Neutral Citation No: [2020] EWHC 3059 (Admin)

Claim No: CO/1930/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2020

Before : HHJ Karen Walden-Smith, sitting as a Judge of the High Court

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Between :

MAKANJU AWODOLA — **Claimant**

- and -

ASSOCIATION OF CHARTERED CERTIFIED ACCOUNTANTS — **Defendant**

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- -

JOSHUA HITCHENS and SIÂN MCGIBBON (instructed by ADVOCATE) for the Claimant
Claimant
PAUL OZIN QC (instructed by **ACCA**) for the Defendant

Hearing dates: 10 November 2020

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Approved Judgment

HHJ Karen Walden-Smith, sitting as a Judge of the High Court:

1. The Defendant, the Association of Chartered Certified Accountants (ACCA) is an association of professional accountants incorporated under the Companies Act 1929. By virtue of the Royal Charter granted by Queen Elizabeth II on 25 November 1974, Members admitted to the association are entitled to denote their status by use of the professional designations Chartered Certified Accountant or Certified Accountant. After five years continuous membership, a member automatically advances to fellowship of the association. The Claimant, Mr Awodola, became a member of ACCA on 30 April 2005 and a fellow on 30 April 2010. He was excluded from membership as a consequence of the decision of ACCA's Disciplinary Committee on 19 October 2018.

2. Mr Awodola brings this claim for judicial review of ACCA pursuant to an order of Michael Fordham QC, then sitting as Deputy High Court Judge, on one of his four grounds seeking permission, namely "ACCA erred by not allowing the appeal committee to hear my [application for permission to] appeal as stipulated in their appeal procedure but instead applying new rules to the existing appeal." The order granting permission to bring this judicial review on 4 September 2019 does not include any reasons but I have been informed that at the hearing the Judge articulated that the issue upon which permission was granted was whether the wording in bye-law 11(c) of the Royal Charter and bye-laws, which provides:

> "For the avoidance of doubt, a person shall be liable to disciplinary action in accordance with the bye-laws and regulations in force at the time the matters complained of took place. All disciplinary proceedings, however, shall (for the avoidance of doubt) be conducted in accordance with the bye-laws and regulations in force at the time of such proceedings"

meant that the 2018 iteration of the ACCA Rulebook ought to have applied to the appeal proceedings brought by Mr Awodola.

The Royal Charter

3. The provisions of the Royal Charter established ACCA as a global body for professional accountants. The introduction to the Royal Charter and bye-laws provides as follows:

> "The affairs of the Association are managed and regulated in accordance with the Charter and bye-laws. Both the Charter and the byelaws may be amended or added to in general meeting by resolution passed by not less than two-thirds of the members entitled to vote and voting. Such amendments or additions to the Charter and bye-laws have no force or effect until they have been approved by the Privy Council. The Association's Council may from time to time make such regulations as it thinks fit, provided such regulations are not in any way inconsistent with any of the provisions of the Charter and bye-laws.

> Members are reminded that, on applying for admission to membership, they sign an undertaking that if admitted, and as long as they are members, they will observe the Charter, bye-laws and regulations for the time being in force."

The Factual History

4. Mr Awodola accepts that in the first and last quarter of 2015 he assisted a colleague by submitting a client's Company Annual Return with the Irish Companies Registration Office in Dublin for years ended March 2014 and March 2015 respectively. It is his case that he was able to submit the annual returns as an individual residing in the country but he realised that he was not able to complete the submission until he entered the Audit Registration Number (ARN) of an auditor who would be auditing the account. He says that he was authorised by another colleague to use his ARN for the purpose of the submission. The allegation made against Mr Awodola was that he had been involved in submitting audit reports allegedly prepared and submitted by a firm falsely purporting to be the company's auditor. Mr Awodola has throughout denied acting either dishonestly or unethically.

5. By a letter dated 10 April 2017, Mr Awodola was informed that an independent assessor had referred the allegations to ACCA's Disciplinary Committee. The allegations stated:

"1.It is alleged that between 2014 and 2016 Mr Gabriel Makanju Awodola, a fellow member of ACCA

(a) Produced and/or signed and/or submitted to Companies Registration Office, any or all of the reports set out in Schedule 1 in the name of Firm B, when Firm B was not the auditor of Company A

(b) Produced and/or submitted to Companies Registration Office any or all of the documents in Schedule 2 in which Firm B was named as auditor of Company A, when Firm B was not the auditor of Company A

2. In light of the facts set out at allegations 1(a) and/or 1(b) above, Mr Awodola's conduct was

(a) dishonest

(b) contrary to the fundamental principle of integrity

3. In light of the facts set out in 1(a) above, Mr Awodola's conduct was contrary to Global Practising Regulation 3(1)(a)

4. In light of any or all of the facts set out in allegations 1 and/or 2 and/or 3 Mr Awodola is guilty of misconduct contrary to bye-law 8(a)(i); and/or

5. In light of any or all of the facts set out above in allegations 1 and/or 3, Mr Awodola is liable to disciplinary action pursuant to bye-law 8(a)(iii)"

4. The substantive hearing of the complaint proceeded against Mr Awodola on 30 and 31 August and 15 and 19 October 2018. On 19 October 2018, the Disciplinary Committee concluded that a number of the allegations were made out and while the Disciplinary Committee did not consider there was sufficient evidence to establish that he had prepared the actual reports, his actions had been dishonest and he was in breach of the fundamental principle of integrity. When determining the appropriate sanction, the Disciplinary Committee found that the Claimant's behaviour was fundamentally incompatible with him remaining a member of ACCA and that the only appropriate, proportionate and sufficient sanction was to exclude him from membership of ACCA.

5. On 14 November 2018, Mr Awodola sought permission to appeal which was refused on the papers by the Appeal Committee chairman on 30 November 2018. In the covering letter enclosing the decision of the Appeal Committee chairman, Mr Awodola was advised that he could renew his application for permission to the Appeal Committee:

> "You may request that your application notice be reconsidered by the Appeal Committee. You should submit your request within 28 days of service of the Chairman's decision by 2 January 2019.
>
> Such requests must be made in writing, stating which parts of the Chairman's decision you disagree with and why the Appeal Committee should reconsider the decision of the Chairman.
>
> Please note that no application notice shall be reconsidered by the Appeal Committee unless, in the opinion of the Chairman of the Appeal committee which would reconsider the application notice"

6. It is to be noted that the letter informing Mr Awodola that he was entitled to ask for his application to be reconsidered expressly referred to that reconsideration being by the Appeal Committee and that the only time constraint on bringing the application for a reconsideration was that it be made by 2 January 2019. Mr Awodola did wait until 2 January 2019 to submit his appeal and, under cover of an email sent at 15.38, he attached the letter of appeal to the Appeal Committee. That was acknowledged by the ACCA hearings officer who stated that it would be "sent to a Chairman to be considered in due course." On 15 January 2019, Mr Awodola was informed that his application for reconsideration would be dealt with by the Chairman on the papers alone and without a hearing, in accordance with the provisions of the 2019 Rulebook. In his response dated 16 January 2019, Mr Awodola objected to that course on the basis that the appeal process started before the 2019 Rulebook was in force *"It is against the spirit of natural justice to change the rules of the game during the game."* At that time, Mr Awodola was under the misapprehension that the application for permission was to be reconsidered by the same Chairman who had already rejected the application.

7. On 1 January 2019 the ACCA Rulebook had been updated and published online. It contained changes to the Appeal Regulations effective from 1 January 2019 including that an applicant can request for his application for permission be reconsidered by a

second Chairman on the papers in private without a hearing (as set out in the Chartered Certified Accountants' Appeal Regulations 2014, Amended 1 January 2019 reg. 6(3)(g)(ii) and reg. 6(4)(a)). That was a substantial change from the 2018 Rulebook which provided that where the Chairman refused permission to appeal the appellant (rather than applicant) may request that his application notice be reconsidered in accordance with regulation 6(4), which provided that:

> "In the event that a request complying with regulations 6(3)(g)(ii) above is filed, the application notice shall be reconsidered by the Appeal Committee on the papers in private without a hearing; or, if the appellant or respondent requests to be heard, at a hearing …If the application notice is being reconsidered on the papers, the Appeal Committee may at any time direct that the matter should be adjourned for reconsideration at a hearing in order to give the parties an opportunity to make oral submissions."

8. The change in the Rulebook therefore removed the renewed application notice being considered by a full Appeal Committee and removed the ability of Mr Awodola to seek a hearing in which oral submissions could be made.

9. The renewed application for permission to appeal was refused by another Chairman of the Appeal Committee on 14 February 2019. In paragraph 11 of that decision, he stated with respect to the change in the rules

> "I have obtained independent legal advice on this matter that confirms my view that the Application can only be dealt with under 2019AR, as these were the only regulations in place when the Application was submitted. This means I will deal with the Application. The Appellant submits that if I do not grant permission to appeal he should be allowed to put his case to another Chairman (C42). There is no provision under the 2019 AR for this to be done. Finally, I am independent and there is no unfairness to the Appellant in the Application being dealt with by me and not the AC."

Judicial Review Proceedings

10. The application for judicial review was issued by Mr Awodola acting in person on 15 May 2019. He set out four grounds upon which he made the application:

    (i) That he had not been given an opportunity to apply to a second independent assessor before referring it to the Disciplinary Committee

    (ii) That the Defendant acted beyond its power by charging him for an offence that was non-professional in nature;

(iii) That the Defendant wrongly applied the law on dishonesty as this was not an acquisitive crime;

(iv) That the Defendant erred by not allowing the appeal committee to hear his appeal as stipulated in their appeal procedure but instead applied new rules to the exiting appeal

11. On 25 June 2019, Richard Clayton QC refused permission to bring judicial review proceedings on all four grounds on considering the matter on the papers. With respect to the fourth ground he stated:

> "It is not arguable that the defendant acted contrary to natural justice in applying a rule change to the procedure for reconsideration of his application since the reconsideration was made in 2019 and was, therefore, subject to the 2019 rules.""

12. As set out above, Michael Fordham QC, then sitting as a Deputy High Court Judge, granted permission on the fourth ground.

13. Mr Awodola now has the benefit of pro bono advice and assistance through the Bar Pro Bono Unit. I am grateful for the oral and written submissions of Mr Joshua Hitchens and Ms Siân McGibbon acting on behalf of the Claimant pro bono and for the oral and written submissions of Mr Paul Ozin QC on behalf of the Defendant.

14. A point has understandably been taken by Counsel for ACCA that Mr Awodola has been changing his position with respect to the manner in which he seeks to argue his case, the final iteration of that being the third skeleton argument dated 24 October 2020 drafted by Counsel, and that permission would need to be obtained to rely upon a skeleton argument served out of time and raising arguments which were not before the court when permission were granted.

15. In oral submissions at the commencement of the hearing before me, Mr Ozin QC on behalf of ACCA very sensibly agreed to take the pragmatic stance that as Mr Awodola had expressly abandoned the arguments raised in the earlier skeleton arguments, he would not object to Counsel developing the contentions set out in the third skeleton argument.

16. In my judgment, the issue for the court to determine on this substantive hearing is a discrete one, namely whether the Disciplinary Committee of ACCA erred in applying the 2019 iteration of the rule book rather than the 2018 iteration, thereby removing Mr Awodola's right to have his application for permission to appeal reconsidered by the full Appeal Committee with the opportunity of an oral hearing, by reason of failing to apply correctly bye-law 11 (c).

<u>The Challenge</u>

17. Counsel for Mr Awodola characterised the public law challenge as falling within four headings: the Defendant had misinterpreted its own regulations and byelaws and were therefore operating under a mistake as to law or fact; the Defendant had fettered its own discretion either because the Chairman who reconsidered the application for

permission failed to recognise he had a discretion to apply the 2018 Rulebook or the regulations were too rigid; that there was a lack of procedural fairness; alternatively that the Claimant had a legitimate expectation that his application for permission to appeal would be dealt with in accordance with the 2018 Rulebook.

18. Counsel for ACCA contends that as the application for reconsideration was made in 2019, the 2019 Rulebook applies. It is said that by virtue of bye-laws 7(a) and 11(c) the procedural rights of Mr Awodola in disciplinary proceedings are determined by the bye-laws and regulations in force at the time of the proceedings in question and, by becoming a member of ACCA, Mr Awodola had agreed to abide by any changes to the regulations. It is contended, therefore, that there is no unfairness or breach of the requirement of natural justice by virtue of the 2019 Rulebook applying as that was when the application was made by Mr Awodola and there can have been no legitimate expectation that his renewed application for permission to appeal would be considered in accordance with the provisions of the 2018 Rulebook where he had brought that renewed application in 2019.

19. While I understand why they set out their arguments in the way that they decided to, the manner in which Counsel for Mr Awodola have sought to divide their submissions does not add to what is the real issue of challenge: namely whether ACCA have misapplied their own rules in that bye-law 11(c) of the Second Schedule to the Royal Charter was either not considered at all or has been misinterpreted. As a consequence, it is said on behalf of Mr Awodola that he has lost a right to have his application for permission to appeal considered in a certain way, by a full committee and with the potential of an oral hearing. The decision to refuse his renewed application for permission to appeal is therefore said to be tainted by procedural unfairness.

20. The relevant part of bye-law 11(c) set out in the Second Schedule to the Royal Charter provides that *"All disciplinary proceedings, however, shall (for the avoidance of doubt) be conducted in accordance with the bye-laws and regulations in force at the time of such proceedings."* The bye-law was not referred to by Mr Wilson, the second Chairman of the Appeals Committee, when he determined that the application to reconsider "can only be dealt with under the 2019AR, as these were the only regulations in place when the Application was submitted."

21. This interpretation, without apparent consideration of byelaw 11 (c), overlooks the fact that the Charter itself provides that the regulations to be applied are those in force at the time of the disciplinary proceedings which took place in 2018. The submission of the application to reconsider the refusal to grant permission to appeal the decision of the Disciplinary Committee on 2 January 2019, did not restart the proceedings. They were still extant from the time of the hearings and determination in 2018.

22. In my judgment, ACCA did fall into error in making the determination the 2019 Rulebook applied. By reason of byelaw 11(c), ACCA are bound to conduct the disciplinary proceedings in accordance with the regulations in force at the time of the proceedings. While it appears that notification of the complaint was made in 2017, no-one has sought to suggest to me that the disciplinary proceedings themselves commenced in 2017 and that the 2017 Rulebook should apply. Rather, the disciplinary hearings, the decision of the Disciplinary Committee, and the application

for permission to appeal all took place in 2018. The disciplinary proceedings were part of a continuing action and that renewed application for permission to appeal is part of that continuum. The fact that the application was made at the end of the 28-day period allowed for a renewed application for permission to appeal and therefore was made in 2019 when new regulations were in force, does not alter the fact that the disciplinary proceedings were taking place in 2018. The disciplinary proceedings did not stop and then start again because of the renewed application for permission to appeal. Until such time as the 28-day period for renewing the application for permission to appeal was made, the proceedings had not come to an end.

23. The failure of ACCA to recognise that the appeal process was all part of the disciplinary proceedings and therefore all part of what had been continuing through 2018 had the consequence that Mr Awodola was denied that which he had been entitled to when the proceedings commenced, namely the opportunity to renew an application for permission to appeal before a full Appeal Committee with, if he requested it, a right to an oral hearing. While it is understandable that ACCA wished to streamline its processes, the interpretation given by ACCA that the renewed application for permission to appeal was governed by the 2019 Rulebook has had the impact that the effect of removing a right that Mr Awodola already enjoyed and is consequently procedurally unfair.

24. Counsel for Mr Awodola in their joint skeleton argument have referred to a number of examples when transitional provisions are put in place to ensure that pre-existing rights are not removed. These examples are illustrative of a principle but not determinative of this case. The issue in this case is simply that the disciplinary proceedings took place in 2018, the renewed application for permission to appeal against the determination of the Disciplinary Proceedings was made in 2019 but it was part of the proceedings which took place in 2018, and it is therefore the 2018 Rulebook which applies.

25. The fact that the Rulebook changes regularly on 1 January of every new year and that the members are informed of the changeability of the rules does not undermine the principle that the rules that apply are those that are in force when the disciplinary proceedings take place. Contrary to what has been submitted on behalf of ACCA, bye-law 11(c) does not provide clarity and simplicity if its effect is to allow for a change in the applicable rules during the course of the proceedings.

26. Reference has also been made to Bennion on Statutory Interpretation in support of the proposition that there is an exception to the presumption of retrospectivity in the case of procedural changes. However, this case is not concerned with statutory interpretation, but construction of a bye-law in a Royal Charter. It has a clear and obvious meaning.

27. Having come to this conclusion, there is no need for me to deal with the other submissions raised on behalf of Mr Awodola in any detail as they do not assist him in this judicial review and ACCA are correct in their submissions that this is not a case where the Claimant can establish either a fettering of discretion or interference with a legitimate expectation.

Conclusion

28. For the reasons I have set out in this relatively short judgment, this is a clear and straightforward issue whereby ACCA have misinterpreted their own rules and regulations so that Mr Awodola has been denied the ability to have his renewed application for permission to appeal heard by a full Appeal Committee with an oral hearing if he, or the respondent or Appeal Committee, seek one.

29. In the circumstances, therefore, I will quash the determination of ACCA dated 14 February 2019 that Mr Awodola's application for a renewed application for permission to appeal is refused by the single Chairman and order that his renewed application for permission to appeal the determination of the Disciplinary Committee made on 19 October 2018 is considered by the Appeal Committee in accordance with the provisions of regulations 6(3)(g)(ii) and 6(4) of the 2018 Rulebook. The fact that the full Appeal Committee is to consider the renewed application for permission to appeal is, of course, no indication that the Appeal Committee will grant permission. Mr Awodola may find that the Appeal Committee may come to the same conclusion as the Chairman, but he is entitled to put his application before the full Appeal Committee.

30. As I have set out above, I intend to hand down this judgment at 10.30am on Tuesday 17 January 2020 with no attendance being necessary. If an order can be agreed between the parties prior to that hearing then that would be of assistance. If there are matters that cannot be resolved with respect to the drafting of a proposed order then that can be dealt with by way of a further short hearing or written submissions, as appropriate.