Neutral Citation No: [2022] NIQB 63	*Ref:* **QUI11869**
	ICOS No: **22/004627**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **14/06/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY HANS STEWART FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

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Mr Skelt QC and Mr Egan BL (instructed by Edwards & Co, Solicitors) for the Applicant
Mr Dunlop QC with Ms Best BL (instructed by the Crown Solicitor's Office) for the Respondent
Mr McEvoy BL appeared for Professional Standards Department of the PSNI as an Intervener

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QUINLIVAN J

Introduction

[1] The applicant Hans Stewart is challenging a decision of a misconduct panel, appointed by the Chief Constable, which found the applicant guilty of gross misconduct and dismissed him from the PSNI.

[2] Mr Skelt QC and Mr Egan BL appeared for the applicant, instructed by Edwards & Co, Solicitors. Mr Dunlop QC with Ms Best BL, appeared for the respondent, instructed by the Crown Solicitor's Office. Mr McEvoy BL appeared on behalf of the PSNI Professional Standards Department ("the Appropriate Authority") as an Intervener. I am grateful to all counsel for the quality of their oral and written submissions.

Factual Background

[3] On 17 January 2020 the applicant, while at his home, accidentally discharged his firearm when removing it from his holster. He did not report the accidental discharge to his superior officer at the time. The applicant was required to notify his superiors of a negligent or accidental discharge.

[4] Subsequently, on 10 March 2020, the applicant attended Queen's Officer Training Centre in Belfast. Upon unloading his firearm, the spent casing was seen by security personnel. Later that same day the applicant informed his supervisor about the spent casing having been seen at the Training Centre. When asked by his supervisor whether he had discharged his weapon by accident the applicant denied any such discharge. He phoned his wife and son, in the presence of his supervisor, to ask them whether they knew anything about the circumstances of the discharge and they confirmed that they had no knowledge of the discharge.

[5] The applicant was further asked about this matter on 11 and 12 March 2020 and he continued to maintain his denials. He advised his supervisor on 12 March 2020 that he had found a bullet lodged in a floor at home and he advised his supervisor that he would enquire of his family whether they could explain the circumstances of this discharge, implying that his son may have been responsible for the discharge. The matter was reported for disciplinary consideration.

[6] On 14 March 2020 D/Inspector Rogers of the Appropriate Authority required Inspector Eastwood to serve a Regulation 16 Notice, pursuant to the Police (Conduct) Regulations (NI) 2016, on the applicant. There is a dispute between these officers as to what was said between them and whether D/Inspector Rogers gave any assurance to Inspector Eastwood to the effect that if the applicant came clean, he would avoid the most severe sanction, dismissal. To my mind, nothing of significance turns on this dispute. The key issue is not what was communicated by D/Inspector Rogers to Inspector Eastwood, but rather what was communicated by Inspector Eastwood to the applicant when he served the Regulation 16 Notice, a matter addressed further below.

[7] The Regulation 16 Notice, as well as containing details of the allegation made against the police officer, identifies certain safeguards available to police officers being served with such a notice. Thus, a caution is recorded at the beginning of the Notice advising the police officer that they do not have to say anything but that it may harm their case if they do not mention when interviewed, or when providing information under the regulations, something which they later rely upon in subsequent proceedings. The police officer is also advised of their entitlement to obtain advice from their staff association and to be advised, represented, and accompanied at hearing by a 'police friend.' The police officer is given an opportunity to make a written or oral statement, or to provide documentation to the investigation, within 10 working days of being served with the notice. The police

officer is further advised of their right to legal representation if the matter proceeds to a disciplinary hearing. The Regulation 16 Notice is clearly formulated so as to communicate these safeguards to the police officer upon whom the notice is being served.

[8] Inspector Eastwood served the Regulation 16 Notice on the applicant on 14 March 2020. According to the Inspector, he advised the applicant that he had been approached by D/Inspector Rogers with what he believed to be an offer of a less severe sanction if the applicant was to tell the truth. He communicated to the applicant that, while the applicant would receive a severe sanction, he did not expect it to be dismissal, provided the applicant made full admissions and apologised for his actions.

[9] Inspector Eastwood made a statement in which he recorded the applicant's response. The applicant made full admissions. He admitted the negligent discharge of his weapon on 17 January 2020, further admitted dishonestly denying negligent discharge thereafter, and he acknowledged that he should have reported the matter at the earliest opportunity.

[10] On 30 April 2020 the applicant was served with a Notice of Referral to Misconduct Proceedings under regulation 23 of the Police (Conduct) Regulations (NI) 2016. He faced two charges, the first a charge of breaching Articles 7.1 and 7.5 of the Code of Ethics. Article 7.1 imposes an obligation on police officers to act with integrity and Article 7.5 obliges police officers not to commit an act of corruption or dishonesty. The particulars of these charges related to the various lies the applicant told about the accidental discharge in March 2020. The second charge was a charge of breaching Article 1.5 (professional duty). This charge related to his failure to report the accidental discharge of his weapon as required.

[11] On 29 September 2020 a misconduct panel was convened. The panel found the applicant guilty of gross misconduct in respect of the dishonesty charge and ordered his dismissal.

[12] The applicant appealed the decision of the misconduct panel to the Police Appeals Tribunal. The Police Appeals Tribunal held a hearing on 4 June 2021 and gave its decision on 9 June 2021. In summary terms, the Appeals Tribunal allowed the appeal, albeit not on all grounds relied upon by the applicant. The Tribunal set aside the decision of the original misconduct panel and remitted the matter to a fresh panel.

[13] A second misconduct panel convened on 4 November 2021. The second misconduct panel found the applicant guilty of gross misconduct in relation to the allegation of dishonesty, and misconduct in relation to the accidental discharge of his weapon. He was dismissed for the charge of gross misconduct and given a written warning in relation to the accidental discharge of his weapon. It is the

decision to dismiss the applicant for gross misconduct which is under challenge in these proceedings.

[14] The applicant challenges the decision on a number of grounds, which I summarise below in very general terms. The applicant maintains that there has been non-compliance with the regulations governing police misconduct and that as a consequence the decision to dismiss him should be quashed. He further contends that the second misconduct panel departed from the guidance of the Police Appeals Tribunal and that it was not entitled to do so. There is also a complaint of procedural unfairness. These issues primarily resolved around what the applicant claimed was the unequivocal promise or assurance provided to the applicant by Inspector Eastwood, as a consequence of which the applicant made admissions which formed the basis of the dishonesty charge, which in turn led to his dismissal. In essence his case is that he made admissions to the allegations in reliance on the assurance that, if he made admissions and apologised, he would not be dismissed.

[15] It is important to note that the applicant does not complain about the fact that misconduct proceedings were taken against him, nor does he complain about the finding of gross misconduct, his complaint focuses on the sanction which followed, dismissal. He accepts that the promise or assurance made to him by Inspector Eastwood did not suggest that he would not face disciplinary sanction, or that the sanction imposed would not be serious. Rather it is his case that the assurance given to him was an assurance that he would not be dismissed. Ultimately, he accepts that he will be sanctioned for his misconduct, but seeks a sanction short of dismissal.

[16] The respondent rebuts the allegation of unfairness. However, the primary focus of the respondent's submission to this court is that the case should not be before this court because the applicant has available to him an alternative remedy, namely an appeal to the Police Appeals Tribunal.

[17] It is common case that the applicant has lodged an appeal from the misconduct panel with the Police Appeals Tribunal in accordance with the Police Appeals Tribunals Regulations (NI) 2016. That appeal has been adjourned, pending the judgment of this court. The applicant can however bring his appeal to the Appeals Tribunal if unsuccessful before this court.

[18] Whilst mindful of the arguments raised before me as to the substance of the decision under challenge, it appears to me that I need to address as a preliminary issue, the question of whether the applicant has available to him an alternative remedy, and if so, whether there are any circumstances which would justify this court determining the application for judicial review.

Police Appeals Tribunals Regulations (NI) 2016

[19] The Police Appeals Tribunals Regulations (NI) 2016 represents a comprehensive code for dealing with appeals from police misconduct hearings. The

rules outline the procedures which regulate the conduct of such proceedings. A number of provisions are relevant for present purposes.

[20] Regulation 4(4) of the Police Appeals Tribunals Regulations (NI) 2016, deals with the grounds of appeal to a Police Appeals Tribunal and provides as follows:

> "**4.-**(4) The grounds of appeal under this regulation are -
>
> (a) that the finding or disciplinary action imposed was unreasonable; or
>
> (b) that there is evidence that could not reasonably have been considered at the original hearing which could have materially affected the finding or decision on disciplinary action; or
>
> (c) that there was a breach of the procedures set out in the Conduct Regulations or other unfairness which could have materially affected the finding or decision on disciplinary action."

[21] As appears from *R (Chief Constable of Durham) v Police Appeals Tribunal & Cooper* [2012] EWHC Admin 2733 which looked at the equivalent English provision, the reference in regulation 4(4)(a) to 'unreasonable' does not impose a test of Wednesbury unreasonableness but something less. (§6-7)

[22] Regulation 23 of the regulations, deals with the decisions which the Tribunal can arrive at on appeal and provides, so far as relevant, as follows:

> (1) The tribunal shall determine whether the ground or grounds of appeal on which the appellant relies have been made out.
>
> (2) The tribunal may impose any sanction available to the original hearing.
>
> (3) Where the tribunal determines that a ground of appeal under regulation 4(4)(b) or (c) or regulation 5(6)(b) or (c) has been made out, the tribunal may set aside the relevant decision and remit the matter to be decided again in accordance with the relevant provisions of the Conduct Regulations or the Performance Regulations (as the case may be).
>
> (4) Where the tribunal remits the matter under paragraph (3) and the relevant decision was the

> decision of a panel ("the original panel"), the matter shall be decided by a fresh panel which is constituted in accordance with the relevant provisions of the Conduct Regulations or the Performance Regulations (as the case may be) but does not contain any of the members of the original panel.
>
> (5) The determination of the tribunal shall be based on a simple majority but shall not indicate whether it was taken unanimously or by a majority.
>
> (6) The chair shall prepare a written statement of the tribunal's determination of the appeal and of the reasons for the decision.
> …"

Alternative Remedy – Discussion

[23] The key authority in this jurisdiction on the issue of alternative remedy remains *Re Ballyedmond Castle Farms Ltd's Application; and re DPP's Application* [2000] NI 174. In that case the DPP had brought a challenge to a costs order made in the magistrate's court by way of judicial review. It was contended that leave should be set aside because the DPP ought to have appealed the costs order by way of case stated. The Divisional Court addressed the issue of an alternative remedy as follows:

> "It tends to be assumed that an applicant's failure to resort to an alternative remedy open to him will almost inevitably result in the rejection of an application for judicial review. On examination, however, it may be found that the principles governing the exercise of the court's discretion are less rigid and draconian and that a degree of flexibility exists which allows the court to take into account a number of factors in its decision. The traditional rule is that although the court may retain its jurisdiction to grant an application for judicial review, where a statutory machinery or other alternative remedy is available the alternative should be pursued, save in exceptional circumstances." (p.503 b-c)

[24] In their judgment the Divisional Court went on to identify six guiding principles to be applied to the question of whether an alternative remedy should preclude an application for judicial review, as follows:

(a) The existence of an alternative statutory machinery will mean that courts will look for 'special circumstances' before granting an alternative remedy.

(b) There are, however, a number of factors which may amount to 'special circumstances', and the court should be astute not to abdicate its supervisory role.

(c) What is the most efficient and convenient method of resolving a dispute should be determined having regard not only to the interests of the applicant and respondent before the court, but also the wider public interest.

(d) Whether the allegedly alternative remedy can, in reality, be equally efficacious to solve the problem before the court, having regard both to the interests of the parties before the court, the public interest and the overall working of the legal system.

(e) In determining the most efficacious procedure, the scope of enquiry should be considered. It may be that fact-finding is better carried out by an alternative tribunal. However, if an individual case challenges a general policy, the relevant evidence may be more readily admissible if the challenge is brought as a judicial review: an allegation that a prosecution is unlawful because brought in pursuit of an over-rigid policy can scarcely be made out on the facts of one case.

(f) Expense of the alternative remedy or delay may constitute special circumstances ..."

[25] The applicant contends that exceptional circumstances arise in the instant case. The applicant makes the point that he has already successfully appealed a decision of a misconduct panel only, as the applicant claims, for the second panel to replicate the errors which led to the first successful appeal. The applicant says the point has thus arrived for this court to treat the case as exceptional and to permit the applicant to proceed by way of judicial review, leave having already been granted.

[26] In looking at the question of whether the instant case is exceptional, the parties referred me to a number of cases in this jurisdiction where the court has

determined applications for judicial review of decisions of misconduct or disciplinary panels without waiting for the matter to be determined by an Appeals Tribunal.

[27] In *Re O'Connor & Broderick* [2005] NIQB 40, Weatherup J who determined a challenge to a decision of a police disciplinary panel, quashed the decision of the disciplinary panel on the grounds of apparent bias. Weatherup J expressly addressed the contention that this was impermissible satellite litigation. In his judgment, Weatherup J referred to a decision of the English Court of Appeal in *R v Chief Constable of the Merseyside Police ex parte Merril* [1989] 1 WLR 1077, quoting from Lord Donaldson at p.1088, wherein he stated:

> "It must be even rarer to have a situation in which a judicial review should even be considered before a Chief Constable has reached a final decision on the complaint, if indeed one can be imagined. Normally, the time for judicial review would not arise, if at all, before the appeal tribunal had given its decision."

[28] Thereafter Weatherup J stated as follows:

> "Both cases cited above recognise that only in exceptional circumstances will it be appropriate for Judicial Review proceedings to take place in the course of criminal proceedings and that all issues should be dealt with in the proceedings whether at trial or on appeal. Similarly in disciplinary proceedings the issues that arise should be dealt with in the proceedings, whether at the initial hearing or on review or on appeal where permitted, and normally Judicial Review would only be appropriate at the conclusion of those disciplinary proceedings. **The issue of apparent bias that arises in the present proceedings goes to the very essence of the system for the conduct of disciplinary proceedings. A longstanding practice is under challenge and the conduct of all disciplinary proceedings may be affected. The present case of apparent bias is not merely case specific but affects the whole system of adjudication. The above circumstances are exceptional** and the Court should intervene at this preliminary stage of the disciplinary proceedings. Accordingly the decision of the disciplinary panel will be quashed and the matter reconsidered by a new panel that will operate in accordance with arrangements that do not give rise to apparent bias." (Emphasis added) §24

[29] As is apparent from the passage cited above, Weatherup J was of the view that in normal circumstances the applicant should exhaust avenues of review or appeal before making an application for judicial review. The exceptional feature of *O'Connor & Broderick* he identified was the fact that the decision under challenge was systemic in nature, going to the manner in which disciplinary proceedings were routinely conducted. The court's decision would thus give guidance to all disciplinary panels.

[30] This court was also referred to *Re Purcell's Application* [2007] NIQB 50. This challenge also concerned an allegation of apparent bias based upon alleged consideration by the panel of a document representing guidance to misconduct panels when issues of delay arose. The case went to the Court of Appeal, *Re Purcell's Application* [2008] NICA 11 wherein Kerr LCJ stated as follows:

> "**This appeal involves a systemic challenge rather than a specific allegation of partiality on the part of an individual panel. It concerns the general question whether panel members, trained under the arrangements described, are inevitably fixed with the taint of apparent bias.** Moreover, the challenge focuses not on the content of the training but on the identity of the organisers of the training courses. For this reason, counsel for the panel submits that a clear insight into the nature of the organisation and the structure of the disciplinary system is essential." (Emphasis added) §17

[31] Although the issue of alternative remedies was not expressly addressed in the judgment, it is apparent that the reason that the challenge was entertained was because the application involved a systemic challenge, not confined to the facts of the case before the court.

[32] In *Re David Andrew Glasgow's Application* [2004] NIQB 34 the applicant contended that the disciplinary proceedings had to be conducted in compliance with Article 6 ECHR on the basis that the disciplinary board was determining the applicant's civil rights. By the time the proceedings were heard they had become academic but the parties agreed that the case should proceed because:

> "All parties were anxious, however, to have the matter proceed **since it was likely to arise in future hearings before the Board. A decision on the point now would avoid uncertainty and delay in those hearings.** In those circumstances I considered it appropriate to proceed to deal with the application." (Emphasis added) §6

[33] Again it is apparent that the issues addressed in the case were of general importance and went beyond the specific facts of the case before the court.

[34] Finally, *Re David Bell's Application* [2006] NIQB 6 was a case concerning whether disciplinary proceedings could proceed in circumstances where at the time the case came before the panel the relevant regulations did not have provisions to confer power on anybody to appoint members of a special panel to hear a directed hearing. The regulations had been amended to address the deficiency before the matter came before the court. Again, it is evident that the issues in that case were of general importance, raising issues which were not confined to the facts of the instant case.

[35] It appears to me that on any analysis, the factor which distinguishes the cases cited above from the instant case, is that in each of the cases identified above the cases raised a systemic challenge of general import rather than being directed to the specific circumstances of the individual case. By contrast the challenge in the case before this court is a challenge to the very specific circumstances of the applicant's case and in particular the significance to be attached to the exchanges between the applicant and Inspector Eastwood. In my view the cases identified above are of no assistance to the applicant.

[36] The exceptionality feature identified by the applicant is the fact of his previous successful appeal and, on his case, the repetition by the second misconduct panel of the failings of the first. In considering whether this is sufficient to render the circumstances of the applicant's case exceptional I remind myself of the guiding principles as outlined in *Re Ballyedmond's Application*.

[37] The applicant argues that having heard the substantive claim for judicial review, leave having been granted on the papers, it is at this stage, more efficient and convenient to resolve the dispute in this court, rather than to send this matter back to be determined by the Police Appeals Tribunal, which decision could itself be susceptible to judicial review. I am in the first instance mindful of the fact that the guidance makes clear that what is most efficient and convenient should be determined having regard, not only to the interests of the applicant and respondent, but also the wider public interest. I am not persuaded that it is in the wider public interest that police officers, who have an entitlement to a bespoke appeal procedure, should nonetheless be able to initiate judicial review proceedings after a decision of a misconduct panel with which they are aggrieved and before the determination of an appeal from that decision.

[38] I also note that, even confining my decision to the instant case, if the applicant were to be unsuccessful before me, he has maintained his appeal before the Police Appeals Tribunal and can pursue that appeal. He can thereafter challenge that decision by way of judicial review. That is without considering his entitlement to appeal my decision at first instance, before reverting to the Police Appeals Tribunal. It appears to me that even focussing on the particular circumstances of this case, it is not more efficient or convenient to resolve the dispute in this court.

[39] I also address my mind to whether the alternative remedy can, in reality, be equally efficacious to solve the problem before the court, having regard both to the interests of the parties before the court, the public interest and the overall working of the legal system.

[40] It is apparent from reading the regulations outlined above, that it is open to the Appeals Tribunal to allow the applicant's appeal on the basis that the disciplinary action imposed was unreasonable (regulation 4(4)(a)) or on the basis that the procedures were unfair (regulation 4(4)(c)), which is the essence of the case before this court.

[41] It is also apparent that the Police Appeals Tribunal is empowered to impose a lesser sanction that that imposed by the misconduct panel (regulation 23(2)). Thus, it would be open to the Appeals Tribunal to accept the decision of the misconduct panel that the applicant was guilty of gross misconduct, but to conclude, in light of the alleged unfairness/prejudice occasioned by the assurance given to the applicant by Inspector Eastwood, that a sanction short of dismissal was appropriate.

[42] The respondent further accepts that it would be open to the applicant, if unhappy with the decision of the Appeals Tribunal, to bring a challenge to that decision to the judicial review court, if appropriate.

[43] It is thus apparent that there is in existence a statutory scheme, entitling the applicant to appeal the decision of the misconduct panel and to advance to the Appeal Tribunal the complaints he advances before this court. He has already invoked that right once, successfully, and has further appealed the current decision under challenge, maintaining his right to pursue that appeal if unsuccessful before this court. I consider that the alternative remedy is efficacious. In real terms it is arguably more efficacious in terms of access to the remedy the applicant seeks than this court is, given that this court is not an appellate court. Moreover, recourse to an appeal does not preclude the applicant's entitlement to seek recourse to a remedy from the judicial review court in due course, if aggrieved by the outcome and if judicial review is appropriate.

[44] The applicant makes specific reference to delay in light of the fact that, on his case, he has to appeal a second time in order to secure the result he contends that he is entitled to. However, looking at the timing of the original misconduct proceedings and appeal it appears that the proceedings proceeded promptly and there was not undue delay between: the conclusion of the misconduct panel; the determination of the appeal; and the reconsideration by the second misconduct panel. In all likelihood, had the applicant pursued his appeal without recourse to judicial review that appeal would have been determined by now. I am not persuaded, looking at the issue in the round that any unwarranted delay is occasioned by expecting the applicant to appeal in the normal way as provided for by the regulations.

Conclusion

[45] For the aforementioned reasons I am not persuaded that the applicant's case falls within an exceptional category entitling him to have recourse to judicial review without first having recourse to an appeal before the Police Appeals Tribunal. Given my conclusions on the issue of an alternative remedy I do not propose to address the substantive merits of this case. The applicant's application for judicial review is dismissed.