteration in that officer's formal status or remuneration.

[25] Overall, therefore, the case falls closer to category three than two and as a result the decision impugned, on careful analysis, is not to be treated as one of public law. This means that the court will decline jurisdiction in this case.

Legitimate Expectation

[26] In case the court is wrong in the conclusion it has just arrived at, it will provide its views on the substantive issues raised, albeit briefly.

[27] As noted above, Mr Smyth asks the court to conclude that the applicant's response to the vacancy bulletin in the form of making an application for a position within Crime Operations Branch conferred on her a legitimate expectation that her application would be dealt with in accordance with the rules of the competition and that the competition would be processed to an end unless there was a good reason to the contrary.

[28] In support of his argument counsel relied on two authorities which, he argued, showed that a legitimate expectation could arise out of applications for positions which flowed from an advertisement of a vacancy. One was a Northern Ireland case Re Corey and Northern Ireland Public Service Alliance's

Application [2013] NIQB 110 and the other was a judgment of the Botswana Court of Appeal in a case called Petoewetse v Permanent Secretary to the President and Others [2001] 4 LRC 580.

[29] Having considered these authorities, the court sees no reason why it should not accept Mr Smyth's general proposition. The court certainly has no difficulty with the idea that the applicant, following the making of her application, would have a legitimate expectation that it would be dealt with in accordance with the rules of the competition. The court also can accept that part of the expectation would be that the competition ordinarily would proceed to an end. The framing of the terms of the expectation thereafter, however, may require careful definition. The applicant has submitted that the expectation would be that it must run its course unless there was a good reason to the contrary whereas an alternative formulation might be to say that it must run its course unless there is a rational reason provided for it not doing so.

[30] In the circumstances of many cases there may be little difference as between these rival formulations but the court would incline to favour the latter as it would avoid the court having to assess what, in fact, amounts to a good, as opposed to a rational, reason.

[31] If the matter was one of public law, the court would accept that the applicant would be a beneficiary of a legitimate expectation that her application would be dealt with in accordance with the rules of the competition and would be processed to an end unless there was a rational reason to the contrary.

Was there a rational reason for withdrawing the bulletin?

[32] The court has already set out the reasons for withdrawing the bulletin as put forward by Ms Kerr. It has also described her affidavit as "sparse".

[33] On the face of it the court can appreciate that where there exists a way of dealing with the matter which avoids a full competition and is simpler this may have its attractions. In this case such a way did exist in that the results of the sergeant to inspector promotion exercise became available with a list in merit order from which positions as an Inspector in Crime Operations Branch could be allocated with ease. Why, however, this method of filling the vacancies was not used in the first place is not at all clear.

[34] Applying a rationality standard the court is willing to accept that the Kerr affidavit provides just about enough to pass the test but if the standard in this case was the existence of a good reason, the court is doubtful whether it would be prepared to accept as meeting the standard the material put before it. What should have happened in this case is that a member of the Senior Executive Team should have sworn an affidavit and him or herself set out the background, why the matter was reconsidered and what the options were. The deponent should then have

outlined the reasoning which led to the decision to withdraw the bulletin and should have indicated what factors were considered to be important and what weight, if any, was given to the position of persons in the applicant's position, a matter about which the Kerr affidavit is silent but which implicitly, if not explicitly, must have been considered.

Delay

[35] Mr Sands for the respondent raised the issue of the applicant's delay in initiating these proceedings. He submitted that the application was neither made promptly nor within the outer limit prescribed by Order 53 Rule 4 of three months. Counsel indicated that in a matter of this kind when attention to filling the posts would be likely to take place speedily, the need for legal certainty was high. The court should not extend the time therefore.

[36] Mr Smyth had to accept that the application was not made promptly or within a period of three months from the date of the impugned decision but he argued that the delay after the expiry of the three months period was short (just three days) and that in any event it was in the public interest to hear the case.

[37] On careful examination of the applicant's explanation for the delay in this case it can be seen that the matter was not advanced at all times with reasonable alacrity. It took six weeks before the applicant consulted with the Police Federation but, even after this, matters did not proceed at pace. In the meantime the posts were at risk of being filled under the new arrangements and the prospects of prejudice to the PSNI and to the officers being appointed to the posts was growing as time passed. Indeed, by the date of the hearing Mr Smyth had to concede that there was no realistic prospect that the court could, if it found in the applicant's favour, make an order quashing the whole process or upsetting the position of the now incumbents of the posts in question.

[38] The court in these circumstances is of the view that the application should fail for the independent reason that it has not been brought promptly or within the period of three months prescribed by Order 53 Rule 4. The court furthermore declines to extend the time or to regard this as being a case which on public interest grounds should proceed.

Conclusion

[39] For the reasons which the court has given the court dismisses this judicial review application.

[40] Before leaving the case the court wishes to recognise that the applicant's treatment as a matter of good administration was not up to the standard one might have expected from an organisation such as the police. On the face of it when the vacancy bulletin was being withdrawn it would have been good administration to

have told the applicant why this step was being taken. Certainly, when she queried the decision it would have involved no great administrative task to have ensured that an explanation was forthcoming. It is unfortunate that such steps were not taken given that she had gone to some trouble to make the application. Finally, no response to her pre-action protocol letter emerged until the usual response time for such a reply had passed. None of this, it seems to the court, puts the respondent in a good light.