

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY THE LOCAL
GOVERNMENT AUDITOR

KERR J

Introduction

[1] This is an application by Mr John S Buchanan, the chief local government auditor, for a declaration under section 81 (1) of the Local Government Act (Northern Ireland) 1972 that expenditure by the Newry & Mourne district council for a staff party held at Christmas 1999 was contrary to law.

Background

[2] The council has been holding a party for its staff at Christmas for a number of years. According to Mr Thomas McCall, the clerk and chief executive of the council, it is "but one small example of the council's approach to staff relations". He has asserted that the party helps to promote productivity and that the expense involved is far outweighed by these positive consequences.

[3] Mr McCall acknowledged that the question whether the expenditure on the party would be of 'direct benefit' to the council was not addressed at the meeting which authorised the holding of the event. The council was principally concerned at that time to ensure that the budget for the party was not exceeded. The council did not contemplate discontinuing the funding for the party; to do so, Mr McCall has averred, was "inconceivable because of the damage [that] such a decision would do to carefully nurtured staff relations"

[4] Mr Buchanan wrote to Mr McCall on 24 March 2000 and one of the matters that he raised was the expenditure on the staff Christmas party. He said that he had referred this and other items from the council's accounts to

his legal advisers. Correspondence was exchanged between the local government auditor and the council and its solicitors which culminated in a letter from Mr Buchanan to Mr McCall of 27 November 2000 on which McShane & Co, solicitors advised. The substance of the advice given was that the expenditure was justified under section 115 of the 1972 Act.

[5] As a result of the local government auditor's intervention the finance sub committee of the council resolved on 29 November 2000 not to authorise expenditure on the Christmas staff party until the legal dispute was resolved. On 4 December 2000 the council was advised that it was entitled to host a Christmas party if councillors formed the view that expenditure on the party was in the interests of and would bring direct benefit to the council. The council agreed (by 19 votes with 3 abstentions) that it would be in the interests of the council to hold the party and that this would bring a direct benefit to it.

The statutory provisions

[6] Section 41 of the 1972 Act makes provision for the appointment and qualification of officers. (Officers are defined in section 148 as including servants.) The following are the material parts of section 41: -

“41. - (1) Every council shall appoint a clerk of the council and shall also appoint such other officers as the council thinks necessary for the efficient discharge of the functions of the council.

(2) A council may appoint a deputy of any officer for the purpose of acting in the place of the officer whenever the office is vacant or the officer is for any reason unable to act.

(3) A person shall not be appointed to-

(a) the office of clerk of a council; or

(b) such other office under a council as the Department may determine,

unless he possesses such qualifications as the Department may determine.

(3A) Without prejudice to any code of procedure established by the Staff Commission, a council shall not appoint any officer unless the vacancy in the

office is advertised in such manner as the Department may determine.

(4) A person shall not be appointed to the office of clerk of a council or to any other office for which qualifications are determined under subsection (3) except in accordance with the advice of an advisory appointment panel established by the Staff Commission; but this subsection shall not apply to-

(b) a temporary appointment made with the approval of the [Department].

(5) Where a council refuses or fails to make an appointment-

(a) from among persons selected by an advisory appointment panel as eligible for the appointment., or

(b) in accordance with directions given by the [Department] for implementing any recommendation made to the council by the Staff Commission;

the [Department], after consulting the council and considering any representations made by it, may make the appointment on behalf of the council and may, for that purpose, annul any other appointment that has been made by the council.

...

(7) A council shall not, without the approval of the [Department], remove from office or suspend, or withhold the remuneration of, any officer appointed by the [Department] under subsection (5).

..."

[7] So far as is material section 115 provides: -

“Expenditure for special purposes.

115. - (1) Subject to subsections (2) to (5), a council may make any payment for any purpose which in its

opinion is in the interests of, and will bring direct benefit to-

- (a) the council;
- (b) its district or any part of its district;
- (c) the inhabitants of its district or any part of its district.

(1A) Subject to subsection (2), a council may make payments to any fund which is raised in connection with a particular event directly affecting persons resident in the United Kingdom on behalf of whom a public appeal for contributions has been made-

- (a) by the chairman of a council; or
- (b) by a committee of which the chairman of a council is a member; or
- (c) by such a person or body as is referred to in section 137(3)(c) of the Local Government Act 1972; or
- (d) by such a person or body as is referred to in section 83(3)(c) of the Local Government (Scotland) Act 1973.

(2) The total payments made under this section by a council in any one financial year shall not exceed the aggregate of -

- (a) the product of a rate of 0.0757p in the pound on the rateable value of all hereditaments in the district which are specified hereditaments as defined by Article 39A(3) of the Rates (Northern Ireland) Order 1977; and
- (b) the product of a rate of 0.5p in the pound on the rateable value of all other hereditaments in the district.

(3) A council shall not make any payment under subsection (1)-

(a) for a purpose for which the council is, either unconditionally or subject to any limitation or to the satisfaction of any condition, authorised or required under any other statutory provision to make any payment or

(b) unless the direct benefit accruing to its district or any part of its district or to the inhabitants of its district or any part of its district will be commensurate with the payments to be made."

[8] Section 81 deals with declarations that items of councils' accounts are unlawful. The material subsections are (1), (2) and (3). They provide as follows: -

"81. - (1) Where it appears to a local government auditor at any audit held by him that any item of account is contrary to law he may apply to the court for a declaration that the item is contrary to law except where it is sanctioned by the Department.

(2) On an application under this section the court may make or refuse to make the declaration asked for, and where the court makes that declaration, then, subject to subsection (3), it may also-

(a) order that any person responsible for incurring or authorising any expenditure declared unlawful shall repay it in whole or in part to the council concerned and, where two or more persons are found to be responsible, that they shall be jointly and severally liable to repay it as aforesaid;

(b) if any such expenditure exceeds £2,000 and the person responsible for incurring or authorising it is, or was at the time of his conduct in question, a member of the council concerned, order

him to be disqualified for being elected or being a member of a council for a specified period; and

(c) order rectification of the accounts.

(3) The court shall not make an order under subsection (2)(a) or (b) if the court is satisfied that the person responsible for incurring or authorising any such expenditure acted reasonably or in the belief that the expenditure was authorised by law, and in any other case shall have regard to all the circumstances, including that person's means and ability to repay that expenditure or any part of it."

The arguments

[9] For the local government auditor, Mr Morrissey submitted that the council had failed to comply with section 115 of the Act in that it did not consider whether the expenditure on the Christmas party would be of direct benefit to the Council. In any event, he argued, the increased productivity that the council claimed the holding of the party would promote carried no tangible advantage for the council; at best it was an indirect benefit and it did not therefore qualify under section 115.

[10] For the council Mr Keogh contended that the power to provide a Christmas party for council staff should either be implied into the council's powers under section 41 or was necessarily incidental to those powers. Alternatively, section 115 was available as the legal basis on which such expenditure could be incurred. Mr Keogh accepted that the council had not complied with this section in relation to the 1999 decision but he suggested that, as was clear from the council's approach to the decision in 2000, if it had been alerted to the point in 1999, it would have concluded that the party was of direct benefit to the council. He suggested that on that account the application for a direction should be refused.

Can the power to incur the expenditure be implied into section 41?

[11] Expenditure on an event such as a Christmas party is not expressly authorised by the 1972 Act. The question arises therefore whether such a power can be implied. In *Bennion on Statutory Interpretation* 4th edition at page 427, section 174, it is stated: -

“The question whether an implication should be found within the express words of an enactment depends on whether it is proper, having regard to the accepted guides to legislative intention, to find the implication; and not on whether the implication is ‘necessary’ or ‘obvious’.”

[12] Ancillary powers may be implied where these are needed to supplement express powers. In *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473, 478 Lord Selborne said: -

“... whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.”

Bennion describes this as the “common law rule that a statutory power by implication carries with it all incidental powers necessary for its operation”.

[13] The promotion of good employment relations by the holding of a Christmas party may be an entirely laudable project but I cannot accept that it would be proper to imply into section 41 the power to incur expenditure of this type. It is certainly not necessary to do so in order to ‘operate’ the powers and duties vested in a local authority by section 41. And the type of expenditure that such an event involves seems to me to be impermissibly remote from those powers and duties to allow such implication.

Section 115

[14] The genesis of section 115 was traced by Hutton J in *Re Cook's application* [1986] NI 242. As he pointed out section 137 of the Local Government Act 1972 (the broadly equivalent provision in England and Wales) was introduced as a result of a recommendation contained in paragraph 323 of the 1969 Report of the Royal Commission on Local Government in England. Professor Wade described this in the fifth edition of *Administrative Law* as a power given to local authorities “to spend money for purposes of their own, so as to give them more scope for enterprise and experiment.”

[15] As originally enacted, section 115 authorised expenditure for any purpose which in the opinion of the local authority was in the interests of the council; of its district or any part thereof; or of the inhabitants of its district or any part of its district. A similar provision (section 83 (1) of the Local Government (Scotland) Act 1973) was considered in *Commission for Local Authority Accounts in Scotland v Grampian RC* 1994 SLT 1120. In that case the

locals authority had given money to two unincorporated associations, the Campaign for a Scottish Assembly and the Scottish Constitutional Convention. The controller of audit challenged these, suggesting that it could not possibly be in the interests of the area or part of it or for all or some of the inhabitants to incur expenditure which was in any way related to the Campaign for a Scottish Assembly. This argument was rejected. At page 1125 Lord Hope said; -

“It seems to us that the question whether the expenditure was in the interests of the area or of its inhabitants was one of fact for the council, not one of law. In a general sense anything which relates in any way to the legitimate interests of the area or its inhabitants may be considered to fall within the words used by the subsection.”

[16] Mr Keogh referred to the fact that the side note to section 115 was “Expenditure for special purposes” and suggested that this may signify the intention to allow councils only a “very limited leeway to incur expenditure”. I do not accept this. Firstly the text of the subsection itself is clear in allowing expenditure “for any purpose”. Secondly it is well settled that one must be circumspect in using a side note as a guide to the interpretation of a statutory provision. At page 637 of *Bennion on Statutory Interpretation* the following appears: -

“... the side note is of very limited use in interpretation because of its necessarily brief and therefore possibly inaccurate nature.”

[17] I am satisfied that if the conditions for the exercise of the power in section 115 are present there is no reason that the council could not have recourse to it for the expenditure on a staff party. It is important to note what those conditions are, however. The council must be satisfied that the payment is in the interests of the council or of its district *etc.* It must also be satisfied that it will be a direct benefit *and that the direct benefit is commensurate with the payment to be made* (subsection 3).

[18] It is accepted that in 1999 the council did not address the question whether the payment would be of direct benefit. On that account alone the payment was contrary to law. An indispensable prerequisite to the lawful exercise of the council’s power under section 115 (1) was that it be satisfied that such a direct benefit would flow from the proposed expenditure. Moreover, although I do not have to decide the point, it appears to me that the decision in 2000 to hold the party was also contrary to law. On that occasion it failed to consider whether the benefit would be commensurate

with the payment made and that is an equally essential ingredient of the decision making process under section 115.

[19] Mr Keogh urged that I should not make the declaration sought notwithstanding the council's omission to have regard to either question in 1999. I cannot accept this invitation. In the first place, as I have held, these are conditions which *must* be fulfilled before the council may validly invoke its powers. (In this context, an interesting contrast may be drawn between the requirements of subsections (1) and (2) of section 81 as provided for in subsection (3). The court must decline to make the orders provided for in subsection (2) if satisfied of any of the matters set out in subsection (3) but no such dispensing power is available in relation to the making of a declaration under section 81 (1).)

[20] In any event, Mr Keogh accepted (correctly in my view) that the onus of establishing that the council would have taken the same decision if it had been alert to the requirements of section 115 (1) rested on his client. That onus has not been discharged. On the evidence available to me I do not consider that it could properly be regarded as inevitable that the same decision would have been taken.

[21] Mr Morrissey submitted that to qualify as a 'direct benefit' the effect of the payment would have to be of a concrete or tangible kind. He accepted, however, that it was for the council to decide whether the claimed for benefit was 'direct'. This concession was well made, in my view, and accords with the approach of Lord Hope in the *Grampian* case. Unless a decision by the council that a direct benefit would accrue from a payment was irrational, it seems to me that it is beyond challenge. If the council had addressed the necessary statutory conditions contained in section 115 and considered those to be fulfilled in respect of the staff Christmas party, the payment of that would have been lawful, in my opinion.

[22] The failure of the council to address those questions rendered their authorisation of the expenditure on the staff party for 1999 unlawful, however, and I will make the declaration sought.