

**Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Dumfries and Galloway Council Headquarters, English Street, Dumfries, on 13 February 2018.**

**Panel Members:** Mrs Patricia Stewart, 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/DG/1929 (the complaint) concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by former Councillor Tom McAughtrie (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 22 November 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 (the Code) and in particular, that he had contravened paragraphs 3.1, 3.2 and 3.16.

The relevant provisions were:

*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.*

*Use of Council Facilities*

*3.16 The Council will normally provide facilities to assist councillors in carrying out their duties as councillors or as holders of a particular office within the Council. This may involve access to secretarial assistance, stationery and equipment such as telephones, fax machines and computers. Such facilities must only be used in carrying out Council duties in accordance with your relevant Council's information technology, communications and member support policies or for incidental personal use as authorised by your Council and not related in any way to party political or campaigning activities. Where the Council recognises party political groups, assistance to such groups is appropriate in relation to Council matters but must not extend to political parties more generally and you should be aware of and ensure the Council complies with the statutory rules governing local authority publicity.*

## **EVIDENCE PRESENTED AT THE HEARING**

The Hearing Panel noted that the Respondent had sent the Standards Commission a letter dated 18 December 2017 confirming he had received the notice of Hearing but would not be in attendance or represented at it. The Hearing Panel was satisfied, therefore, that the Respondent was provided with notice of the Hearing, as required by Section 20 of Ethical Standards in Public Life etc. (Scotland) Act 2000 Act.

### **Submissions made by the CESPLS**

The CESPLS advised that the complaint alleged that, on 4 August 2016, the Respondent posted a comment on the complainer's Facebook page, below a photograph of her and another individual (Mr A) outside a polling station that had been taken and posted on 18 September 2014, being the day of the referendum on Scottish independence. The comment in question was 'thankfully you two deviants were dealt the blow you deserve by the decent people of Dumfries'. The CESPLS indicated that, during the investigation into the complaint, the Respondent had neither confirmed, nor denied, posting the comment.

The CESPLS advised that the Respondent had confirmed, however, that he only had one Facebook account, which he used both for personal and political purposes, including in his role as a councillor. The CESPLS advised that the Respondent had accepted that members of the public would identify him as a councillor when he used his Facebook account. He had further accepted that he accessed the account via an app on his Council issued mobile telephone.

The CESPLS contended that the use of the word 'deviants' in the comment in question was an offensive reference to the sexuality of the individuals in the photograph. This was particularly demonstrated by the distinction that had been drawn in the comment between the two individuals and 'the decent people of Dumfries'. The CESPLS argued that the ordinary usage of the word 'deviant' was as a derogatory term in respect of an individual's sexual preference. The CESPLS referred the Hearing Panel to dictionary definitions in support of this contention.

The CESPLS advised that the Respondent had served as a local government councillor for approximately 30 years. The CESPLS advised the Respondent had stood, but had not be re-elected, at the election in May 2017. The CESPLS indicated that there was evidence that the Respondent and the individuals in the photograph had had previous interactions on matters of local concern. The CESPLS drew the Hearing Panel's attention to evidence that the Respondent had used intemperate language and had made personal comments in previous interactions with the complainer and Mr A, when acting in the capacity as a councillor, including in an email to Mr A of 12 July 2014 and on a local Railway Group's Facebook page (which the complainer helped administer) in 2016. In light of these previous interactions and, in the absence of any evidence to the contrary, the CESPLS invited the Hearing Panel to conclude that the comment made on 4 August 2016 had been posted by the Respondent.

The CESPLS noted that while Article 10 of the European Convention on Human Rights (ECHR) provided protection to politicians in terms of their right to freedom of expression, it was not unqualified. The CESPLS argued that, in this case, the comment made by the Respondent in the posting was offensive and discriminatory on the grounds of sexuality. The CESPLS contended that, in making the comment, 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 argued, therefore, that in posting the comment, 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 further argued that, in using his Council issued mobile telephone to post the comment, the Respondent had breached the Council's Acceptable Use of Information and Communications Facilities (ICT) policy, which provided that while employees and elected members could use Council issued mobile telephones for incidental personal use, they should not be used to insult, bully, harass or defame anyone or to send any discriminatory material. As such, the CESPLS contended that the Respondent had also breached paragraph 3.16 of the Code.

The CESPLS argued that those in public life had a responsibility to shape a culture under which the individuals could engage in debates on matters of public interest without fear of being intimidated or threatened. They also had a responsibility to uphold the highest possible ethical standards.

The CESPLS led the complainer as a witness.

**The complainer:** The complainer confirmed that she was involved in a local Railway Group, which was attempting to improve transport links to and from Dumfries, and that she helped administer its Facebook page. The complainer advised that she recalled the interaction with the Respondent on the Facebook page and confirmed that she had posted a comment in response to some from him, warning him to be careful about what he said on the page and to refrain from making any personal attacks.

The complainer advised that she had been involved in establishing the Dumfries & Galloway LGBT+ Group and had been its Chairperson for approximately two years, having only recently stood down from the role. The complainer indicated that she considered her position in, and engagement with, the Group was widely known in the local community through her involvement in events, its website and Facebook account, and in press coverage. In particular, the complainer advised that there had been quite a bit of publicity in respect of the Group following the suicide of a 14 year old member of the LGBT+ community in the area.

The complainer confirmed that she had posted a photograph of her and Mr A at a polling station on 18 September 2014. The complainer indicated she had become aware that the Respondent had posted a comment on the photograph on 4 August 2016 via an automatic notification from Facebook. The complainer advised she had been confused by the comment, given it was made some two years after the photograph had been taken, and given she had approximately two hundred photographs on her Facebook page. The complainer indicated the comment had 'come out of nowhere', and she could not understand why she had been singled out by the Respondent. The complainer indicated she did not mind a bit of heated debate on local issues but had felt threatened by such a personal post on her own Facebook page. The complainer stated she found the use of the word 'deviants' to be offensive and random and had concluded it must have been a reference to her sexuality. The complainer further indicated that she had felt threatened by the reference to her 'getting what she deserved'. Having retained a screenshot of the posting, She had removed the photograph from the page as she was concerned her family and friends would find it upsetting.

## **Written submissions from the Respondent**

The Hearing Panel noted that the Respondent had submitted comments to the Standards Commission in a letter of 18 December 2017, along with nine letters regarding his character and conduct supplied by associates. The Hearing Panel noted that, in a letter to the Standards Commission of 18 December 2017, the Respondent indicated he did not accept the conclusions of the Commissioner's Report that he had posted a homophobic comment.

## **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 at the time of the events in question.
2. The Hearing Panel found the Respondent had breached paragraphs 3.1, 3.2 and 3.16 of the Councillors' Code of Conduct. The Hearing Panel carefully considered all of the evidence including the submissions made at the Hearing.

## **Reasons for the Decision**

The Hearing Panel considered all of the evidence before it, including the submissions made and evidence presented, 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 prima facie 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 the Respondent had confirmed to the CEPSSL, during the investigation, that he only had one Facebook account that he used both for personal purposes and in his role as a councillor. The Respondent had accepted that members of the public would identify him as a councillor when he used his Facebook account. He had further accepted that he only ever used his Council issued mobile telephone to access the account.

The Hearing Panel noted that, in a letter to the Standards Commission of 18 December 2017, the Respondent did not accept or deny posting the comment in question and had simply stated he did not accept the conclusions of the Commissioner's Report that he had posted homophobic comment.

In the absence of any evidence to the contrary, the Hearing Panel determined, on the balance of probabilities, that the Respondent had posted the comment in question on the complainer's Facebook page on 4 August 2016.

The Hearing Panel considered that the Respondent had, by his own admission, not distinguished between his personal and public role when accessing the Facebook account. The Hearing Panel noted that the Respondent's only interaction with the complainer had been as a councillor and that they did not have a personal relationship. As such, the Hearing Panel concluded the Respondent was acting in the capacity of a councillor or would have been perceived as such when posting the comment.

The Hearing Panel determined that the common use of the word 'deviant' was as a derogatory reference in terms of an individual's sexuality. The Hearing Panel found that its use by the Respondent in the posting amounted to a personal attack on the complainer and Mr A, which had clearly been intended to impugn and demean them. The Hearing Panel was therefore satisfied that the Respondent failed to observe the rules of good conduct by behaving in a disrespectful manner towards the complainer and Mr A.

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

The Hearing Panel proceeded to consider 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 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 the posting 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 gratuitous, offensive and abusive in nature and amounted to a personal attack on the complainer and Mr A. The Hearing Panel was of the view, therefore, that the Respondent's conduct was egregious and that his comments adversely affected the rights and reputation of the complainer and Mr A as individuals. 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 further considered that the Respondent had breached the Council's Acceptable Use of ICT Facilities policy by using a Council issued mobile phone to post an inappropriate and offensive comment. As such, the Hearing Panel determined the Respondent had also contravened paragraph 3.16 of the Code.

The Hearing Panel therefore concluded that the Respondent, Mr McAughtrie had breached paragraphs 3.1, 3.2 and 3.16 of the Code.

## **SANCTION**

The Hearing Panel noted that as the Respondent was no longer a councillor, the only options available to it were either censure or disqualification.

The decision of the Hearing Panel was to censure the Respondent, former Councillor McAughtrie. A censure is a severe and formal reprimand. The sanction was made under terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 section 19(1)(a).

The Hearing Panel made it clear that it would have imposed a suspension had that option been available to it.

### **Reason for Sanction**

In reaching their decision, the Hearing Panel:

- Noted the contribution the Respondent had made to public life in approximately 30 years as a councillor.
- Further noted the character references submitted by associates and former colleagues of the Respondent, including ones to the effect that he was not homophobic.

However, the Hearing Panel:

- Considered the language used in the posting was wholly unacceptable and unjustified and noted the complainer's position that she felt threatened by it.
- Agreed with the CESPLS that those in public life must take steps to ensure that their behaviour does not open the door for intimidation and that they must uphold high ethical standards.
- Noted that the Respondent had not taken responsibility for his behaviour or demonstrated any insight into the potential impact of it.

### **RIGHT OF APPEAL**

The attention of the Respondent is 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:** 15 February 2018



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