

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at West Lothian Civic Centre, Livingston on Thursday 30 November 2023.

Panel Members: Ms Ashleigh Dunn, Chair of the Hearing Panel
Mr Paul Walker
Ms Anne-Marie O'Hara

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/WL/3790, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor Sally Pattle (the Respondent).

The Respondent was represented by Ms Rosie Walker, Solicitor, Gilson Gray LLP. The ESC was represented by Mrs Sarah Pollock, the ESC's Hearings Officer.

Referral

Following an investigation into a complaint received on 24 August 2022 about the conduct of the Respondent, the ESC referred a report to the Standards Commission on 4 October 2023, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The ESC identified three issues of complaint; being that:

1. The Respondent referred, in a public forum, being a town management group meeting held in July 2022, to a local Business Improvement District (BID) document as "cosmetic and flannel".
2. At a meeting of the BID members, in July 2022, the Respondent used an aggressive, loud and inappropriate tone of voice to a staff member.
3. The Respondent used an aggressive, loud and inappropriate tone of voice to a staff member when attending the BID's office on 27 July 2022.

Having reviewed the ESC's report, the Standards Commission was not satisfied that the allegation regarding the Respondent's conduct in respect of issue one, even if established, would amount to a breach of the respect provision in the Code. This was because the Standards Commission agreed with the ESC that it was evident from the context that in making her statement, the Respondent was expressing a view on the report, rather than criticising an individual officer. The Standards Commission further agreed with the ESC that, even if the comment was found to be disrespectful, it was unlikely that a restriction on the Respondent's enhanced right to freedom of expression would be justified.

The Standards Commission agreed with the ESC that there was no evidence to support a conclusion that the Code applied to the Respondent in respect of issue two and concluded, therefore, that it was unlikely that a breach of the Code could be found at a Hearing.

In the circumstances, the Standards Commission concluded that it was neither proportionate, nor in the public interest, for it to consider issues one and two at a Hearing. The Standards Commission determined, therefore, to take no action in relation to issues one and two of the referral.

In respect of issue three, the Standards Commission noted that the ESC had concluded that the Respondent had, on the face of it, breached the Code, but that a formal recommendation of breach could not be made as the ESC considered that a restriction on the Respondent's right to freedom of expression could not be justified. The Standards Commission decided, nevertheless, that it was both proportionate and in the public interest to hold a Hearing. The Standards Commission noted that this was because it considered that holding a Hearing (and the associated publicity) could promote the provisions of the Codes of Conduct and the ethical standards framework. It further noted that the alleged breach was not insignificant or of a technical, minor

nature. The Standards Commission had sent the Respondent a list of the matters that the Panel intended to explore.

In relation to issue three, the ESC advised in his report that he had considered whether the Respondent had failed to comply with the Code, and, in particular, whether she had contravened paragraphs 3.1 and 3.3, which were as follows:

Respect and Courtesy

3.1 I will treat everyone with courtesy and respect. This includes in person, in writing, at meetings, when I am online and when I am using social media.

3.3 I will not engage in any conduct that could amount to bullying or harassment (which includes sexual harassment). I accept that such conduct is completely unacceptable and will be considered to be a breach of this Code.

Evidence Presented at the Hearing

Agreed Joint Statement of Facts

The Panel noted that a joint statement of facts had been agreed between the ESC and the Respondent's representative. This recorded that, as a result of being a ward councillor for Linlithgow, the Respondent had been nominated to the board of One Linlithgow BID at an Executive Meeting of the Council on 7 June 2022.

The joint statement of facts recorded that it was not in dispute that, on 27 July 2022, the Respondent attended the office of One Linlithgow BID in order to hand over a cheque. As the entrance to the office was blocked by boxes, the Respondent was unable to enter fully and, as such, had remained at the doorway. Three people, being witnesses 1, 4 and 5, were in the office at the time, and witnesses 1 and 4 were employees of One Linlithgow BID.

The joint statement of facts further recorded that the Respondent handed over the cheque to witness 1 and engaged in an "extremely brief interaction" with her. It noted that it was not in dispute that the Respondent raised her voice while leaving.

The joint statement of facts stated that, during the interaction, the Respondent briefly referred to her position on One Linlithgow BID's board and engaged in a brief conversation with witness 1 about whether the Respondent was a member of the board of One Linlithgow BID or whether she had merely been nominated as such. It noted that, at the time of the incident, the Respondent had not yet completed the paperwork required to formalise her position on the board.

Witness Evidence

The ESC's representative led evidence from two witnesses, being witnesses 4 and 5.

Witness 4: Witness 4 stated that, at the time of the incident on 27 July 2022, she was the Interim Manager of One Linlithgow BID. Witness 4 confirmed that she had been in the BID's office with witness 1 and witness 5 (the Manager of the Development Trust, which had an office across the road). Witness 4 advised that the door to the office had been wedged open with boxes that also served to prevent anyone from entering fully. Witness 4 stated that she had been sitting behind the door and did not see the Respondent arrive. Witness 4 advised she did not recall speaking directly to the Respondent during the incident.

Witness 4 stated that she recalled the Respondent having handed something in and that witness 1 had spoken to her. Witness 4 advised that as voices were then raised, she had moved so that she could see what was happening. Witness 4 explained that she understood that when the Respondent asked for documents that would have been provided to board members of the BID, witness 1 had requested signed paperwork to enable the Respondent's nomination to the board to be formalised. Witness 4 advised that the Respondent

had raised her voice and stated something to the effect that she was ‘automatically’ a director and had demanded that witness 1 give her the papers. When witness 1 had indicated the requested paperwork would be provided once the signed documents had been received, the Respondent had stated the papers had been signed and were at her house.

Witness 4 indicated that the interaction had lasted a few minutes at most.

Witness 4 stated that after the Respondent left, both witness 1 and witness 5 had appeared “stunned’ and indicated they did not understand what had just happened. Witness 4 advised that she had been surprised at how quickly what had seemed like a normal conversation had changed to the Respondent being angry. Witness 4 said the speed in which the Respondent’s attitude had changed was almost as though a ‘switch’ had been flipped.

Witness 4 explained that, after the incident, members of the BID’s board approached her and witness 1 and advised that witness 5 had advised them about the incident. The board members noted that witness 5 had explained she had approached them as she had been surprised and shocked by the Respondent’s behaviour and had indicated that she would have been unhappy if she had been subjected to that type of behaviour in her workplace.

In response to cross-examination, witness 4 confirmed that neither she, nor witness 1, had raised any formal complaint about the incident as they had become accustomed to similar behaviour.

In response to questions from the Panel, witness 4 advised that as she had initially been behind the door and could not see properly, she had only become aware of who was there when she moved position. Witness 4 advised that witness 1 had been very clear and matter of fact when stating that the Respondent was not a director of the BID until the required paperwork was signed and, as these had not been submitted, she was not entitled to be provided with the documents she had requested.

Witness 4 advised that she had been shocked at how quickly the Respondent’s tone had changed. Witness 4 stated that the Respondent had instantly become louder, with her voice taking on an aggressive edge. Witness 4 further stated that the Respondent had wagged her finger in an aggressive manner before “sweeping” out of the office.

Witness 4 clarified that the CCTV was already in place before this incident had happened and, therefore, had not been requested by employees as a result of this specific incident.

When asked whether the BID employees had received a written apology from the Respondent, witness 4 stated that she understood one had been sent via email, but explained she had been absent from work when it was received.

Witness 5: Witness 5 advised that she was the Manager of the Linlithgow Community Development Trust, which worked in partnership with One Linlithgow BID. Witness 5 advised that she had popped into the BID’s office on 27 July 2022 and had been talking to witnesses 1 and 4, who were the only members of staff present. Witness 5 stated had not seen the Respondent arrive, but had noted that she was aware someone had come to the door and that witness 1 had gone to attend to them.

Witness 5 explained that while she had been trying not to listen to the conversation between the Respondent and witness 1, she had become aware that the Respondent had raised her voice and sounded angry. Witness 5 advised that the change in the Respondent’s demeanour had been “quite sudden”, and that she had repeated that she was on the board in a raised voice. Witness 5 indicated that she thought the interaction between the Respondent and witness 1 had lasted a few minutes.

Witness 5 advised that exchange had been “very awkward” and had left her feeling uncomfortable. Witness 5 stated that as it was apparent witnesses 1 and 4 were upset as a result of the incident, she had been concerned for them. Witness 5 advised that while the Respondent had always been polite when they had interacted in the past, the incident at the BID’s office had been different.

Witness 5 stated that after the Respondent had left, she had stayed for a few minutes to speak to witnesses 1 and 4, before making her excuses and leaving. Witness 5 confirmed that she had subsequently written to the Chair of One Linlithgow BID about the incident. Witness 5 explained she had done so as she had seen how much it had upset the staff members present. Witness 5 noted that she considered the Respondent’s behaviour to be unacceptable and indicated that she had raised the matter with the Chair as she would not have tolerated conduct of that nature being directed towards her own staff.

In response to cross-examination, witness 5 noted that as the incident had taken place some time ago, it was difficult to recall the specifics, but that she was willing to accept the interaction between the Respondent and witness 1 had not been more than two minutes in duration. Witness 5 confirmed that she considered both witness 1 and witness 4 had appeared to be shocked by the Respondent’s behaviour, with witness 1 also seeming to be shaken. Witness 5 advised that she had not paid much attention to the interaction until she heard the Respondent’s tone change and her insist that she was on the board. Witness 5 advised she did not recall hearing any abusive language or profanities being used during the exchange.

In response to questions from the Panel, witness 5 advised she would not necessarily describe the Respondent’s conduct as amounting, absolutely, to yelling or shouting. Witness 5 reiterated, nevertheless, that there had been a really big difference in the Respondent’s tone and the volume at which she was speaking between the start and end of the exchange, which had made it confrontational. Witness 5 stated that witness 1 had looked upset afterwards and had appeared to be nearly on the verge of tears.

Submissions made by the ESC’s Representative

The ESC’s representative advised the Respondent attended the One Linlithgow BID’s office on 27 July 2022, without an appointment, to deliver a cheque. The cheque was unrelated to either the work of the BID or the Respondent’s role as a councillor.

The ESC’s representative explained that BIDs were set up to unite all local businesses, community, transport groups, leisure facilities and heritage sites to encourage them to work collectively to create a thriving and engaging environment for businesses, the community, and visitors. The ESC’s representative explained that, as a result of her being a ward councillor for Linlithgow, the Respondent, along with the town’s other two ward councillors, had been nominated by the Council to the board of One Linlithgow BID. It had also been agreed at a meeting of the Council Executive, on 7 June 2022, that all three ward members were also to be nominated to as directors of the BID. The ESC’s representative noted while the Respondent had already been nominated by the Council to be a director by the time she visited the BID’s office on 27 July 2022, the paperwork to formalise this appointment had not been completed.

The ESC’s representative noted that witnesses 1, 4 and 5 were present in the One Linlithgow office when the Respondent arrived. The ESC’s representative noted that while witness 1 had provided an undated witness statement to the one of the Complainers (the chair of the BID), she had not engaged with the ESC during the investigation process and had not responded to any requests for contact.

Turning firstly to the question of whether the Code applied to the Respondent at the time of the incident in question, the ESC’s representative noted that the Respondent’s position was that she had attended the BID’s office only to deliver a cheque to reimburse its manager for expenses incurred in respect of an event that was unconnected to the Respondent’s position as a councillor. The ESC’s representative accepted that while this may have been the case, it was not in dispute that during her visit, the Respondent engaged in a short discussion with witness 1 about her status in respect of being a member of the BID’s board. The ESC’s

representative noted that witness 1 advised, in her witness statement, that the Respondent had insisted during this discussion that she was a member of the BID's board. This contention had been supported by both witnesses 4 and 5 in their evidence before the Hearing. The ESC's representative noted, therefore, that the Respondent had referred to herself as a board member (a position she held or was to hold solely by virtue of being a councillor) during the incident.

The ESC's representative reiterated that the Respondent's nomination as a member of the BID's board was entirely the result of her being a councillor and ward member for Linlithgow. The ESC's representative contended, therefore, that it would be reasonable for anyone who had observed the incident, and heard the Respondent's referral to herself as a member of the BID, to have objectively considered her to be acting in the capacity as a councillor at the time. As such, the ESC's representative argued that Code was engaged.

The ESC's representative drew the Panel's attention to emails exchanged between the Respondent and witness 1 on the morning of 27 July 2022, before the Respondent's visit to the BID's office. The emails concerned whether the Respondent was entitled to distribute a strategy and arrange a meeting for the BID. The ESC's representative noted that it was apparent from the emails that while the Respondent considered that she was, by then, a member of the BID's board (by virtue of her council appointment), witness 1 did not consider this was the case.

The ESC's representative noted that witnesses 1, 4 and 5 all contended that the Respondent's conduct had changed during her visit to the office when the subject of whether she was a board member of the BID and, therefore, entitled to the accounts or other paperwork had arisen. The witnesses contended that the Respondent had reacted angrily and had suddenly become louder and aggressive. The ESC's representative drew the Panel's attention to witness 1's written statement in which she stated that, upon being told she was not yet a member of the BID's board, the Respondent had "turned back angrily and belligerently with a pointing finger" and had stated that she was on account of having signed the requisite paperwork.

The ESC's representative advised that witness 5 emailed the chair of the BID the following day to advise her of the incident.

The ESC's representative noted that the Respondent's position was that her visit to the BID's office comprised of a very brief, and insignificant interaction at the office door, and that she did not recall having behaved in an aggressive manner. The Respondent had advised the ESC's Investigating Officer that, despite this, she had written to the BID to apologise if her completely unintentional behaviour had caused distress to any member of staff. The ESC's representative noted that the Respondent had not provided a copy of this apology email, despite requests to do so.

The ESC's representative contended that it was clear from the witnesses and evidence provided that, during the visit, the Respondent was angry about her status on the BID's board being questioned and had raised her voice and shouted. The ESC's representative noted that the Respondent accepted she had left the office abruptly and argued that this implied she had done so in a sudden and curt manner, following her exchange with witness 1. The ESC's representative further noted that witnesses 1, 4 and 5 described having been shocked by the Respondent's conduct and had advised it had made them feel uncomfortable. The ESC's representative contended, therefore, that there was evidence that the Respondent had, on the face of it, breached the requirement under paragraph 3.1 of the Code for councillors to treat others with courtesy and respect.

The ESC's representative advised, however, that the ESC did not consider the Respondent's conduct was sufficiently serious as to amount to either bullying or harassment. The ESC's representative advised that this was because the interaction between the Respondent and witness 1 had been very brief, with the Respondent leaving the office quickly afterwards. The ESC's representative noted that there was no evidence or suggestion of protracted shouting or aggression. The ESC's representative further noted that as there was

a physical barrier at the doorway, the Respondent had not entered the office and was not directly facing or in very close proximity to witness 1, which meant she would not have been able to intimidate her to any substantive degree.

The ESC's representative noted that the Panel would be obliged to consider whether a restriction on the Respondent's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), that a finding of breach and imposition of a sanction would entail, could be justified.

The ESC's representative submitted that it was likely that the Respondent would benefit from the enhanced protection to the right to freedom of expression afforded to politicians when discussing political matters or issues of public concern. This was because the Respondent referred to her nomination (which resulted from her status as a Linlithgow ward councillor) to the BID's board during the exchange. The ESC's representative noted that the nomination was made by the Council, given the BID's role in improving the local environment for businesses, the community, and visitors, which was a matter of considerable public interest. The ESC's representative further submitted that the Respondent's right to the paperwork she requested during the visit and her status as a council nominated board member were also matters of public interest.

The ESC's representative acknowledged that Article 10(2) allows restrictions that are necessary in a democratic society, and that this could include the right of a staff member to fulfil their role without undue disturbance and to be treated respectfully whilst doing so. The ESC's representative further noted that the Respondent was entitled to express her concerns or views about the status of her position on the BID's board, albeit she had done so in manner that was disrespectful and discourteous. The ESC's representative noted, nevertheless, that aside from raising her voice and pointing her finger, there was no evidence or suggestion that the Respondent had engaged in conduct that was gratuitous in nature. The ESC's representative noted that the Respondent had not made any personal attack or directed any threat towards any members of staff, and had not said anything that was offensive or shocking in nature.

The ESC's representative advised, therefore, that the ESC did not consider that the Respondent's behaviour was sufficiently shocking, offensive, and gratuitous as to justify a restriction on her right to freedom of expression. The ESC's representative accepted, nonetheless, that this was a decision for the Panel to make.

In response to questions from the Panel, the ESC's representative accepted that the raising of a voice, shouting and pointing could be described as gratuitous and that the witnesses had been shocked by the Respondent's conduct. The ESC's representative further accepted that staff of the BID had a right to work in a safe environment where they were not subjected to shouting and aggressive behaviour. The ESC's representative indicated, however, that it appeared the witnesses were more shocked at the change in the Respondent's demeanour during the incident, and the speed at which this occurred, rather than her conduct.

The ESC's representative further noted that, when the application of Article 10 was considered, a balancing exercise had to be undertaken, which involved weighing the enhanced protection to freedom of expression enjoyed by a Respondent against any restriction imposed by the application of the Code and the imposition of any sanction. The ESC's representative argued that, in this case, it was the ESC's view that the limited duration and nature of the exchange meant that a restriction on the Respondent's right to enhanced protection in respect of her right to freedom of expression could not be justified.

Submissions made by the Respondent's Representative

The Respondent's representative advised that the Respondent had chosen not to give evidence at the Hearing and had instructed that any cross-examination of witnesses should be kept to a minimum, in order to minimise any stress they may be experiencing. The Respondent's representative explained that the Respondent's position in this regard reflected the distress she felt about having inadvertently caused upset to others. The Respondent's representative noted that the Respondent had co-operated fully with both the

investigative and Hearing processes, which included seeking to agree, where possible, the factual basis of the complaint.

The Respondent's representative advised that she had been elected for the first time in May 2022, only some six weeks or so before the incident. The Respondent's representative explained that the Respondent was the only councillor from her party on the Council, meaning that she did not benefit from the experience of more senior colleagues. The Respondent's representative advised that as the Respondent ran a business in Linlithgow she had worked with the BID and had paid its levy for the past eight years, and that she continued to do so.

The Respondent's representative confirmed that the Respondent had been nominated, by the Council on 7 June 2022, to the board of the BID, as a result of her being a Linlithgow ward councillor. The Respondent's representative explained that the Respondent had visited the BID's office on 27 July 2022 to drop off a cheque, which was unrelated to her work or status as a councillor. As the Respondent was on her way somewhere else, she had been in a rush. The Respondent's representative confirmed that the Respondent had been unable to enter the office as the doorway was blocked. The Respondent's representative stated that the Respondent had passed the cheque to witness 1 and had then engaged with her in a brief discussion about the Respondent's entitlement to receive documents relating to the BID board. This had led to the discussion about the Respondent's status and whether she was, in fact, a board member or director of the BID at that time.

The Respondent's representative advised that the whole engagement with witness 1 had been very brief, in that it had lasted no more than a minute or two, before the Respondent had left. The Respondent had not seen anything to indicate, at the time, that witness 1 was shocked or distressed. The Respondent's representative noted that witness 1 had made no mention of being distressed, shocked or upset in her written statement.

The Respondent's representative noted that both witnesses 4 and 5 had indicated that the exchange between the Respondent and witness 1 had appeared normal until the point where they contended that the Respondent had suddenly and aggressively raised her voice, or shouted, to make the point that she was on the board and a director of the BID. Both witnesses agreed that the Respondent had then turned away and left. The Respondent's representative advised that the Respondent could not recall the exact words she had used in the exchange and, therefore, could not dispute the contention that she had said she was on the board. The Respondent's representative advised that as the Respondent had been busy and juggling various commitments, she had been distracted and had not considered the exchange to be of any particular significance at the time. The Respondent's representative stated, nonetheless, that the Respondent was not seeking to minimise any distress and upset she had caused, and advised that she had taken steps to apologise for her conduct.

The Respondent's representative noted witness 4's evidence that CCTV had already been installed by 27 July 2022 to help allay staff concerns about safety following previous incidents, so any reference to this was unconnected to the Respondent. The Respondent's representative further advised that there was no evidence to support any contention that any member of staff had sought to leave their post due to the incident on 27 July. She also stated that the Respondent had emailed an apology to the BID board.

The Respondent's representative accepted that the Respondent's conduct had not been ideal and indicated that she would have behaved differently if she had been aware of the potential affect it could, or indeed did, have. The Respondent's representative advised, in particular, that the Respondent regretted having raised her voice.

The Respondent's representative contended, however, that the Respondent's conduct, in stating that she was on the BID's board, would not reach the required threshold to amount to a breach of the courtesy and

respect provision in the Code. In support of this contention, the Respondent's representative noted that there was no evidence or suggestion that the Respondent had engaged in any personal abuse, used any profanities or that she had verbally attacked, abused or criticised witness 1. Instead, the Respondent's representative suggested that the incident could be characterised a fleeting exchange about an administrative matter.

The Respondent's representative nevertheless advised that if the Panel disagreed, and considered the Respondent's conduct amounted, on the face of it, to a breach of the courtesy and respect provision in the Code, then she was content to adopt the ESC's representative's submissions in respect of the Respondent's right to freedom of expression under Article 10 of the ECHR. The Respondent's representative noted that it was clear that the part of the exchange that was under scrutiny related to the Respondent's membership of the BID board, to which she had been appointed by virtue of being a councillor. The Respondent's representative contended that as the business of the BID was a matter of public interest the Respondent would attract the enhanced protection afforded to politicians when discussing matters of public concern.

Turning to the question of whether a restriction on the Respondent's enhanced right to freedom of expression was necessary, the Respondent's representative accepted that a legitimate aim of such a restriction was to maintain the standard of public discourse. The Respondent's representative argued, however, that it was a question of degree and, in this case, neither the Respondent's comments, nor the manner in which they had been expressed, could be considered as being sufficiently objectionable, egregious or shocking as to justify a restriction on her right to freedom of expression.

In response to a question from the panel, the Respondent's representative indicated that the apology had been sent by the Respondent to the BID Chair in March 2023, and apologised for not making this available to the ESC during their investigation.

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 Pattle.
2. The Respondent had, on the face of it, breached paragraph 3.1 of the Code.
3. A restriction on the Respondent's right to freedom of expression under Article 10 of the ECHR was not justified. As such, a formal finding of a breach of paragraph 3.1 of the Code could not be found.

Reasons for Decision

In reaching its decision as to whether there had been a breach of the Code, the Panel took the following three-stage approach, as outlined in the Standards Commission's Advice Note on the Application of Article 10 of the ECHR:

- First, 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 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 the Code applies in all situations, and at all times, where an individual is acting as a councillor, has referred to themselves as a councillor, or could be considered objectively to be acting as a councillor.

The Panel accepted that the Respondent attended the offices of One Linlithgow on 27 July 2022 to hand over a cheque in her capacity as a local business owner. The Panel found, nevertheless, that the Respondent referred to having been nominated by the Council to One Linlithgow's board, as one of the ward councillors for Linlithgow. The Panel further found that during the visit the Respondent engaged in a conversation with a member of staff as to whether she was a member of the board, or whether she had merely been nominated to it.

The Panel determined that the Respondent had self-identified as a councillor during the exchange. The Panel was further of the view that she could have been considered objectively to be acting as such during the exchange, given she referred to her status as a board member, and the council's decision to nominate her to the board. The Panel therefore agreed with the ESC's representative that the Code applied to the Respondent during the incident in question.

Having considered the evidence led, and the submissions made orally at the Hearing and in writing, the Panel found, on the balance of probabilities that the Respondent had become angry during the visit when challenged by witness 1, a member of staff, about whether she was a director and board member of the BID. The Panel further found, on the balance of probabilities, that the Respondent had used a loud and aggressive tone and pointed her finger at witness 1, leaving those present in the BID's office feeling shocked and surprised.

The Panel agreed with the ESC's representative, therefore, that in behaving in such a manner, the Respondent's overall conduct towards the member of staff present was objectively discourteous and disrespectful. As such, the Panel was satisfied that the Respondent had, on the face of it, breached the requirement under paragraph 3.1 of the Code for councillors to treat others with courtesy and respect.

The Panel further agreed with the ESC's representative, however, that the Respondent's conduct was not sufficiently serious as to amount to either bullying or harassment. In reaching this decision, the Panel noted that the part of the exchange that had caused concern was limited in duration and that there was no suggestion that the Respondent had been personally abusive towards witness 1. The Panel concluded, therefore, that the Respondent had not breached paragraph 3.6 of the Code.

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

Having found, on the face of it, that the Respondent had breached paragraph 3.1 of the Code, the Panel proceeded to consider the applicability of Article 10.

The Panel noted that enhanced protection of freedom of expression under Article 10 applies to all levels of politics, including local politics. The Panel further noted that the Courts have held that political expression is a broad concept and that there is little distinction between political discussion and discussion of matters of public concern¹. In this case, the Panel was satisfied that, during the incident, the Respondent's status as a councillor, apparent through her nomination by the Council as a ward councillor to the board of a local business body, was a matter of public concern. In the circumstances, the Panel considered 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 nevertheless noted that the right to freedom of expression is not absolute. Article 10(2) states that restrictions can be imposed, provided they are necessary in order to achieve a legitimate aim. As noted by the ESC's representative, legitimate aims can include ensuring that the conduct of public life at the local

¹ *Thorgeirson v Iceland (1992) 14 EHRR 843*

government level, including public debate, does not fall below a minimum level so that public confidence in democracy is not eroded. The Panel noted a restriction can also be imposed to protect the reputation and rights of others (including members of the public) and to ensure or maintain confidence in elected members and the council itself.

The Panel noted, however, that the Courts have found any restriction on freedom of expression must also be proportionate to the legitimate aim being pursued. As such, the Panel 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. The Panel proceeded to consider whether the restriction involved by the finding that the Code had been breached was therefore proportionate and justified, in terms of Article 10(2).

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 required.

Furthermore, the Panel noted that the Courts have held that, in a political context, a degree of the immoderate, offensive, shocking, exaggerated, provocative, controversial, colourful and emotive, that would not be acceptable outside that context, is tolerated.

The Panel noted it had found the Respondent had behaved in an aggressive manner towards witness 1, a BID employee, during the incident on 27 July 2022. The Panel accepted that the Respondent had considered she was on the board of the BID and, therefore, was entitled to raise concern about the refusal to provide her with the paperwork she had requested. The Panel agreed, however, there was no reason why she could not have raised her concerns in a respectful manner, without resorting to raising her voice and engaging in aggressive behaviour. The Panel was of the view, therefore, that the Respondent's conduct towards the employee in question had been somewhat egregious.

The Panel noted that a restriction on the Respondent's right to freedom of expression could be justified if it was necessary to protect the reputation and rights of others (which would include the right of BID employees to work in a safe environment and to ensure they were free from undue perturbation in order to perform their duties). The Panel considered, however, that the Respondent's behaviour in this case was not sufficiently shocking, offensive and gratuitous as to justify a restriction on her right to freedom of expression. This was because the Panel had not found that the Respondent had been abusive or that her conduct had amounted to a personal attack on any particular individual. The Panel noted that it had found the Respondent's discourteous and disrespectful conduct had been limited in both scope and duration. The Panel further accepted that the Respondent was attempting to explain her status as a board member, albeit that she had done so in an inappropriate and disrespectful manner. In the circumstances, the Panel determined the imposition of a restriction on the Respondent's right to freedom of expression would not be relevant, sufficient and proportionate.

The Panel concluded, therefore, that a formal finding of a breach of the Code could not be made.

Date: 6 December 2023



**Ashleigh Dunn
Chair of the Hearing Panel**