

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**IN THE MATTER OF AN APPLICATION BY PAULINE SHIELDS FOR  
JUDICIAL REVIEW**

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**CARSWELL LCJ**

This is an appeal from a decision of Kerr J given on 11 December 2001, whereby he dismissed the appellant's claim for judicial review of a decision of the Appeals Panel of the Royal Ulster Constabulary that because of periods of absence from duty she was not eligible for promotion to the rank of chief inspector. In reaching this decision the Appeals Panel applied the provisions of paragraph 9 of the RUC Force Order 10/2001 "Managing Attendance Policy" (the Force Order). The appellant challenged the decision on a number of grounds, but the judge rejected all the grounds argued before him and dismissed the application for judicial review. On the hearing of the appeal before us the appellant raised an issue of the vires of paragraph 9 of the Force Order, which had not been considered in the court below, and we heard argument on this as a separate and preliminary issue. This judgment contains our conclusions on that issue.

The appellant Pauline Shields is an inspector in the Police Service of Northern Ireland, formerly the Royal Ulster Constabulary. In the early part of 2001 she applied for promotion to the rank of chief inspector, but was deemed to be ineligible for promotion because of her sickness record, by reason of the application to her of the provisions of paragraph 9 of the Force Order, which provides:

“9. OTHER ACTION

(1) Officers whose performance does not meet the required standard will be subject to a series of warnings, coupled with review periods.

(2) Maternity related sickness will not be taken into consideration when determining eligibility for boards.

(3) Candidates' attendance records will not be available to force boards. Officers whose attendance does not meet the required standard will not be eligible to apply for any board for a promotion or a transfer to a specialist or other post. This decision will be taken by the district commander/head of department. Any officer who has been absent from duty through sickness over the previous two years for an average of more than fourteen days per year, or who has had more than eight spells of sickness during the same period [unless circumstances as outlined in paragraph 9(4) apply] will not be eligible for any board.

(4) All sickness absence, with the exception of maternity related sickness, will be taken into consideration in deciding whether any candidate is eligible for promotion or transfer. Where a candidate's record fails to meet the attendance criteria, mitigating circumstances will be taken into consideration. To ensure consistency, where there is doubt as to eligibility, the matter will be referred to the Chief Superintendent Personnel.

(5) Officers whose application for a board is rejected on the basis of their attendance record can make a personal appeal to the Chief Superintendent Personnel."

It is apparent from the affidavit of Mr Robert McDowell that the figure of 14 days per year was fixed because it represents what the Chief Constable regards as a reasonable average absence for sickness, based on the experience of the RUC until very recent years and on that of police forces in Great Britain.

The appellant was absent from duty on sick leave from 18 March 1999 to 7 June 1999 on account of an injury received on duty in a riot. She sustained another injury in a road traffic accident on her way to work on 13 November 1999 and was off duty until 10 January 2000 and again from 2 October 2000. She was still off duty at the time of her promotion application. She appealed to the Appeals Panel, which looked at further information furnished by the appellant and the contents of her medical file and computer personnel record. The Panel dismissed her appeal on 11 April 2001, expressing its conclusions as follows:

"The member has 3 periods of sickness. Periods 2 and 3 whilst accepted as Injury on Duty for the basis of pension purposes were not in the execution of duty - the member was travelling to work and therefore not performing duty. Medical evidence provided did not assist the Panel in accepting mitigating circumstances. Appeal is refused."

The appellant was given another opportunity to provide further information or new evidence in support of her appeal. The Panel met again and looked at her case, but again dismissed her appeal, in the following terms:

“The Panel considered the documentation submitted by the Appellant. No evidence was provided to support mitigation in relation to the on-going absence. Appeal is dismissed.”

The Force Order was introduced on 8 February 2001 after a period of discussion and consultation. The RUC had become concerned about the level of absence on sick leave, which was markedly higher than in most other forces. The Chief Constable decided to introduce a sickness policy to manage the issue of attendance at work. The Force Order is a comprehensive document, dealing with a number of issues relating to police officers’ sickness, its management within the force and the consequences on officers’ service and promotion. Paragraph 9, which we have quoted, relates to transfer and promotion.

Rules governing aspects of police work may be made either by Force Orders made by the Chief Constable or by regulations made by the Secretary of State. The Chief Constable’s power to make Force Orders derived from section 19(1) of the 1998 Act, which provided:

“The police force shall be under the direction and control of the Chief Constable”.

Section 19(1) has been repealed and replaced in virtually the same wording by section 33(1) of the Police (Northern Ireland) Act 2000 (the 2000 Act). The power conferred upon the Secretary of State is contained in section 25 of the Police (Northern Ireland) Act 1998, which is still in force. Section 25(1) provides:

“25.-(1) Subject to the provisions of this section, the Secretary of State may make regulations as to the

government, administration and conditions of service of members of the Royal Ulster Constabulary.”

Section 25(2) then provides that without prejudice to the generality of subsection (1), regulations under the section may make provision with respect to a list of matters:

“25.-(2) Without prejudice to the generality of subsection (1), regulations under this section may make provision with respect to -

- (a) the ranks to be held by members of the Royal Ulster Constabulary;
- (b) the qualifications for appointment and promotion of members of the Constabulary;
- (c) periods of service on probation;
- (d) voluntary retirement of members of the Constabulary;
- (e) the conduct, efficiency and effectiveness of members of the Constabulary and the maintenance of discipline;
- (f) the suspension or dismissal of members of the Constabulary from membership of that Constabulary and from the office of constable;
- (g) the maintenance of personal records of members of the Constabulary;
- (h) the duties which are or are not to be performed by members of the Constabulary;
- (i) the treatment as occasions of police duty of attendance at meetings of the Police Association and of any body recognised by the Secretary of State for the purposes of section 35;
- (j) the hours of duty, leave, pay and allowances of members of the Constabulary;

- (k) the pensions and gratuities in respect of service as a member of the Constabulary (including provision for the recognition for the purposes of such pensions and gratuities of service otherwise than as a member of the police force and for the payment and receipt of transfer values or of other lump sums made for the purpose of creating or restoring rights to such pensions and gratuities); and
- (l) the issue, use and return of equipment.”

The terms of section 25(1) and (2) substantially repeat those of section 25(1) and (2) of the Police Act (Northern Ireland) 1970, which conferred the same powers on the Ministry of Home Affairs, with a few minor differences in wording.

Section 22 of the 1998 Act provides for appointments and promotions:

“22. Appointments and promotions to any rank in the Royal Ulster Constabulary other than that of a senior officer shall be made, in accordance with regulations under section 25, by the Chief Constable.”

That provision was re-enacted by section 36(2) of the Police (Northern Ireland) Act 2000 in virtually identical terms. The Royal Ulster Constabulary (Promotion) Regulations 1995 were made by the Secretary of State under the predecessor legislation the Police Act (Northern Ireland) 1970. The only relevant provision for present purposes is Regulation 6, which provides that promotion from one rank to another rank shall be by selection. There is no provision in these regulations dealing with sickness absence, and we were informed that there are no other regulations extant which deal with promotion.

Mr Larkin QC for the appellant relied on the principle of interpretation encapsulated in the maxim *expressio unius exclusio alterius*. He pointed to the fact that under section 22 of the 1998 Act and section 36(2) of the 2000 Act promotions are to be made in accordance with regulations made by the Secretary of State under section 25 of the 1998 Act. Section 25 empowered him to make regulations governing the qualifications for promotion of members of the police service. He submitted that that power was exclusive to him and it was not open to the Chief Constable to invade the field by imposing qualifications for promotion by way of Force Order. He accepted that the Chief Constable might be able to make Force Orders governing other matters to do with promotions, such as administrative arrangements for considering applications for promotion. The question of qualifications for promotion, however, was outside the ambit of his powers and the only power to prescribe them lay with the Secretary of State.

Mr Maguire on behalf of the Chief Constable advanced the argument that the Secretary of State's power to make regulations and the Chief Constable's power to issue Force Orders constituted parallel systems of control. There were areas in which they overlapped, the present case being within one such area. In such a case it was open to either the Secretary of State or the Chief Constable to prescribe the qualifications for promotion. If in any area a Force Order were to conflict with a regulation, the latter would prevail; cf *Taylor v Chief Constable of the RUC* (1986, unreported) at page 8, per

Hutton J. He submitted that as there was no regulation covering the point the Force Order could validly do so.

The ambit of the matters specified in section 25(1) in respect of which the Secretary of State can make regulations is very wide, the government, administration and conditions of service of members of the RUC. So expressed, it appears to cover a very substantial proportion of the running of the police service. If the Secretary of State had exclusive power to make regulations as to such matters, there would be relatively little room for the making of Force Orders on any subject. We do not consider that that could have been the legislative intention, for the issue of Force Orders is a sensible and practical way of dealing with many matters for which they are entirely appropriate, and we believe that they were in regular use in the RUC long before the enactment of section 25 of the 1998 Act. There appears accordingly to be some substance in the proposition advanced by Mr Maguire, that they are parallel powers. We shall not attempt in this judgment to define the limits of the Chief Constable's power to issue Force Orders, which would not be an appropriate method of making provision for some of the topics specified in section 25(2). Equally, it might be more appropriate for other topics to be dealt with by the more flexible means of the issue of Force Orders rather than the elaborate procedure of making regulations. It does, however, appear to be clear that if the terms of a Force Order conflict with those of a regulation, the latter must prevail.



The present issue is concluded in favour of the appellant by section 22 of the 1998 Act (and now section 36(2) of the 2000 Act). Promotions are to be made in accordance with regulations under section 25. That in our view is intended to be exclusive, and Force Orders cannot validly prescribe matters relating to promotion. Paragraph 9 of the Force Order in question purports to do just that, by making officers with a sickness record of a certain level ineligible for promotion. We do not consider that the Chief Constable had power to issue a Force Order containing such provisions. If they are to be put into force, it will have to be done by regulation made under section 25.

This is sufficient to conclude the appeal in favour of the appellant, and we therefore shall not find it necessary to hear submissions or reach conclusions on the issues dealt with by Kerr J in his judgment. We shall allow the appeal and make a declaration that paragraphs 9(2), (3), (4) and (5) of the Force Order are *ultra vires* and void, together with an order of certiorari quashing the decision of the Appeal Panel that the appellant is ineligible for promotion to the rank of chief inspector.

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