

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Scottish Borders Council Headquarters, Newton St. Boswells, Melrose on 6 November 2019.

Panel Members: Ms Ashleigh Dunn, Chair of the Hearing Panel
Professor Kevin Dunion
Mrs Tricia Stewart

The Hearing arose in respect of a Report referred by Ms Caroline Anderson, the Commissioner for Ethical Standards in Public Life in Scotland (the ESC), further to complaint reference LA/SB/2219, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor James Fullarton (the Respondent).

The ESC was represented by her Senior Investigating Officer, Mr Martin Campbell. The Respondent was represented by Mr Iain Burke, solicitor.

Referral

Following an investigation into complaints received about the conduct of the Respondent, the ESC referred a report to the Standards Commission for Scotland on 5 September 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 paragraphs 3.1 and 3.2 of the 2010 Code (being the version of the Code in place at the time).

The relevant provisions were:

3.2 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.

Conduct at Meetings

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. You must respect your colleagues and members of the public and treat them with courtesy at all times when acting as a councillor.

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 had attended a meeting of Eyemouth Community Council on 29 January 2018 in his capacity as an elected member of Scottish Borders Council. The parties further confirmed that part of the discussion at the meeting concerned a Berwickshire Housing Association development. The parties advised that it was not in dispute that the discussion on the matter had become heated and that the Respondent had banged his fist on the table.

Witness Evidence

The ESC's representative led, as witnesses, three members of the Community Council, who had all been present at the meeting on 29 January 2018.

The first witness, Mr A, confirmed that he was Chair of the Community Council. Mr A advised that during the meeting, another community councillor, Ms A, who at the time was a tenant of the Housing Association and lived at the development, had repeatedly asked the Respondent “direct and probing questions” about ongoing problems the residents were experiencing in respect of their properties. Mr A explained that the residents had been complaining about the problems for some two years and that while the Respondent had agreed previously to raise these with the Housing Association, it appeared to members of the community council that he had not done so. Mr A advised that the Respondent failed to give “proper answers” to Ms A’s questions at the meeting and had become increasingly loud, to the point that he had been shouting. Mr A indicated that when another community councillor, Ms W, had also pressed the Respondent to answer the questions raised, the Respondent had stood up, leaned over the table and repeatedly banged his fist on it. Mr A contended that the Respondent had also directed a comment towards Ms W to the effect that she liked a moan. Mr A advised that Ms A and Ms W were upset and intimidated by the Respondent’s behaviour and that, as a result, he was forced to intervene and to tell the Respondent to sit down and stop shouting. Mr A accepted that Ms A was direct in her approach, which could have been misconstrued as being aggressive. Mr A contended, however, that she was not trying to provoke the Respondent and, instead, was just frustrated by his refusal to answer the questions she had “repeatedly put to him”.

In response to cross-examination, Mr A confirmed that the Respondent had advised Ms A that he was unable to answer some or all her questions due to an ongoing legal dispute between the Housing Association and its contractors. Mr A accepted that Ms A knew that the Respondent was also a board member of the Housing Association, but contended that she was simply seeking his assistance as an elected member, as opposed to “having a go” at him. Mr A further accepted that other individuals at the meeting had raised their voices and that community council members had also become frustrated and were talking over each other to try to get their points across. When it was put to him, Mr A disputed the contention outlined in a written statement provided by a Ms F, who had also been present at the meeting, that the Respondent was being shouted down and was being abused by members of the community council or that their conduct was unprofessional and / or aggressive.

The second witness, Ms A, advised that the Respondent had raised his voice and become aggressive at the meeting, in response to her putting questions about the Housing Association development to him. Ms A stated that she recalled him banging his fist on the table, albeit she could not remember how many times or whether he had been standing or sitting when doing so. Ms A advised that she recalled the Respondent directing a comment to Ms W to the effect that she liked a moan, but that she could not remember the exact words that he had used. Ms A stated that neither she, nor Ms W, had been angry or aggressive towards the Respondent and contended that they had just been trying to get their points across so that he would agree to ask the Housing Association to resolve the issues the tenants were experiencing. Ms A indicated that she had also been attempting to hold the Respondent to account for what she alleged was his failure to raise the issues with the Housing Association, despite having agreed to do so at previous meetings.

Under cross-examination, Ms A maintained that she had not asked the Respondent the same question repeatedly or been aggressive towards him. Ms A accepted that the Respondent had explained that the Housing Association could not resolve or deal with some of the issues due to their ongoing legal dispute with the contractors, but advised she did not agree this was relevant to the question of whether it was breaching its tenancy agreements. Ms A indicated that while she had become upset during the meeting, she had nevertheless behaved in a respectful manner towards the Respondent.

The third witness, Ms W, advised that she had asked the Respondent, during the meeting, why the contractors had been chosen and that when he had replied it was because of the cost, she had said “you’ve obviously got what you paid for”. Ms W contended that it was at that point that the Respondent had banged on the table. Ms W advised that the meeting had become heated as community councillor members did not think that the Respondent had relayed the concerns they had previously expressed to the Housing Association. Ms W contended that the Respondent did not seem to want to admit this failure and had become increasingly louder and aggressive in response. Ms W alleged that the Respondent had stood and banged both fists on the table for “about 30 seconds”, causing it to move forward. Ms W stated that her recollection

was that the Respondent had also called her a “moaning old woman”. Ms W advised that she had been really upset by this as she had only joined the community council to help out. Ms W stated that being the recipient of such a public insult was demeaning. Ms W contended that neither she, nor Ms A, had been angry or aggressive towards the Respondent. Ms W advised that it was clear the Respondent had been trying to “fob off” Ms A by saying that some of the issues she was raising about the development were not a matter for the community council.

In response to cross-examination, Ms W clarified that the Respondent had banged on the table “at least 10 times”. Ms W also confirmed that she had been aware that police officers were present at the meeting. Ms W advised she had been surprised that they had not intervened when the Respondent had banged the table. Ms W accepted that the discussion had become emotional and heated, but denied the suggestion that community council members had been talking over each other.

The Respondent’s representative led the Respondent as a witness. The Respondent advised that he had been a councillor for some 15 years and had attended numerous meetings, including community council ones, during that time. While not all of these had been harmonious, he had never previously been the subject of a complaint to the ESC. The Respondent advised that he had been in a very difficult position at the meeting on 29 January 2018 as while he was there in his capacity as a councillor, it was also well known that he was a board member of the Housing Association. The Respondent indicated that there had been confusion at the meeting as the community councillors seemed to think he had not contacted the Housing Association about issues they had raised at previous meetings when, in fact, he had brought these to the attention of its board. The Respondent contended that he had been trying to relay the message at the meeting that the Housing Association was unable to act in respect of the snagging issues raised, due to it being engaged in an ongoing legal dispute with the development’s contractors. The Respondent alleged that that a number of those present had become emotional and frustrated by this answer, and that the meeting had become heated and had turned into “a bit of a rammy”. The Respondent denied any contention that he had been the instigator of this and stated that, instead, community councillors had been aggressive towards him by accusing him of doing nothing about the concerns they had raised previously (something he wholly refuted), and by repeatedly interrupting him when he tried to respond to their questions. The Respondent alleged that community councillors were talking over each other and explained that he had only banged one fist on the table to try to regain control and restore order to the meeting. The Respondent indicated that eventually matters had “settled down” and that the meeting had continued, with him taking an active part and contributing to other agenda items and matters under discussion. The Respondent accepted he had made a comment about people moaning, but contended that this had been directed towards the combined group and not at Ms W as an individual.

Under cross-examination, the Respondent accepted he may have banged his fist more than once, but advised that he had only done so two or three times. The Respondent accepted that, in a written statement before the Panel, a police officer present had noted that she recalled him pointing at one of the community councillors when making his comment about moaning. The Respondent indicated he would apologise if Ms W felt that the remark was directed towards her and advised that he had never intended to demean anyone.

In response to questions from the Panel, the Respondent confirmed that he had not objected to the minute of the meeting, which recorded Mr A as having asked him to lower his voice and to “stop repeatedly banging his fists on the table”, and to the Respondent having said to Ms W “oh woman, you don’t half like a moan”. The Respondent explained, however, that he had only seen the minute after the complaint was made to the ESC following further meetings of the community council in February and March 2018 (both of which he had attended). The Respondent advised that he had chosen not to contest the contents of the minute as he did not want to escalate the matter further.

The Respondent’s representative then led a Ms C who confirmed she had attended the meeting in her capacity as the third representative. Ms C advised that she had attended other community council and Council related forums with the Respondent and had found that he was normally approachable, engaging and respectful. Ms C advised that matters had become heated at the meeting on 29 January 2018, with the

tone being pejorative from the outset. Ms C advised that she could not recall who had raised their voice first, but that she considered the Respondent was being put “under intense pressure”, despite him explaining why he could not address the matters being raised in respect of the Housing Association development. Ms C contended that community councillors had persevered in demanding answers from the Respondent, despite him suggesting that it would be better to deal with issues relating to tenancy agreements in a separate meeting, outwith the community council. Ms C indicated that there was a sense of dissatisfaction with the Respondent from the outset of the meeting and that community councillors seemed to be confusing his role as a councillor with that of a landlord. Ms C confirmed that the Respondent had banged the table with his fist but indicated that this was after a great deal of provocation. Ms C advised that she considered the Respondent’s actions in doing so to be an expression of his frustration, rather than being an act of aggression directed at anyone. Ms C advised that she had intervened at that stage as it was clear the meeting was not being conducted properly, that those present were not observing appropriate boundaries and that any attempt to discuss the matter further would be unproductive.

In response to cross-examination, Ms C confirmed that lots of comments had been directed at the Respondent during the discussion, including ones questioning his integrity, and that he was not given the opportunity to respond properly. Ms C advised that the Respondent had offered to discuss the issues with the tenants in a separate meeting on several occasions, but that the community councillors had continued to talk over him when he had done so. Ms C indicated that she was “pretty sure” the Respondent had remained in his seat while he banged the table as he had been sitting next to her at the table and, as such, she would have remembered if he had stood up. Ms C accepted, however, that in banging the table it was evident that the Respondent was expressing his anger and was experiencing a loss of temper.

In reply to the Panel, Ms C confirmed that her perception was that the community councillors had been determined, from the outset of the meeting, to pursue the issues concerning the development with the Respondent and had been hostile towards him. Ms C advised that she recalled the Respondent banging his fist on the table some two to three times.

Submissions made by the ESC’s Representative

The ESC’s representative argued that the Panel had heard sufficient evidence from the witnesses present for it to conclude, on the balance of probabilities, that at the meeting the Respondent had banged his fist on the table multiple times while standing, that he had raised his voice and that he had called Ms W a ‘moaning old woman’ (or words to that effect). The ESC’s representative contended that there was insufficient evidence for the Panel to conclude that the Respondent had been provoked or had suffered abuse at the meeting. The ESC’s representative noted that some of the evidence from the witnesses he had led differed to that in the written statements from Ms F and the police officer, but argued that the oral evidence should be preferred given it had been given under oath and tested under cross-examination at the Hearing.

The ESC’s representative contended that the Respondent’s behaviour, in raising his voice, in banging the table with his fist while standing and in directing a demeaning remark towards Ms W, taken cumulatively, amounted to him displaying a lack of respect to those present at the meeting. The ESC’s representative argued that, as such, the Respondent had contravened paragraphs 3.1 and 3.2 of the Code.

The ESC’s representative noted that while the Respondent enjoyed the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), this was a qualified right. The ESC’s representative argued that the enhanced protection to freedom of expression afforded to politicians when discussing matters of public concern was not applicable in this case as the matter being discussed at the meeting, in respect of the Housing Association development, was of only very limited public interest. The ESC’s representative contended, in any event, that even if the enhanced protection did apply, a finding of a breach of the Code would be a justifiable restriction on the Respondent’s right to freedom of expression. This was because the public interest in ensuring that community council meetings were accessible, could be conducted without undue disruption and were welcoming to all, required protection. The ESC’s

representative noted, for the sake of fairness, that the Respondent's conduct was not at the serious end of the scale and that he had apologised and had engaged with both the investigative and Hearing processes.

In response to questions from the Panel, the ESC's representative accepted that the meeting had been heated but argued, nevertheless, that the Respondent's conduct in behaving in an intemperate manner to the extent he had to be asked to sit down, was unacceptable in terms of the Code.

Submissions made by the Respondent's Representative

The Respondent's representative argued that Ms W's version of event did not make sense in that it was unrealistic to believe that the Respondent had stood and banged his fists on a table for a full 30 seconds without the police officers present having felt the need to intervene. As such, the Respondent's representative contended that Ms W's evidence should be disregarded as unreliable.

The Respondent's representative argued that there was enough evidence for the Panel to conclude that Mr A had lost control of the meeting and that it had become hostile and heated with a number of those present raising their voices. The Respondent's representative drew the Panel's attention to the written statements provided by Ms F and one of the police officers who had been present. The Respondent's representative noted that Ms F had stated that the Respondent had been "shouted down" when he had tried to address Ms A and Ms W's concerns, that he had banged on the table to "get their attention and stop the abuse he was receiving", and that he had not behaved in a threatening manner towards anyone present. Ms F had further stated that members of the community council had been unprofessional and that the Respondent's frustration was understandable as their conduct had been inappropriate. The Respondent's representative accepted, however, that Ms F's statement had not been tested as she had been unable to attend the Hearing and noted that, as such, the Panel may attach less weight to attach to it.

The Respondent's representative argued, however, that the police officer's statement should be given more weight given that she was a trained observer. The Respondent's representative pointed out that the police officer was there in a neutral capacity and, as such, was removed from the emotion and more capable of providing an unbiased recollection. The Respondent's representative noted that the police officer had stated that "members of the community council began talking over one another as they demanded answers from Councillor Fullarton", and that "after repeated interruption, he banged his fist on the table to regain control". The Respondent's representative noted that were discrepancies in the accounts of the three witnesses led by the ESC's representative as to whether Ms A had repeatedly asked the Respondent the same question and about how many times he had banged his fist or fists on the table. The Respondent's representative noted that there was no suggestion that the witnesses were not credible, but contended that the discrepancies in their accounts was an indication that their recollections of the meeting may not be reliable. The Respondent's representative noted that while this was understandable given that the meeting had taken place more than 15 months ago, it was a good reason as to why the Panel should prefer the police officer's evidence.

In addition, the Respondent's representative argued that the Ms C was the only witness who was not a party in the complaint and therefore was objective. Ms C had made it clear it was a hostile meeting.

The Respondent's representative accepted that, in banging on the table more than once, the Respondent's behaviour was more vigorous than normal but argued that this was in the face of him being targeted in his role as a member of the Housing Association and facing a great deal of hostility and provocation. The Respondent's representative noted that the Code did not require perfect behaviour and that it was unreasonable to have expected the Respondent to have remained passive in the circumstances. Turning to Article 10 of the ECHR, the Respondent's representative argued that the matter being discussed at the meeting was one of public concern and that a community council meeting was, in any event, a political forum. The Respondent's representative contended, therefore, that the Respondent was entitled to the enhanced protection of freedom of expression afforded to politicians in such circumstances. The Respondent's representative questioned whose right or reputation required to be protected to such a degree as to justify a restriction on the Respondent's right to this.

DECISION

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

1. The Councillors' Code of Conduct applied to the Respondent, Councillor Fullarton.
2. The Respondent had not contravened paragraphs 3.1 and 3.2 of the Code.

Reasons for Decision

Having heard the evidence from the five witnesses, including the Respondent, and having noted the two further witness statements, the Panel considered that, on the balance of probabilities, that it had been established that:

- The community council meeting of 29 January 2018 had become quite heated when matters relating to a Berwickshire Housing Association development were discussed;
- Members of the community council had repeatedly directed a number of questions towards the Respondent, who was a board member of the Housing Association, and, in particular, had raised issues regarding repairs to properties within the development;
- When members of the community council had made it clear they did not accept the Respondent's response, the meeting had become even more hostile with those present talking over each other;
- The Respondent had banged on the table with his fist at least two or three times during the discussion and had made a comment to the effect that at least one of the members present was moaning; and.
- The meeting had thereafter continued with other items being discussed.

The Panel noted that the Respondent's position was that he had only banged on the table during the meeting to get people's attention and to stop them shouting. The Panel considered that while this may have been one of his motives, in the context of what had clearly become a heated discussion, it was also likely he had done so out of frustration. The Panel noted there was a clear variation between the witnesses as to whether the Respondent was standing or sitting while banging the table. It did not find, as reliable, the evidence of Ms C that he had done so with both fists for 30 seconds – or at least ten times. While the Panel was of the view that banging on a table was poor behaviour, it did not consider, in the particular context of the meeting and in light of the evidence that those present were talking over each and demanding answers, that that it was an action that amounted to a breach of the respect provision in the Code.

The Panel was satisfied that while the Respondent may have directed his comment about moaning towards one of the members, it was not satisfied that there was sufficient evidence to conclude that the remark was a personal attack on her, as opposed to his opinion of her conduct at the meeting. While the Panel considered the comment was unhelpful, it did not consider the making of the comment in the context of the heated discussion amounted to a breach of the Code.

The Panel was not satisfied, therefore, that the Respondent had breached paragraphs 3.1 and 3.2 of the Councillors' Code of Conduct.

In any event, the Panel was of the view that, even if it had found a breach of the Code, it was clear that the Respondent's conduct had occurred while he was discussing matters of public concern, namely the housing association, at a community council meeting. In such circumstances, the Panel considered that he would have attracted the enhanced protection of freedom of expression afforded to politicians under Article 10 of the ECHR. Even if a breach of the Code had been found, the Panel determined that the Respondent's conduct, in banging the table and making the comment, would not have been sufficiently offensive and gratuitous as to justify a restriction, under Article 10(2), on his right to freedom of expression.

The Panel noted that it was unfortunate that there had clearly been an adverse impact on the ability of witnesses to recollect the events in question due to the timescales involved in the making and investigation of the complaints.

Date: 11 November 2019



**Ms Ashleigh Dunn
Chair of the Hearing Panel**