



TRIBIWNLYS Y GYMRAEG
Rhif yr Achos: TyG/WLT/16/8

ALED POWELL
(Ceisydd)
v
COMISIYNYDD Y GYMRAEG
(Atebydd)

PENDERFYNIAD Y TRIBIWNLYS

Aelodau'r Panel

Keith Bush CF (Llywydd y Tribiwnlys)
Nicola Jones
Isata Kanneh

Deunydd y bu'r Tribiwnlys yn ei ystyried

Gweler yr Atodiad

Natur y cais

Cais dan adran 103 o Fesur y Gymraeg (Cymru) 2011, am adolygiad gan y Tribiwnlys o benderfyniad gan y Comisiynydd i beidio â chynnal ymchwiliad i gŵyn gan y Ceisydd am fethiant awdurdod lleol i gydymffurfio ag un o Safonau'r Iaith Gymraeg.

Penderfyniad y Tribiwnlys

Mae'r Tribiwnlys:

- Yn diddymu penderfyniad y Comisiynydd; ac
- Yn anfon yr achos yn ôl at y Comisiynydd gyda chyfarwyddyd bod y Comisiynydd yn ei ailystyried yn unol â'r egwyddorion a nodir yn Rhesymau'r Tribiwnlys



WELSH LANGUAGE TRIBUNAL
Case No: TyG/WLT/16/8

ALED POWELL
(Applicant)
v
WELSH LANGUAGE COMMISSIONER
(Respondent)

THE DECISION OF THE TRIBUNAL

Members of the Panel

Keith Bush QC (President of the Tribunal)
Nicola Jones
Isata Kanneh

Material considered by the Tribunal

See the Appendix

Nature of the application

An application, under section 103 of the Welsh Language (Wales) Measure 2011, for a review by the Tribunal of a determination by the Commissioner not to carry out an investigation into a complaint by the Applicant of a failure by a local authority to comply with a Welsh Language Standard.

The Tribunal's Decision

The Tribunal:

- annuls the Commissioner's determination; and
- remits the case to the Commissioner with a direction that it be reconsidered by the Commissioner in accordance with the principles set out in the Tribunal's Reasons.

RHESYMAU

Cyflwyniad

1. Mae adran 25 o Fesur y Gymraeg (Cymru) 2011 (“y Mesur”) yn gosod rhai pobl dan ddyletswydd i gydymffurfio â safonau ymddygiad o safbwynt defnyddio'r Gymraeg. Y safonau dan sylw yw'r rheini a nodir gan Weinidogion Cymru mewn rheoliadau dan adran 26 o'r Mesur. Er mwyn bod yn gymwys i berson, rhaid i safon fod wedi cael ei gosod yn benodol ar y person dan sylw gan Gomisiynydd y Gymraeg (“y Comisiynydd”) drwy roi i'r person hwnnw hysbysiad cydymffurfio a roddir dan adran 44.
2. Mae Rhan 5 o'r Mesur yn ymdrin â gorfodi safonau. Mae'n rhoi i'r Comisiynydd ystod o bwerau os yw hi, yn dilyn ymchwiliad dan adran 71 o'r Mesur, wedi penderfynu bod person wedi methu â chydymffurfio â gofynion un o'r safonau. Mae'r pwerau hyn yn cynnwys gosod cosb ariannol ond gall hefyd ei gwneud yn ofynnol i'r person dan sylw gymryd camau penodol er mwyn atal methiannau i'r dyfodol. Gall y Comisiynydd hefyd roi cyhoeddusrwydd i'r ffaith iddi ganfod y bu methiant i gydymffurfio â'r safon dan sylw neu fe all ei wneud yn ofynnol i'r person dan sylw wneud hynny. Mae gan y Comisiynydd ddisgresiwn, dan adran 77, i ddefnyddio ei phwerau gorfodi ai peidio ac, os yw'n penderfynu gwneud hynny, pa gamau (neu gyfuniad o gamau) i'w cymryd yn yr achos unigol.
3. Gall ymchwiliad i fethiant honedig i gydymffurfio â gofynion un o'r safonau gael ei gychwyn yn dilyn cwyn gan aelod o'r cyhoedd dan adran 93 (neu gael ei gychwyn gan y Comisiynydd ei hun). Pan fydd cwyn yn cael ei gwneud, yna, os yw'n bodloni'r gofynion ffurfiol sy'n ymwneud â chwynion (e.e. wedi ei gwneud yn ysgrifenedig ac yn rhoi i'r Comisiynydd gyfeiriad ar gyfer gohebu) “rhaid” i'r Comisiynydd, dan adran 93(1), ystyried a ddylid cynnal ymchwiliad dan adran 71 ai peidio.

REASONS

Introduction

1. Section 25 of the Welsh Language (Wales) Measure 2011 (“the Measure”) places certain persons under a duty to comply with standards of conduct in relation to the use of the Welsh language. The standards in question are those specified by the Welsh Ministers in regulations under section 26 of the Measure. In order to apply to a person, a standard must have been specifically imposed on the person in question by the Welsh Language Commissioner (“the Commissioner”) by giving to that person a compliance notice given under section 44.
2. Part 5 of the Measure deals with enforcement of standards. It provides the Commissioner with a range of powers if, following an investigation under section 71 of the Measure, she has determined that a person has failed to comply with the requirements of a standard. These powers include the imposition of a financial penalty but she may also require the person in question to take certain steps in order to prevent future failures. The Commissioner may also publicise her finding that there has been a failure to comply with the standard in question or may require the person in question to do so. The Commissioner has discretion, under section 77, whether or not to use her enforcement powers and, if she decides to do so, what action (or combination of actions) to take in the individual case.
3. An investigation into an alleged failure to comply with the requirements of a standard may be initiated following a complaint by a member of the public under section 93 (or may be initiated by the Commissioner herself). Where a complaint is made then, if it satisfies the formal requirements relating to complaints (e.g. is made in writing and provides the Commissioner with an address for correspondence) the Commissioner “must”, under section 93(1), consider whether or not to carry out an investigation under section 71.

4. Mae adran 3(1) o'r Mesur yn diffinio prif nod y Comisiynydd, wrth arfer ei swyddogaethau, fel hyrwyddo a hwyluso'r defnydd o'r Gymraeg. Mae'n ofynnol iddi, dan adran 3(3) roi sylw, wrth arfer ei swyddogaethau, i nifer o faterion gan gynnwys:

“dyletswyddau i ddefnyddio'r Gymraeg sydd wedi eu gosod (neu a all gael eu gosod) drwy gyfraith, a'r hawliau sy'n deillio o allu gorfodi'r dyletswyddau hynny”.

Mae'n ymddangos bod y dyletswyddau i ddefnyddio'r Gymraeg sy'n cael eu gosod gan y gyfraith yn cynnwys y rheini a osodir drwy'r system o safonau a hysbysiadau cydymffurfio.

5. Ar 30 Medi 2015 cyflwynodd y Comisiynydd hysbysiadau cydymffurfio i gynghorau sir a chynghorau bwrdeistref sirol yng Nghymru yn ei gwneud yn ofynnol iddynt gydymffurfio â safonau penodol a gynhwysir yn Rheoliadau Safonau'r Gymraeg (Rhif 1) 2015. Gyda rhai eithriadau, roedd yr hysbysiadau cydymffurfio hyn yn mynnu bod y cynghorau dan sylw yn cydymffurfio â'r safonau a ragnodir gan yr hysbysiadau hynny o 30 Mawrth 2016 ymlaen.

6. Ar 15 Tachwedd 2016 cysylltodd y Ceisydd â'r Comisiynydd drwy e-bost, yn cwyno bod ei gyngor lleol wedi methu â chydymffurfio â safonau 61 a 62 o'r hysbysiad cydymffurfio perthnasol. Gan nad yw'r Comisiynydd wedi ymchwilio'n ffurfiol i'r gŵyn a gan nad yw wedi gwneud penderfyniad ynglŷn ag a ddylid cadarnhau'r gŵyn ai peidio, ni fyddai'n briodol enwi'r cyngor dan sylw yn y Rhesymau hyn. Nid rôl y Tribiwnlys, ar hyn o bryd, yw ystyried ymddygiad y cyngor ond yn hytrach ystyried rôl y Comisiynydd. Ond mae'n amlwg bod yna dystiolaeth *prima facie* o fethu â chydymffurfio â safonau 61 a 62, sy'n ymwneud ag arwyddion dwyieithog. O'u hystyried gyda'i gilydd, mae'r safonau dan sylw yn mynnu bod arwyddion newydd sy'n cael eu codi gan y cyngor dan sylw yn rhai dwyieithog yn Gymraeg a Saesneg, gan roi amlygrwydd cyfartal o leiaf i'r fersiwn Gymraeg a rhaid iddynt gael eu cynllunio yn y fath fodd fel bod

4. Section 3(1) of the Measure defines the principal aim of the Commissioner, in exercising her functions, as being to promote and facilitate the use of the Welsh language. She is required, by section 3(3) to have regard, when exercising her functions, to a number of matters including:

“the duties to use Welsh which are (or may be) imposed by law, and the rights which arise from the enforceability of those duties”.

Duties to use Welsh which are imposed by law appear to include those imposed through the system of standards and compliance notices.

5. On 30 September 2015 the Commissioner issued compliance notices to county and county borough councils in Wales requiring them to comply with certain standards contained in the Welsh Language Standards (No.1) Regulations 2015. With some exceptions, these compliance notices required the councils in question to comply with the standards prescribed by those notices from 30 March 2016.

6. On 15 November 2016 the Applicant contacted the Commissioner by email, complaining that his local council had failed to comply with standards 61 and 62 of the relevant compliance notice. Since the complaint has not been formally investigated by the Commissioner and no determination has been made by her as to whether or not to uphold the complaint, it would not be appropriate to identify the council in question in these Reasons. The role of the Tribunal is not, at this stage, to consider the conduct of the council but rather to consider that of the Commissioner. But it is clear that there was *prima facie* evidence of a failure to comply with standards 61 and 62, which relate to bilingual signage. Taken together, the standards in question require new signs which are erected by the council in question to be bilingual in Welsh and English, giving at least equal prominence to the Welsh version and

y Gymraeg yn cael ei darllen yn gyntaf. Cwynodd y Ceisydd fod nifer o arwyddion a godwyd yn ddiweddar gan y cyngor yn rhoi'r geiriad Saesneg uwchben y Gymraeg fel bod y Gymraeg yn llai amlwg na'r Saesneg ac felly'n debygol o gael ei darllen ar ôl y Saesneg (os o gwbl).

7. Roedd yr arwyddion dan sylw wedi'u rhoi yn sownd wrth ffensys o amgylch coeden Nadolig a godwyd mewn sgwâr cyhoeddus ac roeddent yn ymwneud â dathliadau Nadolig. Roeddent felly o natur dros dro - "tymhorol" yw'r disgrifiad a ddefnyddia'r Comisiynydd – yn hytrach na parhaol. Mae Safonau 61 a 62 yn benodol yn darparu eu bod yn berthnasol i arwyddion dros dro yn ogystal â rhai parhaol.
8. Drwy lythyr dyddiedig 9 Rhagfyr 2016 hysbysodd y Comisiynydd y Ceisydd ei bod wedi penderfynu peidio â chynnal ymchwiliad i'w gŵyn gan roi ei rhesymau. Bydd y rhain yn cael eu hystyried yn fanwl isod. Mae'r Ceisydd wedi arfer ei hawl, dan adran 103 o'r Mesur, i herio penderfyniad y Comisiynydd drwy ofyn i'r Tribiwnlys ei adolygu.

Egwyddorion cyfreithiol

9. Mae Adran 103(3) o'r Mesur yn darparu bod:

“(3) Rhaid i'r Tribiwnlys...ymdrin â chais am adolygiad o'r fath fel pe bai'n gais i'r Uchel Lys am adolygiad barnwrol”
10. Mae'r Comisiynydd wedi tynnu sylw at yr egwyddorion sy'n ymwneud ag adolygiad barnwrol fel yr eglurir gan yr Arglwydd Diplock yn *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6:

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first

being so designed that the Welsh would be read first. The Applicant complained that a number of signs recently erected by the council placed the English wording above the Welsh so that the Welsh was less prominent than the English and would be likely to be read after the English (if at all).

7. The signs in question were attached to fences around a Christmas tree erected in a public square and related to the Christmas festivities. They were therefore temporary in nature – “seasonal” is the description applied by the Commissioner – rather than permanent. Standards 61 and 62 expressly provide that they relate to temporary as well as to permanent signs.
8. By letter dated 9 December 2016 the Commissioner notified the Applicant that she had decided not to conduct an investigation into his complaint and gave her reasons. These will be considered in detail below. The Applicant has exercised his right, under section 103 of the Measure, to challenge the Commissioner's decision by asking the Tribunal to review it.

Legal principles

9. Section 103(3) of the Measure provides that:

“(3) The Tribunal must...deal with an application for such a review as if it were an application for judicial review made to the High Court”
10. The Commissioner has drawn attention to the principles relating to judicial review as explained by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6:

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first

ground I would call “illegality,” the second “irrationality” and the third “procedural impropriety.”

By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By “irrationality” I mean what can by now be succinctly referred to as “Wednesbury unreasonableness” (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. “Irrationality” by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction

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is conferred, even where such failure does not involve any denial of natural justice.”

11. Mae'r ddau barti yn cytuno, er bod y Comisiynydd dan ddyletswydd dan adran 93(1) o'r Mesur i ystyried y mater, mae ganddi ddisgresiwn, ar ôl gwneud hynny, i gynnal ymchwiliad i gŵyn ddilys neu beidio. Tynnodd y Tribiwnlys sylw'r partion at benderfyniad Tŷ'r Arglwyddi yn *Padfield v Minister of Agriculture* [1968] UKHL 1 fel achos sy'n gosod yr egwyddorion perthnasol mewn achos o'r fath.

12. Yn ôl yr Arglwydd Reid:

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act...In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.”

13. Ac yn ôl yr Arglwydd Upjohn:

“Unlawful behaviour by the Minister may be stated with sufficient accuracy...

- (a) by an outright refusal to consider the relevant matter, or
- (b) by misdirecting himself in point of law, or
- (c) by taking into account some wholly irrelevant or extraneous considerations, or
- (d) by wholly omitting to take into account a relevant consideration.

In practice (these propositions) merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings I have mentioned.”

14. Mae'r Tribiwnlys felly yn ymdrin â'r her i

is conferred, even where such failure does not involve any denial of natural justice.”

11. Both parties agree that although the Commissioner is under a duty under section 93(1) of the Measure to consider the matter she has a discretion, having done so, as to whether or not to conduct an investigation into a valid complaint. The Tribunal drew the attention of the parties to the decision of the House of Lords in *Padfield v Minister of Agriculture* [1968] UKHL 1 as laying down the relevant principles in such a case.

12. According to Lord Reid:

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13. And according to Lord Upjohn:

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14. The Tribunal therefore approaches the

benderfyniad y Comisiynydd ar y sail ganlynol:

- i) Mater i'r Ceisydd yw dangos bod y Comisiynydd wedi methu â gweithredu o fewn ei phwerau;
- ii) Mae gan y Comisiynydd ddisgresiwn, dan adran 93 o'r Mesur, i gynnal ymchwiliad i gŵyn ddilys neu beidio;
- iii) Rhaid i'r disgresiwn hwnnw gael ei arfer mewn ffordd sy'n gydnaws â pholisi ac amcanion y Mesur yn gyffredinol;
- iv) Wrth benderfynu sut i arfer ei disgresiwn rhaid i'r Comisiynydd roi ystyriaeth i faterion perthnasol a pheidio â rhoi ystyriaeth i rai amherthnasol; bernir yr hyn sy'n berthnasol a'r hyn sy'n amherthnasol drwy gyfeirio at bolisiâu ac amcanion y Mesur;
- v) Er mai mater i'r Comisiynydd yw pwysu a mesur yr ystyriaethau perthnasol er mwyn penderfynu a yw'r cydbwysedd yn ffafrio ymchwiliad ai peidio, rhaid iddi weithredu'n rhesymegol wrth wneud hynny;
- vi) Rhaid iddi hefyd weithredu â thegwch gweithdrefnol tuag at y sawl y mae'n rhoi ystyriaeth i'w gŵyn.

Gweithdrefn

15. O ystyried natur y cais, fe'i hystyriwyd, yn unol ag arfer arferol y Llys Gweinyddol, ar sail datganiadau ysgrifenedig – datganiad y Ceisydd ei hun, a datganiad Mr Rhodri Roberts, Uwch Swyddog Ymchwilio a Gorfodi'r Comisiynydd.
16. Cynhaliwyd gwrandawriad ar y 22 Mai 2017 lle cafodd y ddau barti'r cyfle i annerch y Tribiwnlys. Ymddangosodd yr Ceisydd yn bersonol. Cynrychiolwyd y Comisiynydd gan Mrs Gwenith Price (Cyfarwyddwr Cydymffurfio a Gorfodi) a gan Mr Roberts.

challenge to the Commissioner's decision on the following basis:

- i) It is for the Applicant to demonstrate that the Commissioner has failed to act within her powers;
- ii) The Commissioner has a discretion, under section 93 of the Measure, whether or not to carry out an investigation of a valid complaint;
- iii) That discretion must be exercised in a way that is consistent with the policy and objects of the Measure generally;
- iv) When deciding how to exercise her discretion the Commissioner must take into account relevant considerations and must not take into account irrelevant ones; what is relevant and what is irrelevant is to be judged by reference to the policies and objects of the Measure;
- v) Although it is for the Commissioner to weigh up the relevant considerations in order to decide whether the balance favours an investigation or not, she must act rationally when doing so;
- vi) She must also act with procedural fairness towards the person whose complaint she is considering.

Procedure

15. In view of the nature of the application, it was considered, in accordance with the normal practice of the Administrative Court, on the basis of written statements – that of the Applicant himself and that of Mr Rhodri Roberts, the Commissioner's Senior Investigation and Enforcement Officer.
16. A hearing took place on the 22 May 2017 at which both parties had the opportunity to address the Tribunal. The Applicant appeared in person. The Commissioner was represented by Mrs Gwenith Price (Director of Compliance and Enforcement) and by Mr Roberts.

Y penderfyniad oedd yn cael ei herio

17. Cafodd cwyn yr Ceisydd ei hystyried gan Banel Ymchwilio a Gorfodi'r Comisiynydd (yr oedd hi ei hun yn aelod ohono) ar 1 Rhagfyr 2016. Roedd Mr Roberts wedi paratoi adroddiad byr ar y gŵyn, a oedd yn cynnwys argymhelliad. Dyma ddisgrifiad ei adroddiad o destun y gŵyn:

“Testun Saesneg wedi'i leoli uwchben y Gymraeg ar arwyddion o amgylch coeden Nadolig y Cyngor ar....”

18. Ei argymhelliad oedd:

“Mae'r sefyllfa y cwynir amdani yn un tymhorol a gellir casglu â sicrwydd y bydd yr arwyddion dan sylw wedi eu tynnu ymhen ychydig dros fis.

Argymell peidio ymchwilio: Ni fydd y Comisiynydd fel arfer yn cynnal ymchwiliad statudol os yw cynnal ymchwiliad yn anghymesur â'r methiant honedig.”

19. Derbyniwyd yr argymhelliad, a'r penderfyniad fel y'i cofnodwyd, oedd:

“Peidio ymchwilio ar y sail taw mater tymhorol yw'r achos dan sylw. Ni fydd yn broblem yn dilyn cyfnod y Nadolig.”

20. Cyflwynwyd y penderfyniad i'r Ceisydd, ar 9 Rhagfyr, fel a ganlyn:

“Rwyf wedi penderfynu peidio â chynnal ymchwiliad oherwydd natur dymhorol y sefyllfa. Bydd y goeden, a'r arwyddion, wedi eu tynnu wedi cyfnod y Nadolig. Rwyf felly o'r farn y byddai cynnal ymchwiliad yn anghymesur â'r methiant honedig ar yr achlysur hwn.”

21. Mae datganiad Mr Roberts yn ailadrodd mai:

“Sail y penderfyniad hwn (hy i beidio â chynnal ymchwiliad) oedd natur dymhorol yr

The decision being challenged

17. The Applicant's complaint was considered by the Commissioner's Investigations and Enforcement Panel (of which she herself was a member) on 1 December 2016. Mr Roberts had prepared a short report on the complaint, which included a recommendation. His report's description of the subject-matter of the complaint was:

“English text positioned above the Welsh on signs around the Council's Christmas Tree at....”

18. His recommendation was:

“The state of affairs complained about is a seasonal one and one can conclude with certainty that the signs in question will have been removed in a little over a month.

Recommended not to investigate: The Commissioner does not normally hold an investigation if holding an investigation is disproportionate to the alleged failure.”

19. The recommendation was accepted and the decision, as minuted, was:

“Not to investigate, on the grounds that the case in question is a seasonal matter. It will not be a problem after the Christmas period.”

20. The decision was communicated to the Applicant, on 9 December, in these terms:

“I have decided not to carry out an investigation because of the seasonal nature of the state of affairs. The tree, and the signs, will have been removed after the Christmas period. I am therefore of the opinion that carrying out an investigation would be disproportionate to the alleged failure on this occasion.”

21. Mr Roberts's statement repeats that:

“The basis of this decision (i.e. not to carry out an investigation) was the seasonal nature of

arwyddion.”

22. Yn ystod y gwrandawriad awgrymodd Mrs Price fod materion heblaw natur dymhorol yr arwyddion wedi cael eu trafod yn y cyfarfod ar 1 Rhagfyr, yr oedd hi'n bresennol ynddo, a bod y cofnod y cyfeirir ato uchod, sydd wrth gwrs ond yn cyfeirio at y mater hwnnw, yn llai llawn nag y gallai fod. Nid yw'r Tribiwnlys yn amau y gellid bod wedi cael rhyw gyfeiriad didaro at ffactorau heblaw am natur dros dro'r arwyddion yn y cyfarfod. Ond ni allai hyn fod wedi bod o unrhyw arwyddocâd i ddylanwadu ar y Comisiynydd i benderfynu peidio â chynnal ymchwiliad. Ni chrybwyllwyd dim ffactorau heblaw am natur dymhorol yr arwyddion yn adroddiad Mr Robert i'r cyfarfod ac nid yw'r cofnod ffurfiol sy'n cofnodi casgliadau'r cyfarfod ond yn cyfeirio at y ffactor hwnnw. Mae Polisi Gorfodi statudol y Comisiynydd (paragraffau 4.18 a 4.19) yn ei gwneud yn ofynnol yn benodol i resymau'r Comisiynydd dros benderfynu peidio â chynnal ymchwiliad gael eu cofnodi ochr yn ochr â'r penderfyniad ei hun, a chael ei egluro gan y Comisiynydd wrth y sawl sy'n gwneud y gŵyn.

23. Yr unig gasgliad y gall y Tribiwnlys ddod iddo, felly, yn seiliedig ar gofnodion ac esboniadau'r Comisiynydd ei hun o'i phenderfyniad, yw bod penderfyniad y Comisiynydd i beidio ag ymchwilio yn seiliedig yn unig ar y ffaith bod yr arwyddion dan sylw yn rhai dros dro ac y byddent yn anochel yn cael eu tynnu i lawr ar ddiwedd tymor y Nadolig.

Polisi ac amcanion y Mesur

24. Mae'r Mesur yn creu system o safonau ymddygiad mewn perthynas â defnyddio'r Gymraeg gan (yn bennaf) gyrff cyhoeddus yng Nghymru, gyda'r nod penodol o feithrin a hwyluso'r defnydd o'r iaith honno. Mae'n gosod ar y Comisiynydd ddyletswydd i hyrwyddo'r nod hwnnw. Mae'n rhoi iddi ystod o bwerau y'u bwriedir i'w chynorthwyo i wneud hynny. Er ei fod hefyd yn rhoi i'r Comisiynydd ddisgresiwn eang i wneud defnydd o'r bwerau

the signs.”

22. In the course of the hearing Mrs Price suggested that matters other than the seasonal nature of the signs were discussed at the meeting on the 1 December, at which she was present, and that the minute referred to above, which of course refers only to that matter, was less full than it might have been. The Tribunal does not doubt that there may have been some passing reference to factors other than the temporary nature of the signs in the meeting. But this cannot have been of any significance in influencing the Commissioner to decide not to carry out an investigation. No factors other than the seasonal nature of the signs were mentioned in Mr Robert's report to the meeting and the formal minute recording the conclusion of the meeting refers only to that factor. The Commissioner's statutory Enforcement Policy (paragraphs 4.18 and 4.19) specifically requires the Commissioner's reasons for deciding not to undertake an investigation to be recorded alongside the decision itself and to be explained by the Commissioner to the person making the complaint.

23. The only conclusion that the Tribunal can draw, therefore, based upon the Commissioner's own records and explanations of her decision, is that the Commissioner's decision not to investigate was based solely on the fact that the signs in question were temporary and would inevitably be removed at the end of the Christmas season.

The policy and objects of the Measure

24. The Measure creates a system of standards of conduct in relation to the use of the Welsh language by (primarily) public bodies in Wales, with the express aim of fostering and facilitating the use of that language. It imposes on the Commissioner a duty to further that aim. It provides her with a range of powers intended to assist her in doing so. Whilst it also provides the Commissioner with a wide discretion whether, and in what way, to make

hynny ai peidio, ac os felly ym mha ffordd, rhaid iddi, yn unol â'r egwyddor yn *Padfield v Minister of Agriculture* (gweler uchod) ddefnyddio'r disgresiwn hwnnw mewn ffordd sy'n gyson â nodau cyffredinol y Mesur.

use of those powers, she must, in accordance with the principle in *Padfield v Minister of Agriculture* (see above) use that discretion in a way which is consistent with the general aims of the Measure.

25. Mae penderfyniad i beidio ag ymchwilio i gŵyn sydd yn weithdrefnol ddilys ac sy'n ymddangos yn deg, o leiaf ar yr olwg gyntaf, yn un pwysig, rhywbeth sy'n cael ei danlinellu gan y ffaith bod adran 93(1) o'r Mesur yn gosod dyletswydd glir ar y Comisiynydd ("rhaid ystyried") i ystyried yn ofalus a ddylid ymchwilio i gŵyn o'r fath. Mae penderfyniad i beidio â gwneud hynny yn debygol o achosi siom a rhwystredigaeth i'r unigolyn sydd wedi mynd i'r drafferth o dynnu sylw'r Comisiynydd at achos o dorri rhwymedigaeth gyfreithiol a osodwyd ar gyngor lleol neu awdurdod arall. Mae'r unigolyn hwnnw yn debygol o deimlo bod yr achos o dor-ddyletswydd yn sarhad ar ei hawliau fel aelod o'r gymuned Gymraeg. Mae potensial i benderfyniad i beidio ag ymchwilio i gŵyn o'r fath danseilio hyder y cyhoedd yn effeithiolrwydd y Mesur fel modd o amddiffyn y cyfryw hawliau. Mae iddo hefyd ganlyniadau ymarferol pellgyrhaeddol. Nid oes dim un o bwerau gorfodi'r Comisiynydd ar gael oni bai ei bod wedi cynnal ymchwiliad statudol a phenderfynu bod methiant i gydymffurfio ag un o'r safonau wedi cael ei sefydlu.

25. A decision not to investigate a complaint which is procedurally valid and which appears, at least at first sight, to be well-founded is an important one, something which is underlined by the fact that section 93(1) of the Measure imposes a clear duty on the Commissioner ("must consider") to give careful consideration as to whether or not to investigate such a complaint. A decision not to do so is likely to cause disappointment and frustration to the individual who has gone to the trouble of bringing to the Commissioner's attention a breach of a legal obligation placed on a local council or other authority. That individual is likely to feel that the breach of duty is an affront to his or her rights as a member of the Welsh-speaking community. A decision not to investigate such a complaint has the potential for undermining public confidence in the effectiveness of the Measure as a means of protecting such rights. It also has far-reaching practical consequences. None of the Commissioner's enforcement powers are available unless she has carried out a statutory investigation and determined that a failure to comply with a standard has been established.

26. Mae'n wir y byddai gan y Comisiynydd o hyd y gallu i geisio perswadio person i gydymffurfio â dyletswyddau cyfreithiol y person hwnnw drwy ddulliau eraill. Yn yr achos hwn dywedodd y Comisiynydd wrth yr Ceisydd y byddai'n defnyddio'r cyfleoedd a gododd i weithredu ei "fframwaith rheoleiddio" er mwyn dwyn y mater, a'r angen i gydymffurfio â gofynion y safonau, at sylw'r cyngor. Ond ni fyddai hyn yn cynnwys dim elfen o orfodaeth. Mae'r Cynulliad Cenedlaethol, drwy'r Mesur, wedi darparu i'r Comisiynydd ystod eang o bwerau sy'n cynnwys rhyw raddau o orfodaeth. Mae'n rhaid mai ei fwriad oedd y dylai'r pwerau hyn gael eu defnyddio pan fo angen. Byddai angen i benderfyniad, mewn

26. It is true that it would still be open to the Commissioner to seek to persuade a person to comply with that person's legal duties by other means. In this case the Commissioner informed the Applicant that she would be using opportunities that arose to operate her "regulatory framework" in order to bring the matter, and the need to comply with the requirements of standards, to the council's attention. But this would not involve any element of compulsion. The National Assembly has, through the Measure, provided the Commissioner with a wide range of powers which do involve some degree of compulsion. Its intention must have been that these powers should be used when

achos penodol, i ddibynnu ar ddulliau perswadiol yn unig o sicrhau cydymffurfiaeth â'r safonau roi ystyriaeth i'r gwahaniaeth pwysig o ran pwerau sydd ar gael i'r Comisiynydd o safbwynt cwynion yr ymchwilir yn ffurfiol iddynt a'r rhai nas ymchwilir iddynt. Dylai ei gwneud yn glir ba ffactorau a oedd wedi cyfiawnhau hepgor y cyfle i ddefnyddio peiriannau gorfodi'r Mesur.

necessary. A decision, in a particular case, to rely on purely persuasive methods of ensuring compliance with standards would need to take into account the important difference in powers available to the Commissioner in relation to complaints formally investigated and those that are not. It would need to make clear what factors had justified abandoning the opportunity to use the enforcement machinery of the Measure.

Ystyriaethau perthnasol wrth benderfynu peidio â chynnal ymchwiliad

Relevant considerations when deciding not to conduct an investigation

27. Nid yw'r Mesur ei hun yn rhoi unrhyw arweiniad ynglŷn â pha ffactorau y byddai disgwyl i'r Comisiynydd eu hystyried wrth benderfynu cynnal ymchwiliad ai peidio. Ni fyddai'n iawn i'r Tribiwnlys honni darparu rhestr gynhwysfawr. Mae'r amgylchiadau'n amrywio o achos i achos. Yn gyffredinol, mater i'r Comisiynydd yw penderfynu pa ffactorau sy'n berthnasol mewn achosion penodol (cyn belled nad yw'n anwybyddu rhai sy'n amlwg yn berthnasol) a phenderfynu faint o bwysau i'w roi ar y ffactorau hynny. Ar ôl gwneud hynny byddai wedyn yn rhydd i wneud asesiad o le saif y cydbwysedd rhwng y rhai sy'n cefnogi cynnal ymchwiliad a'r rhai nad ydynt. Mae gan y Comisiynydd hawl i fynegi ei chasgliadau, fel y gwnaeth yn yr achos hwn, o ran "anghymesured". Ond ni all ddod i gasgliad cyfreithlon y byddai'n anghymesur cynnal ymchwiliad oni bai ei bod wedi ystyried y materion perthnasol (ac anwybyddu'r rhai amherthnasol) a dod i'w chasgliad yn rhesymegol.

27. The Measure itself gives no guidance as to what factors the Commissioner would be expected to take into account when deciding whether or not to conduct an investigation. It would be wrong of the Tribunal to purport to provide an exhaustive list. Circumstances vary from case to case. Generally, it would be for the Commissioner to decide what factors are relevant in particular cases (provided she does not ignore obviously relevant ones) and to decide how much weight to give to those factors. Having done so she would then be at liberty to make an assessment of where the balance lies between those which support conducting an investigation and those which do not. The Commissioner is entitled to express her conclusion, as she did in this case, in terms of "disproportionality". But she can only come to a lawful conclusion that it would be disproportionate to conduct an investigation if she has considered relevant considerations (and ignored irrelevant ones) and reached her conclusion rationally.

28. Yn yr achos hwn, yr unig ffactor y seiliwyd y penderfyniad arno oedd natur dymhorol yr arwyddion o dan sylw. Mae'r Ceisydd yn dadlau bod y ffaith y byddai'r arwyddion, o leiaf y tro hwn, yn cael eu tynnu i lawr ar ôl ychydig wythnosau, yn amherthnasol a'i bod felly yn anghyfreithlon ac yn afresymol i'r Comisiynydd seilio ei phenderfyniad ar y ffaith honno.

28. In this case, the single factor on which the decision was based was the seasonal nature of the signs in question. The Applicant argues that the fact that the signs would, at least on this occasion, be removed after a few weeks, was irrelevant and that for the Commissioner to base her decision on that fact was therefore illegal and irrational.

29. Er na fyddai'r Tribiwnlys yn mynd mor bell ag awgrymu na allai natur dros dro arwydd byth

29. Whilst the Tribunal would not go so far as to suggest that the temporary nature of a sign

fod yn berthnasol i benderfyniad i beidio â chynnal ymchwiliad, ni fyddai hyn ond yn wir mewn amgylchiadau eithriadol. Un enghraifft o hyn fyddai arwydd y bu'n rhaid ei osod ar fyr rybudd er mwyn delio â rhyw argyfwng. Ond mae'r Tribiwnlys yn derbyn dadl y Ceisydd y byddai arfer cyffredinol o beidio ag ymchwilio i gwynion sy'n ymwneud ag arwyddion dros dro, heb ystyried yr amgylchiadau, yn mynd yn groes i bolisi ac amcanion y Mesur. Mae'r safonau perthnasol yn benodol berthnasol i arwyddion dros dro. Byddai creu rhagdybiaeth na fydd ymchwiliad yn cael ei gynnal i gŵyn am arwydd dros dro yn cyflwyno gwahaniaeth sy'n mynd yn groes i bolisi ac amcanion y Mesur, nad yw'n gwneud gwahaniaeth rhwng methiannau dros dro a pharhaol i gydymffurfio â'r safonau. Gan fod Mrs Price a Mr Roberts wedi gorfod derbyn, pan awgrymodd y Tribiwnlys hynny wrthynt, nad oes gan ddifrifoldeb cwyn o anghenraid unrhyw gysylltiad â'r amser y bydd y mater y cwynir amdano'n parhau. Gallai arwydd dros dro yn Saesneg yn unig fod yn fwy teilwng o ymchwiliad a chamu gorfodi nag arwydd parhaol gyda mân anghysondeb rhwng yr amlygrwydd a roddir i'r ddwy iaith.

could never be relevant to a decision not to conduct an investigation, this would only be the case in exceptional circumstances. An example might be a sign that had to be put up at short notice in order to deal with some emergency. But the Tribunal accepts the Applicant's argument that a general practice of not investigating complaints relating to temporary signs, irrespective of the circumstances, would be contrary to the policy and objects of the Measure. The relevant standards are specifically applicable to temporary signs. To create a presumption that no investigation will be carried out into a complaint about a sign if it is temporary would be to introduce a distinction which is contrary to the policy and objects of the Measure, which makes no distinction between temporary and permanent failures to comply with standards. As Mrs Price and Mr Roberts were bound to accept when it was put to them by the Tribunal, the seriousness of a complaint has no necessary connection with the duration of the matter complained about. A temporary sign in English only might be more worthy of investigation and enforcement than a permanent sign with a minor discrepancy between the prominence given to the two languages.

30. Yn ei ddatganiad, ceisiodd Mr Roberts gyfiawnhau'r ddibyniaeth a roddwyd ar natur dymhorol yr arwyddion fel sail dros beidio â chynnal ymchwiliad. Cyfeiriodd at y ffaith bod Atodlen 10 i'r Mesur, sy'n rhagnodi'r camau y mae'n rhaid i'r Comisiynydd eu cymryd wrth gynnal ymchwiliad, yn golygu bod yn rhaid neilltuo adnoddau sylweddol ar gyfer ymchwiliad o'r fath. Ei dystiolaeth oedd y byddai ymchwiliad, yn ymarferol, yn anochel yn cymryd o leiaf 90 diwrnod, o ystyried yr amser y mae'r drefn yn ei ganiatáu ar gyfer ymatebion. O ganlyniad, fel yr eglurodd Mr Roberts, fe ddylanwadwyd ar y Comisiynydd gan y ffaith y byddai'r arwyddion wedi cael eu tynnu i lawr ymhell cyn cwblhau'r ymchwiliad.

30. Mr Roberts, in his statement, attempted to justify the reliance placed on the seasonal nature of the signs as a ground for not conducting an investigation. He referred to the fact that Schedule 10 to the Measure, which prescribes the steps which the Commissioner must take when conducting an investigation, means that significant resources must be devoted to such an investigation. His evidence was that in practice an investigation would inevitably take at least 90 days, given the periods which the procedure allows for responses by those involved. As a result, Mr Roberts explained, the Commissioner was influenced by the fact that the signs would have been removed well before the completion of the investigation.

31. Mae'r Ceisydd yn ymosod ar y rhesymeg hon. Yn gyntaf, mae'n awgrymu nad yw'r ffaith bod

31. The Applicant attacks the logic of this reasoning. Firstly, he suggests that the fact

yn rhaid i ymchwiliad gael ei chynnal dros 90 diwrnod neu fwy yn golygu bod yr adnoddau ar ei chyfer o reidrwydd yn fawr iawn - mae'r rhan fwyaf o'r amser hwnnw yn cynnwys amser pan mae'r Comisiynydd yn disgwyl ymateb gan un o'r partion. A thra bod yn rhaid i unrhyw ymchwiliad ddefnyddio rhyw gymaint o adnoddau, byddai hyn yn digwydd gydag unrhyw gŵyn, pa un a yw ei ffynhonnell yn un dros dro neu'n barhaol. Pam ddylid tybio, felly, fod arwydd dros dro yn llai haeddiannol o ddefnyddio'r adnoddau hynny nag un parhaol? Nid oes unrhyw reswm dros ystyried bod natur dros dro arwydd yn arwain at fwy o gymhlethdod. Roedd y Ceisydd wedi cymryd lluniau o'r arwyddion dan sylw. Felly, prin iawn oedd y posibilrwydd o anghytuno ynglŷn â'r ffeithiau perthnasol.

32. Mae'r Tribiwnlys yn ei chael yn amhosibl dilyn rhesymeg dadl Mr Roberts bod rhywbeth yn annymunol am ymchwiliad sy'n parhau ar ôl i ffynhonnell y gŵyn gael ei dileu. Pam ddylai hynny fod yn wir? O ystyried bod llawer o gwynion am fethu â chydymffurfio â safonau yn debygol o ymwneud â digwyddiadau (e.e. methiant i ateb galwad ffôn yn Gymraeg) yn hytrach na sefyllfaoedd parhaus (megis arddangos arwydd), bydd ymchwiliadau yn aml ddim hyd yn oed yn dechrau, heb sôn am orffen, cyn i ffynhonnell y gŵyn ddod i ben.

33. Ail ymgais i gyfiawnhau trin natur dymhorol yr arwyddion fel rhywbeth tyngedfennol oedd dadl Mr Roberts mai ychydig iawn o fudd a geir o ymchwiliad gan na fyddai ei ganlyniad yn arwain at unrhyw "newid arfer sylfaenol a pharhaol gan y Cyngor." Pan ofynnwyd iddynt ymhelaethu, esboniodd cynrychiolwyr y Comisiynydd fod y ddadl hon yn adlewyrchu'r ffaith bod effaith ymchwiliad ac unrhyw gamau gorfodi a fyddai'n deillio ohono yn gysylltiedig, yn ei hanfod, â ffynhonnell y gŵyn benodol ei hun. Dadleuwyd, felly mai cyfyngedig iawn fyddai effaith gweithredu mewn perthynas â methiant a oedd eisoes wedi dod i ben. Mae'r ddadl hon, ym marn y Tribiwnlys, yn ddiffygiol. Bwriad darpariaethau ymchwilio a gorfodi'r

that an investigation has to be spread over 90 days or more does not mean that the resources to be devoted to it are necessarily very great – most of that period consists of periods when the Commissioner is awaiting a response from one of the parties. And whilst any investigation must demand the use of some resources this would be the case in relation to any complaint, whether its source was temporary or permanent. Why should it be assumed, therefore, that a temporary sign is less deserving of the use of those resources than a permanent one? There is no reason to regard the temporary nature of a sign as giving rise to any greater degree of complexity. The Applicant had taken photographs of the signs in question. So the scope for any disagreement as to the relevant facts was very limited.

32. The Tribunal finds it impossible to follow the logic of Mr Roberts's argument that there is something undesirable about an investigation which continues after the source of the complaint has been removed. Why should that be the case? Given that many complaints of failures to comply with standards are likely to relate to incidents (e.g. a failure to answer a telephone call in Welsh) rather than continuing states of affairs (such as display of a sign), investigations will often not even begin, let alone end, before the source of complaint has ceased.

33. A second attempt to justify treating the seasonal nature of the signs as decisive was Mr Roberts's argument that the benefit of an investigation would be very limited since its result would not lead to any "fundamental and permanent change in the Council's practice." When asked to elaborate, the Commissioner's representatives explained that this argument reflected the fact that the impact of an investigation and of any resulting enforcement action was essentially related to the source of the particular complaint itself. So, it was argued, action in relation to a failure that had already ceased would be of limited effect. This argument is, in the Tribunal's judgement, flawed. The investigation and enforcement

Mesur yw newid ymddygiad cynghorau ac eraill yn gyffredinol, nid dim ond cywiro methiannau unigol. Dylai canfod bod y cyngor dan sylw wedi methu â chydymffurfio ag un o'r safonau arwain at iddynt gymryd camau i osgoi gwneud camgymeriadau tebyg i'r dyfodol. Yn wir, mae'r dewis o gamau gorfodi sy'n agored i'r Comisiynydd yn cynnwys yn benodol rhai a fwriedir i atal y methiant a nodwyd rhag cael ei ailadrodd.

34. Mae'r Tribiwnlys felly yn canfod bod y Comisiynydd, wrth arfer ei disgrisiwn i beidio â chynnal ymchwiliad i gŵyn yr Ceisydd, yn gwneud hynny mewn ffordd a fethodd, yn y ffyrdd canlynol, â chydymffurfio â'r terfynau ymhlyg a roddwyd ar ei phwerau gan bolisi ac amcanion y Mesur

- Seiliodd ei phenderfyniad ar un ystyriaeth, sef natur dymhorol yr arwyddion, gan ddiystyru'r holl ffactorau perthnasol eraill. Er mai mater i'r Comisiynydd oedd barnau pa rai yw'r ffactorau hynny, mae materion megis difrifoldeb cymharol y methiant honedig, ansawdd y dystiolaeth o fethiant ac unrhyw hanes blaenorol o ddiffyg cydymffurfio â safonau yn ymddangos bron yn sicr o fod yn berthnasol. Mae Polisi Gorfodaeth y Comisiynydd, er nad yw'n darparu rhestr lawn o'r cyfryw ffactorau, yn nodi rhai y gallent fod yn berthnasol ym mharagraff 4.16, ac eto mae'n ymddangos na chafodd yr un ohonynt ystyriaeth briodol;
- Fe wnaeth drin yr unig ystyriaeth yr oedd ei phenderfyniad yn seiliedig arni, sef natur dros dro neu dymhorol yr arwyddion, fel ystyriaeth sy'n berthnasol i'r penderfyniad hwnnw pan oedd y ffactor hwnnw (ac eithrio mewn amgylchiadau eithriadol nad oeddent yn codi yn yr achos hwn) yn amherthnasol i'r penderfyniad dan sylw;
- Fe wnaeth weithredu'n afresymegol wrth drin anallu i gwblhau ymchwiliad cyn i'r arwyddion gael eu tynnu i lawr fel ffactor a oedd yn cefnogi penderfyniad i beidio â chynnal ymchwiliad;

provisions of the Measure are intended to change the behaviour of councils and others generally, not just to rectify individual failures. A finding that the council in question had failed to comply with a standard should lead them to take steps to avoid making similar mistakes in the future. Indeed, the range of enforcement actions open to the Commissioner specifically includes ones designed to prevent repetitions of the failure identified.

34. The Tribunal therefore finds that the Commissioner, when exercising her discretion not to conduct an investigation into the Applicant's complaint, did so in a way that failed, in the following respects, to comply with the implied limits placed on her powers by the policy and objects of the Measure:

- She based her decision on a single consideration, namely the seasonal nature of the signs, to the exclusion of all other relevant factors. Whilst it was a matter for the Commissioner to identify those factors, matters such as the relative seriousness of the alleged failure, the quality of the evidence of the failure and any previous history of non-compliance with standards seem almost certain to be relevant. The Commissioner's Enforcement Policy, although it does not provide a full list of such factors does identify some potentially relevant ones at paragraph 4.16, yet it appears that none of them was given proper consideration;
- She treated the sole consideration on which her decision was based, namely the temporary or seasonal nature of the signs, as relevant to that decision when (other than in exceptional circumstances which did not arise in this case) that factor was irrelevant to the decision in question;
- She acted irrationally in treating an inability to complete an investigation before the signs were removed as supporting a decision not to conduct an investigation;

- Fe wnaeth hefyd weithredu'n afresymegol wrth ddod i'r casgliad na fyddai cymryd camau gorfodi yn erbyn methiant dros dro neu dymhorol i gydymffurfio ag un o'r safonau "yn arwain at newid arfer sylfaenol yn arfer y Cyngor".

Amhriodoldeb gweithdrefnol

35. Mae'r Ceisydd hefyd yn dadlau bod y ffordd yr ymdriniwyd â'i gŵyn yn annheg, cymaint fel ei fod yn cyfateb i amhriodoldeb gweithdrefnol. Gwnaeth ei gŵyn wreiddiol ar 15 Tachwedd 2016, gan grybwyll y ffaith bod ganddo luniau o'r arwyddion y gallai eu rhannu gyda'r Comisiynydd. Ni wnaeth staff y Comisiynydd, bryd hynny, ofyn i'r Ceisydd anfon y lluniau dan sylw atynt. Ni chynhigiwyd dim eglurhad ynglŷn â pham na wnaethent hynny. Os, fel y cred y Tribiwnlys, fod asesiad o ddifrifoldeb y methiant honedig yn rhan hanfodol o ystyriaeth y Comisiynydd ynglŷn ag a ddylid ymchwilio i'r gŵyn ai peidio, byddai'r ffotograffau wedi bod yn berthnasol iawn i'r ystyriaeth honno. Mater i'r Comisiynydd, wrth gwrs, fyddai penderfynu faint o bwysau i'w roi arnynt. Ond mae'r penderfyniad i beidio â gofyn am eu gweld yn pwysleisio i ba raddau yr oedd y Comisiynydd yn credu mai natur dymhorol neu dros dro'r arwyddion oedd yr unig ffactor o bwys wrth wneud y penderfyniad i beidio ag ymchwilio i'r gŵyn.

36. Ac yntau heb gael ymateb i'w gŵyn, ffoniodd yr Ceisydd swyddfa'r Comisiynydd rywbryd yn ystod yr wythnos yn dechrau 28 Tachwedd (mae ei e-bost at y Comisiynydd ar ddydd Llun 5 Rhagfyr yn cyfeirio at y ffaith iddo wneud hynny'r wythnos flaenorol). Mewn e-bost ar 5 Rhagfyr ailadroddodd sylwedd ei gŵyn wreiddiol gan ychwanegu rhagor o wybodaeth. Ailadroddodd hefyd fod ganddo luniau o'r arwyddion pe dymunai'r Comisiynydd eu gweld.

37. Erbyn hynny, fel y gwyddom, roedd y Comisiynydd eisoes wedi penderfynu peidio ag ymchwilio i'r gŵyn. Nid oedd y Ceisydd

- She also acted irrationally in concluding that taking enforcement action against a temporary or seasonal failure to comply with a standard "would not lead to a fundamental and permanent change in the Council's practice".

Procedural impropriety

35. The Applicant also argues that the way with which his complaint was dealt was unfair, so as to amount to procedural impropriety. He made his original complaint on 15 November 2016, mentioning the fact that he had photographs of the signs which he could share with the Commissioner. The Commissioner's staff did not, at that stage, ask the Applicant to send them the photographs in question. No explanation has been put forward as to why they did not do so. If, as the Tribunal believes, an assessment of the seriousness of the alleged failure was an essential part of the Commissioner's consideration of whether or not to investigate the complaint, the photographs would have been very relevant to that consideration. It would, of course, have been for the Commissioner to decide what weight to give to them. But the decision not to request sight of them underlines the extent to which the Commissioner regarded the seasonal or temporary nature of the signs as being the only material factor when reaching the decision not to investigate the complaint.

36. Having not received a response to his complaint, the Applicant telephoned the Commissioner's office some time during the week beginning 28 November (his email to the Commissioner on Monday 5 December refers to having done so the previous week). In an email of 5 December he repeated the substance of his original complaint and added some further information. He also repeated that he had some photographs of the signs if the Commissioner wished to see them.

37. By that time, as we know, the Commissioner had already decided not to investigate the complaint. The decision had not been

wedi'i hysbysu o'r penderfyniad a byddai'n dal wedi bod yn agored i'r Comisiynydd, bryd hynny, adolygu a diwygio ei phenderfyniad pe byddai'r amgylchiadau'n cyfiawnhau hynny.

communicated to the Applicant and it would still have been open to the Commissioner, at that stage, to review and to revise her decision if the circumstances warranted it.

38. Ar brynhawn 8 Rhagfyr fe wnaeth aelod o staff y Comisiynydd e-bostio'r Ceisydd gan ofyn iddo anfon y lluniau ati. Ni roddwyd dim eglurhad ynglŷn â pham y gofynnwyd am y lluniau bryd hynny, dros dair wythnos ar ôl i'r Ceisydd eu cynnig yn gyntaf ac er gwaethaf y ffaith bod y Comisiynydd, mewn gwirionedd, eisoes wedi ystyried y gŵyn wythnos yn gynharach. Anfonodd yr Ceisydd y lluniau at y Comisiynydd yn hwyrach y noson honno. Nid oedd wedi cael gwybod bod unrhyw benderfyniad wedi cael ei wneud mewn perthynas â'i gŵyn. Fodd bynnag, y diwrnod canlynol anfonodd y Comisiynydd at yr Ceisydd y llythyr yn ei hysbysu o'i phenderfyniad i beidio â chynnal ymchwiliad. Nid oedd hi, na'i Phanel Ymchwilio a Gorfodi, wedi gweld y lluniau o'r arwyddion a gyflwynwyd gan yr Ceisydd. Roedd hynny am fod Mr Roberts, ar ôl edrych arnynt, yn teimlo nad oedd unrhyw beth yn eu cylich a allai newid penderfyniad y Comisiynydd. Mae hyn, unwaith eto, yn gyson â'r ffaith bod y penderfyniad dan sylw wedi ei seilio'n gyfan gwbl ar natur dros dro'r arwyddion.

38. On the afternoon of the 8 December a member of the Commissioner's staff emailed the Applicant and asked him to send her the photographs. No explanation has been given as to why a request for the photographs was made at this stage, over three weeks after the Applicant had first offered to provide them and despite the fact that the Commissioner had actually already considered the complaint a week earlier. The Applicant forwarded the photographs to the Commissioner later that evening. He had not been informed that any decision had been taken in relation to his complaint. However, the following day the Commissioner sent the Applicant the letter notifying him of her decision not to conduct an investigation. Neither she, nor her Investigation and Enforcement Panel, had seen the photographs of the signs submitted by the Applicant. This was because Mr Roberts, having looked at them, felt that there was nothing about them which might change the Commissioner's decision. This, again, is consistent with the fact that the decision in question had been based exclusively on the temporary nature of the signs.

39. Un ffurf arbennig ar amhriodoldeb gweithdrefnol (gweler *Council of Civil Service Unions v Minister for the Civil Service* y cyfeirir ato uchod) yw methu â gweithredu yn unol â disgwyliad dilys sydd wedi cael ei greu. Mae'r Tribiwnlys yn dod i'r casgliad bod y Comisiynydd, drwy ei staff, drwy ofyn i'r Ceisydd ddarparu copïau o ffotograffau o'r arwyddion dan sylw, wedi creu disgwyliad dilys y byddai'r ffotograffau yn cael eu hystyried fel rhan o broses y Comisiynydd ar gyfer penderfynu a ddylid ymchwilio i'r gŵyn ai peidio. Roedd y broses honno'n cynnwys penderfyniad gan y Comisiynydd ar sail y cyngor a roddwyd iddi gan y Panel Ymchwilio a Gorfodi. Yr hyn yr oedd gan yr Ceisydd hawl ei ddisgwyl oedd bod y dystiolaeth bellach yr oedd wedi ei darparu, ar gais swyddfa'r

39. A particular form of procedural impropriety (see *Council of Civil Service Unions v Minister for the Civil Service* referred to above) is that of failure to act in accordance with a legitimate expectation which has been created. The Tribunal concludes that by asking the Applicant to provide copies of photographs of the signs in question, the Commissioner, by her staff, created a legitimate expectation that the photographs would be taken into account as part of the Commissioner's process for deciding whether to investigate the complaint or not. That process involved a decision by the Commissioner based on the advice given her by the Investigation and Enforcement Panel. What the Applicant was entitled to expect was that the further evidence which he had provided, at the request of the

Comisiynydd, yn cael ei bwydo i'r broses honno.

40. Nid dyna beth ddigwyddodd. Dan ddylanwadwyd di-os y ffaith bod penderfyniad y Comisiynydd ar 1 Rhagfyr wedi ei seilio mor ddiamwys ar natur dymhorol yr arwyddion, penderfynodd Mr Roberts beidio â thynnu sylw'r Panel na'r Comisiynydd atynt. Ni chafodd y dystiolaeth dan sylw ei hystyried mewn unrhyw adolygiad neu ail-ystyriaeth ffurfiol o benderfyniad y Comisiynydd, er nad oedd unrhyw beth i rwystro adolygiad neu ail-ystyriaeth o'r fath gan nad oedd yr Ceisydd wedi'i hysbysu o'r penderfyniad. Felly, mae'r Tribiwnlys yn casglu bod staff y Comisiynydd, yn gweithredu ar ei rhan, wedi methu â gweithredu yn unol â'r disgwyliad dilys a oedd wedi cael ei greu. Mae hyn yn cyfateb i amhriodoldeb gweithdrefnol.

Casgliad

41. Am y rhesymau uchod, daw'r Tribiwnlys i'r casgliad bod y canlynol wedi effeithio ar benderfyniad y Comisiynydd i beidio â chynnal ymchwiliad i gŵyn yr Ceisydd, dan adran 71 o'r Mesur:

- anghyfreithlondeb (methu â rhoi ystyriaeth i ystyriaethau perthnasol a dibyniaeth ar ystyriaeth amherthnasol);
- afresymegoldeb (trin natur dymhorol neu dros dro'r arwyddion dan sylw fel rheswm, dan amgylchiadau'r gŵyn, dros gyfiawnhau - yn wir yr unig gyfiawnhad dros - y penderfyniad i beidio ag ymchwilio i'r gŵyn) ac
- amhriodoldeb gweithdrefnol (methu â bodloni disgwyliad dilys y Ceisydd y byddai'r ffotograffau y gofynnwyd iddo eu darparu yn cael eu hystyried yn briodol wrth wneud y penderfyniad).

42. Gweithredodd y Comisiynydd felly y tu hwnt i'w phwerau o ran y ffordd y gwnaeth y

Commissioner's office, should be fed into that process.

40. That is not what happened. Mr Roberts, influenced no doubt by the fact that the Commissioner's decision on 1 December had been based so unequivocally on the seasonal nature of the signs, decided not to draw them to the attention of the Panel or of the Commissioner. The evidence in question was not taken into account in any formal review or reconsideration of the Commissioner's decision, even though there was nothing to prevent such a review or reconsideration since the decision had not been communicated to the Applicant. There was therefore a failure by the Commissioner's staff, acting on her behalf, the Tribunal concludes, to act in accordance with the legitimate expectation that had been created. This amounted to procedural impropriety.

Conclusion

41. For the above reasons the Tribunal concludes that the Commissioner's decision not to conduct an investigation under section 71 of the Measure of the Applicant's complaint was affected by:

- illegality (failure to take into account relevant considerations and reliance on an irrelevant consideration);
- irrationality (treating the seasonal or temporary nature of the signs in question as capable, under the circumstances of the complaint, of amounting to a justification of - indeed the sole justification for - the decision not to investigate the complaint) and
- procedural impropriety (failing to satisfy the Applicant's legitimate expectation that the photographs which he had been asked to provide would be taken properly into account when arriving at the decision).

42. The Commissioner therefore acted beyond her powers in the manner in which she took

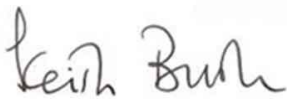
penderfyniad dan sylw.

43. Mae'r Tribiwnlys wedi ystyried a yw'n glir y byddai'r Comisiynydd, pe na fyddai wedi gweithredu yn y ffyrdd a nodir ym mharagraffau 34 a 40 uchod, yn dal wedi penderfynu peidio â chynnal ymchwiliad. Mewn geiriau eraill, a ellir dweud nad yw'r Ceisydd wedi dioddef dim anghyfiawnder o ganlyniad i'r materion dan sylw? Nid yw'r Tribiwnlys yn credu bod y dystiolaeth yn ei alluogi i ddod i'r cyfryw gasgliad. Ni ellir dweud â sicrwydd, na hyd yn oed gyda graddau digonol o debygolrwydd, pe byddai'r penderfyniad wedi cael ei wneud mewn modd cyfreithlon y byddai'r canlyniad yr un fath.

44. Mae'r Tribiwnlys felly:

- i) yn diddymu penderfyniad y Comisiynydd ac
- ii) yn anfon penderfyniad y Comisiynydd yn ôl ati, gyda chyfarwyddyd ei bod yn ei ailystyried yn unol â'r egwyddorion a nodir uchod.

45. I osgoi amheuaeth, mae'r Tribiwnlys yn datgan yn glir y bydd gan y Comisiynydd, wrth ailystyried ei phenderfyniad, yr hawl, ac o dan ddyletswydd, i roi ystyriaeth i'r holl faterion perthnasol fel y maent ar yr adeg y gwna hynny. Caiff roi ystyriaeth i ddigwyddiadau ers y penderfyniad gwreiddiol ac ni chaiff ei chyfyngu i ystyried materion fel yr oeddent ar 1 Rhagfyr 2016. Fel yr oedd y Tribiwnlys yn awyddus iawn i'w bwysleisio wrth y partion, mae ei benderfyniad wedi'i gyfyngu i gyfreithlondeb penderfyniad y Comisiynydd ac nid i'w rinweddau. Nid oes gan y Tribiwnlys ddim pŵer i bennu canlyniad proses newydd o wneud penderfyniad a fydd yn seiliedig ar egwyddorion priodol.



Keith Bush CF
Cadeirydd Panel y Tribiwnlys
28 Mehefin 2017

the decision in question.

43. The Tribunal has considered whether it is clear that, had the Commissioner not acted in the ways identified in paragraphs 34 and 40 above, she would nevertheless still have decided not to conduct an investigation. In other words, can it be said that the Applicant has suffered no injustice as a result of the matters in question? The Tribunal does not believe that the evidence enables it to come to such a conclusion. It cannot be said with certainty, or even with a sufficient degree of probability, that had the decision been taken lawfully the outcome would have been the same.

44. The Tribunal therefore:

- i) annuls the Commissioner's determination and
- ii) remits the Commissioner's determination with a direction that she reconsiders the decision in accordance with the principles set out above.

45. For the avoidance of doubt the Tribunal makes clear that when reconsidering her decision the Commissioner will be entitled, and required, to take into account all relevant considerations as they exist at the time she does so. She can take account of events since the original decision and is not limited to considering matters as they stood on 1 December 2016. As the Tribunal was at pains to stress to the parties, its decision is limited to the legality of the Commissioner's decision and not to its merits. The Tribunal has no power to determine the outcome of a new decision-making process based on proper principles.



Keith Bush QC
Chair of the Tribunal Panel
28 June 2017

ATODIAD

(Deunydd y bu'r Tribiwnlys yn ei ystyried)

- a) Hysbysiad o Gais yr Ceisydd (10.12.16)
- b) Datganiad Achos yr Ceisydd (11.12.16)
- c) Datganiad Achos y Comisiynydd (Rhodri Roberts 25.1.17);
- d) Trefn Orfodi'r Comisiynydd (20.10.16);
- e) Cofnodion Panel Ymchwilio a Gorfodi'r Comisiynydd ac adroddiad Rhodri Roberts (1.12.16);
- f) Safonau 61 a 62;
- g) Awdurdodau:

Padfield v Minister of Agriculture [1968]
UKHL 1;

*Council of Civil Service Unions v Minister
for the Civil Service Service* [1983] UKHL
6;

*Cyngor Sir Penfro v Comisiynydd y
Gymraeg* (TyG 16/5)

*Standard Commercial Property Securities
Limited v Glasgow City Council* [2006]
UKHL 50

APPENDIX

(Material considered by the Tribunal)

- a) Applicant's Notice of Application (10.12.16)
- b) Applicant's Statement of Case (11.12.16)
- c) Commissioner's Statement of Case (Rhodri Roberts 25.1.17);
- d) Commissioner's Enforcement Procedure(20.10.16);
- e) Minutes of Commissioner's Investigation and Enforcement Panel and report of Rhodri Roberts (1.12.16);
- f) Standards 61 and 62;
- g) Authorities:

Padfield v Minister of Agriculture [1968]
UKHL 1;

*Council of Civil Service Unions v Minister
for the Civil Service Service* [1983] UKHL
6;

*Pembrokeshire County Council v Welsh
Language Commissioner* (WLT 16/5)

*Standard Commercial Property Securities
Limited v Glasgow City Council* [2006]
UKHL 50