



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 40
XA29/24

Lord Malcolm
Lord Doherty
Lady Wise

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Appeal

by

MERVYN WILSON

Appellant

against

THE SCOTTISH LEGAL COMPLAINTS COMMISSION

Respondent

Appellant: Party

Respondent: N McLean Solicitor Advocate; Brodies LLP

24 December 2024

[1] Mr Mervyn Wilson timeously complained to the Scottish Legal Complaints about the conduct of and the services provided by his solicitor in respect of a proposed purchase of a tenement property. A case investigator took the view that nine separate issues were raised and a summary of complaint document to this effect was agreed with Mr Wilson. In terms of sections 2(1A) and (2A) of the Legal Profession and Legal Aid (Scotland) Act 2007 the Commission required to determine whether they were conduct or services complaints. The investigator decided that issues 1, 8 and 9 raised issues of possible professional misconduct

or unsatisfactory professional conduct, and that the others alleged unsatisfactory professional services.

[2] The Commission then had to take the preliminary step set out in section 2(4)(a), namely “to determine whether the complaint was frivolous, vexatious or totally without merit”. The investigator issued a decision to the effect that issues 4, 8 and 9 were totally without merit and thus were rejected, with the others accepted as eligible for further procedure. In this appeal Mr Wilson challenges the rejection of issues 4 and 9. His first contention raises an issue of importance for the Commission’s procedures. In particular it is said that the case investigator had no power to reject the complaints.

[3] Paragraph 13 of schedule 1 to the 2007 Act sets out the Commission’s delegation powers. Subject to the following sub-paragraphs, paragraph 13(1) allows the nine member Commission to devolve any of its functions to the chief executive; any of its committees; any of its members; and any of its staff (which would include a case investigator). However sub-paragraph (2)(a) provides that the Commission “may authorise a decision under section 2(4)(a) that a complaint is frivolous, vexatious or totally without merit to be taken only by any of its committees or by one of the Commission’s members.” The Commission must establish a determination committee, and paragraph 13(2)(d) requires that committee to make decisions under, amongst other provisions, sections 9(1) and 10(2) which relate to the ultimate disposal of services complaints (eligible conduct complaints are sent to the relevant professional body for investigation and determination). Other specified decisions are reserved to members of the Commission, and matters such annual reports, accounts and the approval of rules to the whole body.

[4] As illustrated by this case, the scheme of delegation as operated by the Commission allows a case investigator (or any member of the management investigation team) to reject

separate issues of complaint as frivolous, vexatious or totally without merit. However he or she cannot reject an entire complaint on such grounds. The Commission's understanding is that when paragraph 13(2)(a) states that the Commission may authorise a complaint to be rejected as frivolous, vexatious or totally without merit only by a committee or a Commission member, "a complaint" means the complaint as a whole, not a discrete matter contained within it. Thus so long as at least one item of complaint is accepted as eligible, it does not matter how many others are rejected; these decisions can be taken by the case investigator. If all were to be rejected, or a single issue complaint is regarded as, for example, totally without merit, this would have to be determined by a committee or one of the Commission's members.

[5] This interpretation of the statutory delegation scheme is said to be practical, pragmatic and consistent with the overall purpose of the statute that complaints are resolved in an effective manner. The legislation was designed to reassure the public that complaints would not be unfairly rejected as invalid by the professional bodies, see *Council of the Law Society of Scotland v Scottish Legal Complaints Commission* 2011 SC 94 at paragraph 51. Given the number of such decisions that need to be made and the limited time that the Commission members work, namely two days per month, any other approach would be unworkable. In an affidavit the chief executive explains that on the basis of figures from the last operational year, Commission members' eligibility decisions would have increased from 101 to 334.

[6] In summary Mr Wilson submits that the Commission's approach flies in the face of the plain meaning of the terms of paragraph 13(2)(a) and amounts to an error in law. He suggests that it has been adopted purely for the administrative convenience of the Commission.

[7] The Commission relies on a purposive construction of the 2007 Act. In our view the purpose of the delegation provisions is tolerably clear. The Commission has a wide discretion to delegate its functions to, amongst others, any member of staff. But this is subject to understandable qualification regarding matters of particular importance, including the ultimate disposal of a services complaint and the rejection of a complaint at the preliminary stage, all designed to ensure the involvement of a member or members of the Commission in substantive determinations. It is those members who, after consultation with the Lord President, have been specially chosen and appointed by the Scottish Ministers to discharge the important public responsibilities conferred on the Commission. The first schedule lays down detailed requirements for their qualifications and other matters such as grounds and procedures for removal. No such safeguards apply to the Commission's staff.

[8] The plain implication of paragraph 13(2)(a) of the first schedule is that Parliament regarded rejection of a complaint as frivolous, vexatious or totally without merit as a weighty matter worthy of the attention of a member of the Commission. Such a decision means that the complaint is not investigated. It is the type of decision which many thought should be removed from the professional bodies and entrusted to a new "single gateway" public body. In short the intention was that substantive as opposed to procedural decisions are reserved to a member or one of the Commission's committees.

[9] Depending on the context, when used in the Act "complaint" can mean the whole of the original submission or a discrete element of that document. The Commission recognises that preliminary eligibility decisions under section 2(4) can be made in respect of separate issues. Thus if there are two matters, the Commission can rule that one is eligible for investigation and one is totally without merit and reject it accordingly. Given that one has to construe the statute as a whole, there is no obvious reason why paragraph 13(2)(a) when

authorising only committees or Commission members to reject “the complaint” as frivolous, vexatious or totally without merit is to be interpreted in a completely different way. On the contrary, a coherent approach requires consistency, particularly when both provisions are dealing with the same subject matter.

[10] The decision was made that Mr Wilson had made nine separate complaints. The correct procedure would have been for the investigator to submit a report, with if appropriate a recommendation as to the outcome, for the attention of a committee or a member of the commission. What happened in this case was an error of law and a procedural impropriety. It follows that the appeal succeeds. This may cause practical problems for the Commission, but they cannot determine the proper interpretation of the legislation. The number of complaints may have implications for the workload of the nine members, but that is for others to address. For the avoidance of doubt, our decision is not intended to cast doubt on the Commission’s current approach to remedies (section 10), nor to the complaints levy (section 28).

[11] If the appeal succeeded for the above reasons, rather than remit issues 4 and 9 to the Commission, both parties asked the court to determine whether they were or were not totally without merit. We have no difficulty with the view that issue 4, which concerns the fixing of a date of entry, is clearly of no substance, but are unable to affirm the same for issue 9, which involves a complaint as to the solicitor’s withdrawal from acting. This should not be misunderstood. We are expressing no view as to whether the professional body should or should not uphold it; that will be for it to decide. Thus as well as upholding the appeal we shall exercise our power in section 22(1) to substitute decisions ruling that issue 9 is eligible for investigation but issue 4 is not since it is totally without merit. It is a consequence of our decision that the rejection of issue 8 was not a matter for the case

investigator, however we have not been asked to interfere with that determination thus that specific complaint can be regarded as no longer maintained.