

Standards Committee

22nd October 2018

Recent Case Review in Respect of a Standards Issue

Summary of report:

The report is to provide information to Elected Members in relation to a recently decided case in respect of a standards issue. The matter was determined in the High Court.

Background papers:

None

Recommendation:

1. To note the content of the report

1.0 Background

- 1.1 A Councillor won a High Court case with a town council in Herefordshire over sanctions the authority imposed following a complaint by the clerk and deputy clerk about elected member conduct. In *Harvey, R (On the Application Of) v Ledbury Town Council & Anor* [2018] EWHC 1151 Cllr Elizabeth Harvey, who represents the constituents of Ledbury North, challenged a decision of the council made on 11 May 2017. The decision continued and enlarged a number of restrictions first placed on Cllr Harvey in May 2016 following the complaint about her conduct.
- 1.2 These restrictions meant Cllr Harvey could not sit on any committees, sub-committees, panels or working groups or represent the council on any outside body. All communications between her and its clerk and deputy clerk were also to go through the mayor. Another member, Cllr Harrison, who was an interested party in the case, was also sanctioned.

Mrs Justice Cockerill said Cllr Harvey's grounds for judicial review were that:

1. The decision was *ultra vires*, such matters being within the ambit of the Code of Conduct for Councillors, which was found not to have been breached following an investigation carried out for Herefordshire Council.
2. In the alternative, it was substantively unfair, being in breach of Article 10 ECHR or substantively unfair at common law; and / or

3. It was procedurally unfair “as regards (paraphrasing somewhat) absence of investigation, absence of identified basis, absence of disclosure to the decision-making body of full evidence, absence of opportunity to respond or to defend herself”.
- 1.3 The town council argued that the decision was not *ultra vires*, in that the actions were rightly not taken pursuant to the Code of Conduct put in place under the 2011 Localism Act and the council had power to act otherwise than through the code. It also rejected the complaints of substantive and procedural unfairness.
- 1.4 Mrs Justice Cockerill ruled in favour of Cllr Harvey. The judge said the decision must be quashed and that the claimant was entitled to declaratory relief. He found that:
 - The council were not able to sanction Cllr Harvey other than going through the procedural safeguards of a code of conduct process. The council’s restrictions on Cllr Harvey (continued even after she was found not to have been in breach of the code) were an unlawful sanction.
 - The conduct of the grievance process through which the restrictions were imposed was unfair.
- 1.5 This decision was in line with previous authorities. In *R (Taylor) v Honiton Town Council* [2016] EWHC 3307 (Admin) a town council had imposed sanctions on the claimant for breaching its code of practice, and Edis J held that the important safeguard of involving independent persons in the process would be frustrated if a parish council could reconsider the principal authority’s decision and substitute its own decision, if it chose to do so. Similarly, in *Hussain v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin) the council’s Audit Committee undertook a “pre-formal investigation” to determine whether there was substance in the allegations against a councillor before instituting the formal investigatory procedure under s 28 and Green J rejected that submission that the local authority did not have the power to conduct the pre-formal investigation. On the other hand, Cockerill J rejected the approach of the Court of Appeal in *R (Lashley) v Broadland DC* (2001) 3 LGLR 25 on the ground that this decision concerned a different and earlier statutory regime.
- 1.6 In *Harvey* Cockerill J emphasised that the s.28 process contemplates a potentially a four stage process: (i) making an allegation (ii) (optionally) a non-formal investigatory or mediation stage or other relevant steps being taken (e.g. criminal proceedings) (iii) a formal stage, involving an independent person, leading to a decision on breach (iv) (if breach is found) a formal stage, again involving the independent person, dealing with action. She stressed that that an independent person must be involved and consulted under the 2011 Act procedure - both at the decision-making (breach finding) stage and the sanction stage. Cockerill J decided that it was essential to ensure the safeguard at the key stages of decision-making and action, while leaving the possibility of more flexible approaches in appropriate cases.

- 1.7 The National Association of Local Councils (NALC) and the Society of Local Councils Clerks (SLCC) have now called for urgent government talks over a recent High Court ruling on how councillors can be disciplined.
- 1.8 The effect of the High Court ruling – amongst other things – was that Ledbury were not able to sanction the councillor concerned other than going through the procedural safeguards of a code of conduct process under the Localism Act 2011. The judge found that the council’s restrictions, which continued even after the councillor was found not to have been in breach of the code, were an unlawful sanction.
- 1.9 NALC and SLCC revealed that they have written to the Ministry of Housing, Communities and Local Government, the Committee on Standards in Public Life and the Local Government Association to highlight their concerns about the judgment. They said: “The judgment will make it more difficult for local (parish and town) councils to resolve disputes between councillors and their employees. This decision confines most complaints about councillors to the code of conduct process. Employees will now (generally) not be able to use their councils' grievance procedures if the subject of their grievance is a complaint about a councillor.”

“Inevitably, this will lead to more principal authority involvement in local council matters and place additional burdens on already hard-pressed monitoring officers. It is also likely that matters which previously would have been dealt with within a council will take substantively longer when dealt with by a principal authority.”
- 1.10 NALC and SLCC have claimed that the *Ledbury* ruling would impact on the corporate well-being of councils, and said talks should be held “to try and find a sensible way forward to ensure quick and fair resolution of disputes”.

2.0 Resource and legal considerations:

- 2.1 None directly related to this report. The complaints procedure is being managed within Legal and Democratic Services from existing resources. It is important that the procedure for managing complaints is properly and lawfully applied.

3.0 Performance and Risk Management issues:

- 3.1 Performance and risk management are a feature of all council functions. It is important that council policies and procedures are reviewed and updated on a regular basis. If the council fails to do this, there is an increased risk that the council will be subject to legal challenge or litigation.
- 3.2 In terms of performance it is important that both Elected Members have a clear framework of standards to follow in delivering services to the community. These frameworks provide accountability and transparency in respect of the way in which the council delivers services. The council has approved an amended Code of Conduct for Elected Members at annual council 23rd May 2018

4.0 Equality Implications

4.1 In maintaining up to date policies and procedures the council will ensure that services are delivered fairly in an open and transparent manner. There are specific requirements in both codes that elected members and officers observe equalities. It is important that complaints are dealt with in a fair and transparent manner.

5.0 Consultation:

5.1 There is no requirement to consult on this report.

Author:

Tony Cox
Head of Legal and Democratic Services
01922 654822 coxt@walsall.gov.uk