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*Judgment: approved by the Court for handing down
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Cooke's (Jonathan) Application (Judicial Review) [2016] NIQB 38

**IN THE MATTER OF AN APPLICATION BY JONATHAN COOKE FOR
JUDICIAL REVIEW**

MORGAN LCJ

[1] The applicant is a serving police officer. He seeks a declaration that he remains on a select list for the purposes of promotion from the rank of sergeant to inspector. The respondent maintains that no such select list now exists. The basis upon which the applicant raises the matter is that he lodged a grievance concerning his entitlement to be considered for promotion which was rejected by the Chief Constable on 23 December 2014.

Background

[2] The applicant had been appointed to the rank of sergeant in the PSNI on 21 July 2006. He then set about undertaking the relevant steps for the purpose of promotion to the rank of inspector. By virtue of regulation 4(3) of the Royal Ulster Constabulary (Promotion) Regulations 1995 in order to be qualified for promotion to the rank of inspector a sergeant had to have obtained a pass in the qualifying examination for promotion and completed two years' service in the rank of sergeant. The applicant completed the written examination, OSPRE I, and the final part of the examination, OSPRE II, a scenario led work related assessment, in November 2007. At that time he received a letter setting out the following:

“For those officers who have less than two years' service in the rank of sergeant it is anticipated that there will be new promotion regulations introduced

in September 2008. As part of the proposed transition arrangements officers who currently hold passes in OSPRE II will have a future opportunity to make application for promotion.”

[3] The closing date for the 2008 promotion list was 18 April 2008. The applicant was not on that list as at that time he did not have two years’ service in the rank of sergeant. He was, however, eligible for temporary promotion which is available when a shortfall has been identified in a particular rank which is likely to be for a lengthy period in excess of 56 continuous days. The Temporary Promotion Guidance issued by the PSNI states that a protracted period in the higher rank on temporary salary or promotion does not provide an officer with any entitlement to substantive recognition in the higher rank or permanent posting to the role at the higher rank. He was approached by his chief inspector at Strand Road and asked to apply for temporary promotion to inspector. He did so and took up his temporary promotion of 21 July 2008. The PSNI best practice guidance in relation to temporary promotion required a review every six months. The applicant held his first temporary promotion until 31 March 2009. Unfortunately his daughter sustained serious injuries in a road traffic accident on 13 March 2009 and he returned to the rank of sergeant to spend more time looking after her. He was again promoted as a temporary inspector on 27 July 2009 and continued in that role until 25 May 2015 when he was replaced by a newly promoted inspector. Throughout his period as a temporary inspector he was assessed at regular intervals and received commendations for his performance. While acting at the rank of temporary inspector he also paid pension contributions appropriate to that rank.

[4] On 26 November 2008 PSNI recruitment issued an e-mail to all police concerning the promotion regulations and promotion to the ranks of sergeant and inspector. The message indicated that an amalgamation would occur of the current promotion select list with the new select list resulting from the December 2008 promotion protocol. Those officers not promoted on the 2008 promotion select list would achieve priority. Next in line would come officers such as the applicant who were qualified but not at that time on a promotion select list. They could apply for the December 2008 promotion protocol. Those who did so were to be placed in chronological order with officers holding the oldest passes of the relevant examinations at the top. Below those were officers who passed the final part of the examination of November 2008 and met the eligibility criteria. On foot of that arrangement the applicant was duly placed on the 2009 promotion select list.

[5] The e-mail of 26 November 2008 repeated information provided in an earlier e-mail of 6 November indicating that it was envisaged that the number of officers placed on the select list would exceed the number of vacancies. If officers were not promoted off the select list by 31 December 2010 they would no longer retain their current entitlement to promotion within the PSNI.

[6] These changes heralded the intention to introduce new promotion regulations. Rather than create selection lists from which those who passed examinations could then be promoted to the rank of sergeant or inspector as permanent vacancies arose it was intended to move to a system where promotion was to be achieved on the basis of selection, largely by a qualifying examination. The Police Service of Northern Ireland (Promotion) Regulations 2008 (the 2008 Regulations) were made on 1 December 2008 and came into operation on 31 December 2008. Regulation 3 (4) provided that a member who immediately before the coming into operation of the 2008 Regulations was qualified for promotion to the rank of inspector and had not been promoted to that rank could be selected for promotion during the period ending 31 December 2010 without undertaking a selection examination under the 2008 Regulations. For those who had not been promoted by that date Schedule 1 (4) of the 2008 Regulations provided that a sergeant who had obtained a pass in Part I of the qualifying examination for promotion to the rank of inspector under the 1995 Regulations may take Part II of the first selection examination to be held under the 2008 Regulations without obtaining a pass in Part I of that selection examination.

[7] On 1 April 2009 the applicant attended a briefing session in respect of the new arrangements organised by ACC Gillespie at Maydown. He had previously established from the head of PSNI Recruitment and Selection that all those on the 2008 select list for promotion had been promoted. He was informed that on 23 December 2008 he was 19th on the select list and by 1 April 2010 he was advised that his position was 17th. At that briefing he noted that he had not been able to avail of the 2008 select list because he had not completed two years in the rank of sergeant but noted that the two-year rule did not apply under the new promotion regulations.

[8] Although it is clear that it was anticipated that there might be a selection examination under the 2008 Regulations in 2010 that did not occur. That appears to have been the product of a re-assessment of the appropriate ratio between various ranks within the organisation leading to a reduction in the numbers sought at inspector level. Promotions were largely confined to specialist posts and a significant number of those on the 2009 selection list did not achieve promotion to the rank of inspector. By an email dated 19 March 2009 all staff were informed that budgetary pressures indicated that there would be limited opportunities for promotion to the ranks of sergeant or inspector. The next selection examination took place on 4 February 2015 and the applicant declined to participate. He was subsequently returned to duties as a sergeant.

The grounds of challenge

[9] The sole ground upon which the application is pursued is that the applicant had an expectation that he would remain on a select list for promotion without having to take further examinations. The particulars of this claim contended that the legitimate expectation arose in two ways. The first was that having been placed on

the select list for promotion for 2009 there was an established course of conduct that those on that selection list would be promoted when vacancies arose. The applicant indicated that at the briefing meeting on 1 April 2009 it was indicated that there were vacancies likely to occur as a result of which he was likely to be promoted having regard to his position on the selection list.

[10] The second basis upon which the applicant asserted that he had a legitimate expectation of promotion upon vacancies arising was on the basis that he had been temporarily promoted in 2008 to the rank of inspector on a six-month contract. His Order 53 statement said that the contracts were successively renewed. That is incorrect. There was a gap between 31 March 2009 and 27 July 2009. He spent approximately 7 years in the role of temporary inspector and pointed out that the policy on temporary promotion indicated that it should normally apply for only two years. He was paid at the rank of inspector and made pension contributions accordingly. As a result of his return to the rank of sergeant he will not receive any increase in his pension. That is a feature of temporary promotion.

[11] The principal authority on which the applicant relied was R (Simpson) v Chief Constable of Greater Manchester Police [2013] EWHC 1858 (Admin). In that case the process for promotion to the ranks of sergeant and inspector in Greater Manchester Police were that candidates needed first to pass appropriate tests. They then had to pass the "live assessment stage" at which stage the policy indicated that successful candidates would be promoted subject to an appropriate vacancy being available and a professional standards check. On 26 April 2010 a decision was made to place a freeze on the promotion system. Those who had passed were advised that when the promotion process was reinstated it may not continue in the same way. In March 2012 those officers were advised that they would need to reapply along with any other eligible officers when the force was in a position to reinstate any promotion processes. Supperstone J held that the policy and past practice amounted to a promise that was clear, unambiguous and devoid of relevant qualification. He concluded that the removal of the officers from the selection pool had been effected without consultation and no satisfactory reason for the removal had been provided.

Consideration

[12] The principles governing the establishment of a legitimate expectation were considered in this court by Girvan LJ in Loreto Grammar School's Application [2012] NICA 1:

“[42] Whatever undesirable uncertainties may exist in the law of substantive legitimate expectation, it is clear from the authorities that a legitimate expectation can only arise where there has been, in Bingham LJ's succinct terminology, a “clear and unambiguous representation devoid of relevant

qualifications” as to the decision maker’s future conduct (see for example Attorney General for Hong Kong v. Nvunyen Shieu [1983] 2 WLR 735, Bancoult [2009] 1 AC, Coughlan and Association of British Internees v. Secretary of State for Defence [2002] EWHC (Admin) 2119.) A legitimate expectation may arise from an express promise given by or on behalf of a public authority or it may arise from the existence of a clear and regular practice which a claimant can reasonably expect to continue (see for example Lord Fraser in Council for Civil Service Unions v. Minister for the Civil Service [1985] AC 374 at 401). It has been stated, for example, in R v. Falmouth and Truro Port Health Authority (ex parte South West Water Limited) [2001] QB 445 that ‘only the clearest of assurances can give rise to a legitimate expectation’ (per Simon Brown LJ and Pill LJ). The promise or representation must come close to the character of a contract (see Lord Wolff MR in R v. North and East Devon Health Authority (ex parte Coughlan) [2001] QB 21. In R (Niazi) SoS v. The Home Secretary Laws LJ held that the court must be able to find that the public authority has ‘distinctly promised’ before such a legitimate expectation can arise.”

[13] Turning then to the placement of the applicant on the 2009 select list as the first basis upon which he contended for the legitimate expectation, there are two impediments which individually prevent any such legitimate expectation arising. The first is the correspondence of November 2008 which makes it plain that entry onto the select list only gave rise to the opportunity for promotion in the period up to 31 December 2010. Once that date had been reached and the applicant had not been promoted he lost such entitlement to promotion as he had. Secondly, in any event the 2008 Regulations made that position absolutely clear. There was no challenge to the 2008 Regulations nor did the applicant make any challenge at the relevant time about his failure to be promoted on before 31 December 2010. He is plainly well outside any time limit for the making of any such complaint. In any event on the papers in this case there is nothing to suggest that he was individually disadvantaged as compared to others in a similar situation.

[14] There are, in my view, again two obvious impediments to the establishment of a legitimate expectation in respect of the period served by the applicant as a temporary inspector. The first is that it is clear on his own case that promotion to the rank of inspector was, prior to the 2008 Regulations, dependent upon being on a promotion select list. At the time of his first temporary promotion in July 2008 he was not on such a list and in those circumstances could not have asserted any

expectation that he would be promoted. Secondly, in any event the Temporary Promotion Guidance specifically excluded the suggestion that a prolonged period in a higher rank would give rise to any entitlement to a permanent role in that rank. By the time of his subsequent return to the rank of temporary inspector in July 2009 the picture had moved on even further with the introduction of the 2008 Regulations.

Conclusion

[15] In order to establish the legitimate expectation upon which he relied the applicant had to demonstrate that he was the beneficiary of a clear and unambiguous representation devoid of relevant qualification. Such a representation can be inferred from the existence of a clear and relevant practice which can be expected to continue. For the reasons given I consider that the temporary promotion to the rank of inspector in 2008 did not give rise to any such representation and the qualification contained within the Temporary Promotion Guidance would in any event have qualified any such representation so as to prevent a legitimate expectation arising.

[16] His placement on the 2009 promotion select list was preceded by an express indication in November 2008 that the list would only remain effective up to 31 December 2010 and that was copper fastened by the making of the 2008 Regulations which came into effect on 31 December 2008. The applicant took no steps to complain about the failure to promote him during that period and the material available does not indicate any unlawfulness in the fact that he was not so promoted.

[17] For the reasons given the application is dismissed.