Neutral Citation no. [2007] NIQB 99 | *Ref:* **GILF5985**

Judgment: approved by the Court for handing down | *Delivered:* **28/11/07**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY THE PRISON OFFICERS ASSOCIATION FOR LEAVE TO APPEAL FOR JUDICIAL REVIEW

_____

GILLEN J

Application

[1] The applicant in this matter is the Northern Ireland Prison Officers Association ("POA"). The POA is the Prison Officers Trade Union. The applicant seeks leave to apply for judicial review of a decision taken by Prison Governor Alcock on 14 June 2007 to charge seven members of the POA, serving officers at YOC Hydebank Wood, with gross misconduct contrary to the Northern Ireland Prison Service ("NIPS") Code of Conduct and Discipline ("COCD") and of subsequent decisions to maintain the disciplinary process against the officers.

[2] The applicant seeks relief which includes an order of certiorari quashing the decisions, an order of mandamus compelling the NIPS to conduct a full and comprehensive investigation into allegations of overtime fraud at Hydebank Wood to include governor grades, principal officers, senior officers and officers prior to the commencement of disciplinary action against the applicants, a declaration that the NIPS has preferred the charges in breach of the terms of the COCD, and an order of prohibition and/or injunction preventing the NIPS from continuing the disciplinary process against the officers due to persistent breaches of the COCD. Further by way of interim relief the applicant seeks an order staying the disciplinary process against the officers pending the outcome of this application.

The Applicant's Grounds

[3] The applicant submits that paragraph 8.1 of the COCD requires that disciplinary charges should be preferred and disciplinary hearings should be convened by a ranking governor. It was Mr McGleenan's argument that

paragraph 8.1 of the COCD contained within its ambit a clear inference that the person responsible for a decision to convene a disciplinary hearing must be the prison governor and not someone else outside that chain of command. He asserted that any purposeful reading of paragraph 8 together with the Northern Ireland Prison Service Code of Conduct and Discipline guidance to managers reveals that the contents addressed clearly to staff not below the rank of Governor V i.e. to officers within the Prison Service and not non-ranking civil servants without. He further drew attention to the notice of the disciplinary investigation - a pre-printed document - which contains only a printed reference to "Governor" but which in this instance has been deleted and substituted with a handwritten reference to "Deputy Director Head of Operations". The applicant relies on a letter dated 7 August 2007 from Mr McGuckin of the NIPS indicating that although Governor Alcock had signed the charge sheet against the officers, he had not made the decision to charge them and had not instigated the disciplinary proceedings. The charges were drafted in Prison Service Headquarters and taken to Governor Alcock where, it is alleged by the applicant, he was directed to sign and issue those documents. Hence Mr McGleenan submits there has been a clear breach of proper procedures

[4] The applicant further submits that the terms of the COCD and custom and practice within the NIPS preclude anyone other than a ranking prison governor from preferring disciplinary charges or instigating a disciplinary progress. This process has been instigated by a non-ranking civil servant employed at Prison Service Headquarters. Mr McGleenan, who appeared on behalf of the applicant, submitted that this was in clear breach of the COCD and custom and practice.

[5] Mr McGleenan further submitted that paragraph 17 of the NIPS guidance document on the COCD states that a decision to involve the police as a result of a disciplinary process is one to be taken by a prison governor. Paragraph 5.14 of the COCD declares that statements made by staff should not be passed by police without their permission. He submits that on 24 August 2007 Mr McGuckin of the NIPS headquarters wrote to the chairman of the POA and advised that he was required to refer the investigation report into alleged fraud at YOC Hydebank Wood to the Police Service of Northern Ireland ("PSNI"). Mr McGleenan submitted there was no provision in the COCD or guidance document which permitted a non-ranking civil servant to refer a matter arising from a discipline process directly to the PSNI.

[6] It was also submitted on behalf of the applicant that the NIPS had utilised information from the "hand reader" at YOC Hydebank Wood to support the case against the accused officers in breach of an express agreement reached between the POA and NIPS dated 19 August 1995. It is submitted therefore that NIPS have acted in breach of the applicant's

legitimate expectation that the terms of the 1995 agreement would be honoured.

[7] In an amendment to the original statement pursuant to Order 53 Rule 3 of the Rules of the Supreme Court (NI) 1980, the applicant submits that the terms of reference presented to Governor Gray by Deputy Director Head of Operations on 27 February 2007 in relation to the investigation into this matter required that he investigate the extent of abuse of overtime by way of a random sample of 25% of staff from officer, senior officer and principal officer grades. It was submitted that Governor Gray's interim report identified large scale manipulation and collusion between staff to exploit the payment of AEH to include all grades of staff. Mr McGleenan submitted that the decision to exclude 75% of staff from the investigation thereafter was irrational and procedurally improper.

[8] Finally, Mr McGleenan submits that the interim report found that the practice of manipulation of the payment system was most obvious in the principal officer group. The abuse in this group, counsel argued, was directly related to the practice whereby governors at YOC Hydebank Wood worked a "domestic" Monday to Friday pattern while allocated a full shift pattern. Governors did not work weekends but had their shifts covered by principal officers who worked the governor shifts as overtime. A decision to exclude the governor grades from the investigation in counsel's submission was irrational and procedurally improper.

[9] In argument before me Mr McGleenan asserted that it offended against the canons of fairness to permit the investigation and its terms of reference to arbitrarily confine its remit to a narrow group of prison officers instead of widespread involvement of all grades, including governors, and thereafter to proceed against one small group on foot of the flawed investigation.

[10] Counsel resisted the suggestion that this application was premature and could be properly aired at a disciplinary hearing on the ground that systemic failings would not be subjected to examination at a disciplinary hearing before the Governor or upon appeal.

[11] Finally, in a matter on which Mr McMillan on behalf of the proposed respondent reserved his position without argument at this stage, Mr McGleenan submitted that this issue was a public law matter with a broad public component involving the disciplinary process of prison officers.

The proposed respondent's response

[12] Mr McMillen who appeared on behalf of the proposed respondent made the following arguments:

[13] The CODC does not exclude someone of the rank of Deputy Director of the Prison Service initiating disciplinary investigations or preferring charges and convening disciplinary hearings. There is no limit on the rank or position of the appropriate officer at a level such as Deputy Director who can carry out such work. Otherwise who would investigate a governor?

[14] Whilst the Governor did not make the decision there was no evidence that he was directed to sign the charges.

[15] There is no evidence of custom and practice before the court with any examples proffered to sustain the argument that disciplinary charges should be preferred and disciplinary hearings convened only by a ranking governor.

(iv) Paragraph 5.14 of the COCD which states that statements made by staff should not be passed to police without their permission cannot lead to any legitimate expectation that criminal matters that arise will not be referred for criminal investigation to the police.

(v) So far as the hand reader is concerned it was accepted that undertakings were given regarding the use of information stored from the system. However Mr McMillan argued that hand readers were not being used to provide records of hours and minutes of attendance for individual staff for payment or punctuality recording - which was the subject of the agreement - but rather for the issue as to whether or not prison officers were present at all on the occasions in question.

[16] Mr McMillan argued that the investigation of a random sample of 25% of staff by Governor Gray was entirely appropriate. Seventy five persons were considered and seven were found with cases to answer. Counsel argued that there was no basis for an assertion that it was Wednesbury irrational to fail to extend that investigation further in light of the limited numbers of people who allegedly had committed wrong doing. He further submitted that Governor Gray's report had not found any wrongdoing against governors save that the shift system may have been poorly designed. Counsel distinguished between systemic flaws and a poorly designed shift system on the one hand and positive abuse by the officers who were subject to disciplinary proceedings who wrongfully made use of overtime provisions.

[17] Mr McMillen argued that the application was in any event premature because these are matters that could have been raised by the prison officers at any disciplinary proceedings or appeal under the provisions of the COCD.

Leave Hearings

[18] It is well settled that in order to be permitted to present a judicial review application the applicant must raise an arguable case on each of the grounds on which he seeks to challenge the impugned decision (see R v Secretary of State for the Home Department ex parte Cheblak (1991) 1 WLR 890).

Conclusions

[19] I have come to the following conclusions on the arguability test:

[20] I consider that there is an arguable case that disciplinary charges should be preferred and disciplinary hearings convened by a ranking governor given the terms of the COCD and guidance. If that argument succeeds at the substantive hearing the issue of whether or not the governor was directed to sign and issue the disciplinary sheets may not arise.

[21] I do not find an arguable case that it is a matter of custom and practice within the Northern Ireland Prison Service to preclude anyone other than a ranking governor from preferring disciplinary charges or instigating a disciplinary process. I find no evidence whatsoever before me to that effect. I therefore confine the grant of leave to the construction of the COCD and the relevant guidance.

[22] I do not find an arguable case that the NIPS guidance document on the COCD precludes reference of an investigation report or statements made by staff to police without their permission. I consider that investigation of possible criminal offences manifestly transcends any such agreement. The agreement is clearly subject to the necessities of the criminal justice system.

[23] I do not find that there is an arguable case that the hand reader system should not have been used to support the case against the accused officers. I consider that the issue is not one of payments or punctuality but of the much broader issue as to whether or not officers were present at all. I consider investigation of such a serious matter, potentially amounting to a criminal offence, to be outwith the terms of the agreement. I find no arguable case to the contrary.

[24] I have considered the principle that "fairness is the guiding principle of public law" referred to in R (Anufrijeva v Secretary of State for the Home Department) (2003) UKHL 36. This provides the basis for an arguable case

that it was unfair to use a random sample confined to 25% of staff from officer, senior officer and principal officer grades excluding 75% of staff from the investigation together with the exclusion of governor grades to mount a case only against a small selected group.

[25] I am at this stage satisfied that it is arguable that the application is not premature on the basis that the assertion of systemic failure upon which Mr McGleenan relies might not find a place for exploration in disciplinary proceedings. However, I will permit that issue to be revisited at the substantive hearing.

[26] I therefore conclude that I will grant the applicant leave for judicial review in terms of the relief sought at paragraphs 3(i), (ii), (iii) and (iv) of the amended Statement pursuant to Order 53 Rule 3 of the RSC (NI) 1980 on the grounds set out in paragraphs 4(1)(a), (b), (f) and (g). I refuse any interim relief but I do so in the hope that the respondent will not act precipitately in this matter pending a full hearing before this court.