Neutral Citation Number: [2016] EWHC 3307 (Admin)

Case No: CO/1091/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2016

Before :

MR JUSTICE EDIS

- -

Between :

JOHN TAYLOR	**Claimant**
- and -	
HONITON TOWN COUNCIL	**Defendant**
-and-	**Interested Party**
EAST DEVON DISTRICT COUNCIL	

- -
- -

Wayne Beglan (instructed by **Pardoes Solicitors LLP**) for the **Claimant**
Jonathan Wragg (instructed by **Foot Anstey LLP**) for the **Defendant**
Jeremy Phillips (instructed by **Henry Gordon Lennox, Strategic Lead (Legal and Licensing and Democratic Services) and Monitoring Officer**) for the **Interested Party**

Hearing date: 9th November 2016

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE EDIS

Mr. Justice Edis :

1. By this claim for judicial review, the claimant seeks an order quashing a decision (the Decision) by Honiton Town Council (Honiton) dated 14th December 2015 to impose sanctions on the claimant and for declaratory relief in relation to that decision. East Devon District Council (East Devon) is an interested party because of its important role in the procedure which led to the Decision.

2. The issue in the case turns the exercise of functions regulated by ss.27-28 in Chapter 7 of the Localism Act 2011 which is headed "Standards". The relevant provisions are set out at paragraph 29 below. Honiton is for these purposes a Parish Council and East Devon is its principal authority. They work in tandem under the statutory scheme to fulfil the functions of a local authority under those provisions in ways which will require some analysis below. Essentially, East Devon is a substantially larger and better resourced local authority than Honiton and is therefore given certain functions on behalf of Honiton which a larger authority would perform for itself. Between them they seek to comply with the duty under s.27(1) which is as follows:-

> (1) A relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority.

Factual Summary

3. The claimant has been a town councillor of Honiton since 2007. He played a significant role in the running of Honiton, sitting on a number of committees and working groups, including in particular, the finance committee. The present issue arose because he became concerned about the funding of a large building project in the town of Honiton called the "Beehive Community Centre". It will not be necessary for the purposes of this judgment to analyse those concerns in depth or to make findings about that project. It is enough for present purposes to say that it was an enormous project by the standards of Honiton and that significant difficulties arose over the budget and how shortfalls could be funded. The shortfalls were created by the contractor raising claims for additional costs at a late stage. Honiton had entered into a standard form JCT building contract, the terms of which provide for the making of payments against certificates and the making of claims and so on. The Auditor had reported in June 2014 that the Council was at risk because of these additional costs and the very low level of reserves available to meet them, and other costs. The Auditor recommended speedy and decisive action and suggested that the obvious option was to extend the borrowing from the Public Loan Works Board. The conduct of this exercise was certainly a matter of legitimate public interest and was a matter in which a member of the Town Council was likely to take a particular interest.

4. The Decision was communicated to the claimant by letter of 18th December 2015 from Honiton. It imposed sanctions upon him because of a finding that he had committed a breach of Honiton's Code of Conduct for its members by failing to treat the Town Clerk with courtesy and respect. In essence the allegation related to a letter dated the 27th January 2015. Because some argument turned on the nature of that letter, I will set it out. I have highlighted phrases which are of particular significance in the light of counsel's submissions, and the emphasis below is mine. I have otherwise sought to set it out exactly as it was written.

"I am a Town Councillor for Honiton St Michael's Ward. A meeting of the Council was held last night 26 January 2015 most of which was held in 'private'. I am **publishing** one event that asked me to conspire to break the law and I hope that I am allowed in law to issue **this leaflet** under the defence of Public Interest. I may be accused of breaking the rules of the Council and stopped from attending? I might even be arrested and prosecuted but if that happens you will know that I am being punished for telling of an **offence, a conspiracy to use money from the Public Works Loan Board (PWLB) for an improper purpose**. The Town Clerk of Honiton stated that she has applied a loan of £98000 (value published) to cover 'poaching' of monies from the accounts (quote from published internal audit); in fact needed to replace 'poached reserves' used to pay £75000 worth of bills that should have been disputed. This intent etc is already in the public domain. However the Town Clerk stated that she would not need all of the money. That statement would be covered by the 'Part B privacy rules'. She stated that she intended to put the surplus into a high interest account and to use that as a reserve to pay down the loan. That also is covered by the Part B privacy rules. However, to apply for money knowing that there it is not needed for a purpose allowed under the PWLB rules is illegal because it is a way of replacing reserves that are required to be kept by all Councils but in the case of Honiton Town have been 'poached'. The Mayor suggested we use the fancy word 'virement'. I will not stay silent on this. There were other things in the meeting that were **scams on the ratepayers of Honiton** but I have yet to find out my rights of disclosure within section 100a of the Local Govt Act publish because of 'privacy' rules. I can say that six Counsellors have signed a request for a motion that asks for the finances of the Town Council and the Beehive to be investigated by the Devon and Cornwall Constabulary. The Mayor and the Town Clerk got the request yesterday.

"I think the loan must be approved by EDDC and must be consistent with the rules of PWLB. Will EDDC let the application go through? What is stated on the application as justification? – I have not seen it. The PWLB pays out from loans raised by the Government, i.e. 'the public borrowing requirement' of which all political parties are shouting should be controlled and lots of people's incomes are under pressure because of this. Not Honiton Town Council (Beehive).

"Issued by John Taylor Town Councillor for St Michaels. You may see me in handcuffs? Or gagged? I doubt I can be sued for whistleblowing on this."

5. This caused the Town Clerk to make a complaint against the claimant by letter of 28th January 2015 to East Devon saying that the letter had been published in the Express and Echo. She complained that she had been slandered and that her professional reputation was affected. She said that she had only ever acted on the instructions of the Town Council following advice from both the internal auditor and the Audit Commission. She said "I have always ensured that work has been carried out in a professional and legal manner to say this is not the case is not acceptable."

6. After the Monitoring Officer of East Devon had attempted to resolve the complaint informally by suggesting that the claimant should make an unreserved apology, which the claimant refused to do, he appointed Tim Darsley to investigate the complaint on 2nd June 2015. Mr. Darsley decided that the following paragraphs of Honiton's Code of Conduct were engaged by his remit:-

> "General Obligations
>
> 4(a) You must treat others with courtesy and respect
>
> 4(f) You must not disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to aware, is of a confidential nature [subject to exceptions]."

The Investigation Report

7. Mr. Darsley considered various documents and conducted face to face interviews with the claimant and the Town Clerk and spoke to a journalist from Pulman's Weekly News. He made findings of fact which were set out with care in paragraph 5 of his Report which was dated 31st July 2015. When he was appointed there had been discussion about whether it was necessary to resolve the question of the contractor's entitlement to payment for additional costs in order to deal with the complaint. If so, this might tend to justify what the claimant had said in his letter because the existence of unbudgeted but valid claims would support allegations of at least incompetence against Honiton. He said this:-

> "5.6 I am quite clear, however, that establishing the validity or otherwise of the additional building costs which made the loan necessary, is outside of my remit. This is a matter for the Town Council and the contractor to pursue. Any disputed costs should be resolved by negotiation or through dispute resolution under the contract. The outcome of this process is not required in order to reach a finding on this complaint."

8. Mr. Darsley explained that the total costs of the Beehive project exceeded the funds available by £98,073 on what Honiton was told was a "worst case" basis and that it had applied for a loan from the PWLB of £98,000 on 23rd January 2015 and that at its meeting of 26th January 2015 Honiton had agreed to sign and seal a 10 year lease of the Beehive to Honiton Community Complex at a nominal rent. It was this meeting which caused the claimant to write his letter, which Mr. Darsley refers to as a "statement". It found its way quickly to the local media who asked Honiton for a comment on it on 27th January 2016, before the Town Clerk had seen it. An article

appeared on 28th January 2016 in the Express and Echo which refers to the statement and to its allegation of impropriety coupled with a request for a police investigation. The weekly press ran a similar article on 3rd February. Mr. Darsley found that it was not altogether clear how the statement had been issued. The claimant told him that he gave out no more than ten copies to some constituents and one or two councillors. Mr. Darsley accepted this and also the account of the journalist that a scanned copy of it had been distributed to the press by a councillor and constituent of the claimant called Jill McNally.

9. Mr. Darsley considered the accuracy of the statement so far as what the Town Clerk had said at the meeting. This was the subject of a dispute in that the Town Clerk said that she had not used the word "poaching". Mr. Darsley found that she had not, because the claimant accepted that this was probably the case. He also found that the statement was misleading because the Town Clerk had not said definitively that the whole of the loan would not be needed. She had said that the final amount required was not yet resolved and the £98,000 was a "worst case" estimate. She did not then know whether there would be a surplus and could not have said, as the claimant had alleged, that the surplus would be put into a high interest account and used as a reserve to pay down the loan. He concluded overall, that the statement was inaccurate, selective and out of context and as a result gave a misleading account of what the Town Clerk had said. He also found:-

i) That Honiton had been advised by its Internal Auditor to extend the PWLB borrowing.

ii) That the Town Clerk had obtained the relevant guidance and taken advice from the PWLB and the County Secretary for the Devon Association of Local Councils.

iii) That the process for applying for the loan was in line with the provisions of the Local Government Act 2003 and followed relevant guidance.

iv) The key decisions regarding the application for the loan and the amount of funding were taken by Honiton and not the Town Clerk who implemented the decisions in accordance with the resolutions of Honiton.

v) There was therefore no evidence to suggest that the loan application was in any way illegal, and was used for an improper purpose.

vi) The statement did not disclose confidential information because it contained information which was properly in the public domain and the claimant's own contentions about it. No specific confidential information was revealed.

10. As a result of these factual conclusions, Mr. Darsley found that the claimant publicly made claims of illegality and impropriety associated with the Town Clerk and that, in the absence of any reasonable justification for his claims, this constituted a failure to treat her with respect. He felt that criticism of officers by councillors should be made in a proper forum and that personal criticism made in public is unlikely to be acceptable. He found therefore that there was a breach of paragraph 4(a) of the Code, but he found no breach of paragraph 4(f).

11. There is no attack on the procedure by which these findings were made. Mr. Darsley is an officer of East Devon and East Devon is not a defendant to this claim. It became an Interested Party in the way I shall describe below.

The October Sanctions Policy

12. On 12th October 2015 at a full meeting of Honiton the Council resolved to approve a report of the Policy Committee called "Code of Conduct Sanctions Report". This provided for the automatic imposition of sanctions when a Monitoring Officer had ruled that a member had been in breach of the Code of Conduct and specified actions to be undertaken. Until those actions had been complied with in full the following will automatically apply

    i) A member will be unable to speak at any meeting including the Council Meeting. They would retain their right to vote.

    ii) A member will be removed as a member of any committee or working group.

    iii) A member attending any meeting as a member of the public will not be able to speak.

    iv) A member "can also be prevented" from coming into the council office unless accompanied by arrangement. They can be required to make an appointment so that staff are not left alone with them.

13. The origin of this policy is a little unclear. On the 28th September 2015 the Policy Committee of Honiton was advised as follows:-

> "The Deputy Town Clerk advised that both Officers of the Town Council are of the view that local government legislation only permits a local council to act where it has a specific power to do so and that no power exists to remove a Councillor's right to speak at a Council meeting. The advice from the County Secretary of the Devon Association of Local Council's was read out. The advice supported the view of the Town Council's Officers."

14. It appears that the Policy Committee decided not to follow that advice and in the Report for the Council says that the power to disqualify or suspend councillors had been removed but that the powers in relation to alleged [sic] breaches were "for local determination" and that the Act "is silent on [breaches not involving disclosable pecuniary interests] leaving it to the discretion of local authorities to decide their own sanctions".

15. The October Policy also included a Training Policy and Training Plan.

The November meeting of East Devon

16. East Devon considered Mr. Darsley's report at a meeting on 30th November 2015 of its Standards Hearings Sub-Committee. There was a pre-hearing report which explained that the conclusion that the statement had constituted a breach of the Code was reached by the Investigator, by two Monitoring Officers and by the Independent

Person. The Pre-Hearing Report explained that this conclusion applies regardless of the accuracy of what the claimant was actually saying. This is a rather different emphasis from that of Mr. Darsley who did consider the question of accuracy and is an approach which is criticised by Mr. Beglan, counsel for the claimant. The Pre-Hearing Report explained that it would be for the committee to determine the facts and whether there had been a breach of the Code and, if so, whether to recommend to Honiton that a sanction should be imposed and, if so what that should be.

17. The Decision Notice of East Devon acknowledged the claimant's genuinely held concerns regarding the financial governance of Honiton but, in line with the Pre-Hearing Note, said that this was outside the remit of the Standards Sub-Committee. The Sub-Committee found that the claimant had forwarded the statement to Jill McNally knowing that it was likely to be more widely circulated by her. It was not marked confidential and he did not withdraw its contents when they appeared in the media. The Sub-Committee did not, as it might have done, infer from the terms of the statement, highlighted above, that it was clearly a document intended for dissemination and not a letter addressed to an individual. It describes itself as a "leaflet". It says that it was intended to make matters public which revealed criminal conduct. There is no reason not to conclude that the claimant created it for these purposes and intended that it would reach the media. On the main issue the Sub-Committee found that there was a breach of paragraph 4(a) because the claimant had not treated the Town Clerk with respect. They said this

> "In conclusion the findings of the Sub-Committee were that Councillor Taylor had issued a statement, written as a Honiton Town Councillor, which was sent by a recipient to the media. The statement made a number of claims about the legality and propriety of a loan obtained by the Town Council. In the statement, Councillor Taylor referred to the Town Clerk three times, which after deliberation the Sub-Committee concluded that this implied a direct criticism of the clerk's integrity in dealing with the finances of the Beehive."

18. On advice from its officers, East Devon's standards sub-committee recommended these sanctions

    i) That Honiton Town Council censure Councillor John Taylor for his breach of the Code of Conduct;

    ii) That Honiton Town Council publish the findings of the Hearing Sub-Committee. (EDDC will anyway publish the findings on its own website as a matter of procedure).

    iii) That Honiton Town Council instruct EDDC's Monitoring Officer to arrange training for Councillor Taylor in respect of the Code of Conduct and Councillor conduct – such training by the end of the current financial year ("the training requirement").

19. The claimant was represented at the hearing and Mr. Kinder, his solicitor, emailed to the Sub-Committee on 1st December 2015 with a series of complaints and requests for further documentation. The email said that counsel was to be instructed "in relation

to a judicial review of the decision yesterday" but no such proceedings have ever been issued against East Devon.

20. The claimant was therefore found by East Devon to have breached paragraph 4(a) of the Code. He had failed to treat the Town Clerk with respect in that he had publicly accused her of criminal behaviour, namely conspiracy to obtain a loan by deception in that its true purpose was misstated on the application. That finding was the foundation for the Decision.

The decision of Honiton

21. In the Decision Honiton imposed the sanctions recommended by East Devon as above and applied its October Policy by adding the following measures which were to remain in place until the claimant had complied with the training requirement:-

    i) A restriction preventing the claimant from speaking at any meeting including the Council meeting.

    ii) The removal of the claimant from the 5 committees and working groups on which he served.

    iii) A restriction preventing the claimant from attending any meeting as a member of the public together with a restriction from speaking as a member of the public at any meeting.

    iv) A restriction preventing the claimant from attending at the Council offices unless accompanied by the Mayor of the Council.

The challenge

22. The claimant raises 3 issues by his claim for judicial review which was issued on 1st March 2016:-

    i) Illegality for these reasons

        a) The Council has no power to make the Decision;

        b) The Decision was based on a rigid application of policy;

        c) The Decision was imposed for an improper purpose;

        d) The Decision is inadequately reasoned;

        e) The Decision is perverse.

    ii) The Sanctions were not imposed on a proper basis in the light of East Devon's conclusions on the investigation.

    iii) The hearing before the standards sub-committee was procedurally unfair.

23. Long before the proceedings were issued, and by letter of 19th January 2016 Honiton said that it was modifying the sanctions because of "further information" and that the

claimant would be able to participate in full meetings of the Council. By letter of 16th February they said that they were seeking advice from specialist counsel and said

> "In light of the fact that your client seeks to challenge the decision of the District Council dated 30th November 2015 we hereby withdraw all sanctions currently imposed on your client. The Council will, however, consider the issue of sanctions again after (i) any fresh decision made by the District Council and/or (ii) the outcome of any judicial review proceedings against the District Council."

24. As appears above, despite the threat of proceedings against the District Council, East Devon, they were in the result issued against the Town Council, Honiton. By letter of 19th March 2016 Honiton expressed the hope that the claim would be withdrawn because it said:-

    i) The Town Council agrees that the decision dated the 14th December 2015 should be treated as never having been made.

    ii) The Town Council agrees that it will not seek to re-impose all of the sanctions that were imposed on the 14th December 2015. However, the Town Council will consider in due course what actions it might wish to take in light of the decision of East Devon District Council - which decision has not been challenged by your client. It is likely that any such decision of the Town Council may well involve the imposition of some of the sanctions (but not the additional sanctions/measures) previously imposed on your client on the 18th December. Any such decision will take into account (i) the issues raised by your client in his claim against the Town Council (ii) the Town Council's response to your third question below and (iii) further legal advice taken by the Town Council;

    iii) The Town Council is aware that your client seeks a measure of comfort. However, the Town Council has found it difficult to determine what is meant by your third question. The vagueness of the terms you have used makes a meaningful response impossible. The Town Council is content to confine any future sanctions/measures to those set out in the case law you have referred to. Consequently, your reference to "sanctions and/or measures intended to ensure sanctions are adhered to" will not arise.

    iv) The Council will pay your client's costs on the standard basis to be assessed if not agreed.

25. Honiton accepted in its Acknowledgement of Service dated 23rd March 2016, before the grant of permission on 24th May 2016, that it had no power to impose a training requirement and does not intend to do so. It is an unusual aspect of the case that the only interest East Devon has in these proceedings is in establishing that such a requirement is lawful.

26. The approach taken throughout the proceedings by Honiton and East Devon is that the decision on whether there had been a breach of the Code of Conduct was taken by East Devon and that Honiton had no power or duty to substitute its own decision on

that question. On the issue of sanctions it is said that East Devon made a recommendation but Honiton made the decision. That is how the decisions were in fact taken, as the documents I have quoted above make clear. If that is right, then these proceedings are not a proper forum for a challenge to the decision on breach because East Devon is not a defendant and its decision is not attacked.

The Issues

27. Because it seemed to me that these proceedings may raise only academic issues in view of the stance taken by Honiton, I decided that it would be helpful to start the hearing by asking each party what order they were asking the court to make. Their responses were as follows

    i) The claimant, through Mr. Beglan, said that he sought a quashing order in relation to the Decision, which it was accepted he should have. He sought a declaration as to the October policy and a "steer" in relation to any determination Honiton may make as to sanctions. Can Honiton rely on the November decision of East Devon including on disputed matters of fact, and given the terms of s.28(11) of the Localism Act what are the respective roles of Honiton and East Devon in dealing with allegations of breaches of the Code of Conduct.

    ii) Mr. Wragg on behalf of Honiton said that his clients accept everything which is said under Ground 1 and that it had tried to concede everything and get out of these proceedings, but it was unable to accept the claimant's contention that East Devon merely makes recommendations as to whether a breach should be found and that Honiton must make up its own mind on that issue. He said that such an approach would render the task of Parish Councils impossible because they often have no professionally qualified officers and the point of the 2011 Act is to remove decisions on breach from them for that reason.

    iii) Mr. Phillips on behalf of East Devon said that his clients were not the subject of any challenge, but that rulings on two questions may be helpful to them and other local authorities. These were

        a) What is the status of a decision of an authority exercising its function as principal authority under s.28 of the Localism Act 2011? Is the Parish Council bound to accept its findings of fact and on the issue of breach of the Code. On that issue East Devon's position is the same as Honiton.

        b) Is there a power to require a Councillor to undergo training as to the Code of Conduct as a sanction consequent upon a finding of breach? On this issue East Devon and Honiton take different positions.

28. I have considered with some care whether I should make any order at all in this case and whether I should decide the questions raised by the parties since they are academic because the Decision has been withdrawn, several times. The parties have expended costs on these proceedings, and permission has been granted which has encouraged them, no doubt, to continue in the hope of securing a decision. East Devon was joined as an Interested Party at the request of Honiton for this purpose.

Further, the parties will have further dealings and it may be helpful if I make some findings. For these reasons, I have decided that I will address two questions.

i) I will decide whether Honiton was bound by the findings of East Devon as to the facts and as to whether there was a breach of the Code. This is because the Decision actually involves two stages: breach and sanction. Honiton has certainly withdrawn the second, but says that it is still bound by the first. The point is not academic to the Decision and to the order which should be made. Whatever the outcome of this issue, I will quash the Decision. This does not mean that the route to that result is irrelevant. If the claimant is right I will quash the finding that there was a breach of the Code because no such finding was made by Honiton which wrongly simply adopted East Devon's decision. If Honiton and East Devon are right I will quash the Decision because Honiton has conceded that it wrongly included sanctions which are beyond its powers.

ii) I will also consider whether there is a power to impose a training requirement. This is not entirely academic because the application of unlawful sanctions is one basis of the quashing order and the extent to which the sanctions were unlawful is therefore involved in the decision.

The statutory scheme under the 2011 Act

29. The 2011 Act is not entirely clear in the provisions which govern the answers to the questions which are raised. So far as relevant, ss.27 and 28 provide as follows:-

> "27. **Duty to promote and maintain high standards of conduct**
>
> (1) A relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority.
>
> (2) In discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity.
>
> (3) A relevant authority that is a parish council—
>
> > (a) may comply with subsection (2) by adopting the code adopted under that subsection by its principal authority, where relevant on the basis that references in that code to its principal authority's register are to its register, and
> >
> > (b) may for that purpose assume that its principal authority has complied with section 28(1) and (2).
>
> .....
>
> (6) In this Chapter *"relevant authority"* means—
>
> > (a) a county council in England,

(b) a district council,

(c) a London borough council,

(d) a parish council [Honiton is a parish council for this purpose].

.....

28. **Codes of conduct**

(1) A relevant authority must secure that a code adopted by it under section 27(2) (a "code of conduct") is, when viewed as a whole, consistent with the following principles—

(a) selflessness;

(b) integrity;

(c) objectivity;

(d) accountability;

(e) openness;

(f) honesty;

(g) leadership.

(2) A relevant authority must secure that its code of conduct includes the provision the authority considers appropriate in respect of the registration in its register, and disclosure, of—

(a) pecuniary interests, and

(b) interests other than pecuniary interests.

(3) Sections 29 to 34 do not limit what may be included in a relevant authority's code of conduct, but nothing in a relevant authority's code of conduct prejudices the operation of those sections.

(4) A failure to comply with a relevant authority's code of conduct is not to be dealt with otherwise than in accordance with arrangements made under subsection (6); in particular, a decision is not invalidated just because something that occurred in the process of making the decision involved a failure to comply with the code.

.....

(6) A relevant authority other than a parish council must have in place—

(a) arrangements under which allegations can be investigated, and

(b) arrangements under which decisions on allegations can be made.

(7) Arrangements put in place under subsection (6)(b) by a relevant authority must include provision for the appointment by the authority of at least one independent person—

(a) whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate, and

(b) whose views may be sought—

(i) by the authority in relation to an allegation in circumstances not within paragraph (a),

(ii) by a member, or co-opted member, of the authority if that person's behaviour is the subject of an allegation, and

(iii) by a member, or co-opted member, of a parish council if that person's behaviour is the subject of an allegation and the authority is the parish council's principal authority.

(8) [This sub-section provides detailed apparatus for the selection of independent persons for the purposes of subsection (7). It is unnecessary to set the terms of the provision out in full, but it is to be inferred from them that Parliament considered that the role of the independent person was of real importance].

(9) In subsections (6) and (7) *"allegation"*, in relation to a relevant authority, means a written allegation—

(a) that a member or co-opted member of the authority has failed to comply with the authority's code of conduct, or

(b) that a member or co-opted member of a parish council for which the authority is the principal authority has failed to comply with the parish council's code of conduct.

.....

> (11) If a relevant authority finds that a member or co-opted member of the authority has failed to comply with its code of conduct (whether or not the finding is made following an investigation under arrangements put in place under subsection (6)) it may have regard to the failure in deciding—
>
> (a) whether to take action in relation to the member or co-opted member, and
>
> (b) what action to take.
>
> ....."

Discussion and decisions

Issue 1: the status of East Devon's decision

30. This is a matter of statutory interpretation of the somewhat difficult provisions of ss.27 and 28 of the 2011 Act set out above. It is a question which could easily have been answered by simple and clear words in the Act but was not. It must therefore be answered by interpreting the words used in their proper context to identify the intention of Parliament.

31. The starting point is subsection (6) which exempts Honiton, as a parish council, from the obligation to have in place arrangements for investigating allegations and making decisions on them. It follows from this that Honiton is also exempt from the duty to appoint at least one independent person and to involve that person or those persons in decisions imposed by subsection (7). Any decision taken by Honiton will therefore not involve this independence which Parliament, as I observe at paragraph 29 above, plainly regarded as being of importance.

32. Subsection (9)(b) defines an allegation in relation to a relevant authority as meaning a written allegation that a member of a parish council for which the authority is the principal authority has failed to comply with the parish council's code of conduct. It follows from this that East Devon was required by subsection (6) to have arrangements in place, including independent persons, for the investigation of allegations against members of Honiton and for making decisions on those allegations. East Devon did have such arrangements in place as I have set out above, and did investigate the allegation against the claimant and did decide that he had acted in breach of Honiton's code. It did not decide to recommend to Honiton that it should find the breach, but did so itself. It did so in a way which has not been challenged in these proceedings.

33. In my judgment the effect of subsection (6)(b) taken together with subsection (9)(b) is to place the duty of investigation and decision of allegations against members of Honiton on East Devon as principal authority. The arrangements for decision making must involve independent persons and it would frustrate that important safeguard to hold that a parish council had a duty to reconsider the principal authority's decision and substitute its own if it chose to do so.

34. Subsection (11) is a rather puzzling provision. I shall have a little more to say about it below, but in this context I observe that it appears to suggest that the same authority which makes the finding of failure to comply with the code must decide what, if any, action to take about it. Although it refers to arrangements for investigation under subsection (6) it does not in terms deal with the possibility that a decision may have been taken under subsection 6(b) by the principal authority and identify which of the two authorities involved may have regard to the failure and decide what, if any, action to take about it. Both of them are "relevant authorities" as defined in s.27(6) and this creates a difficulty in allocating responsibility for different parts of the process to each of them when subsection (11) appears to contemplate that only one will be involved.

35. In this case East Devon decided the issue of breach but made recommendations to Honiton about what action it should take consequent on that finding. Honiton took the decision on sanctions. The challenge in these proceedings is based on the proposition that East Devon's role was limited to that of investigator and adviser on both questions and contends that Honiton was the ultimate decision maker on both issues. This appears to me to be clearly wrong for the reasons set out above. A natural reading of the Act gives decision making power to the principal authority and requires it to have arrangements for the exercise of that power in place. It would make a nonsense of that scheme if the parish council were able to take its own decision without having any of those arrangements in place. The whole point of the scheme is to remove decision making powers and duties from very small authorities which do not have the resources to manage them effectively and who may be so small that any real independence is unattainable. I therefore reject the challenge.

36. In doing so, I decline to decide that the Act requires the splitting of the decisions as between breach and sanction between the two relevant authorities in the way in which this happened in this case. No-one contended before me that East Devon had responsibility for both decisions under subsection (6)(b) and that Honiton had no responsibility for any part of the decision making process. That being so it is not necessary, or desirable, for me to decide whether that contention, if advanced, would be sound. The language of s.28(11) may point one way, but s.27(1) and (2) to which I return at paragraph 41 below may point the other.

Issue 2: the training requirement

37. The decision of Hickinbottom J in *Heesom v Public Services Ombudsman for Wales (Welsh Ministers intervening)* [2014] EWHC 1504 (Admin), [2015] P.T.S.R. 222 featured in the claimant's representations to East Devon when it took the Decision and also in the submissions before me. It is a decision on different provisions because the Localism Act 2011 does not apply in Wales. However, the judge did include some discussion about the 2011 Act as part of his narrative of the origin of the Welsh provisions. He said this:-

> "The legal framework in England
>
> 25 Until 2012, Wales and England shared the scheme as set out above, the role of the Ombudsman in Wales being performed in England by, first, the Standards Board and, later, ethical standards officers of Standards for England.

26 However, for England, that regime was abolished by the Localism Act 2011 from 1 April 2012. This abolished the model code of conduct for local authorities in England, in favour of a new regime that requires local authorities to formulate and adopt a code of conduct locally which must be based on seven identified principles: sections 26 and 27(1)(2) . The requirement for local authorities in England to have standards committees was also abolished, in favour of "independent persons" who have a consultative role as part of their local standards arrangement: section 28(7).

27 Ethical standards officers in England (the equivalent of the Ombudsman in Wales) were abolished, and their functions were not retained. Instead, from 1 July 2012, section 34(1) makes it a summary criminal offence deliberately to withhold or misrepresent a disclosable pecuniary interest which, on conviction, may attract a maximum fine of £5,000 and an order disqualifying the person from being a member of the relevant authority for up to five years. Thus, in England, a councillor cannot be disqualified unless he is (i) in the paid employment of the authority (section 80(1)(a) of the 1972 Act: see para 12 above); (ii) convicted of any offence and sentenced to imprisonment for at least three months (section 80(1)(b) of the 1972 Act: again, see para 12 above); or (iii) convicted of an offence under section 34(1) of the 2011 Act and thereafter made the subject of a disqualification order by the magistrates. The power of local authorities to suspend members was also revoked from 7 June 2012.

28 It was uncontentious before me that, there being no common law right for an authority to impose sanctions that interfere with local democracy, on the abolition of these sanctions and outside the categories I have described above, a councillor in England can no longer be disqualified or suspended, <u>sanctions being limited to (for example) a formal finding that he has breached the code, formal censure, press or other appropriate publicity, and removal by the authority from executive and committee roles (and then subject to statutory and constitutional requirements).</u>

29 The rationale for this change was set out in a number of statements issued by the Department for Communities and Local Government. There appear to have been two themes. First, the United Kingdom Government considered that the earlier regime, consisting of a centrally prescribed model code of conduct, standards committees with the power to suspend a local authority member and regulated by a central quango, was inconsistent with the principles of localism. There was, in addition, concern that the regime was a vehicle for vexatious or politically motivated complaints which discouraged freedom of

> speech and which could be used to silence or discourage councillors from (eg) whistle-blowing on misconduct.
>
> 30 The Welsh Ministers have not adopted the same approach as England; and, for Wales, have maintained the pre- Localism Act scheme. In their written submissions as interveners in this appeal, they say (at paras 21–23): (1) The Localism Act 2011 has been largely rejected by the Welsh Ministers as being inappropriate to the social policy agenda in Wales. (2) The Welsh Ministers were confident that the Ombudsman, adopting a robust approach, could sift out any minor, vexatious and politically-motivated complaints made in Wales. (3) Thus, the Welsh Ministers were not persuaded that the ethical standards system in Wales was in need of reform. That was confirmed in the Welsh Government White Paper, *Promoting Local Democracy* (May 2012). (4) That remains their view. They refer to paras 16–19 of the Committee for Standards in Public Life annual report 2011–12, which expressed concerns about what the committee regarded as inadequate sanctions in the new English scheme, which were restricted in essence to "criminal law or … the ballot box". The Welsh Ministers remain of the view that the scheme in Wales complies with article 10 of the Convention."

38. The passage underlined in paragraph 28 above has been relied upon as indicating that sanctions in this case were limited to the finding of breach, censure and publicity. Since he did not include a training requirement, there cannot be any power to impose one. This is a misreading of the paragraph which contains the words "for example" indicating that what follows is not an exhaustive list, and of the purpose of this section of the judgment. Hickinbottom J was summarising the agreed effect of provisions which did not apply in his case and which were only tangentially relevant. He was plainly not deciding anything. In my judgment this valuable and penetrating judgment should not be regarded as the origin of a definitive list of sanctions available following a finding of breach of a Code of Conduct.

39. Section 28(11), which I have described above as "puzzling", permits a relevant authority to "have regard to" a breach of the code when deciding whether to take action and if so what action to take. At first sight, this would appear to include a discretion to ignore the breach when deciding whether to take action and what action to take in relation to it. It may also have regard to a breach whether the finding follows an investigation under subsection (6), which appears to sit uneasily alongside subsection (4). I do not have to decide any issue about the scope of this rather odd provision and my interpretation of it is limited to one observation relevant to Issue 2: Parliament clearly contemplates that a relevant authority may take "action" following a finding of non-compliance with a code, and does not seek to define or limit what action that may be. The abolition of the old regime carries with it, as Hickinbottom J observed, the abolition of the power to disqualify and suspend but otherwise the powers appear to be undefined, at least where the breach does not involve any impropriety in relation to pecuniary interests. It also means that suspension and disqualification are not available as sanctions for non-compliance with any action

taken in respect of a failure to comply with a code of conduct. This means that any action which required a councillor to do anything could not be enforced by suspension as a means of securing compliance. As the Welsh Government observed the only sanction where the criminal law was not involved in England was the ballot box.

40. That said, the fact that a requirement cannot be enforced by suspension does not mean that it should not be imposed. Provided that it is lawful, which in this context includes fully respecting the important right to freedom of expression enjoyed by members of local authorities in the interests of effective local democracy, a sanction may be imposed which requires a member of a local authority to do something. It must be proportionate to the breach In *Bank Mellat v HM Treasury (No 2) [2014] AC 700* , the test of proportionality was stated as follows by Lord Sumption JSC at 770, para 20, I as follows:

> "the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them."

41. It must be remembered that Honiton is under the statutory duty to maintain high standards of conduct under s.27(1) of the 2011 Act set out at paragraph 2 of this judgment in relation to its members. Section 27(2) requires it to have a code of its own or to adopt that of East Devon. The existence of a code of conduct is regarded by Parliament as an important aspect of the maintenance of standards. It appears to me to be proportionate to a significant breach of it for a relevant authority to require the person in breach to be trained in its meaning and application. There is no point in having a code of conduct if members of the authority are not aware of its meaning and effect and where a member has demonstrated by his conduct that this is the case, a reasonable amount of training appears to be a sensible measure. A local authority should be able to require its members to undertake training which is designed to enable them to fulfil their public functions safely and effectively.

42. It was reasonably open to the decision maker to conclude that this was a serious breach of the Code. There is no finding as to the claimant's motives and it may be that he acted in good faith, believing that his statement about the Town Clerk was justified. However, it was not. He accused her of criminal conduct when there was not the slightest justification for doing so. This was a very serious error of judgement. Therefore, a requirement of training was proportionate.

43. If such a requirement is made but the member refuses to comply, the only sanction is publicity. Such conduct may reduce the confidence of the electorate in the member so that he or she is not re-elected. Equally, it may not. That is a matter for the electorate to decide which it can do only if it has the relevant information. For these reasons I

consider that it is open to a relevant authority exercising its power as contemplated by s.28(11) to take action following a failure to comply with a code of conduct to require the member to undertake training. That decision will usually be published and it will be open to the authority to publish what happens as a result of the requirement.

Conclusion

44. I therefore quash the Decision on the ground that, in so far as it applied the October Policy and added additional sanctions over and above those recommended by East Devon, Honiton acted unlawfully. The decision of East Devon both as to breach and the sanctions it recommended was lawful.