

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on 24 August 2020.

Panel Members: Professor Kevin Dunion, Chair of the Hearing Panel
Mr Mike McCormick
Mr Paul Walker

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/Fi/2268, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Linda Erskine (the Respondent).

The ESC was represented by Mr Martin Campbell, Director of Investigations and Solicitor to the Commissioner. The Respondent was present online and represented by Mrs Frances Randle, Solicitor.

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 25 March 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 she had contravened paragraphs 5.3 and 5.7(ii). The relevant provisions were:

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.

Your Non-Financial Interests

*5.7 You must declare, if it is known to you, any NON-FINANCIAL INTEREST if:
(ii) that interest would fall within the terms of the objective test.*

Evidence Presented at the Hearing

Joint Statement of Facts

The Hearing Panel noted the terms of a joint statement of facts agreed between the parties, which confirmed that it was not in dispute that the Respondent attended a meeting of Fife Council's Community & Housing Services Committee (the Committee) on 8 November 2018 when a report relating to a request by Benarty Community Council to change its boundary was considered. After the Committee agreed to a review, the Council conducted a consultation, between 10 December 2018 and 31 January 2019, on a proposed change to the boundary.

The Panel noted that the joint statement of facts further confirmed that, on or around 27 January 2019, during the consultation period, the Respondent sent a private message about the consultation via Facebook Messenger to five recipients, in which she stated that she was contacting them to make sure they "have voted against any change to the Community Council Boundary" and asking them to ensure that members of their families also voted 'no' to any change. The Panel heard that it was accepted that the Respondent also sent six emails to members of her family in similar terms.

The Panel heard that it was not in dispute that, on 14 February 2019, the Committee considered a report providing an update on the consultation exercise. The Committee agreed to confirm a change to the boundary, as detailed in the report that was the subject of the consultation. The Panel heard that the Respondent accepted that she had not declared an interest at the Committee meeting in respect of the matter and had not left the room while it was being considered.

Submissions made by the ESC's Representative

The ESC's representative noted a witness statement submitted by the Chair seemed to suggest that, at its meeting on 14 February 2019, the Committee had agreed to change the boundary in compliance with the views expressed by the majority of residents who had participated in the consultation (meaning that an officer recommendation to amend the boundary was accepted without further debate). The ESC's representative noted, however, that both the report before the Committee and the minute of the meeting suggested that the Committee was being asked to make a final determination and confirm either that the boundary should be amended (and, if so, to what extent), or that no change should be made until a review of the Council's Scheme for Establishment of Community Councils was undertaken later in the year. The ESC's representative argued that the version of events outlined in the minute should be preferred to the witness statement, as it was more likely that the officer presenting the report would have asked the Committee to make a decision consistent with recommendations it contained. The ESC's representative contended, therefore, that the Committee had made a substantive decision and was not simply being asked to note or formally approve another Committee's decision (in which case it may not have been necessary for interests to have been declared).

The ESC's representative accepted that the Respondent's messages had been sent privately but noted that they had, at some point, entered the public domain. The ESC's representative argued that in encouraging others to vote against the boundary change, the Respondent's actions could be described as an organised course of action for a particular purpose and, therefore, amounted to a campaign. The ESC's representative contended that the 'campaigning activity' the Respondent had engaged in constituted a non-financial interest that was sufficiently significant as to have required her to have declared it at the meeting and to have refrained from taking part in any discussion, decision-making or voting on the matter. The ESC's representative noted that while the Committee decided to review the boundary, had it agreed with her position that it should not be amended (or at least that it should not be reviewed until the overall Scheme was considered later in the year), the Respondent could have benefitted from taking part in the discussion or decision-making. The ESC's representative contended, therefore, that a member of the public, with knowledge of these relevant facts would reasonably conclude that the Respondent had a personal interest in the boundary change decision that would have been likely to prejudice her decision-making at the Committee meeting on 14 February 2019. As such, the Respondent, having applied the objective test outlined in paragraph 5.3 of the Code, as she was required to do under paragraph 5.7, should have declared an interest in the item and withdrawn from the room while the matter was being discussed.

The ESC's representative accepted that there was evidence that the Respondent had sought legal advice before the meeting as to whether she required to declare an interest and withdraw while the item was being discussed. The ESC's representative argued, however, that regardless of the advice received, it was the Respondent's personal responsibility to comply with the Code. The ESC's representative argued that the Respondent had failed to err on the side of caution as required under paragraph 5.2 of the Code when deciding whether she was required to declare an interest at the meeting.

The ESC's representative concluded that the failure on the part of the Respondent to apply the objective test and declare an interest in the item concerning the potential boundary change at the Committee meeting on 14 February 2019 amounted to a contravention of paragraphs 5.3 and 5.7 of the Code.

In response to questions from the Panel, the ESC's representative agreed that holding or expressing a strong view or an opinion on a matter would not necessarily preclude a councillor from taking part in the

decision-making on a matter of public interest, given that councillors are required to make such decisions in a political context. The ESC's representative accepted that in their published manifestos, councillors will express views on matters of public concern. The ESC's representative argued that what distinguished the Respondent's actions in this case was that not only had she expressed a view on the boundary change but that she had also actively campaigned for others to vote against it. The ESC's representative argued that, in doing so, the Respondent had fallen foul of the objective test as a member of the public, with knowledge of this, would reasonably have regarded her as being unlikely, at the meeting, to support any proposal to amend the boundary.

Witness Evidence

The Respondent gave evidence to the effect that she had mounted campaigns in the past, for example, in respect of improvements to a health centre. The Respondent advised that she did not consider her actions, in sending private messages to friends and family who lived in the local area, via Facebook Messenger and email, amounted to engaging in a campaign. The Respondent advised that this was evidenced by the fact that she had only sent the messages some three days before the consultation was due to close. The Respondent indicated that she was aware some of her family had not yet voted and her messages were intended as a prompt to do so.

The Respondent advised that she had not known the messages had been disclosed until someone had left a print-out of one in an envelope in her office. The Respondent advised that this had prompted her to seek a meeting with both the Council's Chief Executive and its Committee Services Manager before the meeting on 14 February 2019. The Respondent indicated that neither officer had given her any reason as to why she should not attend the meeting and participate in any discussion and decision-making on the item concerning the boundary change proposal. The Respondent stated that she had felt comfortable that she was entitled to participate and that her actions in sending the messages would not preclude her from doing so.

The Respondent advised that as the result of the consultation was clear, and it was evident that the majority of votes cast were in support of the proposal to change the boundary, the matter had not been the subject of any substantive discussion or debate at the meeting. The Respondent confirmed that while her preference was that the boundary should remain as it was, she accepted the result and had not proposed or voted against a change.

In response to cross-examination and questions from the Panel, the Respondent advised that she had been able to consider the report before the Committee objectively and reiterated that she accepted the outcome of the public consultation.

Submissions made by the Respondent's Representative

The Respondent's representative noted that:

- while the Respondent had expressed a view on the boundary change, she had done so privately; and
- the potential boundary change was not a quasi-judicial or regulatory decision.

The Respondent's representative argued that the test to be applied in determining whether a councillor had to declare an interest on general policy matters and decisions was a very different one from that to be applied to regulatory or quasi-judicial decisions (such as on individual planning applications). The Respondent's representative contended that councillors are not required to cast aside any views or opinions they may have formed on policies or matters of public interest either before seeking election or when acting as an elected member. The Respondent's representative argued that councillors are elected to propose and pursue policies and would be entitled, and indeed expected, to have and to have expressed views on matters of public concern, such as community council boundaries. The Respondent's representative drew the Panel's attention to the case of *Persimmon Homes Teesside Ltd v Lewis, R (on the*

application of) [2008] EWCA Civ 746, as an authority for the proposition that there should be no expectation that elected and democratically accountable decision-makers are intended to be independent and impartial (just as if they were judges or quasi-judges) and, instead, that they will have political allegiances, that their politics will involve policies, and these will be known. The Court in that case noted that evidence of political affiliation or of the adoption of policies does not, by itself, amount to an appearance of the real possibility of predetermination, or what counts as bias.

The Respondent's representative contended that the Respondent had been entitled to contact her friends and family to express opinions about matters of public interest, including, as in this case, a proposal for a boundary change policy. There was no requirement in the Code for her to have declared an interest and withdrawn at any subsequent Council meeting where the matter was being discussed and a decision was to be taken.

The Respondent's representative noted, in any event, that the Respondent's messages were sent privately to friends and family as a prompt at a time when the consultation was almost concluded. The Respondent's representative argued that, as such, the messages did not form an organised course of action that could reasonably be taken to be a 'campaign'. The Respondent's representative further argued that any interest the Respondent may have had in the matter was too insignificant to fall within the objective test at paragraph 5.3 of the Code. This was because no member of the public, with knowledge of the relevant facts, being that:

- the Respondent had sent the messages privately to friends and family who lived in the local area; and
- the decision in respect of the boundary change would not have any direct or personal impact on the Respondent or her friends and family,

would reasonably regard her as having an interest that was so significant as to be likely to prejudice her discussion or decision-making at the meeting on 14 February 2019.

While the Respondent's representative accepted the Committee was being asked to, and indeed made, a substantive decision, she nevertheless contended that the sending of the messages had not affected the Respondent's judgement. The Respondent's representative noted that the Respondent had not argued or voted against the boundary change at the meeting on 14 February 2019.

The Respondent's representative concluded that as the objective test had not been met and the Respondent had not been required to declare an interest, there had not been any contravention of paragraphs 5.3 or 5.7 of the Code.

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 Erskine.
2. The Respondent had not breached paragraphs 5.3 and 5.7(ii) of the Councillors' Code of Conduct, as alleged.

Reasons for Decision

The Panel noted that councillors are required, under Section 7 of the Code, to refrain from making public statements about pending quasi-judicial and regulatory matters, in order to avoid any perception that they have pre-judged a decision. In this case, however, the Panel was satisfied that the matter being considered by the Committee at its meeting on 14 February 2019 was not quasi-judicial or regulatory in nature.

The Panel was satisfied that the restriction on pre-judging matters, as outlined under Section 7 of the Code, did not apply to other decisions councillors were asked to make. This was because councillors were entitled to have, and publicly express, views and opinions on policy matters and matters of local interest (which are

not of a quasi-judicial or regulatory nature). The Panel agreed with the Respondent's representative that councillors are often elected precisely because they have expressed such views and that it would be artificial and, indeed unrealistic, to expect them to refrain from taking part in discussions and voting on matters on which they have previously formed an opinion. The Panel noted that while councillors are expected to review reports and consider decisions on their merits, they are not disqualified from doing so if they have previously expressed a view, whether publicly or in private. The Panel considered that the requirements of the Code should not limit councillors from discussing or debating matters of policy or strategy. In this case, the Panel was satisfied that the Respondent was entitled to contact her friends and family to express an opinion and to encourage them to support her preferred option.

The Panel noted that it was a well-established principle that if someone in public life was to act, in their private life, in such a way that it was likely to interfere with the impartial discharge of their duties, or was likely to give rise to that impression amongst members of the public, then they would have no reasonable expectation of privacy. The Panel noted the Opinion of Lord Ballantyne in the case of *B C and Others against Chief Constable Police Scotland and Others [2019] CSOH 48* in this regard. The Panel therefore accepted that, as someone in public life, the Respondent could not have a reasonable expectation of privacy when commenting on matters to be decided by the Council. The Panel did not consider, however, that the sending of private messages to friends and family would, in itself, amount to a public campaign.

The Panel noted, in any event, that even if the Respondent's actions had been found to amount to a public campaign, this would not necessarily have constituted a declarable interest. This was because paragraph 5.7 of the Code only requires a councillor to declare any non-financial interest they have in a matter, if that interest would fall within the terms of the objective test. The Panel was of the view that the expression of an opinion by a councillor, either publicly through a campaign or privately via messages sent to friends and family, on a matter due to be considered by their Council, was unlikely to amount to having an interest unless it engaged their private and personal interests. The Panel considered that, generally, to constitute an 'interest', a councillor's personal circumstances would have to be capable of being advantaged to a greater extent than other members of the public by the decision to be taken on the matter in question. (The Panel noted that the councillor's circumstances could also include those of their close family and associates or any organisation to which they were connected). The Panel considered the terms of paragraph 5.9 of the Code, which referred to a councillor's 'private and personal interests', in the context of deciding whether they had a non-financial interest that should be declared, supported this view. In this case, the Panel determined that there was no evidence or suggestion of such a benefit or advantage to the Respondent or to any person or organisation connected to her.

The Hearing Panel concluded, therefore, that the Respondent's failure to declare an interest at the meeting in question did not amount to a contravention of paragraphs 5.3 and 5.7 of the Code.

Date: 31 August 2020



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