

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on Thursday 23 July 2020.

Panel Members: Mrs Tricia Stewart, Chair of the Hearing Panel
Mr Mike McCormick
Ms Ashleigh Dunn

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/SL/2252, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Gerry Convery (the Respondent).

The ESC was represented by her Senior Investigating Officer, Mr Martin Campbell. The Respondent represented himself.

Referral

Following an investigation into a complaint received about the conduct of the Respondent, the ESC referred a report to the Standards Commission for Scotland on 28 April 2020, 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 5.2, 5.3, 5.10 and 5.12. The relevant provisions were:

5.2 It is your responsibility to make decisions about whether you have to declare an interest or make a judgement as to whether a declared interest prevents you from taking part in any discussions or voting. You are in the best position to assess your personal circumstances and to judge how these circumstances affect your role as a councillor in regard to a particular matter. You can, of course, seek advice from appropriate Council officers or from other sources which may be available to you. In making decisions for which you are personally responsible you are advised to err on the side of caution.

5.3 You may feel able to state truthfully that an interest would not influence your role as a councillor in discussion or decision-making. You must, however, always comply with the objective test ("the objective test") which is whether a member of the public, with knowledge of the relevant facts, would reasonably regard the interest as so significant that it is likely to prejudice your discussion or decision making in your role as a councillor.

The Financial Interests of Other Persons

5.10 The Code requires only your financial interests to be registered. You also, however, have to consider whether you should declare any financial interest of certain other persons.

You must declare if it is known to you ANY FINANCIAL INTEREST of:
(i) a spouse, a civil partner or a co-habitee;

(ii) a close relative, close friend or close associate;

(iii) an employer or a partner in a firm;

(iv) a body (or subsidiary or parent of a body) of which you are a remunerated member or director;

(v) a person from whom you have received a registrable gift or registrable hospitality; or

(vi) a person from whom you have received registrable election expenses.

There is no need to declare an interest if it is so remote or insignificant that it could not reasonably be taken to fall within the objective test.

You must withdraw from the meeting room until discussion of and voting on the relevant item where you have a declarable interest is concluded other than in the following circumstances.

There is no need to withdraw in the case of:

(i) an interest covered by a specific exclusion, or

(ii) an interest which is so remote or insignificant that it could not reasonably be taken to fall within the objective test.

The Non-Financial Interests of other persons

5.12 You must declare if it is known to you ANY NON-FINANCIAL INTEREST of:

(i) a spouse, a civil partner or a co-habitee;

(ii) a close relative, close friend or close associate;

(iii) an employer or a partner in a firm;

(iv) a body (or subsidiary or parent of a body) of which you are a remunerated member or director;

(v) a person from whom you have received a registrable gift or registrable hospitality; or

(vi) a person from whom you have received registrable election expenses.

There is no need to declare the interest unless it is clear and substantial.

There is only a need to withdraw from the meeting if the interest is clear and substantial.

Evidence Presented at the Hearing

Joint Statement of Facts

The Hearing Panel heard that it was not in dispute that a report proposing a budget saving through the redesign of the Council's Housing Repairs Standby (Out of Hours) service was considered by South Lanarkshire Council's Housing and Technical Resources Committee at a special meeting on 6 February 2019.

The Panel further heard that it was not in dispute that the Respondent's son participated in the Out of Hours service as part of his employment with the Council and was also a local representative and vice convener of a trade union that represented other employees who participated in the service.

The Panel noted that the Respondent accepted that he had not declared an interest at the meeting on 6 February 2019 and had voted in support of an amendment put forward by the Independents' Group.

Submissions made by the ESC's Representative

The ESC's representative advised that, before the meeting on 6 February 2019, a paper prepared by the South Lanarkshire Joint Trade Union Committee outlining concerns about the budget savings proposal, and its potential impact on the earnings of those employees who participated in the service, had been circulated to all elected members, including the Respondent. The ESC's representative advised that, in his capacity as vice convener of one of the trade unions, the Respondent's son had participated in separate briefings been provided to the various political groups.

The ESC's representative advised that the Respondent had not declared any interest at the Housing and Technical Resources Committee's meeting on 6 February 2019 when the matter was considered. The ESC's representative noted that the Respondent had supported an amendment, proposed by the Independents' Group. The amendment had the practical effect of deferring a decision on the savings proposal.

The ESC's representative advised, before taking part in the discussion, decision-making and voting on the savings proposal, that the Respondent had admitted he had been aware that:

- the matter was to be discussed at the meeting; and that
- the Joint Trade Union Committee was concerned that the savings would have a detrimental impact on the earning capacity of employees who participated in the service. This included the Respondent's son.

The ESC's representative acknowledged that the Respondent's son was only one of some 110 employees that took part in the service and that the Respondent would not have known the precise potential impact on the earning of each individual employee. The ESC's representative further acknowledged that there was no personal gain to the Respondent or any evidence that the Respondent was influenced in his decision-making by his son's interest in the matter. The ESC's representative accepted that the Respondent had made his decision in good faith and that he had not been influenced by any interest his son had in the matter.

The ESC's representative contended nevertheless that, having erred on the side of caution and having applied the objective test, as required by paragraphs 5.2 and 5.3 of the Code respectively, the Respondent should have declared that his son had both a financial interest in the matter (as an employee who participated in the Out of Hours service) and a non-financial interest as a trade union representative. The Respondent should then have withdrawn from the meeting and not taken part in the discussion or voting on the matter. This was because a member of the public, with knowledge of the relevant facts, being the Respondent's son's (albeit limited) involvement as a trade union representative and the potential impact on his son's earning capacity, could reasonably conclude that the interest was sufficiently significant as to be likely to affect the Respondent's decision-making. The ESC's representative reiterated that the Code not only required councillors to make decisions objectively and in the public interest, but also to avoid doing anything that could give rise to a perception that, in doing so, they were influenced by their own interests or the interests of friends and family.

Submissions made by the Respondent

The Respondent advised that the redesign of the Out of Hours service was part of a bundle of savings being proposed by the Council's Corporate Management Team. Under the Council's procedures, all

the trade unions and elected members could ask questions about any such savings proposals before the Council made a decision on whether to amend, accept or reject them. The Respondent noted that, in this case, the conveners of all the respective unions met to discuss the savings proposal before a representative was sent to discuss them with the various political groups. The Respondent acknowledged his son, as vice convener of one of the unions, had gone to some of these meetings (albeit not any the Respondent himself had attended). The Respondent confirmed, however, that the decision to recommend the proposal be rejected was made by the Joint Trade Union Committee and not just his son's trade union.

The Respondent's advised that:

- the Standby (Out of Hours) service was voluntary and participation in it did not form part of any of the participant employees' terms and conditions of employment;
- that his son was one of approximately 110 tradespeople who took part in the service;
- that while he was aware, at the Housing and Technical Resources Committee's meeting on 6 February 2019, that the savings proposal could have an impact on the earnings of all employees who took part in the service, he was unaware of any specific impact it may have on his son.

The Respondent advised that his actions and decision-making at the Committee meeting had not been impacted, in any way, by his son's connection to the matter. Instead, his decision had been based solely on the facts before him and a desire for there to be further discussions with the trade unions about the savings proposals so that an agreement could be reached. The Respondent contended that the fact his son worked for the Council was well known and he had not attempted, in any way, to conceal this.

The Respondent advised that he had been considering the potential impact on all the employees who volunteered for the service and had not been influenced by thoughts of how any decision the Committee might make could impact his son. The Respondent noted that his concern at the meeting was ensuring that further consideration be given to the matter as he was aware that the employees taking part in the Out of Hours service had to work long and anti-social hours for nominal pay, which is why only approximately one in five eligible employees volunteered to do so.

The Respondent contended that the fact that his son worked for the Out of Hours service was too remote and significant for members of the public to consider it could influence his decision-making on an overall savings proposal. The Respondent further argued that if the provisions in the Code were to be interpreted so strictly, it would mean that all councillors who lived in the local authority area would not be able to take part in the decision-making on the level of council tax to be charged. The Respondent argued that it was unfair and undemocratic for the Code to prevent a councillor from taking part in the discussion and decision-making on an important issue affecting a local authority simply because a member of their family was an employee of the council in question.

In response to questions from the Panel, the Respondent confirmed that he was aware of the potential impact of the savings proposal on the employees who took part in the Out of Hours service. The Respondent advised, however, that he had been acting, with the best of intentions at the meeting, to try to ensure more time was allowed for negotiations and discussions about the savings proposal before any decision was taken to implement it.

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 Convery.
2. The Respondent had breached paragraphs 5.2, 5.3, 5.10 and 5.12 of the Code.

Reasons for Decision

The Panel noted that paragraph 5.3 of the Councillors' Code of Conduct requires councillors to consider the objective test, being:

whether a member of the public, with knowledge of the relevant facts, would reasonably regard an interest they have as so significant that it would be likely to prejudice their discussion or decision making when determining whether they are required to declare an interest and refrain from taking part in any discussion or voting on a specific matter.

The Panel confirmed that, in interpreting and applying the objective test, councillors did not have to worry that one member of the public might be unduly suspicious and consider, without any good reason, that a remote or insignificant interest could affect their decision-making. This was because the objective test required the hypothetical member of the public to be both in possession of the relevant facts and, additionally, to be making a reasonable judgement.

In this case, the Panel had no reason to doubt the Respondent's position that his decision-making at the meeting had not been influenced by any connection his son had to the matter under consideration. However, the Panel was of the view that, having erred on the side of caution (as he was advised to do under paragraph 5.2 of the Code), and having applied the objective test under paragraph 5.3, the Respondent should have concluded, in terms of paragraphs 5.10 and 5.12, that the financial and non-financial interest of his son (being a close relative) in the matter would not be perceived as being so remote and insignificant, or unclear and unsubstantial, that it could not influence him. This was because the Panel considered that a member of the public would be reasonably entitled to conclude that the Respondent would be unlikely to support a proposal that potentially could have a detrimental impact on his son's earning capacity.

The Panel noted the Respondent's point about it being unfair and undemocratic for the Code to prevent a councillor from taking part in the discussion and decision-making on an important issue affecting a Council simply because a member of their family was an employee of it. The Panel confirmed, however, that the Standards Commission's role was to interpret and adjudicate on alleged breaches of the Code in its current form (as approved by the Scottish Parliament).

In addressing the Respondent's point that the Code could be interpreted to mean that all councillors who lived in the local authority area would not be able to take part in the decision-making on the level of council tax to be charged, the Panel wished to draw his attention to the general exclusion at paragraph 5.18, which provides that councillors do not have an interest to declare in the setting of council tax simply because they are liable for it as a resident in the local authority area.

The Hearing Panel concluded, therefore, that the Respondent's failure to declare an interest at the meeting on question amounted to a contravention of paragraphs 5.2, 5.3, 5.10 and 5.12 of the Code.

Evidence in Mitigation

The Respondent advised that he had been councillor for some 25 years and took the role very seriously. The Respondent advised that he considered it a privilege to represent his constituents and that he had always behaved honestly and transparently when doing so. The Respondent confirmed that he always considered matters objectively and made decisions based on the evidence and facts before him. The Respondent reiterated that he had done so in this case and had not, in any way, been influenced in his discussion, decision-making and voting on any interest his son may have made in the matter being considered.

SANCTION

The decision of the Hearing Panel was to censure the Respondent, Councillor Convery.

The sanction was made under the terms of section 19(1)(a) of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

Reasons for Sanction

In reaching its decision on sanction, the Hearing Panel noted, in mitigation, that the Respondent had co-operated fully with the investigative and Hearing processes. The Panel accepted that the Respondent's decision-making and voting had not been influenced, in any way, by his son's interests in the matter.

The Panel emphasised, however, that the requirement for councillors to declare certain interests is a fundamental requirement of the Code. A failure to do so removes the opportunity for openness and transparency in a councillor's role and denies members of the public the opportunity to consider whether a councillor's interests may or may not influence their discussion, decision-making and voting. The Panel 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. The Respondent had failed to apply correctly the objective test as required by the Code.

The Panel was nevertheless of the view that the Respondent's conduct did not warrant a more severe sanction. This was because there was no evidence that there was any personal gain for the Respondent or that he had attempted to conceal his son's employment or connection to the matter.

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: 27 July 2020



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