

Neutral Citation No. [2008] NIQB 70

Ref: HIG7224

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Delivered: 3/7/08

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

HAROLD ANDREWS, WILSON ELLIOTT, RAYMOND FERGUSON,
BASIL JOHNSTON, BERTIE KERR, DEREK NIXON, CECIL NOBLE,
JOE DODDS and BERT JOHNSTON

Appellants;

-and-

W A McDONALD LOCAL GOVERNMENT AUDITOR

Respondent.

HIGGINS LJ

[1] The nine appellants are members or former members of Fermanagh Borough Council and appeal against a decision of the Respondent, a Local Government Auditor (the Auditor), whereby he certified, under the terms of section 82(1)(b) of the Local Government Act (Northern Ireland) 1972, as substituted by article 28(1) of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985, that the sum of £38,178 was due from nine councillors jointly and severally to the Council, being the amount of a loss incurred by their wilful misconduct. Mr T Ferriss QC and Mr Good appeared on behalf of the first seven appellants (the Ulster Unionist Councillors), Mr Larkin QC and Mr Scoffield appeared on behalf of the last two appellants (the Democratic Unionist Councillors) and Mr Brangam QC and Mr Humphreys on behalf of the Auditor.

[2] The substituted section 82(1) provides for the certification, commonly known as surcharging, by a local government auditor, in the following terms:

“82(1) Where it appears to a local government auditor at any audit held by him –

(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Department; or

(b) that a loss has been incurred to deficiency causes by the wilful misconduct of any person,

he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5), both he and the council concerned may recover that sum or amount for the benefit of that council; and if the auditor certifies under this section that any sum or amount is due from two or more persons, they shall be jointly and severally liable for that sum or amount.”

[3] Section 82(3) provides that any person aggrieved by a decision to certify a sum due may appeal against that decision to the Court. Appeals are to the High Court except where the sum alleged to be due falls within the monetary jurisdiction of the County Court. As the amount in this case exceeds that monetary jurisdiction the eleven councillors or former councillors have exercised their right to appeal the Auditor’s decision. Following the procedure confirmed by Carswell J in *Re Baird* 1989 N. I. 56, the appellants have lodged affidavit evidence in support of their appeal and the Auditor has responded similarly.

[4] In 1999 the Council advertised for a new Chief Executive to replace Dr Aideen McGinley who had been appointed a Permanent Secretary of a Department in the Northern Ireland Civil Service. Eighteen applications were received including an application from the Deputy Chief Executive of the Council, Mr Rodney Connor. A Shortlisting Panel that included three councillors and two senior members of the Local Government Staff Commission for Northern Ireland (the LGSC) selected sixteen candidates to attend an Assessment Centre. The eight candidates who achieved the highest marks in exercises carried out at the Assessment Centre were invited to attend for interview by the council on 3 February 2000. The interview panel was to comprise all twenty three members of the Council. Prior to the interviews all

members of the council had received training in interviews and selection from the LGSC. The training included advice on Fair Employment legislation as well as the need to select the candidate who best met the selection criteria and was the best person for the job. Advice was also given on the interview procedure and the requirement to complete an assessment form after each interview. Two independent assessors were to attend the interviews and provide comments after each interview. On completion of the interviews the appointment would be made by elimination and voting.

[5] The advertisement for the post stated that applicants should be qualified under the District Council (Clerk's Qualifications) Determination (Northern Ireland) 1997, have a proven record of achievement and substantial experience in a senior management position and able to demonstrate an awareness of the challenges that faced the council as well as motivational and leadership qualities, creative thinking, communication skills and a pro-active approach to local issues.

[6] On 3 February 2000 twenty two councillors attended the interview and formed the interview panel. Councillor Arlene Foster was unable to attend. Also present were the two independent assessors whose role was to assess the appointability of the candidates and the Chairman of the LGSC (Mr S McDowell) and the Chief Executive of the LGSC (Mr A Kerr) whose role was to act as observers to validate the process. Following the interviews five candidates were eliminated leaving Mr Connor, Mr McSorley and Mr McTeggart. A further round of voting gave Mr McSorley and Mr Connor 10 votes each and Mr McTeggart one vote. One councillor abstained. Mr McTeggart was eliminated. The final round of voting gave Mr McSorley and Mr Connor 11 votes each and the Chairman, Councillor Nixon exercised his casting vote in favour of Mr Connor who was then appointed Chief Executive. Those who voted for Mr Connor in the final round were Councillors Andrews, Elliott, Ferguson, Johnston, Kerr, McClaghry, Nixon, and Noble (all Ulster Unionist Party), Councillors Dodds and Johnson (both Democratic Unionist Party) and Councillor McPhillips (Independent Nationalist). Of the eleven councillors who voted for Mr Connor, Councillor McPhillips was perceived to be a Catholic and the remainder Protestant. No member of the Council who was perceived to be Unionist and Protestant voted for Mr McSorley. Both Mr McSorley and Mr McTeggart were perceived to be Catholic and Mr Connor Protestant.

[7] In April Mr McTeggart lodged a claim with the Fair Employment Tribunal alleging that he had been discriminated against on the grounds of religious belief and/or political opinion in his application for the post of Chief Executive. In May Mr McSorley lodged a similar claim. In February 2003 Mr McSorley's claim was settled with the Council agreeing to pay him £12,500. In January 2004 Mr McTeggart's claim was settled with the Council agreeing to pay him £5000. Each settlement was arrived at following advice from senior

counsel experienced in Fair Employment litigation. As a result of the litigation the Council incurred legal costs in the sum of £20,678. Thus the claims cost the Council a total sum of £38,178. The Auditor found that this loss or deficiency was caused by the wilful conduct of Councillors Andrews, Dodds, Elliott, Ferguson, Johnston, Johnson, Kerr, Nixon and Noble in voting for Mr Connor. No finding was made against Councillor McClaughry who was unable to respond to the Auditor's investigation through ill-health nor was any finding made against Councillor McPhillips. The Auditor analysed the interview assessment forms and voting patterns, received representations from the councillors, interviewed each of them and spoke to or corresponded with the assessors and had access to all the council documentation. There is nothing to suggest that his investigation was other than thorough and painstaking. The Auditor set out his basic findings at paragraphs 39 - 45:

“39. Candidates for appointment to posts with the Council are required to be selected and appointed on merit without reference to actual or perceived religious belief or political opinion.

40. For the reasons set out below, I find as a fact that the decision to appoint Mr Connor as Chief Executive was influenced by an irrelevant consideration, i.e. actual or perceived religious belief or political opinion. There is clear evidence of party voting. As recorded above, no Member with a perceived Protestant religious belief and/or Unionist political affiliation voted for Mr McSorley in the final round of voting on 3 February 2000. All Members with a perceived Protestant religious affiliation and/or Unionist political affiliation voted for Mr Connor in the third (final) round of voting.

41. Where an identifiable group pursue a particular course of action, I am entitled to draw conclusions from the nature of the acts concerned, about the motives of the group as a whole (*Re Baird and Others* [1989] NI 56). In the Northern Ireland context, it stretches the bounds of credulity too far to suggest that it was pure coincidence that all Members with a perceived Protestant/Unionist affiliation believed Mr Connor to be the best candidate (*Cf Baird v Cookstown DC*, Fair Employment Tribunal, 5 January 1994).

42. In the third (final) round of voting the

Members divided on strict party lines (save for the Independent Nationalist, former Councillor McPhillips). This was not “a *matter of coincidence*” as one of the Unionist Members asserted. I do not accept that the appointment of Mr Connor was made on the individual assessments by the Unionist Members of the merits of the respective candidates. I find as a fact that (save in the case of former Councillor McPhillips) those Members who voted to appoint Mr Connor were influenced by reasons of perceived political opinion and/or religious affiliation. Much of the marking by Unionist Members at the interviews on 3 February 2000 is impossible to reconcile with independent assessments of the candidates on the merits.

43. It is remarkable that none of the Unionist Members voted for Mr McSorley or Mr McTeggart, not even former Councillor Basil Johnston who marked Mr McSorley and Mr McTeggart ahead of Mr Connor. Mr McSorley and Mr McTeggart scored better at the Assessment Centre than Mr Connor. Mr McSorley and/or Mr McTeggart performed better at the interviews on 3 February 2000 than Mr Connor as some of the Unionist Members accept, yet all the Unionist Members voted for Mr Connor. The circumstances and voting pattern are consistent only with party political, discriminatory, voting rather than voting on the merits. I find that the three candidates were not assessed on their merits by Unionist Members at the interviews on 3 February 2000.

44. In my view, the evidence leads to the conclusion, and I find as a *fact*, that the decision to appoint Mr Connor was influenced by the Unionist Members having had regard to the actual or perceived religious belief or political opinion of the candidates.

45. My views in relation to the conduct of each of the Unionist Members who voted to appoint Mr Connor in the final round of voting on 3 February 2000 are set out below. I am satisfied that former Councillor McPhillips, Independent Nationalist, who, in the final round of voting also voted to appoint Mr

Connor did so without having regard to the actual or perceived religious belief or political opinion of the candidates. I therefore do not give further consideration to his conduct.”

The appellants challenge the findings of the Auditor and have each filed an affidavit in response to it.

[8] The Auditor found that the appointment was to be made on merit and that marks to be awarded to each candidate were to be based on their performance at interview. It was the view of the independent assessors that Mr McSorley had performed well at interview. The Auditor found that Mr Connor did not perform well at interview. He considered it stretched the bounds of credulity too far to suggest that it was pure coincidence that all Members of the Council with a perceived Protestant/Unionist affiliation believed Mr Connor to be the best candidate. He found a similarity in the reasons put forward by the councillors for voting for Mr Connor and for settling the fair employment claims. However he considered the actions of each individual Members to see if they went along with the approach taken by Unionist Members generally. I propose to set out the principal findings of the Auditor against each councillor and the response to those findings.

Councillor Andrews

[9] Councillor Andrews gave Mr Connor 70.5 marks, Mr McSorley 69 marks and Mr McTeggart 50 marks (he omitted to enter a score for one of the five questions). He named Mr Connor and Mr McSorley as his top two preferences. He accepted that Mr Connor had not performed as well in interview. He marked Mr Connor ahead of Mr McSorley because “there was a commitment from Mr Connor in relation to Fermanagh District Council”. He claimed he voted for Mr Connor as he considered he was the most suitable candidate. The Auditor did not accept that claim. He found misconduct on the part of Councillor Andrews. At paragraph 72 he stated –

“What I have found to be misconduct on the part of Councillor Andrews is that, in concert with other Members, he voted in favour of appointing to the post of Chief Executive despite his poor performance at interview. In doing so, Councillor Andrews took into account an irrelevant and/or unlawful factor. That conduct gave rise to the claims against the Council and caused the Council to incur expenditure in responding to and settling those claims.”

He concluded that the decision to appoint Mr Connor was unlawful, having been influenced by Councillor Andrews and other Members taking into account irrelevant considerations. At paragraph 80 he stated -

“The manner in which Councillor Andrews marked the candidates and cast his votes is explicable only by him having taken into account extraneous, impermissible factors. Those extraneous, impermissible factors were the perceived religious belief and/or political affiliation of the candidates.”

At paragraph 83 he stated that having seen and heard Councillor Andrews he found as a fact that Councillor Andrews took into account the perceived religious belief and/or political affiliation of the candidates in voting for Mr Connor and that in doing so “Councillor Andrews deliberately did something which was wrong or with reckless indifference as to whether it was wrong or not. I find therefore that Councillor Andrews is guilty of wilful misconduct.” He found that Councillor Andrews (and the other Ulster Unionist Members) caused the Council to act in breach of the fair employment legislation.

Former Councillor Elliott

[10] Councillor Elliott gave Mr Connor 80.5 marks and Mr McSorley 74 and Mr McTeggart 79. He named Mr Connor and Mr McTeggart as his top two preferences. At interview Councillor Elliott said he voted for the ‘best man’ and said it was ‘better the devil you know than the devil you don’t know’ and that it was a matter of coincidence that ten unionists had voted for one candidate and all the Nationalists, except one had voted for the other candidate. The Auditor found that if Councillor Elliott had approached the interviews properly he would not have marked Mr Connor ahead of Mr McSorley and that he must have taken other factors into account and that taking other factors into account constituted misconduct. He did not accept Councillor Elliott’s claim that if he did take extraneous matters into account it was on the merits of the most suitable candidate. At paragraph 149 he stated -

“What I have found to be misconduct on the part of Councillor Andrews is that, in concert with other Members, he voted in favour of appointing to the post of Chief Executive despite his poor performance at interview. In doing so, councillor Andrews took into account an irrelevant and/or unlawful factor. That conduct gave rise to the claims against the Council and caused the Council to incur expenditure in responding to and settling those claims.”

He concluded that the decision to appoint Mr Connor was unlawful, having been influenced by Councillor Elliott and other Members taking into account irrelevant considerations. At paragraph 157 he stated -

“The manner in which former Councillor Elliott marked the candidates and cast his votes is explicable only by him having taken into account extraneous, impermissible factors. Those extraneous, impermissible factors were the perceived religious belief and/or political affiliation of the candidates.”

At paragraph 160 he stated that having seen and heard Councillor Elliott he found as a fact that Councillor Elliott took into account the perceived religious belief and/or political affiliation of the candidates in voting for Mr Connor and that in doing so “Councillor Elliott deliberately did something which was wrong or with reckless indifference as to whether it was wrong or not. I find therefore that Councillor Elliott is guilty of wilful misconduct.” He found that Councillor Elliott (and the other Ulster Unionist Members) caused the Council to act in breach of the fair employment legislation.

Former Councillor Ferguson

[11] Councillor Ferguson gave Mr Connor 74.5 marks, Mr McSorley 73 marks and Mr McTeggart 72 marks and named Mr Connor and Mr McSorley as his top two preferences. Councillor Ferguson told the Auditor that he thought Mr Connor was the best man for the job. On the assessment form Councillor Ferguson had written that Mr Connor’s ‘performance was a bit laboured. Didn’t do justice to his ability’. He said he took into account that Mr Connor had been a very effective No 2 in the Council, he knew what to do and he knew his commitment to Fermanagh. He did not accept that those were matters that he should not take into account and stated that Mr Connor had an advantage over the other candidates as the Councillors knew him. He maintained that his marking of the candidates was based on merit and disagreed with the assessments of the independent assessors. The Auditor did not accept Councillor Ferguson’s statement that the marks he gave Mr Connor were awarded on merit. He found that if Councillor Ferguson had approached the interviews properly he would not have given Mr Connor higher marks than Mr McSorley or Mr McTeggart and that he must have taken other factors into account and that taking other factors into account constituted misconduct. At paragraph 198 he stated -

“What I have found to be misconduct on the part of former Councillor Ferguson is that, in concert with other Members, he voted in favour of appointing to the post of Chief Executive despite his poor performance at interview. In doing so, Councillor

Andrews took into account an irrelevant and/or unlawful factor. That conduct gave rise to the claims against the Council and caused the Council to incur expenditure in responding to and settling those claims.”

He concluded that the decision to appoint Mr Connor was unlawful, having been influenced by Councillor Ferguson and other Members taking into account irrelevant considerations. At paragraph 206 he stated –

“The manner in which former Councillor Elliott marked the candidates and cast his votes is explicable only by him having taken into account extraneous, impermissible factors. Those extraneous, impermissible factors were the perceived religious belief and/or political affiliation of the candidates.”

At paragraph 209 he stated that having seen and heard Councillor Ferguson he found as a fact that Councillor Ferguson took into account the perceived religious belief and/or political affiliation of the candidates in voting for Mr Connor and that in doing so “Councillor Ferguson deliberately did something which was wrong or with reckless indifference as to whether it was wrong or not. I find therefore that Councillor Ferguson is guilty of wilful misconduct.” He found that Councillor Ferguson (and the other Ulster Unionist Members) caused the Council to act in breach of the fair employment legislation.

Former Councillor Basil Johnston

[12] Councillor Basil Johnston gave Mr Connor 70.5 marks, Mr McSorley 74 marks and Mr McTeggart 81 marks and named Mr McSorley and Mr McTeggart as his top two preferences. Councillor Johnston abstained from the voting at which Mr McTeggart was eliminated. In the final round he voted for Mr Connor. He accepted that Mr Connor did not perform well at interview but drew a distinction between awarding marks based on performance at interview and voting for the candidate to be appointed. He explained that when voting a Councillor had to take a broad view in the interests of the public. He accepted the inconsistency in voting for a candidate that he had marked third, but stated that he reckoned that Mr Connor was the best candidate. The Auditor did not accept that claim. He found misconduct on the part of Councillor Basil Johnston. At paragraph 238 the Auditor stated –

“What I have found to be misconduct on the part of former Councillor Basil Johnston is that, in concert with other Members, he voted in favour of appointing to the post of Chief Executive despite his poor performance at interview. In doing so, Councillor

Andrews took into account an irrelevant and/or unlawful factor. That conduct gave rise to the claims against the Council and caused the Council to incur expenditure in responding to and settling those claims.”

He concluded that the decision to appoint Mr Connor was unlawful, having been influenced by former Councillor Basil Johnston and other Members taking into account irrelevant considerations. At paragraph 246 he stated –

“The manner in which former Councillor Basil Johnston cast his vote is explicable only by him having taken into account extraneous, impermissible factors. Those extraneous, impermissible factors were the perceived religious belief and/or political affiliation of the candidates.”

At paragraph 249 he stated that having seen and heard Councillor Basil Johnston he found as a fact that Councillor Basil Johnston took into account the perceived religious belief and/or political affiliation of the candidates in voting for Mr Connor and that in doing so “Councillor Basil Johnston deliberately did something which was wrong or with reckless indifference as to whether it was wrong or not. I find therefore that Councillor Basil Johnston guilty of wilful misconduct.”

He found that Councillor Basil Johnston (and the other Ulster Unionist Members) caused the Council to act in breach of the fair employment legislation.

Councillor Kerr

[13] Councillor Kerr gave Mr Connor 81.5 marks, Mr McSorley 72 marks and Mr McTeggart 58 marks and named Mr Connor and Mr McSorley as his top two preferences. Councillor Kerr accepted that Mr Connor had not performed well at interview but he considered he performed better than anyone else. He stated that he did not need to perform on the day, “we knew how he performed for 20 years”. He accepted that at the interviews he was concerned that it was going to be a political appointment the way the voting was taking place. He disagreed with the independent assessors assessment of the interviews. It transpired that Councillor Kerr had made inquiries about the candidates beforehand and was aware that Mr McSorley had taken a claim against another Council and been awarded a substantial sum of money. At the interviews he had it in mind that Mr McSorley “wasn’t competent, he was a man who was arrogant and that he hadn’t the commitment required of a Chief Executive”. Councillor Kerr contended that there was more collusion on the Nationalist side than on the Unionist side. The Auditor found that

Councillor Kerr had taken into account factors other than that should properly be taken into account by an appointment panel. He did not accept that Councillor Kerr voted on his assessment of the merits of the most suitable candidate. He rejected his evidence that Mr Connor “performed better than anyone else”. At paragraph 324 he stated –

“What I have found to be misconduct on the part of Councillor Kerr is that, in concert with other Members, he voted in favour of appointing to the post of Chief Executive despite his poor performance at interview. In doing so, Councillor Andrews took into account an irrelevant and/or unlawful factor. That conduct gave rise to the claims against the Council and caused the Council to incur expenditure in responding to and settling those claims.”

He concluded that the decision to appoint Mr Connor was unlawful, having been influenced by Councillor Kerr and other Members taking into account irrelevant considerations. At paragraph 332 he stated –

“The manner in which Councillor Kerr cast his vote is explicable only by him having taken into account extraneous, impermissible factors. Those extraneous, impermissible factors were the perceived religious belief and/or political affiliation of the candidates.”

At paragraph 335 he stated that having seen and heard Councillor Kerr he found as a fact that Councillor Kerr took into account the perceived religious belief and/or political affiliation of the candidates in voting for Mr Connor and that in doing so “Councillor Kerr deliberately did something which was wrong or with reckless indifference as to whether it was wrong or not. I find therefore that Councillor Kerr guilty of wilful misconduct.” He found that Councillor Kerr (and the other Ulster Unionist Members) caused the Council to act in breach of the fair employment legislation.

Former Councillor Nixon

[14] Councillor Nixon gave Mr Connor 82.5 marks and Mr McSorley 75 and Mr McTeggart 65. He named Mr Connor and Mr McSorley as his top two preferences. At interview with the Auditor Councillor Nixon said it was not his view that McSorley and McTeggart were far ahead of the others candidates. He stated that it was a blatant political vote on the Nationalist side “ but not on our side”. He did not agree with the independent assessors’ assessment of Mr McSorley and said he was of that view because of Mr McSorley’s ‘track record’. He stated that he found Mr McSorley not as good Mr Connor. He said that Mr Connor did not show his good communication

skills on the day and he questioned Mr McSorley's commitment to Fermanagh. The Auditor found that if Councillor Nixon had approached the interviews properly he would not have marked Mr Connor ahead of Mr McSorley and Mr McTeggart and that he must have taken other factors into account and that taking other factors into account constituted misconduct. At paragraph 368 he stated -

"What I have found to be misconduct on the part of former Councillor Nixon is that, in concert with other Members, he voted in favour of appointing to the post of Chief Executive despite his poor performance at interview. In doing so, councillor Andrews took into account an irrelevant and/or unlawful factor. That conduct gave rise to the claims against the Council and caused the Council to incur expenditure in responding to and settling those claims."

He concluded that the decision to appoint Mr Connor was unlawful, having been influenced by Councillor Nixon and other Members taking into account irrelevant considerations. He found that Councillor Nixon was aware that the appointment had to be made on merit and at paragraph 376 stated -

"The manner in which former Councillor Nixon marked the candidates and cast his votes is explicable only by him having taken into account extraneous, impermissible factors. Those extraneous, impermissible factors were the perceived religious belief and/or political affiliation of the candidates."

At paragraph 379 he stated that having seen and heard Councillor Nixon he found as a fact that Councillor Nixon took into account the perceived religious belief and/or political affiliation of the candidates in voting for Mr Connor and that in doing so "Councillor Nixon deliberately did something which was wrong or with reckless indifference as to whether it was wrong or not. I find therefore that Councillor Nixon is guilty of wilful misconduct." He found that Councillor Nixon (and the other Ulster Unionist Members) caused the Council to act in breach of the fair employment legislation.

Former Councillor Noble

[15] Councillor Noble gave Mr Connor 66.5 marks and Mr McSorley 67 and Mr McTeggart 60. He failed to record a score for Mr Conner under one category. He named Mr Connor and Mr McSorley as his top two preferences. At interview with the Auditor, Councillor Noble said that he thought Mr Connor had performed very well at interview. He did not agree with the independent assessors' view that Mr McSorley performed best at interview.

He stated that “in my judgment I selected the best person”. He said he placed Mr Connor first “ as he had been there for 20 years as the Recreation Officer and I knew the man and he had always done the job to my satisfaction and he knew the ways of the Council”. He did not see that taking his personal knowledge of Mr Connor into account was putting the other candidates at a disadvantage. It was put to him that he was saying that the Unionists and Nationalist voted on a political agenda and he replied “ Of course they did, sure it is plain to be seen”. It was put to him that all ten unionists voted for Mr Connor and he replied “Yeah but sure the Nationalists done the very same”. The Auditor found that Councillor Noble was aware that assessment of the candidates was to be the interview itself. The Auditor found that if Councillor Noble had approached the interviews properly he would not have given Mr Connor higher marks than Mr McSorley and/or Mr McTeggart. In fact Councillor Noble had given Mr McSorley higher marks than Mr Connor (67 and 65.5) but had omitted to mark Mr Connor on one category. The maximum mark for that category was ten. The Auditor found that if he had given a mark for that category it would have placed Mr Connor ahead. He found that Councillor Noble had regard to factors other than those which could properly be taken into account and doing so constituted misconduct. At paragraph 412 he stated –

“What I have found to be misconduct on the part of former Councillor Noble is that, in concert with other Members, he voted in favour of appointing to the post of Chief Executive despite his poor performance at interview. In doing so, councillor Andrews took into account an irrelevant and/or unlawful factor. That conduct gave rise to the claims against the Council and caused the Council to incur expenditure in responding to and settling those claims.”

He concluded that the decision to appoint Mr Connor was unlawful, having been influenced by Councillor Noble and other Members taking into account irrelevant considerations. He found that Councillor Noble was aware that the appointment had to be made on merit and at paragraph 420 stated –

“The manner in which former Councillor Nixon marked the candidates and cast his votes is explicable only by him having taken into account extraneous, impermissible factors. Those extraneous, impermissible factors were the perceived religious belief and/or political affiliation of the candidates.”

At paragraph 423 he stated that having seen and heard Councillor Noble he found as a fact that Councillor Noble took into account the perceived religious belief and/or political affiliation of the candidates in voting for Mr Connor

and stated that in doing so “Councillor Noble deliberately did something which was wrong or with reckless indifference as to whether it was wrong or not. I find therefore that Councillor Noble is guilty of wilful misconduct.” He found that Councillor Noble (and the other Ulster Unionist Members) caused the Council to act in breach of the fair employment legislation.

[16] The Auditor rejected claims by the Ulster Unionist Councillors that the decision to settle the claims was reached on economic grounds. He quoted a passage from each of the opinions of senior counsel relating to the claims. In relation to the claim by Mr McSorley counsel stated -

“I do not believe that the Fair Employment Tribunal will accept that all 10 Unionist councillors happened to agree, without reference to religion or politics, that Mr Connor should be appointed on the basis of his experience and commitment to Fermanagh despite his poor performance...

In its initial response to an inquiry about the process from the Fair Employment Commission the Council informed the Commission that Mr Connor was appointed on the basis that he performed better during the interviews. If there is one point on which virtually everybody agrees in this case is that Mr Connor certainly did not perform better at interview...

I believe that the Council is likely to be unable to defend successfully the allegations of discrimination on the grounds of religious belief/political opinion which has been brought by Mr McSorley...

As it is I believe that the Council is exceptionally vulnerable to a finding of discrimination against Mr McSorley. **In the circumstances I believe that the Council should try to settle these claims if terms can be negotiated to minimise the damages which are to be paid and the admissions/concessions which have to be made’** (emphasis added).

In relation to the claim by Mr McTeggart counsel stated -

“In the circumstances, I confirm my earlier advice that the Council is extremely vulnerable to a finding in favour of Mr McTeggart that he suffered unlawful discrimination during the selection process for the appointment of a Chief Executive. The Council should, therefore, in my opinion, compromise the case for the £5,000 which Mr McTeggart will now accept, together with the best achievable terms accompanying that award’ (emphasis added).”

The Auditor went on to add that even if the two claims were settled on economic grounds that would not assist the Councillors. He was not critical of the decisions to settle the claims believing that the Council had little alternative in view of counsel’s opinion. The Auditor found a degree of similarity in the attempts by the Ulster Unionist Councillors in interview to defend their choice of Mr Connor in preference to Mr McSorley. He characterised this as a common approach to identify purported reasons for voting for Mr Connor. He was clearly of the view that the independent assessors’ assessment that Mr McSorley performed better at interview, was correct and that no other view of the respective merits of the candidates could possibly be correct. In those circumstances in the case of the seven Ulster Unionists he found each of them to be guilty of wilful misconduct in similar terms, by taking into account the perceived religious belief or political affiliation of the candidates in voting for Mr Connor and that each of them caused the Council to act in breach of the fair employment legislation.

I turn now to consider how the Auditor regarded the actions of the other two unionist councillors who were members of the Democratic Unionist Party.

Councillor Dodds

[17] Councillor Dodds gave Mr Conner 83.5 marks, Mr McSorley 81 marks and Mr McTeggart 75 marks and named Mr Connor and Mr McSorley as his top two preferences. In interview with the Auditor it was put to Councillor Dodds that his marks were inconsistent with the comments and markings of the independent assessors. Councillor Dodds replied that he felt that Mr Conner merited the marks he gave him at the time. When it was suggested that Mr McSorley, from his application form, had more experience than Mr Connor Councillor Dodds replied that past experience “plays a big part in major interviews, at the end of the day, if you know a person can do the job”. Councillor Dodds maintained that it was his personal opinion at the time that Mr Connor gave a better performance than Mr McSorley and he still believed that. He accepted that he did not show the “same leanings” towards Mr McSorley as he knew of Mr Connor’s commitment to the Council. The Auditor did not accept Councillor Dodd’s evidence that he believed Mr Connor to have given a better performance than Mr McSorley. He found that

in voting for Mr Connor that Councillor Dodds took into account irrelevant or unlawful factors which he knew the appointment panel should not take into account. He found that taking such factors into account constituted misconduct. At paragraph 107 he stated –

“However, in my view, in the circumstances of the appointment of Mr Connor, the manner in which Councillor Dodds marked the candidates and cast his votes is explicable only by him having taken into account an irrelevant and/or unlawful factor namely the perceived religious belief and/or political affiliation of the candidates.”

He reached the above conclusion despite the fact that Councillor Dodds had supported the appointment of the former Chief Executive, who was a Catholic. He concluded that the decision to appoint Mr Connor was unlawful as it was influenced by Councillor Dodds and other Members taking into account irrelevant considerations. At paragraph 115 he repeated his conclusions stated at paragraph 107. Paragraph 115 is in these terms –

“I find as a fact that Councillor Dodds was aware that the appointment of the Chief Executive was to be made on merit. The manner in which former Councillor Nixon marked the candidates and cast his votes is explicable only by him having taken into account extraneous, impermissible factors. Those extraneous, impermissible factors were the perceived religious belief and/or political affiliation of the candidates.”

At paragraph 118 he found that Councillor Dodds took into account the perceived religious belief and/or political affiliation of the candidates in voting for Mr Connor and that stated that in doing so “Councillor Dodds deliberately did something which was wrong or with reckless indifference as to whether it was wrong or not. I find therefore that Councillor Dodds is guilty of wilful misconduct.” He found that Councillor Dodds (and the other Ulster Unionist Members) caused the Council to act in breach of the fair employment legislation.

Councillor Bert Johnston

[18] Councillor Bert Johnston gave Mr Connor 82 marks (though this should have been 75.5) and Mr McTeggart 61 (though this should have been 61). He recorded no marks for Mr McSorley either at the assessment centre or the interview. At interview with the Auditor Councillor Bert Johnston said that Mr McSorley had interviewed very well. He was asked how he had

placed Mr Connor first when the independent assessors had placed Mr McSorley first and Mr McSorley's application form indicated that he had more experience than Mr Connor. Councillor Bert Johnston replied that "I know Mr Connor, because I've worked with him for years, and I know his capabilities, his integrity and his experience of the council area". He did not accept the assessors' view of Mr Connor's interview though he said he felt he did not interview well. He did not doubt the commitment of all three final candidates to County Fermanagh, but went on to say that nobody knew Mr McSorley's commitment to Fermanagh, because he had a record of leaving a number of positions.

Councillor Bert Johnston is diabetic and there was a suggestion that this lay behind his failure to record marks for Mr McSorley. Even if that was so the Auditor found that it was misconduct for Councillor Bert Johnston to vote for Mr Connor when he could not have been in a position to know that he was the best candidate. In the Auditor's view Councillor Bert Johnston voted for Mr Connor because he was acting in line with other Unionist members in favouring the candidate with a perceived Protestant/Unionist affiliation. The Auditor concluded that if Councillor Bert Johnston had approached the interviews on the proper basis he would not have voted for Mr Connor. In so voting the Auditor considered that he had regard to irrelevant or unlawful factors and that this constituted misconduct. At paragraph 278 he stated -

"However, in my view, in the circumstances of the appointment of Mr Connor, the manner in which Councillor Dodds marked the candidates and cast his votes is explicable only by him having taken into account an irrelevant and/or unlawful factor namely the perceived religious belief and/or political affiliation of the candidates."

He reached this view despite the information that Councillor Dodds supported the appointment of the previous Chief Executive, a Catholic. The Auditor then concluded that the appointment of Mr Connor was unlawful as it was influenced by irrelevant considerations. At paragraph 286 the Auditor repeated the views he had expressed at paragraph 278. Paragraph 286 is in these terms -

"I find as a fact that Councillor Dodds was aware that the appointment of the Chief Executive was to be made on merit. The manner in which former Councillor Nixon marked the candidates and cast his votes is explicable only by him having taken into account extraneous, impermissible factors. Those extraneous, impermissible factors were the perceived

religious belief and/or political affiliation of the candidates.”

At paragraph 289 he found that Councillor Bert Johnston took into account the perceived religious belief and/or political affiliation of the candidates in voting for Mr Connor and that stated that in doing so “Councillor Bert Johnston deliberately did something which was wrong or with reckless indifference as to whether it was wrong or not. I find therefore that Councillor Bert Johnston is guilty of wilful misconduct.” He found that Councillor Bert Johnston (and the other Ulster Unionist Members) caused the Council to act in breach of the fair employment legislation.

[19] Both Councillor Dodds and Councillor Bert Johnston represented the Democratic Unionist Party. It will be seen that while there are many similarities in the findings against the members of both groups there is no finding against the Democratic Unionist Councillors that they voted in concert with other Members in favour of appointing Mr Connor despite his poor performance at interview. Why this was so was never satisfactorily explained.

[20] The grounds of appeal in each instance are extensive. The Ulster Unionist grouping lodged a notice of appeal in these terms -

- “a) The Local Government Auditor was wrong in concluding that Fermanagh District Council (‘the Council’) had incurred a loss or deficiency in the sum of £38,178.
- b) If the Council has suffered a loss or deficiency then the Local Government Auditor was wrong in concluding that the same was caused by the wilful misconduct of the Appellant.
- c) The Local Government Auditor failed to give any or adequate weight to a relevant consideration, namely that the loss or deficiency was occasioned by the decision to follow the advices of Senior Counsel.
- d) The Local Government Auditor failed to give any or adequate weight to a relevant consideration, namely that the settlement of the claims by Mr McSorley and Mr McTeggart was appropriate on the basis of the economic concerns of the Council.

- e) The Local Government Auditor failed to give any or adequate weight to a relevant consideration, namely that the settlements of the claims by Mr McSorley and Mr McTeggart, as advised by Senior Counsel, was unlikely to expose individual Councillors to a surcharge by the Local Government Auditor.
- f) The Local Government Auditor was wrong in concluding that the appointment of Mr Connor as Chief Executive of the Council was influenced by an irrelevant consideration, i.e. actual or perceived religious belief or political opinion.
- g) The Local Government Auditor was wrong in concluding that an identifiable group pursued or sought to pursue any particular course of action in the appointment of Mr Connor.
- h) The Local Government Auditor was wrong to seek to draw any conclusion as to the motives of any alleged identifiable group within the Council.
- i) The Local Government Auditor was wrong to reject the assertion that the appointment of Mr Connor was made on the individual assessments of the Appellant and other members of the Council.
- j) The Local Government Auditor was wrong in concluding that those members voting to appoint Mr Connor were influenced by reasons of perceived political opinion and/or religious affiliation.
- k) The Local Government Auditor was wrong to conclude that the circumstances and voting pattern of Councillors was consistent only with party political, discriminatory voting rather than voting on the merits.
- l) The Local Government Auditor was wrong to conclude that the decision to appoint Mr Connor was influenced by the Unionist

members having had regard to the actual or perceived religious belief or political opinion of the candidates.

- m) The Local Government Auditor was incorrectly influenced by an erroneous belief that there had been a previous meeting at which the Council had decided that candidates should be assessed solely on their responses to the core questions.
- n) The Local Government Auditor failed to take appropriate account of the fact of the different composition of the Council at the time of the appointment of Mr Connor and of the decision to settle the claims of Mr McSorley and Mr McTeggart.
- o) The Local Government Auditor failed to give any or adequate consideration as to the behaviour and voting pattern of the Nationalist grouping of the Council.
- p) The Local Government Auditor failed to give any or sufficient weight to the confusion and lack of clarity in respect of recruitment and selection training.
- q) The Local Government Auditor failed to take into account, either adequately or at all, the genuinely held opinion that Mr Connor was the most suitable candidate for the post of Chief Executive.
- r) The Local Government Auditor was wrong in concluding that the taking into account of extraneous factors constituted wilful misconduct.
- s) The Local Government Auditor was wrong in concluding that the taking into account of irrelevant and/or allegedly unlawful factors necessarily constituted misconduct.
- t) The Local Government Auditor wrongly concluded that the Appellant acted in concert

with other members in voting in favour of the appointment of Mr Connor as Chief Executive.

- u) The Local Government Auditor wrongly concluded that the Appellant took into account irrelevant considerations in considering the exercise of his vote in the appointment process.
- v) The Local Government Auditor was wrong in concluding that the factors as expressed to be taken into account in voting for Mr Connor demonstrated alleged consistent evidence of an attempt of a common approach to identify purported reasons.
- w) The Local Government Auditor was wrong in deciding that the Appellant had regard to irrelevant factors or acted in a manner that was not in accord with an intention to afford equality of opportunity to each candidate or was in breach of the fair employment legislation.
- x) The Local Government Auditor was wrong in concluding that the Appellant, in conjunction with other Unionist members of the Council, attempted to find a common approach for his or their action.
- y) The Local Government Auditor was wrong in concluding that the Appellant caused the Council to act in breach of the fair employment legislation.
- z) The Local Government Auditor was wrong in concluding that the Appellant deliberately did something which was wrong, knowing it to be wrong or with reckless indifference as to whether it was wrong or not.
- aa) The Local Government Auditor erroneously concluded that the chain of causation in respect of the alleged loss or deficiency was not broken by the decisions to settle the claims of Mr McSorley and Mr McTeggart.

- bb) The Local Government Auditor was in error in his finding that Unionist members of the Council acted in concert.
- cc) The Local Government Auditor failed to adequately consider or give sufficient weight to the Appellant's representations of 12th August 2005.
- dd) The Local Government Auditor failed to take adequate account of the role of the Local Government Staff Commission for Northern Ireland in participating in the selection process.
- cc) The Local Government failed to conduct his investigation and the consideration of this matter fairly in that:
 - i) he did not fully set out the evidence against the Appellant before asking him to comment or make representations upon the same;
 - ii) he did not provide a proper opportunity to the Appellant to know the precise case being made against him;
 - iii) he failed to appreciate that any conclusion regarding the appointment of Mr Connor could only properly be reached after all steps were taken to mirror any anticipated Tribunal hearing, both procedurally and evidentially;
 - iv) he was not entitled to draw any inference from interview of Councillors without a full oral hearing and testing of the evidence on all issues;
 - v) he failed to have any or adequate regard to the right to a fair hearing pursuant

to Article 6(1) of the European Human Rights Convention and the provisions of the Human Rights Act 1998.

- ff) That the Local Government Auditor had been wrong to conclude that there had been any loss to the Council in the respects alleged and that, if there had been such a loss, that it was caused by the Appellant.
- gg) If the alleged loss had been caused by the Appellant, or other Councillors, the Local Government Auditor had been wrong to conclude that the same had been the result of willful misconduct or any misconduct by the Appellant or any mala fides on his part as was inferred or implied by the Local Government Auditor.
- hh) That the Local Government Auditor had been wrong to conclude that the Appellant had acted unlawfully or wrongly or that he had done so deliberately or with reckless indifference to the results."

[21] The Democratic Unionist Councillors lodged a notice of appeal in the following terms -

- "(1) The auditor found the appellants, and each & them, guilty of wilful misconduct when, applying the correct burden and standard of proof, he should not have (and no reasonable auditor properly directing himself could have) so found,
- (2) The auditor erred in Law and did so, in particular, by:
 - (a) Considering that the sum of £38,178 (representing legal costs and settlement monies paid on legal advice) represented a loss or deficiency in the Council's accounts.
 - (b) Considering that there was any (or a sufficient) causal connection between any loss or deficiency in the Council's accounts and the

conduct of the appellants, and each of them, so as to entitle the auditor to surcharge them.

- (c) Failing, adequately or at all, to look at the conduct of each councillor individually.
 - d) Considering that he was entitled to draw conclusions from the actions of a group, when there was no regular course of action identified on the part of that group.
- (3) The auditor erred in fact and/or took into account irrelevant considerations and did so, in particular, by:
- (a) Considering that the Democratic Unionist Party councillors and the Ulster Unionist Party councillors constituted an identifiable group and/or that there was any pattern of behaviour on behalf of any such group
 - (b) Improperly reaching his own view, without evidential foundation, of the reasons for the Council's settlement of the disappointed candidate's claims.
- (4) The auditor gave manifestly excessive weight to:
- (a) The opinion of senior counsel recommending settlement of the claims against the Council, in circumstances where:
 - (i) The Fair Employment Tribunal made no finding against the Council, let alone a finding based on consideration of the appellants' evidence.
 - (ii) Senior counsel had not had the benefit of speaking to either of the appellants.
 - (iii) The auditor improperly reached his own view, without evidential foundation, of the reasons for the Council's settlement of the disappointed candidate's claims.

- (iv) Senior counsel expressed a view that the settlement, as recommended, was unlikely to expose individual councillors to a surcharge.
- (5) The auditor gave manifestly insufficient weight to:
- (a) The fact that neither the Independent assessors nor the representatives of the Local Government Staff Commission indicated to councillors present and voting that it was impermissible for them to vote for Mr Connor given his performance at interview.
 - (b) The fact that the first-named appellant had previously voted for the appointment of a person of (perceived) Roman Catholic/Nationalist background to the post of Chief Executive.
 - (c) The second named appellant's medical condition and its effects on his judgment.
- (6) The auditor's procedure was conspicuously unfair by reason of
- (a) The delay (of some four years) between the auditor's interviews with the appellants and the appointments process about which the appellants were questioned in detail.
 - (b) The reliance placed by the auditor on the appellants' responses at interview when they were not legally represented or attended.
 - (c) The lack of any opportunity to cross-examine, or otherwise effectively challenge the evidence of, the independent assessors and/or councillors who contended that Mr Connor had performed poorly at interview (which evidence was given considerable weight by the auditor)."

[22] Each Ulster Unionist Councillor lodged an affidavit refuting the findings of the Auditor. I set out a summary of the points made in the affidavits. Each averred that he selected the person whom he considered to be the best candidate and did not decide in his favour on grounds of religious belief or political opinion of any candidate. Each averred that they were unaware that they were to award marks based solely on the performance of candidates at interview in response to the agreed core question or that prior knowledge of a candidate was not to be taken into consideration. There was no discussion of these matters beforehand. It was disputed that his past record was irrelevant. Some stated they could not discount their previous knowledge of Mr Connor. It was alleged that early on in the voting Unionist members did vote for candidates perceived to be Catholic but that the Nationalists never voted for Mr Connor. It was averred that there was no collusion between the unionist councillors to appoint Mr Connor and it was pointed out that the relations between the Ulster Unionists and the Democratic Unionist since 1998 was poor. It was stated that Councillor McPhillips was verbally abused afterwards for voting for Mr Connor it being perceived that he had let the nationalist side down. In deciding to settle the claims the Council did so because the advice given to them was that it would cost more to contest the cases. Generally Mr Connor was praised for the manner in which he has acted as Chief Executive and views were expressed that some Nationalist Members were of a similar view. Some stated that his performance in the post has confirmed the good sense of the Councillors in voting for him. Councillor pointed out that they expressed favourable attitudes to the appointment of Mr Connor's predecessor in 1995. It was pointed out that the observers from the LGSC endorsed Mr Connor's appointment as appropriate. Criticisms were expressed about the questioning by the Auditor and some expressed confusion at the interviews. Councillor Basil Johnston pointed out that the Auditor was incorrect to state at paragraph 229 that he placed Mr Connor third at the assessment centre. He averred he was not present on that occasion. Councillor Nixon denied that he had accepted that Mr Connor had interviewed poorly. All of the Ulster Unionist Councillors expressed resentment at the allegation that they voted for Mr Connor on grounds of religion or political belief.

[23] The Democratic Unionists also swore affidavits. Councillor Dodds averred that he awarded points at interview contemporaneously and later added them up. He considered that Mr Connor performed better at interview than Mr McSorley. Given the requirements of the post and its specification he felt entitled to give Mr Connor credit where his answers supported the experience and pro-active developmental issues approach to local issues which he knew he had. He disclosed that he supported the appointment of Mr Connor's predecessor. He raised a number of other issues that I will deal with later in this judgment including the role of the LGSC. Councillor Bert Johnston swore an affidavit in which he took issue with the findings of the Auditor on similar grounds. Their instructing solicitor Arlene Foster exhibited

a letter from the leader of the Social and Democratic Labour Party who stated that Mr Connor has been a significant asset to Fermanagh District Council and the community it serves. This view of Mr Connor was confirmed further by a letter from a local nationalist businessman and former President of the GAA which was exhibited by a second affidavit sworn by Councillor Kerr which also exhibited the letter from the leader of the SDLP.

[24] It was submitted on behalf of the appellants that these were nine separate appeals and that each appeal should be considered separately. I set out briefly the main submissions of counsel on behalf of the appellants. It was submitted that the Auditor's finding that actual or perceived religious beliefs or political opinions influenced the appointment of Mr Connor based on party voting or otherwise, was unjustified. Equally it was unjustified for the Auditor to draw inferences of motive from the evidence of party voting. Furthermore it was submitted that there was no or insufficient evidence to demonstrate that the loss or deficiency, if there was one, was caused by the acts of the councillors in expressing their vote. The suggested chain of causation was broken by either the voting of Councillor McPhillips, an Independent Nationalist, and/or the casting vote of the Chairman. It was submitted that there was no or insufficient evidence to justify a finding of discrimination against Mr McSorley and/or Mr McTeggart and that the opinion of senior counsel, the settlements of the claims or the voting pattern, either singly or in combination could not lead to such conclusion. There had never been a finding of discrimination and the opinion of senior counsel could not ground one. It was submitted that it was erroneous for the Auditor to conclude that the voting pattern was consistent only with, or explicable only by, party political discriminatory voting. It was submitted that there were other credible explanations why the councillors had voted for Mr Connor and that these should not have been dismissed summarily by the Auditor. It was contended that the voting of Councillor McPhillips and his reasons for so doing, undermined the reasoning and findings of the Auditor. The view taken by the Auditor that the appointment was to be made on the performance at interview was incorrect and that the Councillors were not informed that they could not take other material including personal knowledge of the candidates into account. In so finding, the Auditor ignored inexplicably, the correspondence with the Observer from the LGSC, who were present at the interviews and raised no concerns either at the time or later. It was unjustified for the Auditor to take action against these nine councillors when no action was taken against Councillor McPhillips who voted the same way and for the same reasons. It was submitted that the findings that the councillors acted as a group or in concert or as a block and that their actions amounted to misconduct or wilful misconduct was unfounded. Furthermore it was unfair for the Auditor to dismiss the explanations given by the councillors as ex post facto rationalisations and to describe their answers in interview as misleading without identifying them and then to take them into account as strengthening his findings against the councillors. It was submitted

that the Auditor was not entitled to come to the conclusion that Mr Connor did not perform well at interview. Equally the Auditor was not entitled to dismiss the contention that the claims were settled for economic reasons. The identical reasoning and language deployed by the Auditor in his Statement of Reasons disclosed a failure to consider each case separately and the points made individually by each councillor.

[25] Counsel on behalf of the respondent submitted that as a result of the actions of the councillors, Mr McSorley did not obtain the appointment and Mr McTeggart was denied the opportunity of a fair competition. It was a matter of commonsense that the councillors voted on religious and/or political grounds and that this amounted to misconduct which was wilful in intent and in so doing brought about the fair employment claims which were indefensible. It was submitted that where Protestants voted for a Protestant and where Roman Catholics voted for a Roman Catholic, there was a presumption of discrimination or such inference could be so drawn. Nothing more than a voting pattern was required for such a presumption or inference. It was submitted that if councillors could not show how they voted on merit then voting otherwise amounted to misconduct. As the fair employment claims were indefensible the councillors had caused the loss or deficiency and the issue of the certificate by the Auditor was justified. It was clear that Mr McSorley performed better at interview and that the councillors should have voted for him. If they were to vote for someone else there required to be good reason, of which there was none. It was submitted that in the circumstances the Auditor was entitled to look at the voting pattern and to conclude, as the Court should, that the councillors had manipulated the situation to the advantage of Mr Connor. It was submitted that the action of Councillor McPhillips in voting for Mr Connor was irrelevant. Councillor McPhillips had exercised his choice untainted by party politics. The suggestion that the claims were settled on economic grounds ignored the advice of senior counsel. It was submitted that the issue of the certificate by the Auditor was justified and his Statement of Reasons so disclosed and should be upheld.

[26] Section 82(1) of the Local Government (Northern Ireland) Act 1972 as substituted by Article 28 of the Local Government (Miscellaneous Provisions) (Northern Ireland) Order 1985 provides that where it appears to a local government auditor at any audit held by him that a loss has been incurred or deficiency caused by the wilful misconduct of any person he shall issue a certificate that the sum is due from that person. Where the auditor certifies that a sum is due from two or more persons they shall be jointly and severally liable for that sum. Section 82(2) provides that a person aggrieved by such a decision may require the auditor to state in writing the reasons for his decision. Section 78 of the principal act empowers the auditor to require books and documents to be produced before him, to require any person holding or accountable for any such book or document to appear before him at the audit and to make and sign a declaration as to the correctness of the

book or document. Failure to comply with such a requirement is an offence punishable by fine. In this instance the councillors were requested to appear before the auditor and were cross-examined by the auditor about their actions and statements and the questions and answers were recorded and subsequently transcribed. There is no power in an auditor, other than set out above, to require any person to answer any question though that does not prevent a person attending voluntarily and answering any question asked of him. In this instance the councillors were cross-examined about statements and notes made by other persons which attributed certain statements to the councillor. In the absence of an acceptance of such statements the source of them remained unverified. Considerable caution and care should be exercised in assessing or relying on such notes and statements, and where the contents are contested the weight that may be attributable to them must remain questionable.

[27] It is unlawful for an employer to discriminate against a person in relation to employment on the ground of religious belief or political opinion, that is where he treats that other person less favourably than he treats another person - see Articles 3 and 19 of the Fair Employment and Treatment (Northern Ireland) Order 1998.

[28] Before an auditor can issue a certificate it must be established that a person has through wilful misconduct caused a loss or deficiency. Wilful misconduct is not defined in the Local Government Act 1972. It was considered by Carswell J in *Re Baird and Others* 1989 N.I. 56 where he set out the judicial definitions. At page 69 he stated -

“The 1985 Order changed the condition for surcharge to wilful misconduct, a more stringent requirement than that contained in section 81(1)(d) of the 1972 Act, which provided for a surcharge if a loss was incurred by the “negligence or misconduct” of a councillor or officer. Although the misconduct attributed to the appellants occurred before the passing of the 1985 Order, that provision was in force when the auditor came to give his certificate, and so it has to be based on wilful misconduct. The phrase “wilful misconduct” is not defined in the legislation, but its meaning has been the subject of judicial consideration, both in the present context and in old authorities concerning contracts of carriage with railway companies. I do not propose to discuss the latter line of cases, which are admirably set out in *Jones Local Government Audit Law* (2nd Ed 1985) paragraphs 7.38-7.40. I can move straight to the approval recently given by the House of Lords in *Lloyd v McMahon* [1987] 1 All ER 1118 to the test

propounded by Webster J in *Graham v Teesdale* (1981) 81 LGR 117, 123, which was adopted by the auditor in his statement of reasons. Lord Bridge stated in his opinion at page 1160h that it was abundantly clear that the courts below had applied the right test. Indeed, the appellants did not in the House of Lords seek to reverse the finding of wilful misconduct, their challenge being directed solely to the procedure adopted. In the Court of Appeal Lawton LJ at page 1130d had dealt with the definition succinctly in the following paragraph:

“I start by considering what constitutes 'wilful misconduct' and by what standard of proof it should be established. Wilful misconduct is a more serious charge than 'negligence or misconduct', which was the criterion under the Local Government Act 1933. In *Graham v Teesdale* (1981) 81 LGR 117 at 123 Webster J adjudged that for the purposes of s 161(4) of the 1972 Act s 20 of the 1982 Act is in the same kind of context wilful misconduct meant 'deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not'. I agree.”

When one goes back to Webster J's judgment in *Graham v Teesdale* one finds not only the phrase quoted by Lawton LJ, in which the judge had summarised his consideration of the authorities, but also rather more extended citation of those authorities, which give one further assistance. He referred first to a passage from the judgment of Lord Alverstone CJ in *Forder v Great Western Railway Co* [1905] 2 KB 532, 535, where he said:

“I am quite prepared to adopt, with one slight addition, the definition of wilful misconduct given by Johnson J in *Graham v Belfast and Northern Counties Railway Co* [1901] 2 IR 13, where he says: 'Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even

gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail to omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences.' The addition which I would suggest is, 'or acts with reckless carelessness, not caring what the results of his carelessness may be'."

He also set out two dicta of Barry J in *Horabin v British Overseas Airways Corporation* [1952] 2 All ER 1016. The first is at page 1019F, where he said:

"Wilful misconduct is misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however gross that negligence or carelessness may be. The will must be a party to the misconduct, and not merely a party to the conduct of which complaint is made."

The second is at page 1022E:

"What I think is the best and shortest and most complete definition in English law, not an original definition, but on which has been used more than once in these courts, is this: To be guilty of wilful misconduct the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the results may be."

Two points in particular deserve mention from these passages. The first is that Webster J had omissions as well as positive acts in mind when framing his definition, although he did not specifically mention them. Secondly, the first citation from Barry J's judgment focuses attention on the relation of the

willfulness to the wrongful element in the misconduct, the emphasis being on the first syllable.”

[29] In the context of the instant case it was suggested that the misconduct of the councillors was to treat Mr McSorley (and Mr McTeggart) less favourably on the ground of religious belief or political opinion, by voting for Mr Connor to be appointed to the post of Chief Executive. Thus it had to be established that the nine councillors knowingly voted for Mr Connor on the ground of religious belief or political opinion, the belief or opinion being that of Mr Connor or Mr McSorley or the councillors. The auditor stated correctly at paragraph 37 of his Statement of Reasons the test to be applied, and noted, again correctly, that misconduct occasioned by imprudence, negligence, excess of zeal, misplaced enthusiasm, error or lack of judgment falls short of wilful misconduct.

[30] The standard of proof required is on the balance of probabilities, that is more likely than not, though the more serious the allegation made, the stronger should the evidence be. In *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, 497-8, para 62, Richards LJ expressed the standard in these terms -

“Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.”

This definition was approved recently in the House of Lords in *Re Doherty* 2008 UKHL 33. In giving the leading opinion Lord Carswell observed that the reference to the seriousness of the consequences was relevant to the likelihood or unlikelihood of the allegation being unfounded.

[31] The auditor stated that in view of the serious nature of the allegation of wilful misconduct “it should take a lot of evidence to tip the balance in favour of a positive finding of wilful misconduct”. The auditor found wilful misconduct proved by the decision to appoint Mr Connor where the decision was influenced by actual or perceived religious belief or political opinion as

evidenced by voting on party lines. In arriving at that conclusion the auditor took into account two matters which he identified at paragraph 41 of his Statement of Reasons. He found it stretched the bounds of credulity too far to suggest that it was pure coincidence that all Members of the Council with a perceived Protestant/Unionist affiliation believed Mr Connor to be the best candidate. He compared the context with that which pertained in the case of *Baird v Cookstown District Council* 1998 N.I. 88. In that case it was held that a voting pattern could give rise to a presumption of discrimination on religious or political grounds, which could be displaced by an acceptable explanation. No such explanation was forthcoming in that case. Explanations were put forward in the instant case but dismissed. The second matter was his finding that he could draw conclusions from the nature of the acts of the councillors in order to determine the motive of the group of councillors as a whole. Here he relied on *Re Baird and Others* 1989 N. I. 56 to which I have already referred. In that case a group of unionist councillors had frustrated the grant of a lease to a GAA club over many years. The drawing of an inference as to the motive of the grouping in that case was easily justified given the period of time during which and the consistent manner in which, the group had acted. To do so on the basis of one occasion, as in this case, must be much more problematic and would require very cogent evidence to justify it.

[32] Explanations were forthcoming as to why the Unionist councillors voted for Mr Connor. These were dismissed as *ex post fact* rationalisation. It is clear from the opinion of senior counsel that these explanations were aired before senior counsel gave his opinion in 2003. These explanations included that Mr Connor had worked for the Council for many years, was at the time the Deputy Chief Executive and had acted up in the absence of the Chief Executive. He was well known and clearly liked by many in the Council, had performed well in his job and was committed to the County of Fermanagh. Much of this was undisputed fact. Mr Connor was interviewed for a post in which he had acted up and the interviews were conducted by councillors who knew him and his work record. It would be difficult for any such interviewer to exclude from his mind the favourable impression that Mr Connor made outside the interview. That is only human nature. In the scheme of things it is more likely than not that these issues were not excluded from the minds of those councillors who knew and respected Mr Connor and furthermore, more likely than not that they exercised an influence on their minds. It was a rational explanation that required consideration. In those circumstances, I do not think they should have been dismissed as *ex post facto* rationalisation. The finding about 'seeing and hearing' the councillors is a poor substitute for cogent proof.

[33] The auditor found that Mr Connor did not interview well and that Mr McSorley performed much better. He determined that the councillors should therefore have voted for Mr McSorley as the outcome was in his view to be decided on performance at interview. Reaction to an interviewee is a very

much a subjective matter and there must be room for disagreement about the merits of candidates. It is clear that the assessors expressed their opinion as to who gave the best interview. There was then discussion about the candidates. As one councillor stated – what was the point in asking councillors to decide if they could not exercise their own judgment about the relative strength of the interviewees. There is a body of evidence that creates the impression (if not more) that the councillors felt no constraint about who to vote for, after the interviews had concluded. That raises the question whether it was indeed clear to all, that performance at interview was paramount in the appointment process and that no regard could be had to knowledge of a candidate and his past performance and commitment. While I have some reservations about reliance on unverified notes and comments allegedly made during and after the interview process, it does not appear to be in dispute that Mr Connor’s commitment to Fermanagh was a live issue on the occasion of the interviews. The auditor rejected the suggestion that any such considerations influenced the councillors in their decision making. He found that the marking of the candidates was impossible to reconcile with that of the assessors and that the councillors who voted for Mr Connor were influenced by reasons of perceived political opinion and/or religious belief based on the fact that the Unionists voted on party lines. Voting on party lines for one candidate on one occasion does not give rise to an inevitable or irresistible inference that the voting was influenced by religious belief or political opinion. That is more so when other influences might be (and probably were) at work. I do not consider that the suggestion that the councillors felt and were entitled to feel that they could look beyond performance at interview, can simply be discounted.

[34] The auditor found that the circumstances and voting pattern was consistent only with party political, discriminatory voting, rather than voting on the merits. Councillor McPhillips, the Independent Nationalist, voted for Mr Connor. He gave an articulate and reasoned defence of his decision in interview with the auditor. It is consistent in many respects with the reasons put forward by the appellants, which were rejected by the auditor as *ex post facto* rationalisation. Councillor McPhillips was not surcharged. Counsel on behalf of the respondent submitted that he was exonerated on the basis that he exercised a legitimate choice and was untainted by party politics. If the only councillors to have voted for Mr Connor were Unionists then it might be possible to draw an inevitable or irresistible inference that political opinion or religious belief influenced the decision. However it would require very cogent evidence. The fact that Councillor McPhillips voted for Mr Connor undermines to a significant degree the conclusion of the auditor that the voting pattern of the Unionist councillors was consistent only with party political discriminatory voting and explicable only by the councillors having taken into account an impermissible factor namely the perceived religious belief and/or political affiliation of the candidates. If the reasons put forward by the councillors had been taken into consideration (which I think they

should have been) rather than dismissed, then the conclusion that the only explanation for the voting pattern was discrimination on grounds of religious belief or political opinion could not have been reached. If the other reasons had been considered the voting pattern is equally explicable by the councillors voting for the candidate they knew and trusted to look after the best interests of their county. In those circumstances it could not be explicable only by the impermissible factors of political opinion and religious belief. In any event it does not follow from the voting pattern that the irresistible inference is, that it was for an improper reason.

[35] In July 2004 the auditor wrote to the Chief Executive of the LGSC who had attended the interviews in the role of observer. In the letter he asked a series of questions. Question 8 was -

“I would therefore ask you to let me know why (or if) you consider that Panel members were justified in taking commitment to Fermanagh into account.”

The reply was -

“I feel that panel members were entirely justified in taking ‘commitment to Fermanagh’ into consideration. Councillors need to have an empathy with the Chief Executive. The relationship is a partnership. The interview process is not just about answering questions, it is a verbal exchange to obtain the maximum information about a candidate as possible. The assessment covered an assessment of the whole person, e.g., the application of knowledge and experience in key job areas and personal attributes. These provide a real opportunity for councillors to gauge an individual’s commitment, drive and how they might perform in post.”

Question 10 was -

“In discussion, you suggested that one tradition (presumably you referred to the unionists) wanted a chief executive who would maintain the status quo while the other tradition (presumably the nationalists) wanted a chief executive to bring a fresh perspective and make changes.”

The reply was -

"I agree with the comments attributed to me at our meeting of 10 May."

Question 11 was -

"I wish you to clarify for me whether you believe this to be the reason the traditions split as they did, or whether you were simply advancing this as one possible explanation for the voting pattern. If it was the former, please let me know why you believe this to be the case and how you came to hold that view."

The reply was -

"From experience of voting patterns for posts of Chief Executive in England I am informed that political parties often vote on party lines. There is no religious dimension to this but it is related to a party ethos. It is not surprising that a Labour grouping might support a candidate who identifies with the principles of their party and, in answers to questions; provides examples of how labour thinking and policies could be implemented, should he/she be given the job. Similarly a Conservative controlled council might seek a Chief Executive who can critically appraise central government's treatment of local government at present.

Translating this to a Northern Ireland context, I can well understand, whether consciously or unconsciously, a particular party or tradition might favour a candidate who identifies with their preferred method of working at local government level.

My concern is that in examining voting patterns in Northern Ireland at appointment panels there is an assumption that because party members vote for the same candidate they are doing so for religious/political reasons. This is not necessarily the case and in the Fermanagh appointment, I believe that all those who voted, did so in order to appoint the best person to the job, who they believed could provide the best services to the citizens of the area."

This correspondence took place in July/ August 2004 and the Statement of Reasons was dated September 2005. Surprisingly there is no reference to this

correspondence or these views in the Statement of Reasons. I find that omission a matter of concern. If it was the view of the LGSC observer that those who voted did so in order to appoint the best person to the job, it is difficult to understand how, in the absence of cogent direct evidence to the contrary, that the appointment was found to have been made on grounds of political opinion or religious belief.

[36] A court of law, and an auditor carrying an audit who exercises a quasi judicial function, are entitled to take into account matters of common knowledge which are too notorious to be capable of serious dispute. In the field of politics and religious belief it is wise to proceed cautiously. I will simply say this. It does not follow that if a person is perceived to be a Protestant that he is either a unionist or a loyalist. Equally it does not follow that if a person is perceived to be a Roman Catholic that he is either a nationalist or a republican. It is clear that the nationalist councillors voted for Mr McSorley who was perceived to be a Catholic and, if the reasoning be correct, a Nationalist. It is also clear that the Unionists were alert to what they perceived to be the Nationalists' intention. If the Unionists voted to prevent the Nationalists elect a person whom they believed their political opponents perceived to be 'one of them' in political terms, then it might be argued that the Unionists voted on grounds of political belief. But the political beliefs of the various candidates were not known nor were they or the political beliefs investigated. It might be said that to vote against your political opponents is to do so on grounds of political belief, but that is the cut and thrust of politics. When it occurs it does not follow that it amounts to wilful misconduct. Such a situation might be, for some councillors, equally consistent with them voting with their colleagues out of party loyalty, which might be characterised as imprudence, lack of judgment, misplaced enthusiasm or even zeal, but is it irresistibly wilful.

[37] The auditor found misconduct on the part of the Ulster Unionist councillors in that they, in concert, voted in favour of appointing Mr Connor. The Oxford English Dictionary definition of the word 'concert' is "agreement of two or more persons or parties in a plan, design or enterprise". There is no evidence of a plan to deliberately vote for Mr Connor. It was not alleged that the DUP councillors voted in concert either between themselves or with the Ulster Unionists. The finding that the Ulster Unionists voted 'in concert' is not justified.

[38] Senior counsel advised the Council on the fair employment claims and they were settled. It does not follow from either the advice or the settlements that discrimination in fact occurred. Legal cases are frequently compromised but it does not follow from it that liability is admitted nor can it be inferred. The suggestion by the councillors that the decision to settle was based on economic grounds was, in effect, dismissed by the auditor. However there is a clear undertone in counsel's advice to this effect. In addition counsel

suggested that if the Council failed to accept his advice that failure might expose them to a surcharge. I do not think the suggestion that the decision to settle was taken on economic grounds, or the others made by the councillors, can be ignored on the basis that the auditor both 'saw and heard' the councillors.

[39] The auditor has crafted his reasoning and conclusion with great care. He has set out a number of steps or findings that led to that conclusion. I have given those findings anxious thought and have commented on the difficulties and limitations I find in relation to them. When I consider them individually and in combination I feel a sense of unease that they should lead to the irresistible conclusion that the seven Ulster Unionist and two Democratic Unionist councillors were guilty of wilful misconduct in the manner in which they voted that they caused a loss or deficiency to the Council accounts. I do not consider there was sufficient evidence to justify that conclusion, the more so when there was evidence of considerations taken into account in the voting other than religious belief and/or political opinion, which other considerations should have been considered and not dismissed. The circumstances were consistent with and equally explicable by, selection of the candidate they knew. As one councillor described it - "better the devil you know than the devil you do not know". That is not to condone such approach. There is much about this whole process that can be characterised as unedifying. But if that was the reasoning, and I do not consider it can be discounted, it did not amount to wilful misconduct involving discrimination on grounds of religious belief and political opinion. The auditor stated that it should take a lot of evidence to tip the balance in favour of wilful misconduct. I agree, but I do not consider that the cogent evidence required for such a finding was present.

[40] For all these reasons, while an investigation into the circumstances was justified, I do not consider the findings of the auditor can be sustained and the appeals must be allowed.