

Standards Committee – 30 September 2019

Relevant Court Case Discussion

AIM

This report is to provide a focus of discussion on relevant legal issues affecting Elected Members.

Background papers:

None

Recommendation:

That the Committee consider and discuss the case set out below

1.0 KNOW

FACTS

1.1 The appellant (H) was a long-standing local councillor of Flintshire County Council in Wales. On 12 March 2009, the Public Services Ombudsman for Wales (the Ombudsman) received a complaint about H's conduct submitted by Council Senior Officers. The matter was referred by the Ombudsman to the Adjudication Panel for Wales for adjudication by a case tribunal. The tribunal found that H had committed 14 breaches of the Council's Codes of Conduct by failing to show respect and consideration for Council officers, using bullying behaviour, attempting to compromise the impartiality of officers and conducting himself in a manner likely to bring his office or the Council in disrepute. In terms of sanction, the tribunal disqualified H from being a member of the Council or of any other local authority for two and a half years. H challenged the tribunal's decision.

HELD

1.2 The appropriate standard of proof was the civil standard of the balance of probabilities. Whilst freedom of expression was important to everyone, Strasbourg had recognised the particular importance of expression in the political sphere. It had long recognised that what was said by elected politicians was subject to enhanced protection, *Castells v Spain* (1992) 14 EHRR 445 considered.

COMMENT

A number of principles could be derived from the relevant Strasbourg case law namely:

- i) The enhanced protection applied to all levels of politics, including local.
- ii) Article 10 protected not only the substance of what was said, but also the form in which it was conveyed. In a political context, the immoderate, offensive, exaggerated and aggressive may be tolerated where it would not otherwise be. Article 10 protected the right to make incorrect but honestly made statements; it did not protect statements which the publisher knew to be false.
- iii) Politicians were subject to wider limits of acceptable criticism. They were expected to be more thick-skinned and tolerant to comment than ordinary citizens.
- iv) Enhanced protection applies also to those who commented upon politics and politicians, notably the press.
- v) Political expression was a broad concept in this context, extending to all matters of public administration and public concern, including the manner of performance of public duties by others.
- vi) Comments in the political context were tolerated even if untrue, so long as they had some factual basis. What amounted to a value judgment as opposed to fact would be generously construed in favour of the former.
- vii) The State's margin of appreciation had to be construed narrowly in the context of restrictions on political speech.

Non-elected civil servants acting in an official capacity were, like politicians, subject to the wider limits of acceptable criticism, *Janowski v Poland* (1999) 29 EHRR 705 and *Mamère v France* (2009) 49 EHRR 39 considered. The limits, however, were not as wide as for elected politicians, who came to the arena voluntarily and had the right and ability to respond to commentators. It was in the public interest that civil servants were not subjected to unwarranted comments that would disenable them from performing their public duties and undermine public confidence in the administration. It was a legitimate aim of the State to protect public servants from unwarranted comments that had, or could have, adverse effects on good administration.

The tribunal had clearly considered with great care whether what had been said by H to the Council officers had been political expression. Some cases they found to be borderline; but there was no evidence to suggest that, having found those more difficult cases to be ones of political expression, they then gave less than fully enhanced protection to them. The case tribunal had been correct to proceed on the basis that there was a mutual bond of trust and confidence between councillors and their officers and that the comments made by H had the potential of impairing this trust, *Ahmed v United Kingdom* (2000) 29 EHRR 1 considered.

On the facts, interference with H's article 10 rights was justified. However, a proportionate sanction would be 18 months, and the period of disqualification was so reduced.

The decision offers useful guidance on the application of article 10 where critical comments are made of a civil servant or officer, as opposed to a politician. In the former case, the limits of acceptable criticism are seemingly narrower (see for example with *McEvoy v Michael* [2014] EWHC 701 (QB)).

Where critical comment is made of a civil servant, such that the public interest in protecting him as well as his private interests are in play, the requirement to protect that civil servant must be weighed against the interest of open discussion of matters of public concern, and if the relevant comment is made by a politician in political expression, the enhanced protection given to his right of freedom of expression, see *Mamère*.

It is worth noting that the existence of a relationship of trust between H as Councillor and the subject of his criticism as Council officers weighed heavily in the Judge's conclusion that a restriction on article 10 was justified. In contrast, in *Janowski*, the interference with article 10 was justified where the applicant, acting as a private individual and not as a journalist, had insulted municipal guards. A relationship of trust, therefore, is not determinative.

2.0 Resource and legal considerations:

- 2.1 None directly related to this report Under s27 Localism Act 2011 local authorities are required to uphold and promote standards of elected members.

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 The consideration of case law increases knowledge and understanding of topical issues affecting Elected Members.

"Providing leadership through behaving in accordance with these principles when championing the interests of the community with other organisations as well as within the authority. This will require Members to have the relevant knowledge to carry out their role which is why there is an expectation that Members will attend a minimum of 12 hours training each municipal year. The Council has developed a training and professional development programme to support Members. Members sitting on certain licensing, planning, employment committees are required to undertake mandatory training prior to sitting on the same."

4.0 Equality Implications:

- 4.1 The consideration of relevant case law with Members which includes knowledge and awareness of equality legislation and public sector duties assists Elected Members in their leadership role in communities and in the services delivered by the council to 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. This also supports the council's Public Sector Equalities duty under the Equality Act 2010

5.0 Consultation:

- 5.1 There is no requirement to consult on this report.

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