

Disciplinary Panel Hearing

Case of

Mr Gary McCully BSc(Hons) MRICS [1127561]

Saudi Arabia

On

Monday 28 October 2019

At

By Telephone conference

Panel

Gillian Seager (Lay Chair)

Jane Bishop (Lay Member)

Paul Watkinson (Surveyor Member)

Legal Assessor

Chris Hamlet

RICS Representative

This was a paper hearing, with written representations prepared on behalf of RICS.

The formal charge is:

The charge against Mr McCully is:

‘Between 1 January 2018 and 1 February 2019 you have failed to comply with RICS’ requirements in respect of Continuing Professional Development (CPD) in that you have not completed and recorded, or caused to be recorded, at least 20 hours of CPD on the RICS CPD portal.

Contrary to Rule 6 of the Rules of Conduct for Members 2007 version 6.’

Mr McCully is therefore liable to disciplinary action under Bye-law 5.2.2.

Notice/Proceeding in Absence:

1. The Panel was directed to the witness statement of Mrs Emma Jones, Regulatory Tribunal Executive, dated 17 October 2019 and associated material. This confirmed that Mr McCully was given notice by email only on 6 September 2019 that this case was to proceed by way of written representations ie: a paper hearing, in accordance with Rules 4d and 43a of the Disciplinary, Registration and Appeal Panel Rules version 7 (the “Rules”). The material included a delivery receipt of that email dated 6 September 2019, timed at 1201 hours.
2. The Panel received advice from the Legal Assessor as to the Rules regarding service in respect of paper hearings. It was directed in particular to Rule 23 and the requirement that notice be sent by “special post”. It was advised that this term is defined in the Rules as “either email with a delivery receipt or a method of delivery by which the delivery of the post can be confirmed...” It concluded that Notice had been properly served in accordance with Rules 23 and 43a(a).
3. The Panel next considered whether to proceed in the absence of Mr McCully. The Legal Assessor’s advice was sought and accepted. The Panel was referred to the case of R-v-Jones [2002] UKHL 5, which Tait v The Royal College of Veterinary Surgeons (RCVS) [2003] UKPC 34 states is also applicable to professional conduct proceedings. The Panel was further referred to the case of GMC v Adeogba and GMC v Visvardis [2016] EWCA Civ 162, in which the Court of Appeal ruled that the regulator’s responsibility was to communicate the Notice of Hearing to the address provided by the Registrant and no more.
4. The Panel in this case took account of the fact, confirmed by the statement of Mrs Emma Jones, that Mr McCully had been emailed the Notice and bundle of evidence in accordance with the Rules, to his preferred email address as notified to RICS. A delivery receipt had been received by RICS in respect of that email.
5. The Panel further took account of the email correspondence which preceded the Notice in which Mr McCully acknowledged the fact that this hearing was coming up but stated, on 2 September 2019 “I will not be entertaining any involvement in the disciplinary hearing.” He had not requested an oral hearing.
6. The Panel duly concluded Mr McCully had voluntarily declined to participate in the hearing and it was appropriate and in the public interest to proceed in his absence.

Evidence:

7. The Panel received a bundle containing material relevant to each stage of the proceedings. On advice from the Legal Assessor, the Panel initially took account of the material only insofar as it was relevant to its decision on the charge and liability to disciplinary action. This included a Case Summary produced on behalf of RICS and a statement from Mr Joe Poole, RICS CPD administrator, dated 21 May 2019 (of which account was taken only in respect of the failure to record any CPD for the year 2018).

Burden and standard of proof:

8. RICS is required to prove the allegations to the civil standard; that it is more likely than not that any event material to those allegations occurred. That is a single unwavering standard of proof, though the more unlikely an allegation the more careful an examination of the

evidence might be required before a Panel find it proved. There is no requirement for Mr McCully to prove anything.

9. The Panel has in mind throughout its deliberations that the right to practise a profession is involved in these proceedings and proceeds upon the basis that the Human Rights Act 1998 will apply. It bears in mind in particular Mr McCully's right to a fair trial and respect for his private and family life under Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as incorporated within UK law by that Act. The question of whether or not any facts admitted or found proved gave rise to liability to disciplinary action is a matter for the Panel's judgment.

Facts:

10. The Panel had regard to the evidence produced that Mr McCully, as a matter of fact, had not completed and recorded any CPD between 1 January 2018 and 1 February 2019. That evidence comprised a print out of Mr McCully's CPD record and the statement produced on behalf of RICS referred to above.
11. It was noted that there is no evidence that Mr McCully has applied for any RICS Exemption or Concession which would have allowed him to avoid that requirement.
12. The Panel concluded that as a matter of fact the charge was made out.

Liability to Disciplinary action:

13. The Panel went on to consider whether Mr McCully was liable to disciplinary action. In coming to its conclusion the Panel accepted the advice of the Legal Assessor. This question is one for the Panel's judgment. The Panel considered that failure to carry out a condition of membership which is there to ensure members retain current knowledge and skills, is serious.
14. The Panel observed that a failure to record CPD prevents RICS from monitoring Mr McCully's compliance with his professional obligations and tends to undermine public confidence in the profession.
15. The Panel took into account the fact that the CPD policy was approved by the Regulatory Board and is an expressly stated RICS Rule. The Panel noted that all members agree to adhere to the RICS Rules, Regulations and Bye Laws and accept that they may be subject to disciplinary action if they fail to do so.
16. It concluded that Mr McCully was liable to disciplinary action.

Sanction:

17. Having found the charge proved and determined that Mr McCully was liable to disciplinary action, the Panel referred to the written submissions on behalf of RICS regarding prior breaches of CPD obligations in 2013 and 2017 for which he received a Caution and a Caution and a Fine, respectively.
18. In addition, the Panel took account of statements from Ms Hayley Moore, Business Improvement and Performance Team Manager at RICS, confirming the mailings sent to Mr

McCully about his CPD obligations, including a postal reminder of the consequences of a further breach.

19. The Panel further took account of the fact, confirmed in an additional statement from Mr Joe Poole, that Mr McCully has failed to pay the fine for the 2017 breach, but has paid membership fees for 2017 and 2018.
20. The Panel further noted the exchange of correspondence between Mr McCully and RICS in which Mr McCully confirmed, in April 2018, “my commitment to complete the CPD requirements by Thursday 03 May 2018 but I will not pay any further fine to the RICS”. However, he subsequently questioned the purpose of CPD compliance, asserting 2 September 2019 that it “...in my view is merely part of the fees renewal....I do not see the RICS as a benefit for my career and am satisfied that my future is safe without the hassle of getting involved with meaningless submissions and excessive fees that are not justified.” He invited RICS to “...take the above as a formal resignation.”
21. The Panel bore in mind that the purpose of sanctions is not to be punitive, though that may be their effect. The purpose of sanctions is to declare and uphold the standards of the profession, to safeguard the reputation of the profession and of RICS as its regulator and to protect the public. Sanctions must be proportionate to the matters found proved.
22. The Panel paid careful heed to the advice of the Legal Assessor and to the indicative sanctions guidance of RICS. It considered carefully the mitigating and aggravating factors of this case.
23. The Panel was advised that in determining what, if any sanction to impose on Mr McCully, Rule 21.1 of the Sanctions Policy provides for a presumption of expulsion in the event of a third breach of CPD obligations within 10 years. However, this presumption is capable of being displaced if the circumstances permitted. The advice, in keeping with the approach of other regulators, was that any sanction imposed must be proportionate, and therefore ought to involve consideration of the lowest sanctions available first and only moving to the next level of sanction if it decides the lesser sanction is inappropriate or otherwise fails to meet the public interest. The Panel bore in mind that more than one sanction may be imposed. If conditions are to be imposed they must be proportionate, workable and address the issues raised in these proceedings.

Mitigating/Aggravating features:

24. The Panel took account of the fact that Mr McCully had failed to provide any substantive explanation to RICS for the breach. It acknowledged Mr McCully’s statement that he had resigned his membership but noted that he was unable to do so prior to the conclusion of all disciplinary proceedings, in accordance with Bye-Law 5.2.3.
25. The following features of the case were considered to aggravate the breach:
 - Prior cautions for similar breaches in 2013 and 2017
 - Receipt of a fine for the 2017 breach
 - Failure to pay the 2017 fine
26. The Panel considered there were no mitigating features.

Decision on Sanction:

27. The Panel considered the matter too serious for no sanction to be imposed. It took account of the guidance at paragraph 21 of the Sanctions Policy which provides that a third breach of Rules regarding CPD within 10 years of receipt of a caution raises a presumption of expulsion.
28. The Panel followed the advice of the Legal Assessor and duly considered all sanctions available to it, starting with the least stringent. However, in the absence of any mitigating features, and an apparent settled intention to disengage from the RICS by cancelling/resigning his membership, the Panel concluded the presumption of expulsion should apply in this case.
29. Accordingly, the Panel ordered Mr McCully be expelled from membership of RICS.

Publication

30. The Panel considered the guidance as to publication of its decisions. It accepted the Legal Assessor's advice. The advice was, and the guidance provides, that it is usual for the decisions of the Panel to be published on RICS' website and in RICS Modus. The Panel sees no reason for departing from the normal practice in this case.
31. The Panel orders that this decision be published on RICS' website and in RICS Modus, in accordance with Supplement 3 to the Sanctions Policy 2008 version 6.

Costs

32. RICS made an application for costs in the sum of £400. The Panel acceded to that application in order that the costs of the hearing are not borne by the profession.

Appeal Period

33. Mr McCully may appeal to an Appeal Panel against this decision within 28 days of notification of this decision, in accordance with Rules 58 – 70 of the Disciplinary, Registration and Appeal Panel Rules 2009 version 7.
34. The Honorary Secretary of RICS may require a review of a finding or penalty imposed by a Disciplinary Panel within 28 days from service of the notification of the decision, in accordance with Rule 59 of the Disciplinary, Registration and Appeal Panel Rules 2009 version 7.

