

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Lothian Valuation Joint Board, Edinburgh, on 11 July 2017.

Panel Members: Mrs Patricia Stewart, Chair of the Hearing Panel
Mr Kevin Dunion, OBE
Mrs Julie Ward

The Hearing arose in respect of a Report by Mr Bill Thomson, the Commissioner for Ethical Standards in Public Life in Scotland (the CESPLS) further to complaint reference LA/E/1924 (the Complaint) concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by former Councillor Jim Orr (the Respondent).

COMPLAINT

A complaint was received by the CESPLS about the alleged conduct of the Respondent. Following an investigation, the CESPLS referred the complaint to the Standards Commission for Scotland on 31 March 2017 in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

The substance of the referral was that the Respondent had failed to comply with the provisions of the Councillors' Code of Conduct and in particular, that he had contravened paragraphs 3.1 and 3.2.

The relevant provisions were:

3.1 The rules of good conduct in this section must be observed in all situations where you act as a councillor, including representing the Council on official business.

3.2 You must respect the chair, your colleagues, Council employees and any members of the public present during meetings of the Council, its Committees or Sub-Committees or of any Public Bodies where you have been appointed by, and represent the Council. You must comply with rulings from the chair in the conduct of the business of these meetings.

Evidence Presented at the Hearing

The Hearing Panel noted that a Joint Statement of Facts had been agreed between the parties and that neither the facts nor the Commissioner's conclusions, as outlined in his Report, were in dispute.

The Hearing Panel noted that the Respondent published an article on his online blog on 18 August 2016 about the complainer, Mr Steve Cardownie, who had been a fellow councillor, entitled 'The Steve Cardownie Corruption Map of Edinburgh'. In this, a map of central Edinburgh was reproduced with 10 areas marked on it. Ten corresponding allegations of wrongdoing by the complainer, representing each area, were described in a list underneath the map. The claims of wrongdoing made by the Respondent included allegations that the complainer, as a councillor, had given preferential treatment to certain individuals, had failed to declare relevant interests as

required and had bullied officers. In the blog, the Respondent referred to the complainer as ‘a crook’ and claimed his conduct was ‘bordering on criminal activity’.

The Hearing Panel heard that, in the blog, the Respondent had clearly identified himself as a councillor and was referring to matters that concerned Council business. The Hearing Panel therefore concluded that the provisions of the Councillors’ Code of Conduct applied to the Respondent at the time.

DECISION

The Hearing Panel considered all of the evidence including the submissions made at the Hearing.

In reaching its decision, the Hearing Panel took the following approach. Firstly, it considered whether the facts, as admitted, led it to conclude that the Respondent had failed to comply with the Councillors’ Code of Conduct. Secondly, if so, whether such a finding in itself was *prima facie* a breach of the Respondent’s right to freedom of expression under Article 10 of the European Convention on Human Rights (as incorporated in the Human Rights Act 1998). Thirdly, if so, whether the restriction involved by the finding was justified by Article 10(2), which allows restrictions that are necessary in a democratic society, and in particular, in this case for the protection of the reputation or rights of others.

Stage 1: Has there been a failure to comply with the Code?

The Hearing Panel found that, in his blog of 18 August 2016, the Respondent made a number of allegations and critical comments about the complainer that were of a personal and insulting nature. The Hearing Panel further found that the comments were clearly intended to impugn and demean the complainer in a public forum. The Hearing Panel was therefore satisfied that the Respondent had failed to observe the rules of good conduct by behaving in a disrespectful manner towards the complainer.

In terms of the first stage of the test, the Hearing Panel found that the Respondent’s behaviour amounted to a contravention of paragraphs 3.1 and 3.2 of the Councillors’ Code of Conduct. However, before coming to a finding on the matter, the Hearing Panel was obliged to consider the provisions of Article 10.

Stage 2: Is this finding a breach of Article 10?

The Hearing Panel proceeded to consider whether a finding that the Respondent had failed to comply with the provisions of the Code was *prima facie* a breach of his right to freedom of expression under Article 10 of the European Convention on Human Rights.

In coming to a view the Hearing Panel firstly considered whether the comments the Respondent made on his blog amounted to political expression. It noted that the Courts had interpreted the term ‘political expression’ widely and had found that there was no distinction between political discussion and discussion of matters of public concern. The Hearing Panel further noted that comments made in a political context, which amounted to value judgements, were tolerated even if untrue, as long as they had some, or any, factual basis. A statement of fact would be tolerated if

what was expressed was said in good faith and there was some reasonable (even if incorrect) factual basis for saying it.

In this particular case, the Hearing Panel noted that the comments concerned the conduct of another elected member in respect of his compliance or otherwise with the Councillors' Code of Conduct. As such, the Hearing Panel was of the view that it could be argued that the blog concerned matters of public concern and, therefore, that some of the comments made on it by the Respondent could potentially amount to political expression. However, the Hearing Panel noted that the complainer had raised Court proceedings of defamation against the Respondent. The action was settled after the Respondent paid damages and proffered an unqualified apology, in which he had accepted the allegations and imputations he had made in the blog were 'entirely false and without foundation'. In the circumstances, the Hearing Panel was satisfied that the comments in question did not amount to a value judgement and that the Respondent should not, therefore, be afforded the enhanced protection under Article 10 for political expression.

Stage 3: Is the restriction involved by the finding justified by Article 10(2)?

The Hearing Panel then proceeded to consider whether the restriction involved by a finding that the Code had been breached was justified by Article 10(2), which allows restrictions that are necessary in a democratic society for the protection of the reputation or rights of others.

The Hearing Panel was of the view that the intention of the provisions in paragraph 3.1 and 3.2 of the Code, and the imposition of any sanction if a breach of them was found, was to protect the rights and reputations of others (including other councillors) from, for example, offensive, abusive and defamatory remarks. The aim was also to ensure that public confidence in local government was maintained. The Hearing Panel was content, therefore, that the proposed restriction was in pursuance of a legitimate aim.

The Hearing Panel noted that it was also required to consider whether there were relevant and sufficient reasons to justify the interference to the Respondent's right to freedom of expression and whether the restriction was proportionate to the legitimate aim being pursued. As such, the Hearing Panel was required to undertake a balancing exercise; weighing the right to freedom of expression enjoyed by the Respondent against any restriction imposed by a finding of a breach of the Code and application of a sanction.

In reaching an evaluative judgment, the Hearing Panel took into account that the Courts had held that the more egregious the conduct in question, the easier it would be for a Panel or Tribunal, when undertaking such a balancing exercise, to justifiably conclude that a restriction was required.

In this case, the Hearing Panel concluded that the Respondent's comments had been made without factual basis and were intended to undermine the complainer. The comments adversely affected the rights and reputation of the complainer as an individual but could also impact on the public right to confidence in local government. The Hearing Panel further concluded that the allegations and comments about the complainer were disrespectful and amounted to a personal attack. The Hearing Panel was of the view, therefore, that the Respondent's conduct was egregious. As such, the Hearing Panel determined that the imposition of a restriction in the circumstances was relevant, sufficient and proportionate. The Hearing Panel concluded that it

was satisfied, therefore, that a finding of breach and subsequent application of a sanction would not contravene Article 10.

The Hearing Panel, having given careful consideration to the particular facts and specific circumstances of the case, determined that the Respondent, Mr Orr, had breached paragraphs 3.1 and 3.2 of the Councillors' Code of Conduct.

Evidence in Mitigation

The Respondent indicated that, in his blog, he was trying to be transparent in attempting to bring issues he had concerns about into the public domain. The Respondent explained that he had formerly been employed as a local authority internal auditor and was angry and frustrated that some of the practices and behaviours he was seeing as a councillor were not being addressed or investigated. The Respondent indicated that he accepted, however, that he should not have used the language that he did and that it was inappropriate.

When asked by the Hearing Panel whether he had considered any other options for raising his concerns, such as bringing them to the attention of senior Council officers or the Accounts Commission, the Respondent advised that he had tried to discuss them with members of his political party at the time but had become frustrated by the lack of interest shown by his colleagues. The Respondent confirmed that he had also referred matters to the CESPLS but that police involvement had delayed the investigation, which meant the decision had still not been issued at the time he wrote the comments in the blog in August 2016. The Respondent indicated that he had resigned his party whip in February 2014 due to the stress he incurred as a result of the pressure he was under from colleagues not to disclose matters.

The Respondent advised that, as a result of his actions, his reputation had been destroyed and, as such, his political career had unravelled. The Respondent reiterated, however, that he could not justify the words he had used in the blog. The Respondent advised that he accepted he had breached the Code and should be sanctioned for doing so.

SANCTION

The Hearing Panel noted that, having found a breach of the Code, it was obliged to impose a sanction. The Hearing Panel further noted that as the Respondent was no longer a councillor, the only options available were censure or disqualification.

The decision of the Hearing Panel was to censure, the Respondent, Mr Orr.

This sanction is made under terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 section 19(1)(a).

Reason for Sanction

In reaching their decision, the Hearing Panel:

1. Took account of the Respondent's submissions that he was attempting to act in the public interest, by putting his concerns into the public domain.

2. Acknowledged the Respondent's early acceptance that he had breached paragraph 3.1 and 3.2 of the Councillors' Code of Conduct and that he should not have used the language he did.
3. Noted the Respondent had already suffered consequences as a result of his actions.

However, the Hearing Panel:

4. Considered it had been the Respondent's personal responsibility to comply with the Code at the time. He had failed to do so.
5. Found that the Respondent's comments amounted to a personal attack on a fellow councillor.
6. Considered that the manner in which the Respondent had raised his concerns were inappropriate and, as such, could have undermined public confidence in local government.

RIGHT OF APPEAL

The attention of the Respondent was drawn to Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 as amended which details the right of appeal in respect of this decision.

Date: 12 July 2017



**Mrs Patricia Stewart
Chair of the Hearing Panel**