

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on 16 February 2022

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

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Acting Ethical Standards Commissioner (the ESC), further to a complaint, reference LA/Mo/3516, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by former Councillor Paula Coy (the Respondent).

The ESC was represented by Mrs Angela Glen, the Senior Investigating Officer. The Respondent chose not to be present and, instead, submitted written representations in advance of the Hearing.

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 17 November 2021, in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

The substance of the referral was that the Respondent had failed to comply with the provisions of the 2018 version of Code (being the version in place at the time of the events in question) and, in particular, that she had contravened paragraph 3.2, which was as follows:

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.*

The complaint investigated by the ESC also concerned an allegation that the Respondent had breached paragraphs 3.16 and 3.17 of the Code, which concern confidentiality. Having reviewed the ESC's report on receipt, the Standards Commission agreed with the ESC's conclusion that there was no evidence of a breach of the confidentiality provisions in the Code. The Standards Commission considered that it was neither proportionate nor in the public interest to consider that aspect of the complaint further and determined, therefore, that no further action should be taken in respect of it. As such, the only matter that came before the Panel for consideration at the Hearing was the allegation that the Respondent failed to comply with paragraph 3.2 of the Code.

Evidence presented before and at the Hearing

Submissions made on behalf of the ESC

The ESC's representative advised that the complaint concerned four tweets posted by the Respondent in late March 2021. The ESC's representative advised that there was no dispute that the Respondent had drafted and posted the tweets, which concerned the move of the complainer's husband, a fellow politician, to another political party. The ESC's representative noted that the question before the Panel was whether the Respondent had been disrespectful and / or discourteous to the complainer or her husband in the tweets, in contravention of paragraph 3.2 of the Code.

The ESC's representative noted that paragraph 3.1 of the relevant version of the Code states that the rules of good conduct must be observed by councillors in all situations where they were acting as a councillor, and that this included when they were using social media. The ESC's representative noted the Standards Commission's Guidance on the Code in place at the time stated that councillors should be mindful that their

perception of when they were acting privately may be different to that of members of the public. The Guidance advised councillors to treat the Code as being applicable in all situations in which they might be perceived to be acting as a councillor, particularly if they:

- had described themselves as a councillor or were otherwise readily identifiable as a councillor in the situation / circumstances; and
- were engaged in political activity, or comment on political matters, whether these fell within or outwith the scope of the council's functions.

In this case, the ESC's representative contended that members of the public would reasonably perceive the Respondent to be acting as a councillor when posting the tweets in question. This was because while the tweets were posted from an account that was described as 'personal', it was one that was publicly accessible and one that followed a variety of politicians and public bodies, including COSLA and the Scottish Government. The ESC's representative advised the account had over 2,000 followers at the time of the events in question and was used to tweet and to retweet about a variety of topics, including politics and public events. Whereas the Respondent had also used the account to post about personal matters, such as her family and pets, she had described each of the four tweets in question as being "purely political" in her substantive response to the complaint. The ESC's representative advised that it was evident from other tweets and posts that the Respondent used the account routinely to engage in public debate with other Twitter users, including on matters of public interest.

The ESC's representative further advised an online search of the Respondent's name identified the specific Twitter account involved, with no other 'official' Twitter account being detected. In addition, the ESC's representative noted that the Respondent's then status as an elected member of Moray Council was also easily accessible and understandable from an online search of her name and, as such, it would be reasonable for a member of the public to conclude that she was posting in such a capacity when using the account in question. The ESC's representative argued, therefore, that paragraph 3.1 of the Code was engaged, and that it applied to the Respondent at the time of the events in question.

The ESC's representative noted screenshots of the tweets in question had been captured and were included in the productions before the Panel.

The ESC's representative noted that in the first tweet, posted on 27 March 2021, the Respondent had referred to the complainer's husband as being an "embarrassment", and to him owning two properties, in the context of him having cited another politician when discussing the issue of politicians having dual mandates (as both MPs and MSPs).

The ESC's representative advised that, in response to a tweet from another user querying whether the complainer's husband had joined the other political party, the Respondent confirmed in the second post, later that day, that he had done so and stated: "he would've looked like a d**k if he hadn't".

The ESC's representative noted that the Respondent then posted, on the same day, a third tweet. This third tweet was in response to a comment on her account from another user, who had stated that she had campaigned, in the past, for the complainer's husband on the basis of his stance on the independence debate and because he believed in women's rights. The ESC's representative advised that in her tweet of response, the Respondent indicated that it made her "sick" that someone would argue that anyone who moved to a party led by the former First Minister (Alex Salmond) could be a defender of women's rights. The Respondent noted that the complainer's husband had appeared in the media referring to women who had accused the former First Minister of sexual offences as "liars and conspirators". The ESC's representative noted that the Respondent stated, "women's rights my arse" and "please keep on with this defending women's rights! You're doing a fab job! It's just not ALL women's rights tho (sic), is it?".

The ESC's representative advised that, on the following day (being 28 March 2021), the Respondent had responded to a comment on her Twitter account that had referred to the complainer. In her response tweet, the Respondent referred to the complainer as having been "awful" to her and having called her "a slaving idiot". The Respondent stated in the tweet that the complainer was "the Jane Lax of the ultra nats". The ESC's representative explained that the tweet related to one that the complainer had posted on 21 February 2021, in which she had referred to the Respondent as "slaving" and a "total loop".

The ESC's representative observed that the Respondent's first two tweets concerned political matters, being the question of whether politicians should have dual mandates, and the complainer's husband's decision to move to another political party. The ESC's representative noted, in respect of the second tweet, that the Respondent had not called the complainer's husband a "dick" directly, but rather had stated that is how she considered he would have been perceived, had he not decided to join the other political party. The ESC's representative noted that the Respondent's third tweet concerned matters of public interest; namely women's rights and whether women were being driven out of politics.

The ESC's representative argued that as the first three tweets concerned politics and other matters of public concern, the Respondent would attract 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 noted that the Standards Commission's Advice Note for Councillors on the Application of Article 10 of the ECHR observes that enhanced protection of freedom of expression applies to all levels of politics, including local, and that there was little scope under Article 10 for restrictions on either political speech or on debate on questions of public interest. The ESC's representative noted that the Courts have held that while individuals taking part in public debates on matters of general concern must not overstep certain limits, particularly with regard to respect of the reputation and rights of others, a degree of exaggeration or even provocation is permitted¹.

The ESC's representative contended that the Respondent would also attract the enhanced protection of freedom of expression afforded to politicians under Article 10 in respect of her fourth tweet. This was because the reference to "nats" was clearly a reference to the complainer's political views. The ESC's representative noted that the Courts have held that comments made in a political context, that amount to value judgements, are tolerated even if untrue, as long as what was expressed was said in good faith and there was some reasonable (even if incorrect) factual basis for making such comments. The ESC noted that as the complainer had referred to the Respondent as "slaving" and a "total loop" in her tweet of 21 February 2021. The ESC's representative argued, therefore, that the Respondent's comments about the complainer's conduct amounted to a statement that had some basis in fact.

In the circumstances, the ESC's representative submitted that, even if it was found that the Respondent had been disrespectful towards the complainer or her husband in the tweets, any restriction on the Respondent's right to freedom of expression, that a finding of a breach of paragraph 3.2 of the Code and the imposition of a sanction would represent, would not be proportionate or in response to any pressing social need. The ESC's representative argued, therefore, that a breach of paragraph 3.2 of the Code could not be justified.

In response to questions from the Panel, the ESC's representative confirmed that she understood the complainer's inclusion, in her second tweet, of "d**k" to be a reference to the word 'dick'. The ESC's representative agreed that members of the public reading the tweet would reasonably consider the use of word 'dick' was implied, even if the Respondent's use of asterisks meant that it was not written out in full. The ESC's representative argued, however, that even if that was accepted and the word was taken as a profanity, the context in which it had been used meant that the Respondent should still be afforded the enhanced protection of freedom of expression under Article 10. This was because the Respondent had not

¹ *Mamère v France* (2009) 49 EHRR 39

directly stated that the complainer's husband was a "dick", but rather had indicated that would be how he might be perceived had he not decided to move to another political party. The ESC's representative noted, therefore, that the use of the word as a descriptor was conditional.

The ESC's representative confirmed that the Respondent's mention in the fourth tweet of a "Jane Lax" was a reference to an activist who had been suspended from an opposition party after joking about the First Minister's miscarriage on Twitter. The ESC's representative noted that the Respondent appeared to be equating the complainer with someone whom she considered to have extremely unpleasant and inappropriate views. The ESC's representative contended that while this could be categorised as being a personal attack on the complainer, who was not a politician, the Respondent would nevertheless still be protected by Article 10. This was because the tweet was sent in a political context, where a degree of the offensive, exaggerated and provocative, that would not be acceptable outside that setting, was tolerable.

The ESC's representative agreed that the Code would not apply to all conduct on social media. The ESC's representative argued, however, that it was likely that councillors who were expressing views or commenting on political matters or issues of public concern on social media would only be perceived as acting in a private capacity if their accounts were restricted and / or if there was a very clear delineation between their public and personal accounts.

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, former Councillor Coy.
2. A breach of paragraph 3.2 of the Councillors' Code of Conduct could not be found.

Reasons for Decision

The Panel noted that the Respondent's Twitter account was not an official councillor account, that its name made no mention of her then status as an elected member and that the biography section of the account referred to the account as being 'personal'. The Panel noted, nevertheless, that the Respondent had accepted, in correspondence with the ESC's office, all the tweets in question were political in nature. The Panel further noted that the account was publicly accessible, had over 2,000 followers, and that it followed the accounts of several public bodies and politicians. The Panel accepted the ESC's position the Respondent's name and former role as a councillor were immediately and clearly identifiable from online searches.

In the circumstances, the Panel was satisfied that the Respondent would reasonably be perceived by members of the public as acting in the capacity of a councillor when posting the tweets, particularly given they concerned matters of political and public concern (see stage 2 below). The Panel determined, therefore, that the Code applied to the Respondent at the time of the events in question.

In reaching its decision as to whether there had been a breach of the Code, the Panel took the following approach, as outlined in the Standards Commission's Advice Note on the Application of Article 10 of the ECHR. Firstly, it would consider whether the facts found led it to conclude, on the balance of probabilities, that the Respondent had failed to comply with the Code. Secondly, if so, it would then consider whether such a finding in itself was, on the face of it, a breach of the Respondent's right to freedom of expression under Article 10. Thirdly, if so, the Hearing Panel would proceed to consider 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).

Stage 1: Whether the Respondent's conduct amounted, on the face of it, to a breach of the Code

The Panel noted that paragraph 3.2 of the Councillors' Code of Conduct requires councillors to respect their colleagues and members of the public and to treat them with courtesy and respect, at all times, when acting as a councillor.

The Panel acknowledged the Respondent's position that she had been engaging in political discussion in all four tweets, albeit she accepted she had done so in a "robust" manner. The Panel further noted that the Respondent's position was she had simply been expressing solidarity in the fourth tweet, by pointing out that she had also been a recipient of abusive communications from the complainer.

The Panel did not consider that the majority of the remarks in Respondent's first tweet could be categorised as being either disrespectful or discourteous, as they were simply statements about the complainer's husband's position in respect of some politicians having dual mandates, as well as the number of properties he owned. The Panel was of the view, however, that the Respondent's reference in the first tweet to the complainer's husband as being an "embarrassment" was a personal and derogatory comment and, as such, was discourteous.

The Panel noted that the Respondent had not referred to the complainer's husband by a derogatory term in the second tweet and, instead, had simply proffered an opinion about how he may have been perceived by others, had he chosen not to move to the other political party. The Panel noted that the Respondent had used asterisks rather than spelling out the full word. The Panel considered, however, that the word implied was obvious and, further, that it would have been evident to any other members of the public who had viewed the tweet. The Panel was of the view that the use of a profanity or a derogatory term by a politician in the context of a publicly available tweet was inappropriate because it lowered unhelpfully the standard of public debate and, further, had the potential to erode public confidence in the role of an elected member. The Panel noted, nonetheless, that the Respondent had not used the term to describe the complainer's husband and, instead, had qualified the comment as only being applicable if other conditions had been met (i.e. had he not changed political party). Therefore, the Panel concluded that, in the circumstances, the Respondent's conditional comment did not meet the threshold for a breach of the respect and courtesy provision in the Code.

The Panel noted that the Respondent's references, in the third tweet, to the complainer's husband's support (or otherwise), in respect of women's rights, were an expression of her opinion about his political conduct and decision-making. The Panel did not consider, therefore, that the Respondent's remarks in this regard would be characterised as sufficiently disrespectful or discourteous as to amount to a breach of the Code.

The Panel found that, in elements of the fourth tweet, the Respondent had outlined her opinion in respect of how the complainer had allegedly described her in the complainer's tweet of 21 February 2021. The Panel was of the view that the making of a comment to the effect that the Respondent considered the complainer had been "awful" towards her, followed by a description of what the complainer had allegedly called her, was not inherently disrespectful or discourteous, even if the Respondent should have reasonably known that the complainer might dispute the categorisation or description of her alleged behaviour. The Panel noted that the Respondent was simply expressing an opinion about the complainer's alleged conduct, as opposed to her character, appearance, or beliefs. Again, the Panel did not consider that the Respondent's comments in this regard would be characterised as sufficiently disrespectful or discourteous as to amount to a breach of the Code.

The Panel was of the view, however, that the Respondent's reference in the fourth tweet to the complainer being the "...the Jane Lax of the ultra nats" to be a personal comment. The Panel noted that the reference to "Jane Lax" was a reference to a local activist who had been suspended by another political party for mocking, on Twitter, the First Minister's experience of suffering a miscarriage. The Panel considered that making a

comparison between the complainer, and someone who had behaved in such an offensive manner, was wholly inappropriate and discourteous.

The Panel was of the view that the Respondent should have been much more careful in her choice of words, given her position of authority and responsibility. As such, the Panel was satisfied, on balance, the Respondent's conduct in making some of remarks, as outlined above, amounted, on the face of it, to a contravention of the requirement under paragraph 3.2 of the Code for councillors to treat members of the public with courtesy and respect.

Stage 2: Whether a finding of a contravention of the Code would be a breach of the Respondent's right to freedom of expression under Article 10 of the ECHR

The question that then arose was whether the finding that the Respondent had failed to comply with the provisions of the Code would, on the face of it, be a breach of her right to freedom of expression under Article 10 of the ECHR. In coming to a view, the Panel considered whether the Respondent was expressing views on matters of public concern and was, therefore, entitled to the enhanced protection to freedom of expression afforded to politicians, which includes local government councillors.

The Panel noted that the Courts, in considering Article 10, had found there was little distinction between political discussion and discussions on matters of public concern². The Panel noted that public interest has been defined by the Courts as relating to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention, or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community³.

In this case, the Panel was of the view that the matters that were the subject of all four tweets were ones of public interest or concern, namely:

- the question of whether politicians should have dual mandates and the complainer's husband's decision to move to another political party (the first two tweets);
- women's rights and whether women were being driven out of politics (the third tweet); and
- the complainer's political stance (the fourth tweet).

The Panel determined, therefore, that the Respondent would attract the enhanced protection of freedom of expression afforded to politicians, including local politicians, under Article 10.

Stage 3: Whether any restriction on the Respondent's right to freedom of expression involved by a finding of a contravention of the Code would be justified by Article 10(2) of the ECHR

The Panel then proceeded to consider whether the restriction involved by the finding that the Code had been breached was justified by Article 10(2), which allows restrictions that are necessary in a democratic society for the protection of the reputation or rights of others.

The Panel noted that it was required to undertake a balancing exercise, weighing the enhanced protection to freedom of expression enjoyed by the Respondent against any restriction imposed by the application of the Code and the imposition of any sanction. In this case, as the issues being discussed by the Respondent concerned matters of public interest or concern, the Panel noted there was limited scope under Article 10(2) for a restriction on the Respondent's right to freedom of expression.

² *Thorgeirson v Iceland* (1992) 14 EHRR 843

³ *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], § 171

The Panel accepted that the Courts have held that the less egregious the conduct in question, the harder it would be for a Panel, when undertaking its balancing exercise, to justifiably conclude that a restriction on an individual's right to freedom of expression is required⁴.

The Panel noted that that, in a political context (which includes matters of public concern), a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, that would not be acceptable outside that context, is tolerated⁵.

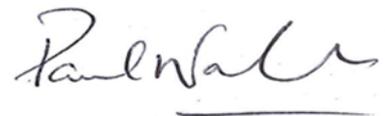
The Panel further noted that the Courts have further held that comments in the political context, that amount to value judgements, are tolerated, even if untrue, so long as what was expressed was said in good faith and there was some reasonable (even if incorrect) factual basis for making such comments⁶.

In this case, the Panel considered that the any comments the Respondent made in respect of the complainer and her husband were value judgements. The Panel had no reason to doubt such value judgements had been made in good faith, even if they were accurate or not.

The Panel noted that the reference to "Jane Lax", as offered, was insulting, particularly when used in the context of a discussion about the behaviour directed towards women in public life. The Panel was nevertheless of the view that the Respondent's comment was not sufficiently offensive, polemical and gratuitous as to justify a restriction on her right to freedom of expression. This was because the Panel was ultimately satisfied that the Respondent was attempting to draw an analogy in terms of her opinion about the extremity of the complainer's views, albeit she had done so in a clumsy manner. As such, the Panel concluded that a breach of the Code could not be found.

The Panel nevertheless emphasises that the requirement for councillors to behave in a respectful and courteous manner towards members of the public is an absolutely fundamental requirement of the Code, because it protects the public and ensures that public confidence in the role of the elected member and the council itself is not undermined.

Date: 21 February 2022



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

⁴ *Calver, R (On the Application Of) v The Adjudication Panel for Wales (Rev 2) [2012] EWHC 1172 (Admin)*

⁵ *Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin)*

⁶ *Lombardo v Malta (2009) 48 EHRR 23*