**Neutral Citation No. [2011] NIQB 65** | *Ref:* **TRE8258**

*Judgment: approved by the Court for handing down* | *Delivered:* **22/7/2011**

*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**Moffatt's Application [2011] NIQB 65**

**IN THE MATTER OF AN APPLICATION BY AARON MOFFATT FOR JUDICIAL REVIEW**

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**TREACY J**

## Introduction

1. The applicant is a former probationer police constable in the Police Service of Northern Ireland. His appointment was terminated on 18 September 2009 pursuant to the "Well-Conducted" Procedure arising under Reg 13(1) of the PSNI Regulations 2005. The applicant seeks an order of certiorari quashing the decision to discharge him from the police service on that date.

2. In summary the grounds upon which relief was sought were procedural unfairness, irrationality, lack of adequate reasons, a challenge to the choice of process and finally a contention that the decision maker gave inappropriate weight to an allegation of disorderly behaviour.

## Background

3. The applicant entered the police service as a probationer in April 2006. Ordinarily student officers are employed initially as probationer constables taking office as constables only when they are confirmed in post. The normal probationary period is two years however in the applicant's case his probationary period was extended for a period of six months.

4. The applicant had come to the attention of the Professional Standards Department ("PSD") because of a number of disciplinary matters that had arisen since he became a probationary constable. He had received two Superintendent's Written Warnings. The first was received on 12 December 2007. The applicant was given this warning after having admitted copying a fellow officer's Personal

Development Portfolio ("PDP"). DS Taylor describes the PDP as an "essential component of the probationer constable's training. They are required to maintain and update this folder as they progress." In this case the applicant had taken material from another officer's PDP and presented it as his own work. The applicant signed the Superintendent's Written Warning[1] on 12 December 2007 acknowledging this behaviour.

5. The warning for plagerisation was not expunged from his record until 11 December 2008. However on 8 December he was issued with a second such warning relating to a failure to properly maintain his notebook during a period between March and June 2007 contrary to the PSNI Code of Ethics. This warning arose as a result of the matter being referred to PSD by Inspector Jennifer Hudson of PDU (Professional Development Unit). In the course of her duties she examined the applicant's notebooks and discovered that on *thirteen* occasions he had completed notebook entries but had failed to rule out the blank spaces in the notebooks. DS Taylor avers that this failure is not a trivial matter and that police officers are specifically trained to ensure that there are no blank spaces in their notebooks in order to offset any potential criticism or challenge that entries have not been made contemporaneously.

6. The next incident on this probationer officer's record is the failure to report damage to a police vehicle on 27 June 2008 resulting in a referral to a Restricted Powers hearing[2]. This issue came to light as the result of a report by Inspector McClarence, Strand Road on 30 June 2008. The Inspector had received a report that the logbook entry for an identified vehicle had been completed with an entry stating "no new damage". The entry had been completed by the applicant. The vehicle had, in fact, been damaged. The Inspector recommended some form of disciplinary action "because there was an ongoing problem in Foyle DCU and raised issues about the officer's integrity" (see DS Taylor at para 14).

7. DS Taylor reviewed the papers and decided that the matter warranted a full investigation. He appointed Detective Inspector Nixon as the Investigating Officer.

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[1] There are three levels of informal misconduct sanction of which the most serious is a Superintendent's Written Warning. A Superintendent's Written Warning is held on an officer's personnel file for twelve months before being expunged. An officer can receive a maximum of two such written warnings within any rolling twelve month period. Should an officer come to further adverse notice whilst subject to two such warnings then the adverse notice matter must be referred to PSD for formal investigation and progression thereafter if need be to a misconduct hearing. The other two levels of informal misconduct sanction are Advice & Guidance and Management Discussion neither of which are held on an officer's personnel file.

[2] The difference between a Full Powers misconduct hearing and a Restricted Powers hearing relates to the sanctions available. In the case of a Full Powers misconduct hearing the sanctions available in descending order of gravity are: Dismissal; Requirement to resign as an alternative to dismissal; Reduction in rank; Reduction in pay; Fine; Reprimand; Caution. In the case of a Restricted Powers hearing Sanctions (iv) – (vii) only are available.

DI Nixon provided his report on 25 November 2008 concluding that the applicant "was being dishonest" in his statement when he alleged that he was too busy during his nightshift to report the damage caused to the police vehicle.

8. Whilst this matter was under review as to the way in which it was to proceed Inspector Nixon expressed doubts about whether the applicant had in fact made a contemporaneous notebook entry about the accident. He also noted that the applicant was now the subject of a criminal and disciplinary investigation in relation to an allegation of disorderly behaviour which had occurred in Limavady on 8 February 2009. DS Taylor had formed the view at one point that the failing to report matter should proceed by way of a Full Powers misconduct hearing but having re-examined the matter, recommended on 2 April 2009 that the matter proceed by way of a Restricted Powers hearing rather than a Full Powers hearing.

9. Following a Restricted Powers hearing on 4 June 2009 the applicant was fined a total of £1,000 and his probationary period was extended for a further six months. DS Taylor (para 23) stated:

> "It should be noted that the misconduct panel wrestled with the decision whether a restricted powers hearing was sufficient to deal with the matters in front of them and it was only after prolonged discussion that it was decided that a restricted powers panel would suffice".

10. During the course of the misconduct investigation as noted above a further issue had arisen with respect to the applicant's behaviour. On 8 February 2009 Constable Logue of Limavady PSNI cautioned the applicant as a result of alleged disorderly behaviour by the applicant in Limavady. The applicant had allegedly been abusive to Constable Logue, who was on uniform duty at the time, and had called him a "wanker". The matter was referred to the PPS who initially directed that the applicant receive an adult caution. The applicant refused an adult caution and presented the PPS with two statements from other police officers who stated that they were with him at the time in question. On 19 May 2009 the PPS directed that the matter did not meet the test for prosecution in light of the two additional statements and the applicant's denial.

11. The PSD did not further pursue the issue of the Limavady incident as this was overtaken by the Reg 13 investigation and the commencement of the Well-Conducted procedure. DS Taylor deposed that if the Well-Conducted procedure had not intervened then it is most likely that the investigation into the Limavady incident would have been pursued further by PSD with the possibility of a further misconduct hearing.

12. The PSNI, in common with other police forces, has in place a bespoke procedure which permits the termination of the employment of probationer

constables in certain narrowly defined circumstances. The procedures are governed by Reg 13(1) of the PSNI Regulations and have given rise to specific guidance in the form of Service Procedure 25/2006.

13. Subsequent to the Restricted Powers hearing on 4 June 2009 a Case Conference was convened. At the Case Conference on 5 June 2009, convened pursuant to Reg 13, it was decided that Service Procedure 25/2006 was appropriate given the specific features of the applicant's case. It was also decided that a recommendation should be made to the nominated Chief Officer that the applicant's service should be terminated. The nominated Chief Officer was Assistant Chief Constable Jones.

14. According to DS Taylor (para 30) the intelligence was "a limited factor in the decision [of the Case Conference] to recommend the applicant's dismissal. The overwhelming reason was the applicant's misconduct record and history of behaviour". DS Taylor reiterated at para 31(v) of his affidavit that the main concern of the Case Conference which recommended the termination of the applicant was "his general conduct, honesty and integrity as a police officer, rather than any specific concern about drug abuse".

15. On 6 July 2009 ACC Jones wrote to the applicant and advised him that he was giving consideration to the termination of the applicant's services as a probationer constable and the applicant was invited to a meeting on 27 July 2009. That letter states:

> "Your District Commander has brought to my attention that you have been involved in a *pattern* of unacceptable behaviour, such as to give rise to concerns that you are unlikely to become a well conducted officer. As Assistant Chief Constable for Rural Region, I have been appointed as nominated Chief Officer in accordance with Service Procedure 25/2006.
>
> I have considered the available information and I am now considering whether or not to terminate your services as a probationer constable. Consideration of termination is in accordance with Reg 13(1) of the PSNI Regulations 2005 ... 'During his period of probation in the police service the services of a constable may be dispensed with at any time if the Chief Constable considers that he is not fitted, physically or mentally to perform the duties of his office or that he is not likely to become an efficient or well conducted constable.'

> I have enclosed a summary of the details of this case and invite you to an interview in my office at police headquarters ... on 27 July 2009 ..."

The letter also pointed out that he was entitled to bring with him a "friend" who must be a serving member or staff association representative.

16. The accompanying summary of information submitted in respect of the recommendation to dispense with the applicant's services was in the following terms:

> "Constable Moffatt placed on PBS1 in June 2006 for personal responsibility
> Constable Moffatt placed on PBS1 November 2007 for copying a PDP folder, and received a Superintendents Written Warning in relation to this matter in December 2007.
> In April 2008 Constable Moffatt refused to obey a lawful order relating to wearing of dual-purpose body armour.
> In June 2008 Constable Moffatt failed to report damage he had caused to a police vehicle.
> In December 2008 Constable Moffatt received a further Superintendents Written Warning in relation to failing to keep proper notebook entries.
> On 4/6/09 at a Disciplinary Hearing in relation to the damage to a police vehicle Constable Moffatt was fined £1000 and his probation extended for a period of 6 months.
> Constable Moffatt was removed from operational duty on 7/3/09 and redeployed as a Gaoler.
> In February 2009 Constable Moffatt was the subject of an investigation into alleged disorderly behaviour at Limavady. The PPS has directed NFPA in relation to this matter.
> Constable Moffatt has received 4 District certificates in recognition of good police work."

The document then outlined four pieces of intelligence which I have numbered:

> "Intelligence suggests an association with known drug dealers.
>
> 1. Doc 3101 29 Oct 2007 (E45) There is a policeman called Moffett from the Mountsandel area who used to deal drugs prior to joining. He is in his

early 20's and does uniform duty at Coleraine Station.

2. Doc 3778 22 Apr 2008 (B21) A service police officer who currently lives at 38 Carnhill Coleraine and who drives a black Audi A4 partial registration OCS and is approximately 26 or 27 years old _____
   This police officer is also using cocaine on a regular basis and on occasions purchases the cocaine from dealers in _____

3. Doc 5126 17 May 2009 (B24) During the _____ _____ socialised in the Portstewart area along with Constable Aaron MOFFATT (21577).
   Amongst licence premises visited _____ was 'Bar 7' and here _____ were noted to be heavily intoxicated through drink and drugs.

4. Doc 5237 9 Jun 2009 (E41) Aaron Moffett (a serving police officer in Londonderry) can provide steroid type drugs."

17. At the meeting on 27 July ACC Jones explained the nature and purpose of the interview to the applicant. The applicant indicated that he understood that he was being considered for termination pursuant to the Well-Conducted procedure in Service Procedure 25/2006. ACC Jones outlined the areas of concern which had been identified in the Case Conference recommendation and which were summarised in the material sent to the applicant on 6 July.

18. Constable Campbell made a number of representations on behalf of the applicant about his disciplinary record, and then addressed the intelligence information that had been provided in redacted form to the applicant. Constable Campbell confirmed that the applicant's parents did live in the Mountsandel area of Coleraine and indicated that the applicant denied ever having taken or dealt in drugs. Constable Campbell also confirmed that the applicant did drive a black Audi as identified in the intelligence report; he referred to an incident in the Bullseye Bar when the applicant, who was off duty, had allegedly observed persons who were intoxicated about to drive a vehicle; he stated that the applicant had made a report of this to the police which had resulted in an arrest. The applicant was of the view that this person was involved in the drugs trade and had made malicious reports about him. In respect of the third intelligence report Constable Campbell observed that this

related to the North West 200 event and stated that he had been there and had observed the applicant who was undoubtedly drunk but not boisterous. He stated that there was no doubt that he had been drinking as he was staggering but that the applicant denied any allegation of drug taking.

19. ACC Jones, having listened to the representations, decided that he wanted to take some time to consider the case and asked Superintendent McCormill, who was also present at the meeting, to make further enquiries to determine whether there was any substance to the applicant's contention that malicious information had been passed to police about him as a result of the incident at the Bullseye pub. ACC Jones also requested that further enquiries be made of the Professional Standards Department as to why no action had been taken in relation to the taking of a drugs test in this case.

20. On 30 July 2009 ACC Jones was informed by DS Taylor that there was "no substance" to the applicant's assertions on the origins of the intelligence information. DS Taylor has averred at para 31(iv) of his affidavit that the intelligence which related to the incidents on 29 October 2007 and 22 April 2008 could not have been proven or disproven by reference to a compulsory drugs test administered by PSNI and that the pieces of intelligence dated May and June 2009 contained information which would not, of itself, have been sufficient in his opinion to warrant the conduct of a drugs test.

21. Following the hearing on 27 July and the clarification of the queries which he had raised following representations made on the applicant's behalf ACC Jones decided that he would confirm the recommendation made by the conference and terminate the service of the applicant and wrote to the applicant on 3 August 2009 (furnished to the applicant on 6 August 2009) informing him that he had been dismissed and instructing him to hand in his weapon and warrant card. The letter stated:

> "Dear Constable Moffatt
>
> As Nominated Chief Officer I invited you to attend a meeting on Monday 27th July 2009 to consider if you were likely to become a well conducted officer as per Service Procedure 25/2006.
>
> At the meeting I indicated my concerns regarding your conduct and behaviour during your probationary period.
>
> In the course of the meeting you put forward your contention that intelligence pertaining to you was malicious in origin, due to your proactivity. I have sought clarification from PSD on the feasibility of the

explanation given and can confirm that there is no substance to your supposition on the origin of the intelligence.

Having now considered all the facts of the case, I have decided that you have not been well conducted in accordance with Service Procedure 25/2006 paragraph 3 (2) (a) (b) (c) and paragraph 2 (3) and therefore your services should be dispensed with under Regulation 13 (1) of the PSNI Regulations 2005 with immediate effect.

In accordance with paragraph 13 (2) of the Regulations you are entitled to receive a months pay in lieu.

You have the right to appeal my decision. Appeals can be made on the following grounds:

1. The decision to dismiss is unfair on the basis that the individual has been treated less favourably than another individual in the same circumstances.
2. The correct procedure has not been followed.
3. The appellant can provide new evidence/information pertinent to the level of performance.

If you wish to appeal you should do so in writing within 14 days of receiving this letter. Your appeal should be addressed to the Chief Constable via the Head of PSD.
Yours sincerely"

22. Following his dismissal the applicant contacted a solicitor who then wrote a letter dated 12 August 2009 appealing the decision and setting out the grounds upon which the appeal was mounted from which it appears that neither Ground 1 or 2 was relied upon. No allegation of less favourable treatment was made nor was it suggested the wrong procedure had been used. The letter of appeal dealt seriatim with each of the matters contained in the summary.

23. DCC Gillespie was involved in the appeal hearing on 9 September 2009. At the date of the hearing the Chief Constable's position was vacant as Sir Hugh Orde had left to take up his post with the Association of Chief Police Officers and Mr Baggott had not yet taken up office. She was therefore discharging the functions of

the Chief Constable on this date in accordance with Section 34 of the Police (Northern Ireland) Act 2000. The note of the hearing states:

> "Regulation 13 Appeal Constable Aaron Moffatt 21577
>
> Date of Review: Wednesday 8 September 2008
>
> Name of Acting Chief Constable: Judith Gillespie
> Appeal Constable Aaron Moffatt 21577
>
> Constable Moffatt was appealing a decision by Assistant Chief Constable Jones to dispense with his services as a Probationary Constable in the Police Service of Northern Ireland.
>
> The Constable met with me, accompanied by his 'friend' Constable David Campbell. I explained at the outset the purpose of the meeting under Policy Directive 06/07 and outlined the grounds at paragraph 6(1) on which an appeal could be made.
>
> Constable Moffatt had instructed Madden and Finucane solicitors to submit in advance of the meeting the grounds on which the appeal was being made. I referred to the correspondence and indicated to Constable Moffatt that I intended to go through each individual query listed in the letter. I then proceeded to refer to each point and advised Constable Moffatt of the information which I had received regarding each and provided him with the opportunity to respond.
>
> In response to the matters relating to intelligence Constable Moffatt suggested that this was malicious information submitted by a former partner of his ex girlfriend. [I interpose that this did not appear in the solicitor's detailed written representations and is different from the allegation of malice investigated by ACC Jones] I indicated to Constable Moffatt that having re-examined the intelligence document that this did not appear to be the case.
>
> Constable Moffatt produced a 2.27kg container of 'Peak Whay' protein powder and indicated that he had sold a similar one to a colleague for £35. When

asked why he felt someone would allege that he was supplying steroids, he was unable to offer any explanation. [I interpose that in the notes of the 27 July meeting ACC Jones has recorded the following: '"Aaron does provide protein powders. His father is high up in the body building fraternity. He supplies police officers with protein powders, has supplied officers in Foyle. He breaks the powders up. It is 100% legal'.

Constable Moffatt raised the issue of not being permitted to take a drugs test at the time and offered to undertake a test. He provided a copy of a Urine test which he had undertaken himself on the 24 July 2009 with negative results. I explained to him that drugs only stay in the system for so long and that it would not prove anything for him to do so at this stage. Constable Moffatt responded by saying that he wanted it recorded that he had offered.

I advised Constable Moffatt that there remained outstanding Misconduct Proceedings which were currently held in abeyance awaiting the outcome of this appeal. [This is a reference to the Limavady incident of February 2009].

I asked Constable Moffatt if there was any further information he would wish to offer. He indicated that he was a very proactive officer, with one of the highest arrest rates and referred to various incidents where he had received commendations for good police duty and three further incidents where he would have expected to do so. When I suggested that he appeared to be a very proactive officer but that there was evidence that he neglected the detail around administration (ie his PDP folder being copied, not reporting RTC damage, no filling in his notebook properly) he indicated that he had never had issues of concern raised with him by the OCMT or regarding giving evidence at court.

I have sought clarification from the District OCMT and they have confirmed that Constable Moffatt has not come under their notice in respect of file quality or submission.

Constable Moffatt admitted that he had made some mistakes and had learnt from those. He referred to a previous meeting where ACC McCausland had agreed to extend his Probation until December 2009 and asked that he be allowed that time to demonstrate that he could become a well conducted officer and if he did not then he could be let go.

I asked Constable Campbell if he wished to raise any matters. Constable Campbell referred to the booklet of references which had been submitted in advance of the hearing and provided an updated version. I indicated that I had read the previous version and would consider the newly provided references. Constable Campbell indicated that Constable Moffatt had attended today despite his Grandfather being seriously ill and that he had given up a very good job in the Prison Service to fulfil his ambition of joining the PSNI and has done everything within his power to try to keep his job since he was dismissed.

Constable Moffatt [sic] also indicated that he had personally observed Constable Moffatt at the NW200 in May and whilst he was clearly intoxicated he could not see any evidence of drug taking.

I have listened carefully to what Constable Moffatt and Constable Campbell have said in response to the various incidents which form the basis of this dismissal. In the period from April 2006, when the officer commenced training, and February 2009 this officer has been involved in a *series of administrative and intelligence related matters which clearly breach acceptable integrity, discipline and professional standards. Taken into account all the information presented to me I regret that I can see no reasonable prospect of Constable Moffatt becoming a well conducted officer, and therefore the original decision of dismissal by ACC Jones stands.*
I wish the officer every possible success in the future.
Judith Gillespie
A/Chief Constable
11 September 2009"

**Evolution of Order 53 Statement and Candour of the Applicant**

24. The first version of the applicant's Order 53 Statement included a very grave allegation that the proceedings were tainted with bias and/or the appearance of bias

for a number of reasons one of which included alleged comments made by ACC Jones and DCC Gillespie at the outset of the hearings which, according to the applicant, suggested they had predetermined the issue. This ground of challenge arose in part from the applicant's contention in para 5 of his first affidavit that at the start of the meeting ACC Jones, according to him, had asked the applicant "to tell him why he should not sack me there and then. He then said I should convince him not to. I found this to be very inappropriate as I believe he had made his mind up before the meeting had even started". The allegation of bias was trenchantly rejected. At para 14(a) of ACC Jones' affidavit he states:

> "I reject the averment that I stated that the applicant should 'tell him why I should not sack him there and then'. I did not use those words. I did explain that the applicant had an opportunity to persuade me that he could become a well conducted member of the police service."

Although the applicant had a police federation representative, Constable Davy Campbell, there was no affidavit from him to support the applicant's averment or challenge the respondent's account. In fact following receipt of the affidavits challenging the applicant's account the applicant simply withdrew the allegation of bias.

25. Following the receipt of the affidavits from DS Taylor, ACC Jones and DCC Gillespie the applicant swore a second affidavit taking issue with a number of matters. As a result of these averments the applicant's Order 53 Statement was amended to include a claim that ACC Jones and DCC Gillespie took into account irrelevant considerations that the applicant had failed to wear a stab vest on *three* occasions and that the applicant had left gaps in his notebook on *thirteen* occasions. In response to this ACC Jones has averred in his second affidavit as follows:

> "(2) At para 3(g)(ii) the applicant contends that I gave undue weight to a belief that he had failed to wear a stab vest on three occasions. Within the file of papers presented to me was a Minute from Inspector Hudson, Inspector with responsibility for probationer development in G District, dated 2 March 2009. This report refers to *three* occasions when the applicant failed to wear a stab vest. I refer to a copy of the same exhibited hereto ...
>
> (3) Similarly, at para 3(g)(iii) the applicant contends that he had not left gaps in his notebook on thirteen occasions and thus I took into account an irrelevant consideration. I believe this is primarily addressed to the Deputy Chief Constable and refer to her second

affidavit sworn in these proceedings and to the reports attached to the same. I can confirm that I had before me the report from D/Inspector Nixon dated 22 September 2008 ... which refers to thirteen gaps. [I note in parenthesis that in para 5 of his second affidavit the applicant in dealing with the issue of notebooks states that he would leave blanks to complete the details but that there was nothing sinister in leaving the notebooks not ruled. For myself I regard this a remarkable and disturbing contention given the obvious significance of completed notebooks. Leaving blanks can seriously impact on the integrity of evidence and endanger prosecutions and the course of justice. To so aver *despite* the warnings he had received is astonishing]. Record keeping and the need for accurate, contemporaneous and ruled off entries in notebooks are an essential requirement of a police officer. This is one of the first lessons taught to probationary constables and is monitored under the probationary system. It is a matter of concern that a probationer constable cannot comply with this basic requirement."

26. DCC Gillespie in her affidavit stated as follows:

> "(11) The applicant also contends that I gave undue weight to a belief that he had failed to wear a stab vest on three occasions. ... I do not recall laying particular emphasis on the precise number of times on which the applicant had refused to wear this bespoke personal protection equipment. *The stab vest is an essential element of police personal protection uniform and the wearing of the same is* <u>*mandatory*</u>, unless a direction to wear ballistic body armour has been issued. *These vests are individually manufactured for each officer* at significant cost to the organisation and the public purse. I considered that *any instance* of failing to wear this equipment was a *significant lapse in discipline*. The fact that I am now aware that he had failed to comply with this direction on more than one occasion *confirms my view that he was unlikely to become a well conducted officer* in the PSNI.
>
> (12) The applicant argues at para 3(g)(iii) of his affidavit that he had left gaps in his notebooks on

> thirteen occasions. I can recall this issue being discussed at the appeal hearing. I do not believe that I was particularly concerned with the specific number of occasions on which the applicant had failed to comply with this *elementary* policing rule. As with the failure to wear protective equipment, I would consider any failure to comply with the training directions on police notebooks to be a *significant* matter for a probationer constable.
>
> (13) I have however made further enquiries in light of the contents of the amended Order 53 Statement. I refer to a letter sent by DI Nixon to DS Taylor on 22 September 2008 where he referred to approximately thirteen gaps in the applicant's notebook entries. I refer to a copy of this letter and the accompanying report from the Professional Development Unit Inspector Jennifer Hudson. I also refer to the notebook entries in question." [Emphasis added]

27. The applicant's lawyers in their detailed written representations to DCC Gillespie did not challenge the use of the Well-Conducted procedure nor did this appear as a ground of challenge in the original Order 53 Statement. It first surfaced in the second version (January 2010) which at para 3(f) stated:

> "The decision to invoke and continue with the well conducted procedure (Service Procedure 25/2006) in relation to any or all of the allegations made against the applicant was contrary to that policy and others for the following reasons:
>
> (i) A number of the matters had already been dealt with under Reg 11 of the PSNI (Conduct) Regulations 2000 (ie the superintendent's warnings and the incident where damage was caused to a police vehicle);
>
> (ii) The allegation of disorderly behaviour had been referred to the PPS. It could and should have been considered by a misconduct hearing."

28. In the third incarnation (February 2010) the applicant sought to add the additional contention at 3(f)(iii):

> "(iii) The applicant should have been dealt with by use of the Service Confidence Procedure(s)."

(In this version the applicant also *abandoned* the contention at (3)(g)(ii) and (iii) in relation to the stab vest and notebook entries).

29. The applicant did however maintain the contention in 3(g)(i) – (first introduced in the second version of the Order 53 Statement in January 2010) that ACC Jones and DCC Gillespie had given inappropriate weight to the allegation of disorderly behaviour and failed to take into account the strength of the evidence against the applicant and his denial of the charge. It may be convenient to consider these matters together.

30. It is however plain ACC Jones and DCC Gillespie knew that the applicant denied the charge of disorderly behaviour and moreover that the PPS had directed no prosecution (see the second affidavit of ACC Jones para 2 and the second affidavit of DCC Gillespie at para 9).

31. In relation to the *choice of process* argument DCC Gillespie averred as follows:

> "(2) The applicant contends at paragraph 3(f) of his amended Order 53 statement that the decision to invoke the Well Conducted procedure in this case was contrary to that policy. It is argued that the Well Conducted policy was not appropriate because a number of the matters had been addressed pursuant to Regulation 11 of the PSNI (Conduct) Regulations 2000.
>
> (3) The fact that a number of the issues raised at the case conference had resulted in the application of misconduct proceedings does not preclude the use of the Well Conducted procedure. Indeed, where a probationer constable has, in a very short time in the service, acquired a significant number of adverse misconduct findings, then that is a highly material consideration in determining whether or not he is likely to become a well conducted officer pursuant to Regulation 13.
>
> (4) In the present case the applicant had been the subject of two Superintendent's Warnings within a twelve month period and a Restricted Powers misconduct hearing. Those warnings and misconduct proceedings had concluded and adverse findings had been made against the applicant. It was entirely appropriate to consider the outcomes of those

concluded proceedings in the course of the well conducted procedure. The Chief Constable is required to assess whether probationer constables are likely to become efficient or well conducted officers. In that context it was entirely appropriate for the case conference and the NCO to examine the applicant's poor record under the Well Conducted procedure.

(5) The applicant further contends that the Well Conducted procedure should not have been used because the incident of disorderly behaviour in Limavady had been referred to the Public Prosecution Service. The applicant's probationary period was due to conclude on 26th August 2009. The applicant appears to be suggesting that his probationary period should have been extended solely in order to allow him to go through a misconduct procedure. This betrays a fundamental lack of understanding of the probationary constable process. If a probationer constable is not able to demonstrate that he is likely to become a well conducted and efficient officer within the defined probationary period then the Police Service will be unable to confirm the appointment. The extension of a probationary period to allow serious misconduct proceedings to be instigated runs counter to the purpose of the probationary exercise.

(6) The applicant also argues that his case should have been dealt with by way of the Service Confidence Procedure. While it is acknowledged that the Well Conducted Procedure does make reference to the need to give consideration to the use of the Service Confidence Procedure, the Service Confidence procedure is, generally speaking, not an appropriate mechanism for cases involving probationer constables.

(7) The Service Confidence procedure is used in cases involving officers who have been confirmed in post, but in whom the organisation has lost confidence. In such cases the officer may be removed from operational policing duties and relocated to other, often administrative, tasks until such time as organisational confidence is restored. This is an entirely inappropriate procedure to use with respect to probationer constables. The Police Service of Northern Ireland operates a performance and competence based method

> of training probationary police officers. They are required to rigorously complete a Personal Development Portfolio in the course of engaging in key operational policing duties. The relocation of a probationer constable to non-operational duties by virtue of the application of a Service Confidence procedure would be entirely incompatible with the probationer training regime. Where the Police Service have a lack of confidence in the competence, integrity or efficiency of a probationer constable the appropriate procedure to invoke is the bespoke well-conducted procedure. ...
>
> (8) The Applicant's case was considered under the Well Conducted procedure outlined in Force Order 25/2006. That procedure was superceded on 18th September 2009 by PD 09/09. The amended policy removes any reference to the use of the Service Confidence in cases involving probationer constables. The Service Confidence procedure was not appropriate in this case and, in my experience, has only ever been used in cases involving police officers who had been confirmed in post. ..."

**PSNI Regulations and Service Procedures**

32. Reg 13(1) of the PSNI Regulations 2005 states:

> "Subject to the provisions of this regulation, during his period of probation in the police service the services of a constable may be dispensed with at any time if the Chief Constable considers that he is not fitted, physically or mentally to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable."

33. Service Procedure 25/2006 is entitled "Guidance on dealing with probationer constables alleged not to be "well-conducted" but such behaviour is not suitable to be considered in either criminal and/or disciplinary terms". It states:

> "1. INTRODUCTION
>
> This General Order should be read in conjunction with General Order Part 1 No 6/06, File Box B(a) – Guidance on Dealing with Probationer Constables

When Their Performance And/Or Attendance Falls Below Standard.

(1) It provides guidance on how PSNI will deal with Probationer Constables alleged not to be 'well conducted', but such alleged behaviour is *not suitable* to be considered in either criminal and/or disciplinary terms.

(2) It also outlines the procedure to be followed in proceedings which could lead to the termination of the services of a Probationer Constable.

(3) The overarching aim is to ensure that public confidence in the Police Service is protected, while ensuring that the rights of individual probationers are protected.

2. BACKGROUND

(1) The Chief Constable must assess Probationer Constables to determine, inter alia, whether they are likely to become an efficient or 'well conducted' Constable. This is part of the process to confirm an individual officer's appointment.

(2) Scope and Definitions

There is no definition of 'Well Conducted'. In considering whether the Probationer Constable has not been 'Well Conducted', cognisance will be given to:

(a) Article 1.10, The code of Ethics, which states "whether on or off duty, police officers shall not behave in a way that is likely to bring discredit upon the Police Service;

(b) Whether the Probation Constable has or is acting on or off duty in such a way as to raise concerns about the Police Services ability to protect public confidence in policing.

(c) Whether the Probationer Constable has or is acting on or off duty in such a way as to raise concerns about their general ethical probity, and/or

character and/or judgment to act in accordance with the requirements set out in paragraph 2(2)(a) above.

(3) A Probationer Constable's behaviour in any given circumstances must be tested against paragraph 2(1) above. If concerns are raised, in the majority of cases the alleged behaviour will be considered in either criminal and/or disciplinary terms. This General Order does not apply to such cases. *However, there may be cases where criminal or disciplinary proceedings are not appropriate or possible. They are likely to be where intelligence indicates incidents or a pattern of unacceptable behaviour which does not amount to criminal or disciplinary offences, but which raise concerns about whether the Probationer Constable is 'well conducted' as referred to in paragraph 2(1) above. It is these types of cases, which will be considered under this process.*

(4) ...

(5) A precise definition of 'concerns' is not possible, as each set of circumstances must be judged on its own merit. In all cases, it should be borne in mind that termination of the services of a Probationer Constable can have very serious negative consequences for them. As a guide to those seeking to implement this process, considerations will include:

(a) The credibility of the individual(s) as witnesses of truth in criminal prosecutions, or misconduct hearings and requirements for disclosure;

(b) The potential risk to the public, colleagues or operations if the Probationer Constable continues in the post;

(c) The perceived risk posed by improper association with criminals and potential corruption;

(d) Suspected unethical or dishonest conduct or corruption;

(e) An assessment of the risk of recurrence;

(f) Whether the alleged action of the individual(s) was undertaken knowingly or recklessly.

3. LEGAL BASIS

(1) Regulation 13(1) of the PSNI Regulations 2005 ... requires a probationer to be assessed against three separate tests:

(a) Medical (including any Disability Discrimination Act aspect);

(b) Efficiency (including the level of performance achieved);

(c) Well Conducted (including a *general suitability test as well as any disciplinary aspect*).

(2) This General Order is concerned with the test of *suitability* set out in sub-paragraph 3(1)(c) above, which is not covered by current Disciplinary Procedures.

(3) The NIO Guidance on Police Unsatisfactory Performance, Complaints and Misconduct Procedures effectively defines the scope of this approach. It states:

> *'The provision for the Chief Constable to dispense with a Constable during his or her probationary period should not be used as an alternative means of dismissing a Probationer who should properly face misconduct proceedings'.*

4. PROCESS

(1) Whenever confidential or source sensitive material becomes available which raises 'concerns' about the conduct of a member of staff, the recipient has a duty to divulge the details either directly to the Head of Branch, Internal Investigation Branch (IIB) or via other internal confidential reporting procedures including Safecall.

(2) IIB will determine if the circumstances and nature of the alleged misconduct are appropriate to be investigated and dealt with under form al discipline procedures or criminal investigation and if so will progress the case accordingly.

(3) If IIB determine that the alleged misconduct indicates an incident or a pattern of unacceptable behaviour which does not amount to criminal or disciplinary offences but which raises concerns about the individual(s) not being 'well conducted' as referred to in paragraph 2(1) above they will refer the case to the Director of Human Resources (DHR).

(4) The DHR will, as soon as is reasonably practicable convene a Case Conference comprising the DHR, Head of IIB, DCU Commander of the Probationer Constable concerned and Legal Adviser. The Conference will be closed and confidential. Everyone in attendance will be required to sign a confidentiality agreement. Confidential minutes will be kept and the decision-making process will be fully documented. The Conference will decide:

(a) Does the alleged behaviour raise concerns about the individual not being 'well conducted'? If not, and no further formal action is required, the matter will be closed. The DCU Commander will inform the relevant Regional ACC accordingly;

(b) Is the case appropriate to be dealt with under the Service Confidence Procedure? If so the ... Service Confidence Procedure, should be invoked direct.

(c) If the alleged behaviour does raise concerns about the individual not being 'well conducted' the conference will decide if the matter requires further investigation or clarification and if so will direct appropriate actions and by whom. The conference will then be adjourned until the actions directed are completed.

(d) The recommendations of the Case Conference will be referred to the Nominated Chief Officer (NCO) for decision. The NCO will be the Assistant

Chief Constable of the area to which the Probationer Constable concerned is attached.

(e) Where applicable IIB will conduct an assessment of the need to review all relevant past and outstanding prosecutions the probationer is involved in. The HOB IIB will conduct a review as to disclosure in those cases.

5. DECISION MAKING PROCESS

(1) The decision making process must be formally documented.

(2) On receipt of a recommendation from a Case Conference the NCO will consider:

(a) *Whether there is sufficient information to support the recommendations of the Case Conference;*

(b) Whether the actions recommended are necessary, proportionate, non-discriminatory and not an abuse of process.

(3) After considering *all* available information the NCO will make a decision on:

(a) Any alternative responses such as invoking the Service Confidence Procedures;

(b) Whether or not to terminate the service of the Probationer Constable.

(4) If the decision is to terminate the service of the Probationer Constable and details of the case can be provided in whole or in part to the Probationer Constable the NCO will provide such details and invite the Probationer Constable to an interview.

(5) The Probationer Constable's DCU Commander should be present at the meeting and in accordance with good practice the Probationer Constable will have the option to have a 'Friend' (must be a serving member) or Staff Association representative present. Confidential minutes will be kept of this meeting and will contain:

(a) A record of the decision making process. These will include the purpose of the meeting and the proposed course of action. The options considered, rejected and any recommendations made;

(b) The procedure being followed will be explained to the Probationer Constable concerned. (The Probationer Constable, the Friend or the Staff Association representative will not receive a copy of the minutes);

(c) The Probationer Constable will be given all possible information but there will be limits on disclosure. This should be done by reading a prepared script to the Probationer Constable concerned. Nothing will be disclosed which would frustrate any investigation or the prevention or detection of crime. In relation to material that might damage national security, breach any statute, compromise or endanger any operation or individual, the method of acquisition or source will not be given. The NCO should consult with HOB IIB and ACC Crime Ops if necessary to formulate what the Probationer Constable can be told in a prepared script format;

(d) The Probationer Constable will be informed of the right to appeal the decision of the NCO in writing to the Deputy Chief Constable (DCC) via HOB IIB within 14 days.

(6) Should a Probationer Constable decline to attend an interview the NCO will communicate their decision in writing to the Probationer Constable via the relevant DCU Commander who will hand the letter personally to the Probationer Constable and record any verbal response. The letter should also inform the Probationer Constable of the right to appeal as at 5(5)(d) above.

(7) On conclusion of this process the NCO will communicate their decision and resulting actions to all members of the Case Conference. All papers in the Case will be retained by HOB IIB.

6. APPEAL

(1) An appeal against the decision of the NCO must be submitted in writing within 14 days of the Probationer Constable being informed of the decision to terminate their service. The notice should indicate the reasons and grounds for the appeal. The Probationer Constable will be afforded the opportunity to present their case to the DCC. A 'Friend' (must be a serving member) or representative of the Staff Association may also be present. A record will be kept of meetings and decisions made. HOB IIB will retain all documentation in the case.

(2) The DCC will consider whether the decision to terminate the service of the Probationer Constable was necessary, proportionate, non-discriminatory and not an abuse of process. The findings of the DCC will be notified personally to the Probationer Constable within six weeks from the date of receipt of the written appeal. The decision of the DCC will be final.

7. HUMAN RIGHTS/EQUALITY/INTEGRITY

This General Order is deemed to be Human Rights compliant. It has been screened for Section 75 considerations, the Code of Ethics and meets the organisations integrity standards."
[Emphasis added]

**Discussion**

34. The applicant challenged the alleged insufficiency of disclosure particularly in respect of the intelligence material. As far as the complaint about intelligence material is concerned the Court was referred to the decision of Weatherup J in ***JR26* [2009] NIQB 101** where the issue of the procedural fairness afforded to a police officer where redacted materials were provided in a service confidence procedure was considered. In that case there were over 150 pieces of intelligence material available to the decision maker none of which were disclosed to the applicant. At para 25 Weatherup J observed:

> "[25] Under the Service Confidence Procedure there will inevitably be many cases where only limited information can be released to the applicant and where only a gist of the information can be provided. Thus there will be a limit on the officer's opportunity

> to make meaningful representations. I am satisfied that, in the present case, the applicant was provided with such a gist of the available information as the circumstances permitted. The countervailing measures in place involved scrutiny of the information in relation to the credibility of the sources, a Case Conference involving a high ranking police officer, a Human Relations official and a Force Legal Adviser, a decision made at ACC level and a review conducted at DCC level and the opportunity to be removed from the Procedure. Were it necessary to decide on the fairness of the procedures applied to the applicant I would not have been satisfied that in the context of this decision making process the private interest of the applicant should prevail over the public interest sought to be achieved by the Procedure. However, as the Procedure is not subject to Judicial Review, any issue of procedural fairness is a private employment law matter arising between the applicant and the Chief Constable. The application for Judicial Review is dismissed."

35. I accept that there was no procedural unfairness and that the applicant was provided with the same safeguards as were provided in ***JR26.*** Furthermore, in the present case the applicant was afforded a full gist of the redacted materials, given an opportunity to comment at the hearing before ACC Jones, again in the written representations by his solicitors before the appeal hearing and at the appeal hearing itself. In relation to the related complaint of alleged unfairness arising from the non-provision of PSD material (re the applicant's suggestion that the drugs allegations were malicious) I consider that this argument is without foundation. The minutes of the 27 July meeting make it clear that ACC Jones took this allegation seriously, directed that it be investigated and did not take any action against the applicant until he had received clarification in respect of the matters raised by him. In those circumstances I consider that there is no substance to the claim of procedural impropriety.

36. The applicant complained that the termination of his employment was vitiated by unfairness because of the failure to afford him the opportunity to submit to a drugs test. However the burden of the evidence satisfies me that the respondent, not unreasonably, questioned the *utility* of such an exercise in the circumstances of the present case. This matter was raised before ACC Jones and DCC Gillespie. It is plain that ACC Jones engaged with the applicant's point about the non-use of a drugs test and moreover at the appeal hearing before DCC Gillespie a copy of a negative drugs test, which the applicant had himself procured from his GP, was furnished to and taken into account by DCC Gillespie. In her notes of the appeal hearing she recorded the fact that the applicant raised the issue of not being

permitted to take a drugs test and offering to undertake such a test. She refers to the provision by him of a copy of a urine test which he had had undertaken himself on 24 July 2009 with negative results. The notes also record that she explained to the applicant that drugs only stay in the system for so long and that a negative drugs test would not prove anything for him at this stage. The applicant responded at the hearing by saying that he wanted it recorded that he had offered. Moreover, DS Taylor pointed out that the intelligence which related to the incidents in October 2007 and April 2008 could not have been proven or disproven by reference to a compulsory drugs test and that the pieces of intelligence dated May and June 2009 contained information which would not, of itself, have been sufficient in his opinion to warrant the conduct of a drugs test. In light of this evidence I do not consider the fact that the applicant was not afforded the opportunity of a PSNI drugs test resulted in vitiating unfairness.

37. The decisions were challenged, albeit faintly, on the ground that they were irrational including a complaint of inequality of treatment. In respect of this latter issue I note that despite the fact that less favourable treatment is a specific ground of appeal this was never raised before DCC Gillespie as a ground notwithstanding that the applicant's solicitor acted for the alleged comparators. This aspect of the irrationality challenge was, in my view, factually (and legally) threadbare and it is difficult to discern how a point not raised with the decision maker could ordinarily result in vitiating unfairness. In any event it is apparent that the cases now relied upon are materially distinguishable from the applicant's case. DCC Gillespie, who was involved in both of these cases, specifically rejected any suggestion that there had been a breach of equality. She averred that each case must be considered on its own merits. The case of ***Damien Neill*** resulted in a judgment of the Court. The case of ***Kyle Jones*** was conceded by the police service because of a technical deficiency in the delegation of the powers of the Chief Constable. She avers "I did not, and do not, consider myself constrained in the discharge of this appeal procedure by the outcomes of these other, *entirely unrelated*, cases" [emphasis added].

38. In respect of the bare rationality challenge DS Taylor responded at para 31(ii) of his affidavit in the following terms:

> "In the period in which I have been supervising member I cannot recall any other case where a probationary constable has been subject to the same degree of formal and informal disciplinary investigation and action. The applicant's conduct exposed grave concerns about his integrity, his honesty and his ability to become a well conducted officer in the Police Service of Northern Ireland."

39. In a similar vein at para 14(c) of his first affidavit ACC Jones indicated that he considered that the applicant's record showed a pattern of behaviour which indicated that he was unlikely to become a well conducted officer. He stated that the concentration of incidents during the short probationary period was significant.

40. I am quite satisfied that the rationality challenge is groundless.

**Choice of Process**

41. The applicant, who was represented, did not contend before the ACC that the correct procedure was not being used. Despite the fact that such a contention is a specific ground of appeal (notified to the applicant) it was not raised by his solicitors in their detailed grounds of appeal. Neither did he or his representative raise it at the appeal hearing itself. Nor was it pleaded as a ground of challenge in the first Order 53 statement.

42. Under the choice of process challenge, summarised at para 3(f)(i)-(iii) of the amended Order 53 statement, three separate reasons are advanced for the contention that the decision to invoke the Well-Conducted procedure in relation to any or all of the allegations made against the applicant was contrary to that policy. The first was the contention that a number of the matters had already been dealt with under Reg 11 of the PSNI (Conduct) Regulations (ie the Superintendent's Warnings and the incident where damage was caused to a police vehicle). This matter is addressed by DCC Gillespie in her affidavit at paras 3 and 4 which are set out at para 31 above. I refer to these for the purposes of incorporation at this juncture (without repeating).

43. I do not accept that it was inappropriate to include these matters in the "Well-Conducted" hearing because they had already been dealt with at a misconduct hearing. Such matters are, in my view, self evidently relevant to the Chief Constable's assessment under Reg 13 as to whether a probationer's service ought to be dispensed with on the basis that it is considered by the Chief Constable that he is not likely to become an efficient or well conducted constable. The decision maker must take into account all relevant matters which bear upon that vitally important judgment exercised by the Chief Constable in the public interest. I can see no good reason for excluding consideration of such material and indeed it would be surprising if it were otherwise.

44. Out of sequence, the third contention was that the service procedure should have been used. This contention was also addressed in detail by DCC Gillespie at paras 6 – 8 of her affidavit also set out at para 31 above to which I again refer.

45. Having regard to those averments I consider there is no merit in this ground of challenge.

46. The second reason advanced for impugning the choice of process was the contention that the allegation of disorderly behaviour had been referred to the PPS and that it could and should have been considered by a misconduct hearing. It is likely that if the Well-Conducted procedure had not intervened that the investigation into the Limavady incident would have been pursued further by PSD with the possibility of a further misconduct hearing (see para 11 above). Events had,

however, overtaken this otherwise extant issue. The applicant's probationary period was due to conclude on 26 August 2009 and the proper initiation of the Reg 13 procedure meant that consideration of a misconduct hearing in respect of the Limavady incident would have been academic if the applicant was, as happened, dismissed under Reg 13. In this respect the Court also recalls what DCC Gillespie said about this aspect of the case at para 5 of her affidavit set out at para 31 above which I again refer to for the purposes of incorporation at this juncture (without repeating).

47. The applicant referred to a number of cases in some of which the choice of process (Reg 13 or its analogue versus disciplinary misconduct route) resulted in Reg 13 dismissals being quashed on the basis that the disciplinary misconduct route should have been adopted.

48. What is clear both as a matter of principle and from the authorities is that where, as here, there are two separate dismissal procedures which govern probationers the decision which to use is a decision of the employing force. There is a very helpful review of the main authorities in this area in the judgment of Elias J in ***Khan* [2009] EWHC 472.** Before referring to the relevant passages I note that the challenge to the use of the Reg 13 process in ***Khan*** failed. The relevant part of the judgment states:

> "27. There are two Court of Appeal authorities which have considered this issue. R v Chief Constable of West Midlands Police ex p Carroll (unreported) 10 May 1994 concerned a decision to dispense with the services of a probationary constable under a predecessor of Regulation 13, which was in identical terms. There were said to have been three incidents which demonstrated that the probationer was unsuitable to retain office. It was accepted by the police that two of the alleged incidents could have been the subject of disciplinary proceedings because they amounted to allegations of conduct contrary to the police disciplinary code. The probationer strongly denied two of the allegations made against him and contended that there was a conspiracy to harm him from within the force and that the charges were untrue.
>
> 28. The Court of Appeal concluded that in the circumstances it was wrong to use the regulation equivalent to Regulation 13. The failure to use disciplinary proceedings was both Wednesbury unreasonable and procedurally unfair. Lord Justice McCowan pointed out, in a passage relied upon by

the claimant, that if the disciplinary route had been taken it was perfectly possible that the claimant might have established that the charges were untrue. this was particularly so since the Divisional Court had found his evidence more credible than that of the other witnesses. Lord Justice Rose agreed and said:

"The fundamental flaw in the fairness of the Chief Constable's decision was that he assumed facts to be established which were and had been virtually from the outset disputed by the appellant, notably on the basis that other officers were conspiring against him."

29. The other case is R v Chief Constable of British Transport Police ex p Farmer (unreported) 30 July 1999. The applicant had in that case admitted that he had committed an offence of dishonesty, helping another probationer to cheat in examinations. His services were dispensed with under a rule similar to Regulation 13. He contended that he ought to have been subject to disciplinary proceedings. The Court of Appeal disagreed. They rejected the submission that it was not legitimate to use the Regulation 13 procedure whenever a matter could be put through the disciplinary process.

30. Lord Justice Henry, with whose judgment Lord Justice Potter and Lord Justice Mummery agreed, said:

> " ..... where the offence is admitted, there will be many cases where it would be contrary to good administration to go by the disciplinary route. The probationary period is there to discover and deal with fundamental unsuitability of outlook or temperament or behaviour. Each of these might manifest themselves in misconduct, but would in most cases be more appropriately resolved in the probationer's dismissal procedure concerned as it is not so much with the individual charges as with fundamental questions about whether the probationary police constable is fitted to perform the testing duties required of the police."

Later he said:

> "In conclusion, there are two separate dismissal procedures which govern probationers. The decision which to use is a decision for the employing force. Where the facts founding the complaint are not admitted, in most if not all cases the decision is likely to be that the question whether the charge is proved or not proved be decided under the disciplinary procedures.
>
> .....
>
> 33. The issue, it seems to me, is whether there was sufficient conflict over the relevant facts to make it unfair for the Chief Constable to make the judgment he did on the basis of the undisputed primary facts. I do not think that there was. In my judgment, the Chief Constable was fully entitled to infer in the circumstances that the woman was vulnerable. He had to determine on the basis of undisputed primary facts whether the claimant was "fitted mentally to perform the duties of his office" and was "likely to become a well conducted constable". In my judgment he had sufficient material to determine that question. He was entitled to take the view, on the material that he had and which was not disputed, that this was inappropriate conduct. Whether a woman in that situation is vulnerable is itself a matter of assessing the primary facts. The Chief Constable was, in my view, entitled to make that determination himself. I do not accept that a disciplinary body would have been in any better position to draw inferences from that material.
>
> 34. Mr Southey placed considerable weight on the fact that Mr Beggs had accepted that if the case went before the disciplinary panel, it was possible that there would be a different outcome. Of course, it can never be stated categorically how a different body might assess matters or how the evidence might turn out. That does not, in my view, show that the Chief Constable's decision to go via the Regulation 13 route was mistaken. The question is whether the scope of the disputed matters was such that it would be unfair for him to make the assessment under the Regulations, not whether the outcome would

inevitably have been the same even if the disciplinary process had been utilised."

49. In the present case there was ample material underpinning the use of the Well-Conducted procedure. The choice of procedure, subject to irrationality or vitiating procedural impropriety, was a matter for the respondent. The decision was plainly not irrational and, in my view, resulted in no unfairness to the applicant. Had it become necessary (in the event that the applicant had been confirmed as a constable) it is likely that the Limavady incident would have been pursued with PSD with the possibility of a misconduct hearing.

50. The apparently undisputed aspects of the facts underlying that incident can be gleaned from the two statements furnished by the applicant to the PPS. These underlying facts reflect extremely badly on the applicant. Whilst he denied calling Constable Logue, the driver of the police cell van, a "wanker", it appears to be common case that at a time when the applicant and his friends, after a night out and under the influence of alcohol, were having difficulty obtaining a taxi that the applicant flagged down a liveried police van asking the on duty police officer for a lift. The driver of the van then closed the door and drove off and sometime later the applicant was cautioned for disorderly behaviour. It is also apparent that the applicant and his friends had arrived in the Limavady area at approximately 1700 hrs and went to a number of pubs in the area. Both his witnesses indicate that they were intoxicated (see Part B Exhibits Pages 175-197). What the material discloses was an attempt by the applicant to divert a patrol for the purposes of securing a lift which would have resulted in an inappropriate use of a police vehicle/resources for his personal benefit and that of his colleagues.

51. One would have thought that a probationary police officer, knowing that he was on probation, would exhibit the highest standards of conduct – particularly so given his existing disciplinary record and the fact that he was then already the subject of a serious misconduct investigation.

52. The final discrete, but related, challenge upon which the applicant placed some emphasis was the contention that the allegation of disorderly behaviour was an inappropriate matter for consideration under the chosen procedure and should not have been taken into account in making the impugned decision. I reject that submission. The fact that a police officer on duty had complained about the applicant's behaviour and might (if confirmed as a police constable) give rise to further internal disciplinary hearings was, (having regard to the purposes of a Reg 13 hearing dealing, inter alia, with "concerns"-see para 2 of the Service Procedure set out at para 33 above) plainly a matter that was appropriate for consideration as a small element of the overall picture. It was but one of a large number of concerns before the decision makers.

53. Contrary to ground 3(g)(i) it is plain from the evidence that the decision makers were aware not only of the applicant's denial of the charge but also that the PPS had directed no further prosecution. It is thus unsurprising that this material

was a peripheral concern to the overall *pattern* of unacceptable behaviour disclosed by this applicant's record and background.

54. I do not consider that there is any vitiating unfairness in the open, albeit peripheral, way in which this allegation, whose investigation was in abeyance, was considered. Even if it had been established that the Limavady incident should not have been considered it is, to my mind, self evident that the result would have been the same. In fact, if the undisputed elements of the account had been explored they could have only made an already irredeemable situation worse.

55. In light of the above I reject all of the applicant's grounds of challenge and accordingly the judicial review is dismissed.