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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

**JR 26's Application [2009] NIQB 101**

**AN APPLICATION FOR JUDICIAL REVIEW BY**

**JR 26 (SERVICE CONFIDENCE PROCEDURE)**

**WEATHERUP J**

**The Service Confidence Procedure**

[1] This is an application for Judicial Review of a decision of the Police Service of Northern Ireland that the applicant, a police officer with over 20 years service, be transferred to other duties on 27 April 2009, further to the operation of the Service Confidence Procedure. Mr Coll appeared for the applicant and Dr McGlennan for the respondent.

[2] The applicant was a member of a crime team and on 5 November 2008 he attended a meeting with a Superintendent Irvine and was informed that he had been made subject to the Service Confidence Procedure. The Police Service had received intelligence from several sources which indicated that the applicant was engaged in illegal drug activity with suspected criminals, unwanted relationships with persons in the community suspected of criminality, the disclosure of information to those individuals and to the media and there were serious concerns that he was a corrupting influence on other police officers and police systems. The applicant denied the allegations. The Service Confidence Procedure was applied and the applicant transferred.

[3] The Service Confidence Procedure was introduced by General Order 9/2004 with effect from 1 March 2004. At paragraph 1 the 'Introduction' states that it provides procedures that are designed to address the issue of loss of confidence in a particular officer to perform their current role or specific

duties where the Police Service has received information about the conduct or activities of the officer which calls into question the officer's integrity. However there will be reasons why the information received cannot be used as evidence in either a disciplinary or a criminal hearing but the Police Service considers that it would be wrong to ignore the concerns raised by the receipt of the 'source sensitive' information. In those circumstances officers are considered for transfer to a post which makes the organisation less vulnerable. The Procedure will only be invoked if having regard to all the circumstances neither prosecution nor misconduct is appropriate or is achievable. The Procedure will not be invoked on the basis of mere rumour or innuendo and is intended for use where 'serious concerns' are raised.

[4] At paragraph 2 the 'Aims of the Procedures' are stated and include the need to establish an ethical framework for dealing with those situations where there is no overt criminal or misconduct outcome but management action is necessary. The motivation behind the management action is confidential as to the source sensitive material that raises serious concerns about the appropriateness of an individual to occupy a particular post. The procedures aim to establish the need to apply fairness, objectivity and proportionality. Concerns about achieving a balance between the needs of the Police Service and the rights of the individual include maintaining a clear position that the use of the procedure is about the protection of staff and the organisation by management action and not misconduct procedures or sanction and that transfers as a result of the application of the procedures will not be treated as a taint against the officer concerned and will not be disclosed.

[5] The General Order describes the procedures, which may be summarised as follows -

The information received by the Police Service will be evaluated and all avenues such as investigation, ethical interviews and any other options such as monitoring and retraining will be considered.

An ethical interview will be conducted by the DCU Commander/Head of Department accompanied by an officer from the Internal Investigation Branch and the officer concerned may have a friend present. Non-sensitive information will be put to the officer concerned, who may make representations.

If there is no resolution of the matter a Case Conference will be held comprising the Head of Internal Investigation Branch, DCU Commander/Head of Department, the Senior Director of Human Resources and the Legal Advisor. The Case Conference will recommend whether to initiate the Procedure. The recommendations

of the case conference are referred to the Nominated Chief Officer for decision, namely, the ACC/Civilian Director.

The Nominated Chief Officer, the DCU Commander/Head of Department and the Regional Head of Personnel will hold a meeting with the officer concerned, who may have a friend or staff association representative present. A prepared script giving all possible information to the officer concerned will be read at the meeting and the officer concerned may respond in writing within 14 days. The Nominated Chief Officer will then make a decision whether or not to implement the Procedure.

The decision of the Nominated Chief Officer may be reviewed by the Deputy Chief Constable. The officer may make representations to the DCC and a representative of the Staff Association or a friend may be present.

The new DCU Commander/Head of Department in charge of the area to which the officer concerned has been moved will act as a monitoring officer who will conduct a review every six months at which the officer concerned and the Staff Association representative or friend may be present. A development plan will be agreed for the officer concerned and if the monitoring officer considers that the officer concerned has achieved the development plan a review case conference will be held and the officer concerned may be removed from the Procedure.

[6] On 2 October 2008 the Police Service issued to the applicant a 'Notice of Investigation and Giving of Caution' under Regulation 9 of the Police Service of Northern Ireland (Conduct) Regulations 2000. The Notice informed the applicant that an allegation had been made and that there was to be an investigation, although the Notice stated that it did not necessarily imply that misconduct proceedings would be taken but that the Notice was served to safeguard the applicant's interests. The nature of the report, allegation or complaint was stated to be that intelligence had indicated that the applicant was a user of controlled substances and a 'with cause' drugs test had been required from him under Regulation 19A of the PSNI Regulations 2005 as amended by the Police (Testing for Substance Misuse) Regulations (NI) 2008. The Notice informed the applicant that a misconduct investigation was being carried out by the Professional Standards Department. The applicant acknowledged receipt of the Notice on 8 October 2008 and on that date undertook the drugs test, which was negative.

[7] Detective Superintendent Clarke, Head of Operations at the Professional Standards Department of the Police Service, reviewed intelligence in relation to the applicant after the negative drug test. The review indicated that the Police Service held in excess of 150 intelligence

documents relating to the applicant, the vast majority of which were of B2 grading or higher. A grading of B2 in respect of a piece of intelligence indicates that the information was provided by a tried and tested source proven to be reliable in the past. The information was not anonymous. The intelligence was from a range and variety of sources and provided intelligence which was considered to raise serious concerns that the applicant was involved in a spread of corrupt activity that was entirely contrary to his role as a police officer. Due to the nature of the material which was held, which was based on intelligence, it was not possible to advance criminal or misconduct proceedings against the applicant. A Case Conference was convened under the Service Confidence Procedure.

[8] Chief Superintendent Irvine and others attended the Case Conference under the Service Confidence Procedure in relation to the applicant on 3 and 4 November 2008 and at the latter meeting a decision was taken to recommend the transfer of the applicant to other duties.

[9] On 5 November 2008 the applicant attended the meeting with Chief Superintendent Irvine and others under the Service Confidence Procedure. A prepared statement was read alleging the applicant's involvement in illegal drug activity, inappropriate relationships with criminals, disclosure of information to criminals and the media and being a corrupting influence on other police officers and police systems. The applicant was informed that a Case Conference had been convened which had made recommendations to the Nominated Chief Officer, ACC Finlay, that the applicant was to be removed from his current position and transferred to other duties. The minute of the meeting of 5 November 2008 records that the applicant considered that the information received stemmed from particular named investigations and that there was malicious intelligence.

[10] The applicant had the opportunity to make written representations to ACC Finlay within 14 days. The applicant made written representations denying the allegations, referring to the negative drugs test on 8 October 2008, referring to the Regulation 9 Notice and the misconduct investigation, which it was stated would have involved disclosure of the full extent of allegations, as compared to the limited extent of disclosure under the Service Confidence Procedure. The applicant's representations concluded:

"I cannot exonerate myself if I am not aware of the specific instance(s) where it is alleged my conduct has not met expectations. I find it impossible to prepare my defence and give a full account of the matter when I have no specific information in my possession. I therefore would request additional information so that I may address these issues and make sufficient representations to ACC Finlay."

[11] Assistant Chief Constable Finlay received the report of the Case Conference on 5 November 2008 recommending the transfer of the applicant. He was made aware of the extent and scope of the intelligence materials involving the 150 intelligence documents relating to the activities of the applicant. He later received the applicant's written representations dated 12 November 2008. ACC Finlay stated that he was convinced that such was the extent of the intelligence surrounding the applicant that he posed a significant risk to the Police Service and the recommendations of the Case Conference were considered necessary, proportionate and non-discriminatory and accordingly he accepted the recommendations. He referred to the applicant being provided with a "gist" of the allegations against him, which ACC Finlay considered amounted to sufficient information, having regard to the need to protect the integrity of sources of intelligence information.

[12] On 28 November 2008 the applicant was informed that ACC Finlay had confirmed the recommendations of the Case Conference. The applicant sought a review by Deputy Chief Constable Leighton. The applicant requested additional information in advance of the meeting with DCC Leighton. Prior to the meeting DCC Leighton was briefed with the available intelligence documents relating to the applicant. The review meeting with DCC Leighton took place on 23 December 2008. By letter dated 15 January 2009 DCC Leighton informed the applicant that the implementation of the Service Confidence Procedure was considered to be both proportionate and necessary and that the applicant was to be transferred. The applicant was transferred to new duties on 27 April 2009.

### **The Grounds for Judicial Review**

[13] The applicant's grounds for judicial review are as follows:

(a) The process that led to the application of the Service Confidence Procedure to the applicant, the imposition of a consequent action plan and the transfer of the applicant were procedurally unfair, contrary to common law, natural justice and Article 6 of the European Convention on Human Rights in that the applicant was provided with inadequate information of the detail of the allegations against him to defend himself properly and was not provided with the opportunity to challenge the maker of the allegations.

(b) The applicant enjoyed a legitimate expectation that allegations of a disciplinary nature against him would be dealt with under the respondent's disciplinary process.

(c) In breach of procedural fairness the process employed denied the applicant the right to legal representation and denied him sight of any evidence against him and the opportunity to subject the evidence to challenge, all of which would have applied had the respondent's disciplinary process been used.

(d) The respondent has acted in an irrational and Wednesbury unreasonable fashion in addressing allegations that are disciplinary in nature other than through the respondent's disciplinary process.

(e) The respondent unlawfully failed to apply and follow the PSNI (Conduct) Regulations 2000 in respect of the applicant.

(f) The respondent has failed to give adequate reasons for its decision to implement the Service Confidence Procedure against the applicant and consequently to impose an action plan and transfer upon him.

(g) The respondent has failed to give any or adequate reasons for its refusal to provide the applicant with further information as to the allegations against him.

(h) The respondent has failed to take account of a relevant consideration in implementing the Service Confidence Procedure and consequent action plan and transfer upon the applicant, in that while ostensibly accused of taking illegal drugs and applicant passed a "with cause" drugs test.

(i) Alternatively the respondent has failed to accord proper weight to a relevant consideration in implementing the Service Confidence Procedure and consequent action plan and transfer upon the applicant in that while ostensibly accused of taking illegal drugs the applicant passed a "with cause" drugs test.

### **Is the Operation of the Procedure amenable to Judicial Review?**

[14] The respondent contends that this is a private law dispute between employer and employee in relation to operational decision-making and is not a public law dispute that should be subject to judicial review.

[15] In R (Tucker) v The National Crime Squad Director General (2003) EWCA Civ 2 the Court of Appeal in England and Wales was concerned with a Detective Inspector who had been subject to summary termination of a secondment from the Derbyshire Constabulary to the National Crime Square. Conditions of service provided that, exceptionally, the Director General

reserved discretion to terminate an officer's secondment without notice. As a result of a covert operation into drugs related crime, two officers seconded to the NCS had their secondments terminated with immediate effect and were returned to their home force for disciplinary investigation. The appellant had his secondment summarily terminated and was returned to his home force but without any disciplinary implications. He was notified that information had been received that he had failed to maintain the professional standards required of a Detective Inspector on the NCS and the Director General no longer had confidence in his ability to carry out his responsibilities. It was stated that the reasons for lack of confidence related to managerial issues in connection with his duties and conduct whilst a serving member of the NCS. The appellant asked for more information but was told that none could be given beyond that contained in the notice.

[16] The Court of Appeal in Tucker looked at the nature of the relationship between the NCS and the appellant, the conditions of service and the nature of the decision. As to the nature of the relationship, it was noted that as a police officer he was in a different position from other employees and that dismissal or other disciplinary punishment was governed by statutory procedures which were amenable to judicial review. As to conditions of service, it was noted that there was an express condition that exceptionally the Director General could terminate the appellant's secondment without notice. As to the nature of the decision, it was stated that there was no disciplinary element to the decision in the appellant's case and that it was an entirely operational decision, a run of the mill management decision involving deployment of staff or the running of the force.

By contrast, in R (O'Leary) v The Chief Constable of Merseyside (unreported 9 February 2001) judicial review was granted because the decision to transfer the applicant was "too closely connected with a disciplinary hearing to be identified as a operational rather than a disciplinary matter". The Chief Constable had decided on the deployment of the applicant in the course of discharging his statutory responsibilities in disciplinary proceedings.

On the other hand in R (Morgan) v Chief Constable of South Wales (unreported 9 April 2001) judicial review was refused where an applicant had been admonished and the Chief Constable had removed him from a pool awaiting promotion, having reached the conclusion that he was not suitable for promotion. This was found to an operational or management decision and not a disciplinary matter.

[17] In Farrell and Wills Applications [2008] NIQN 159 Gillen J dealt with the transfer of two police officers. He found that the decision was subject to judicial review as the applicants were transferred because a number of disciplinary matters involving the applicants were being investigated. Although the investigations had not been completed the fact of the

investigations invested the matter with a sufficient “disciplinary element”. It was not necessary that disciplinary proceedings had been commenced. The case was considered to be akin to that of O’Leary.

[18] The applicant contends that, as in O’Leary and Farrell & Wills Applications, the decision was too closely connected with a disciplinary hearing to be identified as an operational rather than a disciplinary matter. It is clear that there were disciplinary issues in the background to the decision to invoke the Service Confidence Procedure. In the preceding weeks the applicant had received the Notice of Investigation and Giving of Caution under Regulation 9 of the Police Service of Northern Ireland (Conduct) Regulations 2000 giving notice that intelligence had been received in relation to the applicant being a user of controlled substances and being required to undertake a drugs test and that there was a misconduct investigation. Further to the negative drugs test the Police Service turned to the Service Confidence Procedure rather than the disciplinary procedures.

[19] The Service Confidence Procedure has been published as a General Order. It is concerned with loss of confidence in an officer as the result of source sensitive information received that renders criminal prosecution and disciplinary proceedings neither appropriate nor achievable. The aims of the procedures maintain that it is about the protection of staff and the organisation by management action and not misconduct procedures or sanction. The operation of the Service Confidence Procedures does not impact on the rank or financial entitlements of the applicant and do not involve any disciplinary sanction, with the circumstances of the transfer not being disclosed and remaining confidential to those involved in the Procedure. The action taken against the applicant in the form of a transfer to other duties falls within the operational and management action that the Police Service are entitled to take in relation to an officer, in this instance based on a loss of confidence in the performance of his duties in his current post. That the loss of confidence is inspired by information that, had it been possible to disclose to the applicant, would have resulted in criminal or disciplinary proceedings against the applicant, does not convert an otherwise operational or management decision into a disciplinary decision. This was an operational or management decision.

[20] However the applicant contends that, even if the action taken against the applicant is a management decision and is not a disciplinary matter, it nevertheless involves a public law issue that is amenable to Judicial Review. The public law issue is stated to concern the use of the information relied on by the Police Service to transfer the applicant, which information involved misconduct on the part of the applicant and thus could have formed the basis for disciplinary proceedings had the information been capable of disclosure. In dealing with amenability to Judicial Review of issues arising from employment by a public authority in Phillips Application [1995] NI 322,



Carswell LJ at page 334e stated the preferable approach to be one that involved consideration of the issue itself and whether it had characteristics that imported an element of public law. This might arise in relation to a disciplinary or other body established under the prerogative or by statute to deal with disputes, by reason of the Court's supervision of inferior tribunals that are not purely domestic or informal. Further it might arise in relation to a decision of a public body of general application to staff, so that while the applicant will be adversely affected the decision has been taken as a matter of policy in relation to the staff in general.

[21] Consideration of whether a matter involves an element of public law has also been approached by placing the emphasis on the 'function' being performed by the decision-maker, where only a public function as opposed to a private function is amenable to Judicial Review. Fordham's Judicial Review Handbook 5<sup>th</sup> Edition at paragraph 34.2 discusses the principles of reviewability and states Principle 2 as being that the emphasis is on function and not office or status. In Tucker Scott Baker LJ applied the approach of Pitchford J in R (Hopley) v Liverpool Health Authority (Unreported 30 July 2002) who asked:

- (i) Whether the defendant was a public body exercising statutory powers.
- (ii) Whether the function being performed in the exercise of those powers was a public or a private one.
- (iii) Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration.

In Tucker it was found that the third criterion was not met in that the Director General in transferring the appellant back to his home force was not performing a public duty owed to the appellant.

[22] In considering whether there is an element of public law I do not accept that the transfer decision taken in the present case can become a public law issue amenable to Judicial Review by focusing on the potential for disciplinary proceedings, when the function being performed by the decision-maker related to procedures that are implemented only in the event that disciplinary procedures are not appropriate or achievable. Nor do I accept that the respondent was performing a public duty owed to the applicant. The decision that is the subject of this application is not subject to Judicial Review.

### The Fairness of the Procedure.

[23] As the decision is not subject to Judicial Review it follows that the operation of the Service Confidence Procedure does not fall to be examined on Judicial Review grounds. However if I am wrong about the justiciability of the decision I will deal briefly with the central issue of procedural fairness, namely the limited disclosure to the applicant when the source sensitive information is withheld and the respondent provides what is considered to be a 'gist' of the information. This involves consideration of the Doody principles espoused by Lord Mustill in R (Doody) v Secretary of State for the Home Department [1994] 1 AC 531. The fifth principle states that fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result or after it is taken with a view to procuring its modification or both. The sixth principle states that since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer. In the present case the respondent purported to supply to the applicant the gist of the information that was relied upon and the applicant contends that the information that was provided was not sufficient to enable him to make worthwhile representations.

[24] In the balance of public and private interests involved in this exercise the context of the decision-making is of importance. There is a recognised public interest in police forces protecting their sources and their lawful methods of obtaining relevant information. This case does not arise in circumstances where the applicant is in jeopardy of criminal or disciplinary sanctions. Had it done so the balance of public and private interests might have resulted in no criminal or disciplinary proceedings being able to continue against the applicant. However the case arises in the context of a management transfer of the applicant in furtherance of the Service Confidence Procedure, a measure invoked when the applicant is not in jeopardy of criminal or disciplinary processes. The police operate under a statutory framework. The performance of police duties is a matter of the utmost public concern. The policy of the Procedure relates to the need for management action when there is serious concern about an officer's performance in his or her current role or specific duties. The context of decision making may be such that the private interest in the disclosure of information is outweighed by the public interests involved. So for example in relation to the refusal or revocation of firearms certificates, the applicant may be entitled to limited disclosure of adverse information justifying the refusal or revocation. See Donnelly and Donnelly's Application where Gillen J considered the policy of the firearms legislation and the public danger of inappropriate persons having access to firearms in recognising that there are

cases where the public interest must prevail over private interest to some degree. Similarly and by further example, in the prison setting, the restriction of association of prisoners may be based on limited disclosure of information, subject to anxious scrutiny of the information by the decision maker and those supervising the system (Henry's Application [2004] NIQB 8) and the same approach applies to the transfer of prisoners out of the Foyleview Resettlement Scheme (Thompson's Application [2007] NIQB 11).

[25] Under the Service Confidence Procedure there will inevitably be many cases where only limited information can be released to the applicant and where only a gist of the information can be provided. Thus there will be a limit on the officer's opportunity to make meaningful representations. I am satisfied that, in the present case, the applicant was provided with such a gist of the available information as the circumstances permitted. The countervailing measures in place involved scrutiny of the information in relation to the credibility of the sources, a Case Conference involving a high ranking police officer, a Human Relations official and a Force Legal Adviser, a decision made at ACC level and a review conducted at DCC level and the opportunity to be removed from the Procedure. Were it necessary to decide on the fairness of the procedures applied to the applicant I would not have been satisfied that in the context of this decision making process the private interest of the applicant should prevail over the public interest sought to be achieved by the Procedure. However, as the Procedure is not subject to Judicial Review, any issue of procedural fairness is a private employment law matter arising between the applicant and the Chief Constable. The application for Judicial Review is dismissed.