



What is Misconduct in Public Office?

Misconduct in Public Office is a criminal offence in England and Wales, it is a so called 'common law' offence which is not established by statute but by the decisions of the Courts. It is what lawyers call 'indictable only' which means that it is triable only in the Crown Court and it is a serious offence with a maximum sentence of life imprisonment.

Like all criminal offences Misconduct in Public Office is formed of a number of constituent 'elements' each of which has to be proved in order for the offence to be made out. These will be which will be examined below.

Misconduct in public office- the elements of the offence

The leading authority of Att.-Gen.'s Reference (No. 3 of

2003) [2004] EWCA Crim 868; [2004] 2 Cr. App. R. 23, established definitively the elements of the offence. The Court held that the offence of misfeasance in a public office is committed by—

- (a) a public officer acting as such who
- (b) wilfully neglects to perform his duty and/ or wilfully misconducts himself
- (c) to such a degree as to amount to an abuse of the public's trust in the office holder,
- (d) without reasonable excuse or justification;

Misconduct in public office defences

Obviously each of these 'elements' needs to be proven by the prosecution and if they are not then the defendant is entitled to a Not Guilty Verdict. Therefore, most often defences to the charge involve an allegation that the prosecution have failed to make out their case by not proving one or more of these elements. I will therefore examine each parts of the offence in turn-

'A public officer acting as such'

The first prerequisite for the offence to be committed is that the defendant must be 'a public officer' and 'acting as such'.

The authorities state that whilst the offence should be strictly limited the definition of a public office relates not only to the position held by the individual but also to the nature of the duty undertaken by them and whether it is a 'public duty'. What this means is that the duty represents the discharge of one of the responsibilities of government so that the public would have a significant interest in its

proper discharge.

Therefore, examples of persons who have held to be public officers are:

- A nurse working in a prison [A-G's ref (no 3 of 2003)]
- Employees of local authorities [Bowden [1996] Cr.App.R 104]

An example of a person who does not hold public office is an ambulance paramedic employed by the NHS, in that case the duty is held to an individual patient as opposed to a duty to the public at large as held by the Court in Mitchell (William) [2014] EWCA Crim 318; [2014] 2 Cr. App. R. 2.

In respect of 'acting as such' the authorities make it clear that the offences relate to actions undertaken while acting as a public officer, not the private actions of a public officer. So, in the infamous "[Brexit Justice](#)" crowdfunding prosecution of Boris Johnson it was held that the offence cannot be committed by bringing an office into disrepute or misusing a platform outside the scope of the public office see the case of [Johnson v Westminster Magistrates' Court \[2019\] EWHC 1709 \(Admin\), DC](#).

In *H.K.S.A.R. v Wong Lin Kay* [2012] 2 H.K.L.R.D. 898, the Court stated that the proper approach is to look at what, if any, powers, discretion or duties have been entrusted to the defendant in his official position for the public benefit, the Court should then look at how, if at all, the acts or omissions of the defendant involves an abuse of those powers.

'Wilfully neglects to perform his duty and/ or wilfully misconducts himself'

Again this must be proven by the prosecution. Neglect and misconduct are relatively simple concepts showing that the

defendant must have either done something or neglected to do something that amounts to misconduct or neglect.

The use of the word 'Wilful' means that any act or omission that is said to be the conduct must be deliberate, not accidental. So for the offence to be made out by the prosecution they must prove that there was an awareness of the duty or recklessness in relation to the existence of the duty. So a mistake, even if it is very serious will not form an offence. This is very important and many a successful defence has been built on a defence case that what occurred was a well-intentioned mistake.

'To such a degree as to amount to an abuse of the public's trust in the office holder,

This is one of the most difficult of the elements of the offence for the prosecution to prove and a skilful advocate will be able to muddy the waters a lot in this respect. Appellate Courts have repeatedly said that the threshold for this is a high one and that again the misdeed must be deliberate and not accidental. It must also be so very serious that it amounts to an abuse of the public's trust.

So how is this determined? The Court have said that a jury should have regard to the responsibilities of the office and the officeholder as well as the importance of the public objects which are served as well as the nature and extent of the departure from those responsibilities. If the public interest is not harmed, then no offence is committed. example in a case where information was passed to a Journalist the conviction was overturned when the information was so trivial that it could not harm the public interest. This area is complicated and a skilfully presented defence case can cause a prosecution real problems proving this element.

“Without reasonable excuse or justification”

There is some debate as to whether this is a separate element of the offence but it matters little. Appellate courts have held that ‘without reasonable justification or excuse’ simply means acting culpably or in a way that attaches blame.

The Defendant’s mental state.

The law is surprisingly complicated in respect of the mental state or mens rea needed by a defendant to be convicted of this offence. The Courts have said that because the actions that can constitute this offence are so wide and varied, so the mental element needed will not be identical for each offence.

What is clear is that a criminal state of mind is required in order for an individual to be convicted of this offence- the very old case of *Borron* (1820) 3 B. & Ald. 432 is still recognised as the leading authority of this proposition and states that the state of mind must be *“from a dishonest, oppressive, or corrupt motive ... not from mistake or error”*

Dishonestly will very often be a prerequisite for conviction but it is not necessary in every case.

Conclusion

In summary, this offence is not legally straightforward and if you are accused of such an offence or find yourself facing charges you will need to consult specialist legal representation to give you the best chance of success.

Quentin Hunt, the author of this post specialises in this area of law and is a Criminal Law Barrister with a reputation for robust and effective representation. The latest edition of *Chambers and Partners* describes him as: *“A delightful advocate, who is easy to do business with, very straightforward, knows his cases inside out and does*

not pull punches."

You may [contact Quentin](#) at any time for a free, no obligation conversation about your case.



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