SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE

PER-B124-18

JUDGMENT OF SHERIFF PRINCIPAL M LEWIS

in appeal by

COUNCILLOR DAVID VICTOR MACDIARMID

Appellant

against

THE STANDARDS COMMISSION FOR SCOTLAND

Respondent

Appellant: Bovey, QC; Martin, solicitor, Scottish National Party
Respondent: Lindsay, QC; Shepherd & Wedderburn LLP

PERTH, 17 July 2019

The Sheriff Principal having resumed consideration of the appeal, refuses the appeal; confirms the findings of the Hearing Panel of the Commission of 25 April 2018; confirms the sanction imposed by the Hearing Panel of the Commission on 25 April 2018; certifies the appeal as suitable for the employment of senior counsel; finds the appellant liable to the respondent in the expenses of the appeal and allows an account of expenses to be lodged and once lodged remits the same to the Auditor of Court to tax and to report.

NOTE

Background

[1] The appellant is a councillor with Fife Council. He sits on a number of the Council's Committees. On 15 December 2015 the appellant was one of 13 members of the Regulation and Licensing Committee ("the Committee") which met to hear and decide a variety of matters including an application by WH for renewal of his taxi driver's licence. The application for renewal was refused on the basis that the Committee did not consider WH to be a fit and proper person to hold a taxi driver's licence.

[2] WH appealed that decision to the sheriff in Kirkcaldy. Following a diet of proof the sheriff allowed the appeal, overturned the decision of the Committee and determined that WH was a fit and proper person to hold such a licence.

[3] Approximately 2 months later, WH complained to the Commissioner for Ethical Standards in Public Life in Scotland alleging that the appellant had contravened the Councillors' Code of Conduct ("the Code of Conduct"). Following an investigation, on 6 March 2018 the Commissioner referred the complaint to the Standards Commission for Scotland ("the Commission"). On 25 April 2018 the Hearing Panel of the Commission ("the Panel"), having heard evidence and submissions, found that (1) the Code of Conduct applied to the appellant and (2) the appellant had breached paragraphs 3.1, 3.2, 7.3 and 7.4 of it and thereafter suspended the appellant for a period of 2 months from the Committee with effect from 23 May 2018.

[4] The appellant challenges that decision. The issues for determination by this court are whether the Panel erred in law by (1) failing to make adequate comprehensible findings in fact relative to the appellant's conduct, (2) relying on findings in a case in which the appellant had not been a party and had not given evidence, and (3) deciding that the

remarks of the appellant did not benefit from the enhanced protection of freedom of expression that article 10 of the European Convention on Human Rights extends to all matters of public concern, and that the decision complained of is inconsistent with the appellant's article 10 rights. In addition the appellant complains that the sanction imposed was (1) a disproportionate interference with his rights under article 10 and (2) excessive in all the circumstances.

The legal framework

[5] The Ethical Standards in Public Life etc (Scotland) Act 2000 ("the Act") introduced a new ethical framework to promote and uphold proper standards in public life. Sections 1 and 2 of the Act required Scottish Ministers to issue a Code of Conduct for Councillors and a Model Code of Conduct for members of the devolved public bodies listed in schedule 3 to the Act. It created the Standards Commission for Scotland (section 8) and the posts of the Public Standards Commissioner for Scotland (section 9), and a Chief Investigating Officer. The Commissioner is under a duty to investigate and report to the Commission on complaints of alleged breaches of the Code of Conduct. Part 2 of the Act contains provisions for the conduct of any such investigation and the powers of the Commissioner relative to that, and the steps to be followed if the Commissioner decides to report the outcome of the investigation to the Commission including the conduct of further investigation or the convening of a hearing. The conduct of the hearing, the findings of the hearing and the sanctions to be applied if appropriate are set out in sections 17-19. Section 22, which I consider in paras [15]-[17] below is concerned with appeals from the Commission.

[6] A new standards body was created in 2010 known as the Commission for Ethical Standards in Public Life in Scotland ("CESPLS") by virtue of the Scottish Parliamentary

Commissions and Commissioners etc Act 2010 ("the 2010 Act"). The effect of the 2010 Act was, among other things, to consolidate a number of roles, standardise accountability and governance and harmonise terms and conditions of employment.

[7] The Councillors' Code of Conduct came into effect in May 2003. It has been revised to reflect certain legislative changes and was reissued in 2010 by the Scottish Government following consultation and with the approval of the Scottish Parliament. (It has since been revised again but those changes are not relevant for the purposes of this appeal.)

[8] Paragraph 1.3 of the Code of Conduct provides that it applies to every member of a local authority in Scotland. It specifies nine principles which are to govern the conduct of councillors - duty to uphold the law, selflessness, integrity, objectivity, accountability and stewardship, openness, honesty, leadership and respect. The principles are to be applied to informal dealings with "Council's employees, party political groups and others no less scrupulously than at formal meetings of the Council and its Committees and Sub-Committees".

[9] The provision in the Code of Conduct particularly relevant to this appeal are:

> "1.7 Part 2 of the Ethical Standards in Public Life etc (Scotland) Act sets out the provisions for dealing with alleged breaches of the Code and for the sanctions that will be applied if the Standards Commission for Scotland finds that there has been a breach of the Code. In respect of councillors, those sanctions are set out in Annex A.
>
> 3.1 The rules of good conduct in this section must be observed in all situations where you act as councillor, including representing the Council on official business.
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> 3.2 You must respect the chair, your colleagues, Council employees and any members of the public present during meetings of the Council, its Committees or Sub-Committees or of any Public Bodies where you have been appointed by, and represent the Council. You must comply with rulings from the chair in the conduct of the business of these meetings.
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> 7.3 In such cases, it is your duty to ensure that decisions are properly taken and that parties involved in the process are dealt with fairly. Where you have a responsibility for making a formal decision, you must not only act fairly but also be

seen as acting fairly. Furthermore, you must not prejudge, or demonstrate bias in respect of, or be seen to be prejudging or demonstrating bias in respect of, any such decision before the appropriate Council meeting. In making any decision, you should only take into account relevant and material considerations and you should discount any irrelevant or immaterial considerations.

7.4 To reduce the risk of your, or your Council's, decisions being legally challenged, you must not only avoid impropriety, but must at all times avoid any occasion for suspicion and any appearance of improper conduct."

Advice Note - Freedom of expressions article 10

[10] The Commission issued an Advice Note for Councillors on the application of article 10 of the European Convention on Human Rights. The purpose of the Advice Note is to outline the approach which hearing Panels will take when issues arise that concern the application of article 10 and the right to freedom of expression.

Article 10

[11] Convention rights, including article 10, are given direct effect in domestic law by the Human Rights Act 1998. Section 6 makes it generally unlawful for a public authority to act in a way which is incompatible with a convention right. It was not contended in this appeal that the legislative scheme making provision for the Code of Conduct constitutes a breach of article 10.

[12] Article 10 provides:

"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

It was accepted by counsel for the appellant that the right is not absolute. It is a qualified right and may be limited or restricted as prescribed by law (*Heesom* v *Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin)).

Enhanced protection

[13] The ECHR has acknowledged the importance of expression in the political sphere recognising that what is said by elected politicians is subject to "enhanced protection". This does not mean that everything said by a politician or a local councillor will attract enhanced protection.

[14] In the case of *Heesom* v *Public Services Ombudsman for Wales*, Hickinbottom J reviewed a series of decisions relative to freedom of expression and enhanced protection. What he drew from these authorities (paragraph 38 of his decision) is as follows:

(1) The enhanced protection applies to all level of politics including local.

(2) Article 10 protects not only the substance of what is said, but also the form in which it is conveyed. Therefore, in the political context a degree of immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated (*De Haes and Gijsels* v *Belgium* 19983/92 (1998) 25 EHRR 1), *R (Calver)* v *Adjudication Panel for Wales* [2013] PTSR 378).

(3) Politicians have enhanced protection as to what they say in the political arena but they, the politicians, are subject to "wider limits of acceptable criticism" - in other words they are expected and required to have thicker skins and more tolerance to comment than ordinary citizens.

(4) Enhanced protection also applies to those who comment on politics and politicians, notably the press.

(5) The protection goes to "political expression". It is not limited to expressions of or critiques of political views (*R (Calver)* v *Adjudication Panel for Wales)* but extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others. Gratuitous personal comments do not fall within it.

(6) Comments in the political context amounting to value judgements are tolerated even if untrue, so long as they have some - any - factual basis.

(7) The right to freedom of speech brings with it duties and responsibilities.

(8) The state has a margin of appreciation in how it protects the right of freedom of expression and how it restricts that right.

(9) Similarly because of the importance of freedom of expression in the political arena, any interference with that right calls for the closest scrutiny by the court.

The scope of the appeal

[15] In terms of section 22(1) of the 2000 Act a councillor (a) who is the subject of a finding under section 18 of a contravention of the Code of Conduct or (b) on whom a sanction under section 19(1)(b) to (e), (4) or (5) has been imposed may appeal to the sheriff principal. The present appeal proceeds under section 22(1)(a) and (b).

[16] Section 22(3) provides that an appeal

> "(a) under subsection (1)(a) above may be made on one or more of the following grounds -
>
> (i) that the Commission's finding was based on an error of law;
>
> (ii) that there has been procedural impropriety in the conduct of any hearing held under section 16(b) above;

(iii) that the Commission has acted unreasonably in the exercise of its discretion;

(iv) that the Commission's finding was not supported by the facts found to be proved by the Commission;

(b) under subsection (1)(b) above, may be made on one or both of the following grounds -

(i) that the sanction imposed was excessive;

(ii) that the Commission has acted unreasonably in the exercise of its discretion."

[17] The sheriff principal may in an appeal under section 22(1)(a) confirm the finding under section 18 above; quash the finding; quash the finding and remit the matter to the Commission to reconsider its decision, whereas in an appeal under section 22(1)(b) the sheriff principal may confirm the sanction or quash the sanction and either substitute a lesser sanction or remit the matter back to the Commission.

The information before the Panel

[18] WH has held a taxi driver's licence for a number of years. The licence requires to be renewed every 3 years. His application for renewal was approved in 2012. In 2015 he submitted an application for renewal. The application attracted a letter dated 4 November 2015 from Police Scotland which is not an objection but contains detailed information concerning WH's domestic arrangements and the conduct of his relationship with his estranged wife and stepson which resulted in the involvement of the police. The conduct complained of included allegations of controlling and abusive behaviour, acts of violence and stalking.

[19] By letter of 26 November 2015 WH was invited by the Regulation and Licensing Committee to attend the meeting of the Committee to be held on 15 December 2015 when the application and letter of representation from Police Scotland would be considered. In advance of the Committee meeting WH's solicitors wrote to Fife Council accepting a

conviction for a contravention of section 39(1) of the Criminal Justice and Licensing (Scotland) Act 2010 for which an admonition had been granted after a period of deferment, refuting all other allegations concerning his conduct, and expressing concern about the propriety of placing that material before the Committee.

[20] WH attended the meeting and was not represented. The hearing of the application was chaired by Councillor Bob Young. Sergeant Ritchie attended on behalf of Police Scotland. It was a fractious hearing during which WH was reluctant to respond to questions from the Committee. At the conclusion of the hearing the appellant moved that the application be refused as WH was not a fit and proper person to hold such a licence. The motion was seconded by Councillor Pollock.

[21] On 16 December 2015 through his solicitor WH sought written reasons for the decision. A statement of reasons was issued by Fife Council on 22 January 2016.

[22] WH appealed that decision to the sheriff. Having heard evidence and submissions the sheriff concluded that the hearing had been conducted in a manner that was oppressive and was not conducted in a manner consistent with the notice that the Committee had given to the appellant in terms of the letter of 26 November 2015, that he was denied a fair hearing, that the Committee had based its decision in part on untested allegations and that on arriving at their decision the Committee acted contrary to natural justice. In particular the sheriff found that there were no introductory remarks from the chairman as to the procedure to be followed at the hearing, that when WH sought to answer some of the allegations during the reading of the letter of representations from Police Scotland, he was told by the Chairman "Just you be quiet and don't interrupt", and that during the questioning, the appellant stated "I don't understand why two women would live with you never mind get married to you" and "I think this man is a bully and I don't want bullies

driving people around in taxis in Fife". The sheriff allowed the appeal, reversed the decision of the Committee and directed Fife Council to issue forthwith the licence.

[23] On 12 August 2017 WH made a complaint to the Commission about the conduct of the appellant during the hearing before the Committee. He alleged that the appellant had made gratuitously offensive and personal comments during questioning and again immediately prior to the Committee making a decision. The comments are those set out in the preceding paragraph. The Commissioner was assisted by an investigating officer. To establish the background to the complaint, the investigating officer sought and received information and material from Fife Council including the Committee minute of 15 December 2015, and the hand written notes taken by council officers during the hearing. Fife Council supplied the investigating officer with a copy of the sheriff's judgment. Having considered that information, the investigating officer proceeded to interview WH, the appellant and relevant witnesses. Based on the material before him the Commissioner considered that the appellant had not observed paragraphs 3.1, 3.2, 7.3 and 7.4 of the Code of Conduct. The Commissioner set out in paragraph 4.46 of his report the findings established during the investigation. His reasoning appears in section 5. The report was submitted to the Panel.

[24] A joint statement setting out facts that are agreed between the Commissioner and the appellant was presented to the Panel. It is a relatively brief document although there is reference to substantial portions of the Commissioner's report and to the appendices attached to it.

The decision of the Panel

[25] The Panel, having heard evidence from the appellant and then submissions and having regard to the report of the Commissioner, unanimously dismissed the appeal. The

Panel found that the Code of Conduct applied to the appellant and that he had breached paragraphs 3.1, 3.2, 7.3 and 7.4 of it.

[26] In reaching its decision the Panel had regard to three main issues: (1) whether the facts as admitted amount to a failure to comply with the Code of Conduct, (2) if so whether such a finding is a breach of the appellant's right to freedom of expression under article 10 of the ECHR, (3) if so whether enhanced restrictions apply.

[27] In dealing with the first matter the Panel was satisfied in the absence of any evidence to the contrary and in light of the sheriff's findings in fact that on the balance of probabilities the appellant had made the comments substantially to the effect, and in the tenor, of those ascribed to him. The Panel had available to it statements made by officials who were present during the Committee meeting. This information was not available to the sheriff. The Panel concluded that the use of the word "bully" in the context of describing the appellant's behaviour was not necessarily disrespectful and as such did not amount to a breach of the code.

[28] The Panel found however that the comments attributed to the appellant in relation to "why women would live with him or marry him" amounted to a personal attack on WH and were not relevant or appropriate questions to determine whether WH was a fit and proper person to hold a taxi licence. The Panel concluded that notwithstanding the purported lack of engagement on the part of WH at the Committee meeting there was no justification for the appellant having made personal and insulting comments. In those circumstances the Panel found that the appellant's behaviour amounted to contraventions of paragraphs of 3.1 and 3.2 of the Code of Conduct.

[29] In relation to issues (2) and (3) the Panel did not accept that the comments had been made in the context of commenting on a political matter and therefore the appellant did not

benefit from the enhanced protection of freedom of expression afforded to politicians under article 10, and that the comments were unnecessary and gratuitous and amounted to a personal attack on WH. In acting in the way that he did, the appellant had failed to avoid any appearance of having not dealt with WH fairly, and further he had failed to avoid any occasion for suspicion or appearance of improper conduct.

[30] In reaching its decision to impose a sanction, the Panel noted that the appellant had cooperated fully with the investigation and the hearing processes and had acknowledged that the remarks attributed to him were unacceptable. The Panel also noted that the appellant's position was his over-riding aim to act in the best interests of and protect the citizens of Fife. It also took into account the many character references submitted on his behalf and his contribution to public life as a councillor for 11 years.

Submissions

[31] Senior counsel for the appellant invited me to quash the findings of the Panel and to quash the sanction of suspension and to either substitute no sanction or to impose a sanction of censure.

[32] Counsel conducted a forensic examination of the Panel's decision and with reference to the Commissioner's report, the sheriff's decision and many other documents in the bundle, he contended that the process was flawed as a result of the failure of the Panel to make appropriate and adequate findings in fact and the reasoning not comprehensible. If the process is flawed, less weight should be afforded to the judgment of the primary decision maker (*R (Calver)* v *Adjudication Panel for Wales*). The Panel was appointed as a specialist tribunal and its decisions are entitled to due respect and deference. This court should be slow to interfere with any professional conduct tribunal whose primary concern is

the public interest and only act in cases of clear error - in other words if the tribunal has gone plainly wrong - or where an order is excessive or disproportionate (*Fyfe* v *The Law Society of Scotland* 2017 SC 283). There is a duty on the Panel to state their findings in writing, to give reasons, to make findings in fact and to answer questions of law (*BG* v *Mental Health Tribunal for Scotland* [2015] CSIH 18). The Panel did go plainly wrong because it had failed to make adequate *et separatim* comprehensible findings in fact as to the words used by the appellant during the meeting.

[33] There was no video or audio recording of the Committee meeting. There was a dispute about the words used by the appellant. It was therefore incumbent on the Panel to make adequate findings both as to what was said and as to the context in which it was said, and it did not do so. The Commissioner made findings in fact - but he too did not identify what the appellant said. Further WH was described as being intimidating and aggressive, brusque and obstructive during the Committee meeting and failed to adequately engage in the process. Although the Commissioner had regard to that factor, the Panel did not. The present case required an appropriate balancing exercise for the purposes of article 10. In order to assess the justification of an impugned statement a distinction needs to be made between statements of fact and value judgments (*De Haes and Gijsels* v *Belgium* and *Keller* v *Hungary No, 33352/02 (4 April 2006)*). The Panel failed to make such a distinction.

[34] The Panel was wrong to rely on the findings of the sheriff in a case in which the appellant had not been a party particularly as the appellant had not given evidence and the sheriff did not have complete information before him. The Panel was wrong to have had regard to the findings of the sheriff. A decree or verdict in early cause, whether civil or criminal, as distinct from a judicial admission in that cause is not admissible in evidence in another cause (*Walker on Law of Evidence in Scotland* First Edition (1964) at paragraph 32 and

also *HM Advocate* v *Duffy* 2009 SLT 47). In short one court cannot rule and should not speculate on the quality and content of evidence heard in another case (Note on Incidental Procedure in the application by the Lord Advocate on behalf of the Russian Federation for extradition of *Alexander Shapovalov* [2017] SC EDIN 83).

[35] The Panel erred in deciding that the remarks of the appellant did not benefit from the enhanced protection afforded by article 10. In setting the context, counsel explained that WH had attended the Committee meeting in two roles - firstly as an active participant seeking renewal of a licence and secondly as a member of the public. As a member of the public attending an open meeting he is entitled to protection from unwarranted comment but as a participant at a licensing hearing he is comparable to a civil servant (*Heesom* v *Public Services Ombudsman for Wales*) being subjected to critical comment. The comments were made in the context of a quasi-judicial arena. While it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question, any interference with the freedom of expression of a judge calls for close scrutiny on the part of the court (*Baka* v *Hungary* 20261/12 [2016] ECHR 568). Although expressed in a personal and offensive manner, the observations attributed to the appellant were not unconnected to the matter in hand but in fact made a connection between the police observations and the issue of fitness to hold a licence. The observations were therefore not gratuitous although could be perceived as perhaps mocking and sarcastic. They were made in the context of a robust hearing - to interfere with such a freedom of expression may have a chilling effect of the exercise of that freedom (*Baka* v *Hungary*).

[36] Counsel then seemed to vacillate between suggesting that the comments were the equivalent of political expression and thus attracting protection (*R (Mullaney)* v *Adjudication*

Panel for England [2009] EWHC 72 (Admin)), that the comments were made in the public interest and thus fall within the ambit of political expression, and that the comments may fall within the category of "commercial expression" (Clayton and Tomlinson *The Law of Human Rights* (2009 OUP) paragraph 15.282).

[37] On the matter of sanction the findings did not reasonably support more than a censure. WH did not complain until his licensing appeal had been determined. Finally the appellant had included an apology in his email to the Commissioner's office of 17 August 2017.

[38] Senior counsel for the respondent invited me to refuse the appeal. He submitted that the Panel had made adequate and comprehensible findings in fact as to the appellant's statement on the occasion complained of. In particular, adequate and comprehensible findings were made as to what was said and as to the context in which it was said.

[39] Further the Panel did not err in law in having regard to the sheriff's judgment in the licensing appeal. That judgment was a relevant consideration which the Panel could properly and lawfully have regard to. The Panel did not consider itself bound by the sheriff's findings. The Panel carried out its own independent assessment of the evidence and made its own findings.

[40] The Panel did not err in law in holding that the appellant's comments did not benefit from the enhanced protection under article 10 and that its findings and the sanction were a proportionate interference with the appellant's right to freedom of expression and were justified by article 10.2. The comments were not political comment, commercial observation or made in the public interest. The appellant was not discussing or reviewing Council policy on taxi operators in the Fife area - he made a personal attack on WH.

[41] Finally, the sanction imposed by the Panel was reasonable and proportionate. He was suspended merely from the Committee for a period of 2 months. The appellant was able to perform all of his other duties as a councillor during this period without limitation. The sanction was a reasonable exercise of the Panel's discretion and there is no ground upon which the court can interfere with that sanction.

Decision

Ground of appeal 1

[42] On 6 March 2018 the Commissioner as investigating officer found certain facts to have been established based on his investigation. These appear in paragraph 4.46 a-o of his report. The Commissioner concluded that there was evidence available to him that the appellant did make the comments attributed to him and this came from multiple sources - direct evidence of witnesses whom he had interviewed including the appellant, the handwritten notes of the Council Officers, elements of the sheriff's decision, and the offer of an apology from the appellant. The foregoing appears in chapter 5 of the report.

[43] In its decision the Panel, having had regard to the report, all of the oral evidence, written material and the submissions, made two findings - first that the Code of Conduct applied to the appellant and second that he had breached paragraphs 3.1, 3.2, 7.3 and 7.4 of it. In its reasoning the Panel noted that in the absence of any audio or video recording of the Committee hearing, it "could not determine categorically, word-for-word, what had been said" but nonetheless it was satisfied on the balance of probabilities, in the absence of any dispute by the appellant to the contrary and in light of the sheriff's findings that the appellant had made comments substantially attributed to him. The Panel recognised that the sheriff did not have the benefit of the officer's notes and proceeded to examine those

notes in detail. I observe that not only was the sheriff bereft of those notes, the appellant was not a party to the proceedings and was not called by either party to give evidence, and I deal with that matter in the following section. However the notes were available to the Panel and the appellant elected to give evidence to the Panel, as he is entitled to do under section 17(4).

[44] Paragraph 9 of the joint statement of facts records that the appellant

> "cannot recall whether or not he used the words attributed to him in the committee administrator and managing solicitor's contemporaneous hand written notes during the hearing in relation to the complainer's application for renewal of his taxi drivers licence on 15 December 2015, but has no reason to doubt that the committee administrator and managing solicitor were doing their best to record the proceedings and that if both have recorded that certain words were said, that they were in fact said. The respondent does not know if and does not accept that the notes are a complete record of what was said."

[45] In his oral evidence before the Panel, the appellant adhered to this position. The Panel records that the appellant

> "stated that while he had no recollection of making the comments attributed to him and did not recognise them as representative of his normal behaviour, he had no reason to doubt that the officer's notes of the meeting reflected what had been said".

[46] The content of the Committee administrator and managing solicitor's notes were included in the joint statement of facts in the following terms:

> "5. The committee administrator's handwritten notes record the respondent using the words 'just a bully to women + children can't understand why women would stay with him not marry him' in relation to the complainer.
>
> 6. The committee administrator's typed notes record the respondent using the words 'just a bully to women and children. Can't understand why women would stay with him never mind marry him' in relation to the complainer. ....
>
> 9. The managing solicitor's hand written notes record the respondent using the words 'report says basically you are bully to women + children. Why do women live with Y'.".
>
> (The complainer mentioned above is WH and the respondent mentioned above is the present appellant).

[47] Counsel for the appellant suggested that the written notes were contradictory and that the Panel had erred in its treatment of them. I do not agree. Although the written records are in slightly different terms they are not in my view inconsistent. They record the appellant describing WH as a bully and questioning why women would live with or marry him. The Panel was meticulous in its assessment of the comments noted by the officers and the context in which the comments were made. The Panel considered first of all the use of the word "bully" and separately considered the observations regarding WH's relationship with women and marriage. In relation to the former, the Panel concluded the use of word "bully" in the context of questioning WH about his behaviour in light of the report from Police Scotland was not necessarily disrespectful and did not amount to a breach of the Code. In relation to the latter, the Panel concluded that these observations were personal and were insulting. They were not a legitimate line of enquiry for the appellant to pursue because they were not relevant to the issue of whether he (WH) was a fit and proper person to hold a taxi licence. They were simply a personal attack on him. Reading the judgment as a whole it is clear that the Panel did not conflate statements of fact and value judgments (*De Haes and Gijsels* v *Belgium* and *Keller* v *Hungary).*

[48] Having reached that conclusion, the Panel was in my view entitled to make the finding which it did. The written records combined with the findings in the report of the Commissioner and the oral evidence of the appellant provide a lawful basis for the Panel to consider whether these comments constituted a breach of the Code of Conduct.

[49] I am satisfied that the Panel has provided sufficient findings and given an adequate explanation for its decision. In any event reasons "do not become inadequate simply because more explanation could have been given." (*BG* v *Mental Health Tribunal for*

Scotland). I am not persuaded that greater explanation could have been given in the circumstances of this case.

Ground of appeal 2

[50] There is long established principle of the Scots law of evidence that the decision of a judge in one case is not evidence of the facts in another. The latest iteration of that principle is contained within paragraph 9.4.2 of the Fourth Edition of *Walker and Walker on the Law of Evidence in Scotland* superseding the passage in the First Edition to which counsel referred.

[51] The first case is the appeal by WH to the sheriff in Kirkcaldy against the refusal of his application for renewal of a taxi licence. The present appellant was not a party to those proceedings nor was he called to give evidence. At the proof although much was made of the conduct of the appellant during the Committee meeting, the grounds of appeal are wider than simply behavioural issues. The second "case" is the complaint process. The complaint made by WH relates solely to the conduct of the appellant during that same Committee meeting. In the course of the investigation Fife Council supplied the investigating officer with a copy of the sheriff's judgment. I have already described the procedure adopted by the Commissioner and by the Panel (paras [23]-[25] above).

[52] It seems to me that the Commissioner did not consider himself bound by the sheriff's judgment, although he does make reference to it, and he did not use it as evidence of the facts relative to the disputed comments. He conducted his own in-depth investigation, seeking and obtaining access to material and information held by Fife Council, and interviewing those whom he deemed had information of relevance. The extent of his investigation and his findings and conclusions are set out in chapter 4 his report. The background leading up to the making of the complaint is narrated in paragraphs 4.1-4.20,

the content of the notes taken by the council officers are examined at paragraphs 4.21-4.25, the sheriff's judgment is summarised in paragraphs 4.26-4.29, and summaries of the various interviews are provided in paragraphs 4.30-4.45. The judgment of the sheriff was part of the bundle of papers accompanying the report of the Commissioner.

[53] In reaching its decision the Panel took into account "all of the evidence including the evidence led and submissions made orally at the hearing". The written material included the joint statement of facts which refers specifically to the terms of judgment, which appears to have been used as part of the background circumstances without objection. At the risk of repetition, the appellant gave evidence on his own account.

[54] I am satisfied that the Panel did not fall into error in the manner described by the appellant. The Panel did not adopt the sheriff's findings or his reasoning. The decision of the Panel on the matter of the use of the word "bully" does not accord with the opinion of the sheriff and does not reflect his views. It is clear that the Panel carried out its own independent assessment of the evidence, including scrutiny of the notes of the officers and the oral evidence of the appellant.

Ground of appeal 3

[55] Article 10 is qualified right. The right to freedom of expression may be limited by imposition of sanctions in respect of provisions prescribed by law such as the ones contained in the Code of Conduct provided that the restrictions are necessary and proportionate and are in the pursuance of a legitimate aim. In *Livingstone* v *Adjudication Panel for England* [2006] HRLR 45 Collins J held that the strength imposed by a code of conduct designed to uphold proper standards in public life are in principle likely to fall within article 10(2) but such restraints should not extend beyond what is necessary to maintain

those standards. There was no suggestion during the appeal that the Code of Conduct was not ECHR compliant.

[56] Although the appellant made no submission on enhanced protection, the Panel gave careful consideration to article 10. *R (Calver)* v *Adjudication Panel for Wales* and *Heesom* v *Public Services Ombudsman for Wales* provide guidance as to the order a tribunal such as the Panel would require to adopt when considering article 10. The guidance can also be found in paragraphs 5.1-5.4 of the Advice Note on the Application of article 10 of the ECHR and the Councillors' Code of Conduct. In short, the Panel requires first of all to consider whether there has been a breach of the Code. Secondly if it is so satisfied, the Panel must then determine whether the finding is in itself a *prima facie* breach of article 10. Thirdly if so whether the restriction involved was one that was justified by article 10(2), which allows restrictions that are necessary in a democratic society.

[57] It seems to me that the Panel followed that process. Firstly the Panel determined that the facts as established led it to conclude that, on the balance of probabilities, there had been breaches of the Code of Conduct. I have commented elsewhere in this note on the findings and reasoning of the Panel.

[58] In relation to the second stage, the Panel reflected on the context in which the comments were made to enable it to determine whether the enhanced protection would apply. The Panel did not accept that the comments had been made in the context of commenting upon a political matter. It is abundantly clear that the comments were made in the course of determining an application for renewal of a taxi driver's licence, a quasi-judicial setting - not the debating chamber of the Council or in any other political forum. There is nothing in the material before me suggestive of the appellant indulging in political commentary, or engaging in commercial observation or discussing Council policy

or matters of public concern. The contention that WH had attended the Committee meeting as an active participant and separately as a member of the public is somewhat illusory. WH attended the hearing for the sole purpose of securing renewal of his licence. I am not persuaded that *Heesom* v *Public Services Ombudsman for Wales* is authority for the proposition that, for the purposes of article 10.2, an applicant at a licensing hearing is open to wider levels of criticism that a member of the public.

[59] The third stage involves an evaluative judgment on the matter of restriction. The Panel is faced with considering whether there are relevant and sufficient reasons to justify the interference with the right to freedom of expression and whether the restriction is proportionate. There is a balance to be struck – and this was not lost on the Panel. It has to consider whether the sanction is the minimum necessary or whether less restrictive measures could be employed, and then consider whether the benefit of that least necessary measure outweighs its adverse impact on the right to freedom of political expression. The Panel recognised the seriousness of its findings and the imposition of a sanction, and considered with care the issues of necessity and proportionality. The reality is the appellant challenges the merits of the sanction imposed and I deal with that in the following section.

[60] In my view the Panel carried out a thorough and independent assessment of the evidence. I cannot say that the Panel was wrong to conclude that the appellant did not benefit from the enhanced protection afforded to politicians. I agree with counsel for the respondent that the Panel's conclusion that its findings and sanction were a proportionate interference with the appellant's right to freedom of expression and were justified by article 10(2).

Sanction

[61] Section 19(1) of the 2000 Act sets out the steps which a Panel conducting such a hearing must take following a finding of a contravention of the Code of Conduct. Read short, these include censure, suspension, and disqualification. The Panel cannot choose not to apply a sanction.

[62] "The Application of Sanctions", a document published by the Standards Commission for Scotland, provides guidance on the matter of sanctions for Committees and Panels holding hearings into allegations of contraventions of the Code of Conduct. It is a guidance document, the aims of which are to promote adherence to the Code of Conduct, maintain public confidence and achieve credible deterrence. It is not prescriptive. Part 5 provides advice as to the factors that a Panel ought to take into account. The list of factors "is not exhaustive and not all will be present and/or relevant in each case".

[63] The Panel was aware of the need to justify any sanction imposed under article 10(2). The reasons for imposing suspension are set out in page 9 of the Panel's Decision. It seems to me that the Panel carefully considered the circumstances of the contravention during a fractious meeting, the extent and significance of the remarks attributed to the appellant when sitting in a quasi-judicial role, the impact of the remarks on WH which the Panel found amounted to a personal attack on WH and balanced that against mitigatory factors including the co-operation of the appellant throughout the investigation and hearing processes, his acknowledgement that the remarks attributed to him were unacceptable, his many years of unblemished public service, his over-riding aim to act in the best interests of the citizens of Fife, and the letters of support. This is but a summary of the many factors considered by the Panel.

[64] Much was made by counsel for the appellant of an apparent error on the part of the Panel in recording as an aggravation that the appellant had not offered an apology to WH, whereas an apology had indeed been tendered. This, counsel submitted, undermined the decision to sanction. I disagree. Within the bundle of papers there is an email dated 18 January 2017 from the solicitor representing WH to a solicitor at Fife Council. It is part of an exchange regarding possible resolution of the litigation. Fife Council proposed that if WH were to agree to "departing from the case on the basis of a finding of (*sic*) expenses due to or by either party and on the basis that the Councillor who made the remarks about his former wives would be prepared to issue an apology." During his investigation the Commissioner sought clarification from Fife Council about the existence of such an apology. The legal services manager of Fife Council informed the Commissioner by email dated 9 October 2017 that no trace could be found of an apology on file and that "It may be that it was a verbal discussion between the councillor and the solicitor." The appellant confirmed to the Commissioner that he had agreed after the litigation had commenced to apologise to WH "if he had upset him", that a written apology had been prepared by him and was in the custody of the legal officers of Council. WH advised the Commissioner that he was aware that Fife Council had offered an apology on condition that he drop the appeal and reach agreement on expenses. He was not prepared to do so because he wanted his taxi license to be restored. The Commissioner makes reference to the foregoing in his report (paragraphs 4.33, 4.43-4.44).

[65] The foregoing material reveals that (1) the issuing of an apology was contingent on the licensing appeal being abandoned on a no expense due or by basis – it was not so resolved, (2) the appellant was unclear about the terms of the apology or the purpose of it, and (3) a written apology cannot be traced. Accordingly I consider that the Panel was correct

to record (page 9 of its decision) that there was no evidence of an appropriate apology having been provided to WH. This was but one of many factors taken into account by the Panel.

[66] As was said by counsel for the appellant, the Panel is a specialist tribunal. It is tasked with maintaining public confidence. I was reminded by counsel that this court should be slow to interfere with any professional conduct tribunal whose primary concern is the public interest and only act in cases of clear error - in other words if the tribunal has gone plainly wrong - **or where an order is excessive or disproportionate** (*Fyfe* v *The Law Society of Scotland* 2017 SC 283). I am not persuaded that the decision to suspend was excessive or disproportionate. The appellant was able to fulfil his other duties during the period of suspension and was precluded from only two meetings of the Regulation and Licencing Committee.

Expenses

[67] Parties were agreed that unless there was divided success, the usual practice should prevail. Accordingly the appellant will be found liable to the respondent in the expenses of the appeal.

Parties respectively sought sanction for the employment of senior counsel. Having regard to (i) the complexity of the proceedings, (ii) the importance of issues in this appeal to the parties, and (iii) the desirability of ensuring equality of arms in the employment of counsel, I am satisfied that, in all the circumstances of the case, it was reasonable for the parties to employ senior counsel.