

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online on Tuesday 6 February 2024.

Panel Members: Ms Suzanne Vestri, Chair of the Hearing Panel
Ms Anne-Marie O’Hara
Ms Ashleigh Dunn

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/H/3759, concerning an alleged contravention of the Councillors’ Code of Conduct (the Code) by Councillor Maxine Smith (the Respondent).

The Respondent was represented by Mr Martin Smith, Solicitor, South Forrest. The ESC was represented by Mrs Sarah Pollock, Hearings and Investigations Officer.

Referral

Following an investigation into a complaint received on 28 May 2022 about the conduct of the Respondent, the ESC referred a report to the Standards Commission on 1 November 2023, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000.

On receipt of the referral report, the Standards Commission noted that the ESC had identified five issues of complaint. The ESC advised that he found that the allegations in respect of issues 2, 4 and 5, even if established, would be unlikely to result in a formal finding of a breach of the Code. The Standards Commission considered it had no evidence before it that would lead it to depart from this conclusion and determined, therefore, that it was neither proportionate, nor in the public interest, for it to consider issues 2, 4 and 5 at a Hearing. The Standards Commission determined, therefore, to take no action on the referral in relation to issues 2, 4 and 5.

The two remaining issues of complaint, to be considered at the Hearing, concerned an alleged contravention, by the Respondent, of paragraphs 4.20, 3.1 and 3.2 of the Code, 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.

3.2: I will not discriminate unlawfully on the basis of race, age, sex, sexual orientation, gender reassignment, disability, religion or belief, marital status or pregnancy/maternity; I will advance equality of opportunity and seek to foster good relations between different people.

Registration of Interests

Category Six: Interest in Shares and Securities

4.20 I have a registrable interest where: a) I own or have an interest in more than 1% of the issued share capital of the company or body; or b) Where, at the relevant date, the market value of any shares and securities (in any one specific company or body) that I own or have an interest in is greater than £25,000.

Preliminary Matters

The Panel Chair noted that the Standards Commission was unable to hold the Hearing in person as planned, due to weather-related travel disruptions. The Chair thanked all present for agreeing to attend the Hearing online at short notice.

Evidence Presented at the Hearing

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 it was not in dispute that, in relation to the first issue, the Respondent:

- was re-elected as a councillor on 6 May 2022;
- did not register her interests in Thistle Excursions Ltd and Venus Inc Salon until 27 October 2022, despite having received three email reminders to do so on 2 July 2022, 29 July 2022 and 15 September 2022;
- was receiving no remuneration from either Thistle Excursions Ltd or Venus Inc Salon at the time of completing her Register of Interests on 27 October 2022.

In respect of the second issue, the joint statement recorded that:

- the Respondent has been a member of the North Planning Applications Committee (the Committee) since 2007, and chaired it between 2017 and 2022;
- the Respondent's ward had four elected members, being the Respondent, the Complainer's wife, Councillor A and Councillor B. The Council required two elected members to sit on the Committee, with a third member available to act as a substitute if required;
- the Respondent sent a Ward Manager of the Council an email, on 13 May 2022, concerning the membership of the Committee. The Respondent stated in the email that she should join the Committee, and further advised that: *"planning needs someone who can be continuous and consistent. We need two from our ward. As [Councillor A] has a conflict of interest... I suggest [Councillor B] takes up the other position. You can discuss"*.

Submissions made by the ESC's Representative

The ESC's representative noted that the Respondent was first elected to the Council in May 2007 and represented the Scottish National Party (SNP) until 2020. The ESC's representative explained that the Complainer's wife was elected as an SNP councillor in May 2022 and represents the same ward as the Respondent.

In respect of the first issue, the ESC's representative noted that the Respondent was re-elected as a councillor following the local authority elections on 6 May 2022, and signed her Declaration of Acceptance of Office on 9 May 2022. The Code required all councillors, both new and returning, to complete a register of interests within one month of becoming a councillor, with the deadline for the Respondent therefore being 9 June 2022. The ESC's representative noted that Section 4 of the Code sets out what interests require to be registered and argued that compliance with its provisions was important, as it allows the public to have confidence that decisions are being made in the best interests of the public and not those of an individual councillor.

The ESC's representative advised that Companies House records demonstrated that the Respondent had been a director of Thistle Excursions Ltd and Venus Inc Salon, since 2019 and 2022, respectively. The ESC's representative noted that it was not in dispute that these business interests had been recorded on the Respondent's register of interests before the May 2022 election. The ESC's representative noted, however, that the previous register only applied before the election. After the election, it was removed and all new and returning councillors were required to complete a form recording their interests, which were then included on a new publicly available register. The ESC's representative noted, however, that the Respondent failed to complete and submit a form recording her interests by the 9 June 2022 deadline. The ESC's representative advised that it was not in dispute that emails were sent to the Respondent on 2 July, 29 July and 15 September 2022 reminding her to complete the registration of interest form.

The ESC's representative advised that it was not in dispute that the Respondent realised she needed to complete the form and re-declare her business interests and that she sought to do so at a Council meeting on 27 October 2022.

The ESC's representative drew the Panel's attention to a copy of one of the reminders sent by the Council to all elected members. The ESC's representative noted that this made it clear that councillors were required to complete and submit a new register of interests, "even if you are a returning councillor".

The ESC's representative advised that the Respondent's position was that while she had received the reminders, she had thought they were for new councillors only. The Respondent explained this was because she had failed to realise that she was required to re-register her interests, and had assumed her register of interests would carry forward after the election, as she thought that was what had happened previously. The ESC's representative noted that Respondent's position was, therefore, that the failure to register the business interests timeously was simply an oversight, and not an attempt to hide or conceal them.

The ESC's representative noted the Respondent recorded her interests in both businesses in October 2022 under the category 'Shares and Securities', despite having previously registered them under the category 'Remuneration'. When asked about this discrepancy by the Investigating Officer, the Respondent had confirmed that while she had not received remuneration from either business, she had a shareholding in both. The ESC's representative noted that, as no remuneration had or was due to be received, paragraphs 4.4 or 4.11 of the Code did not apply. The ESC's representative contended, however, that the Respondent had failed to comply with paragraph 4.20 of the Code, which requires councillors to register a shareholding amounting to more than 1% of the issued share capital of a company or body.

Turning to the second issue, the ESC's representative noted that it was not in dispute that, in response to the email from the Ward Manager asking for her views on which three of the four ward councillors should be put forward as candidates for membership and substitute membership of the North Planning Applications Committee, the Respondent stated in her email of 13 May 2022 that she should join the committee and that it also needed "someone who can be continuous and consistent". The Respondent mentioned that one of the other ward councillors, Councillor A, had a conflict of interest, and suggested therefore that another elected member, Councillor B, took up the other position. The ESC's representative advised that the Complainer believed the Respondent's intention was to exclude his wife (as the only other ward councillor), who was pregnant at the time. The Complainer contended, therefore, that the Respondent had been discriminatory.

The ESC's representative noted that the Respondent did not mention the Complainer's wife or make any reference to her being pregnant or likely to be absent due to maternity leave in her email. The ESC's representative noted, however, that there were only four ward councillors and that the Respondent referred to the other two, being Councillors A and B. The ESC's representative therefore contended that by the logical extension, the clear inference from the email was that the Respondent was not recommending the Complainer's wife be put forward as a candidate for the committee because she could not be 'continuous and consistent'.

The ESC's representative advised that the Respondent had explained, during the investigation, that she considered the Complainer's wife could not be nominated to the committee as she would be absent on maternity leave for at least a year and, as such, would not be able to undertake the training required or attend Committee meetings consistently. The Respondent advised that she was aware the last SNP councillor to become pregnant had taken some 18 months as maternity leave and, as she had heard the Complainer's wife intended to take maternity leave, she assumed that the Complainer's wife would be absent for a similar period. The ESC's representative noted that the Respondent explained she considered it was important that the ward was represented fully on the committee and that it would not be if one of its councillors was absent for a significant amount of time.

The ESC's representative noted that the Respondent's position was that she had not been prejudiced against the Complainer's wife on the basis of her likely maternity leave and would never discriminate against a fellow female councillor. The ESC's representative further noted that the Respondent had indicated that she had accepted the position when the Complainer's wife was ultimately appointed to the committee. The ESC's representative contended that it was nevertheless evident that the Respondent had sought to exclude the Complainer's wife from the committee because of her pregnancy and an assumption that she would take maternity leave.

The ESC's representative noted that paragraph 3.2 of the Code requires councillors to refrain from discriminating unlawfully on the basis of pregnancy or maternity. The ESC's representative noted that the Advisory, Conciliation and Arbitration Service (ACAS) defined discrimination as people treating an individual less favourably on the basis of a protected characteristic. The ESC's representative contended that while there was no legal definition of what a disadvantage would entail, it could include excluding an individual from an opportunity. The ESC's representative argued, in this case, that the Respondent did not nominate the Complainer's wife because of her own assumptions about her pregnancy and potential maternity leave (being a protected characteristic) and, in doing so, had treated her unfavourably on that basis. The ESC's representative contended that, as the Respondent's actions or comments may have prejudiced the Complainer's wife's chance of being nominated, the fact that she was eventually appointed to the committee was immaterial.

The ESC's representative accepted that the Respondent had not named the Complainer's wife in her email and that she had made a suggestion, not a demand; meaning the question of which councillors would be appointed to the committee was left open for discussion. The ESC's representative further noted that the Respondent's position was that, at the time, online attendance was not an option, meaning anyone nominated to it would need to be able to go to the committee meetings in person. The Ward Manager had indicated in her email, however, that video-conference facilities would be available from various locations across Highland. The Respondent advised that she was unaware of the fact that the Complainer's wife did not intend to take maternity leave and would be able to attend meetings. The ESC's representative noted, nevertheless that paragraph 3.2 also requires councillors to advance equality of opportunity and to seek to foster good relations between different people. The ESC's representative contended that by singling out the Complainer's wife and making assumptions about her maternity leave, and in seeking to draw a distinction between her and the other ward councillors, the Respondent failed to advance equality and foster good relations between different people.

The ESC's representative advised the ESC had concluded that the Respondent had discriminated against the Complainer's wife in her email of 13 May 2022, in making a judgement and expressing a view that related directly to her pregnancy and maternity leave and discriminated against her on that basis. The ESC had, therefore, concluded that the Respondent had, on the face of it, breached paragraph 3.2 of the Code.

The ESC's representative advised that the ESC did not consider there had been any breach of paragraph 3.1 of the Code as nothing in the Respondent's email of 13 May 2022 that could be categorised objectively as being disrespectful or discourteous.

Having concluded that there had, on the face of it, been a breach of paragraph 3.2 of the Code, the ESC's representative nevertheless noted that the Respondent would attract enhanced protection in respect of her right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). This was because she was commenting on a matter of public interest; namely which councillors should be nominated to the North Planning Applications Committee.

The ESC's representative accepted that the Respondent had a right to express her views and that she had not done so in a manner that was, on the face of it, offensive or gratuitous. The ESC's representative contended,

however, that a restriction of the Respondent's enhanced right to freedom of expression, that a finding of a breach of the Code, and the subsequent imposition of a sanction would entail, was justified in order to protect the right of another councillor to be nominated to a committee on merit and not to be excluded on the basis of a protected characteristic. The ESC's representative further argued that the restriction was justified to protect the Complainer's wife from discrimination and to maintain the bond of trust and confidence between elected members.

The ESC's representative noted that the Respondent had confirmed that her reference to the need to nominate someone who would be "continuous and consistent", reflected her view that the Complainer's wife would not meet these criteria. The ESC's representative noted that the Respondent had based this opinion on an assumption that the Complainer's wife would take a lengthy period of maternity leave, without having made any effort to establish whether this would be the case. The ESC's representative argued that councillors and other individuals should be treated fairly and should not be denied opportunities based on assumptions about protected characteristics, such as pregnancy and maternity leave. The ESC's representative contended that a restriction on the Respondent's enhanced right to freedom of expression was compatible with the pressing social need to respect the rights of individuals with protected characteristics. The ESC's representative concluded, therefore, that a restriction on the Respondent's right to freedom of expression that a formal finding of breach would entail was justifiable in the circumstances.

In response to questions from the Panel, the ESC's representative confirmed that no investigation into whether the Respondent had received remuneration had been undertaken, and that the ESC had based his conclusions on the Respondent's submissions and the entries on her completed register of interests. The ESC's representative advised that Venus Inc Salon had been incorporated on 8 August 2022. As councillors were required to register an interest within one month of any change having occurred, the failure to register the shareholding in that business was between 7 September and 27 October 2022.

When asked by the Panel about whether excluding the Complainer's wife on the grounds of her protected characteristics (or otherwise) was inherently disrespectful, the ESC's representative conceded that, in the wider sense it could be, and that the ESC had simply looked at the tone and nature of the language used by the Respondent in her email, when concluding there had not been a breach of paragraph 3.1 of the Code.

Witness Evidence

The Respondent's representative led evidence from the Respondent, who confirmed that she had first been elected as a councillor in May 2007. The Respondent explained that, throughout her time as an elected member she had held numerous roles, including being Chair of the Council's Planning Committee.

The Respondent advised that she was a mother and had carried on working through both her pregnancies. The Respondent advised that she knew how difficult it was for women to break through the 'glass ceiling', and considered they should be afforded all opportunities. The Respondent stated that, as such, she would never be prejudiced against another woman.

The Respondent explained, in respect of the second issue, that her email was sent in response to one from the Ward Manager asking who should be on the North Planning Applications Committee. The Respondent advised that, as was her normal practice, she had replied immediately. The Respondent indicated that she was often multi-tasking and tended, therefore, to reply without giving the response much thought. The Respondent noted that, at the time, she expected to be elected as Chair of the committee again and, as a consequence, wanted another councillor who would be present at the meetings to lead on applications within their ward, to ensure a consistent and continuous approach.

The Respondent advised that she was passionate about the work of the committee, given the significant impact its decisions could have on constituents in the ward. The Respondent explained that, if she was

chairing the committee and the other ward member was not present, an elected member from outside the ward would have had to lead on consideration of a ward-related item. The Respondent explained that this would not be ideal as they may have less of an understanding of the potential impact on or benefits to the ward. The Respondent accepted that a substitute member could attend, but noted that, as they were not given much notice of meetings, they were often unavailable. The Respondent explained that she had therefore reached the view that it would be better to ensure that the other ward member on the committee was someone who would be available to attend all training, planning sessions and committee meetings.

The Respondent advised that she had not intended to exclude the Complainer's wife from the committee and indicated that she was delighted when she later learned that the Complainer's wife had been appointed as a member and would be able to attend meetings virtually. The Respondent noted that she had not excluded the Complainer's wife from the email exchange (as she had copied in all three other ward councillors in her response of 13 May 2022). The Respondent further noted that she had concluded her email by inviting further discussions on the matter. The Respondent advised that she had taken no steps, beyond sending the email in question, to influence who was nominated or elected as a member of the committee.

When questioned why she had assumed the Complainer's wife might be unavailable, the Respondent advised that there was "general talk in the town" about the Complainer's wife being pregnant and that most people had discovered this after the election. The Respondent noted that she did not have a personal relationship with the Complainer's wife and had been competing against her in the election, so there had been no direct contact between them about the pregnancy or her intentions in respect of maternity leave. The Respondent advised that she had just assumed, based on what people were saying, that the Complainer's wife would take maternity leave. Had she known otherwise, she would not have made any suggestions about her lack of availability.

Turning to the first issue, the Respondent advised that some 40% of the Council's elected members were elected for the first time in 2022, meaning that numerous emails about training and induction sessions had been sent to all councillors immediately after the election. The Respondent accepted that she had received the three reminder emails about registering interests but explained she had simply not read them properly and had assumed they did not apply to her, as she had already registered her interests.

The Respondent advised that Thistle Excursions Ltd only started trading in 2019. The Respondent advised that she had mistakenly recorded her interest in it, before the 2022 election, under the 'Remuneration' category. The Respondent confirmed, however that she had invested in both the companies and had not yet received any remuneration from either. The Respondent advised that she advertised both companies on social media and had declared interests in both, in an effort to be transparent. As such, the failure to register had been simply inadvertent and not an attempt to conceal anything.

The Respondent advised that she had been alerted to the possibility that she might need to register her interests again on receipt of the third reminder email and had made a mental note to do so the next time she was at Council Headquarters in Inverness (which is a 45-minute drive away from where she lives). The Respondent confirmed that the Monitoring Officer had approached her and handed her the register of interest form when she next attended the Council Headquarters, for the Council meeting on 27 October 2022. The Complainer advised that she had immediately completed the forms and her register of interests was published shortly afterwards.

The Respondent reiterated that she had been unaware that her register of interests had not carried forward after the election, but that she accepted this had been her own fault. The Respondent apologised for her failure to record the interests timeously, as required by the Code.

In response to cross-examination by the ESC's representative, the Respondent accepted that she had made assumptions about the Complainer's wife and apologised for having done so.

In response to questions from the Panel, the Respondent indicated that the delay between her realising she would need to register her business interests, on receipt of the email of 15 September 2022, and her completing the form required to do so on 27 October 2022, was due to her setting up a new business in a new property and living in temporary accommodation some distance from the Council's Headquarters.

Submissions made by the Respondent's Representative

The Respondent's representative accepted that the Code applied to the Respondent at the time of the events in question and was, therefore engaged.

The Respondent's representative noted, in respect of the first issue, that there was no dispute that the Respondent should have registered her shareholding in both businesses before 27 October 2022 and that she had failed to do so, despite having received reminders from the Council. The Respondent's representative confirmed that the Respondent had not received remuneration from either company in question, and that her register of interests was now correct.

The Respondent's representative advised that the Respondent accepted that she had a personal responsibility to ensure her register of interests was correct and that she had failed to meet this obligation. The Respondent's representative contended, nevertheless, that the Respondent's failure in this regard was entirely inadvertent and that there had been no intention or attempt to conceal her involvement in the businesses, as evidenced by the fact that she had declared interests in both companies. The Respondent's representative noted that the Respondent had updated her register of interests and ensured it was correct before she was advised that a complaint had been made to the ESC.

Turning to the second issue, the Respondent's representative contended that it was arguable that the Respondent's email of 13 May 2022 did not, in itself, amount to breach of paragraph 3.2 of the Code, but accepted that the explanation she had given the ESC about her reasoning for not suggesting the Complainer's wife be put forward for membership of the committee could not be ignored. The Respondent's representative accepted, therefore, for the reasons given by the ESC that, on the face of it, there had been a potential breach of paragraph 3.2.

The Respondent's representative contended, nevertheless, that a restriction on the Respondent's right to freedom of expression under Article 10 of the ECHR was not justified. The Respondent's representative agreed with the ESC that the Respondent would attract the enhanced protection, in respect of her right to freedom of expression, that was enjoyed by politicians when discussing matters of public concern. The Respondent's representative reminded the Panel that the enhanced protection of freedom of expression applies to all levels of politics, including local, and that the Courts have held that there is little distinction between political discussion and discussion of matters of public concern.

The Respondent's representative noted that enhanced protection applies broadly and includes statements of opinion. The Respondent's representative further noted that the Courts have held that comments made in a political context, which amount to value judgements, are tolerated even if untrue, as long as they have some or any factual basis. Even a statement of fact will be tolerated if what was expressed was said in good faith and there is some reasonable (even if incorrect) factual basis for saying it. The Respondent's representative argued that the Respondent's email was an extraction of her opinion on how the ward should be represented in light of her genuine understanding at the time, that she would be the committee Chair and what would happen if no other councillor from the ward was able to attend the committee meetings.

The Respondent's representative contended that the Respondent had a basis for her view that the Complainer's wife would not be able to attend the meetings, given what was being said by others. As such, the Respondent's representative argued that the Respondent had made her suggestion in good faith and based on genuine concerns. The Respondent's representative noted that the Respondent had sent the email without giving it much thought over and above her desire to highlight what she perceived as genuine, practical issues. While the Respondent's representative argued that the Respondent's conduct was not sufficiently rash as to be considered careless, he nevertheless noted that the Courts have held that, as a general proposition, freedom of expression includes the right to say things which "right thinking people" would consider irresponsible¹.

The Respondent's representative argued, in any event, that a restriction on the Respondent's right to freedom of expression was not proportionate in the circumstances. The Respondent's representative explained that the Respondent had merely expressed a view based on her own experience of pregnancy with the clear and legitimate purpose of protecting the effective functioning of the committee. The Respondent's representative contended that the Respondent had not intended to discriminate against the Complainer's wife on the grounds of pregnancy or maternity leave. The Respondent's representative argued that a restriction was not proportionate as it would restrict the Respondent's ability to express her view on a matter of concern to her; namely whether the other ward councillor nominated for the committee would be able to attend its meetings. The Respondent's representative argued that, if the Panel accepted the ESC's view that a restriction was justified, then the only other way for the Respondent to have raised concerns about the Complainer's wife's nomination to the committee would have been to pretend they were based on something else, which in turn would mean that any issue about attendance at the meetings could never be addressed.

The Respondent's representative noted that the Courts have held that a restriction on an individual's enhanced right to freedom of expression is harder to justify if the conduct in question is not particularly bad or shocking. The Respondent's representative argued that this was the case here, as the Respondent had only mentioned the need for consistency when identifying who should be on the committee. The Respondent's representative noted that there was nothing abusive, offensive or shocking about the manner in which the Respondent had expressed her views.

The Respondent's representative accepted that it was legitimate to restrict an individual's right to freedom of expression for the aim of maintaining standards and protecting the rights of others. The Respondent's representative noted, however, that in this case the Respondent had made a suggestion and expressed a view based on a valid and genuine concern in the one email only. She had not attempted to interfere with the nomination process any further and accepted the Complainer's wife's subsequent appointment to the committee.

The Respondent's representative noted that the Courts have held that politicians are expected and required to have thicker skins and have more tolerance to comment than ordinary citizens. The Respondent's representative suggested, therefore, that as a fellow politician of equal status, the Complainer's wife would be expected to have more tolerance and be able to withstand comments she may not like.

The Respondent's representative noted that the fact that the Complainer's wife was appointed to the committee was not irrelevant as it demonstrated the Respondent's actions did not result in a loss of opportunity. The Respondent's representative accepted that the Respondent had strayed into a difficult area with the comment and had not shown care, but reiterated she was expressing a genuine concern in good faith. The Respondent's representative contended, in the circumstances, a restriction on the Respondent's

¹ *Calver, R (on the application of) v The Adjudication Panel for Wales (Rev 2)* (2012) EWHC 1172 (Admin)

right to freedom of expression that a finding of a breach of the Code and imposition of a sanction would entail was not justified.

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 Smith.
2. The Respondent had breached paragraphs 3.1, 3.2 and 4.20 of the Code

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 considered carefully the evidence led, and the submissions made orally at the Hearing and in writing.

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. In this case, the Panel noted that there was no dispute that the Respondent was acting in her capacity as a councillor, both when completing and updating her register of interests and also when corresponding with the Ward Manager in relation to the membership of the Council's North Planning Applications Committee. The Panel was satisfied, therefore, that the Code applied to the Respondent at the time of the events in question.

The Panel noted that it was not in dispute, and found that the Respondent had breached paragraph 4.20 of Code by failing to timeously register her shareholding in Thistle Excursions Ltd between 9 June and 27 October 2022; and in Venus Inc Salon between 7 September and 27 October 2022. The Panel noted that this was despite three reminders having been issued to elected members, including one that clearly stated that even returning councillors were required to complete and submit a new register of interests. While the Panel acknowledged the Respondent's evidence that, due to other commitments, she had been unable to hand in her completed register of interest form between receipt of the reminder email of 15 September 2022 and 27 October 2022, it did not accept this was a mitigatory factor, given the information could have been provided to the Council by other means.

Turning to the second issue, the Panel noted that it was not in dispute that the council's Ward Manager had sent an email to the four ward councillors (the Respondent, the Complainer's wife, Councillor A and Councillor B) seeking nominations for certain committees. The Panel noted that it was further not in dispute that in an email response of 13 May 2022, the Respondent stated that the Council's North Planning Applications Committee "needs someone who can be continuous and consistent. We need two from our ward. As [Councillor A] has a conflict of interest... I suggest [Councillor B] takes up the other position. You can discuss."

The Panel noted there had been no mention by the Respondent of the Complainer's wife in the email in question. The Panel was satisfied, however, that given the Complainer's wife was the only ward councillor not mentioned, a reasonable inference was that she was not considered by the Respondent to be "continuous and consistent".

The Panel noted there had also been no mention by the Respondent of the Complainer's wife's pregnancy, or intention to take maternity leave. The Panel further noted, however, that there was no dispute that, in her response to the ESC's investigation into the complaint, the Respondent advised that she considered the Complainer's wife "couldn't" be on the committee, "as she would be away on maternity leave for at least a year and it requires training and consistency of attendance".

The Panel acknowledged the Respondent's position that it had not been her intention to discriminate against the Complainer's wife. The Panel further acknowledged that the Respondent felt passionately about the effectiveness of the committee and that her aim had been to ensure that two councillors from her ward were on the committee, and in a position to attend its meetings, to ensure that any potential impact on their constituents could be considered.

The Panel considered, nonetheless, that given the Respondent's own admission that she did not put the Complainer's wife forward due to her pregnancy and assumptions about any ensuing maternity leave, meant that the Respondent had failed to advance equality of opportunity. The Panel found, therefore, that the Respondent had, on the face of it, breached paragraph 3.2 of the Code.

The Panel further found that the Respondent, in making assumptions and in seeking to exclude the Complainer's wife based on such assumptions, without making any effort to check they were correct, had been both discourteous and disrespectful and had, on the face of it, also contravened paragraph 3.1 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 paragraphs 3.1 and 3.2 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 politics². 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 concern³. In this case, the Panel was satisfied that the Respondent's conduct occurred in the context of her expressing views on nomination to a council committee, being 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 government level, including public debate, does not fall below a minimum level so that public confidence in

² *Jerusalem v Austria (2003) 37 EHRR 25*

³ *Thorgeirson v Iceland (1992) 14 EHRR 843*

democracy is not eroded. The Panel noted a restriction can also be imposed to protect the reputation and rights of others 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 noted that the Courts have also 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 further noted 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.

The Panel accepted that Courts have held that comments made in a political context, which amount to value judgements, are tolerated even if untrue, as long as they have some or any factual basis. Even a statement of fact will be tolerated if what was expressed was said in good faith and there is some reasonable (even if incorrect) factual basis for saying it.

The Panel further accepted that the Respondent may have made her suggestion, to the effect that anyone appointed to the committee would need to be able to attend its meetings, in good faith. The Panel further accepted that, as the Complainer's wife was pregnant, the Respondent had a reasonable basis for an assumption that she might take maternity leave (even if this turned out to be incorrect). The Panel noted, however, that there was a difference between the making of such an assumption, and discriminating against an individual on the basis of their presumed pregnancy or maternity leave.

While the Panel had no reason to doubt that the Respondent had expressed her views in good faith, and with the aim of protecting the committee and its effectiveness, it noted that she had based this view entirely on two assumptions; the first being that the Respondent would be taking maternity leave, and the second being that this would prevent entirely her ability to attend meetings and any training sessions as required.

The Panel considered that the Respondent's conduct, in assuming and inferring the Complainer's wife would not be suitable for nomination to the committee, was gratuitous in nature. This was because the Panel considered that there had been nothing to prevent the Respondent from advising the Ward Manager that she considered it was vital that any other individual nominated to the committee must be available to attend training and participate fully in its meetings. It would then be a matter for the council and committee to decide whether they agreed and, if so, to make arrangements to ensure a member's availability was managed appropriately. The Panel considered that the Respondent should have been aware that by making such the two assumptions outlined above, and expressing a view based entirely upon them, there was a real risk of discrimination against the Complainer's wife (by excluding her from an opportunity on the basis of protected characteristics). The Panel considered, therefore, that the Respondent should not have made a statement from which it could be inferred that she was recommending the Complainer's wife be excluded from consideration for nomination to the committee, based on the likelihood of her being unable to attend its meetings and any associated training before the Complainer's wife made her intentions in respect of any maternity leave arrangements publicly known. The Panel accepted the ESC's representative's argument that a restriction on the Respondent's enhanced right to freedom of expression was compatible with the pressing social need to respect the rights of individuals with protected characteristics.

The Panel found that there was no question of the Respondent being prevented from expressing her view on the importance of the individual appointed being able to attend training and meetings, or any issues about the manner in which she had expressed that view. Instead, the Panel found a breach of the Code was because the Respondent's conduct in attempting to exclude the Complainer's wife, on the grounds of pregnancy/maternity, failed to advance equality of opportunity. The Panel determined, as such, that a restriction on her right to freedom of expression was relevant, sufficient and proportionate and was required to achieve the legitimate aims of:

- protecting the rights of a fellow councillor;
- maintaining the bond of trust and confidence between elected members;
- helping ensure confidence in elected members and the Council itself; and
- ensuring that the conduct of public life at the local government level does not fall below a minimum level of acceptable standard.

The Panel was satisfied, therefore, that the imposition of a restriction on the Respondent's right to freedom of expression in the circumstances was relevant, sufficient and proportionate. The Panel concluded, therefore, that it was satisfied that a finding of breach, and the subsequent application of a sanction, would not contravene Article 10. It concluded a finding of a breach of paragraphs 3.1 and 3.2 could be made.

Evidence in Mitigation

The Respondent's representative advised that the Respondent had been a dedicated member of Highland Council for many years and noted that, during her time as an elected member, she had held a number of council positions, including budget leader, and chair of the Planning, Tourism and Licensing Committees. The Respondent's representative advised that some of these positions had been held when the Respondent served in the opposition, which indicated she was trusted and well-regarded across the Council.

The Respondent's representative drew the Panel's attention to the character references submitted on behalf of the Respondent, which described her kindness, empathy, honesty and determination in her work to help constituents in her ward and beyond.

The Respondent's representative noted that it was with sadness and regret that the Respondent found herself before the Panel and explained that the experience had been distressing both for her and her family. The Respondent's representative noted that it was a one-off exception to what otherwise had been an exemplary council career.

The Respondent's representative highlighted the inadvertent nature of the breach in respect of the first issue and reiterated that the Respondent had taken steps to update and correct her register of interests before being advised of the ESC's investigation. The Respondent's representative noted that the Respondent had apologised for her failure in this regard.

Turning to the second issue, the Respondent's representative reiterated that the Respondent had other, extraneous concerns on her mind at the time she sent her email. The Respondent's representative had explained the Respondent had been seeking to raise a genuine concern, but accepted that she had strayed into a potential breach of the Code by expressing a view based on assumptions she had made about the Complainer's wife. The Respondent's representative advised that it had been a single, unfortunate lapse on the part of the Respondent.

SANCTION

The decision of the Hearing Panel was to suspend, for a period of one month, with effect from 14 February 2024, the Respondent, Councillor Smith, from all meetings of the council and of any committee or sub-

committee thereof and of any other body on which the councillor is a representative or nominee of the council or body. The suspension will end at midnight on 13 March 2024.

This sanction is made under section 19(1)(c) terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

Reasons for Sanction

In determining the appropriate sanction, the Panel considered:

- first, whether the interference (i.e. the proposed sanction) was the minimum necessary, or whether less restrictive means could be employed; and then
- second, whether the benefit of that least restrictive measure outweighs its adverse impact on the Respondent's right to freedom of expression. For example, whether any benefit in applying a sanction in respect of protecting the rights and reputations of others, and to ensure good administration which enables local government to function effectively, would outweigh any impact on the Respondent.

In making its decision on sanction, the Panel had regard to the Standards Commission's Policy on the Application of Sanctions. A copy of the policy can be found on the Standards Commission's website, here: <https://www.standardscommissionscotland.org.uk/cases/hearing-rules>.

The Panel began by assessing the nature and seriousness of the breaches of the Code. The Panel noted that the Respondent had agreed, as part of her acceptance of office as a councillor, that she would abide by the terms of the Code, which clearly included the requirement to behave with courtesy and respect towards everyone, at all times, and to advance equality of opportunity, when acting as a councillor.

The Panel noted that the requirement to behave with courtesy and respect is a key requirement of the Code. The Panel noted that a failure to do so can lower the standards of public debate and can have an adverse impact on the wellbeing of others. The Panel also noted that a failure to comply with the provision in the Code requiring councillors to advance equality of opportunity could also have a serious consequence for any individual directly affected. It could also impact adversely upon the effective functioning of the Council and prevent or discourage diverse participation in local politics.

The Panel noted that the requirement for councillors to keep their register of interests up to date is important as it gives the public the opportunity to consider whether a councillor's interests may or may not influence their discussion and decision-making.

The Panel reviewed impact statements received from both the Complainer and his wife. The Panel noted, in particular, that the Complainer's wife had indicated that the Respondent's conduct had made her feel that she had to always be available for Council business even when she felt she needed a break.

The Panel then considered the aggravating and mitigating factors as set out in the Policy on the Application of Sanctions, beginning with those in mitigation. The Panel noted that mitigating factors are those which may lessen the severity or culpability of the breach.

The Panel was pleased to note, in mitigation, that the Respondent had co-operated fully with the investigative and Hearing processes and had offered an unreserved apology in respect of her failure to register her business interests timeously. The Panel had no reason to doubt the Respondent's representative's submission that the Respondent's failure to comply with the Code in this regard was inadvertent and an oversight. In addition, the Panel accepted that there was no evidence of dishonesty or concealment, or of any previous contraventions of the Code by the Respondent.

The Panel noted it further had no reason to doubt the Respondent's representative's submission that, at the time of sending the email in question, the Respondent had been attempting to express a genuinely-held concern about the need for someone to be available to attend committee meetings, and accepted, in hindsight, that she should have given the matter more thought before sending her email. The Panel also acknowledged that the Respondent was passionate about planning and had been motivated by an aim to protect the effectiveness of the committee.

The Panel acknowledged the Respondent's longstanding contribution to public life and the numerous positions she had held during her time as an elected member. The Panel further acknowledged the character statements submitted on the Respondent's behalf, outlining her commitment to public service, her constituents and the local area.

The Panel then proceeded to consider the aggravating factors; being ones that may increase the severity or culpability of the breach.

The Panel noted the Respondent's position was that she had understood her register of interests would continue following her re-election as a councillor. The Panel nevertheless considered the reminders she received should have put her on notice that this was not the case.

The Panel further noted that while the Respondent had proffered, at the investigation stage, an apology for her oversight in failing to maintain her register of interests, she had not apologised for her failure to advance equality of opportunity until the Hearing itself.

In addition, the Panel noted that it had found that the Respondent had made assumptions about the Complainer's wife that could have resulted in her being discriminated against (by not being afforded an opportunity to be on the committee), on the basis of presumed protected characteristics.

Having considered the nature and seriousness of the breach, as well as the aggravating and mitigating factors present, in the circumstances of the case, the Panel concluded that a suspension was the appropriate sanction. The Panel accepted that the breach in respect of the first issue was inadvertent, and the conduct that was the subject of the second issue was limited to a single event. The Panel did not consider, therefore, that a disqualification or lengthy suspension was warranted or justified. The Panel was of the view, however, that a censure, being the minimum sanction available to the Panel, was not appropriate in light of the impact the Respondent's conduct had on the Complainer's wife, and the effect it could have had in terms of fostering good relations and ensuring equality of opportunity.

In the circumstances, and after a great deal of consideration, the Panel concluded, on balance, that a suspension of one month was the appropriate sanction. In reaching this decision, the Panel was mindful that it was obliged to select a sanction that involved the minimum interference necessary with the Respondent's right to freedom of expression under Article 10, while achieving the aims of maintaining standards in public life and protecting the rights and reputation of others.

Date: 13 February 2024



**Suzanne Vestri
Chair of the Hearing Panel**