

For General Release

REPORT TO:	ETHICS COMMITTEE 6 September 2017
AGENDA ITEM NO:	7
SUBJECT:	RECENT CASE LAW UPDATE
LEAD OFFICER:	JACQUELINE HARRIS-BAKER, DIRECTOR OF LAW AND MONITORING OFFICER
WARDS:	ALL
CORPORATE PRIORITY/POLICY CONTEXT: The Council has determined that the Ethics Committee shall be responsible for receiving and considering reports on matters of probity and ethics and to consider and recommend revisions to the Code of Conduct.	
FINANCIAL IMPACT Implementation of the recommendations contained in this report shall be contained within existing budgets	
FORWARD PLAN KEY DECISION REFERENCE NO.: N/A	

1. RECOMMENDATIONS

The Committee is asked to:

- 1.1 Note the outcome of recent case law.

2. EXECUTIVE SUMMARY

- 2.1 This report provides details of the Judicial review of a local authority decision to investigate a Member and implications arising from that decision.

3. DETAIL

- 3.1 In *Hussain v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin) a Councillor who had been the subject of formal investigatory procedures by the authority sought a Judicial review of the Council's actions.
- 3.2 Investigations by and on behalf of the council into alleged wrongdoing by elected council members had been undertaken and the claimant is a member of the council who was alleged to have been engaged in procuring the sale of council assets at a substantial undervalue and using his influence to have parking tickets issued to his family cancelled.

- 3.3. Documents before the Court refer to a “culture” which pervaded the Authority whereby members were “the bosses” and the Council was “open for business”. Documents also refer to members bullying employed officials and officers who were compliant in carrying out the members wishes. In 2014 various allegations were circulating in the press (including on the BBC) and on social media to the effect that there was serial and long standing wrongdoing by elected members especially in relation to the disposal of Council property.
- 3.4 To assist in the pre-formal investigation an external firm of solicitors was instructed to collect, collate and review the documentary evidence, to establish facts, and to formulate advice as to the appropriate action to take. The exercise included the conducting of voluntary interviews with relevant members. The solicitors interviewed the Claimant upon two separate occasions about allegations made against him. The interviews were recorded and transcripts made.
- 3.5 Regrettably, towards the end of the process, the solicitor made some personal and derogatory observations about the Claimant and his family to a Council Official (the Chief Executive). This caused the Chief Executive to address whether it was proper to continue with the external lawyers given the risk of bias. Ultimately, it was decided that, given the advanced stage of the solicitor's investigation, the work should be completed but that all the evidence and the resultant report should then be submitted to Leading Counsel for independent and objective advice on the merits of the investigation, the implication of the solicitor's derogatory comments, as to whether the solicitors report should be published, and as to appropriate next steps.
- 3.6 Following receipt of the solicitor's report in April 2016, Leading Counsel was instructed and he advised in May 2016. The gist of the advice was that there was a serious case to be met by the Claimant and that the solicitor's report and the Opinion should be placed into the public domain to address criticisms then being made in the press that the Authority was suppressing wrongdoing and not taking its investigatory obligations seriously. Counsel also advised that the formal arrangements under the Localism Act 2011 for investigations into alleged breaches of the member's Code of Conduct should now be initiated.
- 3.7 This opinion by Leading Counsel led the Chief Executive to initiate the formal investigatory procedures under the Localism Act 2011. The investigation got underway. The Council's Monitoring Officer instructed two members of the Legal Service to act as Investigating Officers. The Claimant agreed to be interviewed as part of the process.
- 3.8 At about this time elections to appoint a new Leader of the Council occurred. Several members indicated that they would stand for election. This included a member who was a subject of the investigation (Councillor Jones). It is argued, by reference to contemporaneous press coverage, that certain Labour candidates (in particular Councillor Eling) used the press to promote their candidature for Leader. The ongoing investigations became a “political” issue with Councillor Eling, who was standing against Councillor Jones, pressing for publication of the solicitor's report and the Opinion and continuation of the investigation. The submission is now made that this was to undermine the position of Councillor Jones and that the decision by the Council to continue

with the investigation and to publish the solicitor's Report and the Opinion was politically motivated.

- 3.9 Also at this time the Council indicated to the Claimant that it intended to publish the solicitor's report and the Opinion in accordance with Leading Counsel's advice. This led the Claimant to seek permission to apply for judicial review and an order prohibiting publication. Permission was refused by Mr Justice Cranston. On the day of the refusal the Council placed the solicitors report and the Opinion into the public domain. Later they also placed a report of the Council's Audit Committee into the public domain. Subsequently the Court of Appeal granted permission to claim judicial review. By this point in time the application for an injunction to restrain publication was academic.
- 3.10 The Council's investigation into the allegations was stayed pending the outcome of the judicial review. The stay covers the matters that Leading Counsel identified as warranting investigation but also various other allegations, also involving property transactions, which are said to have occurred in the late 1990's and which also involve the Claimant. The stay prevents the reference of all the allegations to the Council's Standards Committee which is the body convened to hear and adjudicate upon allegations of breach of duty by members.
- 3.11 As part of the Judicial Review proceedings, the Claimant Councillor challenged the investigations and attempted to prevent the council concluding them and summoning him before its Standards Committee under the provisions of the Localism Act 2011 (Sections 27 and 28).
- 3.12 The Claimant's grounds for judicial review included that the council had acted ultra vires (i.e. beyond its powers), that the process had been politically motivated, and that there had been bias which continued to taint the process going forward. He also challenged the procedures under the Data Protection Act 1998 (DPA 1998) and the European Convention on Human Rights (ECHR).
- 3.13 In addition, one of the issues raised was the fact that the council had conducted a 'pre-formal investigation', i.e. an investigation not conducted under the arrangements put in place under Localism Act 2011 for the formal investigation of breaches under the Code of Conduct applicable to elected members. During this pre-formal stage the Council purported to exercise powers conferred upon it pursuant to the Local Government Act 1972 ("LGA 1972").
- 3.14 The Administrative Court dismissed the application by the claimant Member for judicial review of the defendant's initiation of formal investigatory procedures and publication of documents. The Court found that the authority had power to conduct the investigations it had and did not find itself tainted by bias, nor had it erred by publishing the documents, which had been within its powers and which were not in breach of data protection principles.
- 3.15 The judgment clarifies that 'pre-formal investigations' are permissible. Green J ruled that the council had 'ample power' (for example under section 151 of the Local Government Act 1972) to conduct the initial pre-formal investigation into allegations of serious misconduct. He also rejected the submission that the council did not have the power to investigate under Localism Act any alleged

misconduct occurring prior to the coming into force of Localism Act in July 2012. There was no amnesty for serious misconduct.

- 3.16 The Court indicated that an allegation submitted to formal investigatory arrangements can cover conduct pre and post-dating the coming into effect of Localism Act. The Code that will then govern the conduct being investigated will be that operative at the time of the behaviour in question.
- 3.17 In relation to allegations of breach of the Data Protection Act 1998, the Claimant argued that the publication of the pre-investigation report was unlawful under prohibitions contained in the DPA 1998 and Article 8 ECHR. The effect of publication upon the Claimant professionally and personally and upon his family personally has been serious. Evidence was placed before the Court to this effect by the Claimant in his witness statements. It is also said that the documents contain errors and are not therefore accurate.
- 3.18 It was argued for the Claimant that for the publications to have been justified they had to satisfy the principles laid down in the DPA 1988, and they did not. Publication was not necessary: to comply with any legal obligation that the authority was subject to; for the exercise of any of the authority's proper legal functions; for the exercise of any other functions of a public nature in the public interest; or, for the purposes of a legitimate interest pursued by the authority, these, in outline, being the legal bases under the DPA 1998 relied upon by the Council to justify publication. The Claimant recognised that it was too late to seek relief preventing publication but he sought a declaration and damages.
- 3.19 The Court found that there was a strong public interest in the rate payers of the borough having explained to them the nature of the allegations, the evidence both for and against the Claimant, and the views of independent lawyers. It was fair to publish because it proved to the public that the officers were taking their responsibilities seriously and not concealing possible wrongdoing, which was the prevailing impression. Public confidence in financial probity, which includes transparency, especially in times of financial austerity, is very important.
- 3.20 Accordingly, Green J also rejected complaints that the council had erred by publishing the report of the pre-formal investigation. There is an important public interest, with respect to allegations against a councillor, in openness and transparency. Both go hand in glove with accountability. There was no breach of DPA 1998 or Article 8 ECHR.
- 3.21 Green J further rejected the allegations of causative actual and apparent bias and political motivation. He reached a clear conclusion and ruled that the council's procedures can continue.
- 3.22 In terms of practical implications for the authority of the judgement: the judgment upholds the scope of the powers of local authorities generally to investigate alleged member impropriety, and ultimately to do so in accordance with the formal arrangements under Localism Act 2011. The forum for the member to present his case fully will then be the Standards Committee. The judgment recognises that there is a powerful public interest in serious allegations being thoroughly and fairly tested and adjudicated upon. Moreover,

when there is a flaw in a pre-formal investigation steps can and should be taken to prevent this infecting what follows.

- 3.23 Furthermore, it highlights that any investigation undertaken under the ethics regime must always be subject to the overriding principle of fairness. Subject to that, primacy must be given to the importance of a thorough investigation in the public interest when there is a prima facie case. If issues acquire a 'political' flavour to them that is not a reason for the council, as a body, to act differently.

4. FINANCIAL AND RISK ASSESSMENT CONSIDERATIONS

- 4.1 There are no direct financial implications arising from this report.

5. LEGAL IMPLICATIONS

- 5.1 There are no direct legal consequences arising from the contents of this report beyond those set out in the body of the report.

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BACKGROUND DOCUMENTS:	None