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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARK DEENEY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Michael Potter (instructed by Leontia Drain, Thompsons NI, Solicitors) for the Applicant
Philip McAteer (instructed by Dympna Murtagh, Belfast City Council Legal Services Division) for the Respondent

SIMPSON J

Introduction

[1] This is an application for leave to apply for judicial review. The issue at the leave stage is whether the applicant has crossed the threshold of "an arguable case having a realistic prospect of success" – see McCloskey LJ in *Ni Chuinneagain's Application for Judicial Review* [2022] NICA 56, para [42].

[2] The application arises out of the following circumstances. In May 2021 the applicant in this case applied for appointment as Chief Fire Officer. At the time of his application, he was an Area Commander for the western area in Northern Ireland Fire and Rescue Service, the respondent in this case. There were three applicants for the post. The applicant was unsuccessful, and was notified of the fact on 25 June 2021. Nothing further was done until 10 June 2022 when the applicant made a subject access request. As a result of what he was sent (by letters of 15 and 18 July 2022) arising from that request, the applicant was moved to challenge the 2021 appointment process. A pre-action protocol letter was sent on 23 September 2022. On 14 October 2022 the applicant issued his Order 53 Statement.

[3] In the meantime another candidate [whom I will call 'AB', since his actual identity is not material to this judgment] was appointed to the post in September 2021. AB then left post on 11 June 2022, and a further competition is currently under

way to choose a new candidate for appointment as Chief Fire Officer. The applicant has chosen not to be a candidate in that competition.

The challenge

[4] The impugned decision, according to the Order 53 Statement, is the "appointment of [AB] to the position of Chief Fire Officer and also challenged is the matter of a reserve list given [AB's] resignation in March (sic) 2022." Para 4 of the Order 53 Statement is in the following terms:

> "The applicant seeks the following primary relief:
>
> (a) Declaratory relief.
>
> (b) Such other relief as the Court may deem appropriate that may include a prerogative order.
>
> (c) Costs."

[5] The terms of any declaration were not articulated in the pleadings. In the course of his reply I asked Mr Potter to articulate the declaration sought. He expressed it in these terms: a declaration "that the respondent has acted unlawfully in the procedure and unlawfully departed from the process." No other order was identified in the course of the applicant's submissions. Insofar as the applicant's first affidavit did so, the orders sought were certiorari, mandamus and injunctive relief. Mr Potter specifically said that damages were not sought as part of the relief.

[6] At para 1 of the Order 53 Statement the applicant says that when he was provided with the information sought in his subject access request, by letters dated 15 July 2022 and 18 July 2022, he was caused to believe that the successful candidate had failed the "Assessment of Incident Command Competence Level 4" and that this "raises serious questions over the legality of his appointment." Despite his correspondence with the respondent, he has received no satisfactory explanation.

[7] Since he had been notified in June 2021 that he was ranked as number two candidate, he questions why he was not then appointed when AB left in June 2022.

[8] Under the heading "Grounds", and the sub-heading "The appointment of [AB]" the applicant introduces his plethora of grounds with the words: "On the unconfirmed assumption that [AB] failed the assessment test…" The grounds of challenge are breach of statutory duty, frustration of relevant legislative purposes, ultra vires, departure from policy, procedural and substantive unfairness, irrationality, disproportionality, and breach of both a procedural and a substantive legitimate expectation. The challenge to the decision in relation to the reserve list includes most of the above grounds.

The applicant's case

[9] Mr Potter identified the core of the application to be that the applicant passed the assessment centre, but he believes that AB did not pass. Therefore, AB should never have been appointed. Since the applicant came second in the competition, it follows that if AB should not have been appointed, the applicant should have been appointed. The applicant's belief was strengthened by a conversation with a Mr Paul Stewart, a member of the panel for the Incident Command Assessment who told him that AB had not passed the assessment centre. Further, since the Applicant was a reserve candidate he should have been appointed when [AB] left the post.

[10] Referring to the process he notes that Stage 1, shortlisting of candidates, was on 1 June 2021 and Stage 2, the assessment centre, was to be held on 10 June 2021. The candidate application pack states that "Only the highest performing candidates will be invited to the next stage – interview." The applicant asserts that the assessment centre process was a pass/fail process and para 8 of his skeleton argument sets out the several bases for this assertion.

[11] The introduction to para 11 of the applicant's skeleton argument neatly encapsulates his case:

> "The suspicion and allegation underpinning this judicial review challenge is the process was improperly changed (possibly retrospectively after the results of the assessment centre became known) to facilitate [AB] going forward for interview and ultimately being appointed."

[12] The applicant identifies a number of documents which, he says, appear "to alter the job specification and the selection process in relation to the function of the assessment centre in the process." These documents are:

(i) A second shortlisting panel report, typed and not signed in handwriting. This is described as unusual. It contains what is described as a "crucial difference" compared to the handwritten report, including that the "assessment centre will not count as part of the overall selection process due to only 3 candidates applying…";

(ii) A loose-leaf handwritten document "purportedly containing a note of the shortlisting panel meeting of the 1 June 2021", which includes the words "Assessment centre will not be used as knock out stage…";

(iii) The reply to a FOI Act request dated 22 November 2022 which stated:

> "This was not a pass/fail assessment, and all 3 candidates were deemed suitable to be interviewed. The HR advisor has advised that the panel determined during shortlisting

on 1 June 2021 that the assessment centre would be used to identify the CPD needs for each candidate, and all 3 candidates would move on to the interview stage."

(iv) A further handwritten document, purportedly a note of a telephone call between Ms O'Connor and another (identified) person on 1 June 2021 in which the other participant to the call advised that the assessment centre should be run since it had been advertised, and that it would be a good way of identifying CPD for internal candidates. The applicant says that neither person had the authority to change the process. He challenges "the veracity of this alleged conversation" and calls into question the authenticity of the note.

[13] The applicant says that the material disclosed by the respondent shows the digital history of the Shortlisting Panel report. While it was created on 1 June 2021, the document shows it to have been modified — ie altered, says the applicant — on 2 November 2022, leading to the suspicion that part of the note could have been written long after the event.

[14] The applicant further asserts that a "second major anomaly" relates to the decision to pay for an external candidate to attend a course after selection but prior to appointment. This contention is based on the applicant's belief that it was AB who failed the assessment centre and therefore had to undergo subsequent training, effectively to ensure that he was appropriately qualified to take up the post.

[15] The applicant sets out the attempts he has made to get to the bottom of the matter and complains about the respondent's failure to provide a satisfactory explanation. In his oral submissions Mr Potter said that as documentation came "in dribs and drabs" from the respondent "potentially it looked like a cover-up." Not only was the respondent slow in providing documents, but some were redacted so as to be wholly uninformative, and the respondent has refused to provide unredacted copies.

[16] The applicant also makes the point that since the process was approved by the Minister, and identified "key milestones" within it, it was not open to the respondent to alter the process after it was begun. No subsequent approach was made to the Minister for approval for any change. The applicant says that it is clearly in the public interest to examine why such a process was altered in contravention of ministerial approval. It is also clearly in the public interest to examine whether a person who was not competent was appointed to the post.

[17] As to the reserve candidate issue the challenge is to the "purported decision that a reserve candidate list would not be held." The applicant says that this would not be in accordance with usual processes. He says that the grounds for his "suspicions and concerns" include that in the previous process in 2017 there was a

reserve candidate and that at the bottom of another loose-leaf handwritten note "purportedly dated 21 June 2021" the following appears:

> "I asked if panel were going to have a reserve candidate. Panel confirmed at start of process not to have a reserve candidate."

[18] The applicant says that the "veracity of this note is questioned" and in oral submissions questions the integrity of the process.

[19] When AB resigned in June 2022 the applicant wrote to the respondent seeking clarification of the reserve list position and indicating that he had an expectation that he would be appointed to the role.

[20] The applicant relies on an alleged breach of article 4 of the Fire and Rescue Services (Northern Ireland) Order 2006 in relation to his allegation of breach of statutory duty.

The respondent's case

[21] The respondent frankly accepts that the process could have been handled better, that there are inconsistencies, that it did not display good practice and that some of the information sent in the letter of 15 July 2022 (written by the Scottish Fire & Rescue Service; not the respondent) was just wrong. It asserts, however, that there is no basis for what amount to serious allegations being made against it. Further, it makes the case that its disclosure of material sent with, and following, its pre-action protocol response has allowed the applicant to put flesh on many of his assertions.

[22] As to the requirement for ministerial approval, Mr McAteer points out, first, that the respondent is not the Department (of Health) and, secondly, that the submission that ministerial approval was required for any change in the process does not appear in the applicant's Order 53 Statement.

[23] As to the reserve list point, the respondent identifies emails referring to telephone contact with the applicant in July 2021 by which he was made aware that there was no reserve list. Accordingly, by the date of the challenge, he had known about this decision for more than a year.

[24] Dealing with the allegation that handwritten documents were in loose leaf form, in fact a book containing all the notes was handed to me during the hearing. The handwritten notes are not loose leaf; they are in the book and follow in chronological order. I saw no evidence of potential fabrication.

[25] In relation to the assessment centre point, the protocol response from the respondent, dated 28 November 2022, says that the panel met on 1 June 2021. The Shortlisting Panel Report recorded, inter alia "Not using desirable criteria due to

small numbers of applicants" and all three candidates were considered and shortlisted.

[26] That letter goes on to say the following of the assessment centre issue:

> "After the panel had carried out the shortlisting process … and decided that all three candidates should be shortlisted, a discussion took place. The panel advised that they wanted to see all 3 candidates at interview, particularly as 2 candidates were internal candidates. Ms O'Connor [the interim Director of HR] asked about the assessment centre process as it had been designed to knock out candidates and only take a suitable number forward to interview if the pool of candidates was large. The panel decided that the assessment centre would not be used for knock out and all 3 candidate would progress to interview. They advised that it would be a good tool for identifying CPD needs for the candidates."

[27] In addition a note of the same date included the following:

> "The panel met this morning and raised disappointment at the number of candidates. Only 3 applied (2 internal candidates).
>
> …14 packs had gone out…hopeful of some candidates from ROI. Check out if we can find out why they didn't apply.
>
> Assessment centre 10 June … panel decided they want to see all candidates at interview stage.
>
> Assessment centre will not be used as knock out stage and will be used for CPD purposes – develop internal candidates."

[28] It is clear from the documentation that the panel was not provided with any information about the performance at the assessment centre, so had no knowledge of this at the interview stage.

[29] It is accepted by Mr McAteer that in the circumstances it would have been better to cancel the process than to continue with the altered process. However, he submits that there is nothing untoward beyond that and, that while the applicant is entitled to have criticisms of the process, there is no basis for the allegations which essentially amount to allegations of fraud.

[30] Mr McAteer submits that the best the applicant can argue is breach of a legitimate expectation, but drawing on *Re Finucane's Application* [2019] UKSC 7, eg para [76] he submits that the respondent had demonstrated good policy reasons for changing its position during the process and that, notwithstanding the change of position, each candidate was treated equally.

[31] Mr McAteer relies on the issues of delay and utility, asking the court to consider the question: "What would the grant of relief realistically achieve?" He points to the periods of delay, both before and after the issue of judicial review proceedings. He further submits that there is no point of law which requires to be determined; there is no point of statutory construction; there is no legal principle in play — the allegations arise from a series of mistakes; and any order of the court would produce no utility.

Delay

[32] What seems to have prompted movement in this case is the resignation of AB from the post in June 2022. According to his first affidavit the applicant, when he heard of the resignation of AB, corresponded with the respondent to ascertain if he was the reserve candidate for the position. When he failed to receive a satisfactory response, he made his subject access request which, eventually, led to this challenge.

[33] It goes without saying that this applicant is very substantially out of time. Order 53 of the Rules of the Court of Judicature in Northern Ireland provides:

> "**Delay in applying for relief**
>
> 4. - (1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

(NB the words "promptly and in any event" were removed by SRO 213 of 2017 with effect from January 2018)

[34] In *Turkington's Application* [2014] NIQB 58 Treacy J said at para [32]:

> "As indicated by the use of the word 'shall 'this provision is mandatory. … The three-month time limit is a 'back stop 'and a claim is not necessarily in time if brought within the three-month outer limit. The time limit for bringing a claim for judicial review is much shorter than for most other types of civil claims. This short time limit is clearly intentional, and its rationale is clear. As

> Lord Diplock said in *O'Reilly v Mackman* [1983] 2 AC 237, 280H281A:
>
>> 'the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.'"

[35] While the word 'promptly 'has been removed from the rule, it is clear that there is still a need to act with dispatch.

[36] As Order 53 Rule 4 makes clear, the time limit runs from the date when grounds for the application first arose. In *Re Doyle's Application* [2014] NIQB 82, at para[15] Treacy J said:

> "The time limit runs from the date when grounds for the application first arose and not from the date when the applicant first learned of the decision under challenge nor from the date when the applicant considered that he or she had sufficient information or evidence to bring a claim: *R v Secretary of State for Transport, ex p Presvac Engineering Ltd.* (1991) 4 Admin LR 121, at pp 133-4."

[37] The court has power to extend the time if it considers that there is good reason for doing so. It is for the applicant to establish that there is good reason to extend time (see eg *R v Warwickshire County Council ex parte Collymore* [1995] ELR 217 at 228 f-g). The ninth edition of *De Smith's Judicial Review* says, para 16-059:

> "… the court will consider whether there is an objective justification for the delay, the importance of the issues, the prospects of success, the presence or absence of prejudice to good administration and the public interest more generally."

[38] In the Order 53 Statement the applicant seeks an extension of time because:

(a) The applicant has only recently become aware of the assessment centre issue, ie 15 July, and has sent correspondence which has not been substantially responded to;

(b) The respondent has failed to be sufficiently transparent in its handling of and response to the applicant's correspondence including both issues raised;

(c) The applicant is raising issues of substance and import that ought to be given due consideration by a court; and

(d) The challenge raises issues of public interest.

[39] In his first affidavit (9 November 2022) the applicant says, under the rubric "Delay":

> "33. For the reasons set out above [the narrative of events and the articulation of suspicions], it is my view that this application should not be dismissed on the grounds of delay. Given that I only became aware of the facts that give rise to the judicial review challenge following receipt of documentation on 15 July 2022 following a Freedom of information request and that my application for leave for judicial review was submitted on 14 October 2022.
>
> 34. I consulted with solicitors on 28 June 2022 [this must mean 28 July 2022]. A consultation was held with counsel on 2 September 2022 and a letter was sent to the proposed respondent on 7 September 2022. Following no substantive responses to that letter, a pre-action protocol letter was sent to the proposed respondent on 23 September 2022."

[40] Mr Potter also indicated in his oral submissions that because the allegations to be made involved serious issues, the applicant was cautious "about rushing into court" and that he did not pursue the matter until "he had good reason to."

[41] As the respondent's skeleton argument points out, between 28 November 2022, when the respondent sent its protocol response and April 2023 there was no progress in the matter, a period of in excess of four months. In April 2023 the applicant raised some queries about documentation sent with the respondent's response letter. Even then, a further three months passed until the applicant filed a second affidavit on 17 July 2023.

[42] Accordingly, not only was there a very significant delay before judicial review proceedings were commenced in this case, but even after proceedings were begun, there has been substantial further delay. No explanation was given for this further delay.

[43] On his own case the applicant made no attempt to investigate matters until after the resignation of AB in June 2022. That was more than one year after the impugned process. A fortiori in relation to the challenge made in relation to the reserve list. The applicant was aware of the precise position about the reserve list in July 2021, some 15 months before he commenced his proceedings.

[44] The outer time limit of three months is imposed so that public authorities taking decisions will know — within the deliberately short time frame allowed for proceedings to be commenced — whether there is any challenge to the decision. If no challenge is brought within that time, authorities are entitled to get on with their duties and functions in the knowledge that the decision can safely be acted upon.

[45] In all the circumstances of this case and taking into account those factors identified in *De Smith*, I consider that no good reason has been provided to justify an extension of time. I see no public interest grounds on which it would be appropriate to permit this case to proceed. Accordingly, I refuse the application for an extension of time and dismiss the application on the basis that it has not been brought within time.

Academic/utility

[46] In reality, when properly analysed, the purpose of this judicial review challenge is to permit some sort of historical enquiry so that the applicant may discover whether there was something amiss in the process leading to the appointment of AB for the purposes of ascertaining (i) whether AB should ever have been appointed; (ii) whether the applicant should have been appointed instead. As Mr Potter put it at the end of his replying submissions, the applicant "wants to ensure the inconsistencies are considered by the court."

[47] As noted above, AB was appointed in 2021 and resigned in June 2022. A new appointment competition is in course, in which the applicant has chosen not to participate. In such circumstances it is necessary to consider whether there is any point in granting any remedy to the applicant.

[48] In *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, 457A Lord Slynn said:

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or

> are anticipated so that the issue will most likely need to be resolved in the near future."

[49] Taking Lord Slynn's examples, in the present case there is no discrete point of statutory construction at all; far less is there one which would not involve a detailed consideration of facts. It seems to me to be clear from the nature of the allegations being made, that a grant of leave would involve a significant number of affidavits from those involved throughout the process and a court would have to resolve contested issues of fact, perhaps (since there are allegations effectively of dishonesty) involving cross-examination of deponents. A judicial review court is not the proper forum for the resolution of disputed factual issues. Further, there is no submission that a large number of similar cases presently exist or are anticipated in the future. There is no suggestion that issues raised in this case will need to be resolved in the near future in another case, so that the guidance of the court is required.

[50] In all the circumstances I see no good reason in the public interest why this dispute should be allowed to take up further court time.

[51] In relation to the claim for declaratory relief, in *Re JR47* [2013] NIQB 7, McCloskey J identified "utility" to be the primary factor in considering whether a court should make a declaration in proceedings which were otherwise academic. He said, at para [85]

> "… I remind myself that declaratory relief is not granted for the asking. Rather, a declaration is a discretionary public law remedy. … In reflecting on the propriety of granting any of the declaratory relief now sought, I consider the main criterion in the present context to be that of utility. Where the grant of declaratory relief would serve an important practical purpose, this will clearly count as a positive indicator; see The Declaratory Judgment (Zamir & Woolf, 4th Edition) para 4-99 and following. I refer particularly to the following passage:
>
> > 'If … the grant of declaratory relief will be likely to achieve a useful objective, the court will be favourably disposed to grant a relief …
> >
> > [Conversely] a declaration which would serve no useful purpose whatsoever can be readily treated as being academic or theoretical and dismissed on that basis.'"

[52] The Order 53 Statement also refers to "Such other relief as the Court may deem appropriate that may include a prerogative order." The pre-action protocol

letter and the applicant's first affidavit identified certiorari, mandamus and injunctive relief. None of these prerogative orders was mentioned in submission.

[53] Since the impugned decision is the appointment of AB, making an order of certiorari to bring up that decision and quash it is obviously now entirely academic in the circumstances of this case. I respectfully agree with what Lord McDermott said in *R(McPherson) v Ministry of Education* [1980] NI 115, 121F/G:

> "Certiorari is a discretionary remedy and does not usually issue if it will beat the air and confer no benefit on the person seeking it."

[54] As in the *McPherson* case there is no reason to think that any benefit could accrue to the applicant if the impugned decision was quashed.

[55] Mandamus is an order of the court compelling some person or body to perform some public duty. No public duty was identified by the applicant which the court should consider compelling. Finally, injunctive relief, even at the date of issue of the pre-action protocol letter in September 2022, was clearly a wholly inappropriate remedy for a court to consider.

[56] I am satisfied that this matter is entirely academic, and any order of the court would be of no utility. On that basis I would dismiss the application for leave.

The grounds of challenge

[57] If I am wrong about the issues of delay and whether the matter is academic/of no utility, I turn to consider the grounds in the light of the test in *Ni Chuinneagain.* I will deal in turn with the grounds as they appear in para 5 of the Order 53 Statement.

[58] Para 5(a) alleges breach of statutory duty. The breach alleged is of article 4 of the Fire and Rescue Services (Northern Ireland) Order 2006. In the skeleton argument there is also reference to Part IV of the Order.

[59] There was no oral submission in relation to this ground of challenge. In the skeleton argument para 26, sub-para b merely poses the question: "Was such appointment in breach of statutory duty ie articles 4 and Part IV of [the Order]?"

[60] Under the rubric "Fire safety" article 4 is clearly an enabling provision "for the purpose of promoting fire safety." It allows the Board, to the extent that it considers it reasonable to do so, to make arrangements for publicising information and encouragement about steps to prevent fires and the giving of advice about fire prevention and ancillary matters. It is of no assistance to the applicant in any claim for breach of statutory duty.

[61] Part IV of the Order is entitled "Functions of the Department" (article 2 defines 'the Department 'as the Department of Health, Social Services and Public Safety). The Department is not a respondent in this challenge, and no explanation was given as to how Part IV is relevant.

[62] Accordingly, I see no basis on which any challenge under the heading breach of statutory duty is arguable. I refuse leave on this basis.

[63] As to para 5(b) there is no evidence of, nor was there any argument about, "Frustration of relevant legislative purposes." I refuse leave on this ground.

[64] Para 5(c) merely says "Ultra vires." No power is identified beyond which the respondent is said to have strayed. There is no evidence that the respondent was acting outside its powers. I refuse leave on this ground.

[65] Grounds 5(d) to (f) effectively deal with the process itself. Having seen the materials provided by the respondent I am satisfied that it was fully entitled to depart from the process which it had begun, in light of the circumstances identified by it, particularly because of the limited number of candidates, which was significantly less than it had hoped for or expected. All the parties were treated equally after the decision was taken to interview all three applicants. Accordingly, I refuse leave on the ground in para 5(d), 5(e) and 5(f).

[66] Para 5(g) alleges irrationality. However, in the light of the explanation given for the alteration of the process, I see no arguable case on irrationality.

[67] Para 5(h) alleges disproportionality, but no submission related specifically to how the decision was disproportionate. I see no arguable case on this issue.

[68] As to paras 5(i) and (j) – legitimate expectation – while it is obvious, as the respondent accepts, that the process was handled badly, I consider that there is no arguable case that the challenge could succeed on the basis of legitimate expectation, either procedural or substantive. A public authority is entitled to alter its policy or course of action if that is done on foot of a bona fide decision taken on genuine grounds. In the present case, on the basis of the material before me, I consider that the respondent was perfectly entitled to change tack in the middle of the process, it having been faced with a disappointing number of candidates, and that it did so in a bona fide manner and for genuine reasons. I refuse leave on the ground of breach of a legitimate expectation, procedural or substantive.

Disposition

[69] Accordingly, I dismiss the application for leave to apply for judicial review on the grounds (i) that there is no arguable case, in the *Ni Chuinneagain* sense, in relation to any of the grounds of challenge pleaded, (ii) that the application is

hopelessly out of time and no good reason has been provided to justify an extension of time, and (iii) because the matter is academic.

[70] Counsel are agreed that there should be no order as to costs.