

# Judicial Communications Office

23 January 2024

## COURT HOLDS THAT POLICE MISCONDUCT PROVISIONS DO NOT APPLY TO OFFICERS PRE-ATTESTATION

### Summary of Judgment

The Court of Appeal<sup>1</sup> today held that a police disciplinary panel did not have jurisdiction to hear a misconduct charge in respect of a failure to disclose information by the appellant when he was applying to join the police as he was not a police officer at the time.

Gareth Watson (“the appellant”) applied to join the Police Service of Northern Ireland (“PSNI”) in April 2016. As part of the application process, he completed a questionnaire as part of the security vetting procedure. He began his police training in January 2017 and was formally attested as a constable in June 2017. It later became clear, however, that he had not disclosed details of two periods of part-time employment that he had held within the five years prior to completion of the questionnaire. This was considered significant as he had been given a warning for gross misconduct in the course of one of the jobs and had made unauthorised payments to himself in the course of the other.

When police authorities became aware of this, a misconduct charge was brought against him in March 2021 on the basis that he had made a “false declaration” when completing the vetting questionnaire and that he “failed at any time thereafter to correct the falsity”. This conduct was said to be in breach of a number of provisions of the PSNI Code of Ethics (“the Code”) and to amount to gross misconduct. The appellant asserted he had not been a constable when he had signed the vetting questionnaire and, therefore, the misconduct panel (“the Panel”) appointed to hear and determine the matter did not have jurisdiction to consider the allegations. The Panel, however, determined that it did have jurisdiction as from the moment of attestation (but not before) a police officer in the appellant’s position was “under an immediate and ongoing duty to ensure that his superiors are in receipt of full disclosure of any and all information previously sought”, including that sought in the vetting questionnaire. The Panel also concluded that, even assuming there had been good reason for the initial non-disclosure of the information, “an attested officer is not absolved from correcting or completing that disclosure immediately and certainly as soon as practicably possible upon attestation”. Also, the obligation to correct the record was “an ongoing, career-long obligation”. The basis for the Panel’s jurisdiction in this case came to be termed the “ongoing duty point”.

The appellant sought to quash the Panel’s decision on the basis that it lacked jurisdiction to hear and determine the charge but the application for judicial review was dismissed. The appellant then sought to appeal, but after initiating this he resigned from the PSNI with effect from 1 March 2023. The outcome of the appeal therefore became academic. However the Court of Appeal, in the exercise of its discretion, proceeded to hear and determine it on the basis that this was a case of public interest raising an issue which may arise in a number of cases in future both in this jurisdiction but also in the rest of the UK. The English and Scottish Police Federations were

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<sup>1</sup> The panel was Keegan LCJ, Treacy LJ and Scofield J. Scofield J delivered the judgment of the court.

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permitted to participate in the proceedings as interveners. The PSNI Professional Standards Department (“PSD”) was also an intervener.

## **The interpretation point**

The focus of the argument on appeal was on the issue of whether the Police (Conduct) Regulations (Northern Ireland) 2016 (“the 2016 Regulations”) conferred power to adjudicate on pre-attestation conduct (referred to as “the interpretation point”). The judge at first instance had concluded that the correct interpretation of the Code and the 2016 Regulations was that a police officer could be guilty of misconduct, and disciplined accordingly, in respect of behaviour which occurred before his attestation as a constable. This conclusion was reached primarily on the basis that disciplinary jurisdiction was conferred by reason of the individual being a serving member of the police *at the time of those proceedings* rather than when the misconduct occurred.

The Court of Appeal, however, reached a different conclusion and considered that the judge had gone beyond the proper interpretation of both the Code and the 2016 Regulations. The court accepted that the Code applies only to police officers which it said was the ordinary and natural meaning of its terms. A similar point could be made in relation to the Police (Northern Ireland) Act 1998 (“the 1998 Act”) and the 2016 Regulations as they govern disciplinary procedures relating to “members”, which the court considered refers to members of the police service which again was the ordinary and natural meaning.

The court accepted the appellant’s submission that a person cannot breach the Code at a time when they are not subject to it because they are not then a police officer. It said this was consistent with how the relevant terms are to be read within the 1998 Act. The court felt able to resolve the argument in relation to the interpretation point by means of a simple process of construing the words used in the Code and the relevant statutory provisions. It was also fortified in its conclusion by the following ancillary matters:

- Section 25(2)(e) of the 1998 Act permits regulations to deal with conduct that relates to conduct as police officers, ie, having being sworn in to perform that function and whilst capable of exercising the powers of that office;
- Section 38(1) of the Police (Northern Ireland) Act 2000 (“the 2000 Act”) sets out the statutory declaration to be made by a police officer at attestation and makes clear that the officer affirms prospectively that he or she “will” discharge the duties of the office consistently with the standards required in the Code. The court said it does not purport to require a declaration of prior, historical compliance.
- The Explanatory Notes to the 2016 Regulations also indicate that the Code sets out professional behaviour expected “of members”, breach of which may constitute a matter of performance, misconduct or gross misconduct.
- The effect of embuing the Code or the 2016 Regulations with a retrospective effect would require to have been expressed in clear words which are absent from the Code and the statutory scheme. The court considered in this instance that the legislature would not have intended the provisions of the Code to apply to unattested individuals and, indeed, it was unfair to hold them to the provisions of the Code as if they were police officers at the time of the relevant conduct.
- The only instance where all parties accepted that the Code had an element of retroactive effect was where an officer (whilst a police officer) is convicted of a criminal offence which was committed at a time before he or she became a police officer. This instance of pre-

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attestation conduct giving rise to potential conduct sanctions was an exception rather than the rule.

- The interpretation adopted by the judge gave rise to a potential practical difficulty which the court considered could not have been intended. Article 7.3 of the Code, if interpreted as having effect prior to attestation, could result in a person who was to become a police officer would be under an obligation to report potential misconduct on the part of another person who was later to become a police officer, even at the time when both persons were not constables. The court did not consider that the Code and 2016 Regulations were intended to operate in this way.

The court agreed with all that the first instance judge had to say about the importance of maintaining public confidence in the police service, which is an important aspect of the rule of law:

“It is undoubtedly of the highest importance that improper behaviour on the part of police officers, whilst they are police officers, is brought to light and dealt with, whether they are on or off duty at the time of the relevant misconduct. However, improper behaviour which occurs *before* the individual becomes a member of the police service is a different category. It might well render that person unfit to be trusted with the office of constable and its attendant powers; and it is just as important that such matters come to light and have appropriate consequences; but this will not amount to *police* misconduct.”

The court said the appropriate means of addressing pre-attestation conduct which renders a candidate unsuitable for service as a police constable is in a robust vetting regime. Where, as in this case, the vetting regime fails because of a lack of candour in a candidate’s responses which only later comes to light, it is right that some mechanism exists (where appropriate) for this to have consequences for that individual in the capacity as a police officer. The court suggested this could be met by a simple mechanism of requiring a sworn officer, post-attestation, to confirm the accuracy and completeness of the information previously submitted by him or her in their application to join the police service. If an untruthful answer was provided at that stage it could found a misconduct charge arising from conduct when the individual was subject to the Code:

“If such a procedure is not presently required, we would urge that serious consideration is given to its introduction. We consider that such a process may be preferable, at least in some cases, to relying merely on the withdrawal of a security clearance in the event that an irregularity in the vetting process is discovered. Whilst in most cases withdrawal of such clearance may result in an officer being unable to perform the duties of their role – since such clearance is necessary for individuals to be permitted unsupervised access to the police estate, its assets and infrastructure – in others there may be an argument that the officer can continue with their duties, or with alternative duties, notwithstanding the removal of a certain level of clearance. It yet other cases, it may be that an irregularity which is later discovered is not such as to warrant revocation of a clearance granted at the time of vetting. However, it may still be necessary to mark, and condignly punish, dishonesty.”

The court said that by requiring post-attestation confirmation of information provided at the vetting stage, the PSNI (and other police forces) would be able to ensure that the provision of incomplete or misleading information could properly be dealt with as an instance of misconduct committed whilst the individual was a police officer, where this was necessary. It added that

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consideration should perhaps also be given to including a catch-all requirement to disclose matters which would undermine public confidence in the police service if an individual was to secure admission. The court said it was proportionate to a legitimate aim to seek more information from candidates for the police service, given the nature of their role, than it might be in other contexts.

The court agreed with the PSNI's submission that incorrectly or incompletely filling out the vetting questionnaire should not be a "consequence-free action" but said it did not follow that the consequences should flow from a misconduct charge alleging breach of the Code at a time before the officer was subject to that Code. It said that other mechanisms already exist or may be introduced in order to deal with this issue, including withdrawal of vetting which may give rise to gross incompetence capable of being dealt with under the Police (Performance) Regulations (Northern Ireland) 2016; and/or requiring confirmation of vetting information at a time when the individual has become an officer, rendering them liable to misconduct charges if, in confirming the information previously given, they act in a way which contravenes any provision of the Code of Ethics. In addition, the court considered that such charges are already possible on the basis of the ongoing duty point.

## *The ongoing duty point*

This issue turned upon the proper meaning and interpretation of the Code rather than the 1998 Act or 2016 Regulations. The appellant accepted that the Code could be amended to provide an ongoing duty of disclosure in relation to pre-attestation conduct but the court did not consider this necessary. The court said Article 7, which deals with the requirement of integrity, including a requirement that police officers "shall not commit any act of corruption or dishonesty" and shall "oppose all such acts coming to their attention..." is plainly capable, in appropriate circumstances, of covering a situation where an individual knowingly keeps quiet about misleading or incomplete information which they are aware they previously provided for vetting purposes. It said the questionnaire and related declaration emphasise to a person applying to join the police, in clear terms, both the importance of providing full and honest disclosure and the continuing reliance which would be placed by the police on that obligation having been discharged.

The court rejected the appellant's submission that the basis of the duty can only be that the past conduct which should be disclosed was a breach of the Code, as otherwise there can be no duty to report it. It said the obligation that, once attested, a police officer shall act with integrity and/or shall not commit any act of dishonesty and must oppose any such act are capable of capturing a situation where that officer made a false declaration and, after attestation, keeps that matter to himself or herself:

"Whether or not that amounts to the commission of misconduct whilst a police officer will depend upon all of the circumstances. However, the mere fact that it might – and, in our view, on the evidence in the present case reasonably could – be found to represent misconduct is enough to see off any argument posing a knock-out blow to the Panel's jurisdiction."

The court held that it was plainly open to the Panel to take the view that it could enquire into whether the applicant had been guilty of misconduct in failing to volunteer the matters which had previously not been disclosed.

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## *Article 8 ECHR*

The appellant contended that his dismissal would represent an infringement of his Convention rights on the basis that it was not in accordance with law by reason of the vagueness of the duties imposed. The court rejected this contention. It said that in light of its conclusion on the interpretation point, an officer should only face misconduct charges in respect of conduct committed after their attestation, before which the Code will have been provided and explained to them. Whether any particular disciplinary sanction which is taken in response to pre-attestation conduct (on the basis of the ongoing duty point) is such as to violate an officer's article 8 rights must be determined on a case-by-case basis.

"There is no proper basis to conclude that the Panel's determination - that the misconduct proceedings should be permitted to proceed - represented or would inevitably give rise to a breach of the appellant's article 8 rights. The legitimate aims being pursued by the misconduct proceedings are both obvious and weighty. The expectation of privacy which the applicant enjoys in respect of the subject matter of the proceedings, if any, is highly attenuated given the nature and purpose of the vetting procedure to which the applicant voluntarily submitted. Since the appellant had now resigned from the police, it did not need to determine this aspect of his appeal and it did not appear to raise the type of issue which, in the exercise of the court's discretion, it should go on resolve for the benefit of future cases."

## *Conclusion*

The court said that in recent times, as a result of a number of high-profile cases of the most disturbing nature, there has been a wholly warranted and appropriate focus on the need to exclude or remove from the police individuals who are unfit to hold the office of constable. In the respondent's words, "... local and national discourse regarding trust in the police has scarcely been more heightened". Public confidence in the police is a factor of great importance in the maintenance of law and order in our polity. Improper behaviour on the part of police officers must not be left unchecked. The court added that that behaviour demonstrating that an individual is unfit to be a police officer should also be uncovered and acted upon. However, the relevant accountability mechanisms must operate in a suitable manner and in a way which is fair both to complainants (or the public) on the one hand and to police officers on the other.

The court:

- Allowed the appeal to the limited extent of setting aside the judge's conclusion that jurisdiction was conferred upon the Panel to hear a misconduct charge in respect of conduct when the applicant was not a police officer merely by reason of the applicant being a serving member of the PSNI at the time of the misconduct proceedings.
- Dismissed the remainder of the appeal.
- Considered that there are already mechanisms in place to deal with pre-attestation behaviour of significant concern on the part of an individual who subsequently becomes a police officer, namely a rigorous vetting process, the provisions of the Performance Regulations and/or the possibility of misconduct proceedings for breach of an ongoing duty. Nevertheless, it recommended consideration of amended processes in order to address these in future. Such an approach would promote legal certainty and would avoid the difficulties to which the PSD's preferred interpretation gives rise. If that is still

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considered inadequate by the PSD or their counterparts in GB forces that is a matter to be addressed by amendment of the relevant provisions.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://www.judiciaryni.uk/>).

**ENDS**

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