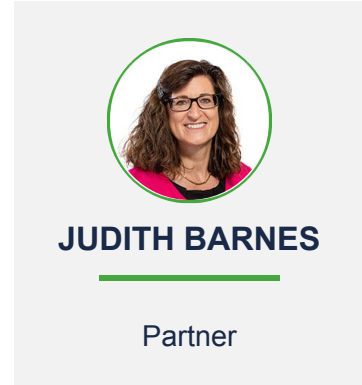


Use of grievance procedures to impose sanctions for councillors' misconduct

Commentary on R (Harvey) v Ledbury Town Council [2018] EWHC 1151 (Admin)

24/05/2018



The High Court has recently considered local authority staff grievance procedures and their relationship with the Code of Conduct regime under the Localism Act 2011. The court held that a council cannot run a grievance procedure alongside, or as an alternative to, a standards regime procedure under the Localism Act 2011, and that complaints regarding a councillor's conduct have to be dealt with under the authority's standards arrangements.

The case of **R (Harvey) v Ledbury Town Council [2018] EWHC 1151 (Admin)** concerned the Town Council's decision to impose sanctions on a councillor under its grievance procedures, banning her from serving on any committees and from communicating with any staff, following complaints of bullying and harassment. The councillor contended that any such complaints had to be dealt with under the Localism Act procedures; the council said that the 2011 Act did not prohibit parish councils from instigating proceedings under their grievance procedure where what was in issue was a matter involving internal relations between its employees and staff.

The facts

Following complaints that Cllr H had bullied, intimidated and harassed staff, the Town Council's Grievance Panel held a meeting to discuss the allegations. Cllr H did not attend, stating that she did not recognise the authority of the Panel, and she requested that the matter be properly investigated under the standards procedure. The Panel upheld the accusations and the Town Council then resolved to impose a number of prohibitions on Cllr H, including that she should not sit on any committees,

sub-committees, panels or working groups nor represent the council on any outside body, and that all communications between her and its clerk and deputy clerk should go through the mayor.

Herefordshire Council (HC), a unitary council, which had responsibility for investigating complaints about parish councillors, advised the Town Council that Cllr H's complaint was sufficiently serious to require further investigation, and so it was making arrangements for the complaint to be investigated by an external investigator. The Monitoring Officer of HC wrote to the Town Council advising that although these allegations were made under the grievance procedure, they were in fact that a member had failed to comply with the authority's Code of Conduct and so had to be dealt with in accordance with the arrangements made under s.28(6) of the Localism Act 2011.

A year later the Town Council reviewed the restrictions, in Cllr H's absence, and decided that the restrictions should not only continue but should also be expanded to prevent her from communicating with all staff. HC then advised that its external investigator had found no breach by Cllr H of the Town Council's Code of Conduct and so HC would be taking no further action on the standards complaint.

Cllr H applied for judicial review of the Town Council's decision to impose sanctions under its grievance procedures. She contended that the decision was:

- ultra vires as a councillor's conduct must always and only be considered under the Code of Conduct procedures required by the Localism Act 2011;
- substantively unfair and in breach of Article 10 of the European Convention on Human Rights (ECHR) or at common law; and
- procedurally unfair in the absence of following proper procedures including the absence of an opportunity to respond or defend herself.

The Town Council claimed that it had powers to determine complaints about councillors through its grievance procedure and under s.111 of the Local Government Act 1972.

Cllr H relied on a number of cases, including *R (Taylor) v Honiton Town Council* [2016] EWHC 3307 (Admin) and *Hussain v Sandwell MBC* [2017] EWHC 1641 (Admin). The Town Council principally relied on *R (Lashley) v Broadland DC* [2001] EWCA Civ 179.

Effect of Localism Act 2011

The court granted the application, and ruled that the Town Council's decision to continue and enlarge the prohibitions must be quashed and Cllr H was entitled to declaratory relief.

Mrs Justice Cockerill found that there was no general power to run a grievance procedure process in tandem with or as an alternative to the Code of Conduct process envisaged by the 2011 Act, as that would be contrary to the intention of Parliament. It was clear that Parliament intended

the 2011 Act to change the regime which was previously in operation. When looking at the case law, cases prior to the 2011 Act operated in the context of a different statutory world and it was important not to strain the meaning of those decisions too far.

Lashley established that councils had, prior to the 2011 Act (in fact before the Local Government Act 2000) a power to investigate misconduct substantively but it could not establish what the power was after the Localism Act 2011. The existence of such a rump power was not a given, and if it existed did not necessitate the finding of a full tandem system. The ability to exclude a parish councillor was no wider than the statutory provision in relation to such councillors and anything which went wider than this would, even before the 2011 Act, be ultra vires.

The court then considered whether a "qualifying allegation" had to be investigated under the Code provisions, or whether the Council had a residual power to investigate formally or informally. The judge stated that the key issue related not to the making of the allegation, but to the taking of a decision as regards breach and then taking action in furtherance of that decision. What s.28(11) of the 2011 Act contemplated was actually a four stage process:

- 1 the making of an allegation;
- 2 (optionally) a non-formal investigatory or mediation stage ("informal resolution") or a pause pending other relevant steps being taken (e.g. criminal proceedings);
- 3 a formal stage, involving an independent person, leading to a decision on breach;
- 4 (if breach is found) a formal stage, again involving the independent person, dealing with action.

An independent person had to be involved and consulted not just at the sanction stage, but also at the decision-making (breach finding) stage.

Breach of Article 10 rights

Article 10 ECHR provides the right to freedom of expression and information, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". This right includes the freedom to hold opinions, and to receive and impart information and ideas. Article 10 protects both popular and unpopular expression – including speech that might shock others – subject to certain limitations.

The judge found that there were two potential issues regarding Cllr H's submission that the action taken was an unjustified interference with her right under Art.10 ECHR and/or that the action was unreasonable at common law: first, whether the conduct of Cllr H engaged Art.10; and secondly, if so, whether it constituted a justified interference with her right.

The issue of her conduct was not in dispute: *Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin)* had confirmed that what was said by elected politicians was subject to "enhanced protection", applying to all levels of politics (including local politics); and that the

protection "extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others".

But the judge noted that *Heesom* qualified this: although the acceptable limits of criticism were wider for non-elected public servants acting in an official capacity, they were not as wide as for elected politicians, who came to the arena voluntarily and had the ability to respond in kind which civil servants do not. Furthermore, where critical comment was made of a civil servant, such that the public interest in protecting him as well as his private interests were in play, the requirement to protect that civil servant had to be weighed against the interest of open discussion of matters of public concern and, if the relevant comment was made by a politician in political expression, the enhanced protection given to his right of freedom of expression.

Mrs Justice Cockerill stated that the key issue here was therefore whether the committee resolutions which full Council had adopted and approved were justified under Art.10(2) ECHR.

Cllr H contended that the case was not sufficiently made clear to her and/or that she did not have a fair opportunity to respond and the proceedings were therefore seriously and obviously unfair, for example she was not told of the content of staff interviews nor did she have a report or any other analysis of the complaints and was excluded from the private discussion of her complaints and did not get the opportunity to hear the case let alone respond. The details of the alleged conduct were not provided to the meeting of the Council and therefore she had no effective opportunity to defend herself at full Council.

The court held that the Town Council's process was flawed both procedurally and substantively. It had not undertaken a process of identification and investigation, and its broad opinion on reconsideration after a year that "there had been little or no improvement in Cllr H's behaviour" could not be adequate. The process of considering the complaint was deficient in natural justice and it was entirely wrong for the Council to approach any fresh consideration of the complaints with anything other than an open mind engaged with the possibility that Cllr H might have legitimate answers to specific complaints made against her.

The judge concluded that: *"In essence, the Council identifies a single purpose in the action it took: "to safeguard staff". That is, of course, a legitimate objective and it may be one which could justify some limitation of Cllr H's Article 10 rights". "...there is no sign at all of engagement with the other factors: rational connection, less intrusive measures and fair balance. All of these also would have to be considered in the light of the specific complaints as established following due process, which of course is missing in this case. I am therefore bound to conclude that for this reason also the decision complained of should be quashed."*

The Council's response needed to demonstrate proportionality. Even if the complaints had been established, the sanctions were unreasonable and disproportionate (for further details see para.180 of the judgment).

Comment

This case provides a useful analysis of the new standards regime under the Localism Act 2011, and makes clear that it overrides the previous statutory procedures and also local authorities' inherent powers under the 1972 Act as determined in the *Lashley* case.

It also highlights that councils cannot try and get round the 2011 Act's lack of effective sanctions by dealing with complaints under their staff grievance procedures.

The judgment provides a reminder that any process must be fair and in accordance with the principles of natural justice, i.e. the right to a fair hearing by an unbiased and impartial body requires that individuals should have been given prior notice of the allegations made against them, a fair opportunity to answer them, and the opportunity to present their own side of the story. The right to a fair hearing is also guaranteed by Art.6(1) ECHR, which complements the common law rather than replaces it.

Notwithstanding this judgment, local authorities must continue to be mindful of their responsibilities to protect their employees from bullying, intimidation and harassment, since the authority may be liable for the actions of its councillors, established in the case of *Moores v Bude-Stratton Town Council [2000] EAT 313/99*. The proper course for the investigation of such behaviour of councillors would however now be under the Code of Conduct adopted under the Localism Act 2011, and following investigation, for the Monitoring Officer to discuss the outcome of the investigation with an Independent Person, ensuring that any hearing or informal action is proportionate in all the circumstances of the case.

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