



TFC Junior Counsel Wins in Historic First Ever Successful Appeal against Ethical Standards Commission in Covid-19 Adjournment Case

Background

The appellant,^[1] Paul Mack, was (and now remains) a councillor on Renfrewshire Council for Paisley Southeast ward, and the only independent member for that constituency. He was first voted into office by its some 12,000 constituents in 1995, and returned in 2012 and 2017. By many accounts, he appears to be a popular albeit occasionally controversial politician. On 28 September 2020, he was disqualified and removed from office by the Standards Commission for Scotland for alleged breaches of the Code of Conduct for Councillors. Disqualification became effective on 1 October for a period of 17 months.

Insofar as known, this was only the second ever occasion on which the Standards Commission had disqualified a councillor since its establishment under the Ethical Standards in Public Life etc (Scotland) Act 2000. Also, this is the first ever successful appeal against a decision of this nature by that body.^[2]

The appeal was conducted by Matt Lynch, solicitor and sole principal of Mackinlay & Suttie, Barrhead, while the appellant was represented by Jon Kiddie, advocate with Terra Firma Chambers, who himself was previously principal solicitor of Renfrewshire Law Centre, Paisley.

Facts

The Standards Commission for Scotland is a statutory body created by the 2000 Act to adjudicate cases referred to it by the Ethical Standards Commissioner, a statutory appointee responsible for receiving and investigating complaints in respect of alleged misconduct by Scottish councillors.^[3] The Code of Conduct regulates matters such as relations with members of the public, fellow councillors and council officials and staff, failure to register or declare interests, financial impropriety, and other forms of dishonesty etc.

The appellant had intervened on behalf of a constituent in a housing allocation dispute, where he accused councillors and officials of wrongdoing. In turn, he was counter-accused by two fellow councillors of placing himself in breach of the Code, and particularly of conducting himself in such a way as, they alleged, failed to show due courtesy and respect to them and officials. His misconduct was alleged to consist of a series of strongly worded emails over the course of the period from March 2019 to February 2020, and remarks attributed to him at a council meeting in June 2019.

The Commission convened a hearing on 10 September 2020, which took place at a physical venue. The appellant had expressed his intention to attend the hearing in order to defend his reputation. However, on 9 September he emailed the Commission to advise it that he had been in contact with someone who had tested positive for Covid-19. Therefore, he required to self-isolate.

The Commission received the appellant's email, but did not read it until after it had commenced the hearing in his absence and heard all the evidence against him. Thus, it was only upon retiring to consider this evidence that it became aware of his situation, whereupon it deliberated on how to proceed further.

In the event, it chose to proceed straight to determining the merits of the case against the appellant absent his own testimony and submissions. It decided the evidence against him was sufficient to prove breach of the Code at paragraphs 3.2, 3.3, 3.5, 3.6 and 3.7, and paragraphs 2 and 20 of Annex C. The only dispensation that it granted him was to allow a further period for written submissions in mitigation of sanction. However, on 28 September it further decided to impose the most severe form of sanction at its disposal, being disqualification.^[4] This had the effect of removing him from office and disentitling him to pay, whereupon he became unemployed and without income. It also left his constituents underrepresented on the Council pending the outcome of any appeal.

Basis for Appeal

Appeal against a decision of the Commission is by means of statutory appeal in terms of the 2000 Act, which should be drawn up as a Summary Application and directed to the Sheriff Principal for the sheriffdom exercising jurisdiction over the council on which the appellant is or was a councillor. Thus, in our modern judicial landscape, where the Sheriff Appeal Court has largely replaced the Sheriff Principal's singular appellate role for his or her own sheriffdom,^[5] this now represents a relatively unusual form of appeal.

The 2000 Act prescribes potential grounds of appeal and remedies in terms of its s.22. In essence, these are, broadly speaking, analogous with judicial review. The Sheriff Principal may interfere with the Commission's decision-making authority only in limited and relatively narrow circumstances, i.e. legal error, procedural impropriety, unreasonable exercise of discretion, finding inconsistent with facts found, or excessive sanction. In the event that a ground is established, the Sheriff Principal may quash (reduce) the Commission's decision, and remit the case back to it for reconsideration (or not, as appropriate), or impose a lesser sanction.

In Cllr Mack's case, he framed his appeal in terms of the principle of *audi alteram partem*,^[6] and on grounds of procedural impropriety, unreasonable exercise of discretion, finding inconsistent with facts found, and excessive sanction. However, the crux of his appeal (which was ultimately determinative) asserted procedural impropriety and unreasonable exercise of discretion in respect of the Commission's failure to respond appropriately to his email of 9 September 2020.

Procedure

In dealing with this appeal, the Sheriff Principal, in effect, separated the issues of procedural impropriety and unreasonable exercise of discretion off from the rest of the case. His Lordship convened a hearing on those issues alone, and subject to the proviso that his decision on them might determine the appeal in its entirety.

Thus, the appeal focused on the Commission's written decision of 28 September, and particularly its explanation for its response to the appellant's email of 9 September, and the choice it made on that basis not to adjourn the hearing on 10 September in order to give Cllr Mack an opportunity to present his own testimony and submissions. In essence, the Commission attempted to justify its decision under reference to various factors, including the means by which Cllr Mack made his situation known to the Commission, his failure to do so by other means, his failure to submit a prior written response to the complaints against him, his alleged failure to cooperate with the investigation, and the fact that he had not specifically requested an adjournment by name under rule 3.11 of the Commission's rules on procedure.^[7]

The appellant argued that, given the recency and urgency of the circumstances in which he had discovered himself to be a potential carrier of Covid-19, it was unreasonable of the Commission to criticise him for the means by which he made his situation known to it. This was particularly so where the Commission's own Executive Director failed to check her email before commencing the hearing. It was also unreasonable of it to take an overly technical approach to the interpretation of his email.^[8] He also contested the accuracy and relevancy of the allegation that he had failed to cooperate with the investigation. And, while he admitted not having submitted a written response, he also contested the relevancy of this, given he had nonetheless expressed his intention to attend the hearing in order to defend his reputation.

The appellant further argued that, even although he did not specifically request an adjournment by name under rule 3.11, nonetheless the Commission ought reasonably to have interpreted his email as requesting such, or, at least, it ought to have recognised the appropriateness of adjourning, and thus adjourned anyway *ex proprio motu* under rule 3.10. Additionally, in giving consideration to the factors that it did, the Commission failed to take account of certain factors specified by rule 3.10, being public interest, and inconvenience or prejudice to parties and witnesses. This was particularly significant where the appellant himself was a party to the case, and indeed the party with most to lose. In this regard, he also argued that his constituents likewise stood to lose out insofar as their choice of candidate had been removed from office absent a full and fair hearing.

In terms of the Commission's breadth of discretion, the appellant argued that this was variable in correlation with the circumstances of each case. However, in a case such as his, where the Commission had in its contemplation that it might impose the most severe sanction, then its discretion was commensurately constrained.^[9] Thus, it should have exercised it with appropriate anxiousness.

For its part, the Commission argued that its choice not to adjourn the hearing on 10 September was reasonable given the background to the case, and particularly the appellant's failures to submit a prior written response and cooperate with the investigation. It argued it was in the public interest to proceed expeditiously towards an outcome, taking account of fairness to both parties.^[10] Also, the fact that it allowed the appellant a further period for written submissions in mitigation of sanction, in effect, ameliorated its decision.

Court's Approach to Issues, Averments & Evidence

The appellant argued that certain facts by which the Commission had attempted to justify its decision remained in contention, and were relevant, particularly in respect of his alleged failure to cooperate with the investigation, and in respect of the fact that the hearing venue had appeared closed on the morning of 10 September. Thus, where these were not denied by the Commission, but only answered as not known and not admitted, then the court could have regard either to relevant averments *pro veritate*, or at least to evidence *de bene esse*.^[11]

However, the Sheriff Principal took the view that the court would only have regard to facts known to the Commission on 10 September. In any event, the issues were sufficiently narrow in scope to enable the court to proceed to a decision on them absent any need to hear evidence. The Sheriff Principal placed emphasis on the case being fact-specific, and fact-specific to the Covid-19 pandemic, in particular. Thus, other jurisprudence was only of limited utility, especially where not in-point.

Ultimately, therefore, the court took the view that the Commission's decision was tainted by unreasonable exercise of discretion, e.g. particularly in its omission to take account of other potential means by which to resolve the situation, including the consequences of its decision for the appellant.

Accordingly, the court quashed the Commission's decision and remitted the case back down to the Commission for reconsideration subject to a proviso in respect of the constitution of its panel for this purpose. It also awarded expenses in favour of the appellant (to the extent of the process for the purpose of this hearing), and approved employment of junior counsel.^[12]

The date for any such re-hearing by the Commission is not yet known.

Commentary

This case is interesting for its relative novelty, where appeals against the Commission are rare. It is also important in terms of its constitutional implications for elected representatives and the constituents whom they represent. While not necessarily reflected by the terms of the court's opinion *per se*, it raises a curious question about the significance of public interest in the exercise of judicial or quasi-judicial discretion in such cases, e.g. in terms of rule 3.10 of the Commission's rules on procedure.

In certain other types of professional regulatory decision-making, it is clearly relevant for the regulator to take account of the need to protect members of the public, e.g. from allegedly incompetent and dangerous medical practitioners in GMC cases. However, where the respondent to an allegation of misconduct has been chosen by the public to serve in a particular capacity, it is arguable that the regulator also has a duty to take account of the need to protect the public democratic right thereby exercised. This might be even more particularly so where constituents have voted for someone for the very reason that they appreciate his or her forthright manner and willingness to challenge authority and speak truth (as they see it) unto power (which might sometimes be misconstrued as discourteous or disrespectful). This requires a somewhat finer balancing act on the part of the decision-maker.

Finally, this case is also interesting as yet another example of jurisprudence emerging from the Covid-19 pandemic, where it was, as the Sheriff Principal astutely determined, fact-specific to the ongoing situation in which we all now still find ourselves living.

The outcome of the appeal was reported by the Paisley Daily Express on 8 February 2021 (part of the Daily Record group). Mr Mack has been re-listed as a Councillor on Renfrewshire Council, and is currently recorded as such on the Council's website. Whether he shall remain a Councillor following re-hearing by the Commission shall depend on the outcome of any such proceedings.

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1. Designed in these proceedings as 'pursuer', the appeal being by way of Summary Application and addressed to the Sheriff Principal under Act of Sederunt (Summary Applications, Statutory Applications & Appeals etc Rules) 1999
 2. As confirmed by the SCS, other cases against the Commission are: Vassie v SCS [2006] ScotSC 52; Delaney v SCS & Anor [2012] 1 WLUK 52; Taylor v SCS [2012] ScotIC 046; Dickson v SCS [2013] CSOH 100; and SCS v Bond [2017] DRS 18838
 3. And certain other public persons
 4. The other sanctions being censure and suspension in terms of s.19 of the 2000 Act
 5. Courts Reform (Scotland) Act 2014
 6. For example, as reflected by Article.6 of the ECHR
 7. Section 17 of the 2000 Act appoints the Commission to regulate its own procedure
 8. D v Nursing & Midwifery Council [2014] CSIH 90
 9. Tait v RCVS [2003] UKPC 34, and R v Jones [2002] UKHL 5
 10. GMC v Adeogba [2016] EWCA Civ 162
 11. *Ibid*
 12. Judgment was pronounced on 4 February 2021 *ex tempore*, and its formal citation shall be provided here once available