

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online on 12 October 2020.

Panel Members: Mr Paul Walker, Chair of the Hearing Panel
Mrs Tricia Stewart
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/Mo/3132, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Shona Morrison (the Respondent).

The ESC was represented by Mr Martin Campbell, Director of Investigations and Solicitor to the Commissioner. The Respondent was represented by Mr Scott Martin, 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 26 June 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 4.1, 4.2, 4.4, 4.11, 5.2, 5.3, 5.5, 5.6 and 5.13. The relevant provisions were:

Registration of Interests

4.1 The following paragraphs set out the categories of interests, financial and otherwise, which you have to register. These are "Registrable Interests", and you must ensure that they are registered, when you are elected and whenever your circumstances change. The register should cover the period commencing from 12 months prior to and including your current term of office.

4.2 Regulations made by Scottish Ministers describe the detail and timescale for registering interests; including a requirement that a councillor must register their registerable interests within 1 month of becoming a councillor, and register any changes to those interests within 1 month of those changes having occurred. It is your personal responsibility to comply with these regulations, and you should review regularly and at least once a year your personal circumstances to ensure that your registration of interests is up to date.

Category One: Remuneration

4.4 You have a registrable interest where you receive remuneration by virtue of being:

- *employed;*
- *self-employed;*
- *the holder of an office;*
- *a director of an undertaking;*
- *a partner in a firm; or*
- *undertaking a trade, profession or vocation, or any other work.*

4.11 When registering a directorship, it is necessary to provide the registered name of the undertaking in which the directorship is held and detail the nature of its business.

Declaration of Interests

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.*

Interests which Require Declaration

5.5 *Interests which require to be declared (if known to you) may be financial or non-financial. They may or may not cover interests which are registrable in terms of this Code. Most of the interests to be declared will be your personal interests but, on occasion, you will have to consider whether the interests of other persons require you to make a declaration. The paragraphs which follow deal with (a) your financial interests, (b) your non-financial interests and (c) the interests, financial and nonfinancial, of other persons.*

Your Financial Interests

5.6 *You must declare, if it is known to you, ANY FINANCIAL INTEREST (including any financial interest which is registrable under any of the categories prescribed in Section 4 of this Code and any interest as defined in a specific exclusion defined in paragraph 5.18 below).*

There is no need to declare:

- (i) an interest where a general exclusion, as defined in paragraph 5.18 below, applies but an interest where a specific exclusion applies must be declared; or*
- (ii) an interest which 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 general exclusion or 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.*

Making a Declaration

5.13 *You must consider at the earliest stage possible whether you have an interest to declare in relation to any matter which is to be considered. You should consider whether agendas for meetings raise any issue of declaration of interest. Your declaration of interest must be made as soon as practicable at a meeting where that interest arises. If you do identify the need for a declaration of interest only when a particular matter is being discussed you must declare the interest as soon as you realise it is necessary.*

Preliminary Matters

The Respondent’s representative asked the Panel to consider adjourning and referring the matter back to the Standards Commission for it to reconsider its decision, under Section 16 of the 2000 Act, to hold a Hearing. The Respondent’s representative noted that the Standards Commission could reconsider such a decision at any time and argued it should do so as there was no alternative option that would allow the case to be concluded in way that was proportionate and in line with good regulatory practice. This was because, if a breach was found, the Panel had no option under Section 19(1) of the 2000 Act other than to impose a

censure, which was ‘a formal recording of the Standards Commission’s severe and public disapproval of the Respondent’. The Respondent’s representative argued that a censure could not be a proportionate disposal in a case where:

- The breach was inadvertent, minor and technical in nature;
- The details of the interest were a matter of continuing public record. The interest appeared, against the Respondent, under the category ‘Outside Bodies’ on Moray Council’s website;
- The Respondent had provided further notice of the interest the same day as the error was brought to her attention and had personally apologised for the omission;
- The Respondent had followed all advice given by the Monitoring Officer at the Council meeting on 2 October 2019. The Monitoring Officer had accepted there were deficiencies in the advice tendered;
- The Respondent had personally apologised for the disruption to Council business caused by the events at the meeting; and
- The Respondent had admitted the breach of the Code from the outset and had co-operated throughout with the investigation.

Having heard that the ESC’s representative had no substantive comments to make on the adjournment request, the Panel proceeded to consider it. The Panel noted that the Standards Commission’s policy on Section 16 of the 2000 Act states that, having made a decision to hold a Hearing, the Standards Commission can later decide to take the option to ‘do neither’ under Section 16(c), if new and material information emerges that leads it to determine that the reasons for holding a Hearing no longer apply (i.e. that it is no longer in the public interest and proportionate to do so). In this case, the Panel was not satisfied that any of the matters raised by the Respondent’s representative were new and material and it determined, therefore, that the adjournment request should not be granted. The Panel considered that it remained proportionate and in the public interest to proceed with the Hearing as the complaint before it concerned alleged breaches of two sections of the Code (albeit in respect of the same interest).

The Panel noted that the Respondent’s representative had argued the Respondent should have been given the opportunity to comment on the proposed section 16 decision to hold a Hearing before it was made. The Panel confirmed that Respondents are not offered such an opportunity as a matter of course, as any comments they have provided to the ESC on her draft report, as well as the potential breach referral, are provided to the Standards Commission and considered by it when a section 16 decision is made. As an aside, the Panel noted that a censure was not the only disposal option available, should a breach of a Code be found, as Section 19 of the 2000 Act also provides that a suspension or disqualification can be imposed.

Evidence Presented at the Hearing

Submissions made by the ESC’s Representative

The ESC’s representative advised that it was not in dispute that, between September 2018 and October 2019, the Respondent failed to include her remunerated position as a member of the board of NHS Grampian on her register of interests. The ESC’s representative advised that while it was accepted that the Respondent’s appointment was well-known and had been covered in the local press, councillors are nevertheless required by the Code to register all remunerated positions as such, within one month. The ESC’s representative confirmed that the Respondent had taken steps immediately to rectify the omission when it was brought to her attention and had apologised unreservedly for her oversight in not ensuring the interest was registered as required.

The ESC’s representative advised that it was also not in dispute that, on 2 October 2019, the Respondent chaired a meeting of Moray Council. The ESC’s representative advised that when the complainer raised concerns about her not having registered her paid position on the board of NHS Grampian, the Respondent had sought advice from the Monitoring Officer before an item of business on the agenda relating to a formal

response from the Council (which was to be sent to the Chief Executive and the Chair of NHS Grampian), regarding a consultation on the future of children's services a local hospital operated by NHS Grampian, was to be discussed. The ESC's representative advised that, having received the advice, the Respondent had stood down as Chair when the item was discussed but had neither formally declared her interest as a member of NHS Grampian Board nor left the Chamber, as required by Code.

The ESC's representative contended that, at the meeting on 2 October 2019, the Respondent should have erred on the side of caution, formally declared her interest in NHS Grampian in the prescribed manner and left the Chamber as required by the Code. This was because a member of the public, with knowledge of the relevant facts, being that:

- she was a member of NHS Grampian Board; and
- the item to be discussed related to the formal response from the Council to NHS Grampian,

would be entitled to reasonably conclude that the Respondent's interest was sufficiently significant as to be likely to affect her discussion and decision-making. The ESC's representative noted, in the interests of fairness, that the Monitoring Officer had confirmed that he could have been clearer in the advice he gave to the Respondent at the meeting. The ESC's representative confirmed, nevertheless, that it was a councillor's personal responsibility to ensure that he or she complied with the Code.

Submissions made by the Respondent's Representative

The Respondent's representative referred to the submissions he had made previously (under 'Preliminary Matters'). The Respondent's representative advised that the Respondent accepted that she should have registered her position as a member of NHS Grampian Board as a remunerated post at an earlier stage. The Respondent's representative reiterated, however, that the Respondent's position was recorded as an outside interest on the Council's website. The Respondent's representative further advised that the Respondent accepted that she had breached the Code by not formally declaring the interest and then by not leaving the Chamber at the Council meeting on 2 October 2019. The Respondent's representative noted, however, that the Respondent had followed the advice provided by the Monitoring Officer and argued it was unfair that councillors should be expected to have a better understanding of the Code than an experienced member of staff.

The Respondent's representative noted that the ESC had found a number of paragraphs in the Code had been breached. The Respondent's representative contended that as these concerned the same matter (being the failure to register and declare the interest), they should not be viewed cumulatively. The Respondent's representative noted, in any event, that paragraph 4.4 of the Code was simply a statement of fact as to what amounted to a remunerated position and, as such, could not be breached. The Respondent's representative further argued that the Respondent's appointment to NHS Grampian Board was as a member, not a director, and therefore there could not be a breach of paragraph 4.11 (which concerned the requirement to provide the name and details of any undertaking in which a directorship was held).

In response to a question from the Panel, the Respondent's representative confirmed that the fact that the Respondent's position as a member of NHS Grampian Board was remunerated had not been evident on the 'Outside Bodies' section of the Council's website.

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 Morrison.
2. The Respondent had breached paragraphs 4.1, 4.2, 4.11, 5.2, 5.3, 5.5, 5.6 and 5.13 of the Code.

Reasons for Decision

The Panel noted that the Respondent accepted unreservedly that she should have both registered and declared the interest under the Code and had apologised for her failure to do so.

In respect of whether the interest should have been declared, 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 or not they were required to declare an interest and refrain from taking part in any discussion or voting.'

The Panel noted that paragraph 5.7 of the Code states that councillors must declare any non-financial interest and must withdraw from the meeting room unless the interest is so remote or insignificant that it could not reasonably be taken to fall within the objective test. In this case, the Panel considered that, having erred on the side of caution as required by paragraph 5.2 and having applied the objective test under paragraph 5.3, the Respondent should have reached the view, in terms of paragraph 5.7, that her interest as a member of NHS Grampian Board would not be perceived as being so remote and insignificant that it could not influence her potential discussion and decision-making on the matter under consideration. This was because the item being considered concerned the Council's response to a consultation on the future of children's services a local hospital operated by NHS Grampian.

The Panel noted the terms of a specific exclusion under paragraph 5.18 of the Code that allows councillors who are also members or directors of certain other devolved public bodies (including NHS Grampian Board), to take part in the consideration and discussion of, and to vote upon, a matter relating to body (provided the matter in question is not quasi-judicial or regulatory in nature). The Panel noted, however, that the specific exclusion only applies if the councillor has declared his or her interest at the meeting where the matter is to be discussed. In this case, the Panel found that the Respondent failed to formally declare an interest at the Council meeting on 2 October 2019. The Panel determined that, as such, the specific exclusion did not apply, and the Respondent should have left the room and made it clear she was not taking part in the discussion and decision-making.

Turning to the registering of the interest, the Panel noted that the Code requires all remunerated positions to be registered. The Panel accepted that details of the Respondent's appointment were a matter of public record and had been reported on in the local press. The Panel further accepted that the appointment appeared under the category 'Outside Bodies' on Moray Council's website. The Panel noted, however, that the fact that the position was remunerated was not evident from this. The Panel was satisfied that it was the Respondent's personal responsibility to ensure the interest had been included timeously in her Register of Interests and that a failure to do so amounted to a breach of paragraphs 4.1 and 4.2 of the Code. While the Panel accepted the Respondent's representative's argument in respect of whether paragraph 4.4 could be contravened, it considered that the Respondent's appointment as a member of NHS Grampian was a non-executive director position and determined, therefore, that paragraph 4.11 also applied and had been breached. (The Panel noted that the Scottish Government's recently published induction advice refers to Members of NHS Boards as being non-executive directors.) The Panel confirmed, in any event, that in determining sanction, it would consider the matter as a failure to register and declare an interest, rather than considering breaches of various paragraphs of the Code cumulatively.

The Hearing Panel concluded, therefore, that Councillor Morrison's failure to register her interest in NHS Grampian and her failure to declare it at the meeting in question amounted to a contravention of paragraphs 4.1, 4.2, 4.11, 5.2, 5.3, 5.5, 5.6 and 5.13 of the Code.

Evidence in Mitigation

The Respondent's representative advised that the Respondent had worked as a mental health nurse before taking a break to care for her young family. The Respondent's representative advised that the Respondent's involvement in local groups had resulted in her taking an interest in community issues which, in turn, had led to her successfully seeking election as a councillor in 2017. The Respondent's representative advised that the Respondent was proud to have become the first female leader of Moray Council in 2018, and that, since then, she had worked hard to develop policies aimed at tackling poverty and discrimination.

The Respondent's representative referred to the Standards Commission's Policy on the Application of Sanctions and advised that there were no aggravating factors to be considered. Instead, the Respondent's representative confirmed that several mitigating factors were present and should be considered, including that:

- there had been an admission of breach from the outset;
- the breach was of limited duration, with no impact;
- there had been no concealment of the interest and no personal gain;
- the Respondent had apologised for the breach and had demonstrated insight and reflection; and
- the Respondent had co-operated fully with the investigative and adjudicatory processes.

SANCTION

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

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 considered the Standards Commission's Policy on the Application of Sanctions. It noted, in mitigation, the evidence presented in respect of the Respondent's good character and public service. The Panel further noted that the Respondent had co-operated fully with the investigative and Hearing processes and had offered an unreserved apology in respect of the failure to register and declare the interest. The Panel accepted the Respondent's submission that the failure to comply with the Code was inadvertent and an oversight.

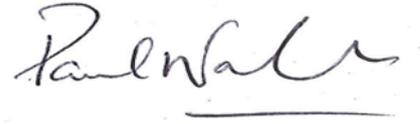
The Panel emphasised, however, that the requirement for councillors to register and declare certain interests is a fundamental requirement of the Code. A failure to do so removes the opportunity for openness and transparency in a councillor's role and denies members of the public the opportunity to consider whether a councillor's interests may or may not influence their discussion and decision-making. The Panel noted that, while advice can be sought from officers, it remains a councillor's personal responsibility to be aware of the provisions in the Code and to ensure that he or she complies with them. The Panel noted that it could be difficult for officers to provide advice on whether a councillor required to declare an interest in the middle of a meeting.

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 the Respondent had attempted to conceal her interest or that there was any personal gain. The Panel further noted that while it had found that the Respondent had not declared the interest as required, had she done so, she would still have been allowed to take part in the discussion and decision-making under the specific exclusion in the Code for councillors who have been approved as a member or director of certain devolved public bodies.

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 October 2020



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