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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 CONSTABLE W

IN THE MATTER OF AN APPLICATION BY THE POLICE SERVICE FOR NORTHERN IRELAND

IN THE MATTER OF A DECISION OF THE POLICE APPEALS TRIBUNAL

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TREACY LJ

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Introduction

[1] This is a judgment in a *'rolled up'* hearing. There are two applications for judicial review brought before the Court, one by Constable W and the other by the PSNI. Both applications arise out of related appeals before the Police Appeals Tribunal ("the PAT").

First Application

[2] The PAT granted Constable W's application for a stay on the disciplinary proceedings initiated against him. The application for a stay was based on his contention that the originating communication to the PSNI was a 'complaint' within the meaning of the Police (Northern Ireland) Act 1998 and should therefore have been referred to the Office of the Police Ombudsman of Northern Ireland ("OPONI"). As a result, it was successfully argued that all of the steps taken by the PSNI in relation to the disciplinary investigation and hearing were unlawful. Constable W contended that following the successful outcome of that appeal he was entitled to be reinstated and that the PSNI unlawfully failed or refused to do so.

Second Application

[3] The application of the PSNI contends that the impugned decision of the PAT:

(a) Failed to allow or dismiss the appeal as provided for at regulation 9 of the Royal Ulster Constabulary (Appeals) Regulations 2000.

(b) Granted the stay of proceedings in the absence of a statutory power to do so.

(c) Acted irrationally in finding that the relevant communication to the PSNI was a 'complaint' for the purposes of the Police (Northern Ireland) Act 1998.

Factual Background

[4] The first applicant, Constable W, took up office as a Constable in the RUC on 22 September 1985. At the relevant time he was responsible for delivering the Citizen and Safety Education (CASE) programme in, and acted as school liaison officer to a local school.

[5] In 2011 he became involved in a non-sexual relationship with a vulnerable young woman (Miss M) who had a history of abuse and self-harm. He got to know her through a drama club. He attended this drama club both in his capacity as a member of the Neighbourhood Policing Team (NPT) and also in his personal capacity. At this stage of the relationship he would drop her home from activities, collect her from home during the day and take her out in his own car.

[6] When Miss M's social worker became aware of this relationship she rang Constable W, informed him that the relationship was inappropriate and advised him to end it. Constable W was offended at this suggestion and the relationship did not end.

[7] When Miss M became 18 she informed the daughter of her foster mother that the relationship had developed into a sexual relationship.

[8] Social services observed the relationship throughout 2012 but did not establish any facts suggesting that any criminal offences had been committed.

[9] Miss M's foster mother happened to be a teacher at the local school in which Constable W delivered the CASE programme and acted as school liaison officer. When the foster mother heard that the school was preparing to give an award to Constable W for his performance in that role (at some stage in late 2012) she informed the Principal of the school of the relationship that was ongoing with Miss M. This information was passed on to the Principal apparently in objection to the award being made.

[10] While Miss M was not a pupil at the school, the Principal nonetheless felt uncomfortable with Constable W continuing his duties around his pupils and made contact with the Inspector Gillespie of the PSNI on 12 December 2012 to ask that he be removed from that role. In the context of this contact the Principal made clear that, in his view, he was not making a complaint, he did not wish to make a statement, he did not want his name put forward, he did not want his place of work identified and that the contact was in relation to off duty conduct. He simply wanted Constable W to be removed from his duties in the school.

[11] Following this contact the PSNI initiated an enquiry to establish whether or not any criminal offences had been committed. They interviewed Miss M who declined to make any complaint. She confirmed that she and Constable W had met when she was 17 and at that point he provided her with support and that when she was 18 years and 3 months the relationship developed into a sexual one, mostly at her instigation. She said that Constable W did not use his role as a police officer to progress the relationship.

[12] On 9 January 2013 the PSNI enquiry concluded with no evidence of a criminal offence. However, the PSNI remained concerned about Constable W's ability to continue to perform his role with children and vulnerable adults and decided to progress the matter by way of an ethical interview. He was removed from any contact with schools while the matter was being considered.

[13] On 23 January 2013 Supt Taylor contacted Ms Graham of OPONI in relation to the issues with Constable W. Supt Taylor's and Ms Graham's note confirm that at that time OPONI were of the opinion that it was not a matter for OPONI.

[14] The ethical interview took place on 28 January 2013. In this interview Constable W denied any sexual relationship with Miss M. He was ordered not to have any further contact with her.

[15] Despite said order, on 31 January 2013 Constable W visited Miss M and gave her a note containing text which he instructed her to send to him as a text message. The content of the note was typed as follows:

> "heya W hope ur good, I'm very dg haha, just need to say, I told a wee lie to two men about us but it ended up a big lie and I told Imelda too. I said we had a relationship goin, ya no? It was very silly of me but my heart really really wanted it to be true, my head knew it could never happen. :(am really sorry for lying, hope to see you soon x"

[16] On 2 February 2013 Constable W followed up that contact with a further contact via a Facebook message. That message read:

> "… Oh cupcake, u have to send it!! My life's in your hands darling! I mean it! I just want to make them doubt, just enough that I can stay in Banbridge doing what I love!! That I can still see u, if that's what you want? Xxxoooxxxooo"

[17] A further series of Facebook and text messages were exchanged on 3 February 2013.

(a) At 0131 Miss M sends a Facebook message to Constable W which reads *'text sent'*. Shortly before this she had apparently sent the message provided to her by Constable W but inserted the additional line *'sorry for getting you in trouble'*.

(b) At 0134 Constable W responds asking her to re-send the message but without the additional line.

(c) At 0143 Miss M responds *'Is that OK?'* (having re-sent the text message as requested).

(d) At 0153 Constable W advised Miss M in a Facebook message not to talk if they phone.

(e) At 0155 Constable W sends a Facebook message which reads *'I think you have saved me – thank you'*

[18] Later on 3 February, Constable W contacts Sergeant William Stewart (who had participated in the ethical interview as Constable W's 'friend' in those proceedings) and showed him the text message he had received from Miss M.

[19] At 1617 on 3 February, Constable W sent a Facebook message to Miss M in the following terms:

> "They will try to prove we have been chattin. You must deny it darling. Same thing with a relationship! Deny everything and say sorry. Try not to meet them face to face. They will push you to say what they want. Please, please be strong."

[20] On 7 February 2013, Inspector Gillespie and Miss M's social worker visited Miss M. During this meeting Miss M confirms that she has been having a sexual relationship with Constable W and provides access to her text messages and Facebook account.

[21] On 20 February 2013 on the basis of the above communications, Constable W is served with a regulation 9 notice informing him that there would be a formal investigation into those communications.

[22] On 25 February 2013 Miss M's social worker ("Ms F") wrote a letter to Superintendent Dodds setting out her concerns about the relationship.

[23] On 26 February 2013 a friend of Constable W, at Constable W's request, visited Miss M to ascertain what she had told police.

[24] On 7 March 2013 a further regulation 9 notice was served on Constable W in respect of the alleged disclosure of police information to Miss M.

[25] On 12 March 2013 the letter from Miss M's social worker was referred to OPONI and it was noted that the discipline branch was in the advanced stages of investigating the matter and were preparing to interview Constable W on 14 March. On that same date OPONI responded in the following terms:

> "I am of the view that there is no need for PONI's involvement in this matter. There is no indication that a public complaint is intended. Indeed there may be issues around the on/off duty situation. Clearly Ms F is sharing information with the PSNI as part of her role in the YPP and as a social worker. Given that discipline is at an advanced stage I would reiterate that I don't believe this is a matter for PONI."

[26] On 14 March 2013 Constable W is interviewed and admits that he had a sexual relationship with Miss M, that he lied during his ethical interview and to the various communications that he had with Miss M following his ethical interview.

[27] On 5 June 2013 misconduct papers were served on Constable W. He was charged with the following disciplinary matters:

(a) That he behaved in a way that was likely to bring discredit upon the Police Service contrary to Article 1.10 of the Code of Ethics as contained in Schedule 4 of the PSNI (Conduct) Regulations 2000 (as amended). The content of this charge was that:

> "During the period from approximately July 2012 to December 2012 you engaged in an intimate relationship with a vulnerable young woman, [Miss M] whom you had met through your duties as an… officer in Banbridge Neighbourhood Policing Team. The nature of this relationship became known to Social Services and a local school Head Teacher necessitating your removal from these duties."

(b) That he failed to obey a lawful order contrary to Article 1.5 of the Code of Ethics as contained in Schedule 4 of the PSNI (Conduct) Regulations 2000 (as amended). The content of this charge was that:

> "On the 28th of January 2013 you were subject to an ethical interview in connection with your relationship with [Miss M]. During the course of this interview it was explained to you that your authorities had concerns in relation to the nature of the relationship and how that was affecting your ability to perform your Neighbourhood Policing team duties. Detective Inspector Sewell ordered you not to have any further contact with [Miss M]. You then made contact by way of a letter on or about the 31st of January 2013 and by way of numerous text messages and via Facebook between that same date and 7th February 2013. Furthermore you requested a friend by the name of [Mr E] to meet [Miss M] to ask her what she had told police in relation to their relationship. He did so on 26th February 2013."

(c) That he failed to keep personal data in possession of the police confidential contrary to Article 3.3 of the Code of Ethics as contained in Schedule 4 of the PSNI (Conduct) Regulations 2000 (as amended). The content of this charge was that:

> 'On the 1st of November 2012 you sent the following information within the text of a message on Facebook to [Miss M] 'I think got arrested tonight. There was a [Mr B], 20yrs from Beechvale court arrest for Assault on police x5!!! Plus other stuff!!!' This information was known to you in your capacity as a police officer and was not disclosed for the purpose of duty, compliance with legislation or the needs of justice."

(d) That he committed an act of dishonesty contrary to Article 7.5 of the Code of Ethics as contained in Schedule 4 of the PSNI (Conduct) Regulations 2000 (as amended). The content of this charge was that:

> "(i) On the 28th January 2013 you were subject to an ethical interview in connection with your relationship with [Miss M] During the interview you stated that your relationship did not involve any sexual activity. You subsequently admitted that you had been in a sexual relationship with [Miss M] between July or August 2012 and December 2012.
>
> (ii) On the 3rd February 2013 you telephoned Sergeant William Stewart and told him that you had received a text message from [Miss M] that had been send the previous night. You further told him that you had not been in contact with her. During interview you admitted that the text message had been sent by [Miss M] at your direction and that you had given her a note with the content of the message that you wanted her to send."

[28] On 17 October 2013 the disciplinary hearing was held. Constable W's representatives made an abuse of process application seeking a stay on those proceedings on the basis that the initial contact from the Principal of the school or the later letter from Miss M's social worker were 'complaints' within the meaning of the Police (Northern Ireland) Act 1998 and should therefore have been referred to OPONI. As a result, it was argued that all steps taken in relation to the disciplinary matter to that date (i.e. the appointment of an investigating officer, the conduct of the investigation, the preferring of charges and the convening of the disciplinary panel) had been carried out unlawfully. In replying submissions, the Chief Constable argued that neither communication was a complaint and that there was therefore no statutory obligation on the police to refer the information to OPONI. This application was refused. Constable W then pleaded guilty to all of the charges.

The then Assistant Chief Constable Harris found that each of the breaches of the Code of Ethics were proved and imposed the sanction of dismissal.

[29] Constable W then applied for a Chief Constable review of the disciplinary hearing decision. This review took place on 13 December 2013 and the findings and sanctions were upheld by the Chief Constable.

[30] Constable W appealed the decision to the Police Appeals Tribunal. He advanced his appeal on three grounds:

(a) First, that the PSNI had failed to properly consider that the communication by the school Principal amounted to a complaint and had failed to deal with it in accordance with Section 52 of the Police (Northern Ireland) Act 1998. It is important to note that the contact between Supt Taylor and Ms Graham of OPONI of 23 January 2013 did not come to light until after the PAT hearing;

(b) Second, that an officer of PONI misdirected herself and improperly rejected the subsequent complaint from Ms F as a complaint suitable for investigation by PONI;

(c) Third, that the sanctions imposed were too harsh.

[31] The PAT hearing took place on 7 June 2014 and the decision was made on 8 July 2014 in the following terms:

> "The Tribunal concluded that the school Principal had in fact made a complaint, and in reaching this conclusion the Tribunal noted the following: The school Principal was a public figure with duties to the public and with responsibility for the success of his school's PSNI School Liaison Programme. The Tribunal concluded that the school Principal had been acting in his capacity as a public figure when he spoke to Inspector Gillespie about his concerns and that he was making a formal complaint about Constable W when he did so. The Tribunal concluded that the fact that the school Principal stated his preference for anonymity or distance did not render the complaint "not a complaint".
>
> In reaching its conclusion the Tribunal also took into consideration the fact that when the school Principal had made his concerns known directly to a member of the PSNI he had specifically requested that the Appellant be removed from his role as the school's PSNI Liaison Officer. The Tribunal concluded that the school Principal had made the formal request for Constable W's removal

> from his role, in which Constable W had hitherto been very successful, on the basis of the complaint he was making about the concerns he had about him.
>
> The Tribunal also concluded on the facts before it, PSNI had treated the school Principal's complaint as a complaint. In reaching this conclusion the Tribunal took account of the fact that PSNI conducted a formal criminal investigation into the substance of the complaint.
>
> Accordingly the Tribunal concluded that PSNI failed properly to treat the school Principal's complaint as a formal complaint which was required, under Section 52 of the Police (Northern Ireland) Act 1988, to be referred to PONI."

[32] In relation to the second ground the Tribunal concluded that it was outwith its remit to reach a conclusion in relation to the actions of an officer of PONI who were not a party to the proceedings. The Tribunal made no findings in relation to the third ground. The determination concluded *'[a]corrdingly the Stay on Proceedings is granted.'*

[33] On 6 August 2014 Mr May of Edwards & Co Solicitors wrote to Superintendent Taylor in the following terms:

> "You will appreciate that the Policing Board upheld our client's Appeal and the disciplinary charges against him were effectively dismissed. He therefore has a clear disciplinary record. We are concerned however that no move has been made to reinstate him. We are unsure as to the justification for the delay in doing so and would ask that you please confirm when it is anticipated he will return to duty."

[34] As no response was forthcoming the Applicant's solicitor spoke with Superintendent Taylor on 27 August 2014 and was informed that a letter explaining the PNSI's position was imminent. No response was in fact received and on 7 October 2014 a pre-action protocol letter was sent to the PSNI and the first set of proceedings herein was initiated the following day.

[35] On 29 October 2014 the Applicant in the second set of proceedings (the PSNI) initiated the second set of proceedings.

[36] Before this matter came on for hearing, enquiries were made of the PAT as to the intention and effect of the decision. Ms Shiels, chairperson of the tribunal replied in the following terms on 17 November 2014:

> "Further to your correspondence in this matter and for clarification I can confirm that the appeal in this case was allowed.
>
> It was the first ground of the appellant's appeal that there should be a Stay of Proceedings. This was a stay of the misconduct proceedings. As it was a ground of his appeal and this Tribunal upheld that ground the appeal was allowed.
>
> Before reaching any conclusion on any ground of the appeal, the Tribunal asked both parties for their views on the effect of allowing the first ground of appeal. This discussion is contained within the transcript."

[37] A further email was sent by Ms Shiels to a person unknown on 24 November 2011 as follows:

> "For further clarification of my letter I confirm that the appeal was allowed. When such an appeal is allowed that appellant is to be reinstated.
>
> The Appellant's first ground of appeal was successful and the appeal was allowed.
>
> For the avoidance of doubt in this case, it was clarified with the parties at the hearing that allowing the appeal on this ground would have the effect of putting Constable W in the position he would have been in if the misconduct proceedings had not existed/been taken. For the purposes this meant that Constable W would be re-instated."

Relief Sought in the First Application

[38] The applicant seeks appropriate relief in relation to the Respondent's refusal to reinstate the applicant to the office of Constable following the decision of the PAT.

Grounds for Relief in the First Application

[39] The applicant seeks the said relief o the following grounds:

(a) In deciding to withhold the Applicant's reinstatement into service, the Respondent is irrationally depriving the Applicant of his employment and

remuneration for same and relatedly that this is a breach of Art 8 of ECHR and Art 1 of the First Protocol to the ECHR.

(b) The Respondent erred in law on the basis that it is specifically provided for at Regulations 9 and 10 of the Royal Ulster Constabulary (Appeals) Regulations 2000 that where an appeal is allowed (as here) the order shall take effect from the date of the decision appealed against.

(c) The Respondent misdirected himself as to material facts and failed to take account of a relevant consideration, namely the full and accurate finding of the PAT.

Relief Sought in the Second Application

[40] The applicant PSNI seeks the following relief:

(a) An order of certiorari to quash the decision of the PAT that the information received by the police from the school Principal was a 'complaint' for the purposes of section 52 of the Police (Northern Ireland) Act 1998.

(b) An Order of certiorari to quash the decision of the PAT to stay the appeal proceedings.

(c) A declaration that said decision is unlawful, *ultra vires* and of no lawful effect.

Grounds for Relief in the Second Application

[41] The applicant seeks the said relief on the following grounds:

(a) The decision of the PAT was irrational in that no reasonable Police Appeals Tribunal, properly directing itself, would have held that the information conveyed to the Applicant by the school Principal was a 'complaint' for the purposes of section 52 of the Police (Northern Ireland) Act 1998.

(b) The PAT erred in law/or misdirected itself as to law in deciding that the information received by police from the school Principal was a 'complaint' for the purposes of the Police (Northern Ireland) Act 1998.

(c) The PAT erred in law in staying the appeal holding that the applicant ought to have referred the information conveyed to the applicant to OPONI.

(d) The PAT failed to take into account, adequately or at all, the circumstances of the information being conveyed to the applicant.

(e) The PAT erred in law by failing to take into account that three of the four charges arose from the Applicant's investigation into the ex-officer's conduct

during and after the ethical interview on 28 January 2013 and not solely the information conveyed by the school Principal.

(f) The PAT erred in law by failing to examine each of the specific charges and the source of the specific charge.

(g) The PAT stayed the ex-officer's appeal when it had no statutory authority to do so.

(h) The PAT erred in law in failing to seek information from OPONI as to whether or not it considered the information conveyed to the Applicant was a 'complaint' under s.52 of the Police (Northern Ireland) Act 1998.

(i) The PAT erred in law in failing to consider appropriately the fact that the Applicant conveyed the complaint by Ms F, Social Worker, to the OPONI in February 2013.

(j) The PAT made the decision in the absence of recently discovered evidence that the Applicant contacted the OPONI on 23 January 2013 relaying the circumstances of the information conveyed to the Applicant by the school Principal. The OPONI, as there was no complaint, was of the opinion that it was not a matter for the OPONI. Neither the misconduct hearing, Chief Constable's review nor the PAT had this information either.

Applicable Legislation

The Judicature (Northern Ireland) Act 1978

> "18 (5) Without prejudice to section 25 of this Act or to Article 159 of the Magistrates' Courts (Northern Ireland) Order 1981, where, on an application for judicial review the court finds that –
>
> (a) the sole ground of relief established is a defect in form or a technical irregularity; and
>
> (b) no substantial wrong and no miscarriage of justice has occurred or no remedial advantage could accrue to the applicant, the court may refuse relief and, where a lower deciding authority has exercised jurisdiction, may make an order, having effect from such time and on such terms as the court thinks just, validating any decision or determination of the lower deciding authority or any act done in consequence thereof notwithstanding that defect or irregularity."

Police (Northern Ireland) Act 1998

"Regulations for Police Service of Northern Ireland

25 (1) Subject to the provisions of this section, the Department of Justice may make regulations as to the government, administration and conditions of service of members of the Police Service of Northern Ireland.

…

(3) Without prejudice to the powers conferred by this section, regulations under this section shall –

(a) establish, or make provision for the establishment of, procedures for cases in which a member of the Police Service of Northern Ireland may be dealt with by dismissal, requirement to resign, reduction in rank, reduction in rate of pay, fine, reprimand or caution; and

(b) make provision for securing that any case in which a senior officer may be dismissed or dealt with in any of the other ways mentioned in paragraph (a) is decided by the Board.

(4) Without prejudice to the powers conferred by this section, regulations under this section shall provide for appeals to an appeals tribunal by members of the Police Service of Northern Ireland who are dismissed, required to resign or reduced in rank…
…

Part VII: Police complaints and disciplinary proceedings

Interpretation of this Part

50 (1) In this Part –

…

"complaint" shall be construed in accordance with section 52(8);

"complainant" means the person by, or on behalf of whom, a complaint is made;

…

"disciplinary proceedings" means –

(a) In relation to a member of the Police Service of Northern Ireland, proceedings identified as such by regulations under section 25;

The Police Ombudsman for Northern Ireland

51(1) For the purposes of this Part there shall be a Police Ombudsman for Northern Ireland.

(2) The person for the time being holding the office of Police Ombudsman for Northern Ireland shall by that name be a corporation sole.

(3) Schedule 3 shall have effect in relation to the Police Ombudsman for Northern Ireland (in this Part referred to as "the Ombudsman")

(4) The Ombudsman shall exercise his powers under this Part in such a manner and to such extent as appears to him to be best calculated to secure –

(a) the efficiency, effectiveness and independence of the police complaints system; and

(b) the confidence of the public and members of the police force in that system.

(5) The Independent Commission for Police Complaints for Northern Ireland is hereby abolished.

Complaints – receipt and initial classification of complaints

52(1) For the purposes of this Part, all complaints about the police force shall either–

(a) be made to the Ombudsman; or

(b) if made to a member of the police force, the Police Authority or the Secretary of State, be referred immediately to the Ombudsman.

(2) Where a complaint –

(a) is made to the Chief Constable; and

(b) appears to the Chief Constable to be a complaint to which subsection (4) applies,

The Chief Constable shall take such steps as appear to him to be desirable for the purpose of preserving evidence relating to the conduct complained of.

(3) The Ombudsman shall –

(a) record and consider each complaint made or referred to him under subsection (1); and

(b) determine whether it is a complaint to which subsection (4) applies.

(4) Subject to subsection (5), this subsection applies to a complaint about the conduct of a member of the police force which is made by, or on behalf of, a member of the public.

(5) Subsection (4) does not apply to a complaint in so far as it relates to the direction and control of the police force by the Chief Constable.

(6) Where the Ombudsman determines that a complaint made or referred to him under paragraph (1) is not a complaint to which subsection (4) applies, he shall refer the complaint to the Chief Constable, the Police Authority or the Secretary of State as he thinks fit and shall notify the complainant accordingly.

(7) A complaint referred under subsection (6) shall be dealt with according to the discretion of the Chief Constable, the Police Authority or the Secretary of State (as the case may be).

(8) Subject to subsection (9), where the Ombudsman determines that a complaint made or referred to him under subsection (1) is a complaint to which subsection (4) applies, the complaint shall be dealt with in accordance with the following provisions of this Part; and accordingly references in those provisions to a complaint

shall be construed as references to a complaint in relation to which the Ombudsman has made such a decision.

(9) If any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, none of the following provisions of this Part shall have effect in relation to the complaint in so far as it relates to that conduct.

(10) In the case of a complaint made otherwise than as mentioned in subsection (2)(a), the Chief Constable shall, if so requested by the Ombudsman, take such steps as appear to the Chief Constable to be desirable for the purpose of preserving evidence relating to the conduct complained of.

Complaints – informal resolution

53(1) The Ombudsman shall consider whether the complaint is suitable for informal resolution and may for that purpose make such investigations as he thinks fit.

(2) A complaint is not suitable for informal resolution unless –

(a) the complainant gives his consent; and

(b) it is not a serious complaint.

(3) If it appears to the Ombudsman that the complaint is suitable for informal resolution, he shall refer the complaint to the appropriate disciplinary authority.

(4) Where a complaint is referred under subsection (3), the appropriate disciplinary authority shall seek to resolve it informally and may appoint a member of the police force to do so on behalf of the authority.
…

Complaints – formal investigation

54 (1) If –

(a) It appears to the Ombudsman that a complaint is not suitable for informal resolution; or

(b) A complaint is referred to the Ombudsman under section 53(6),

The complaint shall be formally investigated as provided in subsection (2) or (3)

…

Steps to be taken after investigation – disciplinary proceedings

59(1) Where –

(a) The Director has dealt with the question of criminal proceedings; or

(b) The Ombudsman determines that the report under section 56(6) or 57(8) does not indicate that a criminal offence may have been committed by a member of the police force,

The Ombudsman shall consider the question of disciplinary proceedings.

(2) The Ombudsman shall send the appropriate disciplinary authority a memorandum containing –

(a) his recommendation as to whether or not disciplinary proceedings should be brought in respect of the conduct which is the subject of the investigation;

(b) a written statement of his reasons for making that recommendation; and

(c) where he recommends that disciplinary proceedings should be brought, such particulars in relation to the disciplinary proceedings which he recommends as he thinks appropriate.

(3) No disciplinary proceedings shall be brought by the appropriate disciplinary authority before it receives the memorandum of the Ombudsman under subsection (2)."

RUC (Appeals) Regulations 2001

"Amendment of Earlier Regulations

2 (5) The Royal Ulster Constabulary (Complaints etc) Regulations 2000 shall be amended as follows –

(a) for Regulation 3 there shall be substituted –

3 These Regulations apply to –

(a) any complaint made to the Ombudsman;

(b) any matter under consideration by the Ombudsman under Section 55 of the Act of 1998; and

(c) any complaint referred to in Article 4 of the Police (Northern Ireland) Act 1998 (Commencement) Order (Northern Ireland) 2000

Interpretation and Application

3 (1)…

'complaint' means a complaint to which section 50 of the Act of 1998 applies;

…

Decisions of the Appeals Tribunal

9(1) On an appeal the Appeals Tribunal may make an order allowing or dismissing the appeal.

(2) Where an Appeals Tribunal allows an appeal it may if it considers it appropriate to do so, make an order dealing with the applicant in a way –

(a) which it appears to the tribunal to be less severe than the way in which it was dealt with by the decision appealed against, and

(b) in which he could have been dealt with by the person who made that decision.

(3) An appeals tribunal may determine a case without a hearing provided both the appellant and respondent have had the opportunity to make written or, if either requests, oral representations and any such representations have been considered.

Effect of orders

10(1) Where an appeal is allowed, the order shall take effect by way of substitution for the decision appealed against, and as from the date of that decision or, where the decision was itself a decision on appeal, the date of the original decision appealed against.

(2) Where the effect of the order made by the police appeals tribunal is to reinstate the appellant in the force or in his rank, he shall, for the purpose of reckoning service for pension, and, to such extent (if any) as may be determined by the order, for the purpose of pay, be deemed to have served in the force or in his rank continuously from the date of the original decision to the date of his reinstatement.

(3) Where the effect of the order made by the police appeals tribunal is to reinstate the appellant in the force and he was suspended for a period immediately preceding the date of the original or any subsequent decision, the order shall deal with the suspension."

RUC (Conduct) Regulations 2000

"Interpretation

(4)…

'complaint' means a complaint to which section 50 of the Act of 1998 applies;"

RUC (Complaints etc) Regulations 2001

"Interpretation

3…

'Complaint' has the same meaning as under section 50(1) of the 1998 Act;

'Complainant' has the same meaning as under section 50(1) of the 1998 Act

…

Application of Regulations

4. These regulations apply to any complaint made on or after 6 November 2000 or to any other matter brought to the Ombudsman's attention on or after 6 November 2000.

Conditions to be met for complaints

5. Subject to regulations 6 and 10, the requirements for a complaint received under section 52(1) of the 1998 Act to be dealt with in accordance with the provisions of Part VII of the 1998 Act shall be:

(1) It is made by, or on behalf of, a member of the public;

(2) It is about the conduct of a member which took place not more than 12 months before the date on which the complaint is made or referred to the Ombudsman under section 52(1); and

3(a) A statement has not been issued in respect of the disciplinary aspects of an investigation under Article 9(11) of the Order or section 59(2) of the 1998 Act;

(b) The complaint has not been informally resolved in accordance with Article 5 of the Order or section 53 of the 1998 Act;

(c) The complaint has not been withdrawn within the meaning of Regulation 16 of the 1988 Regulations or Regulation 25 of the 2000 Regulations;

(d) The complaint has not been dispensed with under Regulation 17 of the 1988 Regulations or Regulation 25 of the 2000 Regulations;

(e) The complaint has not been otherwise dealt with under regulations made under 64(2)(d) or (e) of the 1998 Act, or

(f) The complaint has not otherwise been investigated by the police.

Exceptions for certain complaints

6…

(4) If any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, the Ombudsman shall have no powers in relation to the complaint in so far as it relates to that conduct."

European Convention on Human Rights

"Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 1 of Protocol 1

(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Arguments in the First Application

Applicant's Arguments

[42] The Applicant argues that the Respondent's failure/refusal to reinstate the Applicant is entirely without lawful basis. It was an act in defiance of the decision reached by the statutory tribunal (PAT) appointed to decide the Applicant's appeal.

[43] The Applicant submits that Regulations 9 and 10 of the Royal Ulster Constabulary (Appeals) regulations 2000 provide that where an appeal is allowed the order takes effect from the date of the decision appealed against. In other words the reinstatement is automatically just that. The Applicant should be treated as if he had never been dismissed. The Regulations do not provide for a suspension of the effect of the PAT decision.

[44] The Applicant further contends that in view of the PSNI's decision to bring a judicial review challenge to the PAT decision it must be deemed to accept that the appeal outcome was in the Applicant's favour.

[45] The Applicant notes that this has a significant and ongoing impact on the Applicant, in that despite having been successful in his PAT appeal, he remains in limbo, without a position in the PSNI and without the remuneration to which he is entitled in law (both current pay, pension contributions and backpay to the date of the now overturned termination of his service with the PSNI).

[46] The Applicant submits that the PAT came to the correct decision in law as to whether a complaint had been made that should have been referred to PONI under Section 52 of the 1998 Act (read with Regulation 5 of the RUC (Complaints etc) Regulations 2001), as per the Applicant's argument before the Disciplinary hearing and the PAT.

[47] The Applicant submits that the PSNI on one hand says that the PAT did not extend to a finding in favour of the Applicant's reinstatement (with the effect that it was content to do nothing and allow his status in limbo to continue indefinitely). On the other hand it contends that the PAT was wrong in law to find for the Applicant. Accordingly, the Applicant says that it can be said that the PSNI has now effectively acknowledged that the PAT outcome is that the Applicant has been reinstated. It has manifestly failed to action same since 8 July 2014, without having the benefit of any stay on the Order from the PAT from the lawful effect of that decision.

[48] It was clear what the PAT decision had found and ordered and what the implication of same was (i.e. that the Applicant should be reinstated into the police service). The comments of counsel for the PSNI in front of the PAT clearly demonstrate recognition on the part of the PSNI that upon the Applicant's application for a stay of the disciplinary proceedings being successful the charges

against him would be ended and the misconduct matter would not be progressed against him.

[49] The Applicant submits that the PSNI's submission that the fact that the Applicant's solicitor brought the continued non-reinstatement to the attention of the PAT as suggestive of confusion as to whether the PAT had actually reinstated him is not correct. It is submitted that the relevant letter clearly demonstrates that the Applicant's understanding of the outcome of the decision was that he was reinstated but that the PSNI had made no move to actually reinstate him.

[50] The Applicant argues that in the absence of interim relief to relieve the PSNI of the implications of the PAT order the Applicant is and should be deemed a reinstated member of the police as if he had not been dismissed and is entitled to the remuneration and other benefits that that status attracts. Accordingly, even if the PSNI challenge to the PAT decision is successful, the relief to be awarded should be circumscribed to afford him the benefit of the PAT decision up to the time that it is quashed as the PSNI should have complied with that decision even if, and during the period while, it is under challenge. It is submitted that this is particularly so in the circumstances of the delay in the PSNI bringing its challenge, the failure to seek and obtain interim relief and in light of the fact that the Applicant is eligible for retirement in September 2015.

[51] The Applicant submits that Parliament instituted the statutory scheme expecting it would be followed, not that it simply would be an optional matter at the behest of the PSNI itself. The only way in which the Parliamentary intention can be properly upheld is, as adopted by the PAT, to demand full compliance and in the absence of same to stop any offending disciplinary proceedings (See *R v Secretary of State for the Home Department Ex p. Jeyeanthan* [2000] 1 WLR 354).

[52] Moreover, the body properly charged with deciding upon the extent of the impact of the unlawful breach of the statutory scheme is the PAT, in the exercise of its discretion, subject only to the normal public law supervision by the High Court.

Respondents' Arguments

[53] The Respondent notes that the circumstances in which the school Principal made the relevant complaint were as follows:

(a) He was adamant that he did not want to make a complaint.

(b) He did not make any statement.

(c) He did not wish to make any statement.

(d) He did not want his name put forward in any way.

(e) He did not want his place of work identified.

(f) The information he was conveying was triple hearsay.

(g) It was in relation to off-duty conduct.

[54] The Respondent asserts that the communication by the school Principal did not amount to a complaint because it did not meet the usual factors associated with a complaint – for example, that there is an identifiable grievant, who is given updates on the progress of the grievance and who is ultimately advised of the resolution.

[55] The Respondent contends that there was no 'complaint' for the purposes of the Police (Northern Ireland) Act 1998. This is on the basis that the legislation was intended to address formal complaints that have the following characteristics:

(a) There is an identified complainant intending to make a complaint.

(b) There is an identifiable complaint.

(c) The complaint is made by or on behalf of a member of the public. In this case the school Principal was not making the complaint on behalf of Miss M.

(d) There was a complainant to whom the OPONI could provide feedback regarding the progress of the complaint.

(e) There was a complainant from whom OPONI could obtain a statement of evidence.

(f) There was a complainant from whom more details could be sought should OPONI have required same.

(g) There was a complainant who could be invited to the PAT hearing under Regulation 16 of the RUC (Appeals) Regulations 2000.

[56] The Respondent notes that the PAT failed to take account of the fact that three out of four of the misconduct charges arose following the ethical interview and the steps taken by the ex-officer to encourage a vulnerable young person to lie and mislead police officers investigating his conduct. They did not simply arise because of the information conveyed by the school Principal. The ex-officer's actions, in manipulating the vulnerable young person by providing her with draft messages in which she admitted lying to police, having a friend contact her to find out what she told police and sending her messages about how his job was in jeopardy, resulted in three of the four disciplinary charges.

[57] The Respondent notes that it has initiated judicial review proceedings challenging the PAT decision on the grounds that, inter alia, the manner in which

the information was conveyed by the school Principal to police did not constitute a 'complaint' for the purposes of the legislation.

[58] The Respondent notes that the PAT has the power to either allow or dismiss the appeal of the appellant under Regulation 9 of the RUC (Appeals) Regulations 2000. The decision to stay the proceedings is neither allowing the appeal or dismissing the appeal. The decision does not make any order relating to reinstatement or imposing a lesser sanction. The Decision of the PAT has resulted in uncertainty. At no stage does the decision state that the appeal was allowed. There is no order compelling the Respondent to re-engage the Applicant. The Respondent concludes in this regard that there has been no failure to abide by the decision of the PAT and no refusal to abide by the decision.

[59] The Respondent notes that the Applicant in this matter argued that this was a complaint that ought to have been referred to the OPONI under the provisions of s.52 of the Police (Northern Ireland) Act 1998. However, it notes that disciplinary papers were served upon the Applicant in June 2013 yet the Applicant did not challenge this course of action by way of judicial review arguing that the investigation should be stopped forthwith.

[60] The Respondent argues that if the Applicant is correct in asserting that the stay of proceedings actually compels the Respondent to re-engage the Applicant, this would result in the position whereby the purpose of the Regulations is wholly frustrated. This would result in an officer being reinstated without sanction despite admitting serious misconduct offences.

[61] It could never have been the intention of Parliament to legislate for an appeal mechanism that is usurped by the provisions of s.52 of the Police (Northern Ireland) Act 1998.

[62] The Respondent contends that re-engaging an officer without any sanction whatsoever would render the Regulations ineffective. There would be no decision on the merits of the misconduct matter. Any officer, with whatever offences, would simply be returned to service in the absence of a sanction.

[63] The Respondent argues that the Applicant has mistaken the challenge of the PAT by the Respondent and asserts that the Respondent does not accept that the appeal was allowed by the PAT. In its view the outcome of the PAT hearing was that the proceedings were stayed.

[64] The Respondent does not accept that it 'sat' on the instant issue. The Respondent submits instead that the Applicant has failed to read the decision and realise that it neither allows nor dismisses the appeal. It is the Applicant's appeal for him to prosecute. If the Applicant's case is that an ex-officer can simply be reinstated without sanction of any kind, then this is in error.

[65] The Respondent notes that the Applicant makes reference to an order from the PAT. It notes that there is no order of reinstatement or re-engagement, the order stays the appeal proceedings.

[66] The Respondent submits that the Applicant, when presented with the decision of the PAT failed to act with promptitude seeking clarity of the decision. The Respondent has provided an explanation for the period of time passing since the date of the decision. The application is not late and if the court deems it late, the court is invited to extend the time limit in the circumstances of the case.

[67] The Respondent submits that the Applicant has challenged the PSNI however it notes that the Applicant has failed to seek an order clarifying the decision of the PAT. The Applicant criticizes the Respondent for not obeying a clear order from the PAT however, on 7 October 2014 the Applicant's solicitor wrote to the PAT seeking a review of the decision. This email highlighted that the PSNI did not accept that the appeal was granted and the determination did not state that it had been granted. The Applicant initiated the request for the PAT to review its decision, therefore, by implication, the Applicant was not content with the decision.

[68] The Respondent notes that the Applicant based his application on the assertion that there was an order of the PAT that reinstates him. The Respondent asserts that this is erroneous and that therefore there has been no failure to comply with the said order.

[69] To the extent that the Applicant argues that the appeal to the PAT was 'successful' the Respondent contends that as the decision was unclear this is not the case. The Respondent denies that the Applicant is entitled to current and back pay. There has been no 'overturned termination' of his service. The order of the PAT is the cause of the Applicant's discontentment. He should have challenged the finding of the PAT seeking an order clarifying the position.

[70] In relation to the significance of the Respondent's judicial review of the PAT decision the Respondent contends that:

(a) The decision of the PAT is unclear and did not order the reinstatement of the Applicant. The Appeal proceedings were stayed. The Respondent notes that this is a view shared by the Applicant given his request made to the PAT for a 'review' of its decision. A review is not possible under the Regulations, therefore the Applicant ought to have challenged the PAT decision.

(b) Secondly, the Respondent is challenging, *inter alia*, the finding that the passing of the information to police by the school Principal was a 'complaint' for the purposes of s.52 of the Police (Northern Ireland) Act 1998. This is not an acceptance by the Respondent that the PAT made an order reinstating the Applicant.

(c) It does not follow that the challenge by the PSNI of the PAT decision is any form of acknowledgement that the PAT outcome was that he was re-engaged. The Applicant has manifestly failed to challenge the Respondent at the outset of the investigation and disciplinary proceedings. He has further failed to challenge the lack of clarity in the PAT decision. If the matter has been stayed, the appeal has neither been allowed, in which case there would be no need for a stay, nor has it been dismissed. The lack of clarity in the decision renders it uncertain in law.

(d) The Applicant seeks leave to challenge an alleged refusal/failure to obey an order that has not been made.

(e) The Applicant seeks leave to challenge the alleged failure/refusal of the PSNI to reinstate him despite no order to do so.

[71] The Respondent therefore submits that there is no arguable case. It further relies on the skeleton argument filed in relation to the PSNI challenge to the PAT judicial review proceedings.

[72] In the alternative the Respondent argues that the relief sought by the Applicant is a discretionary remedy and invites the court to decline the claim on the basis of the nature and extent of the admitted misconduct.

(i) Nature and Extent of Admitted Misconduct

[73] In R (on the application of Chief Constable of Wiltshire Police) v Police Appeals Tribunal [2012] EWHC 3288 the decision of the PAT was quashed for a number of failings including that it ignored the well-established principle that one of the primary purposes of professional misconduct proceedings is to ensure the preservation of public confidence in the profession in question.

[74] The Respondent submits that the demands of integrity that are placed on a police officer are the same as those demanded from a solicitor. In this regard the Respondent relies on Sir Thomas Bingham MR's statement in Bolton v Law Society [1994] 1 WLR 512 as to the correct approach to sanction in the context of solicitor's disciplinary proceedings which concludes, in essence that the *'essential issue'* in these disciplinary hearings *'is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness.'*

[75] In relation to the instant case the Respondent contends that the Applicant's conduct is incompatible with the maintenance of public confidence in the police force.

(ii) Discretion to Provide Relief to the Applicant

[76] The Respondent notes that the remedies provided by way of Judicial Review are discretionary. It relies in this regard on the dicta of Hobhouse LJ:

> "The discretion of the Court in deciding whether to grant any remedy is a wide one. It can take into account many considerations, including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy. The discretion can be exercised so as partially to uphold and partially quash the relevant administrative decision or act…"

[77] The Respondent further relies in this regard on the *McBride* litigation in which the Applicant challenged the decision of the Army Board to maintain in the Army two soldiers who had shot her son and been convicted of murder. In the first case the decision of the Army Board was quashed. However, when a fresh Board reconsidered the issue, they reached the same conclusion to retain the two soldiers in the Army. A challenge to this decision was successful in the Court of Appeal, which decided not to grant certiorari. The Army failed to take any further action on foot of this declaration and continued to retain the two soldiers in the army. In turn, this stance was challenged. In refusing relief, Weir J said:

> "The foundation for the second decision was thereby demolished but the decision itself was, quite deliberately, not struck down. What then was its status? As is clear from the passage from Wade and Forsyth at page 302… a finding that a decision is not valid does not, of itself, cause that decision to cease to have effect.
>
> …
>
> Such an absolute result depends, however, upon the willingness of the Court to grant the necessary legal remedies. And the Court may uphold the Act or Order is invalid, but may refuse relief to the Applicant because of his lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case, the 'void' Order remains effective and must be accepted as if it was valid… In my judgment that is the effect produced in this case by the nature and terms of the Order of the majority in relation to the second decision…"

[78] The Respondent contends that this case is a good example of a Court giving careful consideration to grant Declaratory relief only (with no practical effect other

than recognising the illegality of which the Applicant complained). The Respondent continues that there are also a number of bases on which the Court may decide, in the exercise of its discretion, to decline relief altogether even if the Applicant is successful. Some of these grounds were summarised by Carswell LJ (as he then was) in R v Governor of Maghaberry Prison, Ex-Parte Gallagher [1992] NI 155 (QBD):

> "Certiorari is a discretionary remedy and the Court may refuse to grant it in an appropriate case, where there is something in the circumstances of the case which makes it right to refuse the relief sought … This may even extend to cases where the Respondent has acted ultra vires… The discretion must, however, be exercised judicially and there are certain well established heads under which it must generally be brought."

[79] The Respondent, relying on Re Russell's Application [1990] NI 188 (QBD) submits that where the Court is considering withholding relief, it should conduct a balancing exercise of the respective injustices of granting, or not granting the relief sought. Hutton LCJ said:

> "I would also have had to take into account the principle that in considering whether to exercise its discretion to grant the remedy sought by an Applicant the Court is entitled in some cases to have regard to the harmful consequences which would ensue if the relief sought were granted (in this case a restriction on the ability of the Prison Authorities to carry out an exhaustive search to guard against the risk of an escape from the prison) and to balance those consequences against the harm which would be suffered by the Applicant if the remedy were withheld."

[80] The Respondent puts forward the following reasons in support of its contention that the court should decline the discretionary relief in the instant case:

(a) The technical nature of the breach. The Respondent relies on section 18(5) of the Judicature (Northern Ireland) Act 1978 which provides that the Court may decline to grant relief when it considers the successful grounds to represent technical irregularities where no substantial wrong or miscarriage of justice has occurred.

(b) Proper procedure would have made no difference. A common objection on the part of respondents to the Court granting relief is that, even if the shortcomings identified by the Court on judicial review had not occurred, the outcome would have been the same. Usually such a case is made where the Applicant has established some breach of procedural fairness and the

Respondent contends that, even had a fair procedure been adopted, the decision would inevitably have been the same. Similar contentions may also arise where the Court has found that an irrelevant consideration has been taken into account but it is said that it made no material difference to the outcome; or where an improper purpose has influenced the exercise of a power but this was significantly subservient to a lawful purpose for the exercise of the power. In this regard the Respondent relies on Malloch v Aberdeen Corporation [1971] 1 WLR 1578 (HL) in which Lord Wilberforce said the following:

> "The appellant first has to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain…"

In the instant case the Respondent argues that if the court holds that there was a failure to follow the legislation correctly the failure has no material effect in that the officer would, more likely than not, still have been investigated and subjected to misconduct proceedings given the nature of the allegations.

(c) Reprehensible behaviour on the part of the Applicant: The Respondent argues that the Court may decline relief where it finds that the Applicant is guilty of some reprehensible or unmeritorious behaviour, particularly in the manner in which the Application is brought, such that he does not deserve the exercise of the Court's discretion in his favour. While there is a presumption in favour of relief the Respondent argues that the general approach ought to be that a Claimant who succeeds in establishing the unlawfulness of administrative action is entitled to be granted a Remedial Order. The Court does, however, have discretion – in the sense of assessing 'what it is fair and just to do in the particular case' to withhold a remedy altogether or to grant a Declaration. Or to grant relief in respect of one aspect of the impugned decision, but not others. In this regard the Respondent submits that the admitted misconduct of the Applicant in the context of the demands of the position of being a police officer, should deny him the relief sought.

Arguments in the Second Application

Applicant's Arguments (PSNI)

[81] The decision being challenged is that of the intended Respondent dated 8 July 2014 granting the ex-officer's application, staying the proceedings, on the basis of its findings that information conveyed to police by the school Principal was a 'complaint' for the purposes of section 52 of the Police (Northern Ireland) Act 1998. As such, by virtue of this provision, the intended Respondent held that the Applicant Police Service ought to have referred the matter to the Office of the Police Ombudsman for Northern Ireland.

[82] The Applicant argues that the PAT:

(a) Erred in its finding that the information conveyed to police by the school Principal was a 'complaint' for the purposes of s52 of the Police (Northern Ireland) Act 1998.

(b) Failed to examine the provisions of the Police (Northern Ireland) Act 1998.

(c) Granted a stay of proceedings when the ex-officer had admitted all of the charges against him.

(d) Stayed the proceedings and neither allowed nor dismissed the appeal.

(e) Granted a stay of the proceedings in the absence of a statutory power to do so.

(f) Granted a stay of proceedings when the ex-officer ought to have challenged the decision to investigate him in January 2013 by way of judicial review.

(g) Granted a stay of proceedings and failed to decide upon the merits of the appeal and the reasons for the dismissal of the ex-officer from the PSNI.

(h) Failed to consider the impact of such a decision in that:

    (i) Every person providing intelligence or information informally to police about police officers, without wanting to make a complaint, must now be treated as a 'complainant' making a 'complaint' and referred to the OPONI.

        (ii) The detrimental effect upon the flow of information this may have.

        (iii) The impact upon the investigation of crime by PSNI.

(i) Failed to clarify whether or not the officer was to be re-instated.

(j) Failed to consider the impact of having the officer re-instated.

(i) Consequences of the PAT's Decision:

[83] The Applicant notes the following about the PAT's decision:

(a) There is no decision either allowing or dismissing the appeal.

(b) If the appeal is allowed, the PSNI are presented with having to manage the return of an ex-officer into service who has fully admitted the above charges. The PSNI will have great difficulty in re-engaging the ex-officer given that the role requires the utmost trust and responsibility.

[84] In relation to the impact of the decision, the Applicant makes the following arguments:

(a) In addition to complaints that are received by the PSNI and are referred to the OPONI, every concern conveyed by way of intelligence and also confidentially provided, e.g. the confidential telephone system, will have to be referred to OPONI. This has serious implications for the locus of the PSNI to investigate crime and preserve evidence. It will cause delay in the investigation of crime and the preservation of evidence.

(b) This may have a serious impact upon the receipt of intelligence relating to potential offences committed by officers. The information conveyed by the school Principal is akin to intelligence. The impact of the intended Respondent's decision is that now any such source will have to be informed that their details are to be passed to the OPONI to provide a statement of 'complaint' and be a formal 'complainant'. This clearly could result in the endangerment of sources, the reduction in the provision of such intelligence and consequently the failure to investigate and secure evidence of criminal offences.

(c) This cannot have been the intention of Parliament when constructing the complaints mechanism under the legislation.

(d) There is no definition of 'complaint' in the Northern Irish legislation. In England and Wales the following guidance was issued by the IPCC:

> "Guidance pursuant to s.22 of the Police Reform Act 2002: Statutory Guidance to the police service and police authorities on the handling of complaints, 2007
>
> Complaint

11. This means an expression of dissatisfaction with what has happened or how someone has been treated. Often, someone who wishes to complain will be explicit about his or her intentions. If not, the person's wishes and expectations should be established. Although the IPCC does not **require** the word 'complaint' to be used by someone voicing discontent, this term denotes a considered grievance needing to be resolved, not just an observation for the service to note or a question that the person wishes to have answered. The IPCC expects this level of dissatisfaction to be present for the matter to be recordable.

12. There will be occasions when, in the course of police operations or otherwise, a member of the public makes known a concern or criticism to an officer or member of police staff and it is reasonable to judge that this is not a complaint as envisaged by the Police Reform Act. From all the circumstances, including the gravity of what is alleged, the person's own actions or words and his or her response to what may immediately be offered by way of information, explanation or apology, it may be concluded that the person does not expect his or her communication to be received and acted upon as a Police Reform Act complaint.

13. Although in these cases such dissatisfaction will not lead to recording and action under the Police Reform Act, data on public perceptions of policing activity may be significant as community intelligence or as feedback on performance. Where practicable, forces and police authorities should consider the need to capture and use it.

Examples

A woman contacts her local police station to state that a control room operator was rude and put the phone down on her. She is upset when she reports this and says she wants the person dealt with before she does this to someone else. A supervisor immediately contacts the woman, who confirms that she wants her complaint looked into. The supervisor obtains her version of what happened and listens to a recording of the conversation, which confirms the allegation. The operator accepts she

was discourteous and personally apologies to the caller. **This should be treated as a recordable complaint.**

A man calls at his local police station wanting to speak to a patrol officer's supervisor to give feedback from his recent conversation with the officer. He thinks the officer was out of his depth and did not know what he was doing. He tells the supervisor that he does not want to make a complaint but just pass on his concerns. **This does not amount to a recordable complaint.**

A road has to be closed by the police while forensic examination is undertaken at the scene of a crime. Thirty-six hours later a local resident approaches the cordon and askes when the road will be reopened. He objects to the length of time he has been prevented from using his car and says he cannot accept that the police need all this time to do what is required. An officer tells him that the street will be reopened in two hours and he walks away without further comment or question. **This does not amount to a recordable complaint.**

A girl in her early teens on the way to church is stopped by the police and searched, according to the explanation given by the officer, for firearms. She tells the officer that this should not have happened to her. **This is a complaint which should be recorded."**

(e) The Applicant argues that the manner in which the school Principal conveyed the information to the PSNI was clearly not a complaint under the legislation in either substance or form. It was clearly akin to information provided by way of the confidential telephone number or indeed intelligence being passed to police.

(f) The PAT was wrong in law to conclude that the school Principal was making a complaint under the legislation.

(g) The PAT failed to take into account the origins of the charges separately. It is clear from the charges that apart from charge 1, the remaining charges arose from the dishonest answers given to the PSNI in the ethical interview. Charge 3 arose from the enquiries made and access provided by Miss M to her Facebook account.

(h) The PAT erred in deciding that even if what the school Principal had conveyed to the police was a complaint, the charges arose from his improper, misleading and dishonest answers in the ethical interview. This was not

simply about the relationship itself, but about how the ex-officer conducted himself when presented with the opportunity to answer questions honestly about it. Thereafter, it can be seen that the officer then embarked upon a manipulative course of conduct designed to frustrate the police investigation. It is also of significance that one of these steps was to require the vulnerable young person to send a text that stated that she had lied to the police.

(i) The PAT failed to take into account sufficiently or at all, that when the social worker for Miss M, made a complaint with Miss M's knowledge, PSNI passed this immediately to the OPONI. Therefore the OPONI was aware of the allegations.

(ii) Staying the Proceedings

[85] The Applicant makes the following arguments about the PAT's decision to stay the proceedings:

(a) The legislative purpose of the Regulations is to provide for an appeal against decisions of the PSNI.

(b) The PAT is governed by the Royal Ulster Constabulary (Appeals) Regulations 2000. These Regulations were made by the Secretary of State in pursuance of Sections 25 and 26 of the Police (Northern Ireland) Act 1998.

(c) 'Complaint' is defined under Regulation 3 meaning a complaint under Section 50 of the 1998 Act.

(d) Section 50 of the 1998 Act states that:

> "A complaint shall be construed in accordance with Section 52(8);
>
> 'complainant' means the person by, or on behalf of whom, a complaint is made."

(e) Section 52(8) states:

> "subject to subsection (9), where the Ombudsman determines that a complaint made or referred to him under subsection (1) is a complaint to which subsection (4) applies, the complaint shall be dealt with in accordance with the following provisions of this part; and accordingly references in those provisions to a complaint shall be construed as references to a complaint in relation to which the Ombudsman has made such a determination."

(f) Subsection (9) states that:

> "If any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, none of the following provisions of this part shall have effect in relation to the complaint insofar as it relates to that conduct."

(g) Subsection 52(4) is subject to subsection (5).

(h) Section 52(4) applies to a complaint about the conduct of a member of the Police force which is made by, or on behalf of, a member of the public.

(i) Sub-paragraph 52(5) provides that *'Subsection (4) does not apply to a complaint insofar as it relates to the direction and control of the Police force by the Chief Constable'.*

[86] The Applicant concludes therefore that the PAT failed to consider the definition of complaint under the Police (Northern Ireland) Act 1998.

[87] The orders which the PAT may make are set out in Regulation 9 and the effect of those orders is set out in Regulation 10.

> **"Decision of the Appeals Tribunal**
>
> 9(1) On an appeal the Appeals Tribunal may make an order allowing or dismissing the appeal.
>
> (2) Where an Appeals Tribunal allows an appeal it may if it considers it appropriate to do so, make an order dealing with the appellant in a way –
>
> (a) which appears to the tribunal to be less severe than the way in which it was dealt with by the decision appealed against, and
>
> (b) in which he could have been dealt with by the person who made that decision.
>
> (3) An appeals tribunal may determine a case without a hearing provided both the appellant and respondent have had the opportunity to make written or, if either requests, oral representations and any such representations have been considered.

Effect of orders

10(1) Where an appeal is allowed, the order shall take effect by way of substitution for the decision appealed against, and as from the date of that decision or, where the decision was itself a decision on appeal, the date of the original decision appealed against.

(2) Where the effect of the order made by the police appeals tribunal is to reinstate the appellant in the force or in his rank, he shall, for the purpose of reckoning service for pension, and, to such extent (if any) as may be determined by the order, for the purpose of pay, be deemed to have served in the force or in his rank continuously from the date of the original decision to the date of his reinstatement.

(3) Where the effect of the order made by the police appeals tribunal is to reinstate the appellant in the force and he was suspended for a period immediately preceding the date of the original or any subsequent decision, the order shall deal with the suspension."

[88] The Applicant argues that the Respondent neither made an Order allowing or dismissing the appeal.

[89] Further, in respect of Regulation 9, if it is the case that the appeal is allowed, the PAT failed to make any order regarding any lesser sanction. In effect, the officer is arguing for re-instatement in the absence of any sanction whatsoever.

[90] The Regulations do not make provision for staying the proceedings or the subsequent effect of any stay.

(iii) Fettered Discretion

[91] The Applicant argues that by adopting this definition of 'complaint', the Respondent has fettered its discretion to deal with the merits of the appeal itself. It is unclear whether or not the officer is to be reinstated. If it is the case that the officer is to be reinstated, the consequences are that whatever the misconduct, whatever the sanction, the PSNI will be obliged to return the officer to the Police Service without any sanction. This means that officers dismissed for serious offences will be reinstated without sanction. This cannot have been the intention of Parliament when enacting the Regulations.

[92] This has significant implications for the Police Service of Northern Ireland in light of risk assessment and the management of officers that the Misconduct Panel and Chief Constable's review both require the officer to leave.

[93] The purpose of the 2000 Regulations is to provide an appeal mechanism for officers and ex-officers to challenge the decisions of the Applicant.

[94] Section 25(4) states:

> "Without prejudice to the powers conferred by this Section, Regulations under this section shall provide for appeals to an Appeals Tribunal by members of the Police Service of Northern Ireland who are dismissed, required to resign or reduced in rank…
>
> (a) In a case where there is no right of appeal to any other person, by a decision taken in proceedings and the Regulations made in accordance with subsection (3); and
>
> (b) In a case where there is a right of appeal to another person, by the decision of that person."

[95] The legislative purpose of the Regulations is to provide for an appeal against decisions of the PSNI. By making a decision to stay the proceedings, the legislative purpose of the Regulations is frustrated. The merits of the decision being challenged have not been aired and the question arises as to how the public interest is served by the PAT in staying proceedings with the uncertainty of whether or not the offending officer is to be returned to service, the above impact upon the ability to investigate crime and the impact upon the flow of information to police. In the case of R (OneSearch Direct Holding Ltd) v York City Council [2010] EWHC 590 Admin at [24] held:

> "Parliament could not have intended that a power in one statute be exercised in a way that would utterly defeat the purpose of another statute."

[96] Parliament could not have intended to permit the s.52 referral issue to defeat the Appeal regulations and the public interest in the proper administration and hearing of Police Appeals.

(iv) Delay

[97] The PAT raised the issue of delay. The date the decision was communicated to the PAT was 8 July 2014. The decision did not provide for his re-engagement and stayed his appeal.

[98] The date the application was lodged was 29 October 2014.

[99] Between those dates, the ex-constable's legal representatives sought a review of the PAT decision on 7 October 2014 while at the same time issuing a pre-action protocol letter to the PSNI on 8 October 2014.

[100] On 8 October 2014 the PAT indicated by way of email that it intended to hear submissions on this point.

[101] In addition to this, once the proceedings were issued by the PSNI, the PAT chairperson stopped the re-listing and wrote a letter setting out the position of the PAT. This was dated 27 November 2014.

[102] There was clearly an issue regarding the status of the PAT decision and in those circumstances there was no delay in commencing proceedings.

[103] If the court finds that there was delay the Applicant submits that due to the importance of the legal issues in this case it is just in all the circumstances of the case to extend the time period. There has been no prejudice to the parties in this matter.

[104] Ex-const W is protected by the regulations in that if it is ordered that he be re-engaged, his pay and benefits are back dated.

Respondent's Arguments (PAT)

[105] The PSNI seeks to challenge the decision of 8 July 2014 whereby the PAT granted Constable W's application, staying the disciplinary proceedings against him. By the impugned decision, the PAT held that the PSNI had failed to treat the information which gave rise to the disciplinary proceedings as a 'complaint' for the purposes of section 52 of the Police (Northern Ireland) Act 1998. The PSNI failure to adhere to its statutory responsibilities in referring the matter to the OPONI in line with section 52 vitiated the subsequent disciplinary proceedings.

[106] The PAT notes that at the PAT hearing, Constable W's representative argued that the PSNI had had no jurisdiction to hold the disciplinary investigation into the first charge because of its failure to advise the OPONI of the complaint in line with the provisions of s52 of the 1998 Act. As the subsequent charges were all directly consequent to the PSNI having breached s52, they would not have occurred had the PSNI referred the matter to OPONI in line with their statutory duty. Accordingly, the gravamen of that argument was that the validity of the second, third and fourth charges were dependent on a finding as to whether the PSNI had acted within their statutory powers in respect of the first proceedings.

[107] The PAT hearing took place on 17 June 2014 and the impugned decision was issued on 8 July 2014. Accordingly, it is apparent that the PSNI have delayed considerably in bringing these proceedings.

(i) Delay

[108] The PSNI did not lodge any application for judicial review until 29 October 2014, sixteen weeks after the impugned decision. These proceedings therefore are neither prompt nor within the 12-week period suggested by Order 53. Furthermore, ACC Hamilton's explanation for the delay is both curious and wholly inadequate. The explanation for the PSNI's delay appears to resolve to the position that it was for Constable W to have challenged the PSNI for their failure to act; and/or that he should have challenged the PAT decision (which was in his favour) by way of judicial review. This explanation for the delay on the part of PSNI is incomprehensible. Constable W's application for judicial review is to compel the PSNI to adhere to the PAT finding: whereas the PSNI application is to strike the same finding down as being unlawful.

[109] In relation to the Applicant's submissions on delay, that is that the PAT indicated that it would convene a hearing to address Constable W's application for review one day after Constable W sought that review (the review was sought on 7 October 2014). The PAT cannot accept that Constable W's actions, a full three months after the PSNI had received the decision, excuse the PSNI's delay in bringing these instant proceedings.

[110] Order 53 Rule 4 provides that judicial review proceedings shall be initiated:

> "… promptly and in any event 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."

[111] Cases such as Re Shearer's Application [1993] 2 NIJB and Re McCabe's Application [1994] NIJB 27 emphasise the importance of making a prompt application. The rationale for their being such a short time limit is made clear by Lord Diplock in the case of O'Reilly v Mackman [1983] 2 AC 237, 280H-281A:

> "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."

[112] It is not accepted that either of the reasons alluded to by ACC Hamilton amount to a justifiable explanation as to why the PSNI delayed in initiating these proceedings. Neither does the fact that Constable W sought a review of the PAT

decision, three months after that decision had been received, constitute a reasonable explanation for the PSNI's delay.

[113] Furthermore, as in the case of In Re Turkington [2014] NIQB 58 at paragraphs [43] and [44]:

> "[43] There is a need for public bodies and those affected to have legal certainty as to the validity of actions taken. As it was put in another case good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary.
>
> [44] Given the terms and purpose of the rule the issue of delay needs to be addressed and decided in every case in which it arises. Unless the court considers that there is good reason for extending the time the application will fail in limine. The rule clearly envisages that delay must ordinarily be addressed at the leave stage. If not addressed at that stage the parties will be kept in suspense even longer as to the validity of the impugned decision. The Court and the parties cannot simply disregard the time limit. The grounding affidavit should account for all periods of delay – see Bryson Recycling [2014] NIQB 9."

[114] In this case ACC Hamilton has failed specifically to account for the relevant periods of delay and there is no good reason apparent from his affidavit as to why the time limit should be extended.

(ii) The Statutory Framework

[115] Disciplinary proceedings against members of the police, other than senior officers, are provided for in the Police Service of Northern Ireland (Conduct) Regulations 2000 made under the 1998 Act. The Chief Constable is the disciplinary authority and appoints the Misconduct Panel from serving officers. The Chief Constable also has general control of the police.

[116] Key to this current challenge is the introduction to Part VII of the 1998 Act which makes provision for the establishment of the Police Ombudsman in section 51, whose primary duties are set out in section 51(4) as follows:

> "(4) The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure –

(a) the efficiency, effectiveness and independence of the police complaints system; and

(b) the confidence of the public and of members of the police force in that system."

[117] Part VII of the 1998 Act is directly aimed at ensuring that the PSNI does not investigate complaints about the actions of its members, unless permitted to do so by the Ombudsman. Crucial to the operation of the Ombudsman's role is the requirement that all complaints made by members of the public about police officers are referred at first instance to OPONI for consideration (per section 52(1)(b)). The Ombudsman's duty thereafter is to record the complaint, determine if it was made by a member of the public, and if so, deal with that complaint in accordance with the provisions of Part VII of the 1998 Act (sections 52(3) and (8)).

[118] The Royal Ulster Constabulary (Appeals) Regulations 2000 make provision as to the procedure on appeals to a police appeals tribunal. At regulation 3 *'Interpretation and application'* it is provided:

> '3.(1) In these Regulations, the following expressions have the meanings hereby respectively assigned to them, that is to say:
>
> … 'complaint' means a complaint to which section 50 of the Act of 1998 applies; …'

Section 50 of the 1998 Act provides:

> 'a complaint shall be construed in accordance with Section 52(8);
> …
> 'complainant' means the person by, or on behalf of whom, a complaint is made'

Section 52(8) states:

> "Subject to subsection (9), where the Ombudsman determines that a complaint made or referred to him under subsection (1) is a complaint to which subsection (4) applies, the complaint shall be dealt with in accordance with the following provisions of this part; and accordingly references in those provisions to a complaint shall be construed as references to a complaint in relation to which the Ombudsman has made such a determination."

Section 52(9) states that:

> "if any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, none of the following provisions of this part shall have effect in relation to the complaint insofar as it relates to that conduct."

[119] Also relevant to this challenge are the PAT's powers as provided by regulation 9 of the 2000 Regulations:

> "9(1) On an appeal the Appeals Tribunal may make an order allowing or dismissing the appeal.
>
> (2) Where an Appeals Tribunal allows an appeal it may if it considers it appropriate to do so, make an order dealing with the appellant in a way –
>
> (a) which appears to the tribunal to be less severe than the way in which it was dealt with by the decision appealed against, and
>
> (b) in which he could have been dealt with by the person who made that decision.
>
> (3) An appeals tribunal may determine a case without a hearing provided both the appellant and respondent have had the opportunity to make written or, if either requests, oral representations and any such representations have been considered."

[120] The PAT opines that the core of the instant proceedings relates to whether the PAT acted unlawfully in finding that the information conveyed to police by the school Principal should have been referred to the OPONI as a 'complaint' for the purposes of section 52 of the 1998 Act (grounds 11(a), (b) and (c)).

[121] Without prejudice to the specific articulation of the remaining grounds of challenge, the PAT contends that its finding that the school Principal's communication with the PSNI about Constable W's behaviour amounted to a complaint within the scope of section 52 of the 1998 Act was lawful and beyond reproach. It is clear that the determination of whether the school Principal had made a complaint to the PSNI was a question of fact that was well within the PAT's scope to determine as a fact-finding tribunal.

[122] Consideration of the impugned PAT decision confirms that the PSNI Counsel fully articulated the points reiterated in this application for judicial review, citing in

detail why the PSNI did not believe the communication made by the school Principal to have constituted a 'complaint' in the context of section 52 of the 1998 Act. It is trite to say that this forum should not provide the PSNI with a merits appeal arising from their failure to persuade the PAT of their position.

[123] The impugned decision confirms that the PAT found, as a matter of fact, that the school Principal's communication to the PSNI led to: the removal of Constable W from his role in the school; the instigation of a criminal investigation; and thereafter disciplinary proceedings. Accordingly, the PAT held that the PSNI's actions in response to the school Principal's advices had *de facto* accepted that the school Principal had made a 'complaint' about Constable W's behaviour. In this context it was entirely open to the PAT to conclude that the school Principal's communication had the quality of a complaint.

[124] The PAT therefore denies that it failed to take into account all of the relevant grounds wherein the information about Constable W was conveyed to the PSNI (ground 11(d)). This contention is supported by the affidavit on the PAT's behalf by the Chairman, Ms Sheils on 21 January 2015.

[125] At paragraph 13 of Ms Sheil's affidavit, it is accepted that the PAT's decision reflected the terminology used by Constable W's representative when it granted *'a stay of proceedings'*. At paragraph 13 Ms Sheils also confirms that the PAT was fully aware that Constable W had admitted the charges proffered against him (ground 11E) as is revealed by any consideration of the transcript of the proceedings. However, this was in the context wherein it had been found that the PSNI had no jurisdiction to proceed with those disciplinary proceedings because of its fundamental breach of s.52 of the 1998 Act. Although the PAT used the terminology of having 'stayed the proceedings', this did not mean that it neither allowed nor dismissed the appeal (as alleged at ground 11(g)).

[126] Indeed, the PSNI line of argument that it did not understand the meaning of the PAT's determination does not bear scrutiny when one considers the exchanges between PSNI Counsel and Ms Sheils, the chair of the Panel at the PAT hearing. In particular, Mr Flanagan clarified with Ms Sheils that a 'stay' would have the effect of rendering the proceedings *'concluded'* without any scope for reconsideration of the charges which Constable W had admitted committing. Further, Mr Flanagan confirmed that a finding of *'technical non-compliance ought to render the entire proceedings null and void'*. In these circumstances it is therefore inconceivable that the PSNI did not understand the meaning of the PAT's decision.

[127] It was clear that the PAT finding was that Constable W's appeal had been successful, in a manner entirely within its statutory powers. For the avoidance of any doubt, the meaning of the PAT finding was clarified in correspondence dated 27 November 2014 to Constable W's and the PSNI solicitors.

[128] At paragraph 16 of Ms Sheils' affidavit she again confirmed that the PAT found that the subsequent charges against Constable W arose as a direct result of the investigation and ethical interview which the PSNI carried out, without jurisdiction. In these circumstances wherein the subsequent charges were *'fruit of a poisoned tree'* there was no requirement for the PAT to examine the further charges. For this reason, the subsequent referral to OPONI after a further complaint was received from Ms F, social worker, on or about 7 March 2014 was not capable of retrospectively affording the PSNI the jurisdiction to carry out the previous investigation (per ground 11(i)). Indeed, in the course of the hearing it was confirmed that the prompt for Ms F to have made her complaint was the ongoing investigation into Constable W's behaviour consequent to the school Principal's complaint.

[129] In equal measure it is inappropriate for the PSNI to criticise the PAT for failing to seek additional information from OPONI as to whether or not it could retrospectively consider whether the information received from the school Principal was a complaint (ground 11(h)). The PSNI advised the PAT that there had been no contact initiated from the PSNI to OPONI, until a referral was made, in response to Ms F's complaint which was received on 7 March 2014. In these circumstances, it is somewhat surprising to seek a head of complaint being that the PAT failed to adjourn and seek clarification from OPONI.

[130] Further, towards the conclusion of the hearing, the PAT Chairman, Ms Sheils asserts in her affidavit, that the possibility of an adjournment to consider the impact of the failure to refer the matter initially was mooted. The resounding response from the PSNI was that they were opposed to any further adjournment to consider issues and:

> "Preferred to have the matter dealt [sic] today because of the availability of various parties… over the next number of months."

[131] It is contended that it is inappropriate for the PSNI to criticise the PAT's actions for illegality on the basis that Constable W should have *'challenged the decision to investigate him in January 2013 by way of judicial review'*. Had Constable W sought to challenge the decision to investigate him in the currency of the internal disciplinary proceedings, a judicial review court would have (in all likelihood) declined to hear his application, given that he had not exhausted alternative remedies (by way of the disciplinary process, the Chief Constable's review and the right to seek an appeal before the PAT).

[132] Further, at ground 11(j) the PAT is criticised for failing to make the decision without information which the PSNI has only recently discovered in relation to their contact with OPONI. This information is potentially crucial to the issue that had to be determined by the PAT on 17 June 2014. In its skeleton argument the PSNI has offered further details of its contact with OPONI: information which Ms Sheils has confirmed was categorically not available to the PAT at the time of hearing. There is

no explanation as to why this potentially very relevant information was not produced at the hearing. During the hearing the PSNI gave no hint that this information may have existed, and it is difficult to understand how the PAT can be deemed as having acted unlawfully when the PSNI failed to adduce the information, or even allude to the possibility of its existence.

[133] During the hearing both the PSNI and Constable W's representatives made submissions in respect of whether the school Principal should have been regarded as having made a complaint. There is no statutory definition of what constitutes a complaint, and so the PAT was at liberty to accept or reject the PSNI's submissions in the circumstances.

(iii) Alleged negative consequences of the Impugned Decision

[134] The PSNI has elaborated at some length about the negative impact that it believes will flow from the impugned decision. These 'negative consequences' are interesting, but do not vitiate the legality of the decision. The fact that the consequences are undesirable for the PSNI is not determinative of whether the PAT acted in a manner that was lawful.

[135] Further, and for the avoidance of any doubt, it is not accepted that the information conveyed by the school Principal was *'akin to intelligence'* or that the PAT decision would have any such impact (as has been alleged) on the ability of the PSNI to manage intelligence.

(iv) Definition of Complaint

[136] In the circumstances where is no statutory definition of 'complaint' for the PSNI, direct comparisons should not be imported from other legislation in England and Wales. Further, it is clear that the comparison between the position in Northern Ireland and England and Wales was not opened to the PAT. In any event, the PAT does not accept that the guidance referred to by the PSNI (deriving from the Police Reform Act 2002) is of particular assistance in this case, given that the changes brought about by the introduction of the OPONI role in police disciplinary matters were specific to the particular historical and political background of policing in Northern Ireland.

(v) Respondent's Conclusion

[137] In short, a proper appreciation of the full context in which the PAT considered Constable W's appeal impels to the conclusion that the grounds of challenge have not been made out. Particularly apposite in considering the question of whether the PAT acted in a manner to fetter its own discretion are the observations of Lord Halsbury LC in *Sharp v Wakefield* [1891] AC 173 at 179:

> "… discretion means, when it is said that something is to be done within the discretion of the authorities, that that discretion is to be done according to the rules of reason and justice, not according to private opinion… according to law, and not humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself."

[138] Firstly, it is submitted that the PSNI have delayed in bringing this application, and leave should not be granted on that ground alone. Secondly, it is indisputable that the decision made by the PAT was within the scope of its discretion. Thirdly, there was nothing in the manner in which the PAT approached Constable W's appeal that could properly be considered to be outwith the proper discharge of its duties, in a legal and just manner.

[139] Accordingly, the PSNI is unable to demonstrate that the PAT, in making the impugned decision, was guilty of any relevant public law wrong.

Arguments of the Notice Party in the Second Application (Constable W)

Whether the PAT erred in finding that the information conveyed to police by Mr. P was a 'complaint' for the purposes of s.52 of the Police (Northern Ireland) Act 1998

[140] The relevant statutory scheme is found in part VII of the Police (Northern Ireland) Act 1998. The scheme marked the creation of the Police Ombudsman for Northern Ireland and sets out the arrangements for the management of police complaints and discipline as between PONI and the PSNI.

[141] The notice party submits that one of the key policy aims of the legislation was to create a process of investigation and discipline of police officers that would command the confidence of the public. This finds statutory recognition in the careful structuring of responsibilities for consideration of complaints about police officers from the public.

[142] From sections 52 to 59 of that act, the notice party submits that the following principles arise:

(a) All complaints about police must be made to PONI, or otherwise referred to PONI.

(b) PONI must then consider and determine whether the complaint was about the conduct of a member of the police force which was made by/on behalf of a member of the public.

(c) Where PONI considers that the above does not apply he shall refer the complaint to Chief Constable PSNI/NI Policing Board/DPP/Department of Justice as he sees fit and shall notify the complainant accordingly.

(d) Where PONI determines that the complaint was about the conduct of a member of the police force which was made by/on behalf of a member of the public then the complaint must be dealt with in accordance with the provisions following section 52.

(e) Accordingly, PONI must then consider whether the complaint is suitable for informal resolution.

(f) If PONI decides not suitable for informal resolution then he must formally investigate it under the provisions set out in section 56 (if it is other than a 'serious' complaint PONI may either formally investigate it himself or refer the complaint to the Chief Constable for formal investigation by a police officer).

(g) At the end of the PONI investigation the PONI officer investigating the complaint submits a report to PONI.

(h) PONI must then consider whether a criminal offence may have been committed, and if so, refer the matter to the DPP.

(i) If PONI considers that it does not indicate a criminal offence and is not a serious complaint he can refer it for mediation.

(j) Alternatively PONI must consider the question of disciplinary proceedings and can make recommendations regarding same to the Disciplinary authority (i.e. the PSNI authorities).

[143] The notice party submits that:

(a) It is for PONI and PONI alone to decide if a complaint was about the conduct of a member of the police force which was made by/on behalf of a member of the public.

(b) If he determined the above in the negative then it is for PONI to decide to whom the matter should then be referred.

(c) If he decides the above in the affirmative then the formal investigation into the complaint must be conducted by PONI (other than in limited circumstances where PONI decides to refer the matter to the Chief Constable for formal investigation by a Police Officer subject to supervisory requirements imposed by PONI).

[144] In the instant case it appears to be the PSNI's case that the PAT has incorrectly agreed with the submission made to it by the Notice Party that the PSNI investigation into him was on foot of a complaint made about the conduct of a member of the police force which was made by/on behalf of a member of the public.

[145] The notice party submits that there are two fundamental and fatal flaws with the PSNI's argument on this issue:

(a) Firstly, this was clearly a situation of a complaint.

(b) Secondly, it is for PONI to decide the status of the complaint and how it should be further investigated.

[146] The notice party submits that in acting as it did in this case the PSNI subverted the letter and spirit of Part VII of the 1998 Act.

[147] In now further seeking to defend that position on the basis that the issues raised by the school Principal amounted to merely intelligence the PSNI actually highlights its flawed approach to the statutory scheme. Even if information from a member of the public about the conduct of a police officer could perhaps be treated as intelligence, once the PSNI moves from simply having the information to investigation of it the PSNI is, in effect, usurping the role of PONI. It is respectfully submitted that this displays a starkly concerning attitude to the careful regime of police supervision put in place by Parliament.

[148] If the PSNI approach were to be deemed acceptable it would substantially undermine the key principle that complaints about police officers should be investigated by PONI and not other police officers. The fact that in this case the PSNI did instigate disciplinary proceedings is superfluous to consideration of the underlying principle of police accountability and supervision. This is amply illustrated by looking at the hypothetical:

> "Information comes to police attention from a member of the public about the conduct of a police officer and simply because it does not have the stated wrapper of a complaint, or moreover, the member of the public categorically says he does not want the complaint to be treated as a complaint. The PSNI then do not report it to PONI and take no further action on the information provided."

[149] In any event the PSNI's contention that there was no complaint in this case is unsustainable.

[150] On 10 December 2012 the school Principal informed the PSNI of information about the conduct of the notice party. The school Principal further made it clear that

he would not accept the notice party further in his school in his role of school involvement officer due to the information that he had become aware of.

[151] It is submitted that this clearly amounted to a complaint about the conduct of a police officer by a member of the public.

[152] The PSNI suggests various attributes of a *formal complaint* in its skeleton argument.

[153] Firstly, it should be noted that the statutory scheme does not attach the adjective *formal* to the concept of *complaint.*

[154] It is suggested by the PSNI that a significant factor in determining whether a complaint has been made is the stated intention and desires of the person making the complaint/giving the information. However, it is notable that the PSNI's own Service Procedure 4/2013 'Handling Public Complaints and the Role of the Police Ombudsman' recognises that there will be occasions when that is not properly a material factor:

> "In cases where a person in custody has made an allegation against police to a Forensic Medical Officer (FMO), the allegation must be reported to PONI even if the complainant subsequently states that they do not want their allegation to be treated as a formal complaint."

[155] Further, the various attributes are not grounded in the 1998 statute, which is in effect silent on the definition of a complaint. Regulation 5 of the Royal Ulster Constabulary (Complaints etc.) Regulations 2000, under the heading *Definition of Complaint',* provides that:

> "It is for the Ombudsman to determine what constitutes a complaint under Section 52(8) of the Act of 1998, subject to the following exceptions:
>
> (a) A complaint in so far as it relates to the direction and control of the police force by the Chief Constable; or
>
> (b) A complaint about members not on duty, unless the fact of being a member is relevant to the complaint, or
>
> (c) A complaint about a civilian employed at police establishments,

> Shall not constitute a complaint under Section 52(8) of the Act of 1998"

[156] The notice party contends that in considering the interpretation of *complaint* the court should pay special attention to the underlying purpose of the legislation i.e. ensuring public confidence in the matter by removing the opportunity for police to investigate police on matters related to conduct issues raised by members of the public. It is further important to recall that the member of the public is not the only legitimately interested party.

[157] The public as a whole has a legitimate interest in the integrity of police accountability processes. This can properly extend to a situation where a member of the public complains about the conduct of an officer, but expressly states that he does not want it dealt with as a complaint. The Police must consider it to be what it is, a complaint about police conduct. All that is then required is to refer it to PONI.

[158] The PSNI argument refers to guidance in England and Wales under the Police Reform Act 2002 about the handling of complaints. It is trite to observe that the said guidance does not apply to this case. Police accountability in this jurisdiction is a *sui generis* issue.

[159] Notwithstanding same, it is submitted that the very examples relied upon by the PSNI from that guidance illustrates that even on the PSNI's logic there was a complaint in the instant case:

> "The term denotes a considered grievance needing to be resolved" –

In the instant case P's complaint resulted in the notice party being removed from a role within a school.

[160] Rather than treat it as a complaint about the conduct of a police officer by a member of the public (which would require referral to PONI) the PSNI took it upon itself to investigate the matter (in order to consider whether a criminal offence had been committed), with the implication that PONI was *cut out of the loop*. [It is perhaps also important to recognise that, contrary to the statutory scheme, PONI was as a result at that time entirely unaware of the matter and therefore unable to make a decision as to whether Constable W's conduct indicated a potential criminal offence or alternatively should have been met with disciplinary recommendations.

[161] This gives rise to the rhetorical question; if it wasn't a complaint what exactly was it that the PSNI was investigating?

[162] To the extent that it is the PSNI answer that it was simply acting upon intelligence then it can be said that this is an impermissible method of avoiding the requirement to refer the matter to PONI.

[163] On 13 February 2013 it further appears that Miss M's Social Worker, Ms. F, spoke with the PSNI and then wrote to the PSNI on 25 February 2013 to 'share concerns with (PSNI) regarding a vulnerable young person … we wish to specifically reference our 'concerns' regarding the conduct and relevant to this case of a serving PSNI officer Constable W …'

[164] The *complaints* from the school Principal and Miss M's social worker led to the PSNI investigations, which in turn led to the disciplinary charges in respect of which he was dismissed.

[165] The subversion of the statutory scheme fatally undermines the disciplinary process. In law the PSNI had no power to conduct the investigation in the first place.

[166] The arrangements for police investigation of conduct issues concerning police officers are found in the Royal Ulster Constabulary (Conduct) Regulations 2000. It is notable that the definition therein of *complaint* is found in sections 50 and 52(8) of the 1998 Act.

[167] It is further notable that per regulation 7 the arrangements governing the PSNI investigation do not apply to cases where there is a complaint to which section 54 of the 1998 Act applies (i.e. where there is a complaint which falls for formal investigation by PONI).

[168] All the following on provisions of the 2000 Conduct Regulations empowering and governing the PSNI investigation consequently fall away if the Regulation 7 exemption is engaged, which of course the notice party says is, properly analysed, the situation in the instant case.

[169] This results in the situation where there is no power available to the PSNI to refer the matter for a disciplinary hearing under regulation 11.

[170] It is not open to the PSNI to simply disapply or disregard the Part VII 1998 Act regime.

[171] While it does not arise on the facts of the instant case Regulation 24 of the RUC (Complaints etc.) Regulations provides a mechanism by which the Part VII 1998 regime can be disapplied if PONI asks a complainant whether they wish further steps to be taken and no response is forthcoming within the requisite time.

[172] Similarly Regulation 25 allows PONI to disapply the requirement of the Part VII 1998 Act regime in certain limited circumstances (which do not apply in the instant case, and which in any even PONI did not exercise in this case).

[173] By the time that the PSNI thought to make any contact with PONI on 23 January 2013 the police investigation was well underway (and in fact may have been completed as it was understood at that date – which rather begs the question as to why the PSNI felt it necessary to then contact the PONI). As such this cannot rescue the unlawfulness of the investigation and the subsequent disciplinary proceedings.

[174] When the matter came before the PAT it accepted that the school Principal had actually made a complaint for the purposes of the Part VII 1998 Act scheme. It is the notice party's case that not only is this interpretation of the situation demonstrably correct, it is certainly a finding of fact that was open to the PAT in its exercise of its fact-finding area of discretion, and falls very short of reaching the high watermark of *Wednesbury* unreasonableness to establish full-blown irrationality as alleged by the PSNI.

(i) Stay of Proceedings / Outcome of Appeal

[175] Whatever the use of language by the PAT it is, and was, clear throughout that the notice party's appeal had been successful.

[176] The PSNI could have been in no doubt as to the outcome. The PSNI's failure to abide by the statutory requirements to refer the matter to PONI was found to have infected all four disciplinary charges brought and vitiated the subsequent disciplinary proceedings.

[177] It is further clear from Ms Sheils' affidavit evidence that the PSNI were aware of and accepted that the practical import of the PAT's decision was that Constable W was successful in his appeal and that his reinstatement followed.

[178] The transcript of the PAT hearing shows that the PSNI accepted that if the PAT accepted the notice party's contention that the school Principal had made a complaint and that this had not been forwarded to PONI as the PSNI would have been obliged to do then the proceedings against the notice party should be dismissed.

[179] The PAT accepted that the PSNI had failed to follow the proper statutory regulatory/disciplinary procedures and as such the disciplinary proceedings that resulted in the disciplinary sanction of dismissal were lacking in jurisdiction.

[180] *Beggs on Police Misconduct, Complaints and Public Regulation, OUP, 2009* refers to Police Officers serving in a regulated profession (12.08). It further notes:

> "Those regulations accordingly provide the protections for the officers concerned and must as a matter of 'due process' be adhered to. (12.09)

> … the reformers elected not to go down the route of making police officers ordinary employees by removing the unique status of the office of constable… Instead it was determined… that the police should remain a regulated profession (12.10)
>
> It is therefore a little surprising just how frequently senior police officers apparently forget that, when Parliament lays down regulations, it does so with the expectation that they be adhered to." (12.11)

[181] It has been recognised that proceedings may be stayed outside the category of procedural unfairness and instead in order to maintain the rule of law, irrespective of the guilt or otherwise of the person concerned (See R v Horseferry Road Magistrates' Court, ex parte Bennett [1994] 1 AC 42, HL).

[182] In the instant case it is submitted that the vital nature of the role of PONI would be severely undermined if the deliberate sidestepping and subversion of the Parliamentary intention for the supervision and investigation of the police in Northern Ireland were to be permitted in any case.

[183] The departure from the regulatory regime in this case was serious and carried more fundamental implications for the sensitive policing arrangements in this jurisdiction. The PAT was acting accordingly in holding that the deliberate failure to follow the set procedure infected all that came thereafter in the process. The statutory scheme itself mandates that a complaint shall be dealt with in accordance with the provisions of Part VII of the 1998 Act.

[184] The deliberate failure on the part of the PSNI to comply with the requirement to refer to PONI rather than to conduct an investigation itself should not be tolerated. The Court is respectfully enjoined to consider this matter from the wider perspective of the potential implications that may arise generally from action of this nature by the PSNI, and not solely in the direct context of this individual's case.

[185] Essentially, the PAT did not simply stay the proceedings. In fact, it found for the notice party on his appeal. His reinstatement follows as of right.

(ii) General Issues

[186] As part of its case the PSNI suggests that the PAT finding will inhibit its intelligence gathering ability.

[187] It is contended in reply that this simply does not stand up to examination. There is a difference between intelligence and evidence, even if in a disciplinary context as opposed to a purely criminal one. Reflective of that the PSNI has a *Service Confidence procedure* that is specifically designed to allow for the management of

officers against whom there is negative intelligence but which cannot be deployed in the disciplinary setting. (See In re an Application by JR 26 [2009] NIQB 101)

[188] In the instant case the PSNI did not adopt that approach and instead went down the disciplinary investigation route. Having opted to do so, it is incumbent upon it to abide by the statutory regulatory regime.

[189] The PSNI places reliance upon there being allegedly new evidence regarding contact between the PSNI and PONI regarding the notice party on 23 January 2013.

[190] It is entirely unclear why this information was not made known during the disciplinary hearing, the Chief Constable's Review, or during the PAT process.

[191] The officer in the PSNI responsible for the said contact has not made an affidavit addressing the issue.

[192] It is said at paragraph 59 of ACC Hamilton's affidavit that this contact was made under section 55 of the 1998 Act. The relevance of that section is unclear.

[193] In any event, the notice party contends that this apparently *new* information makes no difference. By 23 January 2013 the damage was done. A complaint had been made, had not been referred and instead the PSNI had engaged in its extra-statutory investigation. A subsequent misplaced assertion by a PONI staff member that there was no need to refer changes nothing.

[194] It can further be said that in similar fashion, the PAT was aware of the later contact with PONI in March 2013 – this was not deemed to rescue what had already occurred in breach of the 1998 Act.

[195] The PSNI's application attracts serious concern regarding delay. The PSNI was seemingly only prompted into action following the instigation of the notice party's own judicial review proceedings.

[196] With no explanation now, the PSNI *sat* on this issue, wilfully and in the face of prompting by the notice party's solicitor, and took no action either to reinstate the notice party as required in light of the PAT decision or to challenge the PAT decision (until 28 October 2014, the impugned decision having been made on 8 July 2014). The PSNI application is not only lacking in promptitude, but is in fact made outside the time permitted in Order 52 Rule 4.

[197] No good reason has been given to explain the delay and to justify an extension of time. (See In Re Turkington [2014] NIQB 58)

(iii) Notice Party's Conclusion

[198] The school Principal informed the PSNI of information about the conduct of the notice party. The clear intention of the statutory scheme is that if anybody is going to investigate issues relating to conduct of police officers it should not be the police, but the independent body created specifically for the purposes and role – PONI.

[199] The PSNI's approach to this matter, *dancing on the head of a pin* as to whether this amounted to a complaint or not, is to miss the real point, *viz.:* if the information is to be acted upon (as it was here by the PSNI) then it is a matter that falls to PONI. Otherwise the parliamentary intention is subverted.

[200] In the context of the policing settlement in Northern Ireland the Court will undoubtedly wish to guard against the development of a practice whereby the police investigate the conduct of the police contrary to the spirit and letter of the carefully constructed regime of police accountability and supervision.

[201] The notice party contends that the PSNI application to quash the PAT decision in this matter should be refused with the net effect that the integrity of the statutory scheme is protected and strengthened in future applications.

Discussion

[202] It is convenient to consider the second of these applications first because if the decisions of the PAT are quashed there can be no complaint that the refusal of the PSNI to reinstate Constable W as a consequence of those decisions was unlawful.

[203] In my view there are two matters which are a complete answer to the second application.

[204] First, Regulation 5 of the RUC (Complaints etc) Regulations 2001 which prescribe the conditions which a complaint must meet in order to be dealt with under section VII of the 1998 Act provides:

> "5. Subject to regulations 6 and 10, the requirements for a complaint received under section 52(1) of the 1998 Act to be dealt with in accordance with the provisions of Part VII of the 1998 Act shall be:
>
> (1) It is made by, or on behalf of, a member of the public;
>
> (2) It is about the conduct of a member which took place not more than 12 months before the date on which

the complaint is made or referred to the Ombudsman under section 52(1); and

(3)(a) A statement has not been issued in respect of the disciplinary aspects of an investigation under Article 9(11) of the Order or section 59(2) of the 1998 Act;

(b) The complaint has not been informally resolved in accordance with Article 5 of the Order or section 53 of the 1998 Act;

(c) The complaint has not been withdrawn within the meaning of Regulation 16 of the 1988 Regulations or Regulation 25 of the 2000 Regulations;

(d) The complaint has not been dispensed with under Regulation 17 of the 1988 Regulations or Regulation 25 of the 2000 Regulations;

(e) The complaint has not been otherwise dealt with under regulations made under 64(2)(d) or (e) of the 1998 Act, or

(f) **The complaint has not otherwise been investigated by the police."** [Emphasis added]

[205] By the time the matter came before the PAT (and indeed by the time it came before the original disciplinary hearing) the 'complaint' had been fully investigated by the police and the PAT was therefore statutorily prohibited from finding that the 'complaint' was a complaint which should have been referred to OPONI.

[206] In any event, if the conduct hearing panel was wrong in its decision on the stay at the first instance, it proceeded to make its adjudication on that matter without jurisdiction and that finding was therefore *void ab initio*. In the absence of any valid decision of the conduct hearing panel the PAT is deprived of jurisdiction as, without a valid decision there can be no valid appeal. The jurisdiction of the PAT is parasitic on the jurisdiction of the lower decision-maker. This is clear from regulation 10 of the RUC (Appeals) Regulations 2000 wherein it is stated:

"(10)(1) Where an appeal is allowed, the order shall take effect by way of substitution for the decision appealed against, and as from the date of that decision or, where the decision was itself a decision on appeal, the date of the original decision appealed against."

[207] Where there has been no decision which is appealed against, there is no pre-existing decision that the PAT decision can be substituted for nor is there a relevant date from which the PAT's decision can be substituted.

[208] In fact, the PAT founded their submissions on the fact that the PSNI's alleged failure to consider the communication from the school Principal as a complaint *'vitiated the subsequent disciplinary proceedings'*. Those 'subsequent disciplinary proceedings' must necessarily include the appeal hearing itself.

[209] For this reason, I allow the application of the PSNI and quash the decision of the PAT to stay the process. It follows that Constable W's application is moot.

[210] I make the following general comments which are necessarily obiter.

[211] Section 52(1) of the Police (Northern Ireland) Act 1998 provides that:

> "52(1) For the purposes of this Part, all complaints about the police force shall either –
> …
> b. if made to a member of the police force… be referred immediately to the Ombudsman."

[212] It is clear from this section that the PSNI must therefore perform a screening exercise to determine if a communication to it constitutes *'a complaint about the police force'*. Matters which the PSNI would need to take into account when making this screening decision would include:

(a) Whether it is a complaint relating to *'the direction and control of the police force by the Chief Constable'* in which case, pursuant to section 52(5) of the 1998 Act, it will not be a 'complaint' for the purposes of that section.

(b) Whether or not the communication is something in relation to which a resolution is either sought by the complainant or otherwise considered necessary (see, for example, section 53 of the 1998 Act).

(c) The duty of the Police Ombudsman to exercise his powers in such a way so as to serve the confidence of the public and members of the police force in the police complaints system and the general public interest in maintaining such confidence.

(d) The clear statutory intention that there should not be parallel investigations that may allow one investigating body to undermine the investigation of another body (see, for instance, Regulation 5 of the RUC (Complaints etc) Regulations 2001.

[213] It is likely that there are many considerations which may be relevant to this screening exercise.

Conclusion

[214] The judicial review brought by Constable W is dismissed (the first application). The judicial review brought by the PSNI (the second application) is allowed. The Court quashes the decision of the PAT that the information received by the police from the school Principal was a "complaint" for the purposes of Section 52 of the Police (NI) Act 1998. Relatedly the Court quashes the decision of the PAT to stay the appeal proceedings.

[215] In light of the above findings the Court will make the usual order as to costs.