

Appeals Tribunal Decision

Case Ref:	APE 0414
Date of Appeals Tribunal:	10 February 2009
Relevant Standards Committee:	Berwick-Upon-Tweed Borough Council
Date of Standards Committee Decision:	26 November 2008
Name of member concerned: <i>(Appellant)</i>	Councillor Douglas
Monitoring Officer:	Mr Henry
Independent Investigator:	Mr Newton
<u>Appeals Tribunal Members</u>	
Chairman:	Mr Simon Bird
Member:	Mr Richard Enderby
Member:	Mr Alex Rocke

1. The Appeals Tribunal has considered an appeal from the Appellant about the above decision.
2. The Appeals Tribunal has considered written and oral submissions from Mr Liam Henry and Councillor Douglas and has heard evidence from Mr Ben Guy and Councillor Douglas.

The decision appealed against

3. The Appellant had appealed against the Standards Committee's finding that he had failed to follow paragraphs 3(1) and 5 of the Council's Code of Conduct.
4. The Appellant had been reported in a local newspaper under a headline "Planning Chief attacks own department." The report quoted him as saying that the relevant council department was not performing as it should. He was also quoted as saying that there was a problem in Berwick about the Council being officer-led and that people who came into jobs in the Council lacked local knowledge and a commitment on the future of Berwick.
5. The Hearings Sub-committee of the Council's Standards Committee found that the Appellant had made the comments attributed to him in the press article and rejected his claim to have been misquoted. The Hearings Sub-committee found that the Code of Conduct did apply to the Appellant during his conversation with the journalist.

6. The Hearings Sub-committee found that the Appellant had failed to treat the staff of the Development Services department with respect contrary to paragraph 3(1) of the Council's Code of Conduct. The reason given was that the comments has been made in a very public forum, rather than through the appropriate channels within the authority, which had given the staff concerned no opportunity for redress.
7. The Hearings Sub-committee also found that the Appellant has conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute contrary to paragraph 5 of the Code of Conduct. The reason given was that in their view, the comments were likely to result in a reduction in public confidence not just in the Development Services staff and the planning function but also in the local authority generally. They noted that the Appellant had shown no remorse in respect of his comments at any time despite the obvious concern and distress which these had caused the Development Control Services staff at the Council.
8. The Appellant has appealed against the action, which the Standards Committee decided to take in the light of their decision that he had failed to follow the provisions of the Code of Conduct. That action was to suspend Councillor Douglas for six months.
9. The Appellant's grounds for seeking permission to appeal alleged that he had been unfairly treated by the Standards Committee in that the matter was heard in his absence, the material put before the Standards Committee was selective with material omissions and there was an absence of impartiality. Given (a) that the Appeals Tribunal is itself independent and impartial and will reach its own independent conclusions on both the facts and whether those facts support a finding of the Council's Code of Conduct and (b) the Appellant has a full opportunity to present all relevant evidence to the Appeals Tribunal, there is no need for it to reach any determination on these contested matters.
10. Because Councillor Douglas disputed the accuracy of the content of the press article which lay at the heart of the alleged breaches of the Code, the Appeals Tribunal considered it necessary to hear evidence as to what was said from the author of that article, Mr Ben Guy and from Councillor Douglas.

Findings of Fact

11. The followings are its findings of fact based on that evidence and the other undisputed evidence before it:
 - 11.1. Councillor Douglas was elected to office on Berwick-upon-Tweed Borough Council on 3 May 2007 for a term of four years and gave a written undertaking to observe the Code of Conduct on 8 May 2007. As at 22 May 2008, he was a member of the Council's Planning Committee but not it's Chair.
 - 11.2. The paragraphs of the Code relevant to the determination of this appeal provide as follows:
 - 11.2.1. Paragraph 2 (which provides in so far as is relevant):

“(1) Subject to sub-paragraphs (2) to (5), you must comply with this code of conduct whenever you:-

conduct the business of your authority (which, in this Code, includes the business of the office to which you are elected or appointed); or

act, claim to act or give the impression you are acting as a representative of your authority,

and references to your official capacity shall be construed accordingly.

Subject to sub-paragraphs (3) and (4), this Code does not have effect in relation to your conduct other than where it is in your official capacity.

In addition to having effect in relation to conduct in your official capacity, paragraphs 3(2)(c), 5 and 6(a) also have effect, at any other time, where that conduct constitutes a criminal offence for which you have been convicted....

11.2.2. Paragraph 3(1):

"You must treat others with respect."

11.2.3. Paragraph 5:

"You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute."

12. The Appellant owns land at 11 Mill Strand, Tweedmouth and this land was the subject of a number of applications for planning permission for its development which were made to the Council by Mr Simon Eltringham. Mr Eltringham is the Appellant's grandson. One such application was an application for full planning permission for the erection of 5 dwellings (ref.08/B/0079) which was registered by the Council's Development Services Unit on 6 February 2008. This application was not determined within the prescribed 8 week period and an appeal against the Council's failure to determine the application was made to the Secretary of State on 9 May 2008. Part of the reason for the Council not determining the application within the prescribed period, was that a statutory consultation response had been returned by the consultee to an email address provided by the Council which was in fact the wrong one.
13. In April 2005, the Council was designated as a "Standards Authority" for Development Control performance. A further inspection on behalf of the Department for Communities and Local Government in 2006 acknowledged that improvements had been made since April 2005 but expressed concerns that the Council was still not meeting the government's performance targets, particularly those relating to the determination of planning applications. In May 2007, the Council received a further report on the Council's planning service prepared by Joan Lees Consulting Ltd. This recognised that the Standards Authority designation would extend into 2007/2008 and identified the key themes which emerged from earlier reports as:

"1. Recruitment and retention of staff is a significant challenge and is having a major impact on performance.

2. The small size of the authority presents a challenge in terms of maintaining performance.

3. *There is a major deficiency in terms of procedures and the documentation of procedures. This "systems failure" is impacting on performance and is exposing the Council to risk.*

4. *ICT systems need significant development in order to properly support internal processes and to meet the e-planning requirements.*

5. *There are cultural issues which need to be addressed."*

14. The Joan Rees report adds:

"This review corroborates these previous findings...Performance is good in relation to appeals, delegation levels and ombudsman case and there are some examples of good practice. However, performance is poor in relation to BVPI 111 (satisfaction with planning services) and very poor in relation to the BVPI 109 series (processing times). In the case of the BVPI 109 series, Berwick is in the bottom 2% on all three PIs."

15. Improvement in the processing of planning applications began to be seen in April 2008.

16. On or about 19 May 2008, Mr Ben Guy a journalist employed by the Newcastle Journal received an anonymous tip off to the effect that a planning application submitted to the Council in the name of the Appellant's grandson represented a conflict of interest for the Appellant. Following initial researches, he telephoned the Appellant, who had returned home from work about an hour and half previously. This was an unarranged, speculative telephone call and there had been no previous contact between Mr Guy and the Appellant. It was the equivalent of "door stepping". Although the Appellant contends that the telephone call was made to him in his private capacity, having regard to the substance of the interview (which is not seriously challenged by the Appellant), the Appeals Tribunal prefers the evidence of Mr Guy that the call was made to the Appellant in both his private capacity and as a member of the Council.

17. The telephone call lasted about 20 minutes. The first part of it was concerned with whether there was any basis for the allegation of a conflict of interest. There is no dispute that this part of the conversation was conducted off the record. Mr Guy quickly established by his questions that there was no conflict of interest.

18. As a result, he informed the Appellant that the angle of his story had changed and the interview became focussed, although not exclusively, on the Council's Planning Department. The Appellant's responses to the questions were noted in shorthand by Mr Guy as they were given. Mr Guy produced his shorthand notes of the interview in evidence. The Appellant confirmed in his evidence that it was more likely than not that he had said the statements recorded in the transcript. In so far as there is any discrepancy between the transcript and the subsequently published article, the Appeals Tribunal prefers transcript, it being more likely to be accurate given its contemporary status.

19. There is a dispute between Mr Guy and the Appellant as to whether this second stage of the interview was on or off the record. Mr Guy impressed the Tribunal as an accurate and truthful witness and having regard to his standard approach to conducting interviews, it is satisfied on the balance of probabilities that he did invite the Appellant to confirm that this second stage of the interview was on the record. This is consistent with the absence of any reference in the contemporaneous note to

the interview being off the record. However, the Appeals Tribunal is also satisfied that the Appellant was being truthful in relation to his understanding of the status of the interview. Notwithstanding what Mr Guy had said to him, the Appeals Tribunal is satisfied that the Appellant remained genuinely uncertain as the status of the interview. Those parts of it which related to his private capacity he regarded as on the record as addressing the anonymous complaint. Those parts which related to his public capacity as a member of the Council he regarded as being off the record.

20. There is no full note of the interview and the partial transcript of Mr Guy's notes excludes some sentences which are completely illegible. The partial transcript reads:

"There's no conflict of interest.

The situation in Berwick is that although I am chair I am not a portfolio holder. I have no control over the department. I would like to have control over the department because it would then toe the line and get results."

"The fact is that the council haven't given a decision within the prescribed time and therefore they are not applying the rules.

"At the moment on the planning committee this is something that consistently happens at Berwick.

"That department isn't performing as well as it should be. You can make all of the excuses under the sun about short staff."

"I have no sympathy whatsoever. I asked for a meeting with the regeneration officer.

"The planning committee do not run the department. We are the figureheads that make decisions.

"From my point of view I have got a property. We have people who are trying to manipulate the planning system from the outside.

"There is always an attitude of them and us in local government. The problem we have in Berwick is that we have been officer led for so long.

"I am a Berwicker born and bred and I want Berwick to survive and prosper. There are people who come into jobs and don't have local knowledge. They lack commitment on the future of Berwick."

"I will play it my way"

"The property has been in the family since 1962. If you have got something 46 years at the end of the day it is a ?? family operation??

"I am always going to look to the future. I am 61. There is nothing wrong with it.

Unreadable sentence.

"We are exercising our right to appeal and the situation is that we should have had a decision on the first of April and that hasn't happened because of the way the organisation I set up.

"The reality is that I want the department to improve"

21. The telephone interview formed the basis for an article which appeared in the Newcastle Journal on 22 May 2008 under the heading "Planning chief attacks own department". In the article, the following statements appear as quotations of the Appellant's words:

"The fact is that the Council hasn't given a decision within the prescribed time and therefore they are not applying the rules. As a member of the planning committee this is something I consistently see happening at Berwick.

You can make all the excuses under the sun about short staff, but the simple fact is that the department isn't performing as it should be. I have no sympathy whatsoever. We are exercising our right to reapply.

We should have had a decision on April 1 and that hasn't happened because of the way the organisation is set up. I want this department to improve"

"The problem we have in Berwick is that as a council we have been officer led for so long. I am a Berwicker, born and bred, and I want Berwick to survive and prosper.

There are people who came into jobs who don't have the local knowledge, and they lack the commitment on the future of Berwick. I will play it my way.

22. The Appellant made no reference during the interview to any individual officer of the Council; it focussed exclusively on the Appellant's views as to the performance the planning services department as a whole.
23. The Appellant was elected Chair of the Planning Committee on 3 June 2008.

Findings as to whether the Appellant failed to follow the Code

24. Three matters fall for determination on the basis of the facts as found:

24.1. Whether when talking to Mr Guy on the telephone, the Appellant was acting in his official capacity for the purposes of the Code i.e. conducting the business of the Council or acting, claiming to act or giving the impression that he was acting as a representative of the Council;

24.2. If so, whether what he said:

24.2.1. failed to treat others with respect and/or

24.2.2. was such as could reasonably be regarded as bringing his office or the Council into disrepute.

Official capacity

25. The Code in defining the scope of its operation uses ordinary descriptive English words. Their application is inevitably fact sensitive and so whether or not a person is so acting inevitably calls for informed judgment by reference to the facts of a given case.
26. The Appellant's interview includes the following references:

"I am chair I am not a portfolio holder"

"I have no control over the department"

"We are the figureheads that make the decisions"

"The problem we have in Berwick is that we have been officer led for so long"

"I want the department to improve"

27. In the Appeals Tribunal's view, the content of the interview coupled with the statements made by the Appellant to the investigating officer in his interview during the investigation are such that the Appellant did give the impression that he was wearing his Councillor hat and acting as a representative of his authority. The Code therefore applied to his conduct in giving the interview notwithstanding that he regarded it as off the record.

Failure to treat with respect and disrepute

28. Failure to treat others with respect will occur when unfair, unreasonable or demeaning behaviour is directed by one person against another. The circumstances in which the behaviour occurred is relevant in assessing whether the behaviour is disrespectful. The circumstances include the place where the behaviour occurred, who observed the behaviour, the character and relationship of the people involved and the behaviour of anyone who prompted the alleged disrespect.
29. The Oxford English dictionary defines disrepute as "lack of good reputation or respectability". A member will have failed to comply with the Code if his or her conduct could "reasonably be regarded" by an objective observer as bringing the member's office or authority into disrepute. Anything which diminishes the member's office or their authority, or which harms or could harm the reputation of an authority, will bring that office or authority into disrepute.
30. In considering whether Councillor Douglas breached paragraphs 3(1) and 5 of the Code, the Appeals Tribunal has had regard to Article 10 of the European Convention on Human Rights which provides:
- "(1) 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 public authority and regardless of frontiers....
 - (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of...the protection of the reputation or rights of others, ..."
31. Section 1 of the Human Rights Act 1998 identifies the rights under the European Convention of Human Rights which have effect for the purposes of that Act. They include Articles 6 and 10 of the ECHR. Section 3(1) of the 1998 Act provides that so far as it is possible to do so.....subordinate legislation must be read and given effect in a way which is compatible with the convention rights.
32. Section 6 of the 1998 Act provides as follows:
- "(1) It is unlawful for a public authority to act in a way which is incompatible with a convention right.

- (2) Disapplies the section in certain very limited circumstances concerning primary legislation. This does not apply to the present case as the matters raised by the appellant concern subordinate legislation.

Sub-section (3) provides:

“In this section public authority includes –

- (a) a court or tribunal

Section 7 provides:

- (1) A person who claims that a public authority has acted in a way which is made unlawful by section 6(1) may –

- (b) rely on the convention right or rights concerned in any legal proceedings...”

33. In Sanders v Steven Kingston [2005] EWHC 1145 (Admin) Wilkie J had to consider the relationship between Article 10 and paragraphs 2(b) and 4 of the then Code of Conduct. These provisions equate to paragraphs 3(1) and 5 of the Council’s Code with which this appeal is concerned. In paragraph 69 of his judgment, Wilkie J reviewed a number of authorities. He noted [at para.69] that in *Lingens v Austria* the following was said:

“ In this connection the court has to recall that freedom of expression...constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self fulfilment. Subject to paragraph 2, it is applicable not only to “information or ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no democratic society...More generally freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the convention...In such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues. ”

34. From *R v Central Independent Television plc (1994) Fam 192* Wilkie J set out the following passage from the speech of Lord Justice Hoffman:

“Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which “right thinking people” regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute....It cannot be too strongly emphasised that outside the established exceptions, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.”

35. From the case of *Reynolds v Times Newspapers Ltd (2001) 2 AC 127* he set out the following passage from the speech of Lord Nichols of Birkenhead:

“My starting point is freedom of expression. The high importance of freedom to impart and receive information and ideas has been stated so often and so eloquently that this point calls for no elaboration in this case. At a pragmatic level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country. This freedom enables those who elect representatives to parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions....To be justified, any curtailment of freedom of expression must be convincing established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.”

36. Wilkie J then proceeded to consider whether, on the facts of the Sanders case, a finding of breach and/or imposition of a sanction would violate Article 10. He held that, in principle, Article 10 was engaged, that the finding of breach of itself and the imposition of a sanction was prima facie a breach of Article 10 but that the restriction of the right to freedom of expression was, on the facts, one which was justified by reason of the requirements of Article 10(2). He said this at paragraphs 84 and 85 of his judgment:

“..... the adoption by Parliament of the statement of principles and establishment of a code of conduct arose from the publication by Lord Nolan of the third report of the Committee of Standards in Public Life in July 1997 (CM 3701-1). This report called for a new start based on an ethical framework the effect of which would be a radical change in the ethical framework within which local government operated. It was stated that it was important that local authorities themselves should adopt their own codes of conduct but had to be with a degree of consistency across local authorities and an assurance that certain minimum standards would be attained by any individual code. The government in response introduced into Part III of the Local Government Bill clauses relating to the conduct of local government members and employees. The purpose of the legislation was to encourage and impose certain minimum standards of behaviour in respect of local government. No challenge is made by Councillor Sanders to the scheme. It is, therefore, implicit that he accepts that the system whereby members are obliged to undertake that they will comply with the code of conduct and will be subject to the jurisdiction of the Case Tribunal in the event that they are not satisfied, in principle, the three conditions for a lawful interference with free speech in a democratic society. I have concluded that the words and writing of the appellant amounted to no more than expressions of personal anger and personal abuse and did not constitute political expression which attracts the higher level of protection. In those circumstances, in my judgment the finding by the Case Tribunal that the appellant had breached the code of conduct and its notification of that finding to his local authority constitute an interference with freedom of expression but one which was lawful pursuant to Article 10(2).

I recognise that, were this machinery to be used against a member of a local authority who did give expression to political opinions of an offensive nature or expressed political opinions in an offensive way, then there might be circumstances in which the Case Tribunal could not find a breach of the code of conduct without involving itself in an unlawful infringement of the rights protected by Article 10. However, as a matter of fact, this is not such a case.”

37. The Appeals Tribunal also notes the words of Collins J in *Livingstone v The Adjudication Panel for England* [2006]EWHC 2533 (Admin) [at para.39]:

"The burden is on [the Adjudication Panel for England] to justify interference with freedom of speech. However offensive and undeserving of protection the appellant's outburst may have appeared to some, it is important that any individual knows that he can say what he likes, provided it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2) to render him liable to sanctions".

38. The right to freedom of expression is a crucially important right in a democratic society and it is clear that it may only be interfered with where there are convincing and compelling reasons within Article 10(2) justifying that interference. A key issue for the Appeals Tribunal's determination is thus whether a finding of a breach of the Code on the facts as found, would represent no greater an impairment to the Appellant's right to freedom of expression than is necessary to accomplish the legislative objective of the Code.
39. This requires a factual investigation of the nature of the words used in order to determine whether they constitute expression relating to matters within the legitimate concern of the member as a Councillor (political or quasi political comment which benefit from a high level of protection), or whether they are no more than expressions of personal anger and personal abuse. In the latter case, the high degree of protection required by the authorities is not engaged.
40. It is important that the restraints should not extend beyond what is necessary to maintain proper standards in public life and that political expression is afforded a higher level of protection. In the Appeals Tribunal's view, it is important that members should be able to express in robust terms, concerns that they may have about any aspect of the running of the Council and this can include expressing disagreement with officers and can include criticism of the way in which a department or an officer handles particular matters.
41. The concept of "treating others with respect" is one that allows the essential balance required by Article 10(2) to be performed, as does the phrase "bringing his office into disrepute" used in paragraph 5 of the Code.
42. In the Appeals Tribunal's view, the threshold for a failure to treat another with respect and a failure to comply with paragraph 5 of the Code in the case of expressions of view, has to be set at a level that allows for the passion and fervour that often accompanies political debate or debates relating to the efficient running of a Council and which allows for appropriate and robust criticism of the performance of a Council function. This is entirely consistent with the objective of maintaining proper standards in public life.
43. In seeking to support the Standards Committee's finding of a breach of paragraph 3(1) of the Code, Mr Henry relied upon three of the Appellant's quoted comments as failing to treat others with respect (given their public airing and the absence of a right of reply) namely:

(b) *"You can make all the excuses under the sun about short staff but the simple fact is that the department isn't performing as it should be"*

(c) *"The problem we have in Berwick is that as a Council we have been officer led for so long..."*

