

EAST HERTS COUNCIL

STANDARDS COMMITTEE – 06 MARCH 2006

REPORT BY THE MONITORING OFFICER

6. CASE SUMMARIES AND RECENT DEVELOPMENTS

WARD(S) AFFECTED: None

'D' RECOMMENDATION - that the report be received.

1.0 Purpose/Summary of Report

1.1 The purpose of the report is to consider case summaries issued by the Standards Board for England which are within the remit of the Committee.

2.0 Contribution to the Council's Corporate Objectives

2.1 The report contributes to the Council's corporate priority to deliver responsible community leadership by ensuring that the highest standards of corporate governance are maintained.

3.0 Background

3.1 There have been two cases considered by the Committee in the current Civic Year.

4.0 Report

4.1 The Committee is asked to note the case summaries set out below:

4.1.1 SBE case number: SBE 13202.05 to 13205.05
Completed: 11 July 2006
Members: Councillors A Alder, D Filler, M Taffs, J E Vincent
Authority: Sawbridgeworth Town Council
Allegation: Failure to register and declare interests
SBE Outcome: The Committee found that the Councillors had failed to register and declare interests but that no further action be taken.

4.1.2 SBE case number: SBE 14298.06
Completed: 15 November 2006
Member: Councillor C Geall
Authority: Hertford Town Council
Allegation: The Member had breached the Code of Conduct.
SBE Outcome: The Committee considered there was no case to answer nor was there any evidence of any failure to comply with the Code of Conduct

5. Recent Court Cases

5.1 Recent cases of particular note on a national basis have been included at Appendix 'A6' (Pages 6.3 – 6.16) for Members' information.

6.0 Consultation

6.1 There has been no consultation.

7.0 Legal Implications

7.1 These are contained within the report.

8.0 Financial Implications

8.1 There are none.

9.0 Human Resource Implications

9.1 There are none.

10.0 Risk Management Implications

10.1 The case summaries show the importance of training and advice for standards issues.

Background Papers

Case summaries.

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Councillor with conflict of interest suspended

North Norfolk district councillor Michael Baker was suspended from office for 12 months, following a hearing of the Adjudication Panel for England on 9 January 2006.

The panel's tribunal decided that Councillor Baker had breached the Code of Conduct by taking part in a meeting in which he had a prejudicial interest. The tribunal expressed concerns that members and council officers had not clearly explained the councillor's obligations under the Code of Conduct.

The decision in the case clarifies councillors' duties when they have conflicts of interest in meetings, particularly in relation to the current definition of personal and prejudicial interests and the implications of human rights legislation.

The planning application

Councillor Baker was found to have taken part in the consideration of his own company's planning application for flats and shop storage at the council's development committee meeting on 3 February 2005.

Councillor Baker was the managing director of the company, as well as a company shareholder and employee. However, he did not declare an interest at the meeting, nor withdraw from the room when the application was discussed.

Official capacity

Councillor Baker said that he attended the meeting as an applicant, and not as a councillor. However, the case tribunal referred to a Court of Appeal judgment — *R. (on the application of Richardson) v North Yorkshire CC* [2003] EWCA Civ 1860. This judgment stated that members could not avoid the rules on interests by claiming to be present at meetings in a professional capacity. He would still be a member, and regarded as representing his authority.

There was a potential conflict of interest between Councillor Baker's role as an applicant, and his role as an elected member. His ability to take part in the meeting was restricted by the rules on personal and prejudicial interests in the Code of Conduct.

Personal and prejudicial interests

Members of the committee appeared to be aware of Councillor Baker's interest in the application, but no one seemed to challenge his participation at the meeting. Councillor Baker later claimed that he had not sought to take advantage of his position, but had acted to help build affordable housing for the company's employees, which he regarded as "social housing". However, the test of whether he had a prejudicial interest was an objective one, set out in the Code of Conduct.

The Code states that a member has a personal interest if it relates to one of their interests in the register of interests, or if it could be regarded as affecting his financial position or well-being to a greater extent than others in the area of the authority. A member also has a prejudicial interest if it is one that a member of the public would reasonably regard as so significant that it is likely to impair their judgment of the public interest.

The Adjudication Panel's case tribunal found Councillor Baker had both a personal and prejudicial interest according to these criteria. He was the managing director of the company, as well as a shareholder and employee, and a decision on the application would affect him more than others in the area of the authority. The tribunal also found that a member of the public would be in no doubt that Councillor Baker had a prejudicial interest.

Councillor Baker accordingly had a duty under the Code of Conduct to declare a personal interest and withdraw from the meeting when the application was considered.

Human rights

The case tribunal also looked at the implications of human rights legislation for members making representations at council meetings.

Councillor Baker argued that it was unfair in terms of his human rights that he had been denied the right to speak on the application as a result of his holding office.

Article 6 of the European Convention on Human Rights states that "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The tribunal found that the company had the right to a fair and public hearing and to send anyone to make representations except Councillor Baker, who was prevented from doing so by the Code of Conduct. The tribunal regarded this as a proportionate and lawful restriction to prevent bias and ensure that the planning process was fair:

“The restriction on the company, as to who could represent them ... was a proportionate restriction in pursuit of a legitimate aim, to prevent bias and ensure fairness in the planning decision making process.”

There was also a question of whether this restriction infringed Councillor Baker’s right to freedom of expression.

Article 10(1) of the convention states that:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority...”

However, Article 10(2) states that:

“The exercise of these freedoms ... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others...”

The tribunal found that Councillor Baker’s undertaking to comply with the Code of Conduct restricted his right to freedom of expression. The tribunal decided that this was not an infringement of his human rights, as the restriction was in accordance with the law and “necessary in a democratic society for the protection of the rights of others”.

The tribunal took into account the High Court judgment *Sanders v Kingston* [2005] EWHC 1145. This judgment found that interference with freedom of expression was lawful and justified by the need to protect the rights of others in a democracy, in accordance with Article 10(2) of the convention. The judge concluded that the member was not expressing political opinions, which have a higher level of protection.

The case tribunal’s decision

The Adjudication Panel's case tribunal decided that Councillor Baker had failed to comply with the Code of Conduct by failing to declare a personal interest, failing to withdraw from a meeting when a matter in which he had a prejudicial interest was considered, and improperly seeking to influence a decision on the matter.

The tribunal also decided that Councillor Baker had brought his office or authority into disrepute, particularly by choosing to ignore the advice of council officers before and during the meeting.

The 12-month suspension was imposed in view of the seriousness of the breach, but took into account the fact that Councillor Baker had not received clear advice at the meeting.

Former Mayor disqualified for improper conduct toward clerk

Councillor Anthony Prior, the former Mayor of Chard Town Council and a member of South Somerset District Council, was disqualified for nine months, following a hearing of the Adjudication Panel for England on 21 June 2006.

The panel's tribunal found that Councillor Prior had breached the Code of Conduct by inappropriately asking the town clerk, for whom he had line management responsibilities, to go on holiday with him and offering her £500 as a present if she declined. The tribunal found that that by this conduct Councillor Prior brought his office into disrepute.

Councillor Prior later issued the clerk with a written warning when he found out she had sent a copy of a grievance letter to the Standards Board for England. Councillor Prior also issued a press release in which he made an unjustified public attack on the clerk and published her home phone number. The tribunal found that this behaviour was disrespectful to the clerk, and brought Councillor Prior's office into disrepute.

Not all of the complaints about Councillor Prior were upheld at the hearing. The tribunal found that on a number of occasions Councillor Prior's conduct was motivated by genuine concerns over the clerk's performance or the efficient running of the council.

The decision in the case helps to clarify the distinction between legitimate criticism of council officers and inappropriate conduct. Members should, of course, be able to exercise their right to challenge officers, and the Code of Conduct was not meant to constrain members from doing this. The decision indicates that members retain that right to challenge or criticise officers even where, as in this case, the relationship between the individuals is for any reason strained or has broken down.

However, members should always deal with performance issues in accordance with the authority's procedures, in an appropriate way and in the proper forum. It is inappropriate to discipline an employee in retaliation for a grievance, and to publicly criticise them in a press release.

Holiday invitation

Councillor Prior asked the clerk about the holiday in March 2005, after a meeting to discuss council business. He said he would like to take her on holiday, and said he would pay and buy her anything she needed. When the clerk did not respond to the proposal, Councillor Prior handed her an envelope with a cheque for £500 if she declined the holiday, which she did not accept.

The Adjudication Panel decided that Councillor Prior brought his office into disrepute by making this proposal. The tribunal considered that it was inappropriate for an elected member to extend such an invitation to a council employee when there was such a power imbalance in their working relationship, and when there was not the slightest encouragement from the

employee. This was particularly the case in this instance, where the councillor held two senior posts in the council and was the employee's line manager.

The tribunal noted, however, that this was a highly personal conduct that did not reflect badly on the council as a whole. The only relevance for the council was that the proposal had been made during a meeting between a member and an employee to discuss council business. The tribunal therefore found that the councillor had not brought his authority into disrepute.

The tribunal also considered that this proposal would not, by itself, have justified disqualifying the councillor, especially as Councillor Prior and the clerk agreed to put the incident behind them and not to take any further action at the time.

Criticism of the clerk

There were a number of other allegations about Councillor Prior's behaviour toward the clerk which were not upheld at the hearing. These allegations concerned individual incidents between the holiday proposal and the written warning, as well as Councillor Prior's overall pattern of behaviour during this period.

In relation to these other allegations, the tribunal found that there was insufficient evidence that Councillor Prior had been improperly motivated in his behaviour towards the clerk. The tribunal found that Councillor Prior had genuine concerns about the clerk's performance, and that a number of comments he made about the clerk's work were not disrespectful.

The tribunal also found that Councillor Prior's conduct toward the clerk between the holiday invitation and the written warning was motivated by concern about the efficient running of the council, and so did not bring his

office or authority into disrepute. The tribunal did not consider that the individual incidents constituted an improper pattern of behaviour.

Warning letter in response to grievance

The tribunal regarded Councillor Prior's warning letter to the clerk as inappropriate and disrespectful. Councillor Prior gave the clerk the written warning after she confirmed she had sent a copy of a grievance letter to the Standards Board. This followed an earlier meeting arranged by Councillor Prior to discuss concerns about her conduct.

The tribunal found that the decision to issue the written warning was a direct response to the clerk's grievance to the Standards Board, and this was not relevant to how he should have addressed performance issues. As the tribunal noted:

"[The clerk's] action of sending her grievance to the Standards Board had no bearing on the merits of any concerns the Respondent had about [her] performance as Town Clerk and yet it was the reason the Respondent issued the warning letter..."

The tribunal decided that Councillor Prior failed to treat the clerk with respect, and so failed to comply with the Code of Conduct, "as he was influenced in his decision to issue a written warning ... by the fact that she had sent a copy of the grievance to the Standards Board".

The press release

Councillor Prior also acted inappropriately when he issued a press release in December 2005. The press release related to his resignation as the Mayor of the town council, but made a number of comments about the clerk.

The press release inferred that the clerk concealed two letters from him, which had “proved expensive”. He inferred that the clerk’s actions were improper and led to financial losses for the council. He also implied that the clerk was misleading the council over her sickness. The press release also contained the clerk’s ex-directory home phone number.

The tribunal found that these were unjustified attacks on the clerk, and regarded it as serious matter that Councillor Prior had publicly criticised the clerk’s professional performance and impugned her integrity. The tribunal accordingly regarded the press release as a failure to treat the clerk with respect.

The tribunal also decided that Councillor Prior failed to comply with the Code of Conduct by disclosing confidential information. The clerk’s home phone number was given in the press release without her permission, when she was off work sick and despite the fact that Councillor Prior was involved in a public conflict with her at the time.

The tribunal’s decision

The tribunal took account of Councillor Prior’s long record of public service, deep commitment to work as elected member, and the expressions of public support he had received, as well as the fact that his actions were not dishonest, his motivation after the holiday invitation was the efficient running of the town council, and he was open in dealing with the Standards Board.

The tribunal considered that issuing the warning letter to the clerk as a deliberate reaction to the grievance being sent to the Standards Board was a serious matter and strongly indicated that disqualification was appropriate. In addition, the tribunal noted that Councillor Prior saw the

issuing of the warning letter as a technical failing rather than as a fundamentally flawed action.

The tribunal unanimously decided to disqualify Councillor Prior for nine months to adequately recognise the seriousness of his actions on the three separate occasions when he breached the Code, and to allow him to stand in the May 2007 elections.

Implications of the judgment in the Mayor Livingstone case

The High Court judgment in the case concerning Mr Ken Livingstone, the Mayor of London, has significant implications for the interpretation of the Code of Conduct.

In particular, the judgment suggests that a member can only breach the Code of Conduct if they are performing their functions as a member, and that the Code of Conduct only applies to private conduct in limited cases. The Code covers members who misbehave when performing their duties, or who misuse their status while acting in a private capacity.

The judgment also established that the Code of Conduct cannot interfere with a member's right to freedom of speech in their private life.

The incident

Mr Livingstone had allegedly made offensive comments to a journalist on the evening of 8 February 2005, likening him to a concentration camp guard. Mr Livingstone was leaving a reception at City Hall when he was confronted by the reporter. During their exchange, Mr Livingstone asked the reporter whether he was "a German war criminal". The reporter pointed out that he was Jewish, and was offended by the remark, to which Mr Livingstone said: "Well you might be, but you're just like a concentration camp guard. You're just doing it 'cause you're paid to, aren't you?"

The Ethical Standards Officer investigating the case would ordinarily have referred this matter to the Greater London Authority's Standards Committee, but believed this was not appropriate because the London Assembly had already taken a view on Mr Livingstone's conduct. The Ethical Standards Officer therefore referred the matter to the Adjudication Panel for England.

The Adjudication Panel's case tribunal decided that Mr Livingstone had failed to comply with the Code of Conduct by bringing his office as Mayor into disrepute. The tribunal decided to suspend Mr Livingstone for four weeks from 1 March 2006.

Mr Livingstone appealed to the High Court against the decision, and the suspension was stayed pending the appeal.

Private capacity and disrepute

Mr Justice Collins, the judge presiding in the case, decided that Mr Livingstone had not been acting in his official capacity when he spoke to the reporter or performing his functions as Mayor. As a result, the requirement under paragraph 2(b) of the Code of Conduct, to "treat others with respect" while carrying out official duties, did not apply.

This still left the question of whether Mr Livingstone's conduct was covered by the duty to avoid behaviour which could bring his office or authority into disrepute. This duty, under paragraph 4 of the Code of Conduct, applies when a member is acting in an official capacity, or in "any other circumstance":

A member must not in his official capacity, or any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute.

Mr Justice Collins found that the “any other circumstance” is limited to situations where a member is performing his functions as a member of the authority. This is in accordance with the commitment a member makes on assuming office, to:

...give to the authority a written undertaking that in performing his functions he will observe the authority’s code of conduct...

(Section 52(1)(a) of the Local Government Act 2000)

In this case, Mr Justice Collins found that Mr Livingstone was off-duty and not performing his functions as Mayor, and so paragraph 4 of the Code of Conduct did not apply to his behaviour.

This judgment means there are large areas of members’ private lives, when they are not ‘performing their functions’ as members, which are not covered by the Code of Conduct. Even unlawful conduct, such as convictions for shoplifting, drink-driving, or sexual offences, would not be covered by the Code, if the offences have nothing to do with the person’s position as a member (although members who are convicted of a criminal offence and sentenced to more than three months’ imprisonment are automatically disqualified from public office for five years).

Mr Justice Collins also found that the Adjudication Panel had applied the wrong test in relation to the issue of disrepute. His view was that damage to the reputation of the member as a person did not necessarily affect the reputation of his or her office or authority. He stated that there was a “real distinction between the man and the office”. There was a distinction between “misuse of office”, which can bring disrepute on the office, and “personal misconduct”, which is unlikely to do so. So, a politician may tarnish their own personal reputation by making offensive or insulting comments, but not necessarily that of their office.

Mr Justice Collins expressed the view that private capacity conduct will rarely be capable of bringing a member's office or authority into disrepute. The Code of Conduct will only cover a member's private behaviour where there is a direct link between the conduct and the office – for example, where a member uses their status as a member in a private dispute.

Freedom of speech

The right to freedom of expression, under Article 10 of the European Convention on Human Rights, is not an absolute one, but is:

...subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others...

An earlier High Court judgment had already stressed the need for a high level of protection to be given to political views (*Sanders v Kingston* [2005] EWHC 1145) but made it clear that because of the Code of Conduct members acting in their official capacity were not free to abuse people.

However, Mr Justice Collins found that when a member is not acting in an official capacity or performing their functions as a member the right to freedom of speech includes the right to abuse people:

Anyone is entitled to say what he likes of another provided he does not act unlawfully and so commits an offence under, for example, the Public Order Act ... Surprising as it may perhaps appear to some, the right of freedom of speech does extend to abuse.

Mr Justice Collins judged that it was disproportionate to apply the Code of Conduct to Mr Livingstone's remarks, as such a restraint on freedom of expression was not shown to be "necessary in a democratic society", even if the remarks were not political views.

The Code of Conduct cannot therefore interfere with a member's right to express inappropriate, intemperate or offensive views in their private life. This is in spite of what anyone might think of the views in question, and whether they are political opinions or personal abuse.

While Mr Justice Collins found that the statements were made in a private capacity and not covered by the Code, he nonetheless saw fit to criticise Mr Livingstone's comments to the journalist as "unnecessarily offensive", "intemperate", and "inappropriate", and suggested that he could have resolved the matter by making an apology.

The High Court's decision

The High Court allowed the appeal, set aside the finding that Mr Livingstone had failed to comply with the Code of Conduct, and quashed the suspension.