Neutral Citation Number: [2018] EWHC 1151 (Admin)

Case No: CO/3680/2017

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

Cardiff Civil Justice Centre
Cardiff, Wales

Date: Double-click to add Judgment date

Before :

The Honourable Mrs Justice Cockerill

- -

Between :

THE QUEEN **(on the application of) ELIZABETH HARVEY**	**Claimant**
- and -	
LEDBURY TOWN COUNCIL	**Defendant**
-and-	
HEREFORDSHIRE COUNTY COUNCIL	
-and-	
ANDREW HARRISON	**Interested Party**

- -
- -

Mr Tom Cross (instructed by **Anthony Collins Solicitors LLP** for the **Claimant**
Ms Lisa Busch Q.C. (instructed by **Winkworth Sherwood LLP** for the **Defendant**

Hearing dates: 17 April 2018

- -

Approved Judgment

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

.....

MRS JUSTICE COCKERILL

Mrs Justice Cockerill:

Introduction

1. This claim is brought by Councillor Elizabeth Harvey ("Cllr Harvey"). She is a local councillor who represents the constituents of Ledbury North in Herefordshire on Ledbury Town Council ("the Council").

2. In this application for judicial review, she challenges a decision of the Council made on 11 May 2017 ("the Decision") continuing and enlarging a number of restrictions first placed on her in May 2016 following a complaint about her conduct by the Town Council's then Clerk and Deputy Clerk ("the 2016 Decision"). I should make clear at the outset that the proceedings before me have nothing to do with party politics. I have not asked and do not know what party (if any) Cllr Harvey represents.

3. Also I note here that this, being a substantive judicial review hearing, has nothing to do with the merits of the council's decision. What is in issue is whether that decision was defective on one or more grounds of public law review: vires, substantive unfairness and procedural unfairness.

4. Specifically Cllr Harvey's grounds for judicial review are that:

   i) The Decision was *ultra vires*, such matters being within the ambit of the Code of Conduct for Councillors, which was found not to have been breached.

   ii) In the alternative, it was substantively unfair, being in breach of Article 10 ECHR or substantively unfair at common law; and / or

   iii) It was procedurally unfair as regards (paraphrasing somewhat) absence of investigation, absence of identified basis, absence of disclosure to the decision-making body of full evidence, absence of opportunity to respond or to defend herself.

5. This is a substantive hearing, permission having been granted, essentially by consent, by HHJ Allan Gore QC on 3 Oct 2017 who said that Ground 1 was clearly arguable, though expressing some doubts about Grounds 2-3.

6. Cllr Harvey has been represented by Mr Cross of counsel and the Defendant by Ms Busch QC of counsel. Mr Harrison, a fellow councillor of Cllr Harvey, who is also affected by the measures, but who has brought no application of his own, has been an interested party to this judicial review, lodging written submissions outlining the points he wishes to emphasise, but not attending the hearing itself.

7. Cllr Harvey seeks a quashing order and declaratory relief. The Defendant argues that the decision was not ultra vires, in that the actions were rightly not taken pursuant to the Code of Conduct put in place under the 2011 Localism Act and the council had power to act otherwise than through the code, and rejecting the complaints of substantive and procedural unfairness.

The Legal Backdrop to Ground 1

8. Since Ground 1 is very much the primary ground of challenge, and the legal issue of the interrelationship of the relevant statutes forms part of the debate which took place at the time, it is appropriate to outline the legal framework first.

9. There are two strands of legislation in place. The older is the Local Government Act 1972 ("the 1972 Act") which provides in Part VII of the 1972 Act for miscellaneous powers of local authorities. Section 111 in Part VII provides, inter alia:

> "Subsidiary powers of local authorities.
>
> Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions …".

10. The more modern relevant legislation is the Localism Act 2011 ("the 2011 Act", enacted against the background of the Nolan Report into Standards in Public Life. In particular:

i) Section 27(1) of the Localism Act 2011 requires a *"relevant authority"* to *"promote and maintain high standards of conduct by members and co-opted members of the authority"*.

ii) *"Relevant authority"* includes a parish council: s.27(6)(d). (It should be noted that legally the Council is a parish council.)

iii) Section 27(2) provides that, *"in discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity"*.

iv) Section 27(3) permits a relevant authority that is a parish council to comply with subsection (2) by adopting the code adopted under that subsection by its *"principal authority"*. *"Principal authority"*, in relation to a parish council, means the county council for the county that includes the parish council's area: s.29(9)(c). This is, in the present case, the Herefordshire Council ("the LA"). The Council is a parish council for that purpose and, in adopting the Code of the LA, complied with its obligation under s.27(2).

v) A county council in England (such as the LA here) is also a *"relevant authority"*: s.27(6)(a)). Cllr Harvey is a "*member*" of the Parish Council for the purposes of s.27.

11. Section 28 of the 2011 Act is the section which makes detailed provision in relation to codes of conduct. In particular:

i) Sections 28(1)-(3) make provision for the contents of codes and are not in issue in this case.

ii) Section 28(4) provides:

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

iii) Subsections 28(6)-(9) set out the statutory process for investigating and determining complaints that a member has failed to comply with a code (as distinct from the statutory requirement for a relevant authority to adopt a code).

iv) Subsection (6) provides that:

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

arrangements under which allegations can be investigated, and

arrangements under which decisions on allegations can be made".

v) Subsection (7) states:

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

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

(b) whose views may be sought—

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

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

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

vi) *"Independent person"* is defined in detail in s.28(8):

"(8) For the purposes of subsection (7)—

(a) a person is not independent if the person is—

(i) a member, co-opted member or officer of the authority,

(ii) a member, co-opted member or officer of a parish council of which the authority is the principal authority, or

(iii)a relative, or close friend, of a person within sub-paragraph (i) or (ii);

(b) a person may not be appointed under the provision required by subsection (7) if at any time during the 5 years ending with the appointment the person was—

(i) a member, co-opted member or officer of the authority, or

(ii) a member, co-opted member or officer of a parish council of which the authority is the principal authority;

(c) a person may not be appointed under the provision required by subsection (7) unless—

(i) the vacancy for an independent person has been advertised in such manner as the authority considers is likely to bring it to the attention of the public,

(ii) the person has submitted an application to fill the vacancy to the authority, and

(iii) the person's appointment has been approved by a majority of the members of the authority….".

vii) Subsection (9) provides

"…. "allegation", in relation to a relevant authority, means a written allegation—

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

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

viii) Section 28(10) deals with relatives and is not relevant in this case.

ix) Section 28(11) states:

"(11) If a relevant authority finds that a member or co- opted member of the authority has failed to comply with its code of conduct (whether or not the finding is made following an

> investigation under arrangements put in place under subsection (6)) it may have regard to the failure in deciding—
>
> (a) whether to take action in relation to the member or co- opted member, and
>
> (b) what action to take".

The LA's Code was set out in the Council's Standing Orders 30(a) and (b) which stated:

> "a. On receipt of a notification that there has been an alleged breach of the code of conduct the Proper Officer shall refer it to the Monitoring Officer of Herefordshire Council.
>
> b. Where the notification relates to a complaint made by the Proper Officer, the Proper Officer shall notify the Chairman of Council of that fact, who, upon receipt of such nomination shall, in conjunction with available members of the Standing Committee, nominate a person to assume the duties of the Proper Officer set out in the remainder of this standing order, who shall continue to act in respect of that matter as such until the complaint is resolved.
>
> 31. Where a notification relates to a complaint made by an employee (not being the Proper Officer) the Proper Officer shall ensure that the employee in question does not deal with any aspect of the complaint.…
>
> g. References in Standing Order 30 to a notification shall be taken to refer to a communication of any kind which relates to a breach or an alleged breach of the code of conduct by a councillor".

Factual Background

12. Since Cllr Harvey's election in 2011 she has served as a town councillor on the Council, representing the ward of Ledbury North. She also serves as a county councillor on the LA.

13. Prior to the matters under challenge, Cllr Harvey, who was previously a civil servant, defence research scientist, strategic planner and engineer, had a range of roles at the Council. She sat on all three of the Council's main committees (Finance, Planning and Environment). She was the Chair of the Planning Committee. As such she had a number of serious responsibilities.

14. To take just two examples she chaired the update of the Town Plan from 2012-2016, and she was a founder member of the Neighbourhood Plan Working Group. It is plain from the correspondence I have read that Cllr Harvey feels passionately about the issues

which confront her as a councillor and that she engaged very robustly with other councillors on the issues which they had to decide.

15. As is not unknown on town councils, there has been a history of friction in the Council. The complaint suggests that as regards Cllr Harvey such friction emerged as long ago as 2011, that is, from shortly after her election.

16. A complaint was first made informally in March 2015. Cllr Harvey was told it involved allegations of bullying and harassment. A Standing Committee of the Council considered it "informally" and, on 31 March 2015, following discussion with Cllr Harvey, it recommended that no action should be taken.

17. However on 15 December 2015 a formal Complaint was made by the then Clerk (Ms Mitchell) and the then Deputy (Ms Bradman). Each of them complained (though on a secondary basis) also about Cllr Harrison.

18. Ms Mitchell's complaint comprised a four page letter and one hundred and thirteen additional pages of material, primarily but not exclusively a chronological run of the email correspondence she had had with Cllr Harvey. Ms Bradman's complaint was a rather shorter two page letter. Both in essence alleged a campaign of bullying against them. Ms Mitchell spoke of a "*sustained campaign of malicious bullying and harassing behaviour*", which left her "*feeling intimidated and offended*", and had resulted in "*a toxic atmosphere*" which was "*having a detrimental effect on the morale of all office staff, severely undermining our ability to effectively carry out our roles and diverting resources unnecessarily*". She also said that a former staff member had "*made no secret of the fact that her departure was due in no small part to this behaviour*", and spoke of a concern that "*others may decide to leave to seek a less stressful atmosphere*".

19. Ms Mitchell stated that "*I can provide multiple examples of … malicious rumours … unfair treatment … regularly undermining me …"*. However the complaint itself set out little if anything in the way of allegations of bullying; the main example she gave of intimidatory behaviour related to Cllr Harvey's behaviour to another councillor, not herself. The Clerk asked for the matter to be dealt with under the Harassment Grievance Procedure (which, it was common ground, was not the applicable procedure) and asked the Council to impose sanctions against Cllr Harvey.

20. On 22nd December 2015 the Council's Standing Committee met. Cllr Harvey initially sent her apology for non-attendance at this meeting and named a substitute. On the day, she did attend at the commencement of the meeting but left upon being told by Ms Wilcox of HALC (Herefordshire Association of Local Councils) acting as Clerk, that the meeting could not proceed with both Cllr Harvey and her substitute in attendance.

21. The minutes record that the meeting was conducted on a confidential basis, excluding the public and non members of the Committee, and that a meeting of the Standing Committee on 19 January would investigate the matter.

22. There is some debate about whether at this Standing Committee meeting it was resolved that an alternative clerk would be engaged henceforth to administer the complaints process and whether the committee resolved to meet again on 19 January 2016 at 14:00 to informally consider the substance of the staff complaints in more detail.

23. I should make clear at this point that what the Standing Committee did it did not do randomly or without serious thought. It acted advisedly, in the sense that it sought guidance from NALC and HALC – and possibly also ACAS – and acted on that advice. I have not seen the advice which was given but I have seen guidance which Oxfordshire Association of Local Councils issued in 2017. That guidance, drafted in the light of the existing authorities, indicated that it was appropriate to deal with allegations of bullying under a grievance procedure, as this was more expeditious than the Code of Conduct process, which derives from the Localism Act 2011, because in a situation which involves employee relations dealing with such issues expeditiously was important. It indicated that a grievance procedure could result in sanctions against an elected member limited to removal from a committee or working party, removal from representing the council on an external body, or a training recommendation. However I do also note that in relation to disciplinary action against another employee it says that *"NB a separate disciplinary process must follow, including the investigation stage."*

24. On 19th January 2016 the Council in fact held an Extraordinary Full Council Meeting (EFCM). That meeting agreed new Terms of Reference for the Grievance Panel. These were set out in the course of a single page and included a five person panel and an appeal mechanism to a five person Appeal Panel comprising different members to the Grievance Panel. The Terms of Reference stated that the role of the Grievance Panel was *"to investigate"* and *"to determine"* what it described as the grievances against Cllr Harvey (and Cllr Harrison); and the role of the Appeal Panel was *"to investigate"* and *"to determine"* any appeal against the determination of the Grievance Panel. It appears that this decision to adopt a new Grievance Procedure derived from a concern that the existing complaints procedure was not fit for purpose in some respect which was not in issue before me.

25. Mrs Wilcox thereafter wrote to Cllr Harvey informing her that the Council had agreed that HALC would be requested to provide support services *"in relation to an employment matter"* involving the Clerk's and Deputy Clerk's grievances. The letter went on to state:

> "Members of the Ledbury Town Council Grievance Panel request that you meet with them in the Market House at 11.30 a.m. on Monday 29th February. The purpose of the meeting (which will last no longer than two hours) is to enable you to respond to the allegations made against you and allow members of the Grievance Panel to ask you questions for clarification. If you wish you may attend with a companion who is not directly involved in the matter but your companion will not be able to answer questions on your behalf. In attendance at the meeting will be the following members of the Grievance Panel and myself, to take notes:
>
> To enable you to prepare your response, both officers have been asked to provide a pack of relevant information in support of their allegations and you will be able to collect a sealed pack from the Town Council offices from 10a.m. on Monday 15th February 2016. These packs must be treated as strictly confidential and none of the contents should be discussed or

> shown to anyone other than your identified companion or colleague.
>
> Please confirm in writing that you are able to attend on 29th February and, if you intend to be accompanied, the name of your companion.
>
> To ensure that the investigation can be conducted as fairly as possible it is requested that you keep the matter, and anything discussed at the investigation meetings, confidential".

26. Cllr Harvey did not accept that this was the appropriate way to deal with the complaint. Accordingly she "self-referred" the Complaint to the Monitoring Officer at the LA. She explained to the LA:

> "I take this accusation very seriously and consequently would like to report myself to the standards board via this complaint form so that this matter can be properly investigated. If I have acted in a way which breaches the councillor code of conduct I would wish to be informed as such and to be advised how best I should comport myself in future."

27. Cllr Harvey did take delivery of the complaints as indicated in Ms Wilcox's letter. She plainly considered them, because she later published them in annotated form on her blog. She declined to attend the meeting of 29th February 2016, apparently on legal advice.

28. A meeting of the Grievance Panel took place on 21 March 2016. Cllr Harvey did not attend the meeting, given that she did not recognise the authority of the panel.

29. On the same day as the meeting, 21 March 2016, Cllr Harvey received an e-mail from the Chair of the Grievance Panel, explaining that the Panel had held a meeting that morning and had *"found in favour of the complainants"*, and that it would be reported to a meeting of the full Council in order for them to consider what if any action should be taken.

30. Cllr Harvey appealed in a letter dated 29 March 2016. She noted in a letter that *"I have not been provided with any reasons for the Council's decision and accordingly it is impossible to know what conclusions the Council reached and what the reasons for any such conclusions were"*.

31. On 12 April 2016 the LA's Monitoring Officer (Ms Claire Ward) explained to Cllr Harvey that, having sought the views of the *"independent person"* she could not resolve the Complaint informally, that it was sufficiently serious to require further investigation, and that she was making arrangements for the complaint to be investigated by an external investigator.

32. The appeal meeting took place on 19 April 2016. Following the meeting Cllr Harvey received a short e-mail again stating that the Appeal Panel *"found in favour of the two members of staff (Town Clerk and Deputy Town Clerk) who had made accusations of bullying, harassment and intimidation",* and that the outcome of the meeting would be reported to a meeting of the full Council to enable it to consider what action if any needed to be taken.

33. On 5 May 2016 the Parish Council held an EFCM during which it considered what action to take in light of the decisions of the Grievance and Appeal Panels. There is some doubt as to what materials were available to them for this purpose beyond the complaint itself.

At the meeting, following oral debate, the Council resolved to impose a number of prohibitions on Cllr Harvey (and Cllr Harrison) and take additional steps. The minutes stated:

> "5. CONSIDERATION OF ACTION IN THE LIGHT OF THE ABOVE DECISIONS
>
> Following detailed discussion, and mindful of the Town Council's duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees and that failure to address the issue could result in a fundamental breakdown of trust and confidence between the Town Council as employer and its employees, it was RESOLVED to take the following action, in order to reduce contact between the two officers and the two concerned, and thereby help prevent the on-going bullying, intimidation and harassment of staff …"

34. So far as it related to Cllr Harvey, the resolved action, set out in paragraphs 5.3.1 to 5.3.7 of the Minutes, was that:

i) she should not serve on any of the Parish Council's committees, sub-committees, panels or working / steering groups;

ii) she should not be eligible to substitute for a member of any of the Parish Council's committees, sub-committees, panels or working / steering groups;

iii) she should not represent the Parish Council on any outside body;

iv) all of her communication with the Clerk or Deputy Clerk should go through the Parish Council Mayor (or Deputy Mayor in his / her absence);

v) the LA be informed of the above actions taken by the Council;

vi) all bodies affiliated to the Council be informed of the above actions; and that the prohibitions should remain in place "until the Annual Meeting of [the Parish Council] in May 2017, when the matter may be reviewed".

35. There is a dispute as to whether Cllr Harvey thereafter complied with the prohibitions imposed. The Defendant points to the resignation of the Deputy Clerk in September 2016. Her letter cited the conduct of Cllr Harvey, despite the sanctions, as a reason, saying:

> "I do not feel that the current investigation being carried out by Herefordshire Council will change Councillor Harvey's behaviour. Her attitude towards us has not altered even after the Town Council upheld our complaint of bullying, harassment and intimidation and imposed actions ... At both the Full Council meetings held on 9th June and 21st July, we have come under attack for carrying out our duties; …"

36. The Defendant also notes that on 20 September Cllr Harvey posted an annotated version of the Clerk's complaint on the internet; the annotations contain queries about the complaints and at points make direct criticism of the Clerk's abilities and behaviour.

37. For her part Cllr Harvey says she did comply with the restrictions and that they severely impeded her ability to represent her constituents:

> "The prohibitions imposed on me in May 2016 … hollowed-out a core part of my councillor role. In particular: I was no longer able to sit on <u>any</u> committees, panels, working or steering groups (even by substitution for another member), could not represent the Council on any outside body (even if, for example, the Clerk or Deputy Clerk had nothing to do with such a body), and these prohibitions were to remain in place for at least a year (representing, in context, a very substantial amount of my time as an elected Councillor: my current term will conclude in May 2019). Whilst the prohibitions fell short of purporting to remove me as a Councillor altogether, they have had a very severe effect."

38. Meanwhile the Code of Conduct investigation was ongoing. On 10 May 2016, the LA's Monitoring Officer, who was responsible for the investigation wrote to the then Mayor suggesting this was properly a Code of Conduct matter:

> "…the problem you have is that the staff grievances allege bullying by two councillors. Clearly this is behaviour prohibited by the code of conduct. Therefore in my opinion although these staff have written these allegations within the grievance procedure their allegation is in fact that a member has failed to comply with the authority's code of conduct. As a result you know that my view is that such an allegation cannot be dealt with otherwise than in accordance with the arrangements made under s.28(6) of the Localism Act 2011.

I understand the duty of care to your own staff and why therefore you have followed the grievance procedure and made decisions at the extra ordinary meeting on 5 May. However this is in conflict with the requirements in the Localism Act ..."

39. On 8 May 2017, a Standing Committee of the Council met to *"review"* the action originally resolved at the EGM on 5 May 2016. The agenda for the Standing Committee meeting on 8 May 2017 referred to an intention to *"receive a report on staff interviews"*. Cllr Fieldhouse explains that, in advance of the Standing Committee meeting, she and the then Mayor interviewed the Clerk *"and a former Clerical Officer"* at the Council's offices. There appear to be no notes of these meetings.

40. One of Cllr Harvey's complaints is that neither this nor any other information of any kind was provided to Cllr Harvey (or for that matter the Standing Committee itself) concerning the "review" of the prohibitions. Nor at any time between the imposition of the prohibitions on 5 May 2016 and the Standing Committee meeting on 8 May 2017 was Cllr Harvey invited to provide her views about the continuing impact on her of the prohibitions.

41. In fact Cllr Harvey did not attempt to attend the meeting. At the time she was suffering from bad health due to an autoimmune condition. It was initially in issue as to whether she even realised that the reference to an employment matter in the Agenda referred to the reconsideration of the sanctions indicated in the 2016 Decision. Ultimately Cllr Harvey accepted that she probably did realise that the matter was schedule for discussion.

42. There is also an issue as to the extent to which she could have participated at the meeting given that:

    i) The public participation session of the Standing Committee meeting (item 3) took place *before* the Committee referred to the *"report on staff interviews"* and discussed the prohibitions on Cllr Harvey (item 5).

    ii) Cllr Harvey could not have been present during item 5. That is because, prior to item 5, a resolution was passed *"to exclude members of the public and councillors who were not members of the Standing Committee"* from the meeting.

43. Cllr Harvey also complains about the information provided to her as to the proceedings:

    i) In the public participation session, the husband of the Clerk was permitted to address the Standing Committee and *"spoke of his concern for the health and wellbeing of the clerk in relation to the on-going actions of two members of her employing body (Ledbury Town Council) i.e. Councillors L Harvey and A Harrison"*. There appears to be no record of what he said.

    ii) Thereafter, in private session, *"Cllr E Fieldhouse reported that she and the mayor (Cllr D Baker) had interviewed staff to ascertain whether measures put in place by the Council in May 2016 had been helpful in improving their health,*

safety and welfare whilst at work". The evidence before me is that Cllr Fieldhouse *"provided a verbal update to the Standing Committee meeting that we considered that there had been little or no improvement in Cllr Harvey's behaviour"*.

iii) The minutes then record that there was a discussion following which, for the same reasons as were recorded in relation to the EFCM in May 2016, the Standing Committee resolved to recommend to full Council not merely the continuation of the measures but also a further prohibition on Cllr Harvey, namely that she be restricted from communicating directly within *"all office staff",* (and not merely the Clerk and Deputy Clerk).

44. The day after the Standing Committee meeting, on 9 May 2017, the Monitoring Officer wrote to the Claimant explaining that:

i) She had appointed an external firm (Paul Hoey Associates) to undertake an investigation into the Complaint;

ii) Paul Hoey Associates had used a solicitors' firm (Wilkin Chapman solicitors) to investigate the Complaints, gather further evidence, and produce a report. The Monitoring Officer had now received their conclusions;

iii) The Monitoring Officer had met with the independent persons on 28 April 2017 to consider the reports and had taken into account their views;

iv) The investigation had found, in relation to the Complaint, that there was no basis to support a finding that the Claimant had breached the Code; and the Monitoring Officer's decision was that there had been no breach of the Code, and she would be taking no further action on the Complaints.

On 11 May 2017, the Monitoring Officer wrote to the Mayor:

> "I have had a number of enquiries about the impact my resolution has on the town council.….
>
> My opinion on a town council taking sanctions against a member where there has either not been a code of conduct allegation or where one has been determined, remains. A town council can only take sanctions against a member where the principal authority [i.e. the local authority] has recommended them following a breach of the code…"

45. At a meeting of full Council held on the evening of 11 May 2017 the Council resolved (by 8 to 6, with two abstentions) to approve and adopt the resolution of the Standing Committee continuing and enlarging the prohibitions. This is the decision before me for judicial review.

46. For completeness I will add that I was told by Ms Busch QC in the course of submissions that the Clerk has now also resigned. However there was no evidence

before me as to the date of this resignation, the circumstances or the reasons given for the resignation.

Ground 1: ultra vires

47. Although Cllr Harvey refutes the substance of the complaint, as well as complaining about the fairness of the process, the primary focus of argument before me has been on the issue as to jurisdiction: essentially it is in dispute between the parties as to whether it was open to the Defendant to proceed as it did via the Grievance Procedure, or whether it should rather have followed the process under the Code of Conduct which came into effect pursuant to the 2011 Act.

48. This is an issue which, as I have indicated, is of wider interest in the community of local authorities, because it appears that the Council acted in line with advice from the associations of local authorities as to the appropriate route to pursue in this case; while at the same time it is plain that the Monitoring Officer at the LA took the view that this was not the correct course.

49. Cllr Harvey submits that the Decision of 11 May 2017 was *ultra vires*, either in the narrow sense that the Council lacked power at all or in the broader sense that, if they had power, it was not lawfully exercised (in particular in that the sanctions imposed were *ultra vires*).

50. The starting point is the LA's Code of Conduct, which applied to the Council. Cllr Harvey submits that a key part of that Code of Conduct which applied to Members and Co-opted Members *"when they are acting in that capacity"* required Members among other things to *"treat others with respect and courtesy", "not [to] do anything which may cause the Authority to breach any of its equality duties (in particular as set out in the Equality Act 2010)"*, and *"not [to] bully any person"*.

51. She says that this was plainly relevant to the complaints of bullying and that, although the Clerk and Deputy Clerk had marked their Complaint *"Grievance Statement"*, the Complaint was, in substance and content, a written allegation that Cllr Harvey had failed to comply with the Code and should have been pursued as such.

52. This of course is the course which she followed on her self-referral, and which resulted in the decision that there was no breach of the Code.

53. Cllr Harvey says that the Complaint was a written allegation that Cllr Harvey had failed to comply with the Code and thus was a written allegation for the purposes of s.28(9)(b). She adds that s.28(9)(b) does not require that, in order to qualify as an "allegation" for the purposes of s.28, its author must state that it is an allegation that a member has failed to comply with the code. Were it a requirement, it would mean that the question whether a complaint fell to be determined pursuant to the 2011 Act process or not could turn solely on whether the author stated that it was a 2011 Act allegation, regardless of the substance of the allegation. It would be surprising if Parliament had intended that an authority could avoid dealing with an allegation amounting in substance to an allegation of breach of the code purely on the basis that it was not identified as such or that a misunderstanding of the reality of the complaint either by the complainant or the council (or a desire to cherry pick a particular process) could determine whether it fell within the Code.

54. Cllr Harvey submits that it is the intention of Parliament that allegations within the meaning of s.28(9)(b) can only be dealt with under *"arrangements"* made under s.28(6); in the present case, that would mean that the Complaint had to be dealt with under the LA's arrangements, and certainly and in any event that any action taken in response to the allegation had to be under those arrangements.

55. She points to the fact that that Parliament has made the making of *"arrangements"* under s.28(6) mandatory. It would be inconsistent with that requirement, she says, not to have to deal with qualifying allegations through such arrangements. If that were so, the procedure required by the statute could simply be circumvented.

56. She submits that to the extent that this is not clear from the express terms of the 2011 Act, it is its necessary implication. In particular she contends that the whole point of the requirement to have *"arrangements"* is for there to be an established mechanism for qualifying allegations to be dealt with. Arrangements only exist to deal with qualifying allegations. She also says that the requirement to have specific features (notably the *"independent person"*) provides an insight into how important they are.

57. Cllr Harvey relies on a number of authorities as supporting the approach for which she contends. Firstly she points to the decision of Edis J in *R (Taylor) v Honiton Town Council* [2016] EWHC 3307 (Admin). There a town council had imposed sanctions on the claimant following a finding by the principal authority (East Devon) that he had breached its code of conduct by not treating the Clerk with courtesy and respect. East Devon had made findings of breach and recommended particular sanctions to Honiton. By the decision which was challenged, Honiton had purported to impose the sanctions recommended by East Devon (including a training requirement on the relevant councillor). There were two issues: (i) whether Honiton were bound by the finding of breach made by East Devon and (ii) whether there was power to impose a training requirement.

58. Edis J considered the intention of Parliament in s.28. In the context of the first issue he held that the effect of s.28(6) and (9) is to place the duty of investigation and decision of allegations against members of a parish council on the principal authority (i.e. the LA): [33]. Parliament had provided for allegations of breaches of the code to involve independent persons and: *"it would frustrate that important safeguard to hold that a parish council had a duty to reconsider the principal authority's decision and substitute its own if it chose to do so"*.

59. He held that it was to be inferred from s.28(8) that Parliament considered that the role of the "independent person" was of real importance: [29].

60. He also found that the premise of the challenge in the case – that Honiton was the ultimate decision- making authority on the issues of breach and sanction – was "clearly wrong". The Act required the principal authority to have arrangements in place for the exercise of decision-making power under s.28(11):

> "It would make a nonsense of that scheme if the parish council were able to take its own decision without having any of those arrangements in place. The whole point of the scheme is to remove decision-making powers and duties from very small authorities which do not have the resources to manage them

effectively and who may be so small that any real independence is unattainable" [35].

61. In relation to the second issue, Edis J emphasised the breadth of sanctions potentially available under s.28(11)(b). He referred to a passage *in Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin) [2014]* 4 All E.R. 269 in which Hickinbottom J recorded it as being uncontentious before him that, whilst a councillor in England could no longer be disqualified or suspended, sanctions could include "(for example) a formal finding that he has breached the code, formal censure, press or other appropriate publicity, and removal by the authority from executive and committee roles (and then subject to statutory and constitutional requirements)". Edis J noted that this passage was "not an exhaustive list". He held at [39]:

> "Parliament clearly contemplated that a relevant authority may take "action" following a finding of non- compliance with a code, and does not seek to define or limit what action that may be. The abolition of the old regime carries with it, as Hickinbottom J observed, the abolition of the power to disqualify and suspend but otherwise the powers appear to be undefined, at least where the breach does not involve any impropriety in relation to pecuniary interests".

62. He went on to hold that that sanctions had to be proportionate to the breach and that a training requirement could be proportionate: [40-1].

63. Cllr Harvey made the following points by reference to this case:

i) Parliament regarded the role of the independent person as a matter of *"real importance"* and an *"important safeguard"*. If qualifying allegations could be dealt with otherwise than under "arrangements" put in place under s.28(6), it would as the judge noted at [33] *"frustrate that important safeguard"*.

ii) The present case is *a fortiori Taylor*: that showed that in a town council case, the town council does not have power to go behind decisions of the principal authority (whether as to breach or to action consequent on breach). Here the Council has frustrated the safeguard of the independent person not merely by departing from decisions of its principal authority, but by dealing with the allegation through a wholly different procedure than that provided for by the arrangements.

iii) The case also sheds light specifically on the question of the position in relation to parish councils (as town councils technically are). The judge noted the requirements in the Act that the arrangements for dealing with qualifying allegations against parish council members be those of the principal authority. That, it is said, indicates that qualifying allegations should not themselves be dealt with by parish councils who, as Edis J explained, *"do not have the resources to manage them effectively and who may be so small that any real*

> *independence is unattainable"* ([35]). It follows that Parliament has thus prescribed not merely part of how allegations must be dealt with, but also by whom. For the Council here to have dealt with the allegation otherwise than under the LA's arrangements has frustrated that aspect also.

64. Cllr Harvey also relies on the decision in *Hussain v Sandwell Metropolitan Borough Council* [2017] EWHC 1641 (Admin). In that case the relevant council's Audit Committee undertook what the judge referred to as a *"pre-formal investigation"*, to determine whether there was substance in the allegations, and, if so, to advise on appropriate next steps, which could have entailed the making of a complaint under the formal Council's arrangements for investigating allegations of breach of standards by members, or it could have led to a complaint to the police on the basis that it revealed possible criminality, or the commencement of criminal proceedings, or disciplinary proceedings against Council employees. Following this *"pre-formal investigation"*, the Council then initiated the formal investigatory procedure under s.28.

65. It was argued that the authority did not have the power to conduct the pre-formal investigation. Green J rejected those submissions, holding that although one reason for the change in the standards regime from the predecessor legislation was to move away from a system which could amount to a vehicle for vexatious or politically motivated complaints, there remained a power to investigate under the LGA. However:

> "once an authority determines upon a formal inquiry into an allegation of breach of a code then it must, prima facie, utilise its formal arrangements. But there is no prohibition on pre-formal inquiries and investigations. Such pre-formal inquiries may be necessary to see whether a complaint brought to its attention is frivolous or vexatious or whether even if it has substance it should be dealt with by some other procedure or avenue such as civil proceedings in a court or a complaint to the police." [141]

66. In connection with the second limb of her argument Cllr Harvey draws particular attention to [142(d)] where the judge said:

> "Allegations against members can be investigated formally or informally. If the Council finds a breach by a member then it can impose no sanction open to it under its arrangements unless it then invokes the formal arrangements (as per section 28(4)). Only then does it become empowered to take "action" and impose any form of sanction. For the reasons I have given above I consider that this interpretation accords with the intent of Parliament. It ensures however that no sanction can be imposed upon a member without the formal arrangements having been invoked."

67. The Claimant therefore submits that this case supports the proposition that although a local authority may be able to undertake *"pre-formal investigations"* outwith their

s.28(6) arrangements, the only means available of formally investigating and then taking action against a member following an allegation that they have breached the Code is via such arrangements.

68. Cllr Harvey also refers to the latest edition of *Bennion on Statutory Interpretation* section 26.9, which states that where a construction which tends to produce uncertainty in the law is a factor telling against it. She submits that if councils could *choose* whether or not to follow the Code approach this would create significant uncertainty as to how allegations should be dealt with.

69. The Council's position is, essentially, that Cllr Harvey misses the point; there is no real dispute about how the provisions of the Localism Act 2011 work – when they apply. The question rather is whether the effect of those provisions is to prohibit parish councils like the Defendant from instigating proceedings under their grievance procedure where what is in issue is a matter involving internal relations between its employees and staff. It says that the answer to this question is plainly no.

70. It says first that the Claimant overlooks the fact that local authority grievance procedures and Codes of Conduct have, respectively, different roles and functions. The Council's grievance procedure in the present case had the objectives of fostering good relationships between the Council and its employees; settling grievances as near as possible to their point of origin; ensuring that the Council treats grievances seriously and resolves them as quickly as possible; and ensuring that employees are treated fairly and consistently throughout the Council. It is therefore, solely concerned with the Council's internal administration of its operations, including employee-employer relations. Codes of Conduct, by contrast are directed to the public sphere, with a focus on the maintenance by Councillors of standards in public life.

71. The Council submits that bearing this distinction in mind, there is nothing in the provisions of s.28 of the 2011 Act that precluded it from investigating Members' conduct under its own grievance procedures, irrespective of the fact that the conduct in question might, potentially, amount to a breach of its Code of Conduct, in circumstances where it is not concerned to see the matter investigated under, or otherwise to invoke, the Code of Conduct, but where it is concerned the resolve the grievance to which the conduct has given rise. It points to the provisions in the LGA as empowering the Council to act, as upheld in the authorities.

72. So far as concerns the question of complaint, it does not dispute that the complaints made by the Clerk and the Deputy Clerk were indeed made in writing and therefore could be complaints under 28(9). But, it says, they were made with express reference to the Council's grievance procedure, and without regard to the Code of Conduct and that is how the Council dealt with them.

73. The Council submits that Cllr Harvey's approach to construction of the statute simply cannot be right. It says that if that were so, then it would follow that, whatever the nature of an allegation of a breach of the Code Of Conduct, however frivolous or vexatious, or however unsuited the section 28 arrangements for dealing with it might be, it would nonetheless require to be dealt with by the machinery of that provision.

74. Similarly it says that in this case the result of the argument deployed for Cllr Harvey is that the Council would have been precluded from resolving the complaint that had been

made with respect to her under its grievance procedures, merely because she was found not to have been in breach of the Code. That it says, is incongruous, to say the least. It plainly does not follow from the fact that a Member of a local authority may not, in any given instance, have acted in breach of a Code of Conduct, that there is no substance to a grievance made with respect to him or her. On the contrary, a finding of no breach may be made entirely compatibly with a decision that the officer in question has a case to answer under internal grievance procedures.

75. The Council also relies on *Hussain*, but to rather different effect. It sees it as a case which provides powerful help to its main submission, that the 2011 Act code is not exclusive. It points me to the following passages in the judgment.

i) Paragraph 138, 140 and 141 where Green J set out the submission of the Claimant that the regime set out in the 2011 Act was comprehensive and exclusive by virtue of section 28(4) and the contrary submission advanced by reference to section 1 and section 28(11) , ultimately preferring the latter analysis in the passage I have quoted above at [141] of the judgment and the later passage where he says:

> "In my view, a Council is entitled to investigate in order to find out whether a prima facie case exists and in order for them to receive advice as to the appropriate next steps. Were the distinction between pre-formal and formal inquiries not to exist it would mean that every allegation, however trivial or absurd, could only be investigated through a formal process even if that were wholly disproportionate and represented an unnecessary squandering of the Council's scarce resources or would involve the addressee of a complaint in an unnecessary expenditure of time, money and effort."

ii) The six points at paragraph 142 which, in his view, supported his conclusion. The Council submits that the thrust of the points in question was that section 28(4) *"is concerned with what happens after there is a 'failure to comply' with a Council's code"* and with how that failure is dealt with; or in other words with *"the effects of prior findings of breach"*.

76. In particular the Council submits that, as the judge found at [142(c)], section 28(11) indicates clearly that there can be a finding of failure to comply which has arisen outwith the formal arrangements under section 28(6).

77. The Council says that following this approach, the section 28(6) arrangements are not "wholly exclusive". Other broad powers such as those contained in section 111 of the 1972 Act operate in tandem with them.

78. So, where Code of Conduct proceedings are not invoked, and/or where there have been no *"prior findings of breach"*, a local authority, including a parish council, is entirely at liberty to deal with any conduct issues on the part of its members under its own internal procedures, including grievance procedures, as happened in the present case. It would be entirely permissible for a local authority to investigate a complaint by an employee against a member under its internal grievance procedures, and only thereafter

to consider, in light of that investigation, whether or not to instigate Code of Conduct proceedings pursuant to section 28 of the 2011 Act.

79. As to *Taylor*, the Defendant submits that there is nothing in the decision in Taylor which contradicts or undermines its argument. That is because *Taylor* was concerned with a set of circumstances in which there had been an allegation by a Council officer of a breach of the Council's Code of Conduct by a Member, which was upheld by the Monitoring Officer of the principal authority. The case was not concerned, therefore, with the nature or scope of the powers of a Council to take action with respect to a Member in circumstances in which there has been no such allegation, and no finding of breach. The decision in *Taylor* merely confirms that, where a Member of a parish council has been found to have been in breach of a Code of Conduct by the Monitoring Officer of its principal authority, it is for the principal authority to take the decision as to the sanctions which should be imposed upon the Member in question. Accordingly, it does not assist with the point in issue in the present case.

80. The case upon which the Council places perhaps the strongest reliance is *R (Lashley) v Broadland DC* [2001] EWCA Civ 179 (2001) 3 L.G.L.R. 25. This decision pre-dated the 2011 Act, but the Council says that it nonetheless sheds important light on the scope of local authority powers to regulate relations between its Members and employees under sections 101 and 111 of the 1972 Act.

81. *Lashley* is a case with factual parallels to the present case. In it, an officer of a District Council complained to a senior officer about the conduct of the claimant councillor towards him. The officer had to take three weeks of sick leave from work related stress. It was clearly quite an extreme case: the Court of Appeal was entirely satisfied that *"the situation was clearly one which required action on the part of the Chief Executive"*; but the general outline of the situation was similar.

82. Following an investigation and a hearing, the District Council's Standards Committee agreed, by a majority, that the Claimant's conduct with respect to the officer in *"fell short of the highest standards of councillors"* but *"that no further action be taken in this case"*. The Claimant claimed judicial review of that decision, contending that the proceedings before the Standards Committee were effectively disciplinary proceedings; and that they were *"proceedings to enforce a Code which the Council had no power to enforce"*. It should be noted that the Code in that case was a voluntary code in force before the 2011 Act.

83. The Court of Appeal firmly rejected that argument. At paragraph 28 of his Judgment, Kennedy LJ (with whom Laws and Rix LJJ agreed) observed:

> "[Counsel for the claimant] recognises, as he must, that if a local government officer complains to his senior officer about the way in which he has been treated by a councillor the complaint has to be investigated. Ordinary principles of good management so require, and such an investigation is plainly a function which a local authority is entitled to carry out pursuant to its statutory powers as set out in the 1972 Act. In reality it makes sense for the investigating officer to report to a committee, such as the Standards Committee which can then consider what action to take. So far as the councillor is concerned, the Committee's

> powers are restricted, but they are not non-existent. In extreme cases it can report matters to the police or to the auditors. In less extreme cases it may recommend to the Council removal of a councillor from a committee, or simply state its findings and perhaps offer advice. On the other side of the equation, the committee can dismiss the complaint or, for example, suggest changes to working practices to prevent such problems arising in the future."

84. At paragraph 29 of the Judgment, the Court of Appeal also quoted approvingly from the judgment of Munby J in the Court below:

> "[Counsel for the Claimant] asserts that the activity of the Committee was not linked to any particular function or functions of the Council. I disagree. As [Counsel for the Council] correctly submitted, the activity of the Committee was in my judgment linked to, that is to say it was calculated to facilitate and was conductive or incidental to, the Council's functions (I) of maintaining its administration and internal workings in a state of efficiency and (II) of maintaining and furthering the welfare of its employees."

85. The Council says that what we can take from this is that it was the Court of Appeal's clear view that an investigation into the treatment by a Council member of its staff, aimed at maintaining good administration and furthering the welfare of its employees, is *"plainly a function which a local authority is entitled to carry out"* pursuant to its powers under the 1972 Act and that in light of such an investigation, they have the power to take such steps as the removal of a councillor from a committee and to *"suggest changes in working practices to prevent such problems from arising in the future"*.

86. Plainly, the Council argues, these propositions hold good for the purposes of the present case, notwithstanding that the regime under consideration in that case was in due course dismantled and that sections 27-28 of the 2011 Act were enacted to give effect to different regime for dealing with Code of Conduct complaints.

87. The Council also submits as regards the particular issue of the changes in working practices, such changes, which local authorities have the power, not only to "*suggest*", but also to implement, include a prohibition upon a member from communicating with officers, as was put in place in the present case.

88. Cllr Harvey disputes the contention that this case is of great support to the Council. In particular she submits that the background of the case is key. Cllr Lashley was accused of engaging in conduct *"in breach of the National Code of Conduct"* which arose from the fact that section 31(1) of the Local Government and Housing Act 1989 gave power to the Secretary of State to issue the National Code, which provided recommended

standards of conduct for councillors in carrying out their duties *"and in their relationships with the council and council's officers"*.

89. However there was no statutory provision for enforcement of the National Code as such against a Councillor. Against that background, the local authority investigated Cllr Lashley's conduct through an investigating officer who produced a report. It convened a Standards Committee. It put to Cllr Lashley at that Committee that she had breached paragraph 24 of the National Code. The Committee then reached the decision in question which Cllr Lashley sought to have judicially reviewed.

90. It was, says Cllr Harvey, against that specific legislative context that Munby J decided that the proceedings were within the authority's incidental power under s.111 LGA, because they were *"calculated to facilitate, or were conducive or incidental to the discharge of the authority's functions"* of maintaining its administration and internal workings in a state of efficiency and maintaining and furthering the welfare of its employees. She points to the following section from the judgment of Munby J:

> "I cannot see anything in what the Committee did in relation to the applicant which is inconsistent with the structure of the relevant legislation taken as a whole or with any of the specific statutory provisions to which I have been referred. The legislation does not in relation to the present subject matter establish a code, let alone a comprehensive code, in the sense in which that expression is used in the authorities to which I have referred. There is no scheme of statutory control which the Committee's activities were designed to circumvent".

91. Munby J thus held, and the Court of Appeal upheld, that it was within the Committee's power to take action in the form of what he described as *"naming and shaming"* Cllr Lashley. The Claimant submits that it is not apparent that the Court of Appeal departed from Munby J's analysis on any considered basis.

92. Cllr Harvey also draws my attention to what Munby J had to say as regards the other sorts of action which might, in principle, be available. She places reliance on the following passage about the seriousness of sanctioning an elected representative:

> "…one needs always to have in mind that anything which fetters the otherwise appropriate activities of a democratically elected representative must, as it seems to me, be subjected to the most searching and rigorous scrutiny and is something which requires the most cogent and compelling justification. I confess to being sceptical as to whether any significant restraints of a practical nature imposed on an individual councillor's otherwise appropriate activities (that is, restraints more onerous than those imposed on councillors generally) can be justified in the absence of express statutory authority."

93. The learned judge also referred at pp.36-37 to paragraph 176 of the Third Report of Lord Nolan Committee, which had noted that authorities did not have any power to take action against councillors such as:

i) to bar councillors from particular meetings;

ii) to bar councillors from access to particular papers;

iii) to bar councillors from particular premises;

iv) to restrict their contacts with named staff;

v) to suspend or remove councillors from particular committees;

vi) to suspend or remove councillors entirely from council meetings and council business.

94. The Judge then held that,

> "…as a matter of law, Lord Nolan's Committee was correct in asserting that local authorities at present lack power to control councillors by action of the kind recommended in paragraph 176 of the report. Accordingly, … the imposition by the Council on the applicant of restrictions such as those which Mr Bryant purported to impose would have been *ultra vires* the Council…Putting the point more portentously, the argument that it would have been *intra vires* the Council to impose on the applicant restrictions such as those which Mr Bryant purported to impose involves what in my judgment would be an unacceptable – indeed unlawful – restraint of the applicant's right to perform her functions and duties as a democratically elected representative".

95. Cllr Harvey therefore relies on this section as authority for the proposition that the Council (on whichever basis) lacked authority to impose the sanctions which it did impose.

96. There is, as was fairly conceded by Mr Cross, another section of Munby J's judgment which is somewhat at tension with this. At pp.730, Munby J expressed himself *"far from convinced"* that it would be within the authority's power to make *"new internal arrangements, such as changes to standing orders or working practices (which might involve controlling access to the authority's premises)"*, or to *"give instructions to staff, either general or specific"*, although he was inclined to agree with Counsel for the authority, *"without coming to any final view on questions which do not arise for decision"*, that it might be open to an authority *to "draw up a protocol for member / officer relations [as had been commended by Lord Nolan]"*, *"give advice or make observations, either generally or specifically about a councillor's conduct"*, *"report matters to the police or to the authority's auditors"*, or *"recommend to the full authority*

to remove a councillor from a committee". It was argued that this section should be regarded as tentative and of less authority than the earlier section of the judgment.

97. On that basis Cllr Harvey says that *Lashley* does not really assist the Council because:

i) It was concerned only with the position under the different legislation prevailing at the time. It was not concerned with the issue arising in the present case, namely the effect of the standards provisions in the 2011 Act;

ii) It strongly indicates that, even putting the 2011 Act to one side, an authority's power to take action against a councillor beyond *"naming and shaming"* is significantly limited.

iii) It indicates that prohibitions 5.2.1 and 5.2.2 (the ban on serving on any committee, sub-committee, panel or working group) as well as 5.2.3 (ban on representing the Council on any outside body) and 5.2.4 (ban on direct communication with office staff) were, on any view, *ultra vires*.

98. There are two remaining strands of argument, one advanced by each side.

99. As a back-up argument Cllr Harvey submits that even if the Council's actions as regards sanction might have been within their powers under previous legislation, they were not so in the light of the 2011 Act.

100. Cllr Harvey refers me to the classic statement of the test for implied repeal set out by AL Smith J in *West Ham (Churchwardens, etc) v Fourth City Mutual Building Society* [1892] 1 QB 654 at 658: *"The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier act that the two cannot stand together?".* She says that thus any power which existed prior to the 2011 Act for the Council formally to deal with and take action in response to an allegation that a member had failed to comply with a code of conduct other than through arrangements made under the 2011 Act is inconsistent with the requirement in the 2011 Act to use such arrangements for those purposes.

101. Alternatively even if there was no implied repeal, any previous power could not be *used* consistently with the intention of Parliament in the 2011 Act, given that that powers cannot lawfully be exercised inconsistently with Parliament's intention: *OneSearch Direct Holdings Ltd v City of York Council* [2010] EWHC 590 (Admin) at [24]).

Discussion

102. It has ultimately seemed to me that the reliance placed by the Council on the LGA powers were misplaced, though not entirely for the reasons advanced by Cllr Harvey.

103. To the extent that it was submitted that there was a general power to run a grievance procedure process in tandem with or as an alternative to the Code of Conduct process envisaged by the 2011 Act, I am entirely confident that this cannot be the case, because to do so would be contrary to the intention of Parliament.

104. In the first place there is the wording of the Act. I will come to what the judges in other cases have made of the wording, but the following points seem to me to be clear:

i) S. 27(3) makes clear that a parish council's systems are to be the same as those of a superior authority, effectively by the process of adoption of those systems. There is no "two-track" system for smaller authorities;

ii) S. 28(6) makes the provision of two sets of arrangements mandatory: arrangements as to investigations of Code of Conduct breaches and arrangements as to making decisions on allegations which have been made;

iii) Under s. 28(7) the latter but not the former must include *"at least"* one independent person whose role is to provide views (which must be taken into account) to the authority before they take any decision on an allegation;

iv) The authority may also consult that independent person generally in relation to an allegation (but has no obligation to do so);

v) Section 28(4) is susceptible of being read as a broad obligation to refer all allegations under the code of conduct process. However in my view, in the context of the reference to *"dealt with"* in the first part and the wording of the second part of the section, it is best seen as directed to established breaches and remedies. It imports that a council may not deal with an established breach (eg. as to conflicts of interest) simply by striking down the decision affected by it;

vi) Section 28(11) makes clear that some action may be taken in relation to established breaches;

vii) The same section also indicates that action may be taken in respect of a finding where the investigation was made under different arrangements to those contemplated by sub-section (6) ie under some arrangements which are not the formal investigation process which a council has to have in place.

105. As will be apparent both from the recitation of the section above and these points as to their meaning, the section is carefully structured and introduces arrangements for operations under a mandatory code. Some of those provisions are themselves mandatory. This provides a strong indication that the system which prevailed prior to the introduction of the Act is intended to be affected and not to continue unchanged.

106. In addition, and entirely consistently with this, when one looks at statutory intention in the context of the 2011 Act one needs to bear in mind two points of background. The first is the difficulty which seemed to be inherent in the exercise of disciplinary powers under those provisions before. In this regard I have in mind the passages in *Lashley* at first instance at pp. 725 and 726 (quoting the Nolan report), the summary at p 727, and portions of p. 728.

107. Secondly the statutory provisions have been described in the cases as being designed to fill a lacuna. That lacuna and the desire to deal with it is evidenced at pp. 721 and 726 of *Lashley* at first instance. The intention to move away from it can be seen in *Hussain* [123]:

> "The LA 2011 was intended to strengthen the regime and incorporate expressly the "Nolan principles" on standards in public life. The parliamentary purpose behind the change was twofold. First, to move from a centralised regulatory system to a

> decentralised system based on "localism". Second, to move away from a system which could amount to a vehicle for vexatious and politically motivated complaints which deterred freedom of speech and which could be used to silence or discourage members from whistle-blowing."

108. It is therefore implicit that some change was intended to the regime which was previously in operation.

109. This starting point is of importance when one comes to examine the cases. It is, in my judgment, particularly significant when one bears in mind the underpinning of the finding in *Lashley* at p 719: namely that the operation of s. 111(1) is subject to any contrary statutory provision. The learned judge also gave as one reason for his finding of a power that *"There is no scheme of statutory control which the Committee's activities were designed to circumvent."*

110. One can therefore see that *Lashley* was a case which operated in the context of a different statutory world, and that in introducing the 2011 Act a change was intended.

111. It is therefore important not to strain the meaning of the decision in *Lashley* too far. It certainly is, as was submitted for the Council, a case which establishes that councils had, prior to the 2011 Act, a power to investigate misconduct substantively – but it cannot establish what the power is after that date. It indicates the potential for the survival of a rump power after the 2011 Act. But the existence of such a rump power is not a given, and if it exists does not necessitate the finding of a full tandem system.

112. That limited approach is in tune with *Taylor*. While that case is, as the Council rightly says, not directly on point, it is on my reading aligned with the approach for which Cllr Harvey argued. In particular it flags emphatically the importance of the involvement of independent persons in the context of a statutory scheme of change – again in line with the indications that a change was intended. It flags the intention that the parish council system should be aligned with that of the superior local authority and highlights reasons why that system may be preferable.

113. *Taylor* also provides another indication by way of parallel. The decision there was that the parish council could not go behind the decision of local authority. That is indicative here, where it is effectively argued that the parish council can "cherry pick" an approach to such matters – choosing whether to proceed under the Code or put in place what would be in effect its own different disciplinary Code – potentially with different sanctions regimes. Such an approach would seem to risk incompatibility with the approach in *Taylor* as well as the intention which gave rise to the requirement to adopt the local authority's code procedures.

114. So far as *Hussain* goes, I do not see this as providing the support which the Council suggests it does. While the case plainly leaves open the scope of operation of some powers from the LGA, what was found to operate there was something very specific and very different from the current case. There one was looking at an informal pre-investigation, as opposed to a formal investigations and sanctions process. Further, although the context is different, the analysis of Green J is very clear as to the approach to statutory construction. In particular the learned judge is emphatic as to the mandatory

nature of the operation of the code post that evaluation (see in particular the quoted passages at [141, 142(d)]).

115. So the Council is, on the authority of *Hussain*, right that a pre-investigation before considering whether to institute Code of Conduct proceedings would be permissible. But it does not follow that a formal investigation, and a sanctions element is.

116. In fact it seems to me that there are practical as well as construction reasons to doubt the Council's approach. It would be a considerable oddity if, given the introduction of a scheme to introduce an independent element into disciplinary decision-making, that scheme could be just opted out of. It would also be a considerable oddity if there were no or very limited sanctions for formal Code of Conduct proceedings but full sanctions for non-independent grievance procedures.

117. So far as the approach when sanctions are in question, it certainly seems to me that the statutory code is absolutely clear. Section 28(6) divides the process into two stages: investigation and action (which must logically include sanction). The second element of that must take place with the involvement of the *"independent party"* and must therefore form part of a Code process. It follows that at least the sanctions element of the Council's decision in this case should have taken place via this process and the action taken was indeed *ultra vires*.

118. Indeed I would incline to the view that much of the sanctions decision was *ultra vires* even before the 2011 Act came into force, on the basis of the analysis of Munby J in *Lashley*.

119. As noted above, the position is not entirely clear on this; there is a certain tension between the earlier parts of the judgment where Munby J does seem to express a fairly firm view as to the limits of the sanctions available under the regime then in place, confining them to naming and shaming and exclusion from committees with the consent of their party group, and the section at p 730 where he considers particular possible sanctions and expresses tentative views as to certain wider sanctions. In particular he indicates that the sanction of recommending to a full authority to remove a councillor from a committee might be *intra vires*.

120. Yet I agree with the submission advanced by Mr Cross for Cllr Harvey that that has to be regarded as a very preliminary view; indeed it is expressed as *"Without coming to any final view on questions which do not arise for decision, and on which I have had only limited argument"*. Furthermore that view does not sit well with the views expressed earlier, in particular when they are seen as following on from the citation of the relevant portions of the Nolan Committee report which indicate that the ability to exclude a councillor is dependent on party consent in accordance with s 102 of the LGA.

121. In the end it seems to me that the ability to exclude a parish councillor from a committee of which she is a member will be dependent on the statutory regime, which I am informed is different from that which pertains at the local and county council level, in that at parish council level it is not dependent on party consent. I have not been addressed on what the relevant provisions are, but I conclude by analogy with *Lashley* that the ability to exclude a parish councillor is no wider than the statutory provision in

relation to such councillors. Anything which goes wider than this would, even before the 2011 Act, be *ultra vires*.

122. I therefore consider that the bulk of the sanctions imposed other than exclusion would also be *ultra vires* even on the pre 2011 Act basis. As to exclusion, it seems that the terms of the sanction are likely to be wider than any statutory power, and if so this too would be *ultra vires*.

123. This therefore deals with the sanctions element, and technically with the judicial review. What remains potentially open to argument is the question of investigation. In particular, is it the case, as Cllr Harvey submitted, that if any *"Qualifying Allegation"* is made it must be investigated under the Code provisions, or does a residual power to investigate formally or informally remain? Technically I need not decide this point. However in the light of the detailed argument addressed by both sides to the point, and the fact that this issue is one covered by guidance issued by the organisations of local councils to their members, which would be affected by the outcome, it seems to me appropriate that I deal with it nonetheless.

124. On this the authorities are not directly on point. *Lashley* is of course only pertaining to the position prior to the Act. Meanwhile *Hussain* is focussed on a different issue – informal pre-investigation.

125. In this regard there is also a distinction between the way in which Green J analysed the matter in *Hussain* and the way in which it was argued by Mr Cross before me. Mr Cross submitted that any allegation which substantively if not specifically alleged a breach of the Code of Conduct had to be investigated under the regime set out in the 2011 Act. In *Hussain* Green J drew a distinction between formal and informal investigations, but Mr Cross submitted that was in the context of no allegation having been made – in *Hussain* the *"pre-formal investigation"* was prompted by social media reports of alleged wrongdoing.

126. I have found myself unable to accept the full range of this argument. The correlate of this submission is that if any investigation were prompted by a "Qualifying Allegation", that investigation would have to be a formal one under the Act and could not be dealt with by other means. Thus, as I put it in argument, if an allegation were made by A against B against the background of previously untroubled relations, it would not be open to the council to endeavour to mediate the problem amicably under, say, a grievance procedure or workplace mediation scheme. As a "Qualifying Allegation" it would have to be referred to the formal procedure. One might also hypothesise an equally unsuitable situation for the Code proceedings at the other end of the spectrum.

127. Ultimately I have formed the view that the key issue in relation to such matters actually relates not to the making of the allegation, but to the taking of a decision as regards breach and then taking action in furtherance of that decision. That is the reading most compatible with sub-section 7(a), in particular the wording: *"... whose views are to be sought, ... by the authority before it makes its decision on an allegation that it has decided to investigate"*. That indicates the role of the independent person precedes a decision on an allegation (ie. comes before a finding of breach).

128. It is also compatible with the distinct point made in sub-section 11: *"If a relevant authority finds that a member .... has failed to comply with its code of conduct (whether*

or not the finding is made following an investigation under arrangements put in place under subsection (6)) it may have regard to the failure in deciding ...whether to take action". That section indicates a finding may come following an investigation which is not a sub-section (6) investigation.

129. Accordingly in my judgment, what the section contemplates is actually potentially a four stage process: (i) the making of an allegation (ii) (optionally) a non-formal investigatory or mediation stage or a pause pending other relevant steps being taken (eg. criminal proceedings) (iii) a formal stage, involving an independent person, leading to a decision on breach (iv) (if breach is found) a formal stage, again involving the independent person, dealing with action.

130. What matters for present purposes however is that it is not just at the sanction stage, but also at the decision-making (breach finding) stage that an independent person must be involved and consulted. This of course chimes with the concerns as to the previous regime which could result in partisan processes, and also (to an extent relatedly) with a concern to maximise the chances of procedural and substantive fairness in the process (as to which see Edis J in *Taylor*).

131. This answer does also provide an answer to the absurdity arguments advanced by the Council; though in truth even if I had accepted the full width of Cllr Harvey's argument a reasonable answer to that point was provided by the fact of the procedure in this case, where Cllr Harvey's self-referral went first through an evaluation of whether there was a case to answer. Thus a formal procedure need not involve a full hearing in frivolous cases.

132. Accordingly I would if necessary also have found the Council's decision to be *ultra vires* as regards the investigatory stage. However, as I have indicated, I do consider that Cllr Harvey's approach involves a degree of rigidity and an absence of nuance which does not sit well with the statutory provisions as I read them. The approach which ensures the safeguard at the key stages of decision-making and action while leaving the possibility of more flexible approaches in appropriate cases is to be preferred.

Ground 2: substantive unlawfulness

133. This Ground only arises if, contrary to my finding above, the Council had the power to make the Decision. However since detailed argument was addressed to the point I will consider it below.

134. Cllr Harvey's submission was that the action taken through the Decision was an unjustified interference with her right under Article 10 of the European Convention on Human Rights ("ECHR"), in accordance with which the Council was required to act by virtue of s.6 of the Human Rights Act 1998 ("HRA"). Alternatively, the action was unreasonable at common law.

135. There are two potential issues. First, whether the conduct of Cllr Harvey in respect of which the action is said to have been taken engaged Article 10; and secondly whether, if so, it constituted a justified interference with her right.

136. The former issue was not in dispute. This was in all probability because, as confirmed in *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504 (Admin); [2014] 4 All E.R. 269, what is said by elected politicians is subject to *"enhanced protection",* applying to all levels of politics (including local politics) ([38(i)]); and that the protection *"extends to all matters of public administration and public concern including comments about the adequacy or inadequacy of performance of public duties by others"* ([38(v)]).

137. The key issue before me under this head was therefore whether the particular action in question (i.e. the Standing Committee resolutions which full Council adopted and approved) was justified under Article 10(2).

138. In this regard I was referred by Mr Cross for Cllr Harvey to *Heesom* at [187]-[194], and to *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] UKSC 38 [2014] AC 700 (per Lord Sumption (with whom Baroness Hale, Lord Kerr and Lord Clarke agreed) at [20] and Lord Reid at [74]) and in particular to Lord Sumption's formulation on the question of proportionality, which he says:

> "depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine:
>
> (i) whether its objective is sufficiently important to justify the limitation of a fundamental right;
>
> (ii) whether it is rationally connected to the objective;
>
> (iii) whether a less intrusive measure could have been used; and
>
> (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community."

139. Cllr Harvey also prayed in aid again, as a matter of domestic law, the passage in *Lashley* at first instance at p.45 indicating that the reasonableness of action having the effect of restricting the functions of democratically-elected representatives should be subject to a greater scrutiny than the application of the ordinary *Wednesbury* standard would involve: and specifically would require *"the most searching and rigorous scrutiny"* and *"the most cogent and compelling justification".*

140. On this basis, it was submitted that the action taken against Cllr Harvey, it was manifestly in breach of her Article 10 rights (and unlawful at common law in the same circumstances whether applying the ordinary or heightened *Wednesbury* standard).

141. In particular Cllr Harvey points to the following features:

i) The Council has not clearly identified to the Court the conduct which it found proven and which it says justifies the action.

ii) Insofar as the action was based on conduct said to have occurred between May 2016 and May 2017, this was set out to Cllr Harvey for the first time in Cllr Fieldhouse's evidence to the Court and is disputed by Cllr Harvey.

iii) Even if the Council could *in principle* justify action taken on the basis of conduct which is either unidentified or has not been proven through a fair process, it would have to demonstrate that the action was *"rationally connected to the objective",* that *"a less intrusive measure could[not] have been used"* and that it struck a *"fair balance"*. This it is said it has not come close to doing, particularly in the light of the decision of the Monitoring Officer in her letter of 9 May 2017 (following a Code of Conduct compliant investigation), that there was *"no basis to support a finding that"* Cllr Harvey had breached the Code as alleged in the Complaint.

iv) Cllr Harvey also notes in terms of this last element of the test that the only persons who had raised a formal complaint about Cllr Harvey's conduct had been the Clerk and Deputy Clerk in December 2015 (although neither of them had raised any formal complaint after May 2016). Yet the Council's actions restrict Cllr Harvey in ways which go clearly beyond what would be necessary to achieve the protection of those two persons. In particular she points to the restriction from sitting on <u>any</u> committee and from representing the Council on <u>any</u> outside body and the ban from communicating with <u>any</u> office staff.

142. Cllr Harvey submits that there is no evidence that the decision-maker even turned its mind to the balance of rights, which tells against the attempt to justify the action: *Belfast City Council v Miss Behavin'* [2007] UKHL 19 [2007] 1 WLR 1420 per Baroness Hale at [37]:

> "But the views of the local authority are bound to carry less weight where the local authority has made no attempt to address [the] question. Had the .. Council expressly set itself the task of balancing the rights of individuals ... against the interests of the wider community, a court would find it hard to upset the balance which the local authority had struck. But where there is no indication that this has been done, the court has no alternative but to strike the balance for itself, ..."

143. The Council for its part says that this argument (and Ground 3) is academic because it has attempted to resolve these matters by consent, culminating in its letter of 6th February 2018 offering the Claimant an early review, in advance of that which is due to take place in May 2018. Thus it says that the Council has offered the Claimant the relief which otherwise is potentially available to her by way of an order of the Court.

144. Secondly, the Council points out that the 2016 decision was not challenged and the May 2017 decision did not involve any new grievances, but was taken by way of a review of the May 2016 decision, the upshot of which was that, in the Council's view, the Claimant's conduct towards its employees had not changed in such a way as to warrant a removal of the protective measures which it had earlier put in place.

145. Third, so far as Article 10 of the ECHR is concerned, the Council notes that Article 10 does not confer an unqualified right upon employers, including elected local authority

Members, to bully and/or harass and/or otherwise mistreat their employees in the exercise of their right to freedom of expression. Article 10 on its face explains that it carries duties and responsibilities, and may be subject to restriction for, inter alia, the protection of health or morals, or for the protection of the reputation or rights of others.

146. It submits that the imposition of protective measures such as those which it put in place with respect to the Claimant is, in the circumstances of the present case, entirely consistent with Article 10. It points to the decision of the European Court of Human Rights in *Janowski v Poland* (1999) 29 EHRR 705. In that case the applicant was convicted of insulting municipal guards by calling them "oafs" and "dumb" and in upholding the local court the European Court said at [33]:

> "... civil servants acting in an official capacity are, like politicians, subject to the wider limits of acceptable criticism. Admittedly those limits may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions.
>
> What is more, civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty. In the present case the requirements of such protection do not have to be weighed in relation to the interests of the freedom of the press or of open discussion of matters of public concern since the applicant's remarks were not uttered in such a context."

The Council then directs my attention to the decision in *Heesom* where Hickinbottom J, having considered the Article 10 jurisprudence, remarked at [42]:

> "(1) Civil servants are, of course, open to criticism, including public criticism; but they are involved in assisting with and implementing policies, not (like politicians) making them. As well as in their own private interests in terms of honour, dignity and reputation (see *Mamère* at [27]), it is in the public interest that they are not subject to unwarranted comments that disenable them from performing their public duties and undermine public confidence in the administration. Therefore, in the public interest, it is a legitimate aim of the State to protect public servants from unwarranted comments that have, or may have, that adverse effect on good administration. "

147. The Council says consequently, that there is also a right to protection on the part of civil servants from behaviour which undermines the public confidence in civil servants. It also flags up the point made by the Union representative in *Hussain*, that public servants are not in a position to respond to remarks made to or about them.

148. It says that the evidence in the case establishes overwhelmingly that the Claimant's conduct with respect to the Clerk and Deputy Clerk was of such a nature as to disenable them from performing their public duties, and to undermine public confidence in the administration; and submits that the difficulties evidenced by the resignation of the deputy clerk shows that this behaviour falls within this undesirable ambit. It notes (though this was not formally in evidence) that the Town Clerk herself has now resigned.

149. In these circumstances, the Council says, the imposition of the relevant protective measures upon the Claimant were *"necessary in a democratic society"* for the protection of the interests referred to above, and were entirely proportionate.

150. As regards the question of substantive unfairness the Council submits that the nature of the Clerk's and Deputy Clerk's complaints with respect to the Claimant were entirely clear from their grievances – as is apparent from the publication of the annotated complaint. In these circumstances, it ill-behoves the Claimant to contend that she did not understand the reasons, either for the May 2016 decision, or for the May 2017 decision.

151. The Council also prays in aid the fact that it has made it clear, in both its witness evidence and open correspondence, that it has been anxious to *"engage*" with the Claimant with a view to resolving this matter out of court. Had the Claimant co-operated with that process, it would have provided her and the Council with the opportunity to discuss the Council's concerns regarding her conduct, and for the Claimant to have explored the reasons for those concerns, if she was in any real doubt as to their nature.

152. The Council also makes what amounts to a futility argument akin to an argument under SCA s. 31(2A). It says that Cllr Harvey has now made it clear that she does not accept the legitimacy of the complaints in any respect. Thus they say, even if she was not fully informed at an earlier stage it would have made no difference. It is plain from where we are now that she would not have been prepared to modify her conduct in any respect and so it would have been necessary for the Council to have imposed the protective measures which it put in place in May 2016 and May 2017 in any event.

153. The Council also says that the *ex hypothesi* determination in its favour under Ground 1 resonates here, in particular as regards the relationship between Code of Conduct proceedings, on the one hand, under grievance procedures on the other. It plainly does not follow from the conclusion of the Code of Conduct proceedings that the Claimant had not bullied or harassed the Clerk and Deputy Clerk within the meaning of a grievance process.

154. The Council also notes that it (and the Court) has not had sight of the report produced in connection with the Code of Conduct process that took place with respect to the Claimant and submits that the conclusion of the process cannot be relied upon as an in-principle factor in support of the conclusion that the May 2017 decision was disproportionate.

155. As regards disproportionality of sanction the Council relies on the evidence of the Mayor that in her view it was necessary to restrict the Claimant's external activities,

since Council staff sit on or are associated with external bodies and that the Council had concerns about the nature of the Claimant's communications with staff generally.

156. The Council also submits that Cllr Harvey overstates the effect of the sanctions in that the measures in question do not prevent her from expressing her views. They point me to the principle that where measures do not restrict the essence of expression, this is a proportionate interference: *Rai v UK* (1995) 19 EHRR CD3 and *Mayor of London v Haw* [2010] EWCA Civ 817.

Ground 3: procedural unfairness

157. Under this head Cllr Harvey submits that if the proceedings at issue are properly to be regarded as a "grievance" or "employment" matter, it was dealt with in a way that was obviously and seriously unfair. In particular the process followed did not allow Cllr Harvey any effective opportunity to respond to the case against her, because the case against her was not sufficiently made clear to her and / or because more generally she did not have a fair opportunity to respond to it.

158. Under this umbrella head Cllr Harvey relies on seven specific points, namely that:

i) There was no investigation prior to the Standing Committee meeting on 8 May 2017 (or, apparently, at any time) as to whether the alleged conduct actually occurred and, if so, was justified. In essence, it was never investigated. The Council's actions were a long way from the process of investigation, officer report, and considered deliberation which occurred in ***Lashley***.

ii) The alleged conduct was not identified to Cllr Harvey in advance of the Standing Committee meeting on 8 May 2017 other than by the provision of the complaints in the context of the 2016 Decision She was not even provided with the most basic information; never mind a report or other analysis. In particular, she was not told of the content of the "staff interviews" or about any updated complaints.

iii) The content of the "staff interviews" which supplemented the complaint were not even revealed to the Standing Committee itself. On this the evidence is that the Mayor and Cllr Baker told the Standing Committee *that "[they] considered that there had been little or no improvement in Cllr Harvey's behaviour"*.

iv) the process before the Standing Committee did not allow Cllr Harvey any effective opportunity to respond to it in that the only opportunity for Cllr Harvey to address the Standing Committee at all was in its "public participation" session which took place prior to the private discussion of her case at which any of the allegations against her might have been identified and discussed. Furthermore, the private session meant that she could not hear (literally) the case against her, never mind respond to it.

v) the alleged conduct on the basis of which the Standing Committee made its recommendation was not identified to Cllr Harvey between the Standing Committee meeting and the meeting of full Council on 11 May 2017.

vi) the alleged conduct on the basis of which the Standing Committee made its recommendation was not even identified to full Council.

vii) against the above background, Cllr Harvey had in the circumstances no effective opportunity to defend herself at full Council.

159. The Council submits that, even applying a high standard of fairness, there was no procedural unfairness in this case. Alternatively, even if the process leading up to the May 2017 decision was, in one respect or more, procedurally unfair:

i) As regards the complaint as to absence of investigation the Defendant says that the 2017 decision was a review of the protective measures imposed by way of the May 2016 decision and did not address any new or fresh grievances. In any case, the conduct in question, forming the subject-matter of the original grievances, was well-documented in the attachments to the Clerk's letter in which her grievance was spelt out. There was, therefore, no room for doubt as to whether or not the conduct in question had occurred.

ii) As regards absence of notice of the basis of the May review: the Council submits that it is not realistic to say that Cllr Harvey had insufficient understanding of the nature of the grievances made. Further, it says, she was well-placed herself to know whether she was continuing to indulge in such behaviour after those measures had been put in place.

iii) As regards the staff interviews and generally: the Council says that it should be borne in mind that the grievance procedure deployed by it was not akin to a civil or criminal trial. The Mayor confirmed that there had been little or no improvement in the Claimant's behaviour and this was, as might be expected in regard to a small entity in a small town, a matter of "common knowledge", including on the part of the Standing Committee.

iv) As regards absence of notification and opportunity to respond, the Council says that Cllr Harvey had speaking rights as a sitting Member at the various meetings to which she refers, and she could have submitted a written statement to the meetings in advance of them. Further, the Claimant has not indicated what she would have said which could have led the Council to decide the lift the protective measures and relies on the fact that Cllr Harvey continues to attempt to justify her conduct and refuses to engage with the Council's concerns.

Discussion – Grounds 2 and 3

160. The starting point here is, of course, the hypothetical that the Council did have authority to investigate, decide and sanction under a grievance process and was not (as I have found) bound to proceed, at least as regards the decision and sanction elements, pursuant to a process put in place pursuant to the 2011 Act.

161. On that basis the Council would have had power to act. However the way in which it exercised that power would be subject to the requirements of substantive and procedural fairness. It was accepted by both parties that the issues here overlap. Indeed it has seemed to me that the conventional order is illogical in this case, because it is procedural unfairness which is complained about as regards the earlier stages of investigation and decision-making, and substantive fairness which comes into focus as the process moves to the final aspects of decision-making, and in particular sanctions.

162. I will therefore look at the issues in this reverse order. Before I do so I would make a point which is important in this context. I do not for a moment wish to suggest in what I say below that it is my view that any of the people involved in the process acted from any improper motive. As I hope I have made clear, my concern is solely with a public law review of the process and I have no reason to believe that anyone involved has acted otherwise than in what they thought to be the best interests of their local area and the employees of the Council.

163. Nonetheless it does seem that the process was in substance flawed both procedurally and substantively. The process of abiding by natural justice in a disciplinary process is not necessarily simple or instinctive, particularly in a situation which may be emotionally charged. It is doubtless partially for that reason, as well as bearing in mind the aspects which can occur in some cases of partisan accusations, to which I have referred above, that Parliament introduced the requirement of an independent person at the decision-making and sanctions stages under the 2011 Act and ensured that parish councils were obliged to adopt the process of their superior council.

164. As regards procedural unfairness the position is as follows.

165. As to investigation, Cllr Harvey's complaint appears to be well founded. A complaint of bullying requires to be investigated, which itself involves identification of the precise allegations. Here there appears to have been a detailed but unspecific complaint in 2016. That complaint was never apparently broken down into specific elements which could then be investigated to see if they should (separately or together) properly be categorised as bullying. Similarly, as regards the supplemental material gleaned from the staff interviews.

166. This question would have to be looked at in the context of the particular allegations, and taking into account the kinds of matters which are referenced in *Jarnowski* and *Heesom*. In particular I note that in *Heesom* in the fuller citation of the passage to which I was referred is not insignificant. It states:

> "(2) Nevertheless, the acceptable limits of criticism are wider for non-elected public servants acting in an official capacity than for private individuals, because, as a result of their being in public service, it is appropriate that their actions and behaviour are subject to more thorough scrutiny. However, the limits are not as wide as for elected politicians, who come to the arena voluntarily and have the ability to respond in kind which civil servants do not. ....
>
> (3) Where critical comment is made of a civil servant, such that the public interest in protecting him as well as his private interests are in play, the requirement to protect that civil servant must be weighed against the interest of open discussion of matters of public concern and, if the relevant comment was made by a politician in political expression, the enhanced protection given to his right of freedom of expression: see also *Mamère's* case, para 27."

167. There is simply no evidence that such a process of identification and investigation was undertaken, even as regards the 2016 allegations. When one comes to 2017, and the question of reconsideration after a year, there is nothing except a broad opinion *"we*

considered that there had been little or no improvement in Cllr Harvey's behaviour." This cannot be adequate.

168. In this context it is appropriate to have regard to the facts of *Lashley*, where the question of procedural impropriety formed the second ground of challenge. In that case following complaints, a report was produced by the Council's personnel manager. This was provided to Cllr Lashley. It attached statements from complainants and union representatives. As Munby J summarised it, it identified the *"main allegation"* and then had a number of *"general and unparticularised"* allegations against the councillor. It then listed eight specific instances, said to be updated particulars.

169. Munby J rejected the argument that formal charges should have been made, saying:

> "I cannot accept this complaint .... I have already described Mr Fennell's report, and set out under eight headings the specific instances of "improper behaviour" alleged in the report. Mr Fennell's report very carefully set out each witness's allegations and copies of their statements were, as I have said, attached to his report. It is true that the report and the attached statements contained a number of what I have called general and unparticularised allegations against the applicant, but the specific allegations were all particularised in what seems to me to have been adequate detail.
>
> In my judgment it was sufficiently clear to the applicant from Mr Fennell's report and its attachments what the substance of the complaint against her was. There was no need for "charges"."

170. There is however it seems to me some distance between the process described in *Lashley* and the process which has been explored before me. The allegations in this case were, even at the first stage in 2016, some way short of the level of particularity detailed in *Lashley*. So far as concerned the 2017 decision, and the reliance on subsequent behaviour, it would be kind to describe the material even as unparticularised allegations. All that seems to have been available to the Standing Committee was a one sentence opinion produced by the Mayor and one other councillor. That is no basis for what were, in effect disciplinary proceedings.

171. There is therefore no answer to be found in the Council's case that there was nothing wrong with the 2017 decision because Cllr Lashley knew perfectly well what the allegations against her were in 2016, and there was, effectively, more of the same. I would add that even if the 2016 allegations had been adequately particularised, which in my view they were not, this would not have sufficed in the context of the 2017 decision when what was being considered was whether, after a year's passing and the departure of one of the persons concerned, there was (i) relevant evidence to justify continuing serious sanctions and as part of that (ii) material which was relevant to the intervening period.

172. I also consider that the process was flawed as regards the opportunity given to Cllr Harvey to respond, which should form part of the investigatory process. In part this flows from the absence of clear complaints and identification of evidence. But it does also seem that the process for permitting her participation was defective, in that she was

not able to know what was said about the detail of the charges because of the way the hearing was scheduled, with her only being able to participate in the public session.

173. The Council says that it should be borne in mind that *"that the grievance procedure deployed by it was not akin to a civil or criminal trial"*. This is, I am sorry to say, a point which indicates a concerning lack of consciousness about the requirements of the process. While it was not a civil or criminal trial, it was in effect (because of the decision to impose sanctions) a disciplinary process. A concession to this effect in *Lashley* at first instance was described by Munby J as *"plainly correct"*.

174. It is no answer to say, as the Council does, that the same result would have eventuated, because Cllr Harvey does not accept the validity of the complaints. Where there is a problem with the formulation and investigation of the complaints, it cannot properly be said that the same result would eventuate. For example, if specific complaints had been formulated, Cllr Harvey might have been able to refute some of the complaints on the facts, or contextualise others so as to refute the charge of bullying. Had this happened it cannot (without asserting that the Council's mind was already made up) be said that the same result would have occurred.

175. I therefore concur with the submission made for Cllr Harvey that the statement in the Council's defence that unless Cllr Harvey *"moderates her behaviour",* it is *"highly likely that the same decision will be taken again on any further review"* is a worrying one. If, as I have found, the process of considering the complaint was deficient in natural justice it would be entirely wrong for the Council to approach any fresh consideration of the complaints with anything other than an open mind engaged with the possibility that Cllr Harvey may have legitimate answers to specific complaints made against her.

176. Nor is it an answer to say that the Council have encouraged engagement. The decision before me is not academic in that the Council has not offered the same relief available via this means, either in the form of the lifting of the restrictions or by way of an undertaking that it will not deploy the grievance process again.

177. As regards the issue of substantive unfairness there was no suggestion that the considerations listed in *Bank Mellat* had in fact been engaged with, or indeed that the concept of proportionality had been a consideration. This of course does not mean that the results or the process were defective, but it sounds a note of caution.

178. That note of caution is justified by reviewing the *Bank Mellat* factors in the light of this case. In essence, the Council identifies a single purpose in the action it took: *"to safeguard staff"*. That is, of course, a legitimate objective and it may be one which could justify some limitation of Cllr Harvey's Article 10 rights. But even that first consideration would require also an engagement with the question I have raised above, noted in *Heesom*: was the behaviour beyond that which public servants can be expected to tolerate? Absent the earlier stage of properly particularised complaints it would be hard to answer this question safely.

179. However the question mark which hangs over this first element is irrelevant, as there is no sign at all of engagement with the other factors: rational connection, less intrusive measures and fair balance. All of these also would have to be considered in the light of the specific complaints as established following due process, which of course is missing

in this case. I am therefore bound to conclude that for this reason also the decision complained of should be quashed.

180. But even assuming that complaints were established there seem to me to be, at the very least, question marks hanging over each of the sanctions. Specifically:

i) *She should not serve/substitute on any of the Parish Council's committees, sub-committees, panels or working / steering groups*: The necessary connection here may exist, but there must be doubts over whether a less intrusive measure could have been used (eg. substitute clerks) and whether the balance was fair

ii) *She should not represent the Parish Council on any outside body*: Here all three issues seem open to question.

iii) *The ban on communicating with any office staff*: on the evidence this aspect of the sanctions was plainly not rationally connected with the objective or compliant with minimum intrusion or fair balance indicators in that the complaints derived from two people only, one of whom had now left;

iv) *The LA and all bodies affiliated to the Council be informed of the actions taken by the Council*: again all three issues seem open to question.

181. I would therefore be minded to conclude, if the issue arose on the basis of unchallenged findings of bullying, that the action decided on was unreasonable and disproportionate.

182. As regards the LA conclusion under the Code proceedings, this may not offer the silver bullet contended for by Cllr Harvey, but it does in my judgment constitute a factor which should have been taken into account before any action was taken, as calling the Standing Committee decision into question and potentially as relevant to the question of fair balance.

183. Accordingly it follows from my conclusions above that the decision of 11 May 2017 to continue and enlarge the prohibitions imposed in 2016 must be quashed and that the Claimant is entitled to declaratory relief.