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Judgment: approved by the Court for handing down | *Delivered:* **12/02/08**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY TREVOR PURCELL

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Before Kerr LCJ, Campbell LJ and Girvan LJ

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KERR LCJ

Introduction

[1] This is an appeal by Trevor Purcell, a police officer, from a decision of Weatherup J whereby he dismissed Mr Purcell's application for judicial review of decisions taken by a disciplinary panel on 14 March 2006. Although on the hearing at first instance there were three grounds of challenge, only one issue was canvassed on the appeal. This had been introduced by a permitted amendment of the Order 53 statement, and it is that the panel was fixed with the taint of apparent bias because each of its members had received training which had either been provided directly or had been organised by the Internal Investigation Board (IIB). This board is now known as the Professional Standards Board. At the relevant time, IIB was the section of the police service that investigated complaints and presented disciplinary charges.

Background

[2] The appellant faced charges under the Royal Ulster Constabulary (Conduct) Regulations 2000 which arose out of an incident that took place on 13 July 2001. He was prosecuted for criminal offences that were alleged to have taken place on that occasion. He was acquitted. Disciplinary proceedings were served in July 2005.

[3] The structures for police disciplinary hearings are described in the judgment of Weatherup J in *Re O'Connor and Broderick's application* [2006] NI 114 and we gratefully adopt the following passage from that judgment for an outline of those structures: -

> "[8] … Disciplinary proceedings are brought against police officers in the name, and on the authority, of the Chief Constable. Disciplinary proceedings are dealt with by the "Internal Investigation Branch" of the Police Service. There is an Office of Legal Services to the Police Service and the Chief Constable. … the Head of Legal Services … describes the role of his office in disciplinary proceedings as being "merely a formal role and also entails the passing of papers between the relevant parties." IIB is described as responsible for the investigation of disciplinary matters, co-ordination of investigations with the Office of the Police Ombudsman and the presentation of disciplinary matters before disciplinary panels; however IIB makes extensive use of independent Counsel in practice at the Northern Ireland Bar and the difficulty facing IIB is that Counsel are not permitted to take instructions directly from IIB but can only act on instructions from a person on the Roll of Northern Ireland Solicitors; accordingly when IIB wish to instruct Counsel in disciplinary proceedings they forward the case papers to [the head of the legal services'] office to brief Counsel; when files come to [his] office he assigns disciplinary matters to one of three assistant legal advisers who in turns briefs Counsel. [He] states that in his opinion the assistant legal adviser has no role of any substance in the case."

[4] On 20 December 2005 an application for a stay of the disciplinary proceedings was made on the appellant's behalf. The grounds for the application were (i) the delay in serving a notice; and (ii) the proceedings offended against the principle of double jeopardy. During the hearing it became clear that the panel had had access to a document entitled "Appendix C". This was an advice note from the IIB to panel members as to the effect of the decision in *R v Chief Constable of the Merseyside Police, ex parte Merrill* [1989] 1 WLR 1077 and on how a panel should deal with submissions as to delay in misconduct proceedings.

[5] Counsel for the appellant applied to the panel to recuse itself because, it was said, the fact that they had had seen Appendix C gave rise to the appearance of bias. He relied on the authority of *Re O'Connor and Broderick*. The hearing was adjourned to allow the panel to take legal advice. At a resumed hearing on 14 March 2006 the application was refused. The chairman summarised the legal advice that the panel had received and asked for representations. Counsel for the appellant stated that he wished to

address the panel on the ruling. In the event other matters were discussed but no representations were made in relation to the legal advice. No application was made that the panel should recuse itself on any basis other than that the members had seen Appendix C. In particular, no application was made that the panel should recuse itself because of the training that the members had received.

[6] A judicial review application was made on the basis that the use of Appendix C by panel members gave rise to the appearance of bias since it had been prepared by IIB which was also responsible for investigating disciplinary offences and presenting the charges before the panel. The proceedings further alleged that the panel had approached its task in a procedurally unfair manner. Before the hearing of the application, leave was granted to amend the Order 53 statement to include grounds which alleged apparent bias due to the manner in which the panel members were trained.

[7] Assistant Chief Constable McCausland was the chairman of the panel that was due to hear the appellant's case. The other members of the panel were Superintendent Harper and Superintendent McComb. All three have received training on the conduct of disciplinary hearings. In each instance the training courses were organised by IIB. ACC McCausland had received a day's training in 2000/2001. In 2005 he attended a half day course which included a thirty minute presentation by the head of legal services. He has not received training since then. Superintendent Harper received a day's training about August 2003. Superintendent McComb had a day's training about 14 September 2005. These were the only training courses that the superintendents attended.

[8] The training courses that the police officers attended were described in affidavits of Inspector Emerson filed on behalf of the respondent. In 2003 and 2005 the training took the following broad form: a PowerPoint presentation by a senior police officer dealing with misconduct procedures, the 2000 Regulations and NIO guidance; presentations by the head of legal services or his deputy on human rights issues and on the *Merrill* case; what were described as "self-completion" exercises and a mock hearing to which a Mr Wood of the Office of the Police Ombudsman for Northern Ireland contributed.

The judge's decision

[9] Although the judge found that there had been procedural unfairness in the way in which the panel had approached its task, because he dismissed the application for judicial review based on apparent bias, he exercised his discretion to refuse relief on this single ground on which the appellant's arguments had been accepted.

[10] In relation to the claim that the panel had the appearance of bias because they had participated in training programmes organised by IIB, the judge found that during the mock hearing part of the programme a Sergeant Burnett, the "Police Federation defence co-ordinator", had assisted and provided input from a friend's perspective. He therefore concluded that his presence and the participation of Mr Wood from the Police Ombudsman's office provided the necessary balance to offset the participation of IIB and that this was sufficient to rescue the panel from the taint of apparent bias. Weatherup J dealt with that issue in this way: -

> "[25] Without the Police Federation involvement, as defence co-ordinator, and the Police Ombudsman's involvement, the training structure would clearly fail the test and be unacceptable. The matter is balanced by the presence of the defence co-ordinator and the Police Ombudsman. It might have been preferable to include the legal advisers to the Panel or other independent legal adviser, but it is necessary to have regard to all the circumstances and to make an overall assessment of the scheme to determine whether there is the appearance of the real possibility of bias."

[11] Before the hearing of the appeal, the appellant successfully applied for leave to file an affidavit from Sergeant Burnett. In this the sergeant explained that his correct title was, in fact, the discipline (defence) co-ordinator for the police service. He is an employee of PSNI, just as all police officers are but he happens also to be an appointed member of the police federation. His presence at the training programme had nothing to do with his role as a member of the federation.

The appeal

[12] The judge's decisions in relation to procedural unfairness and the absence of apparent bias arising from the panel members having seen Appendix C have not been appealed. The only ground advanced by Mr Simpson QC (who appeared with Ms Fiona Doherty for the appellant) was that the judge was wrong in finding that the participation of the panel members in the training courses did not give rise to the appearance of bias.

[13] Mr Simpson relied on the following factors in his claim that the panel was fixed with the appearance of bias: -

1. Each of the panel members had received general training and training on the specific issue that arose for decision in this case;
2. That training had been provided by both IIB and the Office of Legal Services;

3. The Office of Legal Services facilitates prosecutions in misconduct cases (by allocating cases and instructing counsel);
4. The head of the office may be required to advise the Chief Constable on a review of the panel's decision;
5. The head of the legal office may advise IIB (which investigates and prosecutes disciplinary offences)
6. IIB is the investigation and prosecution agency in relation to misconduct charges;
7. IIB is a party to the misconduct proceedings.

[14] Mr Simpson further submitted that the involvement of the discipline (defence) co-ordinator could not operate to provide "balance" to the training sessions since the police federation had no role to play in the training. As to the role of Mr Wood, the representative of the Ombudsman's office, since disciplinary charges heard by panels frequently originated from investigations carried out by that office, (and, indeed, this was such a case) his presence could not be said to provide balance.

[15] Finally, Mr Simpson drew attention to the fact that there has been a change in the training programme since the decision in *O'Connor and Broderick*. Now, instead of talks on human rights and *Merrill* by members of the legal services office, booklets with relevant case law were provided. This indicated that the police authorities had recognised that a failure to have panel members independently trained gave rise to an appearance of bias.

[16] For the panel, Mr Maguire QC, drawing on the test for apparent bias enunciated in *Porter -v- Magill* [2002] 2 AC 357 (whether "the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias" (per Lord Hope in at [103])), submitted that such an observer would take the following matters into account: -

(i) the system of police discipline proceedings operates under the overall control of the Chief Constable and is provided for by statutory regulations which prescribe how the system is to function and also deal with the main stages in the process;
(ii) the system of first instance hearings is intended under the statutory scheme to operate largely internally to the police service;
(iii) the system reflects the structures of an organised and disciplined police service. Hence the Chief Constable is both responsible for the provision of those who present the evidence and those who decide the cases. The Chief Constable has an interest in ensuring not just a fair outcome but has inevitably an interest in ensuring that police discipline is correctly enforced;
(iv) the Chief Constable may personally review decisions made by disciplinary panels;

(v) the Police Service is made up of a range of branches which inevitably interact in a context such as the present. This is neither unusual nor objectionable;
(vi) the statutory structures do not mimic criminal proceedings and an analogy cannot be properly made with such proceedings;
(vii) the training that the panel members received was of a general and innocuous nature. There was no evidence that the content of the training was slewed in favour of IIB interests.

Discussion

[17] This appeal involves a systemic challenge rather than a specific allegation of partiality on the part of an individual panel. It concerns the general question whether panel members, trained under the arrangements described, are inevitably fixed with the taint of apparent bias. Moreover, the challenge focuses not on the content of the training but on the identity of the organisers of the training courses. For this reason, counsel for the panel submits that a clear insight into the nature of the organisation and the structure of the disciplinary system is essential.

[18] Mr Simpson's riposte to this is that it would be wrong to impute too detailed an awareness of the workings of the system to the notional observer. That the observer should be informed he accepts but there must be, he says, a limit to the extent of knowledge which he or she should be presumed to have. In advancing that claim, counsel relied principally on the observation of Lord Hope of Craighead in *Gillies v Secretary of State for Work and Pensions* where he said at paragraph [17]: -

> "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny."

[19] One needs to be alert to the danger of transforming the observer from his or her essential condition of disinterested yet informed neutrality to that of someone who, by dint of his or her engagement in the system that has generated the challenge, has acquired something of an insider's status. This theme was taken up by Baroness Hale in *Gillies* when she said at paragraph [39]: -

> "The 'fair-minded and informed observer' is probably not an insider (*i.e.* another member of the same tribunal system). Otherwise she would run the risk of

> having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in *Johnson v Johnson* 201 CLR 488, para 53, 'neither complacent nor unduly sensitive or suspicious'."

[20] Mr Simpson suggested that if the observer is endowed with a surfeit of information, his or her detached status would be compromised and the essential component of public confidence would be imperilled. One can understand that it is necessary that the objectivity of the notional observer should not be compromised by being drawn too deeply into a familiarity with the procedures, if that would make him or her too ready to overlook an appearance of bias, but we do not consider that either Lord Hope or Baroness Hale was suggesting that the amount of information available to the observer should necessarily be restricted to that which was instantly available to a member of the public. The phrase '*capable of being known*' from Lord Hope's formulation holds the key, in our opinion. This does not signify a need to restrict the material to that which is immediately in the public domain but includes such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment.

[21] In our opinion, therefore, it would be necessary for the informed observer to be aware of the general structure of the system of disciplinary panels, to be conscious that this is a procedure internal to the police force and that the Chief Constable is statutorily authorised to appoint members of panels while retaining an interest in the outcome of disciplinary hearings. As this court said in *Re Young's application* [2007] NICA 32, "it is relevant for the informed observer … to take into account the administrative arrangements that underlie the decision and the statutory requirements, if any, as to how it should be reached". He or she should also be aware that the content of the training courses is unexceptional and does not include anything that is likely to predispose the panel to favour the case presented against the officer who is the subject of the disciplinary charge.

[22] The concept of apparent bias does not rest on impression based on an incomplete picture but on a fair and reasoned judgment formed as a result of composed and considered appraisal of the relevant facts. Moreover, while the judgment to be made is whether an ordinary, well informed member of the public would consider that there was a real possibility of bias, one should not neglect to take into account that a fair-minded assessment would include the knowledge that those performing the important task of serving on a disciplinary panel are themselves professional police officers subject to the same disciplinary code.

[23] Applying these principles to the present case, we have come firmly to the view that the case for apparent bias is not made out. We respectfully disagree with Weatherup J that, without the involvement of representatives of the police federation and the ombudsman's office, the training structures would "fail the test". The fact that IIB organised training for the panel members at a time that was completely remote from the actual disciplinary hearing involved here and that there was nothing in the training that bore on the facts of this case make it wholly unrelated to considerations of bias or the appearance of bias on the part of the panel.

[24] The circumstances of this case are entirely different from those that pertained in *O'Connor and Broderick.* In that application the members of the panel agreed that the chairman should consult the head of the legal office and take advice on the interpretation of the case law that applied to the matter actually under consideration. The legal adviser gave advice and was also supplied with a copy of the ruling that the panel proposed to give on legal issues that arose in the case. It is unsurprising that the judge concluded that this would cause an informed observer to consider that there was a possibility of bias. Nothing of the sort occurred here. The most that can be said is that courses provided by IIB of a general and unobjectionable nature had been attended by members of the panel some time before they sat in these disciplinary proceedings. We cannot see how a fair minded judgment could be formed that this gave rise to the real possibility of bias.

Conclusions

[25] Although we have reached the same conclusion by a somewhat different route, we are satisfied that the judge correctly decided that there was no appearance of bias in this case. The appeal is therefore dismissed.

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

Delivered:	**12/02/08**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDCIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY TREVOR PURCELL FOR JUDICIAL REVIEW

GIRVAN LJ

[26] The reasonable man (or woman) on the Clapham omnibus has been joined on the journey by another paragon of rationality, the fair minded and informed observer. These anthropomorphic creations of the common law lend a humanising and homely touch to the law, personalising what are, in effect, objective tests of fairness and rationality. The metaphors should not distract from a proper understanding of the objective nature of the question which has to be addressed in individual cases. The critical issue in the present case is whether it would be fair and reasonable in the circumstances to conclude that there is a real possibility that the relevant decision makers, the members of the disciplinary panel, would not evaluate objectively and impartially the evidence and material which they had to consider in carrying out the task assigned to them of determining whether the applicant was guilty of a breach of paragraph 13 of schedule 4 to the RUC (Conduct) Regulations (Northern Ireland) 2000.

[27] In this appeal the appellant's remaining challenge is based on the proposition that the panel should be disqualified from hearing the disciplinary proceedings against him because of the involvement of the Internal Investigation Branch within the PSNI and the Office of Legal Services

branch of the PSNI in providing training service for the members of the panel in relation to their functions as members of disciplinary panels within the PSNI.

[28] Mr Simpson QC's challenge focused on a number of factors which, he submitted, had a bearing on the suggestion that the panel was infected with the appearance of bias. He argued that the Office of Legal Services facilitates prosecutions in misconduct cases by allocating cases and instructing counsel; that the head of the Office may be required to advise the Chief Constable on a review of the panel's decisions; that the head of the Legal Office may advise the IIB; and that the IIB is the investigation and prosecution agency in relation to misconduct charges and is a party of misconduct proceedings.

[29] The learned trial judge concluded that had the Police Federation not been involved as defence coordinator and had the Police Ombudsman not been involved in the matter the training structures would clearly fail the test and be unacceptable. The matter was, he concluded, balanced by the presence of the defence coordinator and the Police Ombudsman. He concluded that:

> " ….on applying the test of the fair-minded and informed observer there was no apparent bias in this case because of the balanced nature of the participation in the training programme, despite the description of the IIB as organising the event."

[30] The actual evidence adduced dispels any suggestion that the IIB or the Office of Legal Services in the PSNI in any way deliberately or accidentally trained the panel members in such a way that they might fail to carry out their disciplinary duties in an impartial and independent way. Mr Simpson argued that in looking at the question of apparent bias it was appropriate only to look at the facts as known to the public generally. What is in issue, he contends, is the perception of the observer looking at the readily accessible facts. In this instance the readily accessible fact was that the panel members had been exposed to training by the IIB. Mr Simpson called in aid a passage from Lord Hope's speech in Gillies v. Secretary of State for Work and Pensions [2006] 1 WLR 781 at 787 paragraph 17 –

> "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that those facts gives rise to that matters not what is in the mind of the particular judge or tribunal member who is under scrutiny."

[31] Lord Hope earlier in his speech at paragraph [6] pointed out that "whether the fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased cannot be answered without looking at the facts." Baroness Hale points out that the fair-minded and informed observer is informed and knows the relevant facts. Lord Phillips in Re Medicaments and Related Classes of Goods (No 2) (2001) 1 WLR 700 at 726 said that –

> "The court must ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was real possibility that the tribunal was biased."

This court in Re Young [2007] NICA 32 stated that the notional observer must be presumed to have full knowledge of the material facts.

[32] It is clear that in the passage at paragraph [17] of his speech Lord Hope was not seeking to lay down some qualification on the accepted principle of assumed access to all relevant facts. In referring to facts "capable of being known by the members of the public" no doubt he had in mind that relevant facts of which knowledge cannot be gained should not be included. It is not possible to know the unconscious workings of the mind of a judge or tribunal member and apparent bias can arise out of the appearance that the judge may be unconsciously biased, for example because he is a friend of a litigant. In such circumstances one could not dispel the appearance by ascertainable facts.

[33] In the present case, in considering whether exposure on the part of the panel members to training sessions organised by the IIB in the Legal Service gives rise to the real possibility of bias, a fair-minded observer would not jump to a conclusion of potential bias without further investigation. The fair-minded observer will want to inform himself before he draws such an adverse inference. He or she will, for example, consider the nature of the training; the role of the IIB in that training; the function and duties of the IIB; and the likelihood of it providing a biased misleading training which would or might have the effect of invalidating proceedings. He or she would also consider the duties of senior police officers involved in such training sessions to act fairly and impartially under internal ethical codes. It would take into account the duty of solicitors in the Legal Service as officers of the court to ensure that the law is properly and fairly explained and implemented. To jump to a conclusion of a real possibility of bias without looking at these facts would not be the act of a fair-minded observer but of an unfair one. Closing his mind to those questions would mean that he was disabling himself from being properly informed. An observer who wishes to be a fair-minded observer who cannot see clearly will put on his glasses.

[34] In this case the question whether the exposure of the panel members to training by the IIB in the Legal Service some time previously leads to the appearance of bias must be considered in the overall context of the panel members' training and competence to act as panel members. The panel members as senior officers have worked within the police command structure over a lengthy period and throughout their career they will have been required to act fairly, to decide on the evidence and to comply with police regulations and codes of conduct which require fairness and impartiality. They will have gained experience from acting on other panels and they will have been in receipt of other guidance such as the Northern Ireland Office Guidance on Complaints and Misconduct Procedures. All these matters form part of the overall matrix of facts which a fair-minded observer would be bound to take into account.

[35] In considering that but for the presence of the Police Federation defence coordinator and the Police Ombudsman the training structures would clearly fail the test and be unacceptable, the learned trial judge was reaching a conclusion on a hypothetical basis that did not apply in the case. What fell to be decided was whether it had been shown that in the actual circumstances of the case the test for apparent bias was made out. The fair-minded and informed observer had to consider the relevant circumstances including all the matters to which I have referred. The fact that the defence coordinator was not representative of the Police Federation would not make any difference to the ultimate conclusion. The learned judge was correct in reaching the conclusion that the applicant had failed to establish that there was a real possibility of bias on the part of the panel members giving rise to the appearance of bias. I, too, would dismiss the appeal.