

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered:	18/06/2003
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY TERESA HALLIGAN FOR
JUDICIAL REVIEW

KERR J

Introduction

[1] This is an application by Teresa Halligan, who is the joint owner with her husband of a taxi firm in Armagh city, for judicial review of a decision by the Southern Education & Library Board in relation to the allocation of contracts for taxi services for the academic year 2002/2003.

Background

[2] The applicant and her husband took over the firm, which is known as Armagh Contract Services, some 15 years ago and they then employed four or five drivers. In early 1998 they amalgamated with another taxi firm and thereby obtained the services of another five drivers.

[3] Mrs Halligan estimates that 90% of the work undertaken by her firm is contract work. Her clients include several established businesses and hotels, the local health and social services trust and the Southern Education & Library Board. Much of the work for the board involves the ferrying of pupils to and from educational establishments. For the academic year to the end of June 2002 the firm earned approximately £80,000 from its contract with the board.

[4] The board invites public tenders for the provision of taxi services in its area every four years. Advertisements are placed in the local press. Tender offers are received in sealed envelopes and the purchasing officer opens the tenders in the presence of a board member who signs each opened tender.

The tender offers are then summarised by the board's purchasing unit and a recommendation is sought from the board's transport officer, currently Mr Dennis Flannigan.

[5] The last two tender cycles have been in 1998 and 2002. The applicant's firm has been successful in obtaining an allocation of taxi services from the board in both tender rounds but the applicant claims that she has lost a significant amount of business as a result of the allocation made in August 2002. Initially, the applicant claimed that the amount of business allocated to her firm was 80% less than had previously been allocated. The board vigorously disputed this claim. In a letter to the applicant's solicitors of 27 November 2002 W A Neville, the support service manager of the board, stated that as of that date the value of the work allocated to the applicant's firm was approximately 30% less than the previous year.

[6] Within the four-year tender cycle taxi drivers may apply for an inflationary increment at the end of each period of twelve months. This is capped at the rate of inflation. The applicant claims that it has been her practice over the last three or four cycles to carry forward the amount charged for the fourth year and use that as her proposed price for the new tender. This practice, she claims, is unique to her and allows her to "stay ahead of the game". Board officers have told her, she says, that her "pattern of tender-fixing" is unique in their experience.

[7] Some years ago the applicant and her husband had employed a man called Martin Bratton as a part-time driver. They experienced a number of difficulties with Mr Bratton and eventually his employment terminated in acrimonious circumstances in March 1997. After Mr Bratton's employment with Armagh Contract Services ended, Mrs Halligan reported her suspicions that he had not disclosed two previous accidents to the PSV branch of the Department of the Environment.

[8] Shortly after leaving his employment with Mrs Halligan's firm Mr Bratton was appointed to a position in the transport department of the board. In May and August 1997 Mrs Halligan wrote to the board voicing concern that Mr Bratton might show bias against her taxi firm. A number of telephone calls to the board followed and ultimately on 9 April 1998 Mr Neville wrote to the applicant in the following terms: -

"Having considered the matter carefully in consultation with the board's transport officer, I would ask you to accept my assurance that positive action has been taken to prevent any such conflict of interest arising. The individual concerned will not be involved in the receipt of tenders, the opening of tenders, the award of

contracts or the allocation of work to successful contractors.

Can I assure that the 'influence' which the individual may claim to have is entirely inconsequential in relation to the board's contracting arrangements?"

[9] At the time that the letter of 9 April 1998 was written, Mr Bratton was employed as a temporary district transport officer with the board. In July 1999 he was appointed to this post on a permanent basis. In August 1999 a tender cycle took place and the applicant was quite successful in bidding for a number of contracts. She considers that her tenders in August 2002 have been undercut because Mr Bratton was able to predict what her tender would be because of her "unique" system and was able to advise her competitors of what her proposals for the new tendering round would be.

[10] Mr Bratton plays no part in the tendering process and has no access to the tender documents. He - and the board's three other district transport officers - only become involved at the stage of allocating the contracts. He must allocate the contracts on the basis of the cheapest tender for the type of work that has been tendered for. Should the firm that has made the cheapest offer decline the contract, the district transport officer must award it to the firm that has made the second cheapest offer and so on until a firm willing to undertake the contract is found.

[11] Mrs Halligan professes to be convinced that Mr Bratton is using his position to undermine her efforts to obtain contracts with the board not only because of the history of his dismissal from her employment. She claims that he has tried to persuade employees of her firm to tender for work in their own right. Mr Bratton has been observed talking to taxi drivers in their cars. This, Mrs Halligan believes, is indicative of his scheming with her competitors.

[12] Mr Neville has spoken to Mr Bratton about these allegations. He has denied that he had a conversation attributed to him by one of her employees; Mr Neville has explained how the other employee named by Mrs Halligan came to be awarded a contract - this was because that employee had tendered for the work on a personal basis and although his tender was somewhat higher than that of Mrs Halligan he was awarded the contract because he had been the driver of the child in respect of whom the contract had been placed and it was considered that there should be continuity because the child suffered from Down's syndrome. As to the allegation that Mr Bratton was seen talking to other taxi drivers, Mr Neville was informed by Mr Bratton and his superior, Mr Flannigan, that this is a regular feature of their work and that there is nothing untoward about these meetings.

[13] Mr Bratton had connections with another taxi firm in the area before being employed by the board. Mrs Halligan had also referred to this as giving rise to further suspicion that he might allocate work on a preferential basis. Mr Neville pointed out that, so far from this being the case, the proprietor of that firm had expressed similar concerns and had received similar assurances from Mr Flannigan that this would not happen.

[14] Mr Neville explained in his affidavit that the taxi community in the area was "rife with rumour and counter rumour". He stated that the concerns of the applicant have no basis in fact. He described the steps that the board had taken to seek to allay Mrs Halligan's concerns which included meetings and correspondence. He asserted that the reason that Mrs Halligan had not been allocated a greater percentage of the work was that her prices were not competitive. He confirmed, however, that he was willing to meet Mrs Halligan again in order to "address in even greater detail the grievances which she has and to explain the transparency of the board's policy with regard to allocation of work". I was informed that Mrs Halligan was not willing to take up this offer because at earlier meetings the board's officers "seemed either unable or unwilling to accept the nature of [her] complaint".

The issues

[15] The applicant claims that there was at least the suspicion of bias as to the manner in which the contracts for the 2002 round were awarded. The percentage reduction in the contracts allocated to her firm; the history of animosity to the firm displayed by Mr Bratton; the attempts to solicit other employees to tender on their own behalf (one at least of which was not denied); and her well established method of tendering that made her new tender easy to predict all indicated strongly that Mr Bratton had informed her competitors of the likely level of her tender so that they could undercut her. There was at least a real possibility of bias on the part of Mr Bratton and that was sufficient to have the allocation of contracts for the 2002 round declared unlawful.

[16] The applicant argued further that the letter of 9 April 2002 created a substantive legitimate expectation on her part that Mr Bratton would play no part in the allocation of contracts. The undertaking given by Mr Neville had been broken, she claimed, and no justification for this had been offered.

Bias

[17] On behalf of the applicant, Mr Hutton relied on the observations of Lord Goff of Chieveley in *R v Gough* [1993] AC 646 at 668 where he said: -

“In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand.”

[18] The judgment in *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564 modified the test in *Gough* somewhat. There it was held that the test is whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, that the tribunal was biased – see paragraph 85 of the judgment of Lord Phillips of Worth Matravers MR. The House of Lords considered the *Medicaments* decision in *Magill v Porter* [2002] 2 AC 357. At paragraph 103 Lord Hope of Craighead said this about the reformulated test: -

“103 I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph [85]. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to ‘a real danger’. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

[19] The issue in the present case therefore is whether a fair-minded and informed observer would conclude that there was a real possibility that the allocation of the contracts was infected by bias.

[20] It is, I think, important to focus on the precise allegation made by Mrs Halligan. She cannot claim that the board selected a taxi firm that had submitted a higher tender than she did. Such a claim could not survive in light of the unequivocal refutation of it by Mr Neville. Her claim is that Mr Bratton alerted her competitors to the likely level of her tender and that he was able to do so because he would have been aware of her practice of adopting the amount charged for the fourth year as her proposed price for the

new tender. This is the allegation on which the notional informed and fair-minded observer must concentrate.

[30] To have taken the course that Mrs Halligan claims he did would have involved Mr Bratton on a most hazardous enterprise. He had been made aware that she had expressed concerns about the possibility of him acting against her. If it were discovered that he had done so, obviously his employment would have been at risk. Suspicion would, in light of Mrs Halligan's history of complaints against him, have fallen first on him. He had been interviewed about Mrs Halligan's allegations and is bound to have known that any collusion with other taxi firms that manifested itself in the falling off of work allocated to Armagh Contract Services would almost certainly spark off further complaints from her. He would undoubtedly have been the target of those complaints and the subject of investigation about them.

[31] In assessing the claim that the allocation of contracts carries the appearance of bias it is relevant that originally in her Order 53 statement Mrs Halligan claimed that contracts were awarded to operators whose prices were higher than hers. This was entirely wrong.

[32] Two matters require to be highlighted. The first is that the notional observer is to be presumed as having complete information as to all the surrounding circumstances. He would therefore be aware of the fact that Mrs Halligan had made complaints about Mr Bratton in the past; that he had been interviewed by his employers about those complaints; that he could fully expect to fall under suspicion if he colluded with other taxi firms to the disadvantage of Mrs Halligan's firm; that his employment would almost certainly be terminated if it was discovered that he had engaged in such activity; that Mrs Halligan had made allegations that subsequently proved to be without foundation; and that the board officers had offered to meet Mrs Halligan again in order to try to allay her fears.

[33] The second matter that should be emphasised is that there must be a *real* possibility of bias. It appears to me that this concept must be distinguished from a mere suspicion or a fanciful speculation. All the circumstances, viewed objectively, should lead to the conclusion that bias is a genuine possibility.

[34] Taking all these factors into account I am satisfied that an independent, fair-minded and properly informed observer would not conclude that there was a real possibility of bias.

Legitimate expectation

[35] In *Regina v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 it was held that in appropriate circumstances the existence of a legitimate expectation may require a public body to confer a substantive benefit. In such cases the courts will not permit the public body to resile from the representation if to do so would amount to an abuse of power. Mr Hutton relied on this decision, claiming that the undertaking given by Mr Neville in April 1998 was open-ended and unconditional. No justification had been offered for the failure of the board to adhere to its undertaking and in the absence of any explanation for the change in course, the board should be held to the promise that Mr Neville had given.

[36] In *Coughlan* the applicant, a tetraplegic as a result of a road traffic accident, was moved from a hospital which the health authority wished to close to Mardon House, a National Health Service facility for the long-term disabled, which the health authority assured them would be their home for life. In 1998, following public consultation, the health authority decided to close Mardon House and to transfer the long-term general nursing care of the applicant to the local authority, although no alternative placement for her was identified.

[37] The Court of Appeal discussed the debate about the effect of giving an undertaking in paragraph 56 of its judgment and said this: -

“What is still the subject of some controversy is the court's role when a member of the public, as a result of a promise or other conduct, has a legitimate expectation that he will be treated in one way and the public body wishes to treat him or her in a different way. Here the starting point has to be to ask what in the circumstances the member of the public could legitimately expect. In the words of Lord Scarman in *In re Findlay* [1985] AC 318, 338, "But what was their *legitimate* expectation?" Where there is a dispute as to this, the dispute has to be determined by the court, as happened in *In re Findlay*. This can involve a detailed examination of the precise terms of the promise or representation made, the circumstances in which the promise was made and the nature of the statutory or other discretion.”

The first task for the court, therefore, where, as here, there is a dispute as to what the person claiming the fulfilment of the expectation can legitimately

claim, is to examine the nature of the promise made and the circumstances in which it was made.

[38] In Miss Coughlan's case the undertaking given was unequivocal and it was expressed explicitly to be for a defined period *i.e.* the remainder of her life. There was therefore no debate as to the nature of the undertaking or what Miss Coughlan could legitimately expect; indeed all parties accepted that in public law the health authority could break its promise to Miss Coughlan only if an overriding public interest required it. Here, however, the anterior question arises. What was the nature of the undertaking given to Mrs Halligan and what could she legitimately expect from the board?

[39] In effect Mrs Halligan claims that she had been given an undertaking by Mr Neville that Mr Bratton would *never* be employed in a capacity where he would be responsible for allocating contracts. Such an undertaking could only have been given if Mr Bratton had accepted that he would never be eligible for employment in a capacity that would involve the allocation of contracts for the Armagh area or the board had a lawful basis for excluding him from consideration for such employment. I am satisfied that this was not Mr Neville's intention nor could Mrs Halligan have legitimately expected this to be the effect of the undertaking that had been given.

[40] Even if I had decided that the applicant had a legitimate expectation that Mr Bratton would forever be excluded from employment involving the allocation of contracts, I would nevertheless have held that public policy considerations override a requirement that the board be required to adhere to that undertaking. The Court of Appeal in *Coughlan* said on this subject at paragraph 57: -

“Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.”

[41] I do not consider that the frustration of the applicant's expectation, even if legitimate, would be so unfair that a different course *viz* the employment of Mr Bratton as a transport officer, would be an abuse of power. On the contrary, it appears to me that to exclude Mr Bratton from such employment

in perpetuity or alternatively to require the board to adjust its employment structure so as to accommodate him as a transport officer without allowing him to carry out one of the conventional aspects of that post would be unacceptably onerous.

Conclusions

[42] None of the grounds advanced for the applicant has been made out and the application for judicial review must be dismissed.