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Judgment: approved by the Court for handing down | *Delivered:* **13-03-09**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Neill's Application (Damien) [2009] NIQB 25

AN APPLICATION FOR JUDICIAL REVIEW BY DAMIEN NEILL

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DEENY J

[1] The applicant was a probationer constable in the Police Service of Northern Ireland. He had commenced his training on 1 August 2004. After his training he served in the northwest of the province. He was discharged as a probationer constable on foot of a decision originally of 30 June 2008 but confirmed on appeal on 5 September 2008. It is that decision which he seeks to challenge in this application.

[2] The facts may be briefly stated. On 30 May 2008 the applicant was off-duty and at home when a search team from the PSNI arrived at his home in Coleraine to search for drugs. None were found. On 24 June the applicant was served with a letter indicating that there would be a hearing on 30 June 2008 to consider his discharge. This letter was from Assistant Chief Constable J K Gillespie. He was told that he could bring a friend who must be a serving member of the force. He did so and Sergeant Craig who was his superior attended with him on 30 June. In her affidavit of 25 November 2008 ACC Gillespie avers, at paragraph 8, that due to "the sensitive nature of the intelligence materials I considered that the detail which could be provided to the applicant by way of disclosure at the interview would require careful consideration". She had a written summary prepared which was exhibited to her affidavit and which she read to the applicant. The first sentence in effect acts as her summary and what Dr Tony McGleenan for the respondent Chief Constable called the gist of the case. I quote:

> "I have at my disposal a significant quantity of intelligence from a variety of sources which states very clearly that you have been involved in the abuse of illegal drugs including class A whilst you have been employed by the PSNI as a Police Officer. I am

> aware that a search was conducted of your home for illegal drugs and that the search was negative. However I still feel the weight of intelligence is such that there was no doubt of your involvement in this activity. I have received a recommendation that your services should be terminated under Regulation 13(1) of the PSNI Regulations 2005 as this activity would indicate that you are not and are not likely to become a well conducted officer."

I will return to the Regulations in due course. It can be seen that the ACC's summary gave no information about the duration, nature or location of this alleged abuse.

[3] There was then some exchanges between the applicant and the ACC and other persons present.

[4] The ACC concluded this occasion by upholding the recommendation which she had received that the applicant be discharged from the PSNI. This recommendation followed a case conference held on 6 June 2008 attended by the Director of Human Resources, the Head of the Policing Standards Department, the applicant's District Commander and a relevant human resources official as well as a legal advisor.

[5] The applicant was informed that he could appeal the decision of the Assistant Chief Constable to the Deputy Chief Constable. He consulted his solicitors at that point in time and availed himself of that right. He was not permitted to be legally represented on that occasion which is one of the grounds of complaint which he brings before the court. The Deputy Chief Constable, Mr Paul Leighton, sets out in an affidavit of 25 November 2008 his approach to the matter. He convened the hearing on 5 September 2008. The applicant promptly offered to take a voluntary drugs test in light of the allegations against him. He had apparently made that offer before the Assistant Chief Constable also but she had declined to avail of it, although an e-mail had been sent to the whole organisation on 25 June 2008 drawing attention to a voluntary testing scheme being available service wide throughout the summer months. The hearing was adjourned to allow the applicant to take the test. That proved negative. The test indicates that it is reliable for the previous three months. The applicant's counsel therefore points out that if in fact he had been allowed to take the test on 30 June that could have been of great significance with regard to the allegation that he had been abusing drugs in April and May 2008, which it transpired, was part of the case against him.

[6] In any event the appeal hearing was reconvened on 25 September 2008 and in the light of the volume of intelligence reports and the fact that they

came from a number of sources and that the report spanned an extensive period of time, indicating that the applicant had been involved in activities relating to prohibited drugs, DCC Leighton came to the conclusion that the decision of the ACC was "necessary and proportionate". He upheld the decision to terminate the applicant's services.

[7] The applicant sought reliefs on foot of Order 53 of the Rules of the Supreme Court on 14 October 2008. He submitted, with leave, an amended Order 53 statement on 20 January 2009. The exchange of affidavits and the exhibits attached thereto revealed material helpful to and unhelpful to the applicant. He has cited, and it was not denied, that he had been responsible for more than 85 arrests and was the most active constable on the ground in the station in which he served. Against that, the respondent pointed out, there were a number of complaints against him to the Police Ombudsman but I note that none of those was upheld. The applicant's counsel argued that they merely pointed to his activity as a police officer and the complaints should be disregarded. Of two disciplinary matters against him one had subsequently been expunged. Ms Fiona Doherty, who appeared for the applicant, acknowledged that he "had a problem with his paperwork". It is clear that he was incorrect in averring that he was still a probationer constable merely because he had simply not handed in the relevant folder yet. He was nearly four years in service while probation normally ended in two years. It is clear from the affidavit of Inspector Jennifer Hudson that a considerable volume of necessary material required by the PSNI to conclude the probation stage had not been completed by him. In particular, there were no less than four road traffic accidents which he had investigated in which he had failed to complete any accident report, despite reminders over a period of more than six months from his sergeant. There was a suggestion that there was a lack of experienced constables or sergeants in this station to help him in the completion of those tasks. Subsequently Mr McGleenan was to argue that in the light of all that it would be futile to grant him a rehearing as the Police Service of Northern Ireland could take these matters into account against him. However, for present purposes, these matters were not taken into account against him by the ACC and DCC and I propose to say nothing further about them.

[8] The other matter which emerged was very properly exhibited at JG1 to the affidavit of ACC Gillespie. This was an intelligence summary relating to the applicant. It was exhibited in a redacted form but the case conference, ACC and DCC would have seen the full summary in their deliberations. There are no less than 25 suggestions hostile to the applicant from intelligence sources. One of those alleges that he had a relationship with somebody to whom he was passing information relating to police activities. One or two others might be of no consequence but the thrust of the rest was that he was a user of various drugs including cocaine. It was alleged that he associated with known drug dealers. It was alleged that he frequently travelled to

Amsterdam and bought herbal cannabis. This document was not seen by the applicant at any of his hearings. When he did see it in the course of these proceedings he swore an affidavit pointing out, inter alia, that he had never been to Amsterdam and had only twice been out of the United Kingdom in recent years. He sought to counter some of the other allegations in other ways, such as by swearing that he had no relative in Portrush contrary to one of the reports.

[9] These matters grounded one of the two principal arguments of the applicant. It was argued that he had suffered from procedural unfairness because the detail of the case against him was not disclosed. He could not respond to the case against him in any meaningful way because he did not have any dates, times or locations to counter. Ms Doherty referred to Service Procedure 25/2006 of the Police Service of Northern Ireland. It is entitled:

> "Guidance on dealing with probationer constables alleged not to be 'well conducted' but such behaviour is not suitable to be considered in either criminal and/or disciplinary terms."

Section 8(2) deals with the decision-making process. At (2)(e)(iii) one finds:

> "The Probationer Constable will be given all possible information but there will be limits on disclosure."

How can it be said that "all possible information" was given here when the redacted summary was far more detailed than was made available to the applicant at the time? It does not seem to me that that point has been adequately answered.

[10] Dr McGleenan argued that the only duty on the respondent on the authorities was to give the applicant the "gist" of the argument against him. This word is not defined in Words and Phrases Judicially Defined nor in Stroud's Judicial Dictionary of Words and Phrases. So far as the Shorter Oxford Dictionary is concerned it is defined (in this context) as "substance, essence or main part of the matter". It does not seem to me that this brief "summary" was enough information to give the applicant. One of the two most ancient principles of natural justice is audi alterem partem. How can one be said to have heard the other side if it does not know the case against it? No effective answer can be given. The police are perfectly entitled and indeed obliged to protect their intelligence sources but it seems to me that the approach adopted here in the course of these proceedings of disclosing the redacted summary is the approach that should have been adopted at an earlier stage. The court recognises that this was not a judicial or quasi judicial hearing but the basis of the applicant's discharge from the police is his alleged misconduct with drugs and he was entitled at common law to have the

substance of these allegations explained to him, or, under the procedure provided for by the police themselves, to have "all possible information". This did not happen. Authority for my view can be found, inter alia, in Chief Constable of North Wales v Evans [1982] 1 WLR 1155 at 1161 with regard to the need for a person being discharged to know "what is alleged against him", per Lord Hailsham, citing Lord Reid in Ridge v Baldwin [1964] A.C. 40, 66: " an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation." Lord Bridge of Harwich said at 1165C: " First the delegate [of the Chief Constable] should make clear to the constable the precise nature of the complaint and that he, the delegate, is acting on behalf of the Chief Officer of police to hear whatever the constable wishes to say about it."

Sufficiency of enquiry

[11] Counsel for the applicant acknowledges that this ground overlaps to some extent with the ground with which I have just dealt. The contention is that the respondents should have done more to enquire into the matters that were relevant to the decision to discharge the applicant. However, it must be borne in mind that considerable enquiries had been made by the Police Service in Northern Ireland in this regard. The intelligence summary had been collated over a period of several years. A search had been carried out of the applicant's home, which proved negative. The matter was considered at a case conference which included his Divisional Commander. It is true that I have found that the hearings before the ACC and DCC were procedurally unfair because Mr Neill was handicapped in dealing with the allegations against him but it does not seem to me that that flowed separately from any lack of enquiry on the part of those officers. As indicated above it might have been preferable for the applicant to have been allowed to take a drug test at the hearing before ACC Gillespie. However I am not persuaded that that on it's own constitutes a ground for setting aside her decision. Nor am I persuaded that it is properly subject to a separate heading of insufficiency of enquiry. In the circumstances I therefore reject this ground made on behalf of the applicant.

Legal representation

[12] As indicated above the applicant through his solicitors asked to be represented by a solicitor at the appeal hearing before DCC Leighton. This request was refused by a letter from Chief Superintendent Haylett of 13 August 2008. The applicant contends that the absence of such representation amounts to unfairness. Further or in the alternative, it is said that there is

inequality of treatment because a police officer who is past this probationary stage has a right to representation by solicitor and counsel if facing a disciplinary hearing which may lead to his dismissal from the force. Plato said that injustice came from treating equals unequally or unequals equally. The applicant's contention on this point is based on the proposition that he is the equal of an established constable. That is plainly wrong. The Regulations provide for the Secretary of State to lay down a period of probation for a police constable. Parliament has so provided. It is manifestly in the public interest that the integrity, competence and temperament of police officers be suitable for the tasks which they have to perform. Such matters may well not emerge in the period of full-time police training. Therefore a probation period can clearly be of considerable value in insuring an efficient and effective police service. A probationer constable is not the equal of a constable who has passed his probation service. There is therefore no injustice in a probationer not having the same rights to solicitors and counsel. A probationer has rights but they differ from those of a post probation police officer. I also bear in mind the distinction between dismissal for disciplinary offences of a police constable and the broad power under Regulation 13 vested in the Chief Constable to discharge a probationer.

[13] There is no general right in employment law to representation by a solicitor and counsel before an employer who is considering dismissal. See Harvey on Industrial Relations and Employment Law. Nor do the requirements of Article 6 of the European Convention on Human Rights to a fair hearing extend as far as domestic disciplinary procedures, provided that there is, as here, an appeal review hearing before a court of law. Dombo Beheer BV v Netherlands (1993) 18 EHRR 213, ECtHR; R v Securities and Futures Authority Limited [2001] IRCL 764; [2002] IRLR 297, CA. The Police Service did allow the applicant to be accompanied on both occasions by a friend who was a member of the force. In doing so I consider it discharged the duty of fairness upon it.

Delegation

[14] The Police Service of Northern Ireland Regulations 2005 deal with the discharge of a probationer at Regulation 13:

> "13-(1) Subject to the provisions of this Regulation, during his period of probation in the Police Service the services of a constable may be dispensed with at any time if the Chief Constable considers that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable."

In this case, as set out herein, the decision was made by ACC Gillespie with appeal to DCC Leighton.

[15] In his affidavit at paragraph 4, DCC Leighton said that he frequently discharges the functions of the Chief Constable "when he is not available due to other commitments or because he is out of the jurisdiction." The office of Deputy Chief Constable and the authority to exercise the powers of Chief Constable is expressly provided for in Section 34 of the Police (NI) Act 2000. Section 34 reads as follows:

> "34-(1) There shall be a deputy Chief Constable who may exercise all the functions of the Chief Constable –
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> (a) during any absence, incapacity or suspension from duty of the Chief Constable; or
>
> (b) during any vacancy in the office of Chief Constable.
>
> (2) The deputy Chief Constable shall not have power to act by virtue of subsection (1) for a continuous period exceeding 3 months except with the consent of the Secretary of State.
>
> (3) Subsection (1) is in addition to, and not in substitution for, any other statutory provision which makes provision for the exercise by any other person of functions of the Chief Constable."

However counsel for the Chief Constable did not rely on this section, perhaps because the delegation here of functions far exceeded the time limit allowed for in Section 34(2). The respondent instead relies on the Chief Constable's general power under Section 33 of the Act to direct and control the police in accordance with the policing plan and code of practice.

[16] The applicant relies strongly on the decision of the House of Lords in Evans op cit. Ms Doherty cited Lord Bridge at page 1165 who approbated the delegation of the investigation of a specific complaint against a probationer constable under the equivalent Regulation in the Police Regulations 1971 but on condition, inter alia, that a full report be made to the chief officer who should himself show the report to the constable and invite any comment on it before reaching any decision. Likewise Lord Hailsham at page 1161F said that the ultimate decision must not be delegated but must be taken by the Chief Constable himself. These are clear dicta of the highest authority. They are technically obiter, it seems to me, as the Chief Constable did in fact take the decision in that case and it does not appear that Lord Brightman, in the

principal opinion with which other members of the House agreed, addressed this issue.

[17] In case it was thought that the circumstances might have changed since 1982, Ms Doherty also relies on R v Chief Constable of Greater Manchester Police, ex parte Lainton [2000] ICR 1324. That was a case involving a probationer constable but not discharge. I note that the language in the equivalent Regulation refers to a chief officer of police but that would appear to reflect the different nomenclature which sometimes occurs in England and Wales eg. the Commissioner rather than the Chief Constable of the Metropolitan Police. It seems clear that it is the Chief Constable that is meant by that wording and it indeed it was he there that had taken the decisions complained of. Laws LJ deals with the issue before me at page 1332. He quotes Steyn LJ in Reg v Solicitors Complaints Bureau, ex parte Curtin (1993) 6 Admin LR 657, 666 to the effect that the idea of delectus personae is only a principle of statutory construction which 'must give way to a consideration of the practical realities of the exercise of the power to delegate', but continues as follows. "Here, it is accepted that there can be no delegation of the power to dispense with the services of a probationer constable under Regulation 15(1). That is the express effect of the decision in their Lordships House in Evans." (I note that an Assistant Commissioner in the Metropolitan Police is given express statutory provision to stand in the Commissioner's shoes for the purpose of these two Regulations).

[18] In fact in this case there was no evidence that the administrative convenience of allowing a deputy to act as an authorised agent very clearly outweighed the desirability of maintaining the principle that the officer designated by statute should act personally, as contemplated in De Smith Woolf and Jowell, Judicial Review Administrative Action 5th Edition (1995) page 366. While no express evidence was before the court counsel for the respondent accepted that it was likely there was only a handful of discharges of probationer constables in any one year.

[19] Ms Doherty also relied on the judgment of Weatherup J in In Re McAreavey and MacAfee [2007] NIQB 59. However it seems to me that the learned judge was merely stating as a fact that the decision relating to probationer constables in that case was made by the Chief Constable. This was on foot of the 1995 Regulations but prior to the coming into effect of the Service Procedure SP25/2006 previously referred to. It is perhaps a little surprising that in the light of the earlier clear authorities this service procedure delegated the task, even when the Chief Constable was present, of the ultimate appeal to his deputy. It may be that it was thought that the combination of the case conference, the role of the Assistant Chief Constable and the role of the Deputy Chief Constable together provided sufficient safeguards equal to a hearing by the Chief Constable based on a

recommendation from some subordinate. But this may have been incautious in the light of the clear judicial authority referred to.

[20] Regulation 13(1) gives a very wide discretion to the Chief Constable to discharge in these cases. As indicated above that may be an entirely appropriate and wise precaution to ensure high standards of conduct in serving police officers. But it may point to such a wide discretion being exercised at the highest available level. The facts here clearly differ from those in decisions such as DPP v Haw [2008] 1 WLR 379. As Lord Phillips of Worth Matravers LCJ points out in that case at paragraph 36 there was evidence of 1200-1300 demonstration applications in the vicinity of Charing Cross Station alone. Parliament cannot have intended that the Commissioner should determine the conditions with regard to such applications personally. I have taken into account the submissions of Mr McGleenan but despite those it does not seem to me that I am entitled to disregard the factors outlined above including the judicial dicta of high authority nor can I distinguish them. On the particular facts of this case it is appropriate that the decision be taken again by different officers from the prior occasion, as is normally provided for in these circumstances. As I understand it there is only one Deputy Chief Constable who is still at the present time in post. Therefore this matter should be heard, in any event, insofar as the appeal is concerned by the Chief Constable himself and as far as the intermediate level is concerned by a different Assistant Chief Constable.

[21] As the description of the substance of the matter is not a part of the role of the case conference I do not see any need for it to be reconvened. It is also right to acknowledge that counsel for the Chief Constable seems correct in saying that on a rehearing the A.C.C. and Chief Constable are at liberty to take into account evidence of lack of efficiency on the part of the applicant even if that was not before the officers on the previous occasion, although they ought also to take into account his diligence as a police officer with all other relevant considerations. The applicant may invite the A.C.C. or, quaere, Chief Constable to allow him to take a further drugs test which the Deputy Chief Constable thought a proper step on the previous occasion, rightly in my view. I have taken into account Mr McGleenan's submission that there was so much against the applicant that it would be futile to order certiorari or remit the decision back under the Judicature Act as the same result must follow. But the role of the court is to review the process by which the decision was arrived at, not the merits of the decision itself, unless it was a decision which no reasonable authority could have arrived at. To accept his submission would be to make a decision on the merits in effect. It is not a case where the error in procedure was so tangential, to use the helpful language of Carswell LCJ in another field of judicial review, as to allow the court to disregard it and refuse a remedy. I take into account the authorities cited in Re Downes's Application [2007] NIQB 81 relied on in granting relief here.

[22] I will hear counsel further on the relative merits of certiorari or remitting back. It is important that the parties will know where they are, as Lord Brightman said in Evans. With regard to the issue of the delegation I will allow my judgment to speak for itself without making any express declaration.