

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Fife House, Glenrothes, KY7 5LT, on 25 April 2018.

Panel Members: Mr Michael McCormick, Chair of the Hearing Panel
Mr Kevin Dunion, OBE
Mrs Lindsey Gallanders

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/Fi/2050 (the complaint) concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor David MacDiarmid (the Respondent).

The CESPLS was represented by Mrs Claire Gilmore, Senior Investigating Officer. Councillor MacDiarmid was represented by Mr Hugh Olson, Advocate.

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 6 March 2018, 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, 3.2, 7.3 and 7.4.

The relevant provisions are:

General Conduct

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.

Taking Decisions on Quasi-Judicial or Regulator Applications: Fairness and Impartiality

7.3 In such cases, it is your duty to ensure that decisions are properly taken and that parties involved in the process are dealt with fairly. Where you have a responsibility for making a formal decision, you must not only act fairly but also be seen as acting fairly. Furthermore, you must not prejudge, or demonstrate bias in respect of, or be seen to be prejudging or demonstrating bias in respect of, any such decision before the appropriate Council meeting. In making any decision, you should only take into account relevant and material considerations and you should discount any irrelevant or immaterial considerations.

7.4 To reduce the risk of your, or your Council's, decisions being legally challenged, you must not only avoid impropriety, but must at all times avoid any occasion for suspicion and any appearance of improper conduct.

Evidence Presented at the Hearing

Joint Statement of Facts

The Hearing Panel noted that a Joint Statement of Facts had been agreed between the parties. In this, the parties confirmed that the Respondent was a member of Fife Council's Regulation and Licensing Committee (the Committee) that considered an application from the complainer for renewal of his taxi driver's licence at a meeting on 15 December 2015. The Committee had before it a letter of representation from Police Scotland dated 4 November 2015, and also a letter from the complainer's solicitor of 10 December 2015 responding to the allegations it contained. In the Joint Statement, the parties agreed that, in contemporaneous handwritten notes, the Committee Administrator recorded that the Respondent used the words "just a bully to women + children can't understand why women would stay with him not marry him", in relation to the complainer at the meeting. The parties agreed that, in typed up notes of the meeting, the Committee Administrator recorded the Respondent as having used the words "just a bully to women + children can't understand why women would stay with him never mind marry him", in respect of the complainer. The parties further agreed that the Council's Managing Solicitor had recorded, in contemporaneous handwritten notes, the Respondent as having said "report says basically you are a bully to women + children. Why do women live with y."

In the Joint Statement, the parties advised that while the Respondent did not specifically recall whether or not he used the words attributed to him, he had no reason to doubt that the two officers were doing their best to record the Committee's proceedings and that, if they both had noted that certain words had been said, then the Respondent accepted this had been the case. The parties agreed, however, that the Respondent did not know if, or accept that, the notes were a complete record of what had been said at the meeting.

Witness Evidence

The Respondent's representative led the Respondent as a witness.

The Respondent advised that he had first been elected in 2007 and had subsequently been re-elected on two occasions. Over the past 11 years, he had served on a number of Committees that were responsible for making decisions of a quasi-judicial or regulatory nature, including being a member of the Regulation and Licensing Committee for over ten years.

The Respondent indicated that he had no specific recollection of the Regulation and Licensing Committee meeting on 15 December 2015. He advised that since then, the Committee had met some 31 times and had considered over 400 applications.

The Respondent advised that while he had been told an appeal had been lodged in respect of the Committee's decision, he did not recollect being told the grounds for it and would have had only very limited input (if any) to the Council's response. The Respondent accepted that he had been asked to apologise when the appeal was ongoing, but advised it had been his understanding that

he was being asked whether he would apologise for causing offence, as opposed to apologising for using certain words.

The Respondent indicated it was not his practice to make gratuitous, insulting or personal remarks about anyone during Committee meetings and instead, he always tried to conduct himself in a respectful manner. The Respondent noted that his primary aim was always to ensure the safety of the people of Fife. The Respondent confirmed that although the Committee often had before it police reports that contained serious allegations, he would never pre-judge an application. The Respondent advised that it was always his practice, in determining whether an applicant was a fit and proper person, to take into consideration how the individual conducted him or herself when appearing before the Committee and any information or answers they provided.

The Respondent stated that while he had no recollection of making the comments attributed to him and did not recognise them as representative of his normal behaviour, he had no reason to doubt that the officers' notes of the meeting reflected what had been said. The Respondent advised, therefore, that he could only assume that if he had made the remarks in question it was the result of him having become frustrated when the complainer provided non-committal answers to queries from Committee members and to his refusal to engage fully in the process. The Respondent asked the Hearing Panel to note that there was no record of anyone present at the meeting having intervened when he was making his remarks. The Respondent indicated that he would have expected either the officers or the Chair to have done so had his conduct been deemed to be improper. The Respondent accepted, however, that his words could have been chosen more carefully.

Submissions made by the CESPLS's Representative

The CESPLS's representative advised that it was not in dispute that the complainer appealed against the unanimous decision of the Committee not to renew his licence and that, in a judgement of 12 June 2017, the Sheriff reversed it and determined that the complainer was a fit and proper person to hold a taxi licence. The Sheriff noted that the Council admitted, on the Record, that the Respondent had stated at the meeting "I don't understand why two women would live with you never mind get married to you" and that "I think this man is a bully and I don't want bullies driving people round in taxis in Fife". The Sheriff had made a finding in fact that these words, or ones to that effect, had been used. The Sheriff had further found that such remarks were 'completely out of place', 'tainted with prejudice and bias' and should have had 'no place in the decision-making process'. The CESPLS's representative further advised that it was not in dispute that, in January 2017, the Respondent had indicated he was prepared to offer an apology to the complainer as part of a potential settlement discussed by the Council and the complainer's agents in respect of the Sheriff Court appeal.

The CESPLS's representative noted that it was perfectly acceptable for members of the Committee to question applicants, even in robust terms, to ensure public safety. She argued, however, that notwithstanding this, they attended meetings as members of the public and, as such, were entitled to be treated with courtesy and respect.

The CESPLS's representative argued that, regardless of whether the remarks made by the Respondent to the effect that the complainer was a bully and in respect of his marital attractiveness were in the form of questions or comments, they were nevertheless a derogatory

characterisation. The CESPLS's representative accepted that the Respondent would have been entitled to question the complainer in fairly robust terms on the allegations made in the letter from Police Scotland. She contended, however, that the remarks did not simply amount to robust questioning but instead were personal in nature. The CESPLS's representative further contended that the comments were gratuitous as they were not relevant to the question of whether the complainer was a fit and proper person to drive a taxi. The CESPLS argued, therefore, that they were disrespectful to the complainer as a member of the public attending a Committee meeting.

The CESPLS's representative noted that while Article 10 of the European Convention on Human Rights (ECHR) provides protection to politicians in terms of their right to freedom of expression, it was not unqualified. The CESPLS's representative argued that, in this case, the comments made by the Respondent were of a personal and offensive nature. The CESPLS's representative contended that, in making the remarks, the Respondent was indulging in gratuitous personal abuse and, in the circumstances, would not attract the enhanced protection afforded by Article 10 to politicians when commenting on matters of public concern. The CESPLS's representative argued, therefore, that the Respondent had been disrespectful, had failed to comply with the rules concerning good conduct and, as such, had contravened paragraphs 3.1 and 3.2 of the Code.

The CESPLS's representative further argued that by making a personal judgement and emotive comments about the complainer, the Respondent failed to avoid the appearance of being unfair. The CESPLS's representative asked the Hearing Panel to note that the Respondent's comments were one of the reasons for the appeal against the Committee's decision and was a ground for the Sheriff's decision to overturn it. As such, the CESPLS's representative contended that the Respondent had breached paragraphs 7.3 and 7.4 of the Code

Submissions made by the Respondent's Representative

The Respondent's representative advised that the Respondent's was undertaking a legitimate role at the Regulation and Licensing Committee in questioning the complainer on the contents of the letter from Police Scotland in order to determine whether he was a fit and proper person to hold a taxi licence. The Respondent's representative argued that, in light of the contents of the letter, it would have been legitimate and reasonable for anyone reading it to have reached the conclusion that the complainer was a bully and, as such, it was appropriate for the Respondent to have made reference to this when questioning him in order to determine whether he was a fit and proper individual.

The Respondent's representative argued that it was impossible to determine exactly what had been said by the Respondent given that there were discrepancies between the handwritten notes recorded by the two officers and also between the Committee Administrator's handwritten and typed notes. The Respondent's representative argued, in any event, that the context in which the comments were made required to be considered. The Respondent's representative contended that, while they may have been somewhat clumsy in nature, the comments represented a genuine attempt by the Respondent to elicit answers from the complainer on the contents of the police letter and to prompt him into addressing the concerns raised as a result of it. The Respondent's representative argued that this in itself was evidence that the Respondent had not pre-judged the matter.

The Respondent's representative asked the Hearing Panel to note that it was apparent from the officers' notes that the Respondent's remark to the effect that the complainer had come across as a bully had been made in his motion to refuse the application. As such, it was evident that it was an attempt to sum up the reasons why the Respondent, having considered all the material and representations made in writing and verbally at the meeting, was of the view that the complainer was not a fit and proper person to hold a taxi licence.

The Respondent's representative further argued that the Sheriff's decision was of no assistance to the Hearing Panel in determining whether there had been a breach of the Code. This was because the Sheriff had not had before him all of the relevant evidence, including the Respondent's position and the officers' handwritten notes of the meeting. In addition, the Respondent's representative argued that the Sheriff had failed to properly take account of the fact that there was an onus on an applicant to provide such a Committee with information and evidence in response to any adverse representations before it, as outlined by the Inner House of the Court of Session in *Glasgow City Council v Bimende*, 2016 CSIH 41.

The Respondent's representative indicated that, in any event, it would be disproportionate and unfair for a finding of breach to be made, and a sanction imposed, given the length of time that had elapsed between the Committee meeting in question and the submission of the complaint to the CESPLS, and also given that the matter had been disposed of by way of a successful appeal to the Sheriff Court. The Respondent's representative noted that the complainer had been granted a taxi licence as a result of the appeal. He further argued that there was no reason why the complainer could not have lodged his complaint at the same time as his appeal, as opposed to waiting until August 2017 to do so. The Respondent's representative argued that had the complainer done so, the Respondent may have been able to recollect the meeting and exactly what had been said. The Respondent's representative contended that the process was prejudicial to him as a result of the fact that he was unable to do so and could, therefore, be a contravention of his right, under Article 6 of the ECHR, to a fair Hearing within a reasonable time.

DECISION

The Hearing Panel considered the submissions given orally at the Hearing and in writing and found as follows:

1. The Councillor's Code of Conduct applied to the Respondent.
2. The Respondent had breached paragraphs 3.1, 3.2, 7.3 and 7.4 of the Councillors' Code of Conduct.

Reasons for Decision

The Hearing Panel considered all of the evidence, including the evidence led and submissions made orally at the Hearing.

In reaching its decision in respect of the alleged contravention by the Respondent of paragraphs 3.1 and 3.2 of the Code, 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

Code. Secondly, if so, whether such a finding in itself was on the face of it a breach of the Respondent's right to freedom of expression under Article 10 of the ECHR (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.

The Hearing Panel noted that in the absence of any video or audio recorded evidence of the Committee meeting on 15 December 2015, it could not determine categorically, word-for-word, what had been said by the Respondent. The Hearing Panel was nevertheless satisfied, in the absence of any dispute to the contrary and in light of the Sheriff's findings in fact, that, on the balance of probabilities, the Respondent had made comments substantially to the effect, and in the tenor, of those ascribed to him.

The Hearing Panel accepted, however, that the Sheriff did not have the benefit of the officers' notes when reaching his determination. On close consideration and reading of these notes, the Hearing Panel noted that there were discrepancies in the accounts of how the word 'bully' had been used and the context in which the Respondent had made his remarks. The Hearing Panel noted that the Respondent had referred to the complainer as having come across as a 'bully' when making a motion to the effect that the application should be rejected. The Hearing Panel was of the view that the conduct, as described by the police, could reasonably be described as bullying. The Hearing Panel was not satisfied, therefore, that it was clear that the remark could be categorised, definitively, as something other than an attempt to summarise what had been represented in the letter from the police. As such, the Hearing Panel concluded the Respondent's use of the term, in the context of providing reasoning in his motion for why the application should be rejected, was not necessarily disrespectful and, as such, it did not amount to a breach of the Code.

The Hearing Panel found, however, that the comments to the effect of why women would live with the complainer or marry him amounted to a personal attack on the complainer and were not relevant or appropriate questions to determine whether he was a fit and proper person to hold a taxi licence. The Hearing Panel noted that, notwithstanding the Respondent's position that he may have become frustrated as a result of a lack of engagement from the complainer at the meeting, the officers' notes demonstrated that the complainer had answered questions put to him, albeit not necessarily in as comprehensive a manner as the Respondent may have wished. Notwithstanding the level of engagement by the respondent or the recognised responsibility of the Committee to seek to satisfy itself as to whether an applicant is a fit and proper person to be licensed to drive a taxi, the Hearing Panel found that there was no justification for the Respondent having made what amounted to personal and insulting comments. The Hearing Panel was therefore satisfied that, in doing so, the Respondent failed to observe the rules of good conduct by behaving in a respectful manner towards the complainer.

The Hearing Panel found, therefore, that the Respondent's behaviour amounted to a contravention of paragraphs 3.1 and 3.2 of the Councillors' Code of Conduct.

The Hearing Panel proceeded to consider whether such a finding in itself was on the face of it a breach of the Respondent's right to freedom of expression under Article 10 of the ECHR and, 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.

The Hearing Panel did not accept that the comments had been made in the context of commenting on a political matter and, as such, the Respondent did not benefit from the enhanced protection of freedom of expression afforded to politicians under Article 10. The Hearing Panel concluded that the Respondent's comments were unnecessary and gratuitous and amounted to a personal attack on the complainer. As such, the Hearing Panel determined that the imposition of a restriction in the circumstances was relevant, sufficient and proportionate. The Hearing Panel concluded, therefore, that it was satisfied that a finding of breach, and subsequent application of a sanction, would not contravene Article 10.

The Hearing Panel noted that the Respondent's representative had argued that it would be disproportionate for a finding of breach and sanction to be imposed, given the length of time that had elapsed between the Committee meeting in question and the submission of the complaint to the CESPLS. The Hearing Panel disagreed, however, as while it accepted that it had not had the benefit of hearing from the complainer himself and did not know the reasons why he had waited until August 2017 to submit the complaint, it considered that it would have been reasonable for the complainer to have awaited the outcome of the appeal before doing so. This was because it would have been understandable for his focus to have been on overturning the Council's decision not to grant the taxi licence, in order to secure his livelihood. The Hearing Panel further considered that it would have been reasonable for the complainer to have waited for the Sheriff's decision to be issued, and to see whether the Council lodged an appeal against this, before submitting the complaint, in order for him to have been satisfied he had legitimate grounds for doing so. The Hearing Panel noted that the Sheriff's decision was issued on 12 June 2017 and that the Council had 28 days to appeal on a point of law arising from this. The Hearing Panel noted that the complaint was submitted to the CESPLS on 14 August 2017 and considered that this was a reasonable timescale in the circumstances. The Hearing Panel was further of the view that the matter had not been disposed of by the sheriff as the Sheriff had no locus to determine whether a breach of the Code had occurred.

The Hearing Panel fully accepted that the Respondent was unable to recollect the meeting and exactly what had been said, and drew no adverse inference from this. The Hearing Panel considered, however, that the existence of the officers' notes, combined with the Sheriff's finding in fact (based on the admission from the Council), meant that it had been able to establish, on the balance of probabilities, that the Respondent had made comments to the effect, or in the tenor, of those ascribed to him even, if it was unable to determine categorically what precisely had been said. In light of this, and given that it considered that there were good reasons as to why the complainer may not have submitted his complaint before the Sheriff's decision was issued, the Hearing Panel was satisfied that the Respondent's right to a fair and public hearing within a reasonable time under Article 6 of the ECHR had not been contravened.

The Hearing Panel noted that paragraphs 7.3 and 7.4 of the Councillors' Code of Conduct provide that councillors must ensure that, in taking decisions on quasi-judicial or regulatory applications, they not only act fairly but must also be seen as acting fairly. To reduce the risk of the Council's decisions being legally challenged, councillors must not only avoid impropriety, but must at all times avoid any occasion for suspicion and any appearance of improper conduct.

The Hearing Panel noted that the officers' notes recorded the Respondent as having stated, in his motion to refuse the application, words to the effect that he had been open to listening to the complainer and his views on the letter from the police. The Hearing Panel further noted the Respondent's evidence that he always took into consideration how an applicant conducted his or herself when appearing before the Committee and any information or answers they provided. The Hearing Panel accepted, therefore, that the Respondent may not have pre-judged the application. It nevertheless found that, in making disrespectful comments to, or about, the complainer at the meeting, the Respondent failed to avoid any appearance of having not dealt with him fairly. As such, the Hearing Panel found the Respondent failed to avoid any occasion for suspicion or appearance of improper conduct, which would have reduced the risk of a successful legal challenge against the Council's decision.

The Hearing Panel found, therefore, that the Respondent's had also contravened of paragraphs 7.3 and 7.4 of the Councillors' Code of Conduct.

The Hearing Panel determined that it was the Respondent's personal responsibility to be aware of, and comply with, the provisions in the Councillors' Code of Conduct. He had failed to do so at the meeting in question.

The Hearing Panel therefore concluded that the Respondent had breached paragraphs 3.1, 3.2, 7.3 and 7.4 of the Councillors' Code of Conduct.

Evidence in Mitigation

A number of supportive statements and character references from constituents and community groups were submitted on behalf of the Respondent, which testified that he was a diligent, conscientious and committed councillor who had worked hard to serve the interests of the people of Fife.

In addition, the Hearing Panel heard that the Respondent took his responsibilities as a councillor very seriously and had not been the subject of any complaint either before, or since, the one under consideration.

The Respondent's representative explained that while the Respondent had no recollection of the events in question, he was not trying to evade responsibility for the complaint or justify the remarks attributed to him. The Respondent's representative noted that the Hearing Panel had only found a breach in respect of one of the remarks attributed to the Respondent. The Respondent's representative advised that the Respondent accepted the making of such a comment was unacceptable and out of character for him. The Respondent could only assume that he had made the remark as a result of a momentary lapse at a stressful meeting and asked the Hearing Panel to take into consideration the fact that breach that had been found had been of a very limited duration, had been inadvertent and that there had been no repetition since the contravention had occurred.

SANCTION

The decision of the Hearing Panel was to suspend for a period of two months, the Respondent, Councillor MacDiarmid, from the Regulation and Licensing Committee of Fife Council, with effect from 2 May 2018.

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

Reason for Sanction

In reaching its decision, the Hearing Panel:

- Noted the Respondent had co-operated fully with the investigative and Hearing processes, and further had acknowledged that the remarks attributed to him were unacceptable and his submission that such comments were out of character.
- Acknowledged the Respondent's position that his overriding aim at the Committee was to act in the best interests of, and protect, the citizens of Fife.
- Noted the character references submitted on behalf of the Respondent and his contribution to public life as a councillor for 11 years.

However, the Hearing Panel:

- Found that the Respondent's comments amounted to a personal attack on a member of the public. The Hearing Panel considered that members of the public have a right to be treated in a respectful and courteous manner when dealing with any Council and its elected members.
- Considered that, as councillor with a good deal of experience in dealing with regulatory and quasi-judicial matters, the Respondent should have known the importance of not only acting fairly, but being seen to act fairly when dealing with decisions that were either quasi-judicial or regulatory in nature, to avoid a successful legal challenge and consequent risk to the reputation of the Council.
- Considered it was clear that the making of insulting personal remarks towards the complainer was a factor in the success of the legal challenge against the Council. As such, the Respondent's conduct had had the potential to bring the Council into disrepute and risked public confidence in it being adversely affected.
- Noted that evidence was not provided that the Respondent had admitted making the remarks attributed to him, nor was there evidence of an appropriate apology having provided to the complainer.
- Emphasised it was a councillor's personal responsibility to be aware of the provisions in the Code and to ensure that he or she complied with them.

RIGHT OF APPEAL

The Respondent has a right of appeal in respect of this decision, as outlined in Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

Date: 2 May 2018



**Mr Michael McCormick
Chair of the Hearing Panel**