

27.03.20 – Extract from Lawyers in Local Government

Cllr 6 months automatic disqualification

Carolyn Wheater: - City of Lincoln Council

I have just a (probably quite minor) question. We currently have 2 Cllrs who are ill (and would clearly fall into the 'vulnerable' category for coronavirus) They haven't attended meetings for a while. We were intending to take a dispensation to next Council in April as they would be nearing their 6 months limit. If this meeting doesn't go ahead, this would mean they would be automatically disqualified for non - attendance by the time we met again. We do have emergency powers in the Constitution to our Chief Executive and can delegate Exec functions to the Leader, but not sure any of that would cover a Council meeting to grant a dispensation?

Governance Forum – responses:

10 comments

Tim Ryder

Dear Carolyn

We have the same issue with one of our councillors, I am minded to take the view that this would be covered by emergency powers. If challenged, who would consider that this was an unreasonable decision to take in the circumstances?

David McCullough

I have exactly the same issue and although our Leader has power to make all executive decisions in an emergency this is not an executive decision. I am minded just to allow him to continue in office and if challenged (which I very much doubt) I am sure the collective minds of LLG colleagues could come up with a reason! Not very legal I know, but these are strange times.

Helen McGrath

The LGA have raised this with the Ministry and we have submitted representations too. We are hopeful there will be a response soon

Lisa Hastings

Dear Carolyn,

I agree with Tim, we are in exactly the same situation. We have decided to circulate the report to all Councillors, which was going to Full Council, ask for comments from members prior to the Chief Executive taking an Officer decision under emergency powers.

Jeremy Chambers

Hopefully this will be addressed soon by Central Government. If it isn't we are going to have to take a practical approach and risk a challenge (however unlikely).

David Kitson

Although without precedent in terms of case law, I would suggest that this could be dealt with under CE emergency powers (assuming these are set out in your constitution). As to whether an approval of absence is delegable I am also aware of Councils having set up a standing delegated authority to the MO to approve absence in specified circumstances, particularly ill health.

Section 85 of the Local Government Act 1972 (under which the six month rule operates) refers to the member ceasing to be a member of the Council "*unless the failure was due to some reason approved by the authority*" prior to the expiry of the 6 month period. Despite the wording that the approval is to be made by "*the authority*", there is no provision within the same legislation that states explicitly that the approval for absence can only be made by the full Council. This can be contrasted against the duty to set the annual budget, and in relation to which section 67 of the Local Government Act 1992 states that this can "*only be discharged by the authority*".

Therefore in the absence of something similar set out in the LGA 72, it is arguable that the approval of absence under section 85 is delegable and could potentially be exercised by the CE under emergency powers.

To enable Member input on such an approval, it might be worthwhile sending an email to all Cllrs asking for any objections to the approval of absence to be provided within a set period of time (depending on the specific timescales involved regarding the 6 month cut off). The CE could then consider whether any objections received were material or well founded (in a similar vein to the dismissal process under the Local Authorities (Standing Orders) (England) Regulations 2001) as part of a decision whether or not to approve absence.

We have also published a general article on decision making and the coronavirus that may be of interest and can be accessed via the following link:

<http://www.bevanbrittan.com/insights/articles/2020/covid-19-local-authority-governance-and-decision-making/>

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Bryn Roberts

Naturally, we've had similar thoughts going into this rather curious period; fortunately, I had a meeting of full Council on Thursday last week, which went ahead (with only around a third of my Members, to ensure there was sufficient space between them) principally to provide them with an update on COVID-19. However, we also took an urgent item which granted an

additional six months to all members, meaning it'll be somewhere round February (at the earliest) next year before any of them run into any difficulties. But that's only been possible because we had a meeting already scheduled and which the Members wanted to go ahead.

Ian Curtis

I'm not as sanguine as David about the chief executive being able to sanction the absence of a member under delegated powers. I can't see the distinction he seeks to draw between the use of "the authority" in section 67 and that in section 85. Fortunately, the government has indicated that it will legislate to deal with the issue (although there is nothing in the current draft of the Coronavirus Bill).

David Kitson

Hello All

I suppose a key point here is that it is very unlikely that anyone will seek to challenge. Of course opposition Members may seek to raise issue, but this would likely be politically damaging - in essence it would be akin to seeking to take advantage of another's ill health.

For those who may have missed it the government published the proposed amendment to the Coronavirus Bill, which appears to have been considered last night, and is now set out as section 78 in the bill before the House of Lords:

<https://publications.parliament.uk/pa/bills/lbill/58-01/110/5801110.pdf>

Section 78 includes the following:

- (1) The relevant national authority may by regulations make provision relating to—*
 - (a) requirements to hold local authority meetings;*
 - (b) the times at or by which, periods within which, or frequency with which, local authority meetings are to be held;*
 - (c) the places at which local authority meetings are to be held;*
 - (d) the manner in which persons may attend, speak at, vote in, or otherwise participate in, local authority meetings;*
 - (e) public admission and access to local authority meetings;*
 - (f) the places at which, and manner in which, documents relating to local authority meetings are to be open to inspection by, or otherwise available to, members of the public.*
- (3) The regulations may make provision only in relation to local authority meetings required to be held, or held, before 7 May 2021.*
- (4) The power to make regulations under this section includes power—*
 - (a) to disapply or modify any provision of an enactment or subordinate legislation;*
 - (b) to make different provision for different purposes;*
 - (c) to make consequential, supplementary, incidental, transitional or saving provision.*

There is no express mention of the 6 month rule (arguably a suspension or temporary amendment could be made under the above provisions), however the problems should be largely addressed by the ability to hold meetings with remote attendance.

The distinction I make above focuses on the requirement in section 67 LGFA 92 that the exercise of the function can only be "**discharged** by the authority" - it cannot therefore be delegated, whereas there is no similar restriction on the section 85 LGA 72 provision. Another example of where a function cannot be delegated is set out in section 101(6) LGA 72:

"A local authority's functions with respect to levying, or issuing a precept for, a rate...shall be discharged only by the authority."

Take care everybody.

David Kitson | Senior Associate
for **Bevan Brittan LLP**

David Kitson said about about 19 hours ago

FYI the bill is now an Act:

<http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted/data.htm>

There is also a House of Commons Briefing in relation to the section 78 power to make regulations here:

<https://commonslibrary.parliament.uk/research-briefings/cbp-8873/>

Likely timescales for the exercise of the powers is not currently known, however the briefing does set out the likely aims sitting behind the same, which includes reference to the 6 month rule.

Enjoy!

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for **Bevan Brittan LLP**