

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Arkin's Application [2008] NIQB 154

**AN APPLICATION BY PAUL ANTHONY
PETER ARKINS FOR JUDICIAL REVIEW**

WEATHERUP J

[1] This is an application for judicial review of the decision of the Police Appeals Tribunal on 18 February 2008, dismissing an appeal by the applicant against a finding by a Police Service of Northern Ireland Misconduct Panel of 30 March 2007 at first instance and a review by the Chief Constable on 1 June 2007 that the applicant be required to resign as a constable as a result of his conviction on 15 December 2006 for driving with excess alcohol. Mr Coyle appeared for the applicant and Ms Murnaghan for the respondents.

[2] The applicant joined the Royal Ulster Constabulary Reserve in May 1991 and continued as a Reserve Constable until October 2003. At that time he entered the training college as a regular officer and graduated in March 2004. On 6 August 2006 he was detected off duty driving with excess alcohol with a reading of 67 micrograms of alcohol per 100 millilitres of breath (against a legal limit of 35 micrograms). On 15 December 2006, on conviction for driving with excess alcohol, the applicant was fined £120 and banned from driving for 12 months, later reduced to 9 months.

[3] On 5 June 2006 the Chief Constable had issued General Order 26/2006 entitled "Discipline Sanctions for Police Officers Convicted of Drink Driving Offences" which stated as follows –

"1. Background.

(1) The Home Office and Police Service of Northern Ireland are committed to reducing incidents of drink driving, both generally

and within the Service. As such, the PSNI has adopted Annex N of the Police (Conduct) Regulations 1999 Home Office/ACPO Joint Guidelines regarding police officers convicted of drink driving offences.

(2) The damage done to the reputation of the Service by officers convicted of these offences cannot be overstated and detracts from the credibility of the Service in this crucial area of law enforcement.

2. Disciplinary Hearing

(1) An officer convicted by a court of a drink driving offence can expect to face a formal disciplinary hearing. The usual sanction to be applied is either dismissal or a requirement to resign to reflect the serious view which is taken, both inside the Service and by society generally.

(2) A discipline panel will always treat each case on its merits but officers presiding at such hearings must apply their judgment to the facts of the case to consider whether or an alternative sanction could be justified. Aggravating factors in considering the seriousness of the offence include where –

- (a) the offence was committed on duty;
- (b) there is an attempt to avoid arrest;
- (c) there is an attempt to interfere with due process, but particularly by leaving the scene or improperly using their position as a police officer;
- (d) the alcohol reading is particularly high;
- (e) the offence derives from a traffic collision or other incident involving a member of the public;
- (f) given the nature of policing within Northern Ireland, cognisance will also be given to whether the officer is in possession of a firearm.

3. Only in cases where none of these circumstances exists and there are exceptional circumstances should a lesser sanction be imposed. When this happens the reasons should be clearly set out and recorded.

4. Certification

This guidance has been drafted in accordance with the Human Rights Act, Section 75 Northern Ireland Act, the PSNI Integrity Standards and the Code of Ethics.

5. General

This General Order reiterates the contents of the Deputy Chief Constable's email dated 2 May 2006."

[4] Disciplinary proceedings were initiated against the applicant and further to the hearing before the Misconduct Panel on 30 March 2007 the applicant was required to resign as a constable. The misconduct hearing took place at the PSNI Professional Standards Department before an Assistant Chief Constable, a Chief Superintendent and a Superintendent. ACC Gillespie, in outlining the decision of the Misconduct Panel, identified two aggravating factors, being in the first place the particularly high reading for alcohol and secondly, the timing of the offence given the on-going public debate on the issue of police officers drinking and driving and internal communications on the unacceptability of such conduct. Six mitigating factors were identified namely the applicant's Commander's positive character reference, the early plea, letters from members of the public, the personal appearance of an elected representative, the applicant's value in solving community problems and the applicant's apology. The ACC referred to General Order 26/2006 relating to the discipline sanctions for officers convicted of drink driving offences. In considering the appropriate sanction the ACC stated that a caution or reprimand would be unduly lenient, reduction in rank was not applicable, dismissal was unduly severe, a fine or reduction in pay were disproportionately lenient and that there was no alternative but to require the applicant to resign from the PSNI.

[5] A Chief Constable's Review was conducted at police headquarters on 1 June 2007 and the decision of the Misconduct Panel was upheld. The applicant then appealed to the Police Appeals Tribunal which conducted a hearing on 18 February 2008. The Tribunal comprised Ms McGaughey, the legally qualified chair, a retired Chief Constable, a retired Chief Inspector and a member of the Policing Board. The written decision of Ms McGaughey referred to the background circumstances, the arguments of Counsel for the applicant and the Chief Constable and noted their agreement that the Tribunal's task was to determine whether the outcome of the disciplinary proceedings before the Misconduct Panel was reasonable. It was noted that that agreement accorded with NIO guidance to the effect that where an appeal was against sanction only the Tribunal would determine whether the sanction imposed could reasonably be considered to be an appropriate response to the appellant's conduct or performance. Reference was made to the history and status of General Order 26/2006 and to the earlier email from

the Deputy Chief Constable referred to at the end of the General Order, which in turn referred to the “guidelines” that were to be issued, this being a reference to the forthcoming General Order. Ms McGaughey noted and endorsed the Misconduct Panel’s finding that the list of aggravating factors in the General Order was not exhaustive, stated that the Misconduct Panel was not in error in finding that the breath alcohol level was particularly high in all the circumstances, that the Tribunal was not persuaded that exceptional circumstances in the context of the General Order encompassed factors far beyond the offence itself, that the Misconduct Panel’s decision properly identified and considered the full range of mitigating factors advanced on behalf of the applicant. The Tribunal concluded that the decision to require the applicant to resign was proportionate in all the circumstances. In a replying affidavit Ms McGaughey referred to the General Order as “affording useful guidance as to the approach we should take”.

[6] The applicant’s grounds for judicial review are as follows –

The decision of the Police Appeal Tribunal followed General Order 26/2006 5 June 2006 and the same in reality and actuality unlawfully fetters the discretion of any panel by the inclusion of the words at point 2(1) of “the usual sanction to be applied is either dismissal or requirement to resign” and the formula in point 2(3) “Only in cases where none of these circumstances exists and there are exceptional circumstances should a lesser sanction be imposed”. That sanction is therefore prescribed to be the norm and usual. Such a stipulation is illegal. In consequence, the criteria for dismissal which impels any tribunal or appellate body to one outcome, dismissal or requirement to resign, thereby in actuality unlawfully restricts any discretion. If there is but one probable outcome then there is no fairness or legality in the appellate process, such as was applied to the applicant.

[7] The applicant contends that there is conflict between paragraphs 2 and 3 of the General Order in a number of respects. First of all, while paragraph 2(2) states that a Discipline Panel will always treat each case on its merits, paragraph 3 limits that discretion. Second, while paragraph 2(2) provides examples of aggravating factors, paragraph 3 provides no examples of exceptional circumstances. Third, a lesser sanction is only permitted where none of the aggravating factors exists and in addition there are exceptional circumstances. Fourth, paragraph 3 applies a two stage test by requiring the absence of aggravating factors and the presence of exceptional circumstances. Fifth, in effect there is a discretion only in the absence of aggravating factors. In addition the applicant complains that the Misconduct Panel and the Police

Appeals Tribunal found that the exceptional circumstances must relate to the offence and not to wider circumstances.

[8] The wording of paragraph 2(1) of the General Order provides that the “usual” sanction is either dismissal or a requirement to resign and that each disciplinary panel must decide each case on its merits and consider whether an alternative sanction can be justified. The wording of paragraph 3 provides that “only” where none of the specified aggravating factors applies “and” there are exceptional circumstances should a lesser sanction be imposed. This I will refer to as the “paragraph 3 framework”.

[9] The General Order makes reference to “guidance”, thus implying that the General Order was a matter that may be taken into account but that it did not amount to a direction to decision makers. The General Order, at paragraph 1(2), refers to the PSNI having adopted the “Joint Guidelines”, at paragraph 4 refers to the “guidance” in the General Order and at paragraph 5 refers to the Deputy Chief Constable’s email, which referred to the forthcoming “guidance” in the General Order.

[10] The applicant’s complaint relates to the “fettering of discretion” by decision makers in following the General Order. There may be one of two approaches to the General Order. In the first place the General Order may be treated as the basis of decision making in that it is in the nature of a direction and must be followed, so that the decision maker will apply the paragraph 3 framework. In that event the presence of one of the specified aggravating factors will require dismissal or resignation. A discretion as to the nature of exceptional circumstances would not affect the imposition of that sanction. On the other hand the General Order may be treated as amounting to guidance only, namely as a matter to which regard might be had but that it need not be followed. In that event the presence of one of the specified aggravating factors need not result in dismissal or resignation and the sanction to be imposed is at large.

[11] Detective Inspector Merrick of the Policy Unit of the PSNI Professional Standards Department, which had responsibility for issuing General Orders, prepared the General Order. DI Merrick states on affidavit that the guidelines were intended to afford discretion and a margin of appreciation to disciplinary panels and she refers to paragraph 2(2) of the General Order. Further DI Merrick states that it was not the intention of the General Order to constrain a disciplinary panel in its consideration of exceptional circumstances and that by paragraph 3 it was intended that a disciplinary panel should set out the exceptional circumstances justifying any lesser sanction and was not intended to constrain a disciplinary panel’s discretion.

[12] The basis of the rule against the fettering of discretion involves the balance of certainty and consistency on the one hand and responsiveness on the other, as described in De Smith’s Judicial Review 6th edition at page 480 -

“The underlying rationale of the rule against fettering discretion is to ensure that two perfectly legitimate values of public law, those of legal certainty and consistency (qualities at the heart of the principle of the rule of law), may be balanced by another equally legitimate public law value, namely, that of responsiveness. While allowing rules and policies to promote the former values, it insists that the full rigour of certainty and consistency be tempered by the willingness to make exceptions, to respond flexibly to unusual situations, and to apply justice to the individual case.”

[13] It is well recognised that a public authority may introduce a policy in relation to the exercise of discretion, provided that policy is compatible with the decision making power and is rational. The objection is to a blanket policy that dictates a predetermined outcome in all circumstances. However a policy may remain valid while providing for a different outcome in “exceptional circumstances”. In Findlay v. Secretary of State for the Home Department [1985] AC 318 the House of Lords upheld the policy of the Home Secretary of not allowing parole, save in exceptional circumstances and where no details of such circumstances were contained in the policy. Thus in the present case there could be no objection in principle to the General Order, if it were the case that it admitted of a different outcome only where there were exceptional circumstances and without providing any examples or guidelines as to the nature of such exceptional circumstances. However in the present case the exercise of discretion is further confined by the terms of the General Order in that exceptional circumstances operate only in the absence of one of the specified aggravating factors.

[14] Disciplinary proceedings against members of the police, other than senior officers, are provided for in the Police Service of Northern Ireland (Conduct) Regulations 2000 made under the Police (Northern Ireland) Act 1998. The Chief Constable is the disciplinary authority and appoints the Misconduct Panel from serving officers. The Chief Constable also has general control of the police. The General Order exhorts the discipline panel to justify a sanction other than dismissal or a requirement to resign. While expressed in terms of guidance it may be perceived that serving officers appointed to a discipline panel would find it difficult to regard the General Order as other than a direction. While the General Order does state that the sanction of dismissal or a requirement to resign is the “usual” sanction, the paragraph 3 framework provides that a lesser sanction may only be imposed where there are no specified aggravating factors and there are exceptional circumstances.

[15] Even if the General Order might be perceived as amounting to a direction to the serving officers on the discipline panel, that cannot be said to be the position in relation to the Police Appeals Tribunal. The Tribunal is established under the Police Service of Northern Ireland (Appeals) Regulations (Northern Ireland) 2000 and comprises a legally qualified chairman, a police officer from another force, a retired police officer and a lay member from the Policing Board. The decision of the Police Appeals Tribunal refers to the DCC email of 2 May 2006, referring to the 'guidelines' to be issued in the General Order. In setting out its approach the Tribunal refers to the circumstances of each case being fully considered and taken into account; the determining factors being the full circumstances of each case; the careful weighing of all the relevant factors in determining the appropriate outcome. Lest there is to be any doubt about the matter Ms McGaughey's affidavit refers to the General Order as having afforded 'useful guidance'. It is clear that the Tribunal did not consider itself bound to apply any blanket policy.

[16] Further I am satisfied that the Misconduct Panel did not regard the General Order as a direction. ACC Gillespie's decision refers to consideration of the available sanctions, ranging through caution and reprimand as being unduly lenient, reduction in rank as being inapplicable, fine and reduction in pay as being disproportionately lenient, dismissal as being unduly severe and there being no alternative to a requirement to resign.

[17] A Misconduct Panel should not regard the General Order as a direction. By its terms a finding of a specified aggravating factor must lead to dismissal or a requirement to resign; by its terms a finding of exceptional circumstances will not permit an escape from dismissal or a requirement to resign if one of the specified aggravating factors is present. Such an approach by a Misconduct Panel may not be saved by a Police Appeals Tribunal that treats the General Order as guidance only, because the Tribunal is not conducting a rehearing but considers appeals against sanctions on the basis of whether the original decision was 'an appropriate response'.

[18] The Misconduct Panel was satisfied that an aggravating factor was present in that the alcohol reading was regarded as particularly high. The Tribunal concluded that the Misconduct Panel had not been in error in finding that the alcohol reading was particularly high. The application of this factor cannot be a matter of setting a numerical limit and it was entirely reasonable that the Misconduct Panel and the Tribunal should regard the applicant's alcohol reading as particularly high.

[19] I conclude that the Tribunal did not regard the case as involving any exceptional circumstances. The Tribunal stated that it was not persuaded by the applicant's contention that exceptional circumstances, in the context of the General Order, could encompass factors "far beyond the offence itself". This appears to be a response to submissions by Counsel on behalf of the applicant

that exceptional circumstances encompass not only the personal history, record and reputation of the applicant “but the consequences of the sanction for the applicant and his dependants.” The consequences for any officer and his dependants of dismissal or a requirement to resign would clearly be severe and it is not apparent that there were any exceptional consequences for the applicant or his dependants. However I am not satisfied that the boundaries of exceptional circumstances should be limited in their nature. In the event no circumstances have been identified, that were not considered by the Misconduct Panel or the Tribunal, that might be regarded as exceptional or that might have had any bearing on the conclusion as to the appropriate sanction.

[20] I am satisfied that the Misconduct Panel and the Police Appeals Tribunal treated the General Order as a guideline only and that in the present case there was no fettering of discretion as to the sanction to be imposed on the applicant. In effect, while the terms of the General Order were taken into account, the Misconduct Panel and the Police Appeals Tribunal remained responsive to the circumstances of the particular case. The application for judicial review is dismissed.