



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 33
XA96/18

Lord Justice Clerk
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal under section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007

by

Ms JANE BENSON

Appellant

against

a decision of the Scottish Legal Complaints Commission dated 29 May 2018

Appellant: O'Neill, Sol Adv; Scottish Government

Respondent: Welsh; Harper MacLeod

Interested Party: E Cairns

7 June 2019

[1] Ms Jane Benson (the appellant) is a solicitor and a member of the staff of the Crown Office and Procurator Fiscal Service (COPFS). Mr Edward Cairns made a number of complaints to the Scottish Legal Complaints Commission (the Commission) about the appellant and others in COPFS. The Commission organised these into 11 issues, the bulk of which, for various reasons, were ruled ineligible for investigation. The exceptions were issues 1, 4, and 5 (all of them relating to the appellant), which were to be remitted to the Law Society of Scotland for investigation. Ms Benson has appealed to the court against the

decisions in respect of these three issues, all in terms of section 21 of the Legal Profession and Legal Aid (Scotland) Act 2007. At the hearing Mr Cairns appeared on his own behalf as an interested party. In essence, the submission for the appellant is that any reasonable decision-maker would have concluded that the three issues should be rejected as being “totally without merit” or “vexatious”, or both, under and in terms of section 2(4)(b)(ii) of the Act. There is also a submission that the Commission applied the wrong legal test to the question of whether the complaints were totally without merit.

[2] The background to the complaints is that, since about 1993, Mr Cairns has been pursuing a claim that wrongdoing occurred in respect of the financial affairs of Enterprise Ayrshire, a branch of Scottish Enterprise. At the time Mr Cairns was employed by the organisation. The Commission and now the court have been provided with a substantial amount of documentation relating to Mr Cairns’ claim; its investigation by various bodies, including the police; and also correspondence over the years between Mr Cairns and, amongst others, the police and the prosecuting authorities. Mr Cairns is convinced that his concerns were well-founded, and he is aggrieved that no-one who has investigated the matter has concluded that criminal proceedings are merited.

[3] At the conclusion of Ms O’Neill’s submissions on behalf of the appellant, and after a short adjournment, Mr Welsh informed the court that the Commission no longer resisted the appeal. While no concession was made in respect of the challenge to the test applied by the Commission to the issue of “totally without merit”, it was accepted that it had been applied wrongly to the information and documentation before the Commission. The Commission invited the court to conclude that complaints 1, 4, and 5 should have been treated as both totally without merit and vexatious. No similar concession was made by Mr Cairns. At the hearing he lodged a further 38 page note of argument in support of his position that the

original claim in respect of Enterprise Ayrshire and the three complaints against the appellant were well-founded, and that the latter are not vexatious. That note, and indeed all of the documentation lodged by Mr Cairns and the other parties has been taken into account by the court.

General observations

[4] For a complaint to be accepted as eligible for investigation, there must be at least the potential for a positive finding by the professional body. Having regard to all of the information available to it, the court is of the view that it is clear beyond any reasonable doubt or uncertainty that the three complaints at the centre of this appeal are vexatious and totally without merit. Now, more than 25 years after the initial claims made by Mr Cairns about alleged wrongdoing at Enterprise Ayrshire, he is showing no signs that he will ever let matters go. It seems that he will constantly make allegations of misconduct or criminal activity against anyone who does not accept what he says or who does something with which he does not agree. It is not surprising to learn that he has been declared a vexatious litigant. It would appear that, relatively recently, he has decided that the Scottish Legal Complaints Commission can be another recipient of his complaints, this time against solicitors employed by COPFS, including the appellant.

Issue 1

[5] In accordance with her duties, which were of an administrative nature, the appellant informed Mr Cairns that certain material held by the service had been destroyed in accordance with its "records management policy" and that all other retained documentation would be destroyed. This was against the background that Mr Cairns' complaints concerning Enterprise Ayrshire had previously been examined on more than one occasion

and found to be baseless. Without a shred of evidence in its support, Mr Cairns has chosen to categorise this as the appellant colluding with Police Scotland and Scottish Enterprise to pervert the course of justice by destroying evidence. The court accepts that the Commission applied its mind to the correct test for a “totally without merit” complaint. In this regard reference can be made to *McSparran McCormack v SLCC* 2016 SC 413 at paragraphs 46 and 58. However, we consider that, on any reasonable appraisal, a decision-maker would be bound to conclude that there was no evidence upon which such a serious allegation could be upheld.

[6] In passing we note that it is not easy to understand why this complaint was treated as eligible for investigation, yet a more or less identical complaint (issue 8) was not. It is clear that the complaint in issue 1 has to proceed upon the basis that what was destroyed had evidential value in support of Mr Cairns’ concerns about Enterprise Ayrshire; yet in respect of issue 8 the Commission stated that the Crown Office is uniquely placed to assess that question, the view being taken that nothing amounting to relevant evidence was destroyed, and that Ms Benson’s involvement was in line with organisational policy. On the face of it, the same reasoning would apply to issue 1.

Issue 4

[7] Similar comments can be made in respect of issue 4. It alleges that Ms Benson did not pass allegations of misconduct by COPFS employees to independent Crown counsel because she was covering the misconduct of colleagues. Once again, the alleged motive is not supported by anything beyond mere assertion. (It would appear that allegations which could amount to criminal conduct will be passed to Crown counsel, but, unsurprisingly, this is not done if there is nothing to substantiate them.)

[8] The Commission states that in respect of issue 4 an investigation is required in order to see whether Mr Cairns is correct in stating that Ms Benson was covering up for her colleagues. If this general approach is correct, it is hard to identify how or why an allegation of wrongdoing could ever be dismissed as ineligible. While it is true that it is not for the Commission to investigate and determine a complaint, it does play a “sifting” or “gate-keeping” role to filter out cases where, for example, it is entirely clear that the available evidence cannot provide sufficient support for the complaint.

[9] In the present case, the court’s view is that the outcome of a referral would be bound to be a conclusion that the allegation was but a part of Mr Cairns’ vexatious fixation on pursuing his grievances against all who stand in his way, and that nothing would be gained from an investigation by the professional body. To use the language of *McSparran McCormack* (see above) it would not be open to the Law Society to uphold the complaint, thus any referral to it would be a waste of time.

Issue 5

[10] There is an additional problem in respect of issue 5. It has been allowed to proceed on the basis that, having enclosed with her letter of 18 May 2017 to Mr Cairns, amongst other things, a letter written to him in 2005 by someone else, the appellant might have been falsely stating that no other witnesses were available to corroborate the fraud allegations made by Mr Cairns. The court considers that the only available view of the matter is that the appellant was doing no more than copying a letter from the then Glasgow Area Procurator Fiscal, which was to the general effect that there were no criminal proceedings in respect of the complaints against members of Scottish Enterprise and Enterprise Ayrshire, and subsequently certain police officers, because no corroborative evidence had been found,

therefore there was a legal insufficiency of evidence. There is nothing in the appellant's letter of 18 May 2017 which suggests that she was taking personal responsibility for this view, nor that, even if she was, she was doing so on a false basis.

The decision on the appeal

[11] The court is satisfied that the Commission reached decisions which can be characterised as unreasonable and unsupported by sufficient evidence to jump even the low hurdle of the complaints not being "totally without merit". Whatever else this amounts to an error of law. That is sufficient for the disposal of the appeal; however, having regard to the test outlined in *Mazur v SLCC* [2018] CSIH 45, we are also satisfied that the three complaints are vexatious. The court will quash the Commission's decisions in respect of complaints 1, 4, and 5, and substitute decisions in accordance with the above conclusions.

Postscript

[12] It is likely that Mr Cairns will see this decision as further evidence of the covering up of wrongdoing; but we see no harm in encouraging him, if not to accept the outcome of the many investigations, at least to see that not everyone is pursuing a criminal conspiracy, and that a decision adverse to his wishes is not in itself evidence of malpractice by a professional person. If he can bring himself to this position, it is possible that he might be able to enjoy a degree of peace of mind in the years ahead.