

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Corey (John) and The Northern Ireland Public Service Alliance's Application  
[2013] NIQB 110

IN THE MATTER OF AN APPLICATION BY JOHN COREY AND  
THE NORTHERN IRELAND PUBLIC SERVICE ALLIANCE  
FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION OF THE MINISTER FOR HEALTH AND  
SOCIAL SERVICE AND PUBLIC SAFETY ON 7 JULY 2011

TREACY J

**Introduction**

[1] The Court previously allowed the applicants judicial review giving reasons. I set out below the detailed background to the conclusions reached by the Court.

[2] By this application the applicants seek judicial review of a decision of the Minister for Health and Social Services and Public Safety, Mr Poots, whereby he refused or failed to consider the first applicant or any other trade union representative for appointment as a member of the Northern Ireland Social Care Council ("NISCC").

[3] The first applicant was the General Secretary of the Northern Ireland Public Service Alliance ("NIPSA"). In addition he has very extensive experience of sitting on the boards of various public bodies such as the Harbour Commissioners, the Northern Ireland Economic Council and the Economic Research Institution of Northern Ireland. Since his retirement from NIPSA in 2010 he continues his public service at a high level. In particular, I was informed that in 2011 he was appointed as a Commissioner of the Northern Ireland Human Rights Commission.

[4] The second applicant, NIPSA, is a Trade Union which represents some 45,000 workers in Northern Ireland including many workers in the Health and Social Care sector. It is undisputed that NIPSA is consulted upon and negotiates with the Government in relation to the setting of standards and conditions for those who work in health and social care. Indeed, the Department of Health and Social Services and Public Policy recognises NIPSA as one of two Trade Unions that represent the interests of social care staff.

### **Order 53 Statement**

[5] In its Order 53 statement the applicant sought the following relief:

“(a) An Order of Certiorari bringing up to this Honourable Court and quashing the impugned decision;

(b) An Order of Mandamus requiring the Minister to consider the First Applicant’s application to be appointed as a Trade Union Representative Member of the NISCC in accordance with the competition Notice published on or about early 2011;

(c) An Order of Mandamus requiring the Minister to appoint a Trade Union Representative member to the NISCC;

(d) An Order of Mandamus requiring the Minister to give full and proper reasons for his decision not to appoint a Trade Union Representative member to the NISCC;

(e) An Order of Mandamus requiring the Minister to consult with the Second Applicant and any other relevant Trade Union before taking a decision not to appoint a Trade Union Representative member to the NISCC;

(f) In the event that the Minister has appointed 2 lay members to the NISCC as a result of the impugned decision an order to bring up to this Honourable Court and quash the same;

(g) By way of interim relief an order of prohibition forbidding the Minister from making any further appointments to the NISCC or conducting any

appointment competitions until the conclusion of this matter.

(h) ...

(i) ...”

[6] The grounds upon which the applicant sought the relief was set out in his Order 53 statement as follows:

“(a) Both Applicants had a substantive legitimate expectation that a Trade Union Representative member would be appointed to the NISCC. This expectation was frustrated by the impugned decision.

(b) Both Applicants had a substantive, or in the alternative a procedural, legitimate expectation that the Minister would consider the First Applicant’s application for appointment as Trade Union Representative member in accordance with the advertisement for that post published in early 2011. This expectation was frustrated by the impugned decision.

(c) Both Applicants had a substantive, or in the alternative a procedural, legitimate expectation that the Minister would consider the First Applicant’s application for appointment as Trade Union Representative member in accordance with the Code of Practice for Public Appointments in Northern Ireland. This expectation was frustrated by the impugned decision.

(d) In making the impugned decision the Minister failed to have any or adequate regard for:

- (i) the terms of the published appointment Notice;
- (ii) Advice given to him by his officials;
- (iii) The Code of Practice for Public Appointments in Northern Ireland;
- (iv) The fact that to discriminate against a person on the ground of his Trade Union membership is unlawful.

(e) In coming to the impugned decision the Minister misdirected himself by refusing to appoint a Trade Union Representative Member on the basis that the previous Minister had decided not to appoint Trade Union Members when the previous Minister clearly did intend to appoint one Trade Union Member as evidenced by the advertisement.

(f) Both Applicants had a substantive, or in the alternative a procedural, legitimate expectation that if the minister decided to depart from the terms of the appointment Notice or the Code of Practice for Public Appointments in Northern Ireland he would give full and intelligible reasons for the impugned decision. This expectation was frustrated by the impugned decision.

(g) The second Applicant had a substantive, or in the alternative a procedural, legitimate expectation that if the Minister departed from the previous policy that bodies such as the NISCC would contain Trade Union representative members he would conduct a prior consultation exercise with the second Applicant and any other relevant Trade Union.

(h) The Minister has evinced bias or apparent bias towards the appointment of Trade Union members to public bodies.

(i) The Minister has adopted an undisclosed and unlawful policy of not appointing Trade Union members to health service public bodies.

(j) The impugned decision was procedurally unfair for all the reasons set out above at (a) - (j) above."

## **Background**

[7] The NISCC is a statutory Body established by the Health and Personal Social Services Act (NI) 2001 ("the 2001 Act"). It plays the central role in the regulation of social workers and social care workers. General duties are imposed upon the NISCC by section 1(2) of the 2001 act to promote (a) high standards of conduct and practice among social care workers; and (b) high standards in their training.

[8] The NISCC is obliged to maintain a register of social workers and social care workers (section 3). Before admitting persons to the register it must be satisfied of a number of matters including their good character and that they have completed an approved course (section 5). It is required to draw up rules to allow for the removal of persons from the register (section 6). This power was exercised by the Registration of Social Care Workers (Relevant Registers) Regulations (NI) 2005 (“the 2005 Regulations”). Further the NISCC is required to publish a Code of Conduct for registrants (section 9).

[9] By Schedule 1, para 5 of the 2001 Act the Department may make regulations for the appointment to and composition of the NISCC including [sub-para(a)]:

“the appointment of the chairman and other members of the Council (including the number, or limits on the number, of members who may be appointed and any conditions to be fulfilled for appointment)”

[10] This power was exercised by the making of the Northern Ireland Social Care Council (Appointments and Procedure) Regulations (NI) 2001 (“the 2001 Regulations”). Regulation 2 provides:

“The Council shall consist of a chairman and not more than 24 other members appointed by the Department.”

[11] Following a review in 2007 the NISCC comprised of the chairman and 12 members, of whom 4 were lay members, 4 stakeholder members and 4 registrant members. There is no statutory underpinning for this arrangement.

### **Background to the Recruitment process**

[12] On 3 February 2011 officials asked Minister McGimpsey if one of the two vacancies on the NISCC was to be designated to be a Trade Union member. The Minister replied in the affirmative on 8 February 2011.

[13] An advertisement was then published in February 2011 stating, *inter alia*, that the posts were to be for one lay Member and one Trade Union Representative Member. It further went on to say that the Trade Union Representative Member had to be supported by NIPSA or UNISON. It contained a further statement saying:

“The Department of Health, Social Services and Public Safety is committed to the principles of public appointments based on merit with independent assessment, openness and transparency of process. The Department is committed to providing equality of opportunity for all applicants. Applicants are

welcome regardless of age, gender, disability, religion, ethnic origin, political opinion, sexual orientation or whether or not you have dependents”.

It was held out that the appointment process would accord with the Code of Practice for Public Appointments for Northern Ireland.

[14] Following consideration of the application forms and interviews in April/May 2011 five persons were found to be suitable for appointment. This included the applicant and one other Trade Union member.

[15] On 16 May 2011 Mr Poots MLA was appointed as the new Minister and on 31 May 2011 a submission was sent to him asking him “to appoint one Lay and one Trade Union Member to the NISCC”.

[16] On 7 June 2011 the Minister’s office replied stating:

“The Minister has read agreed (sic) your submission of 01/06/2011 and listed [X] and [X].”

The two persons chosen by the Minister were Lay persons as opposed to Trade Union Representative Members.

[17] The officials queried the fact that there was no Trade Union representative member identified and on 10 June 2011 the Minister’s office responded stating:

“SUB/]064/201] Appointment of 2 nonexec members to NISCC was cleared by Minister but Officials have questioned that Minister has highlighted 2 lay members instead of] lay and] trade union. When I checked this with the Minister he has come back with – was not because the previous Minister requested that the 2 people being replaced are not from the trade unions” (sic).

[18] The respondent accepts that the Minister made his decision on the basis of an erroneous understanding of his predecessor’s policy.

### **Relevant Legal Principles**

[19] The general principles governing legitimate expectation are well known. A legitimate expectation can only arise where there has been a clear and unambiguous representation devoid of relevant qualifications as to the decision maker's future conduct. A legitimate expectation may arise from an express promise given by or on behalf of a public authority or it may arise from the existence of a clear and regular practice which a claimant can reasonably expect to continue. In Re Loreto’s

Application [2012] NICA 1 the Court, following a thorough review of the authorities, summarised the key principles at paras 42-45.

[20] De Smith's Judicial Review 6<sup>th</sup> Ed at para 12-016 states:

"An obvious example is where an express undertaking is given which induces an expectation of a specific benefit or advantage. The form of the express representation is unimportant so long as it appears to be a considered assurance, undertaking or promise of a benefit, advantage or course of action which the authority will follow. The promise may relate to an existing situation which will continue, or to a future benefit, In the case of an expectation inducing a right to procedural fairness, rather than the substance of the expectation, the promise, as we have seen, may be either to the benefit itself or to a fair hearing (or any aspect of a fair hearing)."

[21] Whether a government or Minister is free to depart from a previously stated policy position was considered by the House of Lords in Hughes v Department of Health and Social Services [1985] 1 AC 776. Lord Diplock stated at p788:

"Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is inherent in our constitutional form of government."

[22] The principle was also considered by Holman J in R (Luton Borough Council) v Secretary of State for Education [2011] EWHC 217 Admin at paras 79-81.

## **Arguments**

[23] At para 62 of the respondent's affidavit Ms Taylor states as follows:

"The Minister considered that there should be a wide pool of candidates for non-executive appointments and that weighting in favour of any group, including that of Trade Unions was not best practice to achieve the optimum appointment".

[24] The applicant submitted that at no stage was this ever put forward as a reason for the Minister's decision prior to this affidavit being filed and further stated that there was never anything to suggest that there was the slightest concern as to the pool of candidates or the fact that the competition had not brought forward

outstanding candidates such as the first applicant or any evidence to support such concern.

[25] The applicant further submitted that if the Minister was so concerned to have the widest possible pool of candidates being considered for public bodies why did he simply prevent posts being reserved for trade union representatives? Also why did he not remove the ring fenced posts for registrant and stakeholder members of the NISCC or similar bodies? Further if there was such a concern as to have as wide a pool as possible why is the Trade Union post now to be ring fenced for a Registrant?

[26] The applicant submitted that the contemporaneous documents demonstrated that the Minister's decision making was confused and submitted that the only rational explanation was that the Minister did not want Trade Union representatives on such bodies.

[27] Ms Taylor averred that there was no obligation to appoint a trade union representative member as this was not required by legislation. The applicants argued that an obligation did arise on the basis of the published notice and it also arose on the basis of the policy in place at the time the notice was published and although it was correct to say that the Minister had a discretion to appoint whoever he wanted this discretion was circumscribed by the terms of the published notice.

[28] The first applicant argued that because of the approach the Minister took he was deprived of the opportunity to apply for the lay member post and he was not able to apply for the post that was left vacant as that had been ring fenced for a registrant. If the Minister was to change the policy to stop ring fencing posts for trade union representatives the second applicant could have taken steps to challenge his decision but because the Minister conducted his decision making out of the glare of public scrutiny the second applicant has been deprived of these opportunities.

[29] The applicants averred that NIPSA is consulted on matters of concern to the social care sector and NIPSA has had discussions over the years with the Minister's predecessors on many topics and having trade union representation on the NISCC. In his first affidavit the first applicant averred at para 29:

"The net effect is that both applicants are extremely concerned that the Minister has decided to exclude trade union representatives from this important body. I accept that the Minister has wide and varied powers. However it appears to the applicants that the Minister has some undisclosed policy of excluding a Trade Union Representative member from such bodies. Certainly the lack of coherent reasoning supports this. Trade Unions such as NIPSA have lobbied hard for decades to be included on such bodies. In particular



ever since the NISCC was set up NIPSA has lobbied the various Ministers to include Trade Union members. There have been various discussions with Ministers and officials over the years and while we did not always agree the Ministers conducted discussions and consultation led to the former Minister accepting that Trade Unions should be represented on such bodies as evidenced by the various competitions referred to herein. It is understood that there was an agreement with the former Minister McGimpsey and this was put into draft regulation in March 2011 to remove the bar on Trade Union Membership of some HSC Boards.”

[30] The applicant further submitted that the stated reason for not wishing to appoint a Trade Union member had nothing at all to do with widening the pool of potential candidates. Further the applicant submitted that it is beyond doubt that trade unions and their members have been identified as a particular class and excluded from consideration on the basis of their status.

[31] The respondent contended that the principle identified in Hughes and applied by Holman J in Luton was applicable in the present case submitting that the previous Minister, Mr McGimpsey had evinced an intention to appoint trade union representatives to the 17 arms length bodies affiliated to the Department. Following an election he no longer held the post of Minister. The position was taken up by a different Minister in a different political party. The respondent submitted that if the applicant was correct that it meant that, even after a change in government, a new Minister would be required to slavishly follow policies adopted by his or her political opponents even in circumstances where the electorate had rejected those policies in an election. The respondent submitted that this cannot be required by the proper application of the principles of public law.

[32] It was further submitted that the substantive legitimate expectation case developed by the applicant in reliance on the notice which advertised the post of Trade Union member was also misconceived. Any expectation generated by the publication of this notice was always conditional upon the exercise of the Minister’s discretionary power to appoint pursuant to the Code published by the Commissioner for Public Appointments Northern Ireland (“CPANI”). The advertisement itself did not guarantee appointment - the introductory passage stated:

“The Department ..... is seeking to appoint two Non-Executive Members (Lay Member and Trade Union Representative) to the Northern Ireland Social Care Council.”

[33] The advertisement was drafted in aspirational terms and, when read in conjunction with para 1.2 of the CPANI Code, it is apparent, the respondent submitted, that the Department's intentions are subject, ultimately, to the discretionary decision of the Minister on appointment.

## **Conclusion**

[34] The published notice was, as the applicant contended, the clearest example of a public body holding out that it would follow a certain course of action (see para 12-016 from De Smith set out at para 20 above).

[35] I am satisfied that the explanation for the Minister's conduct was that he at the very least did not want weighting in favour of trade unions to continue. Whether he realised he was reversing policy or not (which the applicant questioned) there was a material change of policy without notice or consultation. This unlawfully frustrated the expectation engendered by the public advertisement that the Minister would follow a certain course namely appoint a trade union candidate if (which there were) suitably qualified candidates emerged from the appointment process.

[36] Whilst the appointment of a trade union member was not required or underpinned by legislation, a public law obligation arose as a result of the published notice and accompanying process which the applicant participated in and relied upon. Whilst the Minister had a discretion to appoint the exercise of the discretion was circumscribed by the published notice. The applicants accept that the Minister could have abandoned the process and restarted it in accordance with a lawfully promulgated new policy. This is not what he chose to do.

[37] I am satisfied that trade unions and their members were identified as a particular class and excluded from consideration on the basis of their status.

[38] Following the appointment of Mr Poots as Minister for Health there was a change in policy in relation to appointments to public bodies such as the NISCC, the Blood Transfusion Service and the Northern Ireland Practice and Education Council for Nursing and Midwifery. This important change in policy was not consulted upon. It is correct that the Minister has a discretion to appoint whomsoever he wants and that there was no statutory obligation to appoint a Trade Union representative to the relevant council. But the clear terms of the published notice and the policy in place at the time the notice was published generated public law obligations which were not complied with in the present case. It is accepted that the Minister could have simply abandoned the competition instituted by the public notice and/or initiated an entirely new competition to accord with any new policy provided of course the new policy was not unlawful. But he did neither.

Consequently, in my view the public law obligations generated by the published notice remained in place and were unlawfully departed from by the Minister.

[39] While it is open to the Minister to remove any weighting in favour of any group the respondent has belatedly made the case through the affidavit of Ms Diane Taylor that the exclusion of the applicant resulted from a change in policy whereby the Minister had decided to abolish weightings in favour of any group. At para 62 she stated as follows:

“The Minister considered that there should be a wide pool of candidates for non-executive appointments and that weighting in favour of any group, including that of Trade Unions, was not best practice to achieve the optimum appointment.”

[40] There is no doubt that any Minister has power to make such a change in policy however such a change must be notified in a timely manner to any person who might be affected by the change. Had the Minister promulgated any lawful policy change in advance of this recruitment exercise the applicant would have been able to respond by applying in his capacity as a lay person –rather than as a TU representative – and no complaint could have been made about the process. What is not lawful is for a Minister to decide privately on a new policy and then apply it without warning to an existing recruitment process whereby it may result in unfair injury to the prospects of candidates who have based their applications upon publicly promulgated guidance which reflects a different policy altogether. Such un-notified policy changes are not consistent with good and transparent recruitment processes and they conflict with legitimate expectations arising from information published by the relevant Department which remains in the public domain.

[41] It is therefore unnecessary to deal with the applicants criticism that the belated change in policy referred to in Ms Taylor’s affidavit was at no stage ever put forward as a reason for the Minister’s decision prior to her affidavit being filed. I merely record, as Mr McMillan QC pointed out, that there is no contemporaneous document that supports or records this apparent reasoning. Indeed, there is nothing to suggest that there was the slightest concern as to the pool of candidates or the fact that the competition had not brought forward outstanding candidates. At paras 26-28 of his skeleton argument Mr McMillan, on behalf of the applicants observed:

“The one question that the Minister never answers is if he was so concerned to have the widest possible pool of candidates being considered for public bodies, why did he simply prevent posts being reserved for trade union representatives? Why did he not remove the ring fenced posts for registrant and stakeholder members of the NISCC and similar bodies? Further, if there was such a concern as to have as wide a pool as

possible, why is the Trade Union post now being ring fenced for a registrant? The contemporaneous documents he continued demonstrate that the Minister's decision making was to say the least confused. It is submitted that the only rational explanation was that the Minister did not want trade union representatives on such bodies. One must wonder if the Minister even realised that he was reversing the previous policy. The assertion that there was any concern as to the pool of candidates is an ex post facto fig leaf."

[42] Since the court is satisfied that the public law obligations engendered by the published notice had never been lawfully departed from, it follows that the frustration of those obligations by the Minister was, as I have previously observed, therefore unlawful.