

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**Parker's (Dermot) Application [2015] NIQB 21**

**IN THE MATTER OF AN APPLICATION BY DERMOT PARKER  
FOR JUDICIAL REVIEW**

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**HORNER J**

**Introduction**

[1] The applicant is a former police officer. He seeks a judicial review of the decision of the Chief Constable of Northern Ireland ("the Chief Constable") made on 1 November 2013 ("the Decision") that the Chief Constable had no statutory discretion to make any payment to the applicant for the period between 27 September 2007 and 28 October 2008 ("the period") when the applicant was a member of the PSNI but his entitlement under the Police Service of Northern Ireland Regulations 2005 ("the 2005 Regulations") to occupational sick pay had ended and consequently he received no payment from his employer. In addition, and supplementary to this claim, the applicant seeks to challenge the Chief Constable's decision that he had no statutory discretion to make any necessary adjustments to the applicant's police pension as a result of the applicant being off work and receiving no wages.

[2] The matter has been keenly contested on both sides. At one stage, it was adjourned to see if the Northern Ireland Policing Board ("NIPB") could intervene to remove the impasse. Unfortunately, the NIPB was unable to offer any assistance. It is agreed that the NIPB has no right to make a lawful payment to any police officer in respect of any period when that officer was a serving member of PSNI. As a consequence this matter has proceeded solely against the Chief Constable.

[3] It is only right and proper that I should record my gratitude to counsel for the contribution each has made to the debate on this issue which first arose in 2008.

However, there can be no criticism levelled against either set of lawyers for the delay in bringing this case to a hearing.

### **The Challenge**

[4] Leave to pursue a judicial review was granted on 3 April 2014 by Treacy J. In an amended Order 53 Statement the applicant seeks to quash the Decision of the Chief Constable made under the 2005 Regulations. This involves considerations of the relevant Regulations, that is Regulation 27 (and Regulation 32(5)) and the exercise of the discretion vested in the Chief Constable. The Chief Constable says that he had no option because, as the applicant was no longer a serving member of the PSNI, he could not lawfully make to him a discretionary payment. The applicant says that the Chief Constable did have a discretion and that he could lawfully have exercised it in his favour even though he was no longer a member of the PSNI. Thus the contest in this application lies between different approaches to the discretion vested in the Chief Constable under Regulation 27. Mr Warnock for the applicant says that it can be exercised in respect of former police officers - "the broad approach". Ms Murnaghan QC for the respondent urges upon the court "the narrow approach", namely, that the discretion can only be exercised in favour of those persons who are currently serving members of the PSNI. There is a dearth of authority on this issue and neither counsel has been able to find any case that casts light on what is the correct approach, whether here or in England and Wales, which enjoy similar Regulations. There is also a fall back argument advanced on behalf of the respondent that the applicant has an alternative remedy, namely to bring proceedings under the Disability Discrimination Act before an Industrial Tribunal; see 8.02-8.03 of *Judicial Review in Northern Ireland, A Practitioner's Guide* by Larkin and Scoffield.

### **Background**

[5] It is necessary to set out the background to this dispute as to jurisdiction in a little detail. The salient details can be summarised thus:

- (i) The applicant is aged 42 years having been born on 21 April 1972. He is a married man with twins. He joined the Police Service on 22 September 1996. He retired as a police officer on 29 October 2008. He claims that he was forced into retirement as he was unable to work and was not receiving any pay. He claims that he was "finding it increasingly difficult to survive" and that he was "only going to be dismissed for absence from duty".
- (ii) He now claims that as a consequence of his work with the Child Abuse Rape Enquiry Unit ("CARE") he had developed a depressive illness with anxiety and this prevented him from carrying out his duties. He is supported in this diagnosis by Dr Oscar Daly, Consultant Psychiatrist, who prepared a report dated 22 January 2010. This concluded that the applicant was 100% disabled

and that his “entire disability is, I believe, due to his injury on duty”. This differed from some of the medical opinions that had been expressed beforehand, and in particular marked a radical departure from the opinion of Dr Graeme McDonald, Consultant Psychiatrist, who, like Dr Daly, examined the applicant as an Independent Medical Referee (“IMR”).

- (iii) The applicant had gone off work on 1 September 2006 and had not worked from that date until he retired. He received full occupational sick pay up until 27 September 2007. This necessarily involved the Chief Constable exercising his discretion under Regulation 27 in favour of the applicant as under the Regulations the applicant was only entitled to 6 months at full pay. After that he should then have moved on to half pay in the normal course of events.
- (iv) The refusal to pay the applicant any further money was based on the medical evidence then available to the Chief Constable. On 21 February 2007 it is recorded by the Personnel Manager, Ms Kemp of the PSNI, as follows:

“I note that you were reviewed at Occupational Health and Welfare recently and were advised that you could be considered for medical retirement as it is their opinion that you were unfit for the full range of duties as a police officer.”

- (v) On 18 September 2007 Ms Kemp received a letter which stated:

“The Policing Board Human Resources Committee considered this officer’s case on 13 September 2007, but I am sorry to tell you that after considering all of the available evidence they refused his medical retirement and Injury Award.”

It is not suggested that given the medical evidence then available that this was an irrational view to have formed.

- (vi) From 27 September 2007 the applicant’s occupational sick pay was stopped and he was placed on unpaid sick leave in accordance with the 2005 Regulations.
- (vii) The applicant was managed under the PSNI (Unsatisfactory Performance and Attendance) Regulations 2007 which placed him under threat of dismissal.
- (viii) The applicant submitted an appeal from the Decision on 20 September 2007. As a result he was seen by Dr McDonald on 27 February 2008 in his capacity as IMR. On 4 March 2008 Dr McDonald concluded the decision to refuse ill-health retirement (and an injury on duty award) was correct and that the

original decision should be upheld. On 14 March 2008 Ms Kemp received a letter from the Northern Ireland Policing Board in the following terms:

“I refer to previous correspondence in the above matter and write to advise you that the Board has accepted the report of the Independent Medical Referee who has upheld the decision of the Selected Medical Practitioner to refuse Detective Constable Parker a medical retirement pension and injury on duty award.”

- (ix) Dr McDonald adhered to this view despite receiving further medical evidence from Dr Bell, Consultant Psychologist. He specifically advised on 21 May 2008 that the further information did not impact on the outcome of the appeal.
- (x) Further medical evidence was supplied by the applicant in June 2008 but this was too late for consideration. On 9 September 2008 PSNI wrote to the applicant’s then solicitors pointing out that as the application for ill-health retirement was unsuccessful the issue of an injury on duty award could not be considered by the Selected Medical Practitioner (“SMP”) and/or IMR. The letter stated:

“It is important to be aware that should Mr Parker leave the Service of PSNI he could then submit directly to the Board a new application for consideration of an ill health retirement and injury on duty award which would be taken through the same assessment by an SMP and if requested appeal process with an IMR. The Board and the Northern Ireland Office would also ensure that a different SMP and IMR would be appointed to consider any new application submitted by Mr Parker after he left the Service of PSNI. The most recent information including medical reports could be submitted by Mr Parker, or a nominated representative/solicitor, on his behalf as part of the assessment process.”

- (xi) No doubt induced by this offer, and fearful of dismissal, the applicant resigned. Letters were sent on his behalf by, among others, Lady Sylvia Hermon, his MP. His appeal supported by Dr Daly’s report of 1 October 2010 was successful and he was ruled to have suffered an injury on duty and to be entitled to ill-health retirement.
- (xii) The applicant, following this outcome, requested the Chief Constable to make up his pay during the period when he had received no income at all from the PSNI, his entitlement to occupational sick pay (“OSP”) having expired. He wanted the Chief Constable to exercise the discretion he enjoyed under

Regulation 27 of the 2005 Regulations. In this quest he was ably and effectively supported by Lady Hermon. She has been indefatigable on his behalf doing her level best as his MP to right what she perceives to be an obvious injustice.

- (xiii) However the request that the Chief Constable exercise his discretion in favour of the applicant was refused. Mr Cox wrote to Lady Hermon on 11 May 2010 and said:

“I have looked at this matter and I am content that the OSP provisions have been properly applied in this case and that it would not be appropriate to award Dermot the pay he has asked for in his most recent email to you.”

In a letter of 1 November 2012 the Chief Constable wrote to the Chairman of the NIPB making it clear that no police officers in the future would find themselves in the same circumstances as the applicant. He said:

“This left Dermot in somewhat of a **no man’s land** as he could not return to work nor was he suitable for Ill Health Retirement (IHR).”

He went on to say:

“Our process now is to progress an Unsatisfactory Attendance procedure in tandem with IHR consideration and immediately the Board inform us of non-eligibility for IHR we move to the final stage of this process. In this scenario where the officer successfully appeals the SMP decision, we automatically re-instate the officer from the date of his dismissal to affect an IHR.”

- (xiv) Mr Pollock, the Chief Executive of NIPB, wrote on 17 November 2012 to the Director of Human Resources of PSNI referring to “exceptional circumstances” which would justify the PSNI making a payment in respect of the loss of salary prior to his resignation. The court was told by the applicant’s counsel, although I did not understand the respondent’s counsel to take issue, that if a police officer is unable to work for more than 6 months because of an injury suffered in the exercise of his duty as a police officer, then it is almost certain that the Chief Constable will exercise his discretion under Regulation 27 and ensure that the injured police officer receives the same amount as he would receive on full OSP. It seems that the NIPB take a similar view as to how the Chief Constable will exercise his discretion in these circumstances.

Mr Pollock concluded his letter by stating:

“I emphasise that the decision and the discretion in this matter rests with the PSNI. However, there appear, in retrospect, to be exceptional circumstances which would justify that PSNI make a payment in respect of loss of salary prior to his resignation, to Mr Parker. I trust that this response will assist the PSNI in making a determination on an ex-gratia payment and help resolve the continuing concerns in this case, not least a duty of care to Mr Parker, as a former employee.” (sic)

- (xv) The Chief Constable replied on 28 March 2013 rejecting the suggestion and stating that he would “disagree with a suggestion that I have a discretion in law to, in retrospect, pay an exceptional circumstances loss to salary prior to Mr Parker’s resignation.”
- (xvi) On 9 August 2013 Mr Cox, Deputy Director of Human Resources, confirmed the decision which had previously been taken by the Chief Constable.
- (xvii) On 1 November 2013 the Chief Constable wrote to Mr Pollock and stated that from the date of the applicant’s resignation on 29 October 2008 “any discretion which I may or may not have had under Regulation 42 ceased to exist”. (sic)
- (xviii) Finally, it is important to note that the Chief Constable is the PSNI’s sub-accounting officer and is personally responsible for safeguarding public funds of which he has charge. He also has to ensure that the PSNI conforms to the relevant statutory regime. He is subject to scrutiny by the NIPB and accountable to the Department of Justice.

[6] An application to the Industrial Tribunal for compensation under the Disability Discrimination Act was made by the applicant. This was withdrawn by the applicant’s solicitors in April 2012 on the basis that the PSNI would not seek costs against the applicant. The concern of the applicant was that there were real risks as to the success of any claim made under the Disability Discrimination Act and he did not want to place himself at a risk of having to pay his own solicitor’s costs, never mind being at the risk, albeit a small risk, of having to pay the costs of the respondent.

[7] It is against that background that it is now necessary to consider the Chief Constable’s claim that he is unable to make any discretionary payment to the applicant under Regulation 27 because the applicant is no longer a serving member of the PSNI.

## The 2005 Regulations and The Service Procedure 8/2009

[8] Under Regulation 3(1) a member is defined as meaning “a member of the Police Service and includes a member who is suspended under the Conduct Regulations”.

[9] Regulation 27 of the 2005 Regulations provides:

“The Secretary of State shall determine the entitlement of members to pay during periods of sick leave taken in accordance with a determination under Regulation 32(5), and in making such a determination the Secretary of State may confer on the Chief Constable discretion to allow a member to receive more pay than that specified in the determination.”

Regulation 32(5) provides:

“A member shall not be entitled to be absent from duty on account of injury or illness otherwise than in such circumstances as shall be determined by the Secretary of State, and in making such a determination the Secretary of State may confer on the Chief Constable the power to appoint, or approve the appointment of, a medical practitioner for the purposes of any function to be carried out under the determination.”

[10] Annex I of the Regulations relates to Regulation 27 and to sick pay. It provides:

“1. Subject to paragraph 2, a member who is absent on sick leave, in accordance with Regulation 32(5), shall be entitled to full pay for 183 days in any one year period. Thereafter, for the remainder of that one year period, where the member is absent on sick pay, he shall be entitled to half pay.

2. The period during which sick pay shall be paid and the rate of sick pay in respect of any period of sick leave shall be calculated by deducting from the member’s entitlement on the first day the aggregate of periods of paid absence during the twelve months immediately preceding the first day of absence.

3. The Chief Constable may, in a particular case determine that for a specified period -

- (a) A member who is entitled to half pay while on sick leave is to receive full pay, or
- (b) A member who is not entitled to any pay while on sick leave is to receive either full pay or half pay,

and may from time to time determine to extend the period.

4. For the purposes of this determination:

- (a) References to members being on sick leave are references to his being absent from duty while entitled to be so, under Regulation 32(5) or to his being absent from training while entitled to be so under Regulation 12 of the police trainee regulations,
- (b) References to full pay are references to the rate set out in the Secretary of State's determination of pay made under Regulation 23(1), and
- (c) References to half pay are references to pay at half the member's full pay."

[11] Annex N deals with sick leave under Regulation 32. It is unnecessary for the purposes of this application to set it out in full.

[12] Service Procedure 8/2009 ("SP2009") deals with sick pay provisions for police officers. Its function is to promote "fairness and consistency in the decision-making process for extending the rates of Occupational Sick Pay beyond the normal provisions."

[13] Paragraph 3(1) states:

**"Extending sick pay limits - exercising discretion**

- (a) In some instances the Chief Constable has the authority to exercise discretion to extend payment beyond the limits defined above.



- (b) It is not appropriate to have a fixed policy that discretion always will or will not be exercised in any set of circumstances. **Each case must be examined on its own merits.** (emphasis added)
- (c) Exercise of discretion to extend pay will usually only be considered when a police officer has exhausted, or is about to exhaust, the normal sick pay entitlement as outlined in 3 above.
- (d) Only in very exceptional cases will consideration be given to extend at full pay rate or before the police officer has exhausted normal sick pay provisions. Where a decision to exercise discretion is made this will usually extend at half pay rate.
- (e) Sick pay will be automatically reduced unless the Chief Constable has exercised his discretion.
- (f) Discretion to extend pay will usually only be considered where there is an identified timeframe for the police officer to return to work and this has been verified by Occupational Health and Well-being (“OHW”) and is considered by local management to be appropriate in the context of providing best value and effective police service.
- (g) The Chief Constable may decide to exercise his discretion in the following instances:
  - (i) the police officer is suffering from an illness, which may prove to be terminal. This will be continually reviewed and is not likely to exceed a period of one year; or
  - (ii) OHW has recommended that medical retirement should be considered and the police officer is awaiting a decision on medical retirement from the Northern Ireland Policing Board (NIPB); it is unlikely that discretion to extend pay in these circumstances will be exercised if the police officer unduly delays this process or if the application for

medical retirement has already been considered and refused by NIPB; or

(iii) where, at the time the police officer's pay is impacted upon, the primary cause of the current absence has been determined by PSNI (the Police Service) as being directly attributable to a confirmed injury in the execution of police duty and not solely **on duty**; or

(iv) where a police officer's pay is affected because an application for an **Injury on Duty** award has been stayed pending the outcome of other matters which impact on the decision. Discretion may only be exercised if the Deputy Director of Human Resources (DDHR) considers that delay is solely the responsibility of the organisation; or

(v) the sole reason for the police officer's continued absence is that a reasonable adjustment which has been identified to facilitate the police officer remaining in work as per the requirements of the Disability Discrimination Act has not yet been implemented. This list is intended to be indicative, it should not be interpreted as an exhaustive list."

[14] Under paragraph 3(2) it is a requirement that should the Chief Constable exercise his discretion he must do so in a "timely manner" and any application for discretion to extend pay has to be submitted within 14 calendar days of the police officer being notified of the scheduled date for reduction of his pay. It is worth recording that the Resources Committee of NIPB considered that the Chief Constable did have a discretion to make a payment in this case to the applicant; see minutes of the meeting of 23 May 2013.

## Discussion

[15] Both sides accept there is not much assistance to be gained from looking at different regulations and how they deal with a police officer or member. Obviously

the Pension Regulations necessarily deal with former police officers. In the 1988 Pensions Regulations “member” is defined as including a person “who has been a member”: see A.5.

[16] Under the Police Act (NI) 2000, Section 77 defines a police officer as a person who is a member of the PSNI.

[17] In Regulation 2 of the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Injury Benefit) Regulations 2008, Regulation 2(b) states that any reference to a police officer, however expressed, includes a reference to any person who has been a police officer.

[18] But all these Regulations and statutes fall to be construed on their own facts and circumstances and they shed little light on whether the narrow or broad approach should be adopted in this case in deciding who is a member for the purpose of the discretion vested in the Chief Constable under Regulation 27.

[19] It is quite clear that the discretion which has been given to the Chief Constable and the way it is to be exercised in respect of sick pay as per the service procedure is designed to cover a multitude of different situations. The main aim is, as Ms Murnaghan QC forcefully submitted, to get officers back to work. But that is not the exclusive objective. The discretion is also clearly there to prevent unfairness. Thus a police officer is entitled to be paid when the primary cause of his current absence has been determined by the PSNI as being directly attributable to a confirmed injury in the exercise of police duty but not solely because it was sustained on duty.

[20] If police officer was interpreted as meaning being only a currently serving police officer, it could give rise to a number of potential injustices. For example, a police officer is off work and there is a dispute about the cause of his illness. His entitlement to occupational sick pay runs out. He appeals but during the course of the appeal he dies. It turns out he had a disease directly attributable to the work he was performing as a police officer and which he contracted in the exercise of his police duties. In those circumstances the Chief Constable would be precluded from exercising a discretion in favour of the police officer and his widow under Regulation 27.

[21] In another example, a police officer is off work due to illness. His entitlement to occupational sick pay runs out. He is then dismissed. He subsequently finds out that his illness was a consequence of his carrying out his duties as a police officer. Again in those circumstances the Chief Constable would be precluded from exercising any discretion he enjoyed under Regulation 27 in favour of the applicant because he had ceased to be a police officer.

[22] I consider that the purpose of the discretion vested in the Chief Constable includes the prevention of injustice. It is a wide discretion. There are a number of

potential cases in which an injustice could result if the narrow approach was adopted. *Bennion on Statutory Interpretation (6<sup>th</sup> Edition)* at p727, section 265 states:

“It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to legislative intention, should presume that the legislature intended to observe this principle. The court should therefore strive to avoid adopting a construction that leads to injustice. The courts nowadays frequently use the concept of fairness as a standard of just treatment.”

[23] In Regina (Hampstead Heath Winter Swimming Club and Another) v Corporation of London and Another [2005] 1 WLR 293 Stanley Burnton J said at paragraph [33]:

“The principle contended for by Mr Beloff, that the Act should receive a construction that respects **the individualist values of the common law**, expressed in those terms, would be new. The quotation is from the speech of Lord Hoffmann in Tomlinson v Congleton Borough Council [2004] 1 AC 48, 85, para 47, and there is no reported case in which the phrase has been used since. I shall have to refer to the speeches in that case at length below. However, while the formulation is new, I think that the principle itself is well established. It has always been a principle of the interpretation of statutes that the courts should seek to construe them so as to produce a just and fair law. The courts presume that Parliament intended to legislate justly, fairly and reasonably: see the discussion in Halsbury’s Laws of England 4<sup>th</sup> Edition reissue (1995), Vol. 44(1), para 1442 and in Part XVI of Bennion, *Statutory Interpretation*, 4<sup>th</sup> Ed. (2002), especially Section 265. The values of the common law are components of the concepts of justice, fairness and reasonableness, or to put it more accurately: the values of the common law are dictated by current concepts of justice and fairness and reasonableness. What is considered to be just, fair and reasonable varies from time to time, as do the values of the common law. ...”

[24] I consider that it is just and fair that Regulation 27 be construed so that the Chief Constable has the discretion to make a payment where the applicant has been a serving police officer, but is not a serving police officer at the time of the application. This will prevent potential injustices and possible unfairness.

[25] I should make it clear that the court is not saying anything at all about how the discretion should be exercised. It is not difficult to see that there are arguments both for and against the Chief Constable exercising his discretion in favour of the applicant. On this issue the court is entirely neutral because it has not had cause, nor has it been asked, to consider how the discretion should lawfully be exercised. It is for the Chief Constable to consider whether to exercise it in light of the guidance provided by SP2009.

[26] Finally, I do not accept that an application to the Industrial Tribunal under the Disability Discrimination Act represents an alternative remedy. The issues before the Industrial Tribunal would be very different to the exercise by the Chief Constable of the discretion vested in him under Regulation 27. There were substantial risks of costs being incurred by the applicant and it is no surprise that in the circumstances he chose to abandon this application on the basis that the PSNI did not seek an order for costs against him. Such a course of behaviour does not and should not prevent him from seeking judicial review of the Chief Constable's decision that he enjoyed no discretion to make a payment to the applicant under Regulation 27.

## **Conclusion**

[27] In the circumstances the court favours a broad approach to the discretion vested in the Chief Constable under Regulation 27 and confirms that he can exercise it in respect of former police officers, including the applicant. However, this court says **nothing** about whether such discretion as is vested in the Chief Constable should be exercised by him in favour of the applicant.