

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online on Friday, 13 November 2020.

Panel Members: Mrs Tricia Stewart, 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/ER/3271, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Jim Swift (the Respondent).

The case against the Respondent was presented by Mr Martin Campbell, Director of Investigations and solicitor to the Ethical Standards Commissioner. The Respondent was represented by Mr David Nicholson, 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 10 August 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 3.2 and 3.6. The relevant provisions are:

Relationship with other councillors and members of the public

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.*

Bullying and Harassment

3.6 *Bullying or harassment is completely unacceptable and will be considered to be a breach of this Code.*

Evidence Presented at the Hearing

The ESC's representative advised that the background to the complaint was not in dispute, in that it was accepted that the matter under consideration concerned an exchange between the Respondent and the complainer, Councillor Bamforth, in the offices of East Renfrewshire Council on 28 February 2020. The Hearing Panel noted that both councillors were members of the East Renfrewshire Health and Social Care Partnership Integration Joint Board (the IJB), and that it was not in dispute that the exchange stemmed from a previous difference of opinion between them, relating to the health and social care budget. The Council's overall budget had been discussed at a full Council meeting held on the previous day.

Witness Evidence

The ESC's representative led evidence from two witnesses, being the complainer, Councillor Bamforth and a Mrs A.

The complainer gave evidence to the effect that when she arrived at the Elected Members' common area in the Council offices on 28 February 2020, no other councillors had been present. The complainer advised that she was standing checking her mail in an area next to the Conservative Group's office door, when the Respondent arrived. The complainer stated that when she greeted the Respondent by saying "good morning", he had turned towards her and started shouting. The complainer advised that the Respondent called her a "wee fat ugly liar", accused her of lying about him twice and stated that he "was going to get

her". The complainer advised that during the exchange, the Respondent was incandescent, pointed at her and that his arms were "flailing around". The complainer contended that the Respondent was "very angry" and stated that she had found that this, along with his demeanour and tone, to be aggressive and intimidatory. The complainer indicated that this had been compounded by the fact that the Respondent had initially been standing quite close to her, albeit she had moved further away during the exchange.

The complainer advised that as she had felt threatened and alarmed by the Respondent's words and aggressive manner, she had gone straight upstairs to report the incident to, and seek advice from, the Council's Democratic Services Manager. When her attention was drawn to a statement provided to the ESC recording that the Council's Chief Officer for Legal and Procurement had noted that she was "in a flushed state" when recounting what had happened to the Democratic Services Manager, the complainer accepted it was entirely possible that she had looked as described, given she had been both agitated and upset.

The complainer stated that when she returned downstairs to attend a pre-arranged meeting with a constituent, she discovered that the Respondent had sent her an email, which had the subject heading "false accusations". In the email, the Respondent referred to the subject of false accusations and had sent a link to an article in the *Times* newspaper the previous day. In his email, the Respondent stated that the article may help the complainer "be less of a stranger to facts". The complainer advised that while she could not read the full article as it was hidden behind a 'paywall' and she did not subscribe to the newspaper, she understood that it concerned false allegations of child sexual abuse linked to Conservative Members of Parliament. The complainer stated that she was not sure whether, in sending the email and article, the Respondent was referencing his previous accusations that she had made false allegations about him, or whether he had realised that he had behaved badly towards her and was warning her not to make a formal complaint.

The complainer advised that she had contacted the local police liaison officer that day, to seek advice. The complainer contended that she had done so as she had found the Respondent's behaviour threatening. The complainer advised she had also asked to be allocated a different office in the Council building and avoided arriving early or leaving late as she felt intimidated by the Respondent and did not want to find herself alone with him or give him any further opportunity to be abusive. The complainer indicated that she had continued to feel unnerved after the incident and, as such, would always check whether the Respondent was in the Elected Members' common area before entering.

The complainer accepted that the Respondent's anger stemmed from comments she had made at the Council's budget meeting the previous day. The complainer advised that she had been making a point about how the Respondent could not argue he was trying to protect vulnerable people, when he had suggested at an IJB meeting earlier that month that funds spent on individuals with learning difficulties should be reduced. The complainer confirmed that she had noted another individual at the IJB meeting had referred to his views as bringing eugenics to mind. The complainer noted that the Respondent was also angry about her accusing him, at the Council meeting, of having "a vested interest" as a "pharmaceutical representative". The complainer contended that her comments had been made in the context, and formed part of, robust political discussion at a council meeting and that she believed them to be true. The complainer noted that she had not been reprimanded by the Chair of the meeting for making the comments and advised that she did not consider that there was anything untoward about them.

In response to cross examination, the complainer accepted that the public comments she had made at the Council's budget meeting on 27 February 2020 were directed at the Respondent as an individual and that, as it was an abhorrent ideology, the inference that he was a supporter of eugenics was an ugly proposition. The complainer accepted that while she had not accused the Respondent directly of being a eugenicist, she had referred to a colleague's comment that had linked the Respondent's comments to this philosophy. The complainer further accepted that being falsely accused of being a supporter of such an ideology would be upsetting. The complainer advised that her comments about the Respondent having a vested interest as a drug representative was based on her understanding that he worked in the pharmaceutical industry. The

complainer agreed that being falsely accused of having a conflict of interest would also be upsetting. The complainer confirmed that she had been called a 'nat', as shorthand for nationalist, in the past, albeit infrequently.

The complainer confirmed that, during the exchange on 28 February 2020, the Respondent had repeatedly shouted that she was a liar. The complainer accepted that in sending the email with the link to an article about false allegations, it was possible the Respondent was attempting to draw an analogy with the accusations she had made about him at the meeting the previous day. The complainer contended, however, that she had not known that was the case at the time and, as such, she had found the email to be intimidating.

The complainer accepted that, if the Respondent had been upset at the remarks she had made at the meeting on 27 February 2020, he would have been entitled to raise his concerns with her. The complainer further accepted that the incident the following day was the first time the Respondent had seen her since the meeting, and that it was apparent that the exchange related to the comments she had made about him. The complainer agreed that she had not included the fact that the Respondent had accused her of lying about him twice during the incident in her complaint to the ESC, but indicated this was because she considered she had provided sufficient information for the matter to be investigated.

In response to questions from the Panel, the complainer advised that she had been told by the police that the Respondent had accepted a warning about the incident on 28 February 2020 and that they had a sufficiency of evidence to have charged him with breach of the peace. The complainer accepted, however, that she was not clear exactly what this meant in terms of proving the case beyond all reasonable doubt.

Mrs A advised that, while she was now retired, at the time of the incident on 28 February 2020 she worked for the Council as a members' services officer. Mrs A advised that she had worked for members' services for more than 20 years. Mrs A stated that, on 28 February 2020, she had left her office to see a colleague, which involved walking through the Elected Members' common area. Mrs A advised that when she had opened the door to the Elected Members' common area, her attention was drawn to the Respondent, who was standing by the Conservative Group's office and shouting, with one hand on the door and his other arm waving back and forth in a violent way. Mrs A advised that it was immediately apparent that the Respondent was "very very angry" and that he "looked very aggressive". Mrs A explained that the Respondent's demeanour was so alarming that it caused her to take a step back. Mrs A confirmed that, at the time, the complainer was standing near the photocopier, which was not a great distance from the Respondent, and that she "looked very shocked". Mrs A advised that she had stood in the doorway for a few moments while trying to decide what to do. Mrs A stated that she had not wanted to leave the complainer as she had felt concerned about her safety. Mrs A confirmed that the Respondent's demeanour was very unusual for him and, while she had witnessed arguments between elected members before, in her twenty plus years of service she had never previously seen behaviour as angry as that exhibited by the Respondent.

Mrs A indicated she could not recall if the complainer had spoken during the part of the incident she had witnessed, but confirmed that, if so, she had been doing so quietly and had not been shouting back. Mrs A stated that the incident had ended when the Respondent walked into his office. Mrs A advised she had then asked the complainer whether she was ok. Mrs A stated that while the complainer had said she was alright and that she was going to see the Democratic Services Manager, it was apparent that she was shaken. Mrs A confirmed that she had also reported the incident to the Democratic Services Manager and indicated that she had felt it was her duty to do so. She had also provided a witness account of the incident to the police.

Submissions made by the ESC's Representative

The ESC's representative noted that the complainer had been consistently clear about what the Respondent had said to her during the incident in question, when reporting the matter to the Democratic Services Manager and the police, in her complaint and in her evidence before the Panel. The ESC's representative further noted that Mrs A had been very clear about what she had witnessed. The ESC's representative

contended that both witnesses had been credible and reliable and, as such, the Panel was entitled to accept their versions of events as being an accurate reflection of what had occurred.

The ESC's representative accepted that the Respondent had been entitled to respond to the comments made about him by the complainer during the meeting the previous day. The ESC's representative noted, however, that it was the manner in which the Respondent had done so that was the issue. The ESC's representative contended that the Respondent had made offensive and personally insulting comments towards the complainer in an aggressive tone, whilst shouting and gesticulating, during the exchange on 28 February 2020 and, as such, had failed to treat her with courtesy and respect, as required by paragraph 3.2 of the Code.

The ESC's representative noted that the complainer had felt sufficiently upset and threatened by the Respondent's conduct to make complaints to both the ESC and the police and, further, that she had modified her own behaviour (in terms of asking for her office to be relocated and how she moved around the Council offices), as a result. The ESC's representative noted that the Standards Commission's Advice Note on Bullying and Harassment makes it clear that harassment is any unwelcome behaviour or conduct that has no legitimate workplace purpose and which makes someone feel offended, humiliated, intimidated, frightened and/or uncomfortable at work. The Advice Note states that harassment can occur as an isolated incident and, further, that it is essentially about what the recipient deems to be offensive, rather than what is intended. The ESC's representative argued that it was evident that the Respondent's behaviour had made the complainer and Mrs A feel uncomfortable in the Council offices, being a workplace environment. In addition, the ESC's representative contended that, in making disparaging and insulting comments about her appearance and in shouting at her in a threatening manner, the Respondent had also made the complainer feel humiliated, insulted, shaken and intimidated. As such, his conduct also amounted to harassment and a breach of paragraph 3.6 of the Code.

The ESC's representative accepted that the Respondent was entitled to correct the complainer and seek an apology if he considered the comments she had made about him, in public, at the Council meeting the previous day to be false. The ESC's representative argued, however, that the Respondent's reaction was entirely disproportionate, and that a distinction should be drawn between remarks made in the relatively controlled environment of the Council Chamber, where political point scoring was to be expected, and an encounter between two individuals. The ESC's representative contended that, in making gratuitous and offensive personal comments that caused another individual to feel intimidated, the Respondent was not entitled to any protection afforded under Article 10 of the European Convention on Human Rights (ECHR), in respect of freedom of expression.

The Respondent's Evidence

The Respondent's representative called the Respondent as a witness.

The Respondent advised that he had been about to open the door to the Conservative Group's room when he saw the complainer. The Respondent advised that he had engaged the complainer with a view to seeking an apology for the false claims she had made in public during a meeting the previous day, to the effect that he supported eugenics and had a conflict of interest. The Respondent indicated he had been extremely upset and deeply offended at being falsely smeared, and stated that after the complainer had greeted him, he said "what on earth happened", or words to that effect. The Respondent advised that the complainer refused to apologise and, instead, indicated that she had not accused him of being a eugenicist and that she had simply repeated a comment someone else had made. The Respondent advised that the complainer then proceeded to try to justify the remarks she had made.

The Respondent advised that he accepted the robust debate was part and parcel of politics and could be expected at a Council meeting. The Respondent confirmed, however, that the accusation he was a eugenicist or supported that ideology, in any way, was entirely false. The Respondent noted that the accusation appeared to be based solely on the fact that he had opined, at a previous IJB meeting, that certain packages

of care in place for individuals with learning difficulties were ‘very’ expensive and not subject to any cap, unlike the ceiling placed on the expenditure on drugs and medicines. The Respondent further advised that he was not a drug sales representative, as alleged by the complainer, and that he had no vested interest, or conflict, in any items being discussed at the Council meeting. The Respondent stated that he had been outraged by the complainer’s false accusations against him and considered them to be personal smears that went well beyond the realms of an acceptable and robust political exchange.

The Respondent noted that as the Council meeting had ended sometime between 21:30 and 22:00 the previous evening, his encounter with the complainer the next morning was the first time he had had an opportunity to confront her about his concerns. The Respondent accepted that he had been upset, frustrated and possibly angry that no apology was forthcoming and that he had been gesticulating with one arm. The Respondent advised he had then called the complainer “a small nat”, or words to that effect. The Respondent accepted this had been a somewhat unkind and demeaning comment but explained he had made it in the context of questioning who the complainer thought she was, and in trying to express to her that she was simply an inconsequential nationalist in a small local authority. The Respondent accepted that, during the exchange, he had called the complainer an “ugly liar”. The Respondent advised that his use of the word ‘ugly’ related to the untrue accusations the complainer had made about him, rather than to her physical appearance. The Respondent contended that he had then sent the email with the link to the newspaper article in order to draw the complainer’s attention to other false accusations. The Respondent advised that the email was not intended to be threatening or intimidating.

In response to cross-examination, the Respondent reiterated that he had used the adjective ‘ugly’ to describe the complainer’s lies about him, but accepted that there was a possibility that she could reasonably have perceived its use as being about her appearance. The Respondent advised that while he did not consider that he had over-reacted or had been intimidating, he had not enjoyed hearing that Mrs A felt she could not leave the complainer alone with him. The Respondent agreed that debate in Council meetings was often of a robust nature, with attendees often seeking to make political points. The Respondent conceded that he had made comments about independence at the meeting on 27 February 2020, that were also not directly connected to the budget being discussed. The Respondent reiterated, however, that he considered the accusations made about him by the complainer went beyond the political context and were personally insulting. The Respondent accepted, however, that while the Chair had considered it was appropriate to give him the opportunity to respond to the comment about eugenics, she had not felt the need to do so in respect of the complainer’s later remark about him having a vested interest.

Submissions made by the Respondent’s Representative

The Respondent’s representative noted that the Respondent’s evidence was candid and consistent, in comparison to the complainer’s, which he contended had been evasive. The Respondent’s representative argued that it was unsurprising that the Respondent may have been upset during the incident, given it was the first time he had seen the complainer since she had made the entirely false inference that he was a supporter of an abhorrent ideology. The Respondent’s representative noted that there was no suggestion that the Respondent had entered the complainer’s personal space during the exchange in question and contended that, as there was some distance between them, his conduct could not reasonably be perceived as being intimidating. The Respondent’s representative argued that the Respondent’s contention that he had one hand on the door during the incident, a fact that Mrs A also recalled, demonstrated that there had been an element of restraint about his conduct.

The Respondent’s representative noted that the question of what had been said by the Respondent during the exchange was a matter of one party’s word against the other. The Respondent’s representative argued that the Respondent’s version of events was more credible. The Respondent’s representative contended that there was no gratuitous personal element in the Respondent stating that the complainer was a “small nat” (as in holding an inconsequential position), or in his reference to her lies being “ugly”. While the Respondent’s representative accepted there was a distinction between what could be considered acceptable behaviour in

the Council Chamber, as opposed to an office, he noted that the space in which the incident occurred was still a shared one, and it was evident that the exchange was a continuation of what had been said at the budget meeting the previous day. As such, the Respondent's representative argued that the Respondent was entitled to the enhanced protection afforded to politicians under Article 10 of the ECHR. The Respondent's representative noted that the case law made it clear that in a political context, a degree of the immoderate, non-rational and aggressive, that would not be acceptable outside that context, was to be tolerated.

DECISION

The Hearing Panel considered the submissions made both in writing and orally at the Hearing. It also watched excerpts of a recording of the Council's budget meeting on 27 February 2020. The Panel concluded that:

1. The Councillors' Code of Conduct applied to the Respondent, Councillor Swift.
2. The Respondent had breached paragraphs 3.2 and 3.6 of the Code

Reasons for Decision

The Panel was satisfied that the Respondent was acting as a councillor, or at least could be perceived as acting as such, during the exchange in question on 28 February 2020, given that it took place at the Council's offices and appeared to stem from remarks made at the Council's budget meeting the previous day. The Panel was satisfied, therefore, that the Code applied to the Respondent at the time of the incident.

Having viewed footage of the Council meeting on 27 February 2020, the Panel was satisfied that the complainer had repeated a remark she claimed had been made by another individual, that 'the word eugenics comes to mind' in respect of the Respondent's position in relation to a savings proposal amounted meant that. The complainer had also commented that the Respondent had a "vested interest" as a drug sales representative. While the Panel noted that the complainer may have believed these remarks to be true, it accepted the Respondent's position that they were not.

The Panel noted that there was a dispute between the complainer and Respondent as to what was actually said during the exchange in question on 28 February 2020. The Panel was not convinced that either "small nat" or "ugly liar" were terms that were ordinarily used in the way described by the Respondent, particularly because the word 'ugly' was far more likely to be associated with an individual's appearance, as opposed to being an adjective commonly used to describe an untruth. The Panel therefore concluded, on the balance of probabilities, that it was more likely than not that the Respondent had called the complainer a "wee fat ugly liar", as alleged. The Panel determined that, in making demeaning and insulting personal remarks about the complainer's physical appearance, the Respondent had been disrespectful and discourteous towards her, in breach of paragraph 3.2 of the Code.

The Panel noted Ms A's evidence supported the complainer's position that the Respondent had been shouting at the complainer during the exchange and that his demeanour, tone and body language were aggressive and intimidating. The Panel had no reason to consider that Ms A was anything other than a neutral witness, who had no reason to lie and, as such, determined that her evidence was credible and should be accepted in entirety. The Panel considered the fact that Ms A's account confirmed the complainer's in respect of the Respondent's demeanour and tone, added credibility to the complainer's account of the incident, and supported its conclusion that it was more likely than not that her recollection of the words used by the Respondent was correct. The Panel was of the view that such aggressive and intimidating behaviour had no legitimate workplace purpose. The Panel was also satisfied that the Respondent's conduct was unwelcome and would have left the complainer feeling humiliated and intimidated. The Panel concluded, therefore, that the Respondent's behaviour also amounted to harassment and a breach of paragraph 3.6 of the Code.

The Panel noted, however, that before coming to a final finding on the complaint, it was obliged to consider the provisions of Article 10 of the ECHR, which concerns the right to freedom of expression.

The Panel noted that while councillors, as politicians, are expected to have a ‘thicker skin’ and may be expected to face criticism for their views and decisions, they are nevertheless entitled to be treated with courtesy and respect by their colleagues. The Panel accepted that the Respondent had a right to challenge the complainer about the remarks she had made about him in public at the budget meeting the previous day and to seek an apology. It further accepted that the Respondent may well have been frustrated by her failure to do so. The Panel agreed with the ESC’s representative, however, that it was the way the Respondent had confronted the complainer, and the nature of the comments he had directed towards her, that were the issue.

The Panel noted that the Courts have interpreted Article 10 widely and have found that the enhanced protection for politicians can even extend to comments which some may consider to be inappropriate, offensive and emotive. In addition, comments made in the political context, which amount to value judgments, are tolerated even if untrue, so long as they have some or any factual basis. The Panel noted, however, that gratuitous personal accusations and / or comments that amount simply to offensive abuse do not attract the enhanced protection afforded to politicians. The Panel also noted that the provisions of Article 10 do not extend to protecting intimidating behaviour such as that attributed to the Respondent. The Panel was of the view that the remarks it had found were made by the Respondent were of that nature. As such, the Panel found that the Respondent was not entitled to the enhanced protection for political expression afforded under Article 10.

The Panel noted that it had found that the Respondent’s conduct was unacceptable and gratuitous. As such, the Panel determined that, in the circumstances, a finding of a breach and application of a sanction was justified and proportionate. The Panel concluded, therefore, that the Respondent had contravened paragraphs 3.2, and 3.6 of the Councillors’ Code of Conduct.

Evidence in Mitigation

The Respondent’s representative advised that the Respondent was of good character and had never previously been the subject of a formal complaint. The Respondent’s representative advised that, in addition to his role as a councillor, the Respondent’s had contributed to public life through his previous employment as a health economist.

The Respondent’s representative asked the Panel to note that the incident in question as a one-off, was of limited duration and had been a spontaneous reaction to what the Respondent had perceived as an attempt to impugn his reputation. The Respondent’s representative noted that the Respondent had co-operated fully with the investigatory and adjudicatory processes and had demonstrated an understanding of the potential impact of the behaviour that was the subject of the complaint.

SANCTION

The decision of the Hearing Panel was to suspend the right of the Respondent, Councillor Swift, to attend all meetings of East Renfrewshire Council, for a period of one month, with effect from the date of this decision.

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

Reasons for Sanction

In reaching its decision on sanction, the Panel noted, in mitigation, that the Respondent had co-operated fully with the investigative and adjudicatory processes. The Panel considered that it was understandable that that Respondent would have been frustrated and upset about the remarks made by the complainer about him at the public Council meeting the previous day and, in particular, the inference that he was a supporter of eugenics, being an accusation that he strongly denied. The Panel accepted that the exchange was the first

time the Respondent had seen the complainer since the meeting, and that he had been motivated by a desire to seek an apology and an admittance that her remarks had no basis.

The Panel considered, however, that the requirement for councillors to refrain from conduct that is discourteous, disrespectful and that could amount to harassment, is an important feature of the Code, as a failure to do so can undermine relationships and public confidence in the role of a councillor and the Council itself. The Panel noted that councillors should be able to make points and engage with each other in a constructive, respectful, courteous and appropriate manner, without resorting to personal attacks or being offensive, threatening and demeaning. In this case, the Respondent had failed to conduct himself in a courteous and respectful manner and, instead, had made an insulting personal remark and had behaved in an intimidating manner.

The Panel was nevertheless of the view that the Respondent's conduct did not warrant a more severe sanction. This was because it was satisfied that the incident was a one-off, was of limited duration and that there was no evidence of any previous transgressions by the Respondent. The Panel further noted that there had been no personal benefit to the Respondent and the events in question had been confined to one day.

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: 18 November 2020



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