



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

2021 CSIH 2
XA16/20

Lord Turnbull
Lord Pentland
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the appeal under section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007

by

ABERDEEN COMPUTER SERVICES LTD

Appellant

against

A decision of the Scottish Legal Complaints Commission dated 10 October 2019
communicated to the appellant on 10 October 2019

Appellant: I Leask (Lay Representative)
Respondent: Irvine; Anderson Strathern LLP

20 January 2021

Introduction

[1] On 12 April 2017 a complaint was submitted by the appellant to the Scottish Legal Complaints Commission (“the Commission”) concerning a firm of solicitors and two of the firm’s solicitors, R and H. The appellant had been a client of the firm, and the complaint related to the actings of R and H and the firm following the appointment of a judicial factor to the appellant in 2011. Nine issues of complaint were agreed between the Commission

and the appellant in a summary of complaint. On 16 November 2017 the Commission wrote to the appellant to indicate its preliminary view that the nine issues of complaint were conduct complaints, but that issues 1, 2, 6 and 9 appeared to be time-barred on the basis that the relevant conduct had taken place over a year prior to the complaint being submitted. The appellant was invited to make representations on the issue of time-bar (on the basis of the preliminary categorisation of the complaints as conduct complaints). The appellant submitted representations.

[2] However, ultimately the Commission did not adhere to its preliminary view that the complaints were conduct complaints. On 20 December 2017 it issued an eligibility decision which categorised all nine issues as services complaints, and which held that issues 1, 2, 6 and 9 were time-barred. Rule 7(1) of the Rules of the Scottish Legal Complaints Commission 2016 applied to the appellant's complaint. In terms thereof a conduct complaint normally required to be made not more than a year after the conduct complained of (rule 7(1)(a)). On the other hand, a services complaint normally had to be made not more than a year after the date on which any professional services in respect of that matter were last provided by the practitioner to the client (rule 7(1)(b)). In either case the Commission had power to accept a complaint made outwith the relevant period where there were exceptional reasons why the complaint was not made sooner, or there were exceptional circumstances relating to the nature of the complaint, or the circumstances were such that the Commission considered it to be in the public interest to accept it (rule 7(4)).

[3] Issues 3, 4, 5, 7 and 8 of the complaint were investigated by the Commission and are the subject of an investigation report dated 27 July 2018. On 7 September 2018 the appellant pointed out to the Commission that three issues of complaint which had been raised in the original complaint form and considered in the Commission's investigation report had been

overlooked when the summary of complaint was prepared. As a result, on 24 September 2018 three further issues (issues 10, 11 and 12) were agreed between the Commission and the appellant.

[4] On 21 June 2019 the Commission issued an eligibility decision in relation to issues 10, 11 and 12. It concluded that those issues, which related to a potential conflict of interest (R and the judicial factor were said to be friends), were totally without merit (2007 Act, s 2 (4)). The Commission relied on its understanding that the appellant had been aware of the potential conflict at the time because it had raised and discussed it with R; but that it had been satisfied that R could continue to act.

[5] On 10 October 2019 the Commission issued a determination report and a determination decision. The report considered issues 3, 4, 5, 7 and 8. It did not consider issues 1, 2, 6 and 9, or issues 10, 11 and 12, because the Commission had decided (in the eligibility decisions) that 1, 2, 6 and 9 were time-barred and 10, 11 and 12 were wholly without merit. In terms of the determination report and the determination decision the Commission decided that issue 5 should be upheld in part; that issue 8 should be upheld; and that issues 3, 4 and 7 should not be upheld. It directed that the firm should make payment to the appellant of £200 as compensation for inadequate professional service.

Procedure in the appeal

[6] On 15 November 2019 the appellant applied to the court for leave to appeal against the decision of 10 October 2019. The grounds of appeal stated were in the most general of terms, *viz.*:

“1. The Commission’s decision was based on errors of law;

2. There was procedural impropriety in the conduct of any hearing by the Commission on the complaint;
3. The Commission acted irrationally in the exercise of its discretion;
4. Common law rules of natural justice were breached throughout.”

[7] On 5 December 2019 the Commission wrote to the court and to the appellant advising that it did not intend to lodge answers to the application for leave to appeal, but it reserved its position in relation to defending any subsequent appeal. The appellant was granted leave to appeal on 13 February 2020.

[8] After the appeal was served on the Commission it informed the appellant that it did not intend to oppose it. The Commission tendered a draft joint minute which proposed that the appellant and the Commission would agree (i) that the determination of issues 1, 2, 6, 9, 10, 11 and 12 had been procedurally unfair; (ii) that the eligibility decisions of 20 December 2017 and 21 June 2019 should be “reduced”; and (iii) that the Commission’s determinations of issues 5 and 8 should be upheld, but that otherwise the determination report and the determination decision should be “reduced”. The draft joint minute also proposed that it be agreed that the procedural impropriety in relation to the determination of issues 1, 2, 6 and 9 was that when those complaints were re-categorised as services complaints the appellant was not given the opportunity to make representations on the question whether they were time-barred; and that the procedural impropriety in relation to the determination of issues 10, 11 and 12 was that prior to the eligibility decision of 21 June 2019 being made the appellant was not given an opportunity to comment on the extent of its awareness of a potential conflict or on the conclusions which the Commission should draw from that awareness.

[9] The appellant declined to enter into the proposed joint minute. It enrolled the following motion:

“The applicant requests that the Court grants the petitioner’s Appeal, without a hearing since no Answers have been lodged, and orders the SLCC to reconsider/re-investigate my complaint from scratch.

The applicant further requests the Court to authorise the expenses of this Application and of the procedure following thereon to be paid by the Scottish Legal Complaints Commission.”

At that time the appellant made a short written submission indicating that it wished the court to “deal with” the complaints and to order the Commission to pay damages to the appellant. The appellant was content for the appeal to proceed by way of written submissions. The appellant lodged written submissions on 4 November 2020.

[10] On 26 October 2020 the Commission enrolled a motion to allow answers to the appeal to be received late; to require the appellant to provide the Commission with a copy of the appellant’s written submissions; and to allow the Commission to lodge written submissions in response, if so advised. The stated reason for the motion was that the Commission wished its position in relation to the appeal to be formally before the court. That position was the same as it had put forward previously in the proposed joint minute. The Commission accepted that there had been procedural impropriety in the determination of issues 1, 2, 6, 9, 10, 11 and 12. Accordingly, the eligibility decisions of 20 December 2017 and 21 June 2019 could not stand. Since those issues had not been properly dealt with the Commission accepted that the determination report and the determination decision also required to be “reduced” (Answer 10). However, the Commission suggested that the court should use its powers under section 22(1) of the 2007 Act to uphold the determinations which the Commission had made on issues 5 and 8, for the reasons given in the determination report.

[11] The appellant marked the Commission's motion as opposed. The court intimated to the appellant and to the Commission that it proposed to consider the Commission's motion at the same time as it considered the appeal.

The appellant's written submissions

[12] Four principal points appear to us to emerge from the appellant's written submissions. First, it submits that there was procedural impropriety on the part of the Commission because it determined issues 1, 2, 6, 9, 10, 11 and 12 without giving the appellant a proper opportunity to make representations on matters which were material to the Commission's determination of those issues. Second, it submits that the Commission did not investigate certain of the issues thoroughly enough; and it disagrees with several of the Commission's findings, which it suggests were irrational. Third, it asks the court to find the Commission liable to pay damages to the appellant, but it does not explain the legal basis upon which it says such an award would be competent or appropriate, and it does not suggest how such damages should be assessed. Fourth, it submits that the court should allow the appeal, but that the complaint should not be remitted to the Commission for a procedurally fair investigation and determination. Rather, the court should investigate and determine all of the issues in the complaint.

Decision and reasons

The relevant statutory provisions

[13] Part 1 of the 2007 Act established the Commission and made provision as to its functions. Sections 21 and 22 provided for a right to appeal to this court against a decision of the Commission:

“21 Appeal against Commission decisions

- (1) Any person mentioned in subsection (2) may, with the leave of the court, appeal against any decision of the Commission under the preceding sections of this Part as respects a complaint on any ground set out in subsection (4).
- (2) Those persons are—
- (a) the complainer;
 - ...
- (4) The grounds referred to in subsection (1) are—
- (a) that the Commission's decision was based on an error of law;
 - (b) that there has been a procedural impropriety in the conduct of any hearing by the Commission on the complaint;
 - (c) that the Commission has acted irrationally in the exercise of its discretion;
 - (d) that the Commission's decision was not supported by the facts found to be established by the Commission.
- (5) The Commission is to be a party in any proceedings on an appeal under subsection (1).
- (6) In this section and in section 22, “*decision*” includes any determination, direction or other decision and also includes the making of any report under section 10(2)(e).

22 Appeal: supplementary provision

- (1) On any appeal under section 21(1), the court may make such order as it thinks fit (including an order substituting its own decision for the decision appealed against).
- (2) Where such an order upholds a services complaint or confirms a decision of the Commission to uphold a services complaint, the court may direct that such of the steps mentioned in 10(2) as it considers fair and reasonable in the circumstances be taken.
- (3) On any appeal under section 21(1) the court may make such ancillary order (including an order as to the expenses of the appeal) as it thinks fit.
- ...”

Appeals against the decisions of persons or bodies exercising statutory powers

[14] Where, as here, the court is asked to grant an appeal against a decision of a person or body exercising statutory powers, if the appeal is to succeed the court requires to be satisfied that there are grounds for granting it which are well founded in law. That is the position whether or not an appeal is unopposed or consented to. (See *McAllister v Secretary of State for Work and Pensions* 2003 SLT 1195, per the Opinion of the Court delivered by Lord President Cullen (at paragraphs [3] to [6]).

The present appeal

[15] Section 21(5) of the 2007 Act contemplates that the Commission is to be a party in any proceedings on an appeal under section 21(1). In terms of the court's interlocutor of 11 March 2020 answers should have been lodged within 21 days of service of the appeal on the Commission. In our view it is regrettable that the Commission did not lodge answers to the appeal timeously and in accordance with the rules of court. Had it done so the court would have been provided with a formal statement of the Commission's position at a much earlier stage and the appeal would have progressed in a more orderly manner.

[16] Nevertheless, we are satisfied that we should grant the Commission's motion to allow its answers to be received late. The answers assist the court. They serve a useful purpose. They focus what it is that the Commission accepts went wrong during the decision-making process. There is no prejudice to the appellant in allowing their late receipt. It has been aware of the substance of the Commission's position for some considerable time.

[17] In our view it is unnecessary to delay disposal of the appeal in order to allow the Commission sight of the appellant's written submissions or to allow it to make its own written submissions in response. The answers are a clear and sufficient statement of the Commission's position. The appellant's written submissions do not raise any new point of substance upon which we require to hear further from the Commission.

[18] We are satisfied that there was procedural impropriety in relation to the determination of issues 1, 2, 6, 9, 10, 11 and 12. Issues 1, 2, 6 and 9 were re-categorised by the Commission as services complaints, but in the wake of that change the appellant was not given the opportunity to make representations on the question of time-bar. In particular, the appellant was not asked to indicate the dates that relevant services were last provided to it.

It is not difficult to see that had the appellant been aware that the complaints were being treated as services complaints its representations may have been materially different from the representations which it submitted on the footing that the complaints were conduct complaints. Issues 10, 11 and 12 were determined without giving the appellant the opportunity to comment on its awareness of a potential conflict or on the conclusions which the Commission should draw from that awareness. Once again, in our opinion it is clear that the appellant ought to have been given that opportunity.

[19] While some general statements about procedural unfairness which the appellant makes in the written submissions might be read as suggesting that there was such unfairness in relation to further issues (ie in addition to issues 1, 2, 6, 9, 10, 11 and 12), in our view no procedural unfairness relating to any of the other issues has been identified.

[20] Since each of the eligibility decisions of 20 December 2017 and 21 June 2019 was reached in a procedurally unfair way neither decision can stand. A consequence of the eligibility decisions was that the determination report and the determination decision dealt only with issues 3, 4, 5, 7 and 8. The Commission accepts that the procedural impropriety affecting the eligibility decisions has the consequence that the determination report and the determination decision may not have incorporated all of the issues which might otherwise have been held to be eligible for investigation. Nevertheless, it asks the court to uphold its findings on issues 5 and 8. We are not attracted to that course. The position might have been different if it had been a course which both parties favoured. However, since the appellant resists that suggested disposal, we think it is better that the investigation report, the determination report, and the determination decision are quashed in their entirety.

[21] That brings us to the appellant's submissions that the court should investigate and determine the issues itself, rather than the issues being remitted to the Commission to

determine them with due regard being had to procedural fairness; and that the court should find the Commission liable to pay damages to the appellant. In our opinion each of these submissions proceeds upon a misunderstanding of the statutory scheme contained in the 2007 Act.

[22] The 2007 Act allocates different functions to the Commission and to the court. In the first instance it is for the Commission to decide whether a complaint is a conduct complaint or a services complaint (2007 Act, s 2). It is the Commission's duty to investigate services complaints and to determine them (2007 Act, s 9). There is a right to appeal to the court on limited grounds, with leave, against any decision of the Commission (2007 Act, s 21). By contrast, the court is not empowered to investigate a complaint or to make findings in fact following such investigations. Its function is that of an appellate court. It is empowered to determine whether any of the grounds of appeal set out in section 21(4)(a) to (d) upon which an appellant relies are well founded. Where, as in the present case, procedural impropriety is established, ordinarily the apposite remedy will be for an appeal to be allowed on that ground and for the matter to be remitted to the Commission to hear the matter anew. In our opinion that is the appropriate course here.

[23] We stress again that an appeal to the court against a decision of the Commission is governed by section 21 and section 22 of the 2007 Act. Neither those provisions, nor any other provision of the 2007 Act, empower the court to find the Commission liable to pay damages to a complainer in the course of its determining an appeal against a decision of the Commission.

[24] Since we have concluded that the eligibility decisions, the investigation report, the determination report, and the determination decision require to be quashed because of the procedural impropriety already discussed, it is unnecessary to make findings in relation to

the appellant's other grounds of appeal (and it is probably desirable not to do so since the Commission will have to prepare of new an investigation report). In those circumstances we confine ourselves to the following reminders. First, in order to make good the ground of appeal identified in section 21(4)(a) it is necessary for an appellant to identify an error of law upon which the decision was based. Highlighting disagreement with the facts found by the Commission will not suffice where those findings are not shown to have been based upon a legal error. Second, in order to make good the ground of appeal identified in section 21(4)(c) it is necessary to show that the Commission exercised its discretion in an irrational way. Irrationality involves a very high threshold (*AS v Scottish Legal Complaints Commission* 2020 SC 443, at paragraph [33]).

[25] It is common ground that the Commission should be found liable to the appellant for the expenses of the appeal and the application for leave to appeal.

Disposal

[26] We shall (i) allow the appeal on the ground of procedural unfairness; (ii) quash the eligibility decisions of 20 December 2017 and 21 June 2019, the investigation report of 27 July 2018, the determination report issued on 10 October 2019 and the determination decision made on 10 October 2019; (iii) remit issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 to the Commission for investigation and determination; and (iv) find the Commission liable to the appellant for the expenses of the appeal and the application for leave to appeal.