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2008 No. 87172/01

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Giboney's Application No. 2 (Leave) [2008] NIQB 156

AN APPLICATION FOR JUDICIAL REVIEW BY HAZEL ANNE GIBONEY [NO. 2]

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HEADNOTE

Police officer – member of the RUC Part Time Reserve Force – injury on duty – application for injury on duty benefit – refusal – reasons for refusal - Regulation A10, Royal Ulster Constabulary Pension Regulations 1988 – definition of "member" – part time Reserve Constables excluded – Royal Ulster Constabulary Reserve (Part Time) (Appointment and Conditions of Service) Regulations 1996 - Police Service of Northern Ireland Reserve (Part Time) Regulations 2004 – application for judicial review – discontinuance of judicial review – Tribunal proceedings under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 – function of the Tribunal - attempted resurrection of judicial review proceedings – delay – misuse of process – presence or absence of public law element – practice – Order 53 Statement – particularisation of grounds of challenge.

McCLOSKEY J

I INTRODUCTION

[1] This is an application for leave to apply for judicial review in which Hazel Anne Giboney ("*the Applicant*") seeks to challenge the following:

> "*The decision of the Police Service of Northern Ireland communicated to the Applicant by letter dated 7th September 2004 …* [whereby] *the proposed Respondent did not consider the injury to the Applicant sustained ... on 19th September 2000 at Newtownstewart Police Station, County Tyrone as accepted for pay purposes on the grounds that the Applicant did not take*

> *reasonable care of* [sic] *her own safety whilst descending stairs and the decision taken on appeal communicated by letter to the Applicant of 23rd February 2005 to refuse the appeal of the earlier decision*".

[These are described hereinafter as "*the impugned determinations*"].

There is no dispute between the parties about the terms of the impugned determinations or the assertion which underpins them viz. the Applicant's claim that whilst on duty as a police officer at Newtownstewart Police Station, County Tyrone on 7th September 2004 she sustained injury. Furthermore, it is common case that at all material times the Applicant was employed by the proposed Respondent as a member of the Part Time Royal Ulster Constabulary Reserve ("*RUCR*").

[2] In the events which occurred, the court conducted a comprehensive inter-partes hearing in this matter, with contributions which included both written and oral submissions on behalf of the proposed Respondent. In the course of the hearing, the Applicant sought to amend the Order 53 Statement by incorporating the following additional ground of challenge:

> "*As a part time member of the Royal Ulster Constabulary Reserve Force, the Applicant was not as a matter of fact and of law ever eligible for payment of the injury on duty award as a consequence of her injury sustained on 19th September 2000. Consideration of the Applicant's request, in the manner which took place, and resulted in the two decisions of 7th September 2004 and 23rd February 2005 was beyond the powers of the decision makers. The decisions were therefore illegal and unlawful*".

This passage contains the *fourth* ground of challenge discussed in paragraphs [4] and [5] below. The argument was advanced on behalf of the Applicant that this amendment was unnecessary, as its contents were already reflected in grounds [B] and [F] of the Order 53 Statement. Ground [B] equates with the *first* of the grounds discussed in paragraph [4]. Ground [F] corresponds with the *second* ground. An examination of the formulation of these grounds coupled with, if necessary, some reflection on the history of this litigation confirms that this argument is without merit. In particular, the initial Order 53 Statement was, in these respects, a mirror image of the original Order 53 Statement in the first judicial review proceedings, which was prepared at a stage when the matrix giving rise to this further ground of challenge, constituted mainly by the letter dated 15th August 2005 from the Crown Solicitor's Office, was not in existence.

[3] At the conclusion of the hearing, I reserved my ruling on the application to amend. I conclude that, given that the proposed Respondent has had an opportunity to consider, and react to, the amendment mooted and bearing in mind the early stage of the proceedings, coupled with the desirability of all issues and

arguments being fully ventilated in the context of a protracted litigation saga featuring both the High Court and the Industrial Tribunal, it would be appropriate to permit the amendment to be made and I rule accordingly. I am also mindful of the usual practice whereby an Order 53 Statement may be amended without the permission of the court at any stage before determination of an application for leave to apply for judicial review. The amendment constitutes the *fourth* of the grounds of challenge summarised in paragraph [6] below.

[4] Some reflection on the grounds of challenge is appropriate. The *first* ground complains that the impugned determinations "*… fail to take into account all relevant information, and apply the Regulations properly, or at all*". Two observations about this ground are apposite. The first is that it appears to conflate two distinct species of challenge – one of the limbs of the ***Wednesbury*** doctrine and , in conjunction, error of law. The second is that it has no particulars. On the first day of hearing, this feature was highlighted by the court. On the second day of hearing (some two months later), a revised Order 53 Statement was submitted. In the revised version, the terms in which this ground were expressed remained unchanged. The court's subsequent attempts to elicit the particulars of this ground were unyielding. I would observe that where a judicial review Applicant seeks to challenge a decision on the familiar ground that the decision maker failed to take into account some relevant information or consideration, this complaint will almost inevitably be devoid of meaning in the absence of appropriate particulars and elaboration. This observation applies to the present case. Moreover, where a judicial review Applicant seeks to make the case that the impugned decision is vitiated on the ground that the decision maker failed to properly apply some provision of primary or secondary legislation, it will almost invariably be necessary (a) to identify the statutory provision/s in question and (b) to particularise the alleged failure. These elements were also absent from the Order 53 pleading, both original and revised, in the present case.

[5] Within the *second* ground of challenge, some conflation is also evident. This ground complains that the decision maker "*… misapplied and misunderstood the correct test to be applied …* [and] *… the decision was as a consequence irrational, and thereby unlawful*". This appears to contain mixed elements of asserted error of law and irrationality, complaints which are normally segregated from each other. While the *third* ground of challenge complains that the Applicant "*… has been deprived of an effective and fair appeal …*", the outworkings of this ground seem to merely repeat the earlier grounds. Moreover, no particulars of either the asserted right of appeal or the alleged denial of this right are provided. I would observe that the consideration that the appellate agency concurred with the first instance decision maker would not appear to constitute a denial of any right of appeal enjoyed by the Applicant. The *fourth and final* ground of challenge requires some interpretation. I construe it to advance the case that the impugned determinations were *ultra vires* the powers of the proposed Respondent in view of the Applicant's status as a part time member of the RUCR. The burden of this ground appears to have the twin components that (a) the Applicant was not eligible to be considered for the benefit and (b) the proposed Respondent, therefore, should have refused her application on this ground alone.

[6] Ultimately, it is the court's understanding that the Applicant seeks to challenge the impugned determinations on the following grounds:

(a) Error of law, by misapplying Regulation A10 of the 1988 Regulations.

(b) Irrationality.

(c) Deprivation of a fair appeal.

(d) A further error of law and/or *ultra vires,* based on the Applicant's asserted ineligibility.

The primary relief sought by the Applicant is an Order of Certiorari quashing the impugned determinations. In the alternative, various forms of declaratory relief are claimed.

II STATUTORY FRAMEWORK

[7] The background to these proceedings is somewhat protracted and convoluted. I shall outline in the following paragraphs, in summary form, the landmark dates and events of greatest significance. At the outset, it is appropriate to highlight Regulation A10 of the Royal Ulster Constabulary Pension Regulations 1988, which provides, so far as material, as follows:

> *"A10.(1) A reference in these regulations to an injury received in the execution of duty by a members means an injury received in the execution of that person's duty as a member.*
>
> *(2) For the purposes of these regulations an injury shall be treated as received by a person in the execution of his duty as a member if –*
>
> *(a) the member concerned received the injury while on duty or while on a journey necessary to enable him to report for duty or return home after duty, or*
> *(b) he would not have received the injury had he not been known to be a member, or*
> *(c) the Police Authority are of the opinion that the preceding condition may be satisfied and that the injury should be treated as one received as aforesaid.*
>
> *(3) For the purposes of these regulations an injury shall be treated as received without the default of the member concerned unless the injury is wholly or mainly due to his own serious and culpable negligence or misconduct.*

…"

The repeated appearance of the word "member" throughout these provisions is striking and in Schedule A to the 1988 Regulations, the following definition is found:

> "'*Member*' *means a member of the Royal Ulster Constabulary other than an auxiliary member and includes the Chief Constable and the Deputy Chief Constable*".

Although singularly phrased and structured, in the context in which it appears, the import of Regulation A10(3) would *appear* to be that (a) a member is disqualified if the injury is due to the member's default and (b) such default occurs where the injury "*is wholly or mainly due to his own serious and culpable negligence or misconduct*". Where negligence is concerned, it must be both serious *and* culpable. In passing, it is unclear whether one applies the same analysis to *misconduct.*

[8] It is also appropriate to refer to Regulation 19 of the Police Service of Northern Ireland Reserve (Part Time) Regulations 2004, which provides:

> *"**Sick pay***
>
> *19 – (1) Where a member loses remuneration in his private employment in consequence of an injury received in the execution of his duty as a member, he shall be entitled to an allowance by way of sick pay as hereinafter provided.*
>
> *(2) Except where the Secretary of State, at the request of the Chief Constable, determines otherwise in specific cases, the sick pay shall be payable for so long as the member continues to lose remuneration or for a period of 26 weeks, whichever is the less; and, subject to Regulation 20, the rate thereof shall be whichever is the lower of the following rates, that is to say –*
>
> *(a) the rate of such loss of remuneration,*
> *(b) the rate of pay to which he would have been entitled if he had been a member of the Police Service of Northern Ireland holding the rank of constable and his service as a reserve constable had been service as such a member."*

Thus a clear distinction is made between members of the PSNI who are constables and members of the PSNI Reserve. This distinction is reinforced by the definition of "*member*" in Regulation 2(1):

> "'*Member*' *means a member of the Police Service of Northern Ireland Reserve and includes a member who is suspended under the Conduct Regulations*".

I would add that the predecessor of Regulation 19 of the 2004 Regulations is Regulation 17 of the Royal Ulster Constabulary Reserve (Part Time) (Appointment and Conditions of Reserve) Regulations 1996. Regulation 2(1) of this code defined "*member*" as "*a member of the Force appointed on a part time basis …*".

Thus, in summary:

(a) The 1988 Regulations apply only to regular, full time police officers.

(b) The 2004 Regulations apply only to part time members of the PSNI Reserve.

III BACKGROUND

[9] This is the second judicial review application initiated by the Applicant. It is related to her first judicial review application, which was commenced on 11th May 2005 and amended in October 2005. Its subject matter was a challenge to the following determinations:

> "*The decision of the Police Service of Northern Ireland communicated to the Applicant by letter dated 7th September 2004 which did not consider the injury to the Applicant sustained at 11.40am on 19 September 2000 Police Station, County Tyrone as accepted for pay purposes on the ground that the Applicant did not take reasonable care of* [sic] *her own safety whilst descending stairs …*
>
> *And a subsequent decision communicated by letter from the Crown Solicitor's Office to the Applicant's solicitors … dated 12th August 2005, purporting to rely upon the application of the Police Service of Northern Ireland Reserve (Part Time) Regulations 2004 and particularly Regulation 19 thereof*".

The Applicant sought an Order of Certiorari challenging these decisions and, in the alternative, a variety of declarations. Fundamentally, the Applicant challenged the legality of the conclusion that she had failed to take reasonable care for her safety in relation to the accident which occurred on 19th September 2000, on what would appear to be the same grounds as those summarised in paragraph [6] (a) and (b) above. The Applicant also contended that the applicable statutory provision was Regulation A10 of the 1988 Regulations, as amended, rather than Regulation 19 of the 2004 Regulations. It will be apparent that by the present judicial review application, the Applicant seeks to challenge again the September 2004 determination, while omitting any further challenge to the letter dated 12th August 2005 from the Crown Solicitor's Office. With the exception of the new, fourth

ground of challenge (discussed in paragraphs [2] and [3] above, it seems to me that the grounds of challenge in the present application duplicate the original grounds.

[10] The injury on duty allegedly suffered by the Applicant was the subject of a formal "Injury on Duty Report", dated 11th May 2004, apparently completed by her, in the following terms:

> "*On 15 September 2000 at approximately 11.40pm whilst descending the station stairs I missed my step and tumbled down about ten steps before coming to rest in the hallway. Although I had some pain in my knee, finger and back I continued with my tour of duty until 8.00am. …*
>
> *An entry was made in the Accident Register at the station by Sergeant Irvine. Since this incident I had had* [sic] *intermittent pain in the affected area, which continues to the present*".

On 2nd June 2004, the Social Security Agency determined that this accident was an industrial accident within the meaning of the Social Security (Northern Ireland) Order 1998. On 1st September 2004, one Sergeant Catterson of Newtownstewart Police Station reported to the effect that the staircase in question was not defective, there was adequate lighting, there was a handrail *in situ* and the Applicant was using this, while descending the stairs at the beginning of a station security shift.

[11] This was followed by the impugned decision, expressed in a memorandum compiled by Ms Nixon, personnel manager, dated 7th September 2004, in these terms:

> "*The injury sustained has not been accepted for pay purposes for the following reasons:*
>
> *Members must take reasonable care of* [sic] *their own health and safety whilst descending stairs*".

The Applicant promptly notified her intention to lodge an appeal against this decision. This culminated in a further decision, made by Ms Burnet, whose designation is described as "Head of Personnel Rural", in a memorandum dated 15th February 2005, containing the following passages:

> "*3. I believe your decision is supported in this instance by the facts that the lighting was good in the area, the staircase was not defective, there was appropriate handrail and appropriate footwear was worn. There had to therefore be some other reason which was outside the control of the organisation and by the lack of any other information to determine the cause of the injury you are stating that it was within the officer's control.*

> *4. I do not see any information to support that the officer was culpable for this injury, however I do not see any information to state that there was anything which could otherwise have caused the injury.* ***On the balance of probability I have to therefore draw the conclusion that the fall was down to the officer's negligence in taking care to descend the stairs***".

[My emphasis].

The appeal was dismissed accordingly. If I have correctly understood the Applicant's grounds, the central thrust of her case appears to be that these decisions are vitiated on the ground that Regulation A10(3) employs the language "*serious and culpable negligence*", with the result that mere negligence or a mere failure to take reasonable care could not properly constitute a ground for refusal of the benefit.

[12] Following the initiation of the Applicant's first judicial review application, there was a letter dated 12th August 2005 from the Crown Solicitor's Office to the Applicant's solicitors containing the following passage:

> "*The relevant Regulations can be found in … the Police Service for Northern Ireland Reserve (Part Time) Regulations 2004. These Regulations revoked, inter alia, the* [1996 Regulations]. *I would draw your attention in particular to the Regulation relating to entitlement to sick pay. I understand that your client does not have 'private employment'*".

The Crown Solicitor's letter can be linked to the affidavit sworn by Ms Burnet on 23rd June 2006, which contains the following material averments:

> "*4. Having received legal advice concerning my decision of February 2005, privilege in relation to which is not waived, I am now satisfied that my decision in respect of the Applicant should have been to the effect that she, as a part time Reserve officer, has no entitlement to an injury on duty payment.*"

It would appear that the court granted leave to apply for judicial review on paper and, further, that a hearing date of 6th September 2005 had been determined.

[13] Both Ms Burnet's affidavit and the letter from the Crown Solicitor's Office were reflected in the Respondent's skeleton argument in the first judicial review proceedings, which contained the following passages:

> "*7. However on further investigation it transpired that as a part time Reservist the Applicant had no rights to an injury on duty award and this position was communicated to the Applicant's solicitor by letter from the Crown Solicitor's Office dated 12th August 2005.*

> *8. The Applicant's true position was that her employment was based on the* [1996 Regulations] …
>
> *9. Regulation 17 of the 1996 Regulations governed her case and this indicated that it was only where a member loses remuneration in her private employment in consequence of an injury on duty that any issue of the provision of sick pay arises.*
>
> *10. In the Applicant's case there was no such issue as the Applicant (unlike other part time Reservists) did not have a private employment.*
>
> *11. Under the 1996 Regulations, therefore, there was no fiscal benefit which the Applicant could derive from her employer in respect of the injury, whether it was or was not an injury on duty.*
>
> *12.* [This] *information* [was] *communicated by the Crown Solicitor's Office … with a view to ending the judicial review proceedings as it appeared to the Respondent that these had been taken in the belief that the Applicant had injury on duty rights*".

As further noted in the Respondent's skeleton argument, the letter dated 12th August 2005 from the Crown Solicitor's Office prompted the Applicant to amend her Order 53 Statement to advance a new and different case, to the effect that the 1996 Regulations contravened the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("*the 2000 Regulations*"), the complaint being that the 1996 Regulations treated full time police officers more favourably than part time police officers. The amendments also incorporated the following complaint:

> "*The later reliance by the Respondent through its solicitors by letter of 12th August 2005 … upon* [Regulation 19 of the 2004 Regulations] *is the first time reliance has been placed on this statutory provision by the Respondent. It was not prayed in aid by the original decision maker nor was it relied upon by the person considering the appeal to resist same. It is therefore a later invented reason and cannot cloak the original decision in legality*".

This averment was at no time revoked subsequently.

[14] The letter dated 12th August 2005 from the Crown Solicitor's Office had a further consequence of some significance. On 7th November 2005, the Applicant submitted an application to the Industrial Tribunal, containing the following complaint:

> "*I have been refused to be accepted as having sustained an injury on duty at Newtownstewart PSNI Station when I fell down stairs*

> *at that station on 15th September 2000 on the ultimate basis that I am not entitled by virtue of the* [2004 Regulations]. *This was communicated to me by my solicitor by letter dated 12th August 2005. I believe this is in breach of the* [2000 Regulations]".

At this stage, the Applicant was pursuing, in tandem, remedies in both the High Court and the Tribunal. Notwithstanding that they are now of three years' vintage, the Applicant's Tribunal proceedings remain unresolved. This delay is highly regrettable.

[15] There are two additional features of the still unresolved Tribunal proceedings which should be noted. Firstly, in the Respondent's Notice of Appearance, it is stated (*inter alia)*:

> "*(3) The original decision to refuse the Claimant's application was communicated to her on 7th September 2004. Following the Claimant's appeal and the decision of 23rd February 2005, there was no fresh consideration of her application. The Respondent therefore submits that the Tribunal does not have jurisdiction to hear the Claimant's complaint as it has been lodged outside of the relevant time period.*
>
> *(4) In the course of the Claimant's proceedings for judicial review (and as directed by the court) the Crown Solicitor's Office provided confirmation of the relevant Regulations* [re] *members of the* [RUCR], *by way of a letter of 12th August 2005. These Regulations provided further clarification as to why the Claimant was prima facie ineligible to receive a pension in her particular circumstances. However, the Respondent contends that the question of the applicability of the Regulations to the part time* [RUCR] *was not considered by the original decision maker in the Claimant's case, as it had been held that her application failed at the first hurdle, on the basis of her negligence in causing the subject accident.*
>
> *(5) It is submitted that the Claimant's attempt to portray the correspondence of 12th August 2005 from the Respondent's solicitor as constituting a 'decision' in relation to her application for a pension is fundamentally misconceived …*
>
> *(7) Furthermore, the Respondent contends that the Claimant, as a part-time member of the* [RUCR], *cannot come within the ambit of the 2000 Regulations.*
>
> *(8) The Respondent therefore denies that its actions in this regard amount to a breach of the 2000 Regulations, as alleged or at all.*

> *(9) The Claimant has not identified a comparable full time worker. The Respondent denies that the Claimant has been less favourably treated than a comparable full time worker*".

This Notice also highlights the amendment of the Order 53 Statement noted at the conclusion of paragraph [13] above. Secondly, by letter dated 14th January 2008, the Applicant's solicitors intimated the following amendment to their client's Tribunal application:

> "*The Applicant alleges that the failure to provide to her an injury on duty pension by the Respondent is an act of sex discrimination contrary to the Sex Discrimination (Northern Ireland) Order 1976 by reason of the greater number of females who are members of the Part Time Reserve proportionate to males and to full time officers. The discrimination alleged is therefore indirect discrimination.*"

This amendment was duly made, with the result that the Applicant is now advancing two separate types of discrimination complaints in the Tribunal proceedings.

[16] The Applicant's first application for judicial review had the following outcome. Following the amendments of the Order 53 Statement (as noted above) and receipt of the Respondent's affidavit evidence, the case was listed for hearing, on 20th March 2007. It did not proceed, evidently because the Applicant's legal representatives were giving active consideration to the possibility of discontinuance. On 8th May 2007, the Tribunal was informed by counsel for the Applicant that the judicial review application "*… was likely now to be withdrawn on terms between the parties …*". On 21st May 2007, the High Court made a consensual order dismissing the judicial review application, with no order as to costs *inter-partes*. Throughout this period, the Applicant's legal team consisted of senior counsel, junior counsel and her solicitor.

[17] During the progress of the Tribunal proceedings and following a case management hearing conducted on 8th May 2007, the Respondent submitted a document specifying the issues which, it contended, arose to be determined by the Tribunal. These include the following:

> "2. *Did the correspondence of 12th August 2005 from the Respondent's solicitor to the Applicant's solicitors constitute a 'decision' in relation to the Claimant's application for a pension?*
> …
>
> 5. *Can the Claimant, as a part time member of the Reserve Force of the PSNI, come within the ambit of the 2000 Regulations?*"

The remaining eight issues identified in this paper relate, broadly, to (a) time, (b) the 2000 Regulations and (c) the complaint of indirect sex discrimination. It would

appear from the submissions advanced to this court that this was an agreed statement of issues.

[18] On 13th June 2008, the Tribunal conducted a further case management hearing. This recorded that the substantive hearing of the Applicant's complaint had been scheduled to proceed on 20th May 2008, but had been adjourned "*… to allow the Claimant to renew her application to the High Court for a judicial review*". The Tribunal was informed that there was uncompleted correspondence between the parties' legal representatives. On behalf of the Applicant, it was intimated that if judicial review proceedings were to be pursued, these would be "*… initiated … before the end of the summer*". It was further represented that the Applicant had "*… applied for funding to support her judicial review application on foot of a favourable senior counsel's Opinion*". Next, by letter dated 30th June 2008 from the Crown Solicitor's Office, the Applicant's solicitors were informed:

> *"Dear Sirs*
>
> ***HAZEL ANNE GIBONEY -v- POLICE SERVICE OF NORTHERN IRELAND CASE REFERENCE NO: 1525105***
>
> *I refer to your correspondence of 3 June 2008.*
>
> *For the avoidance of doubt I repeat that the letter dated 12 August 2005 from the Crown Solicitor's Office was not (and should never have been construed as) a reconsideration or revision of the original decision made on 7 September 2004, and upheld on 15 February 2005 in respect of Mrs Giboney's application for an injury on duty award. There was never any retrospective decision made post 15 February 2005 in respect of Mrs Giboney's application for an injury on duty award.*
>
> *Further I would state that Mrs Giboney's withdrawal of her judicial review proceedings was indicated to the Court on the morning of hearing on 20 March 2007(although not perfected until 21 May 2007). At no stage was the withdrawal of the judicial review proceedings subject to any terms, agreed or otherwise, save for the agreement that the parties would go back to back in respect of costs. Further, I am instructed that there was never any understanding or agreement that the Tribunal should adjudicate on a hypothetical decision that the PSNI might have reached, had the original decision been overturned by the judicial review proceedings.*

You are correct to say that the only basis upon which the PSNI decided that Mrs Gibony was ineligible for the injury on duty award was that she was negligent/culpable. The PSNI instructs me that it is not prepared to reconsider its decision now, your client having voluntarily withdrawn the judicial review proceedings that she brought in respect of the decision. It is inappropriate for your client to seek to circumvent the time limits for judicial review by inviting the PSNI to withdraw a decision that she is now well out of time to challenge."

[19] From all of the foregoing it is possible to disentangle a single uncontroversial fact, of some significance. The Applicant contends that at all material times she was a member of the Part Time RUCR and the Respondent does not dispute this. It is against the background outlined above that the first application for judicial review, the letter dated 12th August 2005 from the Crown Solicitor's Office, the pending Tribunal proceedings, the voluntary discontinuance of the first judicial review application by the Applicant and this further application for leave to apply for judicial review fall to be considered.

IV THE PARTIES' ARGUMENTS

[20] Following this, the current proceedings were initiated, by Order 53 Statement dated 21st August 2008 and an inter-partes leave hearing ensued. As appears from the above outline, the spotlight is mainly focussed on the letter dated 12th August 2005 from the Crown Solicitor's Office. This relatively brief letter has become the subject of microscopic examination and detailed argument. The Applicant argues that this letter constitutes the real and effective decision, superseding the initial September 2004 determination and the appeal determination of February 2005. The Applicant's case appears to be that (a) it is necessary for her to challenge the impugned determinations in this court prior to the hearing and determination of her Tribunal application and (b) the Tribunal has no jurisdiction to entertain a challenge by her to the impugned determinations. In short, the Applicant seeks to conduct a re-run of her first judicial review application, which was discontinued in May 2007, with the incorporation of an additional ground of challenge. The Applicant challenges the impugned determinations on the grounds summarised in paragraph [6] above.

[21] On behalf of the proposed Respondent, three central contentions were advanced:

(a) This application does not raise an issue of public law.

(b) This application is made almost four years after the precipitating event and no good reason for extending time has been demonstrated by the Applicant.

(c) The Applicant's claims have already been dismissed, by order of Gillen J dated 21st May 2007.

In support of the first proposition, the court was reminded of the relevant jurisprudence, in particular the decision in ***Re Phillips' Application*** [1995] NI 322, at p. 332 especially; ***McLaren –v- Home Office*** [1990] ICR 324 (per Woolf LJ, at pp. 333-335); and ***Regina (Tucker) –v- Director General of NCS*** [2003] ICR 599. It was submitted by Mr. Paines QC (appearing with Mrs. Murnaghan on behalf of the proposed Respondent) that neither of the impugned determinations was of general application. Rather, each was particular and personal to the Applicant. It was further submitted that the impugned determinations did not involve the performance of any public law duty owed to the Applicant. Rather, they simply determined the question of whether the Applicant qualified for a particular financial benefit, in circumstances where the mere existence of a statutory ingredient was insufficient to import a public law dimension. As regards delay, the proposed Respondent relied heavily on the consensual dismissal of the first judicial review application by order of the High Court dated 21st May 2007 and the absence of any good reason put forward to explain the Applicant's inertia since then.

V CONCLUSIONS

[22] I shall consider firstly the question of whether this application raises an issue of public law. This requires the court to apply the principles set out in paragraph [21] above to the factual matrix. The matter lying at the heart of these proceedings is a dispute between the Applicant and her employer, the proposed Respondent, about her entitlement to a financial benefit arising out of an accident which befell her in the course of her employment. This dispute has a statutory dimension, having regard to the provisions set out in paragraph [7] above. However, in my view, this consideration does not operate to import a sufficient element of public law. Moreover, while the proposed Respondent would be considered to be a public authority, neither of the impugned determinations entailed the expenditure of public funds: *au contraire*. I find nothing in the judgment of Woolf LJ in ***McLaren –v- Home Office*** to warrant the allocation of the present dispute to the domain of public law. Insofar as it is appropriate to consider the question of public interest, as in ***Re McBride's Application*** [1999] NI 299 and ***Re Kirkpatrick's Application*** [2003] NIQB 49, I find that none exists. There is no impact of any kind on the public or a section thereof and none was identified or advanced in argument.

[23] In ***Leech –v- Deputy Governor of Parkhurst Prison*** [1988] AC 533, Lord Oliver enjoined the Court to focus on the nature and consequences of the impugned decision, rather than the status or characteristics of the decision maker. In the present case, the *nature* of the impugned decision is a refusal to classify an accident befalling the Applicant as one qualifying for the payment of a financial benefit. Its *consequences* are of a purely financial nature and are exclusive to the Applicant. In this respect, I consider the judgment of Scott Baker LJ in ***Tucker*** (*supra*), at paragraph [22], especially apposite:

> "*While it is true that the National Crime Squad performs an important function, as do police forces generally, that does not mean that every decision personal to an individual officer engages public law remedies. There is a line over which the courts cannot go. It is impermissible to trespass into the management of police forces generally or the National Crime Squad in particular*".

Furthermore, with particular reference to the three criteria devised by Pitchford J in ***Regina (Hopley) –v- Liverpool Health Authority*** [2002] EWHC 1723 (Admin), I hold that the function being performed in the making of the impugned determinations was a purely private one, in an employment context, and did not entail the discharge of any public duty owed by the proposed Respondent to the Applicant.

[24] Secondly, as regards delay, Order 53, Rule 4 of the Rules of the Supreme Court (NI) 1980 provides:

> "*An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made*".

Applying the template of Rule 4 to the matrix before the court:

(a) The impugned determinations were made in September 2004 and February 2005.

(b) I consider that acting "*promptly*" would have entailed the submission of an application for leave to apply for judicial review within some few weeks of the date of the second impugned determination viz. 23rd February 2005.

(c) Accordingly, it is indisputable that the present application has not been brought promptly.

(d) The question which arises, therefore, is whether there is "*good reason*" to extend the period by approximately three-and-a-half years. This question must be determined primarily by reference to the evidence before the court, coupled with the arguments presented. I find nothing in either to establish good reason for extending time. No adequate explanation for the discontinuance of the first judicial review application or the heavily delayed initiation of this further application has been proffered. The submissions advanced to this court hinted at a differing approach by a (partially) newly constituted legal team on behalf of the Applicant. There was also an opaque suggestion that the

> Applicant's legal representatives may not have fully appreciated the implications of the statement of agreed issues which materialised in May 2007 in the Tribunal proceedings. During the hearing, the court endeavoured, to no avail, to explore and expose the substance of these suggestions. I conclude that they are vague, insubstantial and devoid of particularity, with the result that they fall markedly short of constituting good reason for extending time.

Standing back, compelling grounds would clearly be required to justify the grant of leave to apply for judicial review in December 2008 of decisions made in September 2004 and February 2005 respectively. Such grounds are manifestly absent in the materials and arguments presented to the court.

[25] I would add that admonitions to tardy judicial review litigants are commonplace in the decided cases. See in particular ***Re Shearer's Application*** [1993] NIJB 12, per Carswell J at p. 27:

> "*…The fact that an application is made within three months does not mean that it was made promptly. Applicants should not assume that they have three months in any event in which to bring an application.*"

In ***Re McCabe's Application*** [1994] NIJB 27, Kerr J stated [pp. 27-28):

> "*It has been repeatedly emphasized in applications for judicial review that the requirement to make application promptly is crucial …*
>
> *In a series of decisions, Carswell LJ has sought to disabuse advisers of Applicants of the idea that three months are in any event available within which to make an application. I take this opportunity to reiterate and reinforce that message. The requirement to make a prompt application must be observed unless there is good reason; the failure to observe it will defeat an application unless good reason is demonstrated*".

Kerr J developed this theme in ***Re Aitken's Application*** [1995] NI 49, at pp. 55-56:

> "*It appears to me that promptness (always desirable in any form of litigation) is particularly necessary because of the nature of judicial review. As has frequently been said judicial review, par excellence, involves an examination of the procedures leading to a decision rather than the merits of the decision itself. Other types of dispute may require an investigation of the wisdom of a particular course followed by the impeached party as a matter of abstraction; this is generally not true of judicial review. I believe that it is necessary that a court should bear these factors closely in mind*

> *when invited to conclude that there is good reason for extending the period in which the application may be made. The consideration to be given to the question of whether the period should be extended will usually involve an examination of not only the effect that this will have on good administration but also the reasons for the Applicants in action.* ***While I would refrain from suggesting that an Applicant must justify every period of delay (however short), in general, one would expect a cogent application to be presented which dealt with the entire period before a court would allow a delayed judicial review challenge to proceed.***"

[My emphasis].

It appears to me that this latter proposition is unassailable, having regard to the terms of Order 53, Rule 4. I have held that an explanation of this quality is missing in the present case. I would observe, further, that there is no explanation at all for the inertia on the part of the Applicant (a) between May 2007 and May 2008 and (b) between 20th May 2008 (a date emphasized in her affidavit) and 22nd August 2008, the date when the papers grounding this leave application were filed in court.

[26] My third main conclusion relates to misuse of process. I consider that it will *ordinarily* be a misuse of the process of the High Court to initiate an application for judicial review, to discontinue such application and subsequently to attempt to resurrect it. This is the sequence which has occurred in the present case. In common with the approach to questions of delay, it is self-evident that the court would require a cogent and compelling explanation for this sequence. I hold that no such explanation exists: see paragraph [24](d) above.

[27] Furthermore, there is one singular aspect of the present application which should be highlighted. Stated succinctly, the Applicant agrees with the *outcome* of the impugned determinations, but disagrees with *the underlying reasons*. The effect of the outcome was to deny the Applicant the financial benefit pursued by her. The Applicant now seeks an Order of Certiorari quashing two decisions with which she agrees, in the sense explained above. She does not seek an Order of Certiorari with a view to bringing about a reconsideration which might result in the conferral of the relevant financial benefit on her. Equally, she does not invite the court to disagree with the outcome of the impugned determinations. Rather, she asks the court to disagree with the underlying reasons. Properly analysed, she is requesting the court to provide a judgment and an accompanying remedy which, simultaneously, affirm the impugned determinations (i.e. the offending refusal) but exhort the proposed Respondent to similarly affirm them, while revising its reasoning.

[28] No precedent for the invocation of the supervisory jurisdiction of the High Court to this effect was cited. It seems, at the least, doubtful that it is appropriate to have resort to the court's jurisdiction for this purpose. It seems equally questionable that if the Applicant were, ultimately, to succeed the grant of a discretionary public

law remedy to facilitate this purpose would be appropriate. There is one matter which is unambiguously clear: the Applicant does not seek relief in the form of an order directing the proposed Respondent (a) to reconsider the impugned determinations and (b) to affirm them on the sole disqualifying ground now espoused by the Applicant viz. her ineligibility. Notwithstanding the prominence assumed by the Order 53 pleading and amendments thereof throughout the hearings, a mandatory order in these terms has not been sought by the Applicant. It seems highly questionable that the court would be empowered to issue such an order in any event. To summarise, the Applicant is pursuing a discretionary public law remedy designed to stimulate a reconsideration by the proposed Respondent which will result in a potentially unlawfully discriminatory fresh decision, one which the Applicant would unhesitatingly condemn as unlawful. In my opinion, the High Court should not make available its process for this purpose. The Applicant seeks to misuse the process of this court accordingly.

[29] Given that the arguments advanced on behalf of the Applicant were suggestive of some uncertainty or possible confusion about the role of the Tribunal, I would add the following. The essence of the Applicant's case in the pending Tribunal proceedings is that she was refused the financial benefit in question on account of her status as a part time member of the RUCR and that this contravenes the 2000 Regulations. The gist of the Respondent's riposte is that the impugned refusal had nothing whatever to do with the Applicant's aforementioned status but was, rather, attributable to the assessment set out in the decision letters of 7th September 2004 and 23rd February 2005 viz. the conclusion that, applying Regulation A10 of the 1988 Regulations, the Applicant had failed to take reasonable care for her safety, thereby disqualifying her for receipt of the benefit. As this brief summary demonstrates, the battle lines are clearly drawn. In these circumstances, I consider that it will be incumbent on the Tribunal to enquire into all issues having a bearing on the competing cases thus advanced. Fundamentally, in my view, this will require the Tribunal to explore, and determine, the reasons underpinning the impugned refusal. This investigation will entail, *inter alia*, an examination and determination of the cogency and veracity of the reasons put forward by the Respondent in its defence. In short, the central question for the Tribunal will be: Why did the offending treatment occur?

[30] I consider that the "why" question lies at the heart of all discrimination cases. The trend of modern authority is to simplify the questions and tests to be imposed in such cases. See per Lord Hoffmann in ***Regina –v- Secretary of State for Work and Pensions, ex parte Carson and Reynolds*** [2006] AC 173, paragraphs [14] – [16]. In the same case, see also per Lord Nicholls [paragraph 3], Lord Rodger [paragraphs 43-45], Lord Walker [paragraph 63] and Lord Carswell [paragraph 97]. To like effect is the approach advocated by Lord Nicholls in ***Shamoon –v- Chief Constable of the Royal Ulster Constabulary*** [2002] NI 174, where he highlighted "*what is essentially a single question*", formulated thus:

> "*Did the claimant, on the proscribed ground, receive less favourable treatment than others*"?

[Paragraph 8]

Lord Nicholls also advocated the approach of -

> "*… concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others*".

[Paragraph 11]. Further, per Lord Hope, paragraphs [42] and [48]:

> "*The crucial question is whether this truly was the reason why she was treated less favourably, or whether she was treated less favourably than the men were on the ground of her sex*".

In ***Carson and Reynolds***, Lord Walker, recalling the approach of Lord Nicholls in ***Shamoon,*** similarly emphasized that the question of ***"****why the complainant had been treated as she had been treated*" was "*the real issue in the case*": paragraph [63].

[31] It is correct, of course, that in performing its function in the present case, the Tribunal will not be considering, or determining, the *legality* of the impugned refusal. The Tribunal will not be competent to consider, and determine, a challenge to the impugned refusal based on the grounds set forth in the Order 53 Statement. Only the High Court would have jurisdiction to do so. The jurisdiction of the Tribunal, in contrast, is circumscribed by the task conferred on it by the 2000 Regulations and the 1976 Order. However, in my view, the legality or otherwise of the impugned determinations will not impinge on the Tribunal's task of investigating and determining why the offending treatment occurred. Thus, if the High Court were to intervene and quash the impugned determinations on any of the grounds on which they are challenged, this, in my view, would make no difference to the Tribunal's task. It would still have to investigate the Respondent's case that the offending refusal occurred on account of the reasons proffered in the two written determinations and make its findings and conclusions accordingly. On this hypothesis, I consider that it would <u>not</u> be open to the Applicant to contend that the Tribunal should disregard the reasoning and explanations advanced in the two written texts on the ground that the High Court had found either or both of them to be vitiated by an error of law or irrationality. Insofar as the Applicant has sought to advance the contrary case, I consider this fallacious, for the reasons explained above.

[32] It follows that if the court were to grant leave to apply for judicial review *and*, ultimately, quash the impugned determinations or declare them unlawful this would, in my view, be of no avail to the Applicant in the Tribunal proceedings. The finding of a public law defect in the impugned determinations would have no impact on the central function to be performed by the Tribunal. Further, the Tribunal will also have to investigate, and determine, the Applicant's freestanding contention that the letter dated 12th August 2005 from the Crown Solicitor's Office is the real and effective decision in the matrix under scrutiny. Finally, it will form no part of the Tribunal's function to investigate the question of what the reasons for the offending treatment/impugned refusal *should* or *might* have been.

Disposal

[33] In summary, I conclude:

(a) The dispute between the parties giving rise to this application does not belong to the domain of public law.

(b) This application for leave to apply for judicial review has not been brought promptly and there is no good reason for extending time.

(c) Given the history and purpose of these proceedings, this application is a misuse of the process of the High Court.

It follows that leave to apply for judicial review must be refused, thereby giving rise to an order dismissing this application.

Postscript

[34] The succession of legal challenges characterising the history of this litigation began almost four years ago. The Tribunal proceedings are now of some three years' vintage. I consider that the Applicant deserves much better of our legal system. I trust that the Tribunal will now relist her case with the minimum of delay, with the full co-operation of both parties.