

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Midlothian House, 40-46 Buccleuch Street, Dalkeith, EH22 1DN on 9 May 2019.

Panel Members: Professor Kevin Dunion, Chair of the Hearing Panel
Mrs Tricia Stewart
Mr Paul Walker

The Hearing arose in respect of a Report by Mr Bill Thomson, then Commissioner for Ethical Standards in Public Life in Scotland (the ESC), further to complaint reference LA/Mi/2169 (the complaint) concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor John Hackett (the Respondent).

The ESC was represented by Mr Paul Donnachie, Solicitor. Councillor Hackett was represented by Mrs Frances Randle, Solicitor.

COMPLAINT

A complaint was received by the ESC about the alleged conduct of the Respondent. Following an investigation, the ESC referred the complaint to the Standards Commission for Scotland on 31 January 2019, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act), as amended.

The substance of the referral was that the Respondent had failed to comply with the provisions of the Code and, in particular, that he had contravened paragraphs 7.3 and 7.4.

The relevant provisions are:

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

Background

The complaint about Councillor Hackett related to his attendance at a meeting of Midlothian Council's Planning Committee on 3 April 2018, at which a planning application by Dalkeith Lawn Tennis Club for the erection of screen netting was considered. The Panel noted that while objections to the proposal had been submitted by the proprietors of a property adjacent to the tennis club, who were concerned about potential light depletion, the planners' recommendation was that planning consent should nevertheless be granted.

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 it was not in dispute that, before the meeting on 3 April 2018, Councillor Hackett undertook an unaccompanied site visit to the objectors' property, that lasted around 15 to 20 minutes, and discussed the potential impact of the netting with one of them.

The Panel noted that it was also not in dispute that Councillor Hackett made comments on the proposal and the potentially adverse impact on the objectors' property during the discussion on the application at the Planning Committee meeting on 3 April 2018. The Panel heard that a motion, subject to a change to the type of netting that was to be used, was approved without dissent and planning consent was granted on that basis.

Submissions made by the ESC's Representative

The ESC's representative advised that Councillor Hackett had admitted that he had not sought advice from officers before undertaking an unaccompanied visit to the objectors' property. The ESC's representative advised that it was not in dispute that, during the visit, Councillor Hackett spoke to one of the objectors about their concerns regarding the impact of the proposed netting.

The ESC's representative noted that it was accepted as good practice for elected members to ask officers to accompany them on site visits to reduce the risk of the public having concerns that councillors were acting improperly or unfairly. The ESC's representative further noted that the Councillors' Code of Conduct did not differentiate between the size and importance of any planning applications in terms of the obligations it imposed on elected members to act fairly and to ensure they were seen to be acting fairly when making any quasi-judicial or regulatory decisions.

The ESC's representative indicated that Councillor Hackett had not engaged in any discussions with the applicants about the proposal, nor had he made any corresponding visit to their premises. The ESC's representative contended that Councillor Hackett's failure to balance his visit with one to the applicants or to seek their views on any proposal to amend the application, in terms of the type of netting to be installed, meant that he failed to ensure that all the parties involved in the process were dealt with fairly.

The ESC's representative further argued that, by drawing the Committee's attention to a different type of netting than that being sought in terms the planning application, and by suggesting that the netting be taken down when tennis was not being played, Councillor Hackett not only took into account an irrelevant consideration but may have influenced other members to do so. While the ESC's representative accepted that Councillor Hackett may have been trying to act fairly and seeking to reach a compromise that would be acceptable to all concerned, his failure to ensure that the views of both parties were fully explored, gave rise to a reasonable perception that he was behaving

improperly. As such, the ESC's representative contended that he had breached paragraphs 7.3 and 7.4 of the Code.

Witness Evidence

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

Councillor Hackett advised that he had only been a councillor for a year at the time of the events in question. Councillor Hackett advised that he was a Council Cabinet Member, a member of various outside local groups and was committed to serving his ward and community.

Councillor Hackett explained that as he also worked full-time, he tended to undertake any constituent activity outwith normal office hours. Councillor Hackett advised that he was interested in hearing from all parties involved in, or affected by, any proposal and that it was his practice to listen and reflect on any debate at the Planning Committee before reaching his own conclusions on the merits or otherwise of it.

Councillor Hackett indicated that, having received a request sent by the objectors to all members of the Planning Committee, he had contacted them directly and arranged a site visit. Councillor Hackett advised that he had considered doing so would be helpful to enable him to gain a better understanding of the potential impact of the netting. Councillor Hackett stated that as he was undertaking the visit outwith office hours, he had not considered it appropriate or reasonable to ask an officer to accompany him.

Councillor Hackett confirmed that he had engaged in a conversation with one of the objectors during the visit about their concerns regarding the potential impact of the netting to their property in terms of light depletion. Councillor Hackett advised that while he had asked the objector questions about the effect of the light and direction of the wind, and had listened to their concerns, he had not given any indication of how he intended to vote on the proposal. Councillor Hackett indicated that he had walked along the objectors' side of the perimeter fence between their property and the tennis club's premises and had looked over it to get a better perspective on the potential impact of the netting from both sides.

Councillor Hackett stated that he had not considered it necessary to undertake a corresponding visit to the tennis club as, having read the application, he was aware of their position. Councillor Hackett advised that he would have undertaken such a visit had he received any request to do so. Councillor Hackett confirmed that he did not discuss the application with anyone from the tennis club or any officers before the meeting.

Councillor Hackett indicated that he had mentioned making a declaration of interest at the meeting, regarding the site visit. Councillor Hackett confirmed that he should have instead simply made a 'statement of clarity' in the interests of being as transparent as possible as, having applied the objective test, he had been satisfied that he did not have an actual interest that required to be declared in terms of the Code. Councillor Hackett indicated that he was concerned that by mis-speaking, he had given the applicants the wrong impression and a reason for them to have mistakenly concluded that he had an interest in the matter.

Councillor Hackett indicated he had been keen to find a compromise and, as such, had suggested at the meeting that the applicants could remove the netting when no tennis was being played. Councillor Hackett advised that an officer had replied and advised that the suggestion was not feasible on the basis that it would place a too onerous burden on the applicants, and that he had accepted this.

In response to cross-examination from the ESC's representative, Councillor Hackett admitted that his mention, at the meeting, of the potential of black netting being installed and his suggestion that the netting be removed when tennis was not being played was simply hypothetical as the proposal only concerned the installation of dark green netting. Councillor Hackett advised, however, that he was simply trying to see if a compromise could be reached that was acceptable to both the applicants and objectors.

Submissions made by the Respondent's Representative

Councillor Hackett's representative argued that Councillor Hackett had been trying to act fairly by undertaking the site visit to ensure that he could reach a fully informed view. Councillor Hackett's representative reiterated that he had not, in any way, indicated his support for, or opposition to, the application during the visit or at any other time before the meeting.

Councillor Hackett's representative noted that it was clear from the comments he had made at the meeting that Councillor Hackett was seeking to find a solution that was acceptable to all concerned. Councillor Hackett's representative indicated that, in openly advising the Committee about his site visit, it was evident that Councillor Hackett was being transparent and was trying to avoid any suspicion of bias.

While Councillor Hackett's representative accepted it would have been good practice for Councillor Hackett to have asked an officer to accompany him, in practice this was not always possible or practical. Councillor Hackett's representative advised that he had only gone on the site visit as he had been invited to do so and confirmed that, during it, he had tried to act fairly by looking over the fence to try to determine the potential impact of the netting from both sides.

Councillor Hackett's representative noted that the application had been granted, albeit with a minor condition, and argued that, as such, the risk of the Committee's decision being legally challenged was minimal. Councillor Hackett's representative further argued that as it was evident from his actions during the site visit, and the contribution he had made at the meeting, that Councillor Hackett had been trying to act fairly, it was clearly not the case that he had acted improperly or given any reason for anyone to suspect he had done so, in contravention of paragraph 7.4 of the Code.

DECISION

The Hearing Panel considered the evidence and submissions made both in writing and orally at the Hearing. It concluded that:

1. The Councillors' Code of Conduct applied to the Respondent, Councillor Hackett.

2. The Hearing Panel found the Respondent had breached paragraph 7.3 of the Councillors' Code of Conduct.
3. The Panel determined that the Respondent did not breach paragraph 7.4 of the Code.

Reasons for Decision

The Hearing Panel noted that it was not in dispute that, before the Planning Committee meeting on 3 April 2018, Councillor Hackett undertook an unaccompanied site visit to the objectors' property, that lasted around 15 to 20 minutes, and discussed the potential impact of the netting with one of them.

The Panel noted that Councillor Hackett admitted that he had not made any corresponding visit to the applicants' premises, nor had he discussed the planning proposal with them. While the Panel accepted that Councillor Hackett considered he was aware of the applicants' position, it noted that this was only in respect of the dark green netting that was being sought. The Panel considered that it would have been reasonable for a member of the public who was aware of the visit, to have expected Councillor Hackett to have also gone to see the applicants' premises or to have at least discussed the matter with them. The Panel noted that while Councillor Hackett may have been trying to act fairly, he should nevertheless have considered how his actions could have been viewed from an external perspective.

The Panel noted that at the Planning Committee on 3 April 2018, Councillor Hackett had made comments on the proposal and the potentially adverse impact on the objectors' property. The Panel further noted that the applicants had not proposed black netting, as mentioned by Councillor Hackett at the meeting following his site visit to the objectors' property, and that they may well have had views on the feasibility of his proposal that the netting be taken down when tennis was not being played.

The Panel recognised that paragraph 7.3 of the Code provides that councillors have a duty to ensure that any formal decisions are properly taken and that any parties involved in the process are dealt with fairly. Councillors are not just required to act fairly, but are also obliged to be seen as acting fairly.

In this case, the Panel determined that it would be reasonable for a member of the public to consider that by:

- failing to seek advice from officers before contacting the objectors directly and undertaking an unaccompanied site visit, despite it being best practice for elected members to ask officers to accompany them on such visits;
- making a visit to the objectors' property and discussing the proposal with one of them;
- failing to make any corresponding visit to the applicants' property or any effort to discuss the proposal, or any potential changes to it, with them;
- actively contributing to the discussions that gave rise to the amended planning consent's approval;

Councillor Hackett gave an appearance of unfairness and bias towards one of the parties.

The Panel therefore concluded that Councillor Hackett had breached paragraph 7.3 of the Code.

The Panel further noted that paragraph 7.4 of the Code not only obliges councillors to avoid impropriety, but requires them to avoid any occasion for suspicion and any appearance of improper conduct, at all times, in order to reduce the risk of the Council's decision being legally challenged.

The Panel was satisfied that there was no question of Councillor Hackett having tried to conceal the visit, or his discussion with one of the objectors, and noted that he had openly declared the fact that he had made a site visit at the Committee meeting. The Panel was satisfied that Councillor Hackett's actions did not give rise to any appearance of improper conduct. As such, the Panel determined that he had not breached paragraph 7.4.

Evidence in Mitigation

Councillor Hackett's representative advised that Councillor Hackett was a relatively new councillor had only attended seven planning Committee meetings at the time of the events in question. Councillor Hackett's representative indicated, however, that he was deeply involved in his community and that he worked extremely hard for his constituents.

Councillor Hackett's representative advised that Councillor Hackett sincerely regretted the impact of his actions on the applicants and that he may have given them cause to conclude that he had not considered the proposal objectively and without bias. Councillor Hackett's representative indicated that Councillor Hackett would be writing to the applicants to apologise.

Councillor Hackett's representative asked the Panel to note that the breach was a one-off incident and that there had been no deliberate intent on the part of Councillor Hackett to breach the Code. Councillor Hackett's representative advised that Councillor Hackett had reflected on the matter and gained a better understanding of the requirements of the Code. He had co-operated fully with the investigative and adjudication processes and intended to work hard to rebuild his reputation and his relationship with the applicants.

Councillor Hackett's representative confirmed that there had been no benefit or personal gain to Councillor Hackett as a result of the contravention.

SANCTION

The decision of the Hearing Panel is to suspend for a period of one month, the Respondent, Councillor Hackett, from Midlothian Council's Planning Committee. This decision is effective from 1 June 2019.

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

Reasons for Sanction

In reaching its decision on sanction, the Hearing Panel noted, in mitigation, that Councillor Hackett had co-operated fully with the investigative and Hearing processes. The Panel further noted Councillor Hackett's commitment to working hard for his constituents and the wider community. The Panel heard that Councillor Hackett deeply regretted the impact his conduct may have had on the applicants and that he intended to apologise to them. The Panel was pleased to note that

Councillor Hackett also intended to work to regain any trust he may have lost as a result of his actions.

The Panel emphasised, however, that the duty on councillors to act fairly and to be seen to be acting fairly when taking quasi-judicial and regulatory decisions is a fundamental requirement of the Councillors' Code of Conduct. The Panel noted that a breach of these provisions had the potential to erode public confidence and trust in how such decisions was being made and in local government itself. The Panel was concerned that Councillor Hackett had failed to ensure that he complied with the Code in this regard, and agreed that the sanction should reflect this.

The Panel was nevertheless of the view that Councillor Hackett's conduct did not warrant a longer suspension. This was because it accepted the incident had been a one-off and there was no suggestion or evidence that there had been any deliberate intent to breach the Code. The Panel also accepted that Councillor Hackett had not acted dishonestly or made any attempt to conceal his visit to the objectors' property.

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: 14 May 2019



**Professor Kevin Dunion
Chair of the Hearing Panel**