OUTER HOUSE, COURT OF SESSION

[2022] CSOH 15

P485/21

OPINION OF LORD WOOLMAN

In the Petition

X

Petitioner

for Judicial Review of an undated decision of the Tribunal constituted under section 21 of the Courts Reform (Scotland) Act 2014 to report into the fitness for office of Sheriff John Albert Brown against

against

(FIRST) SHERIFF JOHN ALBERT BROWN; (SECOND) THE SCOTTISH COURTS & TRIBUNALS SERVICE; (FOURTH) THE LORD ADVOCATE

Interested Parties

Petitioner: McBrearty QC, A McKinlay; Urquharts (for Livingstone Brown, Glasgow)
First Interested Party: Duncan QC, Welsh; Brodies LLP
Second Interested Party: Moynihan, Pugh; Judicial Office for Scotland
Fourth Interested Party: Springham QC, P Reid; Scottish Government Legal Directorate

8 February 2022

Introduction

[1] The petitioner (X) is a court lawyer. In 2018 she regularly appeared at hearings before Sheriff John Brown (known as "Jack"). She alleges that during that period he acted inappropriately toward her. The incidents took place out of court. X voiced her concerns to

her manager. In August 2018 he lodged a formal complaint on her behalf. That set in train disciplinary proceedings. The Judicial Office for Scotland was responsible for the administrative arrangements. Ultimately a "fitness for office" tribunal found one allegation against him had been proved. While deprecating the sheriff's behaviour, it did not recommend that he should lose his judicial office.

[2] The police undertook a parallel inquiry into the allegations. They took witness statements from two other females (C1 and C2). Each claimed that the sheriff had also acted inappropriately towards them. Their allegations related to a period before his appointment to the bench. The police sent a report to the Crown Office and Procurator Fiscal Service. The accompanying bundle of documents included the witness statements of C1 and C2.

[3] The COPFS decided not to prosecute. It notified the Judicial Office for Scotland of its decision. At the same time it forwarded the statements of C1 and C2. It did so with their consent. For reasons discussed later in this opinion, they were not passed to the tribunal.

[4] In this petition for judicial review X seeks to quash the tribunal decision. She contends that, while no one was at fault, the judgment was unfair. The tribunal reached its decision without being aware of the allegations of C1 or C2, which could have had a material impact on the key issues. That breached the rules of natural justice. She invites this court to remit the case to a fresh tribunal for further consideration.

[5] The sheriff argued that the tribunal's task was to determine X's allegations. The scope of its jurisdiction did not extend to the claims made by C1 and C2. As it had correctly fulfilled its remit, its decision should stand. There were two fallback positions in the event that I found against the sheriff. First, it would be unjust to remit as that would amount to double jeopardy. Second, if there was to be a remit, it should be to the same tribunal.

[6] The Lord Advocate and the Judicial Office for Scotland both entered the proceedings in the public interest, this being the first case of its kind. Neither made a formal motion on the merits.

Overview

[7] Detailed provisions govern procedure. They can be found in the Courts Reform (Scotland) Act 2014, the Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 015, and the Complaints about the Judiciary (Scotland) Rules 2017. There are several distinct stages after a complaint is made:

a. a disciplinary judge investigates the complaint and reports to the Lord President;

b. if there is a case to answer, he asks the First Minister to constitute a tribunal;

c. she appoints the members of the tribunal, including its chair;

d. the tribunal chair in turn appoints an investigating officer, and (if required) a presenting officer to lead the evidence at a hearing; and

e. the tribunal reports to the Scottish Parliament

[8] It is worth adding one point about the role of the investigating officer. The 2015 Rules specify that he must investigate the "tribunal case". In so doing he must consider the existing information and make such further enquiries as he considers appropriate. If he determines that further procedure is required he must (a) submit a recommendation for further procedure; and (b) provide a statement of reasons to the tribunal, which notifies the judicial office holder of the case he has to answer.

Initial stages

[9] The disciplinary judge concluded that the sheriff had a case to answer. On receipt of his report the Lord President wrote to the First Minister. In a letter dated 31 August 2018 he set out the nature of the complaint and requested that she constitute a tribunal to consider the sheriff's fitness for office. The First Minister replied on 23 September 2018 assenting to his request. She appointed the members of the tribunal with the Lord Justice Clerk (the Rt Hon Lady Dorrian) as its chair. On 18 December 2018, in terms of section 34 of the Courts and Judiciary (Scotland) Act 2008, the Lord President suspended the sheriff from office with immediate effect.

[10] Ryan Gare of the Judicial Office for Scotland was nominated as the clerk to the tribunal. In the first week of November 2018 he drafted an Initiating Statement, which outlined the background to the complaint. After revision and approval the Lord Justice Clerk sent it to the Rt Hon Lord Bracadale, a retired senator of the College of Justice, whom she appointed as the Investigating Officer. Shortly after he began his task he learned of the police investigation. He then suspended his own enquiries to await its outcome.

Police investigation

[11] The police statements from C1, and C2 were to the following effect:

(a) C1 has a clear recollection of a specific incident between 1992 and 2000. (In her affidavit she states that, on checking her diaries, the date was Friday 26 February 1999). She claimed that one evening in a pub the sheriff put his hand inside her jumper and bra and touched her naked right breast.

(b) C2 referred to two incidents that occurred in the early 2000s. She alleged that the JOH had: (i) kissed her on the mouth in a courtroom, and (ii) patted her bottom when congratulating her on a promotion she had received.

The disciplinary investigation resumes

[12] Mr Gare sent the witness statements to Lord Bracadale and queried whether he wished to interview C1 and C2. In his reply of 28 April 2019 Lord Bracadale stated:

> "… I cannot see [the sheriff] until I have decided whether the other two complainers should be included in the investigation. I do not want to make that decision until I have had an opportunity to look into the question of relevancy. … My concern is that if the investigation explores irrelevant matters it has the potential to undermine the whole process."

[13] After due reflection, Lord Bracadale concluded that his task had been identified in the exchange of letters between the Lord President and the First Minister. The investigation concerned X's allegations of misconduct. The much earlier allegations of C1 and C2 fell outside his remit.

[14] At a meeting on 7 May 2019, Lord Bracadale believes he told Mr Gare that the witness statements of C1 and C2 should be put with the papers and made available in due course to the presenting officer. Mr Gare does not recall such an instruction. He made an informal note that C1 and C2 were not relevant.

[15] Lord Bracadale interviewed X on 13 May 2019. In response to her enquiry about C1 and C2, he gave a non-committal reply. He indicated that he wished to focus on her complaints. He did not mention the allegations of C1 and C2 to the sheriff during his interview. The sheriff was unaware that they had given statements to the police.

[16] Lord Bracadale issued his report on 1 August 2019. It does not mention C1 and C2, but does state:

> "[17] While my investigation has focused on the events set out in the Statement of Reasons, I have also explored a number of other events in the surrounding months in 2018 to the extent that they might cast light on the events libelled in the Statement of Reasons and have a bearing on issues of credibility and reliability."

Presenting officer

[17] In the first week of February 2020, the Lord Justice Clerk appointed Stephen O'Rourke QC as the presenting officer and Mr Gare sent him: (i) the initiating statement, (ii) the investigating officer's report, and (iii) a bundle of documents, which did not include the witness statements of C1 and C2.

[18] The clerk then arranged a meeting between the investigating officer and the presenting officer. It took place in Parliament House on 12 February 2020. Mr O'Rourke described it as "friendly and constructive". The discussion focused on the report. Those present differed, however, about what was said about C1 and C2. In summary their respective positions were as follows.

Lord Bracadale	He did not take notes and cannot be certain as to what was said. He thought that he mentioned that the witness statements should be made available to the presenting officer.
Mr Gare	He is "positive" that the statements were mentioned, but he cannot remember by whom or what was said about them.
Mr O'Rourke	He took informal notes on his laptop. He had "… absolutely no recollection of any mention of other complainers".

[19] Because I have not heard the witnesses I cannot resolve these conflicting accounts. Fortunately it is unnecessary for me to do so. That is because the petition does not challenge

the investigating officer's actions or omissions. The one key fact that does emerge is that the presenting officer never saw the witness statements of C1 and C2. Mr Gare has no record of sending them to him.

Tribunal decision

[20] The presenting officer led evidence over a number of days before the tribunal. Shelagh McCall QC represented the sheriff. In her closing submissions she relied on letters of support vouching his prior good character. The tribunal found that, on the balance of probabilities, only one of X's allegations had been established - that he made an inappropriate remark about "a pretty face" and hugged someone he had, misguidedly, come to view as a friend. It concluded that the sheriff's conduct was "entirely inappropriate and failed to respect proper professional boundaries", but did not justify his removal from office.

Analysis

The potential importance of C1 and C2

[21] I begin with a query. Were the allegations made by C1 and C2 important? If they were of no moment in the context of the disciplinary process, then it is unnecessary to go further. But the view of those involved is clear. In his affidavit Lord Bracadale mentions that the statements:

> "might become of significance in the course of the tribunal in relation to issues of credibility. I was conscious that there was likely to be a head-on conflict between the evidence of the sheriff and the complainer as to what had happened and that therefore issues of credibility might become important. I had in mind that the judicial officeholder might put his good character in sexual matters in issue; he might claim in his responses or in evidence that such allegations had not previously been made against him; or that he had never engaged in inappropriate sexual behaviour in the past. I considered, therefore, that the statements should be available to the presenting officer so that, in the event of such an approach being

> adopted on behalf of the judicial officeholder, the presenting officer could apply to cross-examine on these allegations and, if appropriate, seek to lead evidence in replication. I recognised that whether such applications would be granted would be a matter for the tribunal considering all the circumstances."

[22] That is why he thought he had directed the clerk to pass the witness statements to the presenting officer.

[23] Mr O'Rourke was emphatic. He said that if he had known of this evidence:

> "I would definitely have acted upon it, since it would have been of great importance, providing as it would a potentially clear basis for a *Moorov o*f the respective complainers' accounts. It is unthinkable to me that other complainers would or could have been mentioned and that I would not have acted upon it. As far as I was concerned, there was the complaint … to the Lord President about the complainer; a Tribunal convened on that basis; a report prepared by the investigating officer on the basis of that complainer's position; 3 questions posed by the investigating officer in his report for the Tribunal to address and then my involvement to lay the evidence out before the Tribunal for its determination. Had I been made aware at any stage in the proceedings that there were in fact other complainers, I would have acted upon that information immediately. To this day, other than the information set out in the petition, I know nothing about the other complainers or what they speak to."

What if the statements had been made available?

[24] The next step is to suppose that the presenting officer had been made aware of the allegations. What would he have done? It seems likely that he would have instructed further inquiries. Depending on their outcome, he would then have had a number of options. He could have sought: (i) to amend the tribunal case to include the evidence of C1 and C2 as complainers in their own right, (ii) to call them as witnesses in support of X's allegations, or (iii) to use their statements in cross examination or in final submissions about character.

[25] No doubt any attempt to refer to this evidence would have resulted in an objection. But there are grounds for thinking that the tribunal would have ruled in favour of admissibility. Several factors point in that direction.

[26] Tribunals wish to arrive at their decisions knowing the full facts. The probative effect of having more than one complainer is well known. As it was put in *PGT* v *HMA* 2020 JC 205:

> "It defies reason to suggest that the existence of a second complainer, with an account of the same nature as is required to establish mutual corroboration, can play no part at all in assessing the credibility of the first complainer and *vice versa*." Lord Justice General (Carloway) para [21]

[27] Of course its impact on an individual case will vary. It may be minimal or considerable (*ibid* para [22]). As to the "good character" evidence, I infer that the tribunal would have been keen to know of any adverse matters because of the following passage:

> "We accept that to a degree the sheriff's career and reputation so far are relevant. The weight to be attached to this is however small compared with the weight to be attached to the nature and extent of the behaviour. For example, had we found the more serious allegations of ground two established, the weight to be attached to the evidence about the sheriff's professionalism and commitment would be much reduced. This would be even more so had we found ground three established, because not only would that conduct be of a degree of gravity similar to that alleged in ground two (b), it would have constituted a repetition of such behaviour. As it is we are dealing with one incident in which the sheriff made an inappropriate remark about 'a pretty face' and hugged someone he had, misguidedly, come to view as a friend. The evidence that the sheriff is regarded as pleasant, courteous, fair and firm in appropriate circumstances, and is generally highly regarded as a sheriff, is material which should be taken into account in the circumstances of our findings." (para 4.26)

[28] There is no formal constraint on admissibility. The 2015 rules envisage that the investigating officer may uncover matters beyond the terms of the original complaint. It would be odd if such new material could not figure in the tribunal hearing. The tribunal has wide powers to regulate its own procedure, including the power to amend documents, which must include the statement of reasons.

Should the tribunal decision stand?

[29] Mr Duncan urged me not to reopen the tribunal's findings. He advanced several arguments across a broad front. I shall deal with them in turn.

[30] First, X's case runs counter to the principle of finality. That is a weighty consideration. As Lord Wilberforce said in the *Ampthill Peerage Case* [1977] AC 547, 569:

> "Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry."

[31] It is difficult to apply the principle in this case. The witness statements in question were available and recognised as being potentially significant, but were not put into the hands of the presenting officer. That deprived the court of the opportunity to reach "the best and safest solution".

[32] Second, decisions of specialist tribunals should command respect: *PSA* v *Nursing and Midwifery Council* 2017 SC 542 paragraph 25.

[33] Again the force of that proposition is not in issue. But it is inapt in this case because X does not quarrel with the reasoning or approach of the tribunal. Instead she says that the integrity of its decision is compromised because it was not put in possession of all the facts.

[34] Third, it is argued that the evidence of C1 and C2 would not have altered the reliability findings. The tribunal had carefully cross-checked X's account against the other evidence. Here is the clearest example (at para 4.13):

> "From the whole evidence given by X about what she recalled once in the corridor, and from the other evidence about the nature of the corridor and the door, we were unable to conclude that there was any deliberate contact between them. We were unable to find that X was a reliable witness in this respect, although we have no doubt she genuinely believed something had happened … In short, the account X gave – and from which she would not be moved – that the sheriff was on her right as she passed through the door was unlikely to the point of impracticability."

[35] I reject this argument because, as all judges are aware, dynamics shift during the course of a hearing. Sometimes that shift can be subtle. Sometimes it can be profound. There is a real possibility that the allegations of C1 and C2 might have altered the decision on the merits.

[36] Fourth, Mr Duncan maintains that the tribunal only had jurisdiction to determine X's complaints. That flowed from the investigating officer's decision to exclude the witness statements of C1 and C2, which is not the subject of challenge.

[37] Fifth, the petition was irrelevant because it did not fit neatly into a recognised "GCHQ" ground of review: *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374.

[38] I shall address the fourth and fifth grounds together, because there is a line of jurisprudence that supports the approach taken in the petition, which asserts that there has been a breach of natural justice. Lord Bridge stated in *Lloyd* v *McMahon* [1987] AC 625 at page 702 that:

> "the so-called rules of natural justice are not engraved on tablets of stone … what the requirements of fairness demand … depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."

[39] The requirements of fairness were revisited in *R* v *Criminal Injuries Compensation Board, Ex parte* A [1999] 2 AC 330. A woman sought compensation for a serious sexual assault during the course of a robbery. The refusal to award her compensation was quashed by the House of Lords, because the Board had not been provided with a medical report that vouched her claim. Lord Slynn stated (345 C-E):

> "… what happened in these proceedings was a breach of the rules of natural justice and constituted unfairness. It does not seem to me to be necessary to find that

> anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness."

[40] In *E and R* v *Secretary of State for the Home Department* [2004] QB 1044 Carnwath LJ accepted that broad proposition. He added, at paragraph 66, however, that while not seeking to set out a precise code, an applicant had to satisfy four conditions before a decision could be quashed:

> it was a mistake as to an existing fact (including the availability of evidence on the matter);
>
> the fact must be established and not contentious;
>
> the appellant or his advisers must not have been responsible for the mistake; and
>
> the mistake must have played a material part in the reasoning.

[41] I conclude that the circumstances of the present case satisfied the CICB test. X did not receive a "fair crack of the whip": *Fairmount Investments* v *Secretary of State for the Environment* [1976] 1 WLR 1255, Lord Russell at page 1266. The circumstances also met the four stage test. The tribunal proceeded in ignorance of the availability of other evidence. That fact is not contentious. X and her advisers were not responsible for the mistake. It did have an impact on the reasoning. Accordingly I shall quash the tribunal's decision.

Further procedure

[42] Mr Duncan's principal submission was that I should decline to remit the matter. He pointed out that the sheriff was not responsible for the procedural flaw and that any further delay would prolong the stress and upset endured by him and his family. Alternatively if the matter was to be remitted, Mr Duncan submitted, and Mr Moynihan agreed, it should

return to the same tribunal. By contrast, Mr McBrearty and Ms Springham consider that a differently constituted tribunal is required.

[43] I conclude that the Courts Reform (Scotland) Act 2014 places that issue in the hands of the Lord President and the First Minister (section 21). My task has been to determine whether the tribunal's findings can stand. I have completed that task. I do not consider that it is appropriate or perhaps even competent for me to decide if (a) the original tribunal, if it does still exist, can reconsider this matter, (b) a new tribunal should be constituted, or (c) the individuals who should serve on such a tribunal.

[44] Were it competent for me to decide these matters I would conclude that the case should be determined by a freshly constituted tribunal. That avoids any risk of perceived unfairness or damage to public confidence: *HCA International Ltd* v *Competition and Markets Authority* [2015] 1 WLR 4341.