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Judgment: approved by the Court for handing down | *Delivered:* **14/01/2014**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McCotter's (Michael John) Application [2014] NIQB 7

IN THE MATTER OF AN APPLICATION BY MICHAEL JOHN McCOTTER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

TREACY J

Application

[1] The applicant in this case is Michael John McCotter, a solicitor employed by the Public Prosecution Service for Northern Ireland (PPS), as a public prosecutor. His wife is also employed by the PPS as an administrative officer and the applicant appears in person as a personal litigant.

Order 53 Statement

[2] By this judicial review, he seeks, amongst other things, an order quashing the respondent's decision said to have been made on 26 February 2013. The grounds in his amended Order 53 Statement are as follows:

(i) That in deciding to identify 5 employees at administrator officer grade for redundancy and re-assignment in Newry Chambers on 26 September 2013 by means of a lottery-type exercise, the proposed respondent, and the Director of Public Prosecutions in particular, breached its statutory duty under Section 75 of the Northern Ireland Act 1998 as amended and further breached Section 6(1) of the Human Rights Act 1998 and therefore, it was said that, the devolution issue under Schedule 10 of the Northern Ireland Act 1998 arises.

(ii) It is alleged that the decision was unfair.

(iii) That it was unreasonable.

(iv) That it was irrational.

(v) That it was contrary to legitimate expectation [although it does not say whose legitimate expectation].

(vi) That the decision was contrary to the principles of natural justice.

Background

[3] It was alleged by the applicant that the decision to identify the said 5 employees for redundancy and re-assignment via a lottery-type exercise was taken on 26 September 2013 and implemented on 2 October 2013.

[4] The application was lodged by the applicant on 2 October 2013, without compliance with the pre-action protocol, in particular, no pre-action correspondence was sent to the proposed respondent in accordance with that protocol.

[5] Unfortunately the applicant's affidavit was very sparse in detail but it did make clear that it was the applicant's wife, not him, who was one of the employees subject to possible selection for re-assignment by random selection. He, nonetheless, has asserted that he had sufficient standing because firstly, as his wife is the joint carer for their disabled daughter, any re-assignment would affect him by proxy, as he put it. Secondly, he was potentially subject to the same impugned procedure in the near future. Thirdly, that the lottery mode of selection raises unspecified public interest considerations and finally, that such a mode of selection would set a precedent if allowed to proceed. Amongst the reliefs claimed the applicant sought an injunction to prevent the proposed respondent from carrying out the proposed course of action.

Judicial Review Procedure

[6] Before an application for leave for judicial review is made applicants are required to observe the pre-action protocol. The reason for this is quite simple. It is intended to prevent disputes coming to court where possible by facilitating the independent or mutual resolution of the dispute by the parties to it. The pre-action protocol correspondence in particular, is the method which provides a case-management mechanism that seeks, amongst other things, to limit costs. See, for example, para3.14 of Mr Anthony's book, '*Judicial Review in Northern Ireland*'.

[7] The requirements of the pre-action protocol must be complied with by the applicants unless there are exceptional circumstances, which there are not in the present case, to justify non-compliance.

[8] Because of the failure to comply with the pre-action protocol in this case and the sparsity of the unsworn grounding affidavit, I directed that the papers be served

on the proposed respondent who were to treat the papers as pre-action correspondence and serve a reply.

[9] Very promptly, by letter dated 10 October 2013, the proposed respondent served a detailed response which sets out the background leading up to the impugned decision. The following salient points emerged from that letter:

(i) The impugned arrangements were agreed with the Trade Union. This is a point which was reiterated in further correspondence from the PPS dated 7 October.

(ii) At a meeting, the applicant's wife was assured that her specific circumstances would be taken into account if her name was selected, again this was a point which was reiterated in the letter of 7 October from Mr Hurst of the PPS.

(iii) The selection process was undertaken on 2 October 2013 and the applicant's wife was not selected.

(iv) At a meeting on 30 September 2013 the applicant was advised by Ms McGrath, the regional prosecutor for the Western and Southern region, in response to the applicant's query, that she was not aware of any intention to use the same method of selection in relation to legal staff of whom this applicant was one.

[10] The letter of 2 October in respect of this issue states as follows:

> "… You further enquired if the same method of selection was to be used in relation to legal staff. Ms McGrath advised you that she was not aware of any intention to do so, she referred to business improvement team reviews which are to take place in respect of legal grades in the future but confirmed that neither redundancy nor re-assignment had ever been mentioned to her at any stage. She further indicated that it was her view that as there was a public prosecutor competition taking place in the near future, it was more likely that the staffing numbers from this competition would be limited instead. She further tried to re-assure staff that centralisation of legal staff was not being discussed by the senior management group as far as she was aware."

[11] Judicial review is concerned with public law issues and not private disputes such as private employment disputes involving no element of public law. For a more detailed treatment of this area see Chapter 2 of Mr Anthony's text on judicial

review. The context of the present case has, in my view, no sufficient public law element which would justify invocation of the supervisory jurisdiction of the High Court. The context of the present case is, at most, a private employment dispute involving no element of public law. There is no relevant statutory underpinning. The applicant's reliance on Section 75 of the Northern Ireland Act 1998 as amended is misconceived. Section 75 imposes an obligation on public authorities to have due regard to the need to promote equality of opportunity between the protected groups identified in Section 75(a)-(d).

[12] It is however, clear that even if this duty were engaged in this case it is not a duty which was intended to be enforced by a court in judicial review proceedings. Instead, Parliament has provided a very specific enforcement mechanism in Schedule 9 of the 1998 Act by way of complaint to the Equality Commission for Northern Ireland. Section 75 imposes a duty on public authorities to have due regard, as I say, to the need to promote equality of opportunity between protected groups. This legal duty is not generally, if at all, intended to be enforced by a court in judicial review proceedings and, as I have already indicated, Parliament has provided a very specific enforcement mechanism under Schedule 9.

[13] Therefore, the appropriate redress, as it seems to me, for any alleged failure to comply with Section 75 is by way of complaint to the Equality Commission. This is a matter which was also considered in ***BMA's Application*** **[2012] NIQB 90** where at para33, the Court stated:

> "This case is therefore one which calls for an investigation of the procedural fairness of the process that was applied. Such cases fall squarely within the remit of the ECNI (Equality Commission) using the clear and well developed statutory mechanism established under Schedule 9 of the Act for precisely this purpose. This allocation of enforcement responsibility was deliberately inserted into the body of the legislation. It is clearly the intention of Parliament that this class of complaint should be dealt with by the specialised mechanism it specifically designed for that purpose. There is no basis upon which this court could or should take any step to circumvent the clear legislative intent of the Act. Moreover, to do so would fly in the face of a clear and established line of authority exemplified by the case of Re Peter Neill's application [2006] NICA 5 in which Kerr LCJ stated:
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> > "At the kernel of this is the avowed failure of the Northern Ireland Office to comply with its Equality Scheme. This is precisely the type of

> situation that the procedure in Schedule 9 is designed to deal with. It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Equality Commission has the express statutory remit. We have concluded that this was no the intention of Parliament."

Conclusion

[14] Even if the issues were subject to judicial review, I hold that the applicant does not have sufficient standing. This issue is dealt with in some detail in Mr Anthony's book beginning at para3.64. The applicant does not have sufficient interest in the matter to which this application relates, which is a requirement both of Section 18(4) of the Judicature Act 1978 and Order 53 Rule 3 (5) of the Rules of the Supreme Court.

[15] The applicant was not directly affected by the impugned process. His wife was directly affected but he was not. His wife has not initiated proceedings. Further, the letter of 2 October also makes it abundantly clear that there is no reason for supposing that this applicant, a solicitor, might be subject to a similar process in the future. On the contrary, this appears to have been eschewed by the proposed respondent and the applicant's expressed fears are apparently groundless. Finally, as the applicant's wife has not been selected for re-assignment the proceedings, insofar as they relate to her possible selection, are now in any event academic and for all these reasons leave is refused.