SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 10
P925/20

Lord Justice Clerk
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

CALUM STEELE

Petitioner and reclaimer

for

JUDICIAL REVIEW

Petitioner and reclaimer: Dean of Faculty QC; T Young; MacRoberts
Respondent: Ross QC; Irvine; Clyde & Co

4 March 2022

Introduction

[1] The petitioner and reclaimer is the General Secretary of the Scottish Police Federation, and a serving police officer, albeit he does not undertake operational duties. The respondent is the Deputy Chief Constable of the Police Service of Scotland. Although not operational the reclaimer remains subject to the misconduct procedures under the Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68). In this reclaiming motion he challenges the Lord Ordinary's decision refusing his petition seeking declarator that a

decision to institute and maintain misconduct proceedings against him was unlawful at common law and incompatible with his right to freedom of expression in terms of Article 10 of the European Convention on Human Rights, and reduction of the decision to institute such proceedings. In a cross-appeal the respondent challenged the Lord Ordinary's finding that there was no effective alternative remedy available to the petitioner. The proceedings allege misconduct by the reclaimer in the form of certain tweets.

Misconduct by police officers

[2] The following is an extract from the opinion of the Lord Ordinary summarising issues concerning allegations of misconduct by police officers, including in the context of the use of social media.

> "[4] Issues of alleged misconduct by police officers are regulated principally by the 2014 Regulations. In terms of Regulation 2 "misconduct" is defined as "conduct which amounts to a breach of the Standards of Professional Behaviour". The "Standards of Professional Behaviour" are set out in Schedule 1. Under the heading "Discreditable conduct", it is provided that:
>
> > 'Constables behave in a manner which does not discredit the Police Service or undermine public confidence in it, whether on or off duty.'
>
> [5] Police Scotland's Guidance relating to the operation of the 2014 Regulations states *inter alia* (at paragraph 3.10.3):
>
> > "Discredit can be brought on the police service by an act itself or because public confidence in the police is undermined. In general, it should be the actual underlying conduct of the police officer that is considered under the misconduct procedures, whether the conduct occurred on or off duty."
>
> [6] Specific Guidance is also given to police officers about their use of social media. A document entitled "Online Safety Guidance for Police Officers and Police Staff" states that constables must:
>
> > 'when interacting online or using any social media channel ... be aware and consider the impact their actions might have, not only on themselves, but on Police Scotland.'

Constables are advised carefully to manage which images/videos they upload, and are cautioned that:

> 'any images should not reflect badly on Police Scotland – or you as Police Scotland personnel'.

Police Scotland Standard Operating Procedure in relation to e-mail and internet security states *inter alia*:

> 'in terms of professional advice and guidance, staff should consider the following [...] staff must not publish or exhibit anything textual or photographic that would be considered disrespectful to others and detract from the dignity of their public office.'

and

"Police Scotland recognise that constables have a right to use social media. Provided they adhere to the statutory standards of professional behaviour and behave in a manner that does not discredit the Police Service or undermine public confidence in it, the use of social media is consistent with holding public office and with the oath taken by all constables.""

Background

[3] On 3 May 2015 Sheku Bayoh died in police custody shortly after being arrested in Kirkcaldy. On 11 November 2019 the Lord Advocate confirmed that the police officers involved would not face any criminal prosecution. The decision attracted much public debate and commentary. The issue with which the court is concerned relates to a tweet posted by the reclaimer in the course of an exchange of tweets involving the solicitor for members of the Bayoh family. On 11 November the solicitor posted on Twitter what bore to be a quotation from a third party. It read:

> "This decision not to prosecute the police at an individual or corporate level is deeply disappointing & is based on a fundamentally flawed investigation. A public inquiry is now needed."

[4] At 4.18pm, the reclaimer responded to that post stating:

> "Thankfully wholly independent decisions to prosecute or otherwise are made on the basis of evidence and not innuendo, speculation, or smear."

[5] A further post by the solicitor stated:

> "Sheku Bayoh died in police custody 3 May 2015, up to 50 separate injuries, broken rib, lacerations, with over 50 stones bodyweight on him, cuffed, ankle & leg cuffs, restrained by up to 9 officers – today he was described to his family of being like a 'toddler having a tantrum!'"

[6] The post included a picture of members of Mr Bayoh's family and an image taken from a newspaper article. The latter was headed "Sheku: The Injuries" and bore to be a body map showing, *inter alia*, the sites of various injuries which had been found on Mr Bayoh's body at post-mortem examination.

[7] The reclaimer responded at 4.53pm in these terms:

> "Anyone looking at 'the injuries' image might want to read this alongside it and consider if something relevant has been missed in the innuendo laden accompanying report."

The reclaimer's post contained a link to an online newspaper article in a different newspaper about a fight that Mr Bayoh was alleged to have had with a third party shortly before his arrest by police officers.

The reclaimer posted again at 5.06pm:

> "Lots of people who follow me also follow [the Bayoh family's solicitor] (well we are both interesting chaps) but whilst many of you will see the image on the left [the body map] … you won't be shown the somewhat more than relevant story on the right."

The "story on the right" was again a link to the newspaper article about the alleged earlier fight. Another user of Twitter, a political journalist, responded to the 5.06pm post by posting:

> "What an appalling tweet. The article … has no bearing on whether or not the police used appropriate force. Drawing attention to it could well be seen as simply an attempt to damage the character of a dead man and remove focus from the police."

At 6.17pm, the petitioner responded on Twitter to the post by the journalist, saying:

> "Or an attempt to bring much needed context to a much used image that otherwise lacks it – or maybe the earlier well reported fight was like this and everyone else is wrong?"

[8] The 6.17pm post included a graphics interchange format image (also known colloquially as a "GIF") showing one man lightly tapping another man on the cheek once before running away. The GIF image was apparently a clip taken from a comedy film called "Napoleon Dynamite".

[9] A report by an inspector of police under Regulation 13 concluded that in terms of the regulations the petitioner had a case to answer for misconduct in relation to the posting of the message which included the video clip. The Inspector recommended that the charge be advanced in the following terms:

> "Between 11 and 12 November 2019 at [*an address in*], Glasgow or elsewhere, you acted in an inappropriate manner by posting to Twitter, in reference to an alleged fight reported in the media between Sheku Bayoh and another individual, which you referred to as 'the earlier well reported fight', a video clip of approximately 3 seconds' duration from the 2004 comedy film 'Napoleon Dynamite'. Two of the characters are the titular Napoleon Dynamite and his brother Kip Dynamite. The video clip apparently shows Napoleon striking Kip on the face with Napoleon's left hand to Kip's right cheek. An otherwise unknowing person viewing the footage would reasonably take it not to be a real fight. Your conduct in posting this video clip and linking it to the death of Sheku Bayoh has discredited the Police Service."

The Inspector set out the reasons for her recommendation, noting that:

> "The Police Service of Scotland (Conduct) Regulations 2014 underpin the Standards of Professional behaviour and set out the high standards the service and the public expect of police officers in Scotland. Failure to meet these standards may undermine the important work of the police service and public confidence in it. Even when off duty, police officers should not behave in a manner that discredits the police service or undermines public confidence. Maintaining public confidence in the police service is a legitimate aim not just for reputational reasons but also to protect public safety and prevent crime and disorder."

[10] She observed that the officer posted the message on a Twitter account which could be viewed by anyone and that it could be inferred that the post was from a serving police

officer. If proven the allegations could amount to discreditable conduct by posting the GIF "in the circumstances outlined". She added:

> "The death of Sheku Bayoh occurred following his arrest by police officers and there have been serious allegations made against those officers. It is the Investigating Officer's opinion, considering the whole circumstances alleged, and notwithstanding the subject officer's role in representing Scottish Police Federation members, that the general public would expect Police Scotland to fully examine the conduct of the subject officer and that failure to do so would discredit Police Scotland or undermine public confidence in it ...
>
> Improvement action would not be appropriate in this case because the subject officer does not accept that he acted in an inappropriate manner by posting to Twitter, a message which included a video clip (in reference to the alleged fight reported in the media between Sheku Bayoh and another individual which he referred to as 'the earlier well reported fight') of approximately 3 seconds' duration from the 2004 comedy film 'Napoleon Dynamite'. Two of the characters are the titular Napoleon Dynamite and his brother Kip Dynamite. The video clip apparently shows Napoleon striking Kip on the face with Napoleon's left hand to Kip's right cheek. An otherwise unknowing person viewing the footage would reasonably take it not to be a real fight. His conduct on (*sic*) doing so has discredited the Police Service…"

[11] The Inspector's report was, as required under the regulations, considered by a Chief Inspector who also concluded that the reclaimer had a case to answer, and that the matter should be referred to a misconduct meeting.

Decision of the Lord Ordinary

[12] The Lord Ordinary accepted that the making of a formal allegation could amount to an interference with the reclaimer's Article 10 rights because of the "chilling effect" highlighted in the authorities cited by the petitioner (eg *Akcam* v *Turkey* (2016) 62 EHRR 12, at paras 67-68 and 72-75). The respondent, in line with *Ahmed and others* v *UK* (2000) 29 EHRR 1, required to show that there was a legitimate aim, and that the interference was (i) proportionate and (ii) supported by reasons which are relevant and sufficient. The issue of maintaining public confidence in the police represented the link between the aims of public safety and the prevention of disorder or crime (*BC and others* v *Chief Constable of the*

Police Service of Scotland [2019] CSOH 48, Inner House [2020] SLT 1021). Maintenance of the two aims required the police to be regulated by proper and efficient disciplinary procedures.

[13] It was important to acknowledge that the issue here was not whether the imposition of a disciplinary penalty or sanction was necessary and proportionate because no such sanction had been issued. The decision to institute proceedings could not be said to be irrational. Clear reasons were provided, and the respondent's view of the GIF as potentially constituting discreditable conduct was tenable.

Analysis and decision

[14] It was notable that the submissions for the reclaimer placed little focus on the opinion of the Lord Ordinary, the reasons he gave for reaching it or any alleged error of law. In some respects this is not surprising, because the substantive issue which the Lord Ordinary had to decide was one of assessing the reasonableness of the respondent's decision, rather than any significant matter of law. In fact the Lord Ordinary agreed with the reclaimer on all points of law. He accepted - or at least proceeded on the basis - that the decision to institute proceedings could be viewed as constituting an interference with the reclaimer's Article 10 rights (see below for some further observations on this issue). He recognised that any interference with the right must have a legitimate aim, be prescribed by law, and be necessary in a democratic society, all of which was for the respondent to establish. There was no dispute about the first two issues, so the core question he had to address was the third one. The Lord Ordinary interrogated the justification and reasons provided and carried out an assessment of whether any interference could be said to be proportionate. He observed that it was important to recognise that the issue in this case was not whether the imposition of a disciplinary penalty or sanction was, or would be, necessary

and proportionate, but simply whether the respondent had established that, in order to maintain public confidence in the police, it was a necessary and proportionate interference with the petitioner's Article 10 right for the petitioner to be invited to attend a disciplinary meeting. The Lord Ordinary held that the conclusion that the reclaimer had a case to answer was not irrational. The reasons for that decision were clearly expressed and were neither ambiguous nor difficult to understand. The view that the use of a clip from a comedy film in the specific context might constitute discreditable conduct was tenable. The decision fell within the relevant margin of appreciation recognised in relation to the legitimate scope of interference with the Article 10 rights of civil servants, including police officers. On this issue there was a range of conduct where a case to answer of discreditable conduct may properly be found to exist, and the conduct in question was within that range. In our view the Lord Ordinary was entitled to reach these conclusions.

[15] In the reclaiming motion, the parties joined issue on whether the mere institution of disciplinary proceedings constituted an interference with the respondent's right to freedom of expression. In the context of a police officer, in respect of whom it is acknowledged that a degree of proportionate restriction must be placed on the exercise of the right to free expression, and in the context of a disciplinary system which is acknowledged to be capable of enforcing that restriction in an Article 10 compliant way, we understand why the respondent argued that there may be an issue about treating the mere initiation of disciplinary proceedings as constituting interference; there is undoubtedly an issue in being able reasonably to assess the issues which come within the scope of Article 10(2), when the facts are yet to be determined, and when the nature of any eventual sanction, which is relevant to the question of proportionality, is not known. As the Lord Ordinary pointed out, the issue is not whether the facts justify a finding of misconduct, but whether they are

sufficient to justify a finding of a case to answer for alleged misconduct. These matters are intertwined, but they are not the same. If the apparent facts would allow a disciplinary committee to address whether they come within the scope of the kind of restriction on Article 10 rights of police officers permitted by operation of Article 10(2), then it is hard to see that any issue arises other than the question whether, as the reclaimer asserts in his note of argument, the apparent facts, if established, would be quite incapable of bearing the characterisation used in the charge made against him in the disciplinary proceedings.

[16] The central issue upon which this reclaiming motion hinges is thus whether, as submitted for the reclaimer, the post could not, on any objective view reasonably arrived at, constitute misconduct, and that the reasoning that it could, and that there was a case to answer, was irrational. The Lord Ordinary concluded that it was not irrational to consider that it might constitute misconduct, that the view that there was a case to answer was one the senior officers were entitled to reach, and that the reasons given were sufficient.

[17] This is not an appeal on the merits of the allegations. The reclaimer seeks to prevent further action being taken in the disciplinary proceedings. Before this court could even consider whether he might be entitled to such a remedy, it would have to be satisfied that no reasonable person, objectively construing the post, could consider that it was a communication which could come within the proportionate degree of restriction which may be placed on the right to freedom of expression by a police officer, and thus potentially be capable of being classified as misconduct.

[18] Only if satisfied of that would the respondent's cross-appeal about alternative remedies arise. If the reclaimer does not satisfy the court of this, the cross-appeal becomes academic. Had it been necessary to determine the point, we have some sympathy with the Lord Ordinary's view that it would not seem to be a remedy against unlawful disciplinary

proceedings to insist that those proceedings continue – on the issue of alternative remedies much turns on the nature of the respective remedies which may be available, the basis upon which they may be advanced, and the result which may be achieved under each.

[19] However, this is not an issue which arises for determination because we are satisfied that the reclaiming motion must fail on its primary argument.

[20] The reclaimer recognises that the post in question must be construed in the context of the twitter conversation of which it forms part. However, the submissions for the reclaimer repeatedly failed to do that, focussing not on the whole context, but on the post itself in isolation. Admittedly, it is the posting of the message and the use of the GIF which forms the nub of the charge, but the character and quality to be attached thereto comes not from the post in isolation, but from the context in which it appears, as part of a lengthier conversation.

[21] Senior counsel for the respondent conceded that the use of the GIF was central to the decision to bring proceedings, and that proceedings would not have been brought otherwise. This led to a submission on behalf of the reclaimer to the effect that if one substituted in words the message which the GIF was intended to convey, it could be seen that on no possible view could it be characterised as it had been in the charge. It was submitted that the message which the GIF was intended to convey was that the fight which Mr Bayoh had allegedly been involved in prior to his arrest was not a trivial one. We do not accept that we can assess the matter by examining what the position would be were the GIF substituted by a hypothetical message. We have no way of knowing how such a message might have been expressed, and the construction to be placed thereon would depend on the actual words used. The fact is that rather than express himself in words the reclaimer chose a GIF for the task, and selected one from a comedy film. A message conveyed visually may

have more force, or may be more open to nuanced interpretation, than a simple message stated in words. That the right to freedom of expression involves the right to choose the medium of expression does not assist: it would still necessary to consider what the message, expressed in that medium, may reasonably be said to convey.

[22] It was not the GIF only which formed the basis of the Inspector's conclusion that there was a case to answer, but the posting of the GIF "in the circumstances outlined" in the report, which includes the written message and the other exchanges of which it was part. The reasons given for the assessment that there was a case to answer should not be subjected to detailed linguistic analysis. The reasons given are sufficient to justify the conclusion, and to enable the reader to understand why it had been reached.

[23] It was submitted that the use of GIFs such as this one is a common place means of expression on twitter and that it would be wrong to make much of the use of a GIF on this occasion. No doubt it is true that the use of GIFs is commonplace on twitter but that is of little assistance in determining whether the use of this particular GIF, in the context of the exchange of which it was a part, may be capable of bearing the characterisation suggested in the disciplinary proceedings. The fact that it is a common method of expression on twitter will no doubt be recognised by the decision maker in due course, as part of the whole circumstances which require to be taken into account. Those circumstances would include the position within the police federation held by the reclaimer, but that position does not give him a latitude to exceed the bounds of what may be expected from the holder of the office of constable.

[24] It was submitted that it was not possible, would indeed be irrational, to suggest that the post and the GIF were used in a way which "linked" them to the death of Mr Bayoh. In other words, it was said that the fact that the post did not make specific and direct reference

to the death of Mr Bayoh meant that it could not be said to be linked to it. That submission must be rejected. The word "linked" used in the charge must be given the normal meaning of being related to or connected with something. In this respect the context of the conversation is important. It was commenced by a tweet from a solicitor commenting on the Lord Advocate's decision not to take criminal proceedings against police officers arising out of Mr Bayoh's death. The whole context related to Mr Bayoh's death in custody, the injuries found on his body after death, and the reports of his allegedly having been involved in a fight prior to his arrest. Of course the observations in the post in question were designed to comment directly on the issue of the possible source for the injuries found on the body, but we do not think that this can be isolated from the conversation of which it was part; it is not unreasonable to form a view that the post and GIF were "linked" to the death in the way in which that word is commonly used. We have already noted that the use of a visual aid as a form of expression may convey more than mere words, and may be more open to nuance and interpretation. The visual aid, in this case the comedy GIF, is part of the tone of the comment. In the context in which it was used, it could be open to construction as trivialising the subject matter of the conversation. Whether this is so would be a matter for the fact finder in light of all the circumstances. It is important to stress that the court is expressing no view on the merits of the charge facing the reclaimer nor pre-judging any defence thereto. It has simply rejected the challenge to the legality of the proceedings themselves. For the reasons given above we are satisfied that the reclaiming motion must be refused.