

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY KIM DUNN FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE POLICE SERVICE OF
NORTHERN IRELAND

DEENY I

[1] This application for leave to apply for judicial review was listed for oral hearing on Tuesday 20 December 2005. Mr Frank O'Donoghue QC appeared with Mr Scofield for the applicant and Mr Paul Maguire for the respondent, the Police Service of Northern Ireland. I am obliged to counsel for their helpful skeleton arguments.

[2] The applicant is a constable in the PSNI and the mother of two small children. The principal reliefs sought by her at paragraph 2 of her Order 53 statement were:

(a) An order of certiorari to bring up into this Honourable Court and quash a decision of the Police Service of Northern Ireland made on or about 13 May 2005 whereby the Management Attendance Appeals Panel dismissed her appeal against a determination that she was ineligible to sit Part III of the sergeant's examinations by reason of her sickness absence record;

(d) A declaration that Section 3 entitled "Pregnancy" of "Guidance for Promotions, Appointments and Transfers Appeals - Applicable to Police Personnel Only", General Order No. 31/2003 file box BA is unlawful, ultra vires and of no force or effect.

[3] While a serving police officer the applicant had had a child in April 2002. She was dissatisfied with the approach of the police to her return to work but nothing now turns on that dissatisfaction.

[4] Her second child was born in August 2004. She was entitled to have maternity leave until 24 November 2004. In her affidavit she said that she

was certified unfit for work by her doctor for “post natal debility” and remained absent from work from the end of her maternity leave until 26 March 2005. I observe that post natal debility was not demonstrated to be a certifiable illness. It means “weakness or languor” after the birth of a child. In particular I noted that there was no report or even short certificate from the applicant’s unnamed general practitioner attesting to this matter. I will return to that later in light of Mr Maguire’s submissions.

[5] The plaintiff returned to work on 23 March 2005 (according to paragraph 19 of her affidavit). She wanted to sit the examinations for promotion to sergeant. Because of a well recognised problem of a high rate of absence from duty caused by sickness in the police force the PSNI had formulated policies to cope with this, one of which was that one was not eligible to sit such examinations if one had been absent from duty through sickness over the previous two years for an average of more than 14 days per year etc (General Order No. 31/2003).

[6] On 15 May the applicant received a letter dated 13 May advising her that she was not eligible to sit the examination due to sickness. This was from an Appeal Panel confirming an earlier decision to that effect. She seeks judicial review of that decision.

[7] The best point made on her behalf, I think it is fair to say, relates to Section 3 of the said General Order set out by her at paragraph 30 of her affidavit and reading as follows:

“Pregnancy

This does not include absence following the birth of a child. Qualifying absence is regarded as an illness which relates directly to being with child and occurs prior to the date of confinement. Absence which is not directly related to being with child or which occurs after the date of confinement may be considered in the context of mitigating circumstances.”

I am not at all sure that this section is happily worded. Obviously one could have an illness directly related to child birth which occurs after the date of confinement. Mr Maguire, wisely did not seek to defend the precise wording of this paragraph. He did however strongly attack the application for leave on four freestanding grounds.

[8] Firstly, and with relation to my earlier observations, he said that not only was there no evidence about the plaintiff having an illness related to her confinement but that the reverse was the case. In a document properly

exhibited by the applicant's advisors at KD4 to her affidavit and dated 1 April 2005 she makes no reference to "post natal debility" but firmly states that the reason for her absence from work after November related to continued breast feeding of her child which she felt could not be accommodated in a station environment. While the court would have every sympathy with this it is clear that it is going well beyond and is indeed inconsistent with the case the applicant was making ie. that she was being discriminated against as a woman because her pregnancy illness was being held against her when she sought promotion. Obviously any police officer might have difficulty with a close relative or an elderly parent or sick husband or wife. Provision exists for such absences not to be held against the officer within the discretion of the Police Service of Northern Ireland. In this case that discretion was exercised against her. That was done on the basis of her own statement of 1 April 2005 which clearly does not make a case of illness.

[9] Secondly, Mr Maguire submitted that issues of promotion within a police force are matters of private law. He relied on Tucker (2003) ICR 599 and Morgan (2001) EWHC Admin 262, both of which are noted in Wades Administrative Law (9th Edition) page 129. See also in Re Phillips Application 1995 NI 322. When asked by the court Mr O'Donoghue could not point to any express decision in support of his contention that the court should rule on this issue within the public law context.

[10] Thirdly, Mr Maguire pointed out, which indeed, in fairness, Mr O'Donoghue acknowledged that the protection for pregnant women under the equal treatment directive was not open ended. He referred to Brown v Rentokil 1998 2 FLR 649, a decision of the European Court of Justice. I quote briefly from paragraphs 26 and 27:

"However, where a pathological conditions caused by pregnancy or child birth arise after the end of maternity leave, they are covered by the general rules applicable in the event of illness (see, to that effect, Hertz, cited above para. 16 and 17). In such circumstances the sole question is whether a female worker's absences, following maternity leave, caused by her incapacity for work brought on by such disorders are treated in the same way as a male worker's absences, of the same duration, caused by incapacity for work; if they are there is no discrimination on grounds of sex. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work."

It can be seen that in Constable Dunn's case not only is a case not established that she was in fact ill leading up to 23 March 2005 but any relevant illness is after the expiry of her maternity leave.

[11] Fourthly and finally Mr Maguire submits that the applicant has an effective alternative remedy before an industrial tribunal with regard to any alleged sex discrimination. Mr O'Donoghue very properly acknowledged that such an application had been lodged protectively. He frankly said that this application was being funded by the Police Federation, with the implication that the other application was not. I can see no reason why, if an issue of principle arises here, why they should not choose to fund the industrial tribunal proceedings. As Mr Maguire pointed out there is statutory provision for such a tribunal to make a recommendation under Article 65(1)(c) of the Sex Discrimination Order if they considered that the policy to which I referred had a discriminatory effect. One could also observe that they are in a much better position to award compensation if there has been discrimination than this court, which only very rarely does so in the judicial review context.

[12] In the light of these submissions I have concluded that the applicant does not have an arguable case justifying the grant of leave and I refuse leave.