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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY CHRISTINE McCULLOUGH FOR JUDICIAL REVIEW

Before Campbell, Sheil and Higgins LJJ.

CAMPBELL LJ

[1] This is an appeal by Christine McCullough from the refusal of an application by her for judicial review of a decision by the Deputy Director of Human Resources of the Police Service of Northern Ireland on 24 April 2005. The issue that the Deputy Director had to determine was whether it had been correctly decided that a period when she was absent from duty as a police officer should not be treated as being the result of an injury on duty. He decided that the decision was correct.

[2] Christine McCullough is a Chief Inspector in the Police Service and in June 2003 she was serving as Deputy Head of Foundation Faculty at the Police College at Garnerville on the outskirts of Belfast. At that time Dr J Drennan was the Director of Training, Education and Development at the College. She claims that she was the victim of bullying and abusive behaviour by Dr Drennan. He denies this and says that she was hostile towards him and that he did no more than carry out his role as her superior. Although it was not disputed that there were incidents involving the Chief Inspector and Dr Drennan there was a difference as to the circumstances leading to these incidents and as to what actually occurred during them

[3] Between 2 June 2003 and 25 June 2003 after a series of these incidents Chief Inspector McCullough was diagnosed as showing symptoms that were stress related. She was seen by the Chief Medical Adviser in Occupational Health and Welfare on 2 June 2003 and given advice and support. She was absent from duty from 26 June to 22 December 2003. At a review examination on 8 August 2003 the medical adviser considered that she was medically unfit for duty.

[4] The Chief Inspector applied to have the period of her absence from June to December 2003 treated as being the result of an injury on duty. Chief

Superintendent Wilson decided that it should be so regarded. The matter then passed to Mrs Richardson, the Head of Personnel Urban Region. She did not accept that Chief Inspector McCullough was bullied or intimidated by Dr Drennan and found "that she was subject to normal day to day management". Accordingly, she decided her application could not be treated as a management induced stress injury for pay purposes.

[5] This decision by Mrs Richardson was appealed to Mr Cox, the Deputy Director of Human Resources, who affirmed it. Mr Cox's decision became the subject of an application for judicial review. In his written decision Mr Cox identifies as the key question whether the absence was a direct result of an injury sustained in the execution of duty. He goes on to consider two separate aspects – first, whether the injury was directly and causally linked with service as a police officer in the execution of duty and second, whether the case showed that the absence was directly [due to an injury received] in the execution of duty. He is satisfied that in relation to the first aspect the medical evidence showed that there was a causal link. He describes the second aspect as whether the management action was reasonable in the circumstances and similarly the response to it. He finds an analogy between the application of the police complaints procedure (referring to the case of *Stunt v Mallett*) and management actions in the circumstances of any particular case. Mr Cox states that in his view if a manager reacts reasonably to circumstances then it could not be regarded as an injury in the execution of duty. He observes that in cases where there are disputed circumstances, such as this, an assessment of what is reasonable management action is problematic but it is not adequate to go simply with an individual's perceptions or the consequences for them. He suggests that to do so would open the door to any individual who did not like management action to claim absence as 'an injury in the execution of duty' (albeit subject to medical confirmation).

[6] The application for review of Mr Cox's decision was heard by Sir Liam McCollum who dismissed it. In his judgment he found that Mr Cox had applied the correct test and that the appellant did not establish an injury on duty if the injury complained of was the consequence of reasonable management action.

[7] The grounds of Chief Inspector McCullough's appeal to this court are –

> 1. That the Learned Judge was wrong in law in respect of the test applied by him regarding what constituted an injury on duty and in particular in holding that the injury sustained in the course of the Applicant/Appellant's duty could not be held to be an injury on duty unless it was established that the event, events, conditions or circumstances giving rise

> to the injury did not arise out of the legitimate exercise of management function, and
>
> 2. That, applying the correct legal test, the Learned Judge should have granted the relief sought by the Applicant/Appellant.

An injury on duty

[8] If sick leave from the police service is accepted for pay purposes as attributable to an injury on duty it can be to the financial benefit of an officer. If the officer is medically retired an enhanced pension is payable. If the officer is off duty for more than six months sick pay continues at a higher rate. Disadvantages flow in respect of promotion and transfer. If a period of sick leave is not accepted for pay purposes as attributable to an injury on duty this may affect an application for promotion. It is the policy of the Police Service to exclude initially any member with an unsatisfactory attendance record from promotion, appointment or transfer however an injury that has been accepted for pay purposes as an injury on duty is discounted.

[9] Arrangements for sick pay are contained in regulation 42 of the Royal Ulster Constabulary Regulations 1996. If the Chief Constable is satisfied that a particular case is exceptional under regulation 42 (4) the member who is entitled to pay while on sick leave receives full pay. An exceptional case is defined as;

> " a case in which the member's being on sick pay is directly attributable to an injury received in the execution of his duty as defined in the Pensions Regulations."

The phrase "injury on duty" is defined in the Royal Ulster Constabulary Pensions Regulations 1988, as amended (SR 1988 No 374), in the following terms;

> "A10- (1) A reference in these regulations to an injury received in the execution of duty by a member means an injury received in the execution of that person's duty as a member.
>
> A10-(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 been injured 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.

In schedule A to the regulations "injury" is defined as including "any injury or disease whether of body or of mind…"

[10] This definition and another in almost identical terms in regulation A11 of the Police Pensions Regulations 1987 (SI1987/257), have been the subject of consideration in a number of cases in this jurisdiction and in the rest of the United Kingdom. Some of these decisions are difficult to reconcile.

[11] A convenient starting point is the decision of the Court of Appeal in England and Wales in *Regina (Stunt) v Mallett* (2001) EWCA Civ 265 which was followed by this court in *The matter of an application by Staritt and Cartwright for Judicial Review* {2005] NICA 48. In *Stunt*, after a complaint made against a police officer by a member of the public was investigated, it was decided that there would be no criminal proceedings but the officer would be subject to a charge under the Police Discipline Code. The officer went on sick leave complaining of mental stress to which he had been subjected by reason of the investigation. He did not return to police service. The court decided that an injury resulting from subjection to disciplinary proceedings is not to be regarded as received in the execution of duty as it results from the officer's status as a constable. Simon Brown LJ said at para.34 of his judgment;

"It follows that I would regard the series of cases concluding with *Kellam* [2001] to have been rightly decided provided only and always that the officer's ultimately disabling mental state had indeed been materially brought about by stresses suffered actually through being at work. In the majority of the decided cases this clearly was so; the significant part played by events at work was a consistent theme. In *Kellam* itself, however, that was by no means obvious.

Simon Brown LJ suggests that *Kellam* takes to their limits the principles that the judge deduced from earlier decisions.

[12] In *R v Kellam, Ex p South Wales Police Authority* [2000] ICR 632 a police officer, Mr Milton, and his wife both served with the South Wales Force. In 1991 Mrs Milton was transferred to a specialist child abuse unit where she formed the view that there was malpractice. She complained about this to an inspector. She was transferred to another unit and she believed she was harassed by the inspector and a group of officers. Around this time she became pregnant with her second child. She brought a claim for sex discrimination against the force which was settled. She did not return to duty and in 1992 the baby was stillborn.

[13] Mr Milton said that as a result of his wife's complaints and his support for her he was shunned and victimised at work by other officers including superior officers over the following years. He felt that the atmosphere at the force headquarters had become so hostile that he requested and was given a transfer. He said that a senior officer carried out observations at his home and it was suggested to him that his career would not progress. A newspaper article about his wife's claim and the loss of the baby was left on his desk and on the notice board and a neighbour made ill founded allegations of criminal offences against him. As a result he suffered from depression and he said that he was depressed in part because of what happened to his wife but his subsequent treatment by other officers was largely responsible. Dr Kellam, a medical referee under the Police Pensions Regulations, allowed an appeal by Mr Milton and held that some of the causes of his anxiety and depression resulted from his being a police officer.

[14] The matter came before Richards J, by way of judicial review, and he adopted the test set out in *Garvin v London (City) Police Authority* [1944] KB 358 as being whether the person's injury "is directly and causally connected with his service as a police officer". He said that the causal connection must be with the person's *service* as a police officer, not simply with his *being* a police officer. He held that it was sufficient for there to be *a* causal connection with service as a police officer and it was not necessary to establish that work circumstances are the *sole* cause of the injury.

[15] The phrase "execution of his duty" was considered by the Inner House in *Lothian and Borders Police Board v Ward* 2004 S.L.T. 215. A former police officer had been certified as having been permanently disabled as a result of an injury sustained in the execution of her duty. Initially she was off work because she was upset following her annual assessment and because of other difficulties at work. On her return she was transferred to another station and a month later she went off work and did not return to duty. There was some discussion about a possible transfer to non-operational duties but nothing

came of this. The issue was whether the Lord Ordinary had erred when he concluded that the stresses experienced by the officer while still at work were sustained in the execution of her duty. It was conceded by the parties that the test for determining whether an event occurred in "the execution of duty" was as stated in *Stunt* and *Kellam.* Lady Cosgrove said that the court had;

> "… reached the view that the appraisal process can properly be distinguished from disciplinary proceedings and from the situation where an officer has applied for promotion. Neither of these situations is directly concerned with a person's *service* as a police officer. The appraisal process, on the other hand, is an event experienced by an officer through actually being at work and is, in our view, essentially and inextricably linked with the performance by him of his duties as a police officer.

The court went on to cite with approval a passage in the judgment of Richards J in *Kellam* where he said that it is "sufficient to find a causal connection with events experienced by the officer at work, whether inside or outside the police station or police headquarters and including such matters as things said or done to him by colleagues."

[16] In *Lothian and Borders Police Board v MacDonald* 2004 S.L.T. 1295 an officer retired on grounds of ill heath following a period when he was unfit for work due to anxiety and situational stress. A question arose as to his pension entitlement. A medical history showed that the officer was frustrated at being unable to continue research that he had begun some years earlier and to attend conferences. He complained of being obstructed by senior officers in connection with his desire to pursue his research and to attend conferences. In particular he alleged that his unfitness for work had followed a meeting with his superintendent when he had been "berated" at length, shortly after a bereavement. Lord Reed having reviewed the history of the legislation and the modern authorities noted that in *Stunt* the judgments focus on whether the injury was received by the officer "while he was carrying out his duties" (per Lord Phillips) or "actually through being at work" (per Longmore LJ) and he contrasted this with the language of Richards J in *Kellam* where he referred to "all aspects of the officer's work", "work circumstances" and "events experienced by the officer at work " which he suggested was capable of a wider interpretation and appeared to have been used in a wider sense.

[17] Lord Reed said that it appeared to him;

> "that a distinction can be drawn, and ought to be drawn, between stresses encountered while the officer is at work which arise out of the execution of his

> duties as a constable (such as attending the scene of a crime, questioning witnesses, and arresting suspects), and stresses which are experienced while at work but do not arise out of the execution of his duties (although they may be connected with his duties). An officer who feels stress while at work because he thinks that he is in a dead end job (as in Clinch) or because he thinks that he is being "marginalised" (as in Ward), or because he thinks that his abilities are not being recognised, or because he thinks that his work is undervalued, or because he thinks that he ought to be allowed to attend conferences instead of carrying out routine duties (the present case), does not suffer stress as a result of anything arising out of the execution of his duties, but as a result of his feelings about the duties to which he has been allocated or his concerns about the progress of his career."

[18] In this jurisdiction the appeals in *Staritt and Cartwright* involved two officers who had suffered stress reactions due to complaints made against them by another officer and the instigation of a disciplinary process. The Court of Appeal followed the authorities of *Kellam* and *Stunt* and held that it was necessary to establish a causal connection with the officers' service and it was not sufficient that the incident in question occurred during the hours of duty or while the officer was at work. An officer's reaction to a disciplinary investigation did not form part of his service.

The application for judicial review

[19] Chief Inspector McCullough states in her affidavit in support of the order 53 statement that she was involved in a number of incidents with Dr Drennan when he was Director of Training Education and Development and she was Deputy Head of Foundation Faculty at the College. She acknowledges that there is a dispute between them as to what actually occurred and while she considers that he was at fault she has been advised that the determination of who was at fault should not be necessary in order to decide whether her period off work was due to an 'injury on duty.'

[20] In her order 53 statement it is submitted that the test applied by Mr Cox was wrong in law in that there was no further requirement that the officer establish that her superior had acted unreasonably.

The decision under appeal

[21] In his judgment Sir Liam McCollum adopted the passage in S*tunt* where Lord Phillips referred to one common element in each case in which the injury was held to be an injury sustained in the execution of duty. This is "an event or events, conditions or circumstances [that] impacted directly on the physical or mental condition of the claimant while he was carrying out his service which caused or substantially contributed to physical or mental disablement."

[22] A further element added by Sir Liam McCollum is " that the event or events conditions or circumstances must contain some traumatic or harmful element of the kind that can be recognised, although not necessarily foreseen, as liable to cause injury or disease." The judge went on to explain that it was not a question of fault and the injury could have been caused by an accidental occurrence or pressure of work or reaction to a highly traumatic event. However an officer who succumbs to the ordinary pressures of duties or to events connected with them which are not in themselves traumatic or injury inducing is not entitled to claim that injury or disease has been suffered as an injury on duty.

The submissions on behalf of the parties

[23] Mr Colm Keenan, who appeared for Chief Inspector McCullough, sought to distinguish the decision of Lord Reed in *MacDonald* on the ground that he attached importance to the intention of the legislation and the meaning, having regard to that intention, of the words used. The legislation to which Lord Reed was referring was s.1(2)(c) of the Police Pensions Act 1976 which empowers the making of regulations that are required to provide for the payment of "pensions to and in respect of persons who cease to be members of a police force by reason of injury received in the execution of their duty." The corresponding legislation in Northern Ireland, s.25 (20)(k) of the Police Act (NI) 1970, which empowered the Ministry of Home Affairs to make the Police Pension Regulations 1988, (now s.25 (2)(k) of the Police (NI) Act 1998), gave the Ministry power to make regulations with respect to "pensions and gratuities in respect of service as a constable…". Mr Keenan submitted that as the words "execution of duty" do not appear in the enabling legislation in Northern Ireland the same importance should not be attached to them where they appear in the regulations as is in the rest of the United Kingdom.

[24] If the enabling legislation in this jurisdiction is wider than the corresponding legislation in England and Wales the regulations made in exercise of the power, and on which this case falls to be decided, are no wider than the Police Pensions Regulations 1987. We do not accept that Lord Reed's decision should be disregarded because of any difference in the enabling legislation

[25] Mr Keenan submitted that all the appellant was required to demonstrate was that she was injured "while on duty" though, if necessary, he would contend that the appellant was injured "in the execution of duty". He relied on regulation A10-(2) and A-10(2)(a) which provide;

> "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.

[26] We consider that regulation A10-(2) (a) is intended to include other circumstances in which an injury is to be treated as an injury in the execution of duty such as where the member is on duty, and for example in a canteen or on a journey necessary to enable him to report for duty or return home after duty. It is not exhaustive as an officer who is off duty and by reason of his office comes on duty and is injured will have received the injury in the execution of his duty. It is to allow for such situations that the Chief Constable is given discretion under regulation A10-(2) (c).

[27] In addition Mr Keenan referred to the passages in the judgment of Richards J. in *Kellam* (at page 645) where he said;

> "In any event it is sufficient in my view to find a causal connection with events experienced by the officer at work, whether inside or outside the police station or police headquarters, and including such matters as things said or done to him by colleagues at work. In so far as the applicant contended for an even greater degree of connection with a person's performance of his functions as a police officer, I reject the contention…
>
> It is sufficient for there to be *a* causal connection with service as a police officer. It is not necessary to establish that work circumstances are the *sole* cause of the injury. Mental stress and psychiatric illnesses may arise out of a combination of work circumstances and external factors (most obviously, domestic circumstances). What matters is that the work circumstances have a causative role."

[28] Lord Reed in *MacDonald* [at para.88] suggests that *Stunt* is couched in narrower language than *Kellam* and that *Stunt* rather than *Kellam* should be regarded as the most authoritative decision of the English courts to date. We agree with Lord Reed and in particular [at para [77]] where he contrasts the language of Richards J. with that of Lord Phillips in *Stunt* where he focuses on whether the injury was received by the officer "while he was carrying out his duties", and of Simon Brown LJ who refers to the officer "actually being at work" and Longmore LJ who uses the expression "on police duty".

[29] Mr David McAlister, on behalf of the respondent, submitted that the decision maker had considered the issues before him and had followed *Stunt* in arriving at his decision. Although he accepted that Chief Inspector McCullough was on duty at the relevant time this is not the same as execution of duty. Without the need for the identification of some harmful element in the management procedure, as Sir Liam McCollum had suggested, any injury suffered would not result from the execution of duties but from her feelings about her duties and the progress of her career.

[30] The correct test Mr McAlister argued is whether there is a causative connection with service as a police officer and management decisions are concerned with being a police officer and not with service as a police officer.

Conclusions

[31] In *Kellam* at page 64 Richards J. doubts whether the point about "while on duty" or "in the execution of duty" is of any great practical significance "since a person who receives an injury "in the execution of [his] duty" (in the basic meaning of that expression) is likely generally to receive it "while on duty" within the meaning of regulationA11(2)(a): the latter extends beyond the former but also encompasses the generality of cases falling within the former. "

[32] It is not necessary in this appeal to decide if the two phrases mean the same thing or not as the one test to be applied to both is - "substantial and direct causative connection with service as a police officer."

[33] The critical question, as stated by Simon Brown LJ in *Stunt (*at para. [45]), was whether the officer's mere subjection to the [disciplinary] process of itself constituted the execution of duty. He concluded at para.[46];

> "Sympathetic though I am to police officers for the particular risk of disciplinary proceedings they run by the very nature of their office, I cannot for my part accept the view that if the injury results from subjection to such proceedings it is to be regarded as received in the execution of duty. Rather it seems to

> me that such an injury is properly to be characterised as resulting from the officer's status as a constable – "simply [from] his being a police officer" to use the language of paragraph 5 of Richards J's conclusions in *Kellam* [2000] ICR 632, 645 when pointing up the crucial distinction. This view frankly admits of little elaboration. It really comes to this: however elastic the notion of execution of duty maybe, in my judgment it cannot be stretched wide enough to encompass stress-related illness through exposure to disciplinary proceedings. That would lead to an interpretation of regulation A11 that the natural meaning of the words just cannot bear."

[34] When the question posed in *Stunt* is asked in the present case - whether Chief Inspector McCullough's subjection to management decisions constitutes the execution of her duty or is as a result of her being a police officer- the answer is that it is as a result of her being a police officer.

[35] If the management decisions to which Chief Inspector McCullough was subjected involved bullying and intimidation these would be issues that could attract remedies both civil and criminal. We do not consider that the status of officers alters according to the propriety of the management decisions to which they are subjected. Therefore we do not agree that it is relevant to give consideration as to whether Dr Drennan's conduct was such that it could be demonstrated as liable to cause mental distress to the appellant. We do not consider it necessary to express any concluded opinion on the need for the further element, introduced by the trial judge, of some traumatic or harmful element that can be recognised as liable to cause injury or disease other than to say that it serves to emphasise the underlying purpose of the legislation as described by Lord Reed in *Macdonald*.

[36] It follows that we do not consider that Chief Inspector McCullough is entitled to have her period of absence due to her reaction to management decisions treated as an injury on duty. As we have reached the same conclusion as the trial judge, albeit by a different route, the appeal will be dismissed.