SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 15
XA63/21

Lady Dorrian
Lord Doherty
Lord Matthews

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

PAUL MACK

Appellant

against

THE STANDARDS COMMISSION FOR SCOTLAND

Respondent

Appellant: Dean of Faculty (Dunlop QC), D Anderson; Drummond Miller LLP, (for MacKinlay Suttie, Solicitors, Barrhead)
Respondent: Lord Keen of Elie QC; Shepherd and Wedderburn LLP

11 March 2022

Introduction

[1] The appellant was elected as a councillor on Renfrewshire Council at the election in May 2012. He was re-elected at the election in May 2017. Between 1992 and 1995 he had been a district councillor on Renfrew District Council. The respondent is a corporate body established under section 8 of the Ethical Standards in Public Life (Scotland) Act 2000. In

terms of section 9 of that Act the Commissioner for Ethical Standards in Public Life is responsible for investigating complaints of breaches of the Councillors Code of Conduct issued by the respondent. On receipt of a report from the Commissioner the respondent may, *inter alia*, hold a hearing (section 16(a) of the 2000 Act). On 3 May 2021 the respondent held a hearing in respect of two reports which the Commissioner had prepared. On 10 May 2021, having found the appellant in breach of several paragraphs of the Code of Conduct, the hearing panel disqualified him from being, or being nominated for election as, or from being elected a councillor, for a period of 16 months (reduced from 20 months, as narrated below). The appellant appealed to the sheriff principal against the panel's decision, but that appeal was refused. He now appeals to the court. He accepts that the panel was entitled to find the breaches of the Code established and to disqualify him, but he maintains that the disqualification period was excessive and was an unreasonable exercise of the panel's discretion. It is fair to say that the arguments advanced to the court by the Dean of Faculty were somewhat more refined than the arguments before the sheriff principal.

Background

[2] Para 1.5 of the Code specifies that it is a councillor's personal responsibility to comply with the Code and any Guidance issued by the respondent.

[3] The Commissioner investigated two complaints against the appellant (complaints LA/R/2257 and LA/R/3262) and submitted two reports to the respondent. The respondent directed that a hearing panel should take place on 10 September 2020. On 9 September 2020 the appellant indicated that he could not attend the hearing because he had been in close contact with someone who had Covid and he required to self-isolate. The panel refused to adjourn the hearing. It proceeded in the appellant's absence. It found that there had been

breaches of the Code. On 1 October 2020 it disqualified the appellant for a period of 17 months from that date. The appellant appealed to the sheriff principal. On 4 February 2021 the sheriff principal held that the hearing ought not to have proceeded in the circumstances. The panel's decision was quashed and the case was remitted back for a further hearing, which took place on 3 May 2021. Only one of the three members of the second hearing panel had sat on the first panel. The second panel issued its decision on 10 May. It found that the appellant had breached paragraphs 3.2 - 3.7, and paragraphs 2 and 20 of Appendix C, of the Code. The breaches included failure to respect, and treat with courtesy, colleagues and council employees; failure to follow the Protocol for Relations between Councillors and Employees; bullying or harassment; and raising matters relating to the conduct or capability of employees in public. The panel imposed a sanction of disqualification for a period of 16 months. It indicated that the sanction would have been 20 months had it not been for the fact that between 1 October 2020 and 4 February 2021 the appellant had served just over 4 months of the disqualification previously imposed. The effect of the new disqualification is that the appellant will be unable to contest the May 2022 elections; and indeed, unless there is a by-election, he will not be able to contest any local government election until 2027.

[4] In each complaint the language used by the appellant was intemperate and abusive, making general allegations of malfeasance. Complaint LAR/2257 related to a series of emails sent by the appellant to various councillors and officers of the council between March and August 2019. They alleged that those councillors and officers were involved in nepotism in assisting or abetting the daughter of a councillor ("Mr D") to obtain a council house tenancy over more worthy recipients. The correspondence also alluded to the resignation of a cabinet secretary apparently involved in sending texts to a 16 year old

youth. The appellant falsely accused Mr D of having been "paid handsomely to assist in the cover-up" of similar but unrelated historic conduct by others. The communications asserted misconduct including abuse of power, cronyism, an approach to housing allocation which was "wilful and bordering on the criminal", and which operated "entirely on nepotism and graft".

[5] In relation to the 2000 Act, the appellant stated:

> "…. it contains the phrase 'must respect fellow councillors – I for theological reasons refuse to read the damn thing, ditto, the code of conduct."

[6] Complaint LAR/3262 concerned an exchange of emails which followed the appellant's attendance as an observer of the first meeting of the council's Emergency Board on 20 March 2020. On 22 March he emailed the chief executive, all elected members of the council, and the press criticising the Board's decisions:

> "Yesterday's 'star chamber'/COBRA meeting of five councillors giving themselves powers which haven't been seen since Adolf Hitler gave up house painting has left someone who was prepared to give of his time, experience and with the danger of sounding conceited local knowledge and without remuneration – a concept almost all of you will have great difficulty in grasping – somewhat disappointing."

[7] When one of the councillors present at the meeting took exception to the comments, the appellant responded by email dated 24 April 2020, again copying in all elected members of the council and the media, in terms which included the following:

> "In any decent society someone would simply have come round to your hoose, amputated your right arm with a blunt spoon and hit you over the heid with the soggy end, you smug, self-satisfied, precious, pious, puffed-up pompous little prick."

Issues

[8] The appellant maintains that whilst the panel was entitled to make the findings it did, and to impose disqualification, the period selected was disproportionate and unjustified in the circumstances. A disqualification which prevented him from participating in the May

2022 election was not necessary to meet the aims of the legislation and was in all the circumstances excessive. The court was invited to quash the disqualification and substitute a disqualification of 10 months, after giving credit for the 4 months disqualification period which had been served between 1 October 2020 and 4 February 2021.

[9] On the other hand, the respondent maintains that the conclusion that the sanction was not excessive, unfair, unreasonable or disproportionate was one open to the panel and to the sheriff principal. The panel had neither taken account of irrelevant considerations nor ignored relevant ones. There was no serious flaw in the process. The decision was not plainly wrong or wholly unreasonable. There was no basis for the court to interfere with the length of the disqualification. The proportionality of a sanction is to be dictated by the seriousness of the contraventions found established, not by the date of the next local election.

Decision and analysis

[10] It is important to note that there has been no appeal against the panel's findings of breaches of the Code. In making those findings the panel had due regard to the enhanced protection of freedom of speech under Article 10 ECHR which was engaged given the appellant's role as a councillor. While at one point during his submissions the Dean of Faculty seemed tentatively to suggest that the panel had erred in finding that the appellant had no basis for the assertions he made, we did not understand him to press that submission. Had he done so, we would have rejected it. We proceed on the basis of the findings made by the panel, including: their assessment that these were serious breaches; that the appellant had no basis for the allegations he was making; that they constituted gratuitous personal abuse; that the breaches were deliberate in nature, intended to be disrespectful, to cause offence and to harass; that the appellant had no insight, and had

failed to learn from two prior suspensions imposed for breaching the code, thus raising issues about the prospect of repetition; that the breaches included not just discourtesy, disrespect and abuse towards other councillors, but involved intimidation and harassment of council employees; and that the breaches had the potential to disrupt working relations and pose a threat to the council's reputation and to the role of elected representatives. In short, the panel was fully entitled to reach the conclusion that the only appropriate sanction was disqualification, and that the disqualification ought not to be brief.

[11] The only issue therefore is whether the length of the disqualification is excessive, having regard to the effect on the appellant's ability to contest the 2022 election. It poses the question whether the sanction was "appropriate and necessary in the public interest or was excessive and disproportionate" (*Sastry* v *General Medical Council* [2021] EWCA Civ 623). This is a much more difficult and more nuanced issue. The disqualification interferes with the appellant's Art 10 right to freedom of expression. It is a requirement of Art 10(2) that the sanction imposed should be the minimum which is required to achieve the aims of maintaining standards in public life (*Heesom* v *Public Services Ombudsman* [2015] PTSR 222, Hickinbottom J at paras 221(3), 224).

[12] The panel required, and this court requires, to look at the practical implications of the sanction imposed (*Heesom*, para 221(4)). If not disqualified from doing so, the last date on which the appellant could be nominated to stand in the 2022 election is 30 March 2022. The period between 10 May 2021 and 29 March 2022 is 10 months and 19 days. A disqualification in excess of that period will prevent the appellant's nomination. The next local government elections after those in 2022 will be in May 2027.

[13] The weight to be given to the fact that a disqualification period extends past the date for nomination for the next election will vary from case to case. Plainly, since the maximum

available disqualification is 5 years, the 2000 Act envisages that in some cases an appropriate sanction may, because of the normal cycle of elections, prevent someone from contesting the next election. Depending on the circumstances, a disqualification period which has that effect may be proportionate and appropriate. However, in other cases it may be a very material factor pointing to the need to select a period which does not have that effect, in order to avoid a sanction which is disproportionate. If the shorter period imposed remains sufficient to serve the sanction's aims, it will be both appropriate and proportionate.

[14] The panel considered that a headline disqualification period of about one-third of the maximum of 5 years, 20 months, was appropriate. In arriving at that conclusion one of the factors to which it attached weight was that the appellant had not expressed remorse. It discounted the 20 months to 16 months because of time already served.

[15] On the final page of its decision the panel "noted" that a disqualification of that length would preclude the appellant from standing at the 2022 election, but it does not appear to have attached any significant weight to that consideration. Rather, it reasoned that:

> "any effect arising from the timing of the election should not obstruct what the panel considered to be the fair, just and reasonable period of disqualification, and it was neither disproportionate nor did it outweigh an overriding public interest in the imposition of a sanction that would:
>
> - act as a credible deterrent; protect others from intimidating and offensive behaviour;
> - maintain public confidence in the ethical standards framework, local government and the role of a councillor;
> - ensure effective working relationships were maintained, to enable a Council to function effectively; and
> - reflect its view that, as someone who is not prepared to abide by the code, the [appellant] was not fit to hold office as a councillor."

[16] We have difficulties with the panel's conclusion and reasoning.

[17] First, in the particular circumstances of this case the proximity of the 2022 election was a very material factor, and we consider that the panel erred in not giving it significant weight. When it determined the sanction on 10 May 2021 the panel ought to have been alive to the fact that it could have selected a headline disqualification period (before allowing for discount) of up to 14 months and 22 days (instead of 20 months) without disabling the appellant from standing in the 2022 election, and that it could have discounted that by just over 4 months to reflect time already served.

[18] Second, we are not satisfied that the panel properly addressed the need to select a period of disqualification which involved the minimum interference necessary with the appellant's Art 10 right to freedom of expression while achieving the aims of maintaining standards in public life.

[19] Third, we are uneasy with the panel's fifth bullet point. The risk of repetition of breaches was, of course, a relevant consideration. However, the panel seems to have gone much further than assessing that risk. It states that in its view the appellant is unfit for office, and that the period of disqualification reflects that view. However, it was not the panel's remit to decide whether the appellant is fit to hold office. Its remit was to determine the specific complaints which had been made and to impose an appropriate sanction for breaches which were established. The panel's view of the appellant's fitness was not a relevant consideration when it came to selecting the disqualification period. If the panel selected the disqualification which they did in order to prevent the appellant from standing in the 2022 election because they considered him unfit to hold office it misdirected itself.

[20] We are satisfied that the panel erred in the respects discussed, and that as a result the headline sanction of 20 months disqualification which it selected was excessive. We shall look *de novo* at the length of disqualification.

[21] We bear in mind that the primary purpose of the sanction here is to deal with specific breaches of the Code in a way which maintains effective public standards and public confidence. The primary purpose is not to punish the appellant.

[22] We record that the appellant instructed the Dean of Faculty to indicate that he acknowledged that it was regrettable that he had expressed himself in the ways which he had. We have regard to that but we do not give it much weight. It was far from a fulsome apology, and we are not convinced that the appellant is truly contrite.

[23] As we have said, here the proximity of the 2022 election is a weighty consideration. Giving it due weight we consider that the appropriate and proportionate headline disqualification is a period approaching the maximum period (14 months and 22 days) which may be imposed without preventing the appellant's nomination for the election. The headline disqualification we select is 14 months.

[24] In our view that headline disqualification is sufficient in the circumstances to achieve the aims identified in the first four bullet points which the panel referred to on the final page of its decision. It also withstands scrutiny when compared with (i) the 17 months disqualification which the first panel imposed; and (ii) the 18 months disqualification which the court found to be appropriate in *Heesom*.

[25] The first panel imposed a sanction of 17 months at a time when that sanction would not impinge upon the 2022 election. If a disqualification of that length would have impinged on the election that would have been a weighty factor in favour of selecting a lesser period which did not have that severe consequence. It is also worthy of note that had

the appellant not appealed the first tribunal's decision he would have been able to participate in the election. That is part of the context in which a proportionate sanction requires to be determined. Unless there are cogent reasons to the contrary (and we see none here), the appellant should not be penalised for having succeeded in the first appeal.

[26] In *Heesom* there were 11 breaches of the relevant Code, committed during the course of nine incidents. The hearing before the tribunal took 58 days. The hearing before the panel took a day. The tribunal in *Heesom* (para 222(4)) and the panel here (see pp 20 and 21 of the decision) both proceeded on the basis that there was a real risk of repetition. Our impression is that while Mr Heesom's behaviour and the appellant's behaviour were broadly similar in character, Mr Heesom's was considerably more extensive. On the other hand, Mr Heesom had not previously breached the relevant Code, whereas the appellant was suspended in October 2016 for 3 months and in October 2017 for 7 months. In *Heesom* the court disqualified Mr Heesom for 18 months from 19 July 2013 (para 227). As the next local government election was not until May 2016, its timing was not a factor which the court had to consider when determining a proportionate sanction. Had it been, the whole circumstances would have included that very material factor and it is likely that the proportionate disqualification would have been for a lesser period.

Disposal

[27] We allow the appeal, quash the existing disqualification of 16 months, and substitute a disqualification of 10 months. The headline disqualification has been reduced to 10 months to take account of the period already served. As before, the disqualification runs from 10 May 2021.