

Neutral Citation no. [2006] NIQB 6

Ref: **GIRC5474**

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

Delivered: **30/01/06**

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

**IN THE MATTER OF AN APPLICATION BY DAVID BELL
FOR JUDICIAL REVIEW**

GIRVAN J

[1] The applicant is a serving officer in the Police Service of Northern Ireland. In April 2003 he was the subject of a complaint lodged by Paul Robinson who alleged that on 15 March 2003 he was arrested by the officer for no reason and that the applicant lifted a baton to him in a threatening manner. In November 2004 the applicant was informed that it was the intention of the Office of the Police Ombudsman to pursue the matter to hearing under Section 59(5) of the Police (Northern Ireland) Order 1998. The Chief Constable accordingly was obliged to bring a disciplinary charge against the applicant, the charge being use of force contrary to Article 4 of the Code of Ethics of the Police Service of Northern Ireland as contained in Schedule 4 of the Police Service of Northern Ireland (Conduct) Regulations 2000 (as amended).

[2] When the hearing of the matter was convened on 7 April 2005 before a so-called "Directed Tribunal" purportedly established under Regulation 28 of the Royal Ulster Constabulary (Complaints etc) Regulations 2000 Mr Hanna QC who was the barrister chairman of the tribunal pointed out that there did not appear to be any provision which conferred power on anybody to appoint the members of the special panel to hear a directed hearing. The members of the panel concluded that they could not deal with the case until the regulations had been amended.

[3] Mr McCloskey QC challenged the initiation and conduct of the disciplinary proceedings on the ground that there was no valid mechanism to hear and determine a directed complaint when the Ombudsman gave her direction. He contended that the absence at any material time of a duly established body competent to hear and to determine a disciplinary charge referred against the applicant was fatal. The primary contention was that the

Ombudsman's direction to the Chief Constable to bring disciplinary proceedings was a legal nullity in the absence of a valid special procedure. In the alternative it was argued that once it was discovered that there was no valid procedure to deal with such a directed disciplinary proceedings the Ombudsman was bound to give leave to the Chief Constable to discontinue the disciplinary proceedings.

Statutory Provisions

[4] Section 51 of the Police (Northern Ireland) Act 1998 established the Office of Ombudsman on whom the powers contained in Part VII are conferred. As appears from Section 52 the statutory powers of the Ombudsman are concerned with complaints about the conduct of a member of the police force made by or on behalf of a member of the public. Mechanism is provided for informal resolution of complaints in Section 53. Section 54 distinguishes between serious complaints investigated by the Ombudsman and other complaints which the Ombudsman may choose to investigate or to refer to the Chief Constable for investigation. Section 55 provides that the Secretary of State and the Policing Board for Northern Ireland may refer suspected criminal conduct or disciplinary conduct by a police officer not the subject of a complaint to the Ombudsman. Such a referral triggers a formal investigation by the Ombudsman under Section 56. A similar power of referral is conferred on the Chief Constable the Ombudsman is also given a own motion power to investigate. Section 56 provides for investigations by duly appointed officers of the Ombudsman, the powers of such investigating officers and the submission of consequential reports to the Ombudsman. Section 57 contains similar provisions which apply in the case of a Chief Constable's investigation following referral under Section 54(3)(b) by the Ombudsman. By Section 58 the Ombudsman on receipt of any report made under Section 56(6) or Section 57(8) considers whether there is evidence that a criminal offence may have been committed by a police officer and is empowered to forward the report to the DPP with accompanying recommendations. Section 59 is of central significance in the present case. It applies where either the Director of Public Prosecutions has dealt with the question of criminal proceedings or the Ombudsman concludes that the investigation report is not suggestive of a criminal offence. In both instances the Ombudsman shall consider the question of disciplinary proceedings. Further, the Ombudsman may recommend the initiation of disciplinary proceedings by forwarding to either the Chief Constable or the Policing Board a memorandum in specified terms. If the Chief Constable is unwilling to bring the recommended proceedings it is envisaged that there will be consultation with the Ombudsman who may direct the Chief Constable to bring proceedings. The Ombudsman may give the Chief Constable leave not to bring disciplinary proceedings or to discontinue disciplinary proceedings. Section 59(8) provides for a "special procedure" where disciplinary proceedings brought pursuant to either an Ombudsman's

recommendation under Section 59(2) or a direction under 59(5). The impugned disciplinary proceedings against the applicant in the present case resulted from an Ombudsman's direction to the Chief Constable under Section 59(5).

[5] Regulation 28 of the Royal Ulster Constabulary (Complaints etc) Regulations 2000 ("the Complaints Regulations") provided in relation to directed tribunals:

"(1) Under Sections 25(3) and 26(3) where the Ombudsman directs the Chief Constable to bring disciplinary proceedings under Section 59(5) of the Act, there will be a special procedure for the disciplinary proceedings:

(a) there shall be hearing by a panel consisting of a barrister or solicitor who shall be a chairman, a member of appropriate rank and another panel member who is not a serving police officer and

(b) The Ombudsman shall present the case."

Regulation 28 further provides that the panel may determine the question of whether there was any breach of conduct by the member concerned by a majority decision, and, where it so decides, it shall send a report to the Chief Constable containing recommendations about appropriate sanctions.

[6] Subsequently in 2005 after the inadequacies in Regulation 28 came to light the Police Service of Northern Ireland (Complaints etc) (Amendment) Regulations 2005 amended the earlier regulations to insert a new regulation 28 which now provides:

"28(1) Under Section 59(5) of the Act of 1998, where the Ombudsman directs the Chief Constable to bring disciplinary proceedings or in disciplinary proceedings under Section 59(8) of the Act of 1998, there will be a special procedure for bringing those proceedings.

(2) There shall be a hearing conducted in accordance with the provisions of Part III of the Royal Ulster Constabulary (Conduct) Regulations 2000, subject to the modifications specified in the Schedule to these amending regulations."

Regulation 18 of the 2000 Regulations is modified to provide that the disciplinary hearing shall be heard by a panel appointed by the Chief Constable who shall not be interested parties consisting of a barrister or solicitor who is chairman, a member of appropriate rank and another panel member who is not a serving police officer selected from a list of eligible persons maintained by the Chief Constable. The hearing before the panel is conducted by or on behalf of the Ombudsman.

[7] It is common case that the 2000 Regulations as originally enacted failed to establish an effective special procedure. Mr Fee QC on behalf of the Ombudsman argued, however, that this in no way invalidated the direction given by the Ombudsman to the Chief Constable which would bring disciplinary proceedings against the applicant. The direction still stands and a properly constituted panel can now be convened in accordance with the 2005 Regulations. The Ombudsman was perfectly correct to reject the suggestion that the Chief Constable should be directed to discontinue the disciplinary proceedings.

[8] The power conferred on the Ombudsman in Section 59(5) is a power to direct the Chief Constable to bring disciplinary proceedings. To exercise the power the Ombudsman forms a judgment that such proceedings are called for. Once the power is exercised then the duty is on the Chief Constable to bring disciplinary proceedings. Had the legislature made no provision for any special provisions then the ordinary practice would apply and disciplinary hearings would be carried out in accordance with the 2000 Regulations. This includes provision for the hearing to be conducted by three police officers appointed by the Chief Constable. Section 59(8), however, empowers the making of regulations for the establishment of a "special procedure". This is a procedure outside the framework of the ordinary procedure. Section 59(8) provides that where disciplinary proceedings are recommended (rather than directed) the Ombudsman may direct that the special procedure should be followed. If proceedings are directed then the special procedure appears to be mandatory. The statutory framework clearly envisages that there will be in place special procedure and in the case of directed proceedings the proceedings must be by way of that special procedure. The question is whether the absence of a valid special procedure means:

- (a) that the direction is invalid; or
- (b) whether it remains a valid direction which cannot be effectively implemented pending the introduction of a valid special procedure; or
- (c) it remains a valid direction and the disciplinary hearing can be conducted under the ordinary procedure in the absence of a valid and effective special procedure.

While I was initially attracted to (c) in the course of argument the tenor of the legislation points to the conclusion that directed disciplinary proceedings call for a special procedure because of their nature, rendering the ordinary procedures unsuitable. The true way of looking at the situation is to distinguish between:

(a) the decision of the Ombudsman determining that the bringing of disciplinary proceedings is called for; and

(b) the effectuation of the direction by the Chief Constable proceeding to set up such proceedings.

To quash the decision determining that the bringing of disciplinary proceedings must be directed when the Ombudsman remains of the same mind would be somewhat arid exercise since it would result in the same decision being reached by the Ombudsman in present circumstances. Obviously if the law demanded that course the court would be bound to grant the appropriate quashing order. If, however, we analyse the situation in the manner suggested the Ombudsman's decision determining that the bringing of disciplinary proceedings is called for remains valid in law. It is a matter for the relevant authorities to ensure, as they now have, that proper legal effect can be given to that decision by an established special procedure.

[8] In the circumstances I dismiss the application.