SHERIFF APPEAL COURT

[2021] SAC (Civ) 30
HAM-A256-19

Sheriff Principal A Y Anwar

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL A Y ANWAR

in appeal by

PAUL DONNELLY

Pursuer and Appellant

against

SOUTH LANARKSHIRE COUNCIL

Defender and Respondent

Pursuer/Appellant: Mr Hutcheson; Hutchesons solicitors
Defender/Respondent: Ms Lunny; South Lanarkshire Council

7 September 2021

Introduction

[1] The appellant is employed within the respondent's Social Work Resources Team. The respondent has received two separate complaints from two members of its staff. One complaint, made on 7 August 2018 relates to the appellant's alleged conduct at a meeting on the same date; the second complaint, made on 10 September 2018, relates to the appellant's alleged conduct at a meeting on 6 September 2018 ("the complaints").

[2] The appellant seeks interdict to prevent the respondent from proceeding with its disciplinary procedures in relation to the complaints.

[3] On 9 July 2019 the sheriff refused interdict *ad interim*. On 9 December 2020 the sheriff refused a second motion for interdict *ad interim*. The appellant appeals each of these decisions.

Background

[4] It is necessary to set out the background in some detail. This being an appeal in relation to an application for interim interdict, the facts have not been established; the background to this matter is gleaned from the parties' pleadings and submissions and from the voluminous productions lodged and referred to.

[5] On 7 August 2018, the respondent received a complaint in relation to the appellant's conduct, from an employee, MM. On 10 September 2018, the respondent received a further complaint regarding the appellant's conduct from another employee, KB. The complaints were referred to the respondent's Head of Children and Justice Services (Mr P) as the Nominated Manager in terms of the respondent's Disciplinary Procedures for Local Government Employees and Craft Operatives dated September 2011 ("the Disciplinary Procedures"). The Nominated Manager is tasked with deciding whether a complaint should be progressed further under the Disciplinary Procedures. The respondent avers that as a consequence of the Nominated Manager and MM's periods of annual leave, and as MM had not decided whether she wished the complaint resolved informally or formally, no decision was made in relation to how to proceed until around the time KB submitted her complaint. Mr P then decided that the complaints be dealt with informally.

[6] On 20 September 2018, a meeting took place between the appellant and the respondent's East Kilbride Locality Manager (Dr A) to allow the complaints to be dealt with

informally. Following the meeting, Dr A wrote to the appellant on the same date. Dr A's letter (5/1/81 of process) states *inter alia:*

> "During our meeting, attended by [NM] (Fieldwork Manager), I outlined the nature of the complaints and outlined the purpose of the meeting was to alert you to how your conduct can be interpreted as inappropriate, provide an opportunity for you to share your reflections and agree actions to move forward . . . . . During our conversation, you acknowledged that elements of your conduct could be perceived an unbefitting and had previously agreed with [NM] to take remedial actions to apologise to [KB] in respect of some of the concerns she raised. On reflection, you indicated that some of the conduct issues were borne from frustration arising from your experience of not having a forum where options could be strategically considered. You also intimated that your interactions with [MM] have, since your appointment in 2016, been strained.
>
> Notwithstanding this, and in acknowledgment of how your conduct could be perceived by others, you agreed to the following actions
>
> 1. To reflect and temper your response within meetings and interactions with colleagues where your views may differ. I would wish to emphasise that this action however should not silence you in contributing your expert knowledge to the operational and strategic development of services
> 2. To actively utilise supervision sessions and the Locality management structure to share your frustrations and agree actions . . . ."

[7] In her letter, Dr A proposed a review of progress in 3 months and proposed the option of mediation which she noted the appellant to have been amenable to.

[8] In response, by letter of 26 September 2018 (6/1/2 of process) the appellant raised "a number of facts and context" which he considered to be important to understanding the issues set out in Dr A's letter of 20 September 2018. The facts and context which he wished to draw to the respondent's attention were set out in five numbered paragraphs. The first and third paragraphs read as follows:

> "1. I learned from the letter of 20 September 2018 that the complaints about the meetings on 7 August 2018 and 4 September 2018 were sent to [Mr P], Head of Service, in the form of a letter. I have never seen these letters nor have knowledge of their specific content. It would be reasonable and fair to see the content of any complaint letter against you and in order to prepare a response to any complaint it needs to be seen.

> 3. There has been no fact finding to establish if there was any inappropriate or unbefitting behaviour at the meetings of 7 August 2018 or 4 September 2018. In the absence of fact, all that remains is perception; perception cannot be relied upon to measure outcomes. Without the facts, it cannot be established that this sort of behaviour took place at the meetings of 7 August 2018 and 4 September 2018. The only means of establishing the facts is to talk to everyone who was at those meetings and establish what happened at them. To date this has not happened."

The appellant added " . . I accept the plan of action laid out in your letter of 20 September 2018 within the facts and context of my letter to you." The respondent avers that it understood the appellant to have accepted at the meeting on 20 September 2018 that his conduct complained of could be perceived as unbefitting (which I understand to be a reference to an objective assessment of his conduct) whereas his letter indicated that he only accepted that those who complained subjectively perceived it as unbefitting. The respondent avers that the appellant's letter of 26 September 2018 (particularly paragraphs numbered 1 and 3), demonstrated that no agreement had been reached at the meeting of 20 September 2018 and that the appellant took issue with the process. Accordingly, the respondent resolved to progress to a formal fact finding investigation in terms of its Disciplinary Procedures.

[9] The appellant was invited to attend a fact finding meeting on 21 December 2018 (5/1/83). By email dated 18 December 2018 (5/2/100) the appellant stated that he did not consent to the proposed fact finding meeting as the respondent had acted in breach of an agreement reached on 20 September 2018 that the complaints would be resolved informally. Additionally he objected to the fact finding meeting on the basis *inter alia* (a) that in terms of paragraph 5 of the ACAS Code of Practice on Disciplinary and Grievance Procedures, any disciplinary issue must be raised promptly and not unreasonably delayed; there had been a delay of over 4 months and 3 months in relation to the respective complaints; (b) he had not received adequate specification of the complaints against him; (c) all relevant parties had

not been interviewed; and (d) he objected to the involvement of Mr P in the process. He stated his intention to invoke a grievance "in respect of the prejudicial conduct of this matter against me."

[10] The respondent's Grievance Procedures for Local Government Employees and Craft Operatives June 11 ("the Grievance Procedures") do not apply to "matters of discipline which are covered separately" (paragraph 2.1 of 5/1/18). Extensive correspondence in relation to the interaction between the Grievance Procedures and the Disciplinary Procedures was exchanged between the parties. By letter dated 18 January 2019 (5/2/104), the respondent wrote to the appellant's agent in the following terms:

> "The issues Mr Donnelly has raised in his previous correspondence are linked to the discipline process. As previously explained to Mr Donnelly (email dated 18 December 2018), the grievance procedures state that matters of discipline are excluded, which is why Mr Donnelly is unable to raise a grievance.
>
> It is important to point out that we are not denying Mr Donnelly the right to raise any issues or concerns he has. When Mr Donnelly attends the fact finding meeting scheduled for Friday 25 January 2019, he will have the opportunity to put forward these issues and explain the background to them in more detail. These issues will then be considered as part of the formal fact finding investigation. If, following this, there are any residual issues or concerns that remain outstanding for Mr Donnelly, he will have the opportunity to exercise his rights in accordance with South Lanarkshire Council's Grievance procedures."

[11] The appellant contends that the respondent had failed to comply with its obligation in terms of section 3(1)(b)(ii) and section 3(1)(c) of the Employment Rights Act 1996 by failing to specify a person to whom the appellant could submit a grievance and to explain or provide written information on its Grievance Procedure. The appellant maintained that he was being prevented from submitting a grievance. The respondent maintained that if the appellant did not regard his grievance as being linked to matters of discipline, he could submit a grievance. By letter dated 18 January 2019, the appellant's agent wrote to the respondent stating that:

> "it is absolutely clear that Mr Donnelly's complaint concerns the propriety of the proposed [fact finding] meeting of 25 January 2019. Accordingly, it is wholly inappropriate that the complaint would only be addressed at a meeting which my client complains should not take place." (5/2/105).

[12] The proposed meeting of 25 January 2019 did not take place. By letter dated 5 February 2019, the respondent set out why it was proceeding with a fact finding meeting; why there had been no unreasonable delay in doing so (referring to periods of annual leave of those involved, the time taken in an attempt to resolve matters informally, a period of bereavement leave for MM, the appellant's annual leave and the time taken liaising with the appellant to offer a date for a meeting with him); that it considered that the appellant had been provided with sufficient specification of the complaints to allow him to discuss an informal resolution at the meeting on 20 September 2018; and while not accepting that there was any difficulty or impropriety with the involvement of Mr P in the process, indicated that it would agree to appointing another Nominated Manager to allow matters to progress.

[13] A further fact finding meeting was arranged for 7 March 2019. That was cancelled as correspondence was ongoing between the parties regarding the interaction between the Grievance and Disciplinary Procedures. By letter dated 22 February 2019 (5/2/112) the appellant's agent again stated that the appellant's grievance "is that there is no entitlement to proceed with the disciplinary case". In response on 7 March 2019, the respondent stated that

> "it is the standard practice utilised by the council and recognised by Trade Unions that concerns inextricably related to a case being pursued under the Disciplinary Procedures be raised whilst dealing with that process . . . It is the Council's position that Mr Donnelly cannot seek to prevent the Council proceeding with its Disciplinary Procedures by way of raising a grievance."

In light of medical concerns raised on behalf of the appellant, the respondent agreed that rather than arrange a further fact finding meeting, the appellant would be provided with questions to which he could respond in writing.

[14] There then followed further correspondence during which the appellant's agent required sight of 'supporting authorities' in relation to what had been described as 'recognised Trade Union practice' and sought confirmation that the views expressed by the respondent in the letter of 7 March 2019 were expressed by someone with sufficient authority to do so. The appellant maintained that the respondent was acting in breach of section 3(1)(b)(ii) of the 1996 Act. The respondent maintained that if the appellant did not agree that his grievance was linked to the disciplinary process, he could submit a grievance in the ordinary course.

[15] On 16 May 2019, the respondent wrote to the appellant with a list of questions in lieu of his attendance at a fact finding meeting. A response was requested by 31 May 2019.

[16] On 28 May 2019, the appellant's agent wrote to a Councillor who acted as Chair of South Lanarkshire Council Social Work Resources Committee to bring matters to his attention and sought his confirmation that pending a resolution of matters, the appellant would not require to respond to the written question provided to him (5/1/92). On 31 May 2019, the respondent wrote to the appellant's agent advising that while employees may write to elected members as an individual or a service user, employment matters required to be dealt with through the appropriate complaints procedure (5/1/98). The respondent advised that if the appellant did not wish to respond to the written questions, the investigation would be finalised without his responses.

[17] On 10 June 2019, the appellant's motion for interim interdict preventing the respondent from proceeding with its Disciplinary Procedure called before a sheriff. The

hearing was continued to 9 July 2019. The sheriff refused the appellant's motion for interim interdict.

[18] Following further correspondence between the parties, the appellant submitted a grievance on 14 August 2019 ("the Grievance"). He responded with his answers to the written questions on 13 August 2019. On completion of the fact finding investigation on 25 September 2019, the respondent took the decision to proceed to a disciplinary hearing. By letter dated 25 October 2019 (6/3/16), the respondent intimated to the appellant that a disciplinary hearing would not be held until after the Grievance Procedure had been completed.

[19] The final paragraph of the Grievance (5/4/144) stated:

> "This Grievance concerns my Department, the Human Resources Department, the Legal Department and the Chief Executive. It would not be appropriate [for] any of these departments to determine my Grievance. Further, and in any event, as in each case I was improperly treated I have little confidence in these Departments. . . it is essential in order to restore such confidence that my Grievance should be determined by a suitably qualified person external to my employer and selected by mutual agreement."

[20] Upon receipt of the Grievance, the respondent invited the appellant to attend a "Stage 2 Grievance Hearing" on 27 August 2019 (6/3/17). There followed correspondence between the parties in relation to whether the Grievance should be dealt with under Stage 2 of the Grievance Procedures. The grievance form submitted by the appellant was one which was used for a Stage 2 or Stage 3 grievance. The respondent explained by letter dated 23 August 2019 (6/3/19) that it was not appropriate for an employee to be consulted on the selection of the officer nominated to hear a grievance nor necessary for an external party to be appointed to deal with the grievance. In light of the exchange of correspondence, the Stage 2 Grievance Hearing was re-arranged for 30 August 2019. The appellant wished to take legal advice and sought a postponement. The meeting was re-arranged for

25 September 2019. By email dated 6 September 2019 (6/3/22) the appellant intimated that he wished to have a colleague and employee of the respondent accompany him to the meeting. The appellant wished to audio-record the discussion at the meeting. The respondent advised that this was not in accordance with its procedures but explained that a note of the meeting would be taken by a note taker and provided to the appellant.

[21] The Stage 2 Grievance Meeting took place on 25 September 2019. By letter dated 28 October 2019, the respondent advised that the Grievance had not been upheld (5/5/163-181). The appellant appealed to the respondent's Grievance and Disputes Panel on 10 November 2019 (5/6/182). Paragraph 5.3.3 of the Grievance Procedure is in the following terms:

> "NB Prior to the appeal being heard by the Panel, a meeting of the Parties concerned will be convened in an attempt to resolve the matter. This will be co-ordinated by Corporate Personnel. It is not within the Panel's powers to grant the resolution sought, or is contrary to existing Council policies and/or agreements, this will be deemed to as the end of the internal process."

The respondent invited the appellant to such a meeting on 27 November 2019. An exchange of 21 emails between the parties in the period 22 November to 10 December 2019 followed (item 6/3/28). The appellant did not agree that any such meeting could be held in terms of the Grievance Procedures and questioned whether the resolution sought by him was within the Panel's power to grant. He indicated that he would be prepared to attend on a voluntary basis, provided his solicitor was in attendance. The respondent explained that in term of the Grievance Procedures (paragraph 4), a solicitor could not be in attendance. The appellant refused to attend the meeting proposed in terms of paragraph 5.3.3 of the respondent's grievance procedure.

[22] 13 February 2020 was identified as a date suitable to the Panel members for the Appeal to be heard. Further correspondence followed in the period 16 January 2020 to 20 February 2020 between the parties relating to the question of whether the appellant could have his solicitor attend the Appeal hearing (item 6/3/30). The appellant sought to have his solicitor attend either as an 'adviser' or as a 'companion'. The respondent contended that a solicitor was not entitled to accompany the appellant as a "companion" in terms of section 4 of the Grievance Procedures. It contended that the reference to the term "adviser" in the Grievance Procedures was intended to cover individuals providing support but did not include a legal adviser. The respondent then arranged for the Panel to hear the Appeal on 12 March 2020. The Panel gave its decision orally at the conclusion of the Appeal, followed by confirmation in writing (5/7/194). The Appeal was rejected.

[23] As the Grievance Procedures had concluded, the respondent intended to continue with the disciplinary process in relation to the complaints. The respondent avers that owing to the national lockdown caused by the Coronavirus pandemic, a disciplinary hearing could not be arranged. It avers that consultations were required with the Trade Union as to how the Disciplinary and Grievance Procedures could be restored during the pandemic in respect of all of its employees. The respondent avers that it began consulting with its Trade Union at the end of May 2020 and reached agreement on 11 June 2020. The respondent then wrote to the appellant on 23 June 2020 advising that it intended to fix a disciplinary hearing.

[24] By interlocutor dated 23 June 2020, the court allowed the pursuer time to lodge a minute of amendment in these proceedings. The solicitor for the appellant explained that upon conclusion of the amendment procedure, he intended to renew his motion for interim interdict. On 9 December 2020, a lengthy amendment procedure was completed, the

appellant's renewed motion for interim interdict was refused and a diet of debate was assigned.

The grounds of appeal

[25] The single ground of appeal advanced is that the sheriff erred by concluding that there had been no material change of circumstances when he refused to grant interim interdict on 9 December 2020; his decision was 'one which no Sheriff acting reasonably would have made and that it was manifestly inequitable'. This court is invited to find that there had been a material change of circumstances and to consider the appellant's motion for interim interdict *de novo.*

Submissions

[26] Before summarising, as best the court can, the submissions made in this appeal, it is necessary to comment upon the pleadings and the information placed before the court.

[27] Parties are each responsible for their own pleadings, the purpose of which is to set out the material facts and the propositions of law on which reliance is placed in support of a claim or defence. The court should be able to identify with precision the matters upon which parties agree and those upon which they differ and by doing so, identify the case upon which it is asked to adjudicate. A clear understanding of the rules of pleadings (see Macphail, *Sheriff Court Practice,* 3rd ed, chapter 9*)* equips pleaders to better serve those instructing them and assists the court in performing its function. Lucid, well-ordered and concise written pleadings assist the court in its task. Conversely, unintelligible, verbose pleadings, averments of evidence and legal submissions in the form of averments, significantly hinder the court. In this regard, it is the pursuer who "sets the tone" with a

defender required to answer the pursuer's averments. It is the pursuer who is responsible for the presentation and form of the record.

[28] In this action, the record consists of 62 pages of averments, many of which are typed in small font size with minimal line spacing. There has been little attempt over these 62 pages to present the pleadings in any recognisable order; much evidence is pled, there is no consistent chronological sequence to the averments and no discernible attempt to lay out the averments in a manner which might focus the issues upon which the court is asked to adjudicate. Identifying with precision what is agreed and where parties differ has been an almost impossible task. Identifying what is material and what is peripheral in the long and cumbersome narratives is yet more challenging. Many averments consist of lengthy sentences containing numerous statements of fact. Article 16 of Condescendence extends to 37 separate paragraphs over 8 pages. The approach to Article 16 is mirrored in many of the 22 Articles.

[29] A notable feature of the submissions for both parties has been to provide the court with cross references to a vast quantity of material, which the sheriff had aptly described as 'bewildering' in its scale. The appellant's note of argument is particularly lengthy, diffuse and repetitive. That note of argument extends to 42 pages. The first mention of any authority to support any proposition advanced is found on page 39 of the note. In the preceding 38 pages, the note of argument narrates at length the factual background to the dispute and analyses in a manner more appropriately suited to the analysis of a contractual or conveyancing document, the import of particular words, sentences or paragraphs in the correspondence passing between the parties. It contains little by way of specification of errors said to have been made by the sheriff. Many words appear mid-sentence in capital letters, presumably by way of emphasis. Pages 5 and 6 are almost entirely in capital letters.

Having spent considerable time unpicking and understanding the pleadings and the notes of argument, I invited the parties to produce a one page summary of their salient arguments. The margins on the appellant's summary had been extended so far that the words had fallen off the right hand side of the page.

[30] It is simply impractical to provide a reasoned response to each point made by the parties. I will accordingly confine my discussion to the salient points pertinent to the appeal.

Submissions for the appellant

[31] The solicitor for the appellant adopted his Note of Argument.

[32] It was submitted that the sheriff had been wrong to conclude that there had been no material change of circumstances as at 9 December 2020. When the first motion for interim interdict had been presented to the court the appellant had an alternative remedy, namely, he could raise a grievance. That was no longer available to him. In July 2019, the respondent had proposed only a fact finding meeting. In December 2020, the respondent sought to proceed with a disciplinary hearing. Finally, the delay in progressing the fact finding meeting, the appellant's Grievance and the delays caused by the pandemic all represented a material change of circumstances.

[33] The appellant invited the court to consider the motion for interim interdict *de novo.* The appellant had established a *prima facie* case. Firstly, the respondent had breached the terms imported and implied into the parties' contract of employment that disciplinary matters would be dealt with promptly and would be investigated within 14 days. Paragraph 4 of the ACAS Code of Practice on Disciplinary and Grievance Procedures (which the respondent had undertaken to comply with in terms of its own Disciplinary Procedures)

required matters to be dealt with promptly. Section 2.1 of the respondent's Disciplinary Handbook (5/1/34) stated that

> "a fact finding investigation must be initiated and be completed within a reasonable timescale given the nature and complexity of the situation, normally within 14 days . . .the employee will be advised of any change to the timescale and the reason for it".

Investigation into MM's complaint did not commence within 14 days. It was not raised with the appellant until after a period of 44 days. The appellant had been advised on 10 October 2018 that a fact finding investigation would take place, however the 14 day timescale had not been varied. By that stage, 30 days had passed since KB's compliant and 64 days had passed since MM's complaint. On 4 December 2018, Mr P advised that a fact finding interview would take place after "all relevant witnesses had been interviewed" (5/1/34 and 5/2/139). As at 28 November 2018, only five witnesses of a potential sixteen had been interviewed. Two further witnesses were interviewed on 5 and 7 December 2018. A further nine witnesses had not been interviewed. Secondly, the respondent had failed to provide fair notice of the complaints against the appellant. Written specification had not been provided until 16 May 2019 (6/1/17). Thirdly, the respondent had repudiated an agreement reached on 20 September 2018 to deal with matters informally. The appellant's letter of 26 September 2018 did not indicate that he did not accept the discussion which took place on 20 September 2018. Fourth, the respondent had failed to allow the appellant to invoke a grievance in breach of section 3 of the Employment Rights Act 1996. Section 2.1 of the Grievance Procedures excludes matters of discipline which it states are "covered separately". No separate procedure was provided. The respondent only departed from its position and allowed a grievance to be submitted at the hearing on interim interdict on 9 July 2019. The respondent took a lengthy period to consider the Grievance and failed to

keep the appellant updated on progress. Fifth, the respondent failed to address many of the complaints in the Grievance and the findings which were made were perverse and were findings which no reasonable person or persons determining the Grievance would have made (pages 22-37 of the appellant's note of argument set out the appellant's challenges to the decision of the Panel which determined the Grievance and the appellant's challenges to the decision on appeal). Sixth, it was submitted that the respondent had acted in breach of its duty of care to the appellant; it was submitted that the respondent's actings and omissions "comprise persistent, chronic, wilful breaches" of its duty of care and that such conduct has caused injury and is liable to persist in causing injury to the appellant. Reference was made to information from the appellant's medical practitioner (5/1/4, 5/3/143, 5/7/193).

[34] It was accepted on behalf on the appellant that the court should not "intervene to restrain the [respondent] of its disciplinary proceedings, which form part of the contract of employment between the parties unless there has been a material failing on its part". It was submitted that the failings set out in the appellant's submission were material. The respondent had breached the parties' contract of employment, breached its own procedures, breached the ACAS procedures, and breached duties it owed to the appellant. The balance of convenience favoured the granting of an interim interdict because of the concerns regarding the appellant's health, the strength of the appellant's prima facie case (Robinson, *The Law of Interdict,* p176) and because a refusal to grant interim interdict would be a determinative, adverse, final outcome for the appellant (*Trapp* v *Aberdeenshire County Council* 1960 SC 302). Interdict may be granted in such cases (*Stevens* v *University of Birmingham* 2015 IRLR *899* and *Edwards* v *Chesterfield Royal Hospital NHS Foundation Trust* [2010] EWCA Civ 571).

Submissions for the respondent

[35] On behalf of the respondent, it was submitted that an employer has a power vested in it to manage its employees. The respondent has acted fairly and is entitled to use its broad discretion to deploy its disciplinary procedures (*Al-Mishlab* v *Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC 3096). None of the actions or alleged failures referred to by the appellant amount to a material breach of contract justifying interdict (*West London Mental Health NHS Trust* v *Chhabra* [2013] UKSC 80). The actions or alleged failures of the respondent have not destroyed or seriously damaged the implied relationship of trust and confidence between the parties such as to amount to a material breach of contract (*North West Anglia NHS Foundation Trust* v *Dr Andrew Gregg* [2019] EWCA Civ 387).

[36] There had been no material change of circumstances. The appellant sought interim interdict in July 2019 to allow him to proceed with his Grievance. That was refused. The appellant has now submitted a Grievance and exhausted the Grievance Procedures, which have been dealt with fully and reasonably. He is bound by his contract of employment to comply with the Disciplinary Procedures. While the solicitor for the appellant claimed before this court that the proceedings were continued on the premise that should the Grievance not be upheld, the appellant would be able to renew his motion for interim interdict, the respondent had made no such concession.

[37] It was submitted that in any event, the sheriff has been correct to refuse interim interdict on 9 July 2019. The appellant had failed to satisfy the court that he had a *prima facie* case or that the balance of convenience justified interim interdict. Firstly, there had been no delay in progressing the disciplinary process. The respondent required to take account of periods of annual leave and the wishes of MM and KB before deciding how to proceed. The

respondent has resolved to deal with the complaint informally. When dealing with matters informally, there was no requirement to carry out an investigation (paragraph 1.6 of the Disciplinary Procedures), thus there can be no compliant of delay during this period. The formal stage of the disciplinary process which included the fact finding investigation was only invoked because of the appellant's response to the letter of 20 September 2018 and subsequent correspondence. The fact finding investigation then proceeded timeously, taking account of the availability of those who required to be interviewed, including one witness who required bereavement leave. There is no mandatory timescale for completion of investigations in section 2.1 of the Disciplinary Procedures; there has been no breach of those procedures. Insofar as the appellant's complaint that he was not advised of a timescale within which the fact finding investigation would be completed, that was a minor irregularity. Mr P stated in correspondence to the appellant on 4 December 2019 that all "relevant" parties would be interviewed. It was for the respondent to decide the scope of its investigation.

[38] The appellant has been the cause of delays. He refused to take part in fact finding meetings. It was unreasonable for him to do so. He delayed in responding to written questions provided to him, only doing so in August 2019.

[39] The respondent required to write a fact finding report after receipt of the responses to the written questions. This required to be considered by a Nominated Manager. The Nominated Manager provided his decision that matters should proceed to a disciplinary hearing, after consideration of the fact finding report, on 25 October 2019. Given the volume and nature of the papers, the work pattern of the employees involved, and the annual leave of the Nominated Manager, this was not an unreasonable delay.

[40] Having chosen to invoke the Grievance Procedures, the appellant then questioned the terms and application of those procedures; he questioned why the Grievance was being dealt with at Stage 2, he questioned the appointment of the Nominated Manager, he submitted his appeal to the decision on the Grievance on 10 November and then refused to take part in a meeting organised in terms of the Grievance Procedures. He insisted that his solicitor be present. It was unreasonable of him to do so and his actions caused delay. The respondent was unable to arrange a meeting to discuss the Grievance within the 5 days envisaged by the procedures due to the appellant's challenges, his requests to postpone the meeting and because his Grievance extended to 112 pages and required careful consideration. The Appeal hearing was convened as soon as practicable, taking account of the festive holidays and the need to ensure the availability of those who would hear the appeal.

[41] The respondent had provided the appellant with sufficient notice of the allegations against him. The appellant had not complained that he did not have sufficient information when parties believed they had reached an agreed outcome at the informal meeting on 20 September 2018. Further information was provided by letter dated 12 December 2018 inviting the appellant to a fact finding meeting and again on 16 May 2019.

[42] It was clear that the appellant did not accept the outcome of the informal meeting on 20 September 2018 nor the process involved. He referred to the process as "flawed" in his email of 12 October 2018. It cannot be said that the respondent repudiated any agreement; it was clear that no agreement had been reached.

[43] In relation to section 3 of the Employment Rights Act 1996, the respondent had not at any point denied the appellant the right to invoke the Grievance Procedures. *Esto*, the

respondent had done so (which was denied), jurisdiction to deal with breaches of section 3 falls to the Employment Tribunal in terms of section 11 of the Act.

[44] The decision of the Nominated Manager in relation to the Grievance could not be described as unreasonable nor was there any delay in that process. Each of the appellant's complaints, which also form part of the claims in these proceedings regarding (a) "inordinate and inexcusable delay in progressing the disciplinary procedures"; (b) refusal to give fair notice of the complaints; (c) repudiation of any agreement already reached; (d) prevention from invoking a Grievance, was considered and rejected. *Esto*, the respondent did not reach a reasonable conclusion on the Grievance (which is denied), any defect was cured when the Grievance was considered upon appeal by the Grievance and Disputes Panel. That Panel comprised elected members of the respondent; no employee of the respondent took part in the decision making.

[45] Finally, whereas it was accepted that the appellant suffered from certain medical conditions, it was not accepted that any of the information produced demonstrated a link between those conditions and any conduct on the part of the respondent. The respondent has repeatedly supported the appellant in relation to any ill health. The appellant had only two short periods of sick absence from work due to illness since the first complaint arose in August 2018. The respondent is entitled to deploy its disciplinary procedures despite the health conditions referred to.

[46] In relation to the balance of convenience, there is public interest in allowing the internal processes to run their course and courts should be slow to interfere. There is no prejudice arising simply by virtue of the passage of time; the appellant has produced detailed notes of the circumstances in which the conduct which gave rise to the complaints took place. Interviews have already taken place with seven witnesses. The necessary

information is available. Moreover, the nature of the allegations is such that, even if the complaints are upheld, the appellant is not in danger of losing his employment.

Discussion

[47] The principal question for this court is whether the sheriff erred in the exercise of his discretion by refusing to grant the appellant's renewed motion for interim interdict. An appellate court will only interfere with the decision of the sheriff on one or more of the conventional grounds for doing so: a failure to exercise a discretion, unreasonableness, a misdirection or error of law, the taking into account of irrelevant material or omission of relevant material.

[48] The appellant contends that the sheriff failed to pay due regard to the following factors which are said to amount to a material change of circumstances: (a) that having exhausted the Grievance Procedures, the appellant now had no alternative remedy; (b) the respondent now sought to convene a disciplinary hearing rather than a fact finding exercise in respect of the complaints; and (c) the appellant was now further prejudiced by the further delays since 9 July 2019.

[49] While the sheriff's decision is stated in very brief terms, it is clear from the sheriff's summary of the background circumstances (at paragraph 4 of his note) that when he refused the first application for interim interdict, he was aware the appellant had sought to invoke a grievance on 18 December 2018. At paragraph 5 of his note, the sheriff summarises the submissions made on behalf of the appellant, namely that "the disciplinary proceedings should not be taking place while the grievance was on-going". That the grievance procedures may be exhausted and the outcome may or may not be favourable to the appellant had no bearing upon the sheriff's decision to refuse interim interdict in July 2019.

He stated in terms "it appeared to be in the interests of all to ascertain what had transpired and that this should be progressed rather than delayed or halted." The sheriff's decision to refuse interim interdict was not predicated upon nor influenced by the existence or otherwise of an alternative remedy; the sheriff had not been persuaded that the test for interim interdict had been met. It is not surprising then, that upon consideration of the renewed motion for interim interdict, the sheriff was not persuaded that the conclusion of the Grievance Procedures represented a material change of circumstances. He was correct to do so.

[50] Similarly, when refusing the first application for interim interdict, the sheriff was aware that the respondent may continue with its Disciplinary Procedures in respect of the complaints. He expressed a view that it was in the interests of all parties that the complaints be investigated. The respondent had provided no undertaking to the court that it would not progress its Disciplinary Procedures. The respondent wrote to the appellant in October 2019, 3 months after the sheriff's refusal to grant interim interdict, advising that it would not continue with its Disciplinary Procedures pending the conclusion of the Grievance Procedures. Following the conclusion of the Grievance Procedures, having been advised by the appellant's agent that a second application for interim interdict would be presented to the court, the respondent refrained from progressing its Disciplinary Procedures. It was not required to do so by the court. It was an entirely foreseeable consequence of the sheriff's decision to refuse interim interdict in July 2019 that the Disciplinary Procedures would run their course. The sheriff did not err in his assessment that the respondent's decision to now proceed to a disciplinary hearing rather than a fact finding meeting, being part of that Disciplinary Process, did not amount to a material change of circumstances.

[51] Finally, the sheriff was correct to conclude that the delays since July 2019 did not amount to a material change of circumstances. On behalf of the appellant an unhelpfully simplistic and repetitive approach was adopted in submissions: the number of days and months were calculated from the date of the complaints to various events which had occurred since, without any regard to the context in which those delays had occurred. It is not disputed that the respondent had sought to convene a fact finding meeting in relation to the complaints since December 2018. Voluminous correspondence followed between the parties. The respondent sought answers to written questions from the appellant in May 2019 in lieu of his attendance at a fact finding meeting. Those answers were not received until August 2019, after the refusal of the first motion for interim interdict. Since then delays have occurred in the context of the submission and conclusion of the Grievance (including the appeal process), the respondent's decision (which is not challenged by the appellant) not to proceed to a disciplinary hearing while the Grievance was ongoing and while a lengthy amendment procedure was completed in these proceedings. The sheriff addresses the issue of delay in paragraph 12 of his note. He was correct to conclude that the context in which these delays had occurred was relevant. Again, while the sheriff's decision of 9 December 2019 is stated in very brief terms, he clearly applied his mind to the question of delay and concluded that "there were no material changes of circumstances which seriously impacted upon the previous decision". I am not persuaded that he failed to pay due regard to the effect of any delays since July 2019. It was submitted that those delays had prejudiced the appellant. In that regard, the appellant bears a measure of responsibility, as noted by the sheriff "one effect of the current action and its interim procedure is to achieve, at least on a temporary basis, the goal sought of preventing the disciplinary procedure from progressing."

[52] Having found that the sheriff has not erred, the appeal falls to be refused. That being so, there is no need to consider the appellant's motion for interim interdict *de novo.* However, lest I am wrong, having regard to the lengthy submissions made in respect of the motion, I should make is clear that, I would not have granted interim interdict. For the same reasons, I am not persuaded that the sheriff erred in refusing to grant interim interdict on 9 July 2019.

[53] When considering an application for interim interdict, the court can, of course, only take a provisional view of the issues raised. Having considered the averments, the productions referred to and the submissions, I have come to the conclusion that the appellant has, at best, a weak *prima facie* case and that the balance of convenience does not favour the orders sought.

[54] The gravamen of the appellant's case is that the respondent has acted in breach of the implied term of trust and confidence in the employment relationship. An employer is required:

> "… not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages…The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer." (per Lord Nicolls of Birkenhead in *Malik* v *BCCI* [1998] AC 20, at p35).

As Lord Steyn noted in *Malik* (at p53):

> ". . the implied mutual obligation of trust and confidence applies only where there is no 'reasonable and proper cause' for the employers' conduct, and then only if the conduct is calculated to destroy or *seriously* damage the relationship of trust and confidence. That circumscribes the potential reach and scope of the implied obligation".

[55] Lady Justice Hale (as she then was) described the test as a "severe one" in *Gogay* v *Hertfordshire County Council* [2000] IRLR 703. The court will ordinarily require strong or

compelling reasons or serious irregularities before it intervenes in disciplinary procedures. Lord Hodge, delivering the unanimous decision of the Supreme Court in *Chhabra* (at paragraph 39) explained the approach of the courts to an application to intervene in disciplinary proceedings in the following terms:

> "As a general rule it is not appropriate for the courts to intervene to remedy minor irregularities in the course of disciplinary proceedings between employer and employee - its role is not the 'micro-management' of such proceedings: *Kulkarni* v *Milton Keynes Hospital NHS Foundation Trust [2010] ICR 101*, para 22. Such intervention would produce unnecessary delay and expense."

[56] More recently, in *Al-Mishlab*, Mr Justice Greene (at paragraphs 16-19) set out a useful summary of the principles to be considered:

> "16. First, in an employment context there is a power vested in the employer to manage employees, which includes establishing relevant facts and deciding how these facts affect future relations. Even where internal procedures are detailed the purpose of those procedures is to facilitate the employer's managerial power. Where detailed procedures are silent on the matter then the fallback is that it is a managerial discretion for the employer to decide upon in relation to that gap. . .
>
> 17. Secondly, it is accepted that there are implied terms in the Applicant's contract that neither party will without reasonable and proper cause act in a manner that is calculated or likely to destroy or seriously damage the relationship of trust and confidence and that the defendant will in any event act fairly in the conduct of an internal disciplinary or similar process. It is therefore accepted that implied terms constrain the exercise of the employer's discretion. . .
>
> 18. Thirdly, it is submitted that the court should not engage in micro-management of employment procedures. . .
>
> 19. Fourth, there is a public interest in allowing internal processes to run their course and courts should be slow to interfere if disputed issues can be sorted out and resolved within the framework of the internal procedure itself. . ."

[57] In my judgment, the various irregularities averred by the appellant do not singly or cumulatively justify intervention by the court.

[58] First, neither paragraph 4 of the ACAS Code of Practice on Disciplinary and Grievance Procedures nor the Disciplinary Procedures (section 2.1) referred to by the

appellant set out a mandatory timescale in which investigations required to take place. Both required matters to be dealt with "promptly". Insofar as the appellant relies upon the respondent's Disciplinary Handbook, it required fact finding investigations to be completed "within a reasonable timescale given the nature and complexity of the situation, normally within 14 days." The respondent's explanation for the delays and the appellant's contribution to these delays has been set out in detail above. It cannot reasonably be maintained that there was no reasonable or proper cause for these delays or that they were calculated to destroy or seriously damage the relationship of trust and confidence between the parties. Insofar as paragraph 2.2 of the Disciplinary Procedures required an employee to be advised of "an indication of the expected timescale" of a fact finding investigation, a failure to do so, in my judgment amounts to no more than a minor irregularity.

[59] Second, the appellant contends that the respondent had undertaken to interview all witnesses and that many witnesses had not been interviewed. That does not appear to be correct. What Mr P in fact stated in his email of 4 December 2018 was that "all relevant" witnesses would be interviewed. The scope of the investigation was a matter for the respondent in terms of its Disciplinary Procedures. Beyond a statement in the appellant's submissions that all witnesses have not been interviewed, it is not clear on what basis it is said that a failure to interview any further witnesses would be prejudicial to him. I am not persuaded that there are adequate averments to support the contention that a failure to interview further witnesses is a serious irregularity.

[60] Third, insofar as the appellant contends that there had been a failure to provide adequate specification of the complaints against him, his own averments do not support that position. It is clear from the letter of 20 September 2018, that the appellant had sufficient information to allow him to discuss matters informally, to acknowledge his conduct, to

explain his conduct, to have agreed previously to take remedial action to apologise to one of the complainers and to agree to an action plan to address his conduct.

[61] Fourth, in my judgment, it cannot reasonably be maintained that there had been a failure on the part of the respondent to allow the appellant to invoke a grievance; the parties differed in relation to the forum in which such a grievance could be invoked and in relation to the interaction between the Grievance and Disciplinary Procedures. Had the appellant disagreed with the respondent's position, he was able to invoke a grievance at any time and indeed did so in August 2019 following the refusal of the first application for interim interdict. I am also not persuaded that any alleged failure to provide a statement in terms of section 3(1)(b)(ii) of the 1996 Act can or should be treated as an *ex facie* breach of the implied term of trust and confidence in the employment relationship. Parliament has provided a remedy in the event of such a failure, in the form of a reference to the Employment Tribunal in terms of section 11 of the 1996 Act.

[62] Fifth, the Grievance has been considered and adjudicated upon in terms of the appellant's processes and it has been the subject of an appeal by individuals unconnected to the disciplinary matters. I am not satisfied that the appellant had relevantly averred any serious irregularity in this regard, which would justify the court's intervention in the Disciplinary Procedures. Part of the Grievance related to the question of whether the respondent had repudiated an agreement reached on 20 September 2018 to deal with the complaints informally. I am not persuaded that a consensus had been reached between the parties at the meeting on 20 September 2018. Notwithstanding his statement that he was prepared to accept the action plan set out in that letter, the appellant had made it clear that he did not consider himself to have received an adequate opportunity to respond to the

complaints, he pointed out the lack of a fact finding process and he questioned that his conduct could be described as inappropriate or unbefitting.

[63] Turning to the balance of convenience, the appellant submitted that as a refusal to grant interim interdict would be determinative of the outcome of the proceedings, the balance of convenience lay in his favour. It is noteworthy however that in each of the cases referred to by the parties and in which the courts had intervened in disciplinary matters, the applicant was facing serious allegations, with serious consequences. In *Trapp*, a dismissed rector sought an inquiry into the reasons for his dismissal; before a decision had been taken in relation to whether an inquiry would be held, the outcome of which might have led to reinstatement, the Education Authority had resolved to advertise the vacancy. In *Stevens*, a clinical academic faced allegations of misconduct which could have led to dismissal and the possibility of a loss of his registration with the General Medical Council. In *Chhabra*, a consultant forensic psychiatrist faced allegations of gross misconduct for which she could be dismissed. In the present case, on behalf of the respondent, it was submitted that were the Disciplinary Procedures to run their course and were the complaints to be upheld, there was no risk of the appellant losing his employment; the most likely outcome was a formal warning. Indeed, the respondent had intended to deal with the complaints informally, in terms of section 1.6 of the Disciplinary Procedures which applied to problems involving "minor misconduct and poor performance". The lack of serious consequences and the nature of the complaints are matters which I take into account in weighing the balance of convenience.

[64] I also take account of the delay in progressing these proceedings. The appellant could have sought to progress these proceedings at any stage to obtain a final determination, notwithstanding the ongoing Grievance Procedures. He elected not to do so.

[65] Insofar as it was suggested that concerns in relation to the appellant's health were matters relevant to the exercise of a discretion to grant interim interdict, I am not persuaded that the appellant has adequately averred any causal link between the Disciplinary Procedures and the appellant's ill health.

[66] In these circumstances, I am not satisfied that the balance of convenience lies with the appellant. The respondent has obligations to each of its employees (including those who have made complaints) to investigate disciplinary issues and to manage its employees. The complaints in the present case are now almost three years old. The Disciplinary Procedures should now be allowed to run their course. The interim orders sought in the present case, particularly where there is no risk of dismissal, would, in my judgment constitute an unwarranted and unjustified interference in the exercise of an employer's ability to manage its employees.

Decision

[67] For the reasons stated, I shall refuse the appeal and adhere to the sheriff's interlocutors of 9 July 2019 and 9 December 2020.

[68] I was not addressed on the issue of expenses. I shall arrange for a hearing to be assigned to deal with the expenses of the appeal.

Postscript

[69] Prior to any further procedure before a sheriff, parties should pay particular attention to the comments made at paragraphs 27 and 28 above. Every effort should be made to put the pleadings in order.