Neutral Citation no. [2008] NIQB 35 | *Ref:* **GIL7118**

Judgment: approved by the Court for handing down | *Delivered:* **31/3/08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

JUDICIAL REVIEW

RE THE PRISON OFFICERS ASSOCIATION

GILLEN J

Application

[1] The Applicant in this matter is the Prison Officers Association. It has been granted leave to apply for judicial review of a decision of the Northern Ireland Prison Service ("the Respondent") of 14th June 2007 to prefer disciplinary charges against six prison officers for gross misconduct at Hydebank Young Offenders Centre ("the YOC"). Leave was granted on the grounds set out in Re *Prison Officers Association* [2007] NIQB 99.

[2] The issues for the determination of this Court can be summarised as follows:

(i) Has paragraph 8.1. of the Northern Ireland Prison Service Code of Conduct and Discipline ("COCD"), which the Respondent asserts is enacted under Rule 6 of the Prison and Young Offenders Centre Rules (Northern Ireland) 1995 ("the Rules"), been breached in that disciplinary charges were preferred by the Deputy Director of Operations and not by a ranking governor in the Northern Ireland Prison Service?

(ii) Were the terms of reference for the investigation which led to the impugned disciplinary process procedurally unfair in that it required and relied on a random sample of 25% of staff at the YOC and excluded the governor grades from investigation?

The Statutory Framework

[3] Where relevant to this case, the Rules provide as follows:

"4.- (1) In these rules-

'the governor' means the governing governor of a prison whether or not present at the prison;

'a governor' means any governor and includes an officer acting with authority under rule 117(2) or rule 117(3);

'officer' means an officer of a prison; 'prisoner' means any person required to be detained in a prison;

Code of Conduct

6. The Secretary of State may approve a code, or codes, of conduct to have effect in relation to the conduct, duties and discipline of the staff of prisons.

GENERAL RULES RELATING TO OFFICERS

General duties of officers

110.-(1) Every officer shall conform to these rules and whatever rules and regulations may be in force in the prison and shall assist and support the governor in maintaining them.

(2) Every officer shall perform his duties conscientiously and shall be courteous towards other officers, staff and members of the public

(3) An officer shall obey the lawful instructions of the governor.

(4) An officer shall inform the governor promptly of any breach of these rules or any abuse or impropriety which comes to his knowledge.

116.-(1) The governor shall be in command of the prison.
…….

(4) Subject to any direction from the Secretary of State, the governor shall have authority over all officers and employees on the staff of the prison.

Delegation by governor

117. – (1) In a prison where a deputy governor has been appointed the deputy governor shall, in the absence of the governor, act for him.

(2) Subject to paragraph (1), the prison shall in the governor's absence be in the charge of an officer approved by the Secretary of State, and the officer so approved shall, at such a time, be competent to perform and shall perform any duty required of the governor.

Powers and duties relating to officers

118.-(1) The governor shall superintend the conduct of the officers under his authority.

(2) The governor may suspend an officer if there is prima facie evidence of misconduct and shall, without delay, report the matter fully to the Secretary of State and shall carry out any directions given by the Secretary of State.

(3) The governor shall deal with offences against discipline as empowered by the Secretary of State under any code of conduct made under rule 6.

(4) The governor shall record all his orders relating to the management and discipline of the prison and shall have such orders communicated to the proper officers.

(5) The governor shall keep such records of officers' conduct as the Secretary of State may determine.

(6) The governor shall forward without delay any report or complaint which an officer wishes to make to the Secretary of State and may add any reports he feels appropriate.

(7) The governor shall-

(a) make available, as he considers appropriate to all officers and other staff circulars from the Secretary of State and other documents relating to their duties, rights and responsibilities including any code of conduct made under rule 6; and

(b) also ensure that such officers and staff have adequate opportunity to acquaint themselves with the contents of those documents."

Regulatory Framework

[4] The Northern Ireland Prison Service Code of Conduct and Discipline ("COCD") is enacted under Rule 6 of the Rules.

[5] Section 5 deals with the investigations of misconduct and provides as follows:

"5.3 Where an investigation follows an allegation or suspicion of misconduct by a particular member of staff it will normally be conducted by a Governor V or at a higher level appropriate to the circumstances unless his/her objectivity might be in question. The exception to this is allegations of harassment which should be referred direct to headquarters for the appointment of an investigating officer.

5.4 Other investigations of more serious and complex incidents must be authorised –

At an establishment by a Senior Governor; or - at headquarters by the Head of Division or the Chief Executive of the NI Prison Service.

5.5 Such investigations do not preclude a line manager e.g. who is on duty at the time of an alleged or suspected offence, from ascertaining or establishing facts at the time for use in any subsequent investigation.

They must normally be conducted by an officer from the same establishment or Division as that in which the alleged or suspected misconduct took place ….

Exceptionally, it may be desirable to call someone in from another establishment or headquarters to

conduct the investigation, for example in cases where senior staff are the subject of investigation.
……..

5.10 The appropriate Headquarter divisions must always be consulted where practicable before the police are called in. Where this is not possible – for example at weekends or in cases of great emergency – they must be informed as soon as possible. Personnel Division will also advise on the appropriate (*sic*) of convening a disciplinary hearing."

[6] Section 6 deals with precautionary suspension and provides as follows where relevant:

"6.2 In such cases, examples of which are provided for in paragraph 6.4, the Governor or Head of Division, or a more senior line manager, where appropriate, may suspend a member of staff from duty pending the outcome of an investigation and any subsequent disciplinary or court action.
……

6.5 In all cases Headquarters' Personnel Division must be consulted before suspension but if that proves impossible they must be informed as soon as possible."

[7] At paragraphs 8.1 and 8.2 COCD provides for "Formal Disciplinary Action" as follows:

8.1 "The person responsible for a decision to convene a disciplinary hearing

- must not be the immediate line manager
- must not be the person who investigated the alleged or suspected misconduct
- must be at least two substantive grades higher than the subject of the disciplinary action although where an investigation has been carried out cannot be lower than a Governor IV."

8.2 There may be circumstances where it is not appropriate for a Governor or Head of Division to

conduct a hearing in their own establishment or Division, for example, where they have had a direct involvement in a case or have a possible personal interest in the outcome .Where this is so a Governor from another establishment or Headquarters or another Head of Division may be asked to conduct the hearing."

[8] Paragraph 9 provides:

> "9.4 In all cases appeals will be only be dealt with by an individual who has had no previous involvement in the case. In the event that the Governing Governor cannot hear the appeal a case will be referred to headquarters and a Governor will be appointed from another establishment or from within headquarters.
>
> 9.6 In cases where the penalty has included
> – dismissal –
> - a reduction in rank –
> - disciplinary transfer
>
> the member of staff may submit written grounds of appeal to Headquarters or request a personal interview with a panel of Headquarter staff of suitable rank. In either instance the Headquarter staff involved in the appeal must have had no previous involvement in the case."

COCD Guidance

[9] The COCD has a "Guidance to Managers" provided. Mr O'Donoghue, who appeared on behalf of the applicant with Mr McGleenan, drew attention to a number of paragraphs contained within that Guidance as follows:

> "The role of Personnel Division
>
> 3. Under the Code the role of the Personnel Division is largely advisory other than processing cases where the award has included dismissal, reduction in rank or a disciplinary transfer and some appeal cases. Responsibility for initiating disciplinary action therefore lies with line management. However there are a number of types of circumstances in which it is important that Personnel Division is consulted

wherever possible before action is taken as is made clear in the following paragraphs of the Code.

5.3	-	Investigation of harassment cases
5.9	-	Police investigations and cases involving for example alleged criminal misconduct
6.5	-	Precautionary suspension of staff
8.5	-	Attendance at a hearing when on sick leave
9.6	-	HQ appeals
10.3	-	Section 10 dismissal cases

9. 5.3 disciplinary investigations should not be conducted by staff below the rank of Governor V. In selecting an investigating officer the Governor should consider the possibility that a COCD hearing might ensue.

10. In deciding to hold a disciplinary investigation into other serious and complex incidents Governors should;

Provide terms of reference for the investigating officer
Advise staff associations that investigations are taking place

Inform headquarters (operational management and personnel divisions) …

11. 5.5 The investigation

The Governor should:

- Start a log to assist in writing his report
- Collect and study all available hard evidence eg journal statements etc

……

14. As a general rule where a Governor is of the opinion that prima facie evidence exists of a criminal act having taken place within an establishment, headquarters should be consulted immediately and the RUC asked to investigate as soon as possible.

……

17. Wherever possible, Personnel Division should be consulted before any action is taken relating to police investigations of alleged criminal actions by staff in establishments. However, the decision to call in the police is not for the Governor to take in the event of a serious incident and/or one which occurs outside office hours. It may be necessary to act immediately: in such circumstances Personnel Division should be informed as soon as possible thereafter."

Background

[10] Mr Max Murray is the deputy Director and Head of Operations within the Northern Ireland Prison Service. The Director of Prison Service for Northern Ireland is Mr Robin Masefield. There are three deputy Directors namely Max Murray, Mark McGuckin and Anne McCleary. Each of the governing Governors of HMP Hydebank Wood, HMP Magilligan and HMP Maghaberry answers directly to Mr Murray. He declared in his affidavit of 25 January 2008 that he is their line manager and in turn forms part of the chain of command answering directly to the Director. Mr Dunlop, who appeared on behalf of the Respondent, informed me that the governor grades run from Grade 1 to Grade 5. In each of the three prison establishments in Northern Ireland the governing governors are assisted by deputy governors. The grade of the respective governors can be different in the various establishments. Mr Murray deposed that he had been a governor within the Prison Service for 26 years before being promoted to the post of Deputy Director, Head of Operations. He regarded himself as being part of the chain of command within the management of the Prison Service.

[11] Mr Murray further deposed in his affidavit that he became aware there was a possibility of significant overtime fraud occurring at Hydebank Wood. In view of the nature of the potential wrongdoing, he considered it appropriate that an outside manager should conduct an examination of the relevant records to assess whether there was any evidence of overtime fraud. Accordingly he directed a Governor Grade IV namely Mr Pat Gray to commence such an investigation by way of terms of reference dated 27 February 2007. That investigation took three months. Mr Gray prepared a report of his findings.

[12] Mr Gray, in his affidavit of 22 February 2008, indicated that the terms of reference imposed an obligation to investigate a random sample of 25% of staff. In the course of his investigations he alleged that Principal Officer Cameron accepted in the course of an interview that improper payments had

been made to various members of staff. Prison Officer Cameron was in charge of the COMPASS staff deployment and payment system. Accordingly Mr Gray investigated the manner in which additional emergency hours were being allocated to some staff and in consequence overtime payments being made. He deposes in his affidavit that when he commenced investigations he examined the records relating to four members of staff named in the terms of reference. Mr Gray alleges that he was able to determine relatively quickly that there was evidence of fraudulent payments being made.

[13] Mr Gray made clear in his affidavit that all governors except the governing governor and deputy governor were considered and investigated by him. He refers to a shift pattern to which the Principal Officers and the governors were assigned and which had been introduced in the mid-1990s when overtime payments were not being made. The introduction of overtime payments in 2003 created an anomaly with regard to the shift pattern. Principal Officers are an overtime grade whilst governors are not. That meant in practice that Principal Officers were paid for any additional hours that they worked over and above those which the shift pattern dictated i.e. rest days during the week and at weekends. It was decided that governors would work a domestic week Monday to Friday but nonetheless remained on the shift pattern. This meant that their actual attendance was compared against the original shift and a plus or minus bonus of hours were credited or debited against them. PO Cameron covered the hours that governors were not working in the evening and weekends by allocating these shifts to other Principal Officers and himself. This then resulted according to Mr Gray in overtime being paid to them. According to the deponent, the governors continued to be on the shift pattern in theory but not in practice. They worked their Monday to Friday week and PO Cameron debited or credited hours to them on the COMPASS system. Mr Gray asserts that whilst this practice was wrong the benefactors were the Principal Officers in terms of the exploitation of this situation for their financial gain. In essence the principal officers were taking annual leave on their weekend on and working overtime on their week off. Mr Gray found that whilst there was clear evidence of exploitation of the circumstances by certain Principal Officers for financial gain there was no evidence of any wrongdoing by governors.

[14] Mr Gray asserts that having checked the governors, principal officers and 100% of the records of all staff connected with the COMPASS system, he found wrongdoing concerned only in the limited number of men named in the report. Thereafter he carried out the random sample of roughly 25% of the remaining staff. The wider investigation was complex according to him and required the full-time commitment of a governor and two principal officers together with administrative support for a period of three months. Mr Gray was directed by Mr Murray to consider a sample of 25% of staff from each group. Mr Murray considered that a random sampling of staff allowed

an assessment of the extent of the problem without permitting the breadth of the investigation to become intolerable from an administrative point of view.

[15] Mr Gray produced his interim report in March 2007 and in May 2007 his substantive report. His preliminary findings were that there was prima facie evidence of financial misconduct by five of the six officers named in the relief sought by the applicant and referred to at paragraph 1 of this judgment .

[16] On reviewing the reports of Mr Gray, Mr Murray was satisfied that there was clear evidence to justify a decision to bring formal disciplinary charges against the six officers. Accordingly he requested Governor Alcock, who is a deputy Governor at Hydebank Wood to implement his decision to charge the various individuals and to complete the charge sheets F2 on his behalf. These were subsequently served on each of the members of staff facing the respective disciplinary charges. Governor Alcock completed the charge sheet in each case and they were then countersigned by their respective employees at the time the charge sheets were served upon them. Mr Dunlop asserted that this procedure was adopted to avoid Mr Murray having to take these logistical steps personally. In a letter of 7 August 2007 from Mr McGuckin of Prison Service Headquarters, it was made clear that the charges were drafted in the Prison Service Headquarters and taken to Governor Alcock where he was directed to sign and issue these documents.

[17] Mr Finlay Spratt the Chairman of the Prison Officers' Association challenged the conclusions reached about the prison officers involved. It was his argument that there was a systemic confusion as to how payments were made and the system for paying overtime at Hydebank was such that it was difficult to know for what period officers had been paid. Money was often paid in arrears which made it difficult to tally current payments with past payments. He also submitted that governors had a much better understanding of the Hydebank system than Mr Murray. This is the rationale behind his argument that the Rules and the COCD made clear that the governors were to be responsible for discipline in their own establishment.

The applicant's case

[18] The arguments put forward by Mr O'Donoghue on behalf of the applicant were as follows.

[19] First Mr O'Donoghue submitted that Rule 118(3) of the 1995 Rules was the empowering section giving rise to the COCD and the Guidance. In this instance there had been a clear breach of the COCD and the Guidance in that the Personnel Division had usurped the position of the governor thus compromising the current process and rendering it unlawful. The Personnel Division, of which Mr Murray was a member, should be largely advisory and consultative. Whilst counsel acknowledged that investigations may be

initiated by the Personnel Division, the responsibility for initiating disciplinary action and convening a disciplinary hearing should be that of the governors. He relied upon the wording of Rule 118(3) of the 1995 Rules, paragraphs 8.1 and 8.2 of the COCD and paragraphs 3,9,10 and 17 of the Guidance. He discerned a distinction between governors and officers with a clear emphasis on the role of governors to deal with offences against discipline. Mr O'Donoghue asserted that the clear intention of Parliament, and the logical interpretation of the Rules, COCD and Guidance, was that governors had greater knowledge of their own establishments and the various systemic workings within. This was the reason he submitted why governors were vested with the powers to deal with disciplinary matters rather than the rather removed structure of the Personnel Division.

[20] Counsel's submission was that it was highly significant, and illustrative of Mr Spratt's claim that it was custom and practice for governors alone to invoke disciplinary measures, that no practical example could be given by the Respondent of any instance where governors had not exercised disciplinary action against officers.

[21] Mr O'Donoghue also pointed out that paragraphs 9.1-9.9 of the COCD, dealing with appeals, was premised on the Personnel Division not being involved in the disciplinary stage because otherwise, as in this instance he argued, there would be no one who could carry out an appeal due to their involvement in the disciplinary action itself.

[22] Counsel argued that the distinction between governors and officers coursed through the 1995 Rules e.g. the definition section at Rule 4, Rule 110, Rules 116-18, all of which made it crystal clear that the governor was in charge of the prison with authority over the officers and a duty to superintend their conduct. The COCD was a code of conduct for staff and prisons creating a structure of discipline for officers as opposed to governors. Whilst it was open for there to be an investigative evaluation by Personnel Division, counsel submitted the relevant governor could then carry out further investigations before deciding to lay charges. In this instance counsel asserted that the governor had been overridden by HQ staff in the management of his own prison.

[23] Secondly, counsel submitted that there had been a breach of the canon of procedural fairness in the investigation process. By adopting a methodology which examined only a small portion of existing staff, without completing a full investigation of the conduct of all officers and governors within the workplace, the investigation was improperly informed. It was unable to establish the extent of and reasons underlying the problem of overpayment or wrongful payment or conduct warranting disciplinary action by the Respondent. Moreover the investigation by its very nature was so small as to be unable to identify the extent of the problem so that any penalty

to be made following disciplinary proceedings was unlikely to be proportionate to the circumstances of the case. He urged that this was particularly unfair where some officers might be at risk of dismissal for gross misconduct at a time when others in a similar position might escape investigation completely.

[24] Thirdly, Mr O'Donoghue rejected the submission of the Respondent that this case did not carry any element of public law being in effect merely a challenge to the mechanism and procedure by which disciplinary charges might be preferred. Mr O'Donoghue drew my attention to De Smith, Woolf and Jowell "Judicial Review of Administrative Action" 5th Edition at paragraph 3-062 (*seemingly not repeated in identical terms in the 6th edition)* which reads:

> "The need to focus on the nature of the dispute has also been emphasised in other cases. If what is in issue is a code of discipline set up by statute or under the prerogative then this provides the statutory underpinning and it can also result in the issue having implications for others apart from those who are the immediate parties to a contract of employment, so that the issue is treated as one of public law."

[25] Counsel submitted that the current case involved construction of a disciplinary process underpinned by statute and had implications for the Prison Service as a whole in terms of the disciplinary procedure.

[26] Fourthly he rejected the submissions of the Respondent that this court should follow the principles set out in Jeyeanthan R (On the application of) v Secretary of State for the Home Department (1999) EWCA Civ. 3010 (21 May 1999) ("Jeyeanthan's case") and ignore the old distinction between mandatory and directory terminology. Mr O'Donoghue relied on the approach adopted by the House of Lords in R v Clarke and McDaid (2008) UKHL 8("McDaid's case"). At paragraph 17 Lord Bingham said:

> "Technicality is always distasteful when it appears to contradict the merits of the case. But the duty of the court is to apply the law, which is sometimes technical and it may be thought that if the State exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place."

Lord Bingham further said at paragraphs 18 and 19:

> "18. What had Parliament intended the consequence to be, when it had enacted Sections 1 and 2 of the 1933 Act, if a bill of indictment was preferred but not signed by the proper office? That, as I think both parties agree, is the question to be answered in this case …
>
> 19. It is necessary to ask a second question. What did Parliament intend the consequence to be if there were a bill of indictment but no indictment."

Relying on the extracts indicated above at paragraphs 3-9 of this judgment counsel asserted that the intent was clear that only governors should exercise disciplinary procedures. The disciplinary charges were serious and accordingly the prison officers concerned were entitled to expect that the formalities would be observed.

The Respondent's arguments

[27] Mr Dunlop on behalf of the respondent firstly argued that the mere fact that COCD is pinned on a statutory framework does not immediately give rise to a sufficient public law status to open the way for a judicial review. The instant case, he urged, is concerned not with the outcome of the disciplinary hearing but rather with the fact that the disciplinary proceedings were commenced on the direction of the Director of Operations, ie the mechanism and procedure by which disciplinary charges had been brought. He helpfully reminded me of the principles set out in R (on the application of Noble) v Derbyshire County Council (1990) ICR 108, the decision of Carswell LCJ in Re Phillips Application (1995) NI322, Kerr J's decision in Re McBride's Application (1999) NI 299 and the decision of Weatherup J In the Matter of an Application by Donal McQuillan for Judicial Review (2004) NIQB 50.

[28] Secondly Mr Dunlop argued that the applicant's interpretation of the Rules and the COCD was too narrow in each case. Such an approach would throw up a number of unacceptable anomalies including that a governor Grade I or Grade II suspected of misconduct could never be subject to disciplinary action because under the applicant's interpretation only governors were responsible for disciplinary measures. Paragraph 8.1 of the COCD made clear that responsibility for disciplinary action must be at least two substantive grades higher than the subject of the disciplinary action. Thus it would preclude action against governors at the top level. Mr Dunlop acknowledged that the determination of disciplinary matters will naturally and usually fall to be dealt with at governor level in the establishment where the individual is based and where the governor is in command. However the COCD did not exclude the Director of Operations i.e. the Head of Division from having input into disciplinary matters in exceptional cases such as the

present case. Had it been intended otherwise, it would have been expressly stated.

[29] Drawing attention to paragraphs 5.4, 5.5, 5.10, 6.2, 6.5 and 8.2 of the COCD, Counsel argued that these references contain a clear indication of the engagement of Headquarters or a Head of Division in disciplinary matters. The clear intention of paragraph 8.1, submitted counsel, was to ensure that disciplinary hearings are not convened unless sanctioned by responsible persons of sufficient rank or independence. It can never have been intended that a person such as Mr Murray should be excluded because he is too high a rank especially when as in this instance the remit of Governor Gray was so serious as to investigate all persons including those at governor level. It would be incongruous to permit Mr Murray to instigate investigation into the matter ,have the investigator report to him and then be rendered unable to take the decision to prefer charges or convene the disciplinary hearing.

[30] As an alternative, counsel argued that even had there been a breach in procedures defined under paragraph 8.1, Jeyeanthan's case invokes a new approach to the former distinction between mandatory and directory steps. He relied upon the judgment of Lord Woolf where he stated as follows:

> "In the majority of cases, whether the requirement is categorised as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation that tribunal's task will be to seek to do what is just in all the circumstances."

In this case Mr Dunlop argued that it would be unjust to deny the Respondent the opportunity to prefer charges for the alleged serious wrongdoing in a properly conducted disciplinary hearing as a result of a technical breach of 8.1 if that were established.

[31] In any event Mr Dunlop invoked the principle set out in Carltona Ltd v Commissioners of Works (1943) 2 AER 560 at 563. Under the Carltona principle the courts have recognised that "the duties imposed on ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the Department. Public business could not be carried on if that were not the case". Such an official must satisfy the test of Wednesbury unreasonableness. He must not be so junior that no reasonable minister would allow him to exercise the power (see R (on the Application of the Chief Constable of the West Midlands Police) v Birmingham Magistrates' Court (2002) EWHC 1087). Rule 116(4) of the 1995

Rules provides that "subject to any direction from the Secretary of State", the governor shall have authority over all officers and employees on the staff of the prison. Counsel submitted that even if governors ought to be responsible for instigating disciplinary functions Mr Murray had power to direct the governor Alcock to act as he did by virtue of Rule 116(4) in exceptional circumstances such as this.

[32] Mr Dunlop reminded the court of the power under Section 18(5) of the Judicature Act (NI) 1978 to decline to grant relief in any event given the discretion vested in the court where the court found that the sole ground of relief established was a defect in form or a technical irregularity and no substantial wrong or no miscarriage of justice had occurred.

[33] Finally in this context counsel contended that even if the improper procedure had been adopted, it would have made no difference to the outcome and I should exercise my discretion to refuse relief .

[34] Turning to the procedural unfairness relied on by the applicant, Mr Dunlop reminded the court that according to Governor Gray and Mr Murray the investigation was made into all staff and did not exclude governors.

[35] Of the 25% of the staff investigated, which involved 75 persons, only 4% were found to have engaged in wrongful or fraudulent claims. He submitted that the Respondent was entitled to form the view that the cost and time engaged in examining the remaining 75% of staff was not merited. It is open to a public authority in the exercise of its discretion to take account of such resource matters.

Conclusions

[36] I reject the submission of Mr Dunlop that the application should be refused in limine because the subject matter was one of private law containing an insufficient element of public law to entitle the applicant to seek judicial review from this court.

[37] I find the four principles set out by Woolf LJ in McClaren v Home Office (1990) ICR 824 to be instructive in determining this issue. In brief they are:

(a) In relation to personal claims against an employer, an employee of a public body is normally in exactly the same situation as other employees.

(b) There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee of the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to

which the employer or the employee is entitled or required to refer disputes affecting their relationship. Consequently a prison governor's disciplinary powers in relation to prisoners are reviewable on judicial review (see Leech v Deputy Governor of Parkhurst Prison (1988) AC 533).

(c) If an employee of the Crown or other public body is adversely affected by a decision of general application by his employer but contends that the decision is flawed on Wednesbury grounds he can be entitled to challenge that decision by way of judicial review.

(d) There can be situations where although there are disciplinary procedures which are applicable they are of a purely domestic nature and therefore, albeit that the decision might affect the public, the process of judicial review will not be available.

[38] Applying these principles to the present case, I consider that the issue in this matter is an interpretation and construction of the code of discipline set up by statute. This is an issue of real substance. It contains therein the necessary statutory underpinning to ensure the matter is treated as one of public law. Moreover it will affect not only the prison officers in the instant case but will be of general application. Accordingly I consider this matter is justiciable by way of judicial review.

[39] The nub of the applicant's case is as set out in paragraph 6 of Mr Spratt's affidavit of 18 September 2007 when he stated:

> "Mr Murray was formerly a ranking Governor within the Northern Ireland Prison Service. He no longer holds such rank and is not employed as a civilian civil servant at headquarters. Paragraph 8(1) of the COCD provides that decisions on the commencement of a disciplinary process can only be taken by a ranking Governor."

[40] I do not accept this contention . It is my view that Mr Murray did have authority to act as he did. The first reason why I conclude this to be so is founded on a purposive construction of the 1995 Rules and the COCD which I find to have been enacted pursuant to Rule 6 of the 1995 Rules. I do not believe it can have been the intention of Parliament or of the Secretary of State approving the COCD that the initiation of or the convening of disciplinary matters should be confined to governor level and should exclude such steps being taken by a higher rank. The code of conduct expressly applies to all governor grades and to prison officers of all classes and grades. It is based on the principle, inter alia, that the primary objective of disciplinary procedures must be to ensure high standards of conduct and behaviour by staff at all levels. The legislative purpose and the aim of the code would be unjustifiably

diluted if Headquarter staff were to be excluded in all instances from taking a decision that disciplinary charges should follow especially where as in this instance a serious investigation has involved those at governor level. How else would the principles of transparency, independence and proper accountability be guaranteed in the investigation and disciplining of those at the highest levels up to the grade of governor?

[41] Courts must not attempt to determine the purpose of statute or for that matter a code approved thereunder at a level that is more abstract than what is apparent from the ordinary meaning of the statutory context. Nonetheless some evaluative reasoning is unavoidable in determining the purpose of such a statute or code provided judges do not resort to guess work (see Magor and St Mellons Rural District Council v Newport Corporation (1952) AC 189 per Lord Simonds at p. 191). It seems to me that it would be illogical, and in instances such as the present potentially irresponsible , if staff at a higher level than governor were to be precluded from initiating charges and convening disciplinary hearings where serious issues of widespread misbehaviour involving potential theft of public money were the subject of investigation .

[42] In many respects this is the locus classicus to illustrate the need for a flexible approach to the preferring of disciplinary charges. Mr Murray is Head of the Division and Director of Operations with responsibilities which directly include the prison concerned in this matter. It is clear from the background report of Governor Gray that this problem had surfaced in February 2007 when members of staff from Hydebank Wood Prison had contacted Prison Service Headquarters and raised a number of concerns that they had regarding the establishment. These concerns included allegations of the improper payment of additional emergency hours to staff, thefts from the establishment, viewing of inappropriate computer images by staff and the influence one particular member of staff had on the governor. The investigation was an exhaustive one which resulted in his conclusion that there had been manipulation of the detail and collusion between prison officers to create overtime and take their time off on duty days. A number of named officers were alleged to have been involved in that collusion. Significantly, Mr Gray also concluded:

> "There is evidence that the payment of AEHRs and the requirement for staff to attend for duty on conditioned hours at Hydebank Wood has been the subject of abuse over a considerable period of time, certainly for at least two years and probably longer. There is also evidence that Senior Management were made aware of concerns as far back as mid to late 2005."

[43] In such circumstances it seems to me inconceivable that Mr Murray, having received such a report, would then consign the decision about and formation of disciplinary charges to senior management (who conceivably may have included the Senior Management referred to by Mr Gray) rather than direct them himself. I can well understand why it was considered inappropriate that, in light of the widespread allegations in Hydebank and the senior level to which the investigations had reached, anyone other than Headquarter staff should have been involved in dealing with disciplinary charges.

[44] Moving from the particular to the general Mr Dunlop compellingly argued that a narrow interpretation of the Rules and COCD would result in a number of damaging anomalies. For example if the governing governor or a governor Grade I or II were suspected of misconduct it would seem that they could never be subject to disciplinary action under the code because 8.1 makes clear that responsibility for disciplinary action must be at least two substantive grades higher than the subject of the disciplinary action and not lower than governor IV. Hence Headquarter staff must inevitably be permitted to draw up disciplinary proceedings in those instances. Mr O'Donoghue attempted to meet this argument by asserting that in those circumstances the Secretary of State under Rule 116(4) would then appoint someone from Headquarters to carry out such a task. He submitted that in the absence of such a direction, someone such as Mr Murray could not intervene. I find no basis for such an argument given the broad general terms of Rule 6 of the 1995 Order and the content of the Code itself. I shall deal further with this matter in paragraph 51 of this judgment.

[45] Mr O'Donoghue's interpretation of Rules 116-118 of the 1995 Rules betrays a fundamental misunderstanding of the purpose of the 1995 Rules. It is Rule 6, not 118(3), which provides the basis for the COCD. That applies to the discipline of all staff including governors and officers. Rule 118 is specifically a discrete rule relating only to governors and does not form the source of the COCD. Rules 116-121 are confined to dealing with the status and powers etc of the governor but do not thereby exclude others eg. at Headquarters from also dealing with offences against discipline. Mr Spratt is probably correct in asserting that in other instances disciplinary charges have been dealt with by governors. Undoubtedly that will be what normally happens when prison officers have offended. Mr Dunlop conceded that this was the first instance that he was aware of where Mr Murray had initiated disciplinary proceedings. The words of the COCD and the guidance however must take their colour from their context. This guidance is not a set of prescriptive rules. It must be sufficiently flexible to permit the intervention of someone of the rank of Mr Murray in an investigation as serious and wideranging as this one in circumstances where I consider it might well have been singularly inappropriate or personally invidious for governors to have

been given the responsibility for preferring disciplinary proceedings given the findings in the report of Governor Gray.

[46] Turning to a textual analysis of the COCD, I find nothing which dictates that governors alone should initiate disciplinary proceedings. Paragraph 8.1 simply defines those who must not be responsible for a decision to convene a disciplinary hearing. It is exclusionary in nature and does not exclude Headquarter personnel. Paragraph 8.2 specifically recognises that there may well be circumstances where the governor or Head of Division should not conduct a hearing in their own establishment or division, for example where they had a direct involvement in a case. Clearly this indicates that in those circumstances a governor from another establishment or headquarters or another head of division may be asked to conduct a hearing. Paragraphs 5.4, 5.5, 5.10, 6.2 and 6.5 all envisage circumstances where headquarter staff may be involved. I find no basis for Mr O'Donoghue's suggestion that these references are purely geographical in nature, confining headquarter involvement to the geographical location of headquarters and Governor involvement to the geographical location of the prison. That would constitute a wholly artificial fetter on the necessary task of a disciplinary investigation and subsequent charges against at the highest levels. The facts of this case betray the anomaly that such a confined interpretation would throw up.

[47] I find unconvincing Mr O'Donoghue's assertion that the guidance at paragraphs 3, 9, 10, 11, 14 and 17 significantly makes reference only to governors carrying out investigations. He argued that this is another indication that it is the governors who are responsible for such matters and not headquarters.

[48] In the first place, it is important to appreciate that the document concerned is a "guidance to managers". This is an internal document comparable to policy documents. It is not to be regarded as a statutory document. Accordingly it is not to be subjected to fine analysis so as to interpret it in the way one would a statute (see also Auld J in R v Secretary of State for the Home Department, ex parte Engin Ozminnos (1994) Imm Arr 287 at 292). It may well be based on the normal experience of what has happened historically where generally speaking governors are involved in these steps. Significantly, for example, paragraph 5.3 of the guidance makes no reference to paragraph 5.5 of the code which embraces exceptional circumstances where headquarters will have to be involved in conducting the investigation. I consider therefore that the guidance is a general approach to the usual circumstances that obtain in the prison and does not necessarily embrace exceptional circumstances such as the present case. That the usual pattern had been for governors to deal with disciplinary matters did not create an implied representation or binding custom and practice so that the applicant could reasonably expect this pattern would be continued even in

exceptional circumstances such as the present. Not all past practice justifies a legitimate expectation that the practice will continue in all circumstances .

[49] I pause to observe that I find no substance in Mr O'Donoghue's submission that appeals could not be carried out if HQ staff were involved in the preferring of disciplinary charges. That will be a fact specific matter in each instance but I see no reason why there should not be independent members of HQ who have not been materially involved in an investigation or the drawing up of charges. Mere outline notice of what was going on in the process would be unlikely to render such people unsuitable to carry out an independent appeal procedure.

[50] I have therefore come to the conclusion that disciplinary charges need not be preferred or disciplinary hearings convened by a ranking governor in all cases albeit that will be the usual procedure in the vast majority of disciplinary cases. I am satisfied it was appropriate for Mr Max Murray to act as he did in this instance by asking Governor Alcock the deputy governor at Hydebank Wood to implement his decision to charge the various individuals.

[51] If I am wrong in that conclusion and have incorrectly interpreted the Rules, the COCD and the guidance analysed above, I consider that there is merit in Mr Dunlop's alternative argument that Mr Murray, as Director of Operations, acts in a position where he can impose directions on governors and has the power to direct on behalf of the Secretary of State pursuant to the Carltona principle (see paragraph 31 of this judgment). Rule 116(4) of the 1995 Rules provides that "subject to any direction from the Secretary of State", the governor shall have authority over all officers and employees on the staff of the prison. I consider that this is a delegable power which is not required to be performed by the Secretary of State and can be exercised at different levels including by Mr Max Murray who was head of division. Consequently if I am wrong in concluding that disciplinary proceedings can be initiated by persons other than the governor of the prison, I am satisfied that the Carltona principle enabled Mr Murray to direct Governor Alcock to act as he did in this matter.

[52] Mr Dunlop raised a further alternative in the event of the court determining that there had been a breach in procedure by virtue of Mr Murray's participation in this matter. It was his submission that such a breach amounted to a procedural failure and was not one of substance. In a number of recent cases the courts have displayed flexibility in the face of breaches of imperative language. In Jeyeanthan's case the Court of Appeal considered the consequence of the Secretary of State failing to use a prescribed form for applying for leave from the Special Adjudicator to the Immigration Appeals Tribunal. The only difference between the form used and the prescribed form was the absence of a declaration of truth. Lord Woolf adopted the dictum of Lord Hailsham in London and Clydesdale

Estates (1980) 1 WLR 182. Eschewing a rigid adherence to the language of "mandatory" and "directory", it was held that the matter should be judged upon the overall intent of the legislation and the interests of justice. In particular, if there had been "substantial compliance" with the requirement, and if the irregularity was capable of being waived, then whether the non-compliance could be justified depended upon the consequences of non-compliance which, in the circumstances of that case, did not materially prejudice the appellants. De Smith's Judicial Review 6th Edition at paragraphs 5-061 et seq indicates that a similar approach has been adopted in Commonwealth countries. In Northern Ireland in Re Application for Judicial Review (2007) NIQB 64, a Divisional Court in Northern Ireland upheld the validity of an order made by a magistrate notwithstanding a procedural failure to follow the statutory requirements in making a special measures direction with reference to a witness in a criminal trial.

[53] Recently in R v Clarke and R v McDaid (2008) UKHL 8,("McDaid's case") the House of Lords considered the effect of a trial that had taken place in circumstances where the indictment had never been signed. Their Lordships held that in those circumstances the indictment was a nullity and the trial consequently of no effect. This finding was founded upon their conclusion as to the intention of Parliament. In his speech at paragraphs 18 and 19 Lord Bingham of Cornhill said:

> "18. What did Parliament intend the consequence to be, when it enacted Sections 1 and 2 of the 1933 Act, if a bill of indictment was preferred but not signed by the proper officer? That, as I think both parties agree, is the question to be considered in this case. Although Section 1 has been repealed and Section 2 has been amended, it is not suggested that the answer to the question has changed. The 'always speaking' principle has no application. The answer to the question now is the same as should have been given then. It is inescapable: Parliament intended that the bill should not become an indictment unless and until it was duly signed by the proper officer.
>
> 19. It is necessary to ask a second question. What did Parliament intend the consequence to be if there were a bill of indictment but no indictment? The answer, based on the language of the legislation and reflected in 70 years of consistent judicial interpretation, is again inescapable: Parliament intended that there could be no valid trial on indictment if there were no indictment. Parliament has never enacted, with reference to proceedings on

> indictment, a provision comparable with Section 123 of the Magistrates' Courts Act 1980, but even that section has received a restricted interpretation: see New Southgate Metals Limited v London Borough of Islington (1996) Crim. LR 334-335."

[54] McDaid's case was recently considered in R v Marchese (2008) EWCA Crim 389 No. 2007/01032/B2 by the Court of Appeal Criminal Division in England and Wales. The court considered whether an indictment which was duplicitous was rendered a nullity. The court distinguished McDaid's case at least partly on the basis that a precedent authority had held that duplicity is a matter of form and not substance.

[55] Subject to my conclusion about the applicability of the Carltona principle, had I concluded that Parliament in the 1995 legislation and the Secretary of State in the COCD had intended that only governors would be permitted to exercise disciplinary functions against the officers, I would have inclined to the view that the principles in McDaid's case applied in this instance. The exercise of the appropriate discretion before the issuing of proceedings is a matter that might vary from officer to officer. Accordingly if Parliament had intended, as I have found it has not, that that discretion should be exercised only by a governor, then I would have considered that a matter of substance rather than mere form. It could not have been said that there had been substantial compliance. However since I have found that the purpose of the legislation and the COCD was not to confine such steps to the governor, it has been unnecessary for me to make a definitive conclusion on this matter.

[56] I find no substance in the second ground of relief sought by the applicant namely that the methodology employed by the respondent in the investigation was procedurally unfair and had failed to include an investigation of governors. I do not consider that a proper investigation required, as asserted Mr O'Donoghue, a full investigation of all existing staff and not merely a portion of 25%.

[57] I can deal with my reasons for so concluding in short compass. First, I find as a matter of fact that the investigation into overtime fraud and improper claims for additional payments did include investigation of governors' records. I am satisfied that Governor Gray's affidavit makes this patently clear. There is no reason to disbelieve his assertion in this regard.

[58] Secondly, in considering the methodology deployed by the respondent in this matter, it is important to appreciate that in judicial review the courts should usually abstain from a merits review or retaking the decision on the facts. In appropriate classes of case the court will of course look very closely at the process by which the facts have been ascertained and at the logic of

inferences drawn from them. However in this case it was Governor Gray and not the court that was the body charged with the duty of investigating and evaluating the evidence and finding the facts. It is only where that investigation has misdirected itself in law, or the decision is so illogical or irrational so that no sensible person applying his mind to the question could have decided to ascertain the facts in this manner or come to the conclusion that he or Mr Murray did, that the courts should intervene. I do not believe that it is the role of the court to set about forming its own preferred view of how the task of investigation could have been pursued (see Lord Clyde in Reid v Secretary of State for Scotland (1999) 2 AC 512 at 514F-542A). In short I find nothing inherently unacceptable or unfair in approaching this task by way of a 25% sample in order to make an assessment of the nature of the fraud taking place. It must be remembered that this operation took three months with three senior staff working on it (see paragraph 14 of this judgment). I have no doubt that the Respondent is entitled to bear in mind resource implications given that it is a publicly funded body. In the event of the 75 staff examined only a small percentage were found to have engaged in allegedly fraudulent claims and that in itself seems a justification of the random sample approach. Accordingly I reject this ground of relief sought by the applicant.

[59] I dismiss the applicant's claim. I shall ask counsel to address me on the issue of costs.