

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at West Lothian Civic Centre, Livingston on 20 November 2019.

Panel Members: Mr Paul Walker, Chair of the Hearing Panel
Mrs Tricia Stewart
Mr Mike McCormick

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/WL/2213, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Frank Anderson (the Respondent).

The ESC was represented by her Senior Investigating Officer, Mr Martin Campbell. The Respondent was represented by Mr Scott Martin, 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 3 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 the provisions of the Code and, in particular, that he had contravened paragraphs 3.1, 3.2 and 3.18. 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 or are perceived as acting as a councillor, including representing the Council on official business and when using social media.

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

3.18 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 Considered by the Hearing Panel

Documentary evidence the Hearing Panel had before it included: the ESC's report together with the complaint forms and enclosures submitted to her; copies of an article from a third-party blog, 'Grouse Beater', that was entitled 'GMB- A Cockney Clique' both in its original and amended form; a number of press articles; and written submissions on the applicability of the Code.

The Hearing Panel also had before it a Joint Statement of Facts agreed by the parties. In this, the parties confirmed that, on 28 October 2018, the Respondent shared, on Twitter and Facebook, an article (the article) from a third-party blog, 'Grouse Beater', that was entitled 'GMB- A Cockney Clique'. The parties confirmed

that it was not in dispute that the Respondent shared the article, using a Council supplied equipment, which led to it appearing on 1) the SNP's Livingston East Twitter account; 2) a Facebook page entitled 'Veronica Smith, Carl John and Frank Anderson for East Calder and East Livi', which had been set up for the purpose of campaigning for the 2017 local council elections; and 3) the SNP's Livingston East Facebook page.

The parties advised that the Respondent and Councillor John had continued to use the Facebook page in their name after being elected and that, on 6 November 2018, the Respondent had amended the title of it to "Cllr Anderson for Pumpherston and Uphall". The parties further advised that the author of the 'Grouse Beater' blog had been a member of the Scottish National Party (SNP) at the material time but that he was suspended after writing the article and was subsequently expelled from the party.

The Hearing Panel noted that the article in question was critical of an individual, Ms A, as a member of the GMB Union and, in particular, as the organiser of a two-day equal pay strike at Glasgow City Council. The Article included a photograph of Ms A and contained references to 'Mein Kampf' and to Adolf Hitler having accused "The Jew" of gradually assuming leadership of the trade union movement. The Panel noted that this was followed by a paragraph which referred specifically to Ms A and speculated as to whether she was aware of Hitler's views.

Preliminary Matters

The ESC's representative advised at the outset of the Hearing, that he no longer wished to pursue an alleged breach of paragraph 3.18 of the Code by the Respondent. The ESC's representative advised this was because he accepted that, while the Respondent had used Council equipment to share the article in question, he had used his own network and it had only amounted to a "few taps" on a Council issued iPad.

The ESC's representative noted the Respondent's representative had submitted written arguments to the effect that, when sharing the article, the Respondent was neither acting as a councillor, nor could he be perceived to have been acting as a one (as required by paragraph 3.1) and, as such, the Code did not apply. The ESC's representative noted that if the Panel agreed with the Respondent's representative on this point then the question of whether he had failed to conduct himself in a courteous and respectful manner as required by the Code would not arise and, therefore, any submissions on that point would be irrelevant. The ESC's representative suggested, therefore, that in order to ensure an expeditious disposal of the matter it would be appropriate for the Panel to hear arguments, and reach a decision, on the applicability of the Code at the outset. Having obtained confirmation from the Respondent's representative that he supported this approach, the Hearing Panel adjourned to consider the issue and subsequently agreed to it.

Submissions made by the ESC's Representative on the Applicability of the Code

The ESC's representative noted that paragraph 3.1 of the Code requires councillors to observe the rules of good conduct, which includes treating members of the public with courtesy and respect in all situations where they are acting as councillors or could be perceived as acting as such. The ESC's representative noted that, in his written submissions, the Respondent's representative referred to the Code of Conduct for Members of the Scottish Parliament, which explicitly stated that it did not cover Members' private and family life or when they were expressing political views in their capacity as a member of a political party or organisation. The ESC's representative noted that the Respondent's representative's contention was that this was the same for councillors. The ESC's representative argued, however, that the reference, in paragraph 3.1 of the Code, to its applicability "including" when councillor were representing the Council on official business and when they were using social media, demonstrated that the intention was for the rules to also apply in other circumstances.

The ESC's representative advised that the relevant act to be considered was the Respondent's conduct in sharing and defending the article. The ESC's representative argued that, in undertaking these acts, the

Respondent was identifiable as a local councillor, engaging in conduct driven by the political aim of trying to discredit an opponent. The ESC noted that the Standards Commission's Guidance on the applicability of the Code stated that councillors should treat the Code as being applicable in all situations where they could be perceived as acting as a councillor. The Guidance encouraged councillors to note that this could include situations where they had described themselves as a councillor or were readily identifiable as such; when they were engaged in political activity or were commenting on political matters (regardless of whether these fell within or outwith the scope of the Council's functions); and where their conduct could bring their role as a councillor or the Council itself into disrepute. The ESC's representative noted that while the Guidance was not binding, paragraph 1.5 of the Code clearly indicated that councillors should observe and comply with it.

The ESC's representative argued that the Respondent was readily identifiable as a councillor and would have been perceived to be acting as such when sharing the article, and subsequently defending it in the press, for the following reasons:

- The article concerned strike action in another local authority, administered by the Respondent's political party;
- The strike action was in respect of an equal pay claim dispute, being a matter that fell within any council's functions;
- The Respondent had shared the article on a Facebook page of a local branch of his party, in an attempt to discredit a political opponent and to advance his own party's interests;
- The Respondent subsequently took this Facebook page clearly for his sole use as a councillor and to promote his activities as a councillor;
- The Respondent made comments to the press about the article, doing so in his capacity as a councillor; and
- The sharing of the article, which was antisemitic, could have brought both the Respondent's position as a councillor and the Council itself into disrepute.

Submissions made by the Respondent's Representative on the Applicability of the Code

The Respondent's representative argued that for the Code to apply the Respondent not only had to be identifiable as a councillor but also had to be either be acting as such, or undertaking an act where he could be perceived to be acting as such. The Respondent's representative contended that this meant that the perception that the Respondent was conducting himself as a councillor at the relevant time could only arise if he was undertaking an act in that capacity. The Respondent's representative argued that was not the case in the circumstances in question, as the Respondent had simply shared the article on a campaign party created for the three members of his party who were seeking election to the Council from one of its wards during the 2017 local government election. As such, he was entirely engaged in party politics and campaigning. The Respondent's representative contended that the Respondent's later adoption of the page for his sole use was irrelevant for the purpose of determining whether he could reasonably have been perceived as acting as a councillor at the time. This was because while the Respondent accepted he was the one who had posted about the article and he had subsequently made this clear, there was nothing on the page at the time to identify him as the individual who had done so. The Respondent's representative confirmed that the Respondent's post about the article had subsequently been removed from the page.

The Respondent's representative argued that the Code did not apply, as in this case, where an individual was simply acting as a member of a political party. The Respondent's representative noted that while the Respondent accepted he should not have shared the article and that it was wrong for him initially to have defended doing so, he was simply acting (albeit ill-advisedly) in what he thought was his local party's interest by attempting to expose, what he considered to be, alleged shortcomings of an opponent. The Respondent's representative contended that the Code did not apply in such situations as there was no link to an act that a councillor could be perceived as undertaking in that capacity. The Respondent's representative argued that, if no such connection was required, the Code could potentially cover a situation where a councillor was giving a speech at a party conference, or where they were acting in an entirely personal capacity and someone

happened to refer to them as being a councillor. The Respondent's representative noted that it had never been intended for the Code to cover such scenarios, or for it to apply in the wholly political sphere. The Respondent's representative argued that the Code and Standards Commission should not be used to regulate party politics.

Decision on the Applicability of the Code

The Hearing Panel considered the submissions made both in writing and orally at the Hearing. It advised the parties that it was persuaded, in the specific circumstances of the case, that the Code did apply (the reasons for this are outlined in the 'Reasons for Decision' section below). The Panel confirmed it would proceed to hear any further submissions the parties wish to make on the question of whether the Code had been breached.

Further Submissions

The ESC's representative noted that the article in question contained references to 'Mein Kampf' and to Adolf Hitler having accused "The Jew" of gradually assuming leadership of the trade union movement. The ESC's representative argued that its subsequent reference to Ms A inferred that she represented a stereotype of "The Jew" and further perpetuated negative perceptions. The ESC's representative noted that the International Holocaust Memorial Alliance, in its definitions and examples of antisemitism, referred to the "making of mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as a collective – such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions". The ESC's representative argued that the article's contents fell within this definition and was, therefore, antisemitic in nature. The ESC's representative advised that the Respondent had shared the article with a comment that it was "an interesting read" and argued that, in doing so, he could reasonably be perceived to be endorsing its contents. The ESC's representative contended, therefore, that the Respondent had failed to be respectful to both Ms A as an individual and the public as a whole.

In addressing the question of whether the Respondent was identifiable as a councillor when the alleged breach of the code occurred, the ESC's representative argued that the contravention and disrespectful behaviour was not confined to the specific time the Respondent shared the article, as his post referring to it could have been read at a later point. In any event, the ESC's representative advised that while it was not initially clear who was responsible for the post, the Respondent had subsequently identified himself as the individual responsible. In addition, the ESC advised that the Respondent had initially defended his sharing of the article, in comments to 'The National' published on 30 October 2018, where he was quoted as stating that he did not accept it was antisemitic and, further, that he was not aware of Ms A's Jewish heritage. The ESC's representative noted that the Respondent was referred to as a councillor in the piece, and contended that his initial defence of the article compounded, or was a continuation of, the failure to demonstrate respect.

The ESC's representative argued that, in endorsing and subsequently defending an article containing antisemitic content and the gratuitous personal comments about Ms A, the Respondent was not entitled to the enhanced protection of freedom of expression afforded to politicians under Article 10 of the European Convention on Human Rights (ECHR). The ESC's representative contended that a restriction on the Respondent's right to freedom of expression was justified for the legitimate and lawful purpose of ensuring that antisemitic material has no place in public or political discourse.

The Respondent's representative advised that he had no further submissions to make.

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 Anderson.
2. The Respondent had contravened paragraphs 3.1 and 3.2 of the Code

Having accepted the motion for the withdrawal of the allegation, the Panel determined that the Respondent had not contravened paragraph 3.18 of the Code.

Reasons for Decision

The Hearing Panel noted that it was not in dispute that the Respondent had shared an article that was critical of Ms A as a member of the GMB Union and, in particular, as the organiser of a two-day equal pay strike in Glasgow. The Article included a photograph of Ms A and contained references to 'Mein Kampf' and to Adolf Hitler having accused "The Jew" of gradually assuming leadership of the trade union movement. The Panel noted that this was followed by a paragraph that specifically referred to Ms A and speculated as to whether she was aware of Hitler's views.

The Panel noted that, while the article did not specifically refer to Ms A as being Jewish, the information was in the public domain as she sits on the Labour Party's National Executive, had been involved in its policy on antisemitism and was a prospective UK Parliamentary candidate for Livingston.

The Panel was satisfied that any reasonable person reading the article would consider that the author was inferring that Ms A, as a person playing a prominent role in trade union activity, represented a stereotype of 'the Jew' as referred to by Hitler. The Panel was satisfied that the article perpetuated negative stereotypes and was in no doubt that it was antisemitic in nature in line with International Holocaust Memorial Alliance definitions. The Panel noted that the article's author was suspended by the SNP after writing it and was subsequently expelled from the party.

The Panel noted, from the written submissions, that the Respondent's position was that while he knew Ms A was a Labour party activist, an organiser for the GMB and had been a candidate in a previous election, he had not been aware that she was Jewish. The Respondent advised that while he had not read the article properly at the time, he now accepted it could be perceived as antisemitic. The Panel noted, however, that the Respondent had initially defended the article by his comments published in the 'The National' on 30 October 2018, where he was quoted as stating that he did not accept it was antisemitic. The Panel accepted that the Respondent had subsequently sent Ms A an email, on the same day, in which he had apologised for sharing it.

The Panel noted, again from the written submissions, that the Respondent's position was that he had not been identifiable as a councillor on either Facebook page, and that it was Ms A's partner who had identified him as such on a Twitter feed about the article. As such, the Respondent argued that he was not acting as a councillor, nor could be perceived as acting as such, when he posted about it. The Panel further noted that Respondent's representative's submissions that, when sharing the article online and describing it as "an interesting read", the Respondent was not undertaking an act as a councillor. The Panel accepted that the Respondent had subsequently sent Ms A an email, on the same day, in which he had apologised for sharing it. The Panel also noted that a public apology from the Respondent for his "lack of understanding of the issues", and "for his part in the offence Ms W suffered", was also published in 'The National' on the same date.

The Panel agreed with the Respondent's representative contention that there could be situations where councillors cannot reasonably be perceived to be acting as such, including when they were acting solely in a

personal capacity and where they were expressing political views. The Panel considered, however, that there were circumstances when the Code would apply when a councillor was undertaking a political act or making political comment, provided they were also acting as a councillor at the time or could reasonably be perceived as acting as such.

In this case, the Panel accepted the Respondent had not referred to himself as a councillor when sharing the article originally. The Panel nevertheless was of the view that, when considering the Respondent's course of conduct, when sharing and encouraging others to read the article and subsequently defending it in the national press, it would have been reasonable for a reasonably informed member of the public to have perceived that he been acting as such for the following reasons:

- He was identified in press coverage of the matter as a councillor. In particular, the Panel noted that the Respondent had been identified in 'The National' as a councillor in the piece where he had defended the article as not being antisemitic;
- The purported crux of the article concerned the activities of a union and a specific member of the public, Ms A, in respect of a council equal pay strike (being a local authority related issue);
- Both he and another councillor had continued to use the campaign Facebook page after being elected;
- He had used Council equipment to share the article; and
- He had sent the apology email to Ms A from his Council email account.

The Panel found that by sharing and commenting briefly upon the article, the Respondent was, in effect, endorsing its contents or, at the very least, could have been perceived as doing so. The Panel considered that the article contained comments that were antisemitic and that it also amounted to a personal attack on Ms A. The Panel considered that even if it accepted the Respondent's position that he had not read the article properly initially, or understood that Ms A was Jewish, the public controversy that followed should have put him on notice that it might contain antisemitic or offensive contents. The Panel was of the view, therefore, that the Respondent must have read the article and ought to have been sufficiently aware that Ms A was Jewish before he defended it in his comments to 'The National'. The Panel was satisfied, therefore, that the Respondent failed to observe the rules of good conduct by behaving in a respectful manner towards Ms A and the public at large by both sharing, and commenting on, the article and by then defending it in a national publication.

The Panel found that, on the face of it, the Respondent's behaviour amounted to a contravention of paragraphs 3.1 and 3.2 of the Councillors' Code of Conduct. The Panel then proceeded to consider whether such a finding would breach 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 and to ensure a council or public office of a councillor is not brought into disrepute.

Regarding Article 10 of the European Convention on Human Rights, the Panel concluded that the content of the article was offensive and gratuitous, and that the Respondent's implicit endorsement of it amounted to a personal attack on Ms A. As such, the Panel determined that the imposition of a restriction in the circumstances was relevant, sufficient and proportionate. The Panel concluded, therefore, that it was satisfied that a finding of breach, and subsequent application of a sanction, would not contravene Article 10.

The Panel did not accept the Respondent's representative's argument that it was the exclusive responsibility of a political party to regulate its members' conduct in respect of any politically related matters. This was because the Standards Commission's role and remit, in adjudicating on complaints about potential breaches of the Code, was wholly separate and distinct to any role that any political party may have in enforcing its own rules.

The Panel noted that the Council did not attach any specific conditions to use when issuing IT equipment to its elected Members, albeit the Monitoring Officer had confirmed in correspondence to the ESC that they were expected to be familiar with, and comply, with the provisions in the Councillors' Code of Conduct in terms of the use of Council facilities. The Panel noted that while the Code prohibited the use of Council facilities for party political or campaigning activities, it accepted that local authorities permitted councillors to use IT equipment for incidental personal use. Having heard the ESC's representative's submissions that while the Respondent had used a Council iPad to share the article, he had done so on his own network, the Panel was satisfied that it was minimal and incidental use of council equipment that would not constitute a breach of paragraph 3.18 of the Code in the circumstances.

Sanction

The decision of the Hearing Panel was to suspend the right of the Respondent, Councillor Anderson, to attend all meetings of West Lothian Council and of any committee or sub-committee thereof, for a period of three months with effect from Monday, 25 November 2019.

The decision is made in terms section 19(1)(b)(i) and (ii) of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

Reasons for Sanction

In reaching its decision on sanction, the Hearing Panel considered the Standards Commission's Policy on the Application of Sanctions.

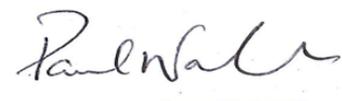
The Panel noted, in mitigation, that the Respondent had co-operated fully with the investigative and Hearing processes. The Panel accepted the Respondent had not written the article in question himself and confirmed that the sanction would have been much more severe had he done so. The Panel noted the Respondent's position was that he had not fully understood the nature of the content or appreciated that Ms A was Jewish before sharing the article and encouraging others to read it.

The Panel noted, however, that the requirement for councillors to behave in a respectful manner is an important part of the Code as it prevents a council and role of a councillor from being brought into disrepute, and ensures public confidence in both are not adversely affected. In this case, the Respondent failed to conduct himself in a respectful manner and, instead, had shared and subsequently defended an article that was, in the Panel's view, clearly antisemitic, offensive and would have caused Ms A a great deal of distress. The Panel noted that the ESC's report described Ms A as having stated that while she had previously received antisemitic material from other places, the fact that the article had originated in Scotland and had been shared by a local councillor had been especially frightening for her. This was particularly the case given that she lived in the area and had been required to make her home address public when standing for election.

The Panel emphasised it was a councillor's personal responsibility to be aware of the provisions in the Code and to ensure that her or she complied with them. It noted that the Respondent had been negligent in this regard.

The Panel was pleased to note that the Respondent had apologised to Ms A, in person via email, publicly in the media and had removed the link to the article from the relevant social media sites. The Panel confirmed that the suspension would have been longer had he had not have done so promptly.

Date: 26 November 2019



**Mr Paul Walker
Chair of the Hearing Panel**