

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held in Council Headquarters, Kilmory, Lochgilphead on 20 September 2016 and in Lothian Chambers, Edinburgh on 19 October 2016.

Panel Members: Mr Ian Gordon, OBE, QPM, LL.B (Hons), Chair of the Hearing Panel
Mrs Lindsey Gallanders
Mr Matt Smith, OBE

The Hearing arose in respect of a Report by Mr Bill Thomson, the Commissioner for Ethical Standards in Public Life in Scotland (“the CESPLS”) further to complaint reference LA/AB/1758, (“the complaint”) concerning an alleged contravention of the Councillors’ Code of Conduct (“the Code”) by Councillor Michael Breslin (“the Respondent”).

The CESPLS was represented by Mr David Sillars, Senior Investigating Officer. The Respondent was represented on 20 September 2016 by Mr Eric Scott, solicitor. The Respondent represented himself on the second day of the Hearing.

COMPLAINT

A complaint was received by the CESPLS about the alleged conduct of the Respondent. Following an investigation, the CESPLS referred the complaint to the Standards Commission for Scotland.

The substance of the allegation was that the Respondent had contravened the Councillors’ Code of Conduct and, in particular, the provision that obliged councillors to respect Council Employees, to treat them with courtesy at all times and to avoid publicly criticising them; and also the provisions which indicate that Councillors and Officers should work within an environment of mutual trust and respect and avoiding public criticism respectively. Essentially the complaint alleged that the Respondent behaved in a disrespectful manner towards officers in correspondence.

The CESPLS investigated the complaint and concluded that the Respondent had breached paragraph 3.3, and paragraphs 2 and 20 of Annex C of the Code of Conduct.

The relevant provisions were:

Relationship with Council Employees (including those employed by contractors providing services to the Council)

3.3 You must respect all Council employees and the role they play, and treat them with courtesy at all times. It is expected that employees will show the same consideration in return.

ANNEX C: PROTOCOL FOR RELATIONS BETWEEN COUNCILLORS AND EMPLOYEES IN SCOTTISH COUNCILS

Principles

2. Councillors and employees should work in an atmosphere of mutual trust and respect, with neither party seeking to take unfair advantage of their position.

Public comment

20. Councillors should not raise matters relating to the conduct or capability of employees in public. Employees must accord to councillors the respect and courtesy due to them in their various roles. There are provisions in the Code of Conduct for Employees about speaking in public and employees should observe them.

The CESPLS submitted a report to the Standards Commission on 20 June 2016 in accordance with section 14(2) of the Ethical Standards in Public Life etc. (Scotland) Act 2000 as amended.

Evidence Presented at the Hearing

The Hearing Panel heard that the Respondent had engaged in correspondence with officers of Argyll & Bute Council in respect of the service provision in relation to three discreet matters, being the disposal of Castle Toward, the terms and conditions of contracted care workers and operational practices at Rothesay Harbour.

It was agreed by both parties at a pre-Hearing meeting held on 18 August 2016 that there was no requirement to call any witnesses in respect of whether or not there had been a breach of the Councillors' Code of Conduct. This was because there was no dispute between the parties about the content of the correspondence in question, or that it had been sent by the Respondent. What was in dispute was whether the Respondent, in sending the correspondence, had breached the Councillors' Code of Conduct and, in particular, the provision that obliged councillors to respect Council Employees, to treat them with courtesy at all times and to avoid publicly criticising them; and also the provision which indicates that Councillors and Officers should work within an environment of mutual trust and respect.

The correspondence consisted of:

1. An email from the Respondent to the Council's Head of Governance on 29 December 2014;
2. An email from the Respondent to all Argyll & Bute councillors of 5 February 2015 relating to the proposal to purchase Castle Toward by the South Cowal Community Development Company;
3. An email from the Respondent to the Council's Executive Director of Community Services of 25 February 2015 relating to the terms and conditions of contracted care workers employed by external contractors;
4. Emails between 25 August and 4 October 2014 from the Respondent to the Council's Executive Director of Development and Infrastructure Services relating to a disagreement over the circulation of emails concerning Rothesay Harbour to third parties;
5. Emails of 2 December 2014 and 11 January 2015 from the Respondent to the Council's Executive Director of Development and Infrastructure Services relating to the issue of safety equipment issued to staff working at Rothesay Harbour; and

6. An email of 25 February 2015 from the Respondent to the Council's Executive Director of Development and Infrastructure Services relating to previous emails concerning operational issues at Rothesay Harbour.

The Hearing Panel noted at the outset of the Hearing that the parties had agreed at the pre-Hearing meeting that they would make submissions on the circumstances in which the correspondence was sent and whether the Respondent had breached the Councillors' Code of Conduct, along with submissions on whether the comments made by the Respondent in the correspondence in question fell within the parameters of 'political expression' allowed in terms of the enhanced protection provided to politicians under Article 10 of the European Convention for Human Rights (ECHR).

The Hearing Panel further noted that it had been agreed that the Hearing Panel would then adjourn and consider the submissions made, together with the documentary evidence presented, and decide if it had sufficient information to determine whether any breaches of the Councillors' Code of Conduct had been established. If the Hearing Panel determined that it did not have sufficient information, it would advise the parties as to the matters which required clarification and invite them to identify any witnesses who might be called to assist that clarification.

The Hearing Panel confirmed that if it considered the Respondent, in sending the correspondence, had breached the Councillors' Code of Conduct, it would then proceed to consider whether his comments fell within the parameters of 'political expression' allowed in terms of the enhanced protection provided to politicians under Article 10 of the ECHR and/or whether any limitation in respect of the public interest in protecting public servants from unwarranted criticism applied.

Submissions made by the CESPLS's Representative

The CESPLS's representative outlined the facts as set out in the CESPLS's Report. In particular, he explained that in his email to the Council's Head of Governance on 29 December 2014, the Respondent expressed concern about an incident at a meeting on 26 June 2014 where an amendment he proposed to a motion on the disposal of Castle Toward had been deemed incompetent by the Head of Governance. The Respondent stated in his email 'I should perhaps make clear now that your response will be made public'.

The CESPLS's representative advised that the Respondent's email of 29 December 2014 had been published on a local website, 'ForArgyll'. The Respondent had confirmed he had not forwarded his email to the publishers of the website. However, he confirmed in an email to the Head of Governance of 15 January 2015 that a 'number of people' had been given a copy of his email of 29 December 2014 and 'any of them could have passed it on'. The Hearing Panel heard that there was a great deal of public criticism of the Head of Governance as a result of the publication of the email on the website. The CESPLS's representative noted this criticism was unwarranted as the decision to rule the amendment incompetent had not been made by the Head of Governance. The Respondent had accepted this criticism had been factually inaccurate in a later email to the Head of Governance.

The CESPLS's representative argued that the public criticism of the officer was a direct result of the Respondent having circulated the email of 29 December 2014 to a number of people and that such behaviour compounded a misunderstanding of the roles of officers and members and eroded public confidence in the Council. He further argued that the content of the email of 29 December 2014 was critical of the Head of Governance and was not, therefore, compatible with the provisions in the Code relating to trust and mutual respect.

The CESPLS's representative explained that the email from the Respondent to all councillors of Argyll & Bute Council of 5 February 2015 related to a proposal by the South Cowal Community Development Company to purchase Castle Toward. In his email, the Respondent referred to a quotation from Councillor Walsh published in 'The National' newspaper that day about a loan offered to the South Cowal Community Development Company in respect of the proposed purchase. The Respondent was critical of the terms of the loan offer and, in rebutting the quote in the article, he incorporated text from an email sent by the Council's Head of Strategic Finance to the South Cowal Community Development Company of 14 January 2015. The Respondent indicated in the email that he intended to forward it to 'The National'. The CESPLS's representative contended that by incorporating the email from an identifiable officer in a critical email, which he intended to make public, the Respondent demonstrated a lack of courtesy and respect towards the officer.

Turning to the Respondent's email relating to the terms and conditions of contracted care workers, the CESPLS's representative noted that the primary responsibility for ensuring compliance with employment law lay with the external employers who employed them. The Respondent had, however, asserted in an email of 25 February 2015 to the Executive Director of Community Services that the perceived poor treatment of the contracted care workers was attributable to a flawed approach taken by officers to a tender process, which the Executive Director had been responsible for. The CESPLS's representative argued that the Respondent's email of 25 February 2015 contained implications that officers had been, or were, complicit in malpractice and possibly illegal conduct without any substantive evidence of this. It was unwarranted and disrespectful.

The CESPLS's representative drew the Hearing Panel's attention to a number of emails sent by the Respondent to the Council's Executive Director of Development and Infrastructure Services between 25 August and 4 October 2014. These concerned a disagreement about whether emails concerning Rothesay Harbour should be circulated to third parties. The CESPLS's representative argued that the tone of the correspondence along with the conduct of the Respondent in insisting in his emails on disclosure to third parties, including one who was in dispute with the Council, lacked the required elements of trust and respect.

The CESPLS's representative explained that the Respondent had sent emails to the Council's Executive Director of Development and Infrastructure Services on 2 December 2014 and 11 January 2015 relating to the issue of safety equipment issued to staff working at Rothesay Harbour. In these he had made repeated assertions that the safety equipment was inadequate, despite being advised otherwise by the officer. The CESPLS's representative argued that in making such assertions, without an obvious attempt to assess the contrary advice, the Respondent demonstrated a lack of courtesy and respect towards the Executive Director of Development and Infrastructure Services and a lack of trust in her competence.

The CESPLS's representative advised that the Respondent had sent the Executive Director of Development and Infrastructure Services an email on 12 December 2014 raising 31 points about operational matters at Rothesay Harbour. Despite having received a detailed point by point response from on 12 February 2015, the Respondent had nevertheless sent a further email on 25 February 2015, disagreeing with several of the points in the response and making comments that were of a critical nature. The CESPLS's representative argued that the level of engagement with a senior officer was inappropriate and contrary to an aim of the Code, which was to facilitate communications and the working of local authorities. If such an approach was replicated across the Council then it could not operate. The CESPLS's representative further contended that the Respondent's unwillingness to accept the officer's professional judgement and his criticisms of it were indicative of a lack of trust in her competence and, further, lacked trust and respect.

In respect of the application of Article 10 of the ECHR, the Hearing Panel heard submissions from the CESPLS's representative that the Councillors' Code of Conduct and the legislation that introduced it (being the Ethical Standards in Public Life etc. (Scotland) Act 2000) were ECHR compliant. The interpretation of the Code in light of the provisions of the ECHR was, therefore, a balancing act. The scope of Article 10 should not be interpreted to operate in a way which allowed elected members, without any measured application of the Code, to make erroneous critical comments about officers, which were damaging to their reputations and also that of the Council.

The CESPLS's representative noted that the Respondent's representative had submitted a number of authorities, culminating in *Heesom v The Public Services Ombudsman for Wales* ([2014] EWHC 1504 (Admin)). However, the CESPLS's representative argued that a number of the authorities related to circumstances and Codes which were very different to the ones in question.

The CESPLS's representative further noted that while the case law indicated that public servants were subject to wider limits of acceptable criticism than private individuals, the limits were not as wide as those elected politicians could expect. The CESPLS's representative noted there was also a public interest in protecting public servants from unwarranted criticism, which required to be taken into account.

The CESPLS's representative argued that the Respondent's email of 29 December 2014 did not fall within the scope of 'political expression' allowed by Article 10 because it was an erroneous attribution of responsibility to an officer for a political decision made by someone else. In addition, he noted that Article 10(2) acknowledges restrictions on freedom of expression may be imposed by, for example, legislation or Codes of Conduct. These were necessary in a democratic society to protect the rights and reputations of others. The CESPLS's representative contended, therefore, that even if Article 10(1) extended to the comments made by the Respondent in the email, then Article 10(2) allowed such remarks to be restricted by the Councillors' Code of Conduct.

While the CESPLS's representative accepted that political expression has been interpreted by the Courts as being a wide concept, in this case the Respondent's comments did not concern political discussions or views; instead they were criticisms of how officers undertook their duties. A perturbation of officers' ability to do their jobs properly did not

fall within the scope of political expression. The CESPLS's representative further accepted that the more senior the officer, the more they should be expected to take the 'rough and tumble' of political dispute. However, this did not mean that councillors are allowed to criticise officers in public.

Submissions made by the Respondent's Representative

The Respondent's representative argued the Respondent's correspondence should be considered in the context of the key principles in Councillors' Code of Conduct and, in particular the ones concerning:

- Duty, which placed an obligation on councillors to represent the interests of the Council as a whole and also the communities served by it and to represent their interests conscientiously;
- Selflessness, which obliged councillors to act in the public interest; and
- Openness, which provided that information should only be restricted when the wider public interest clearly demands.

The Respondent's representative also drew the Hearing Panel's attention to Argyll & Bute Council's Constitution, which outlined the roles and functions of councillors. The constitution made it clear that they must represent and be advocates for their communities, must assist constituents with grievances and must balance representing their wards and the electorate as a whole. One of the principles of decision-making in the Constitution was 'a presumption in favour of openness'.

The Respondent's representative contended that the Respondent was acting in accordance with the key principles and Argyll & Bute Council's Constitution when sending the correspondence in question. He had been exercising, with due diligence, the responsibilities he was due to the electorate as a whole and also to those who had asked him for assistance.

The Respondent's representative explained that the background to the Respondent's email to the Head of Governance of 29 December 2014 was there had been significant public interest in the disposal of Castle Toward. A number of members of the public present at the meeting on 26 June 2014 were unhappy about the way the Respondent's motion had been handled and had continued to lobby him on the matter. There was significant public interest in the matter and the Respondent was simply advancing the cause on behalf of his constituents. It was not a private concern. The Head of Governance was aware of the public disquiet so the Respondent's use of the words 'should perhaps make clear now that your response will be made public' should not have been a surprise.

The Respondent's representative confirmed that the Respondent had not made the email public; he only disseminated it to those on a copy list. The CESPLS should have taken steps to ascertain who made it public but had failed to do so. The Respondent's representative argued that email was measured, reasonable and polite in tone. He had simply been asking about the advice given by the Head of Governance, which was a fair question given the presumption in favour of openness in the Council's Constitution and also in the context of the amount of public interest. The Respondent was simply fulfilling his responsibilities in dealing with a matter on behalf of his constituents.

The Respondent's representative argued that the Respondent's email of 5 February 2015 was a factual email, sent with the intention of making the political point to Councillor Walsh that the quote attributable to him in 'The National' was incorrect. The context and purpose was not disrespectful to officers. The Respondent's representative noted the Respondent referred in the email to the probity of the proposed loan offer and argued that this fell within the scope of normal political debate. The email was generally polite and measured in tone and the Head of Strategic Finance's email to the South Cowal Community Development Company of 14 January 2014 had only been incorporated to demonstrate Councillor Walsh's quote was incorrect. In any event, the Respondent's representative argued that the email of 14 January 2014 had been made available to the South Cowal Community Development Company so was effectively already in the public domain.

In respect of the email relating to the terms and conditions of contracted care workers, the Respondent's representative advised that the Respondent had been approached by some care workers who expressed concerns that the contractors were not complying with employment legislation and were paying less than the minimum wage. The Respondent was simply advocating for these constituents and there was nothing inherently disrespectful in him doing so, given it was part of his role. The Respondent's representative further argued that the Respondent was acting in the public interest in trying to avoid the Council being criticised by alerting the officers to this possibility. He was not personally attacking or criticising officers.

Turning to the emails concerning Rothesay Harbour, the Respondent's representative explained the Respondent would not normally have got so involved in matters of an operational nature. He had done so, however, as had received an email from a senior officer on 29 August 2014 indicating the Harbour Authority had liability for health and safety issues. Given he was a member of the Harbour Authority, this email and the content of the Marine Safety Code led the Respondent to legitimately believe he had a personal responsibility for health and safety at the Harbour. He was raising legitimate concerns in this capacity and only became frustrated when the issues were not addressed. The Respondent's representative advised that the Respondent accepted his emails to the Council's Executive Director of Development and Infrastructure Services had been robust in nature but this was because he had become concerned that she was not taking the matters he had raised seriously. The Respondent's representative argued that none of the emails were disrespectful.

The Respondent's representative accepted the facts of the specific cases he had lodged in respect of the application of the ECHR were not necessarily analogous to the current case. However, the authorities demonstrated how the principles of how Article 10 were to be applied.

The Respondent's representative noted that authorities clearly indicated that, in the political context, a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, emotive, non-rational and aggressive, which would not be acceptable outside that context, was tolerated. The case law also indicated that the enhanced protection of freedom of expression was a broad concept and was not limited to expressions of or critiques of political views. Instead, it extended to all matters of public administration and public concern including comments about the adequacy or inadequacy

of performance of public duties by others. It also extended to value judgements made in good faith, which had sufficient factual basis.

The Respondent's representative further noted that Article 10(2) allowed some limitations on freedom of expression in order to protect the rights and reputations of others. However, the case law demonstrated that Article 10(2) must be interpreted in a narrow manner. Public servants can expect protection if there is a pressing social need in the circumstances of the case, but such protection must be relevant and sufficient. It required to be weighed against the interests of freedom of the press or of open discussion of matters of public concern.

The Respondent's representative argued that the matters raised by the Respondent in his emails were of public interest and or were value judgements made in good faith, both of which were allowed by Article 10. The Respondent had not been abusive or offensive to officers and had not made personal attacks or used excessive language; he was simply acting on behalf of his constituents in trying to draw their attention to matters of serious public concern.

DECISION

The Hearing Panel, having considered the submissions made by both the CESPLS and the Respondent's representatives, determined that it had sufficient information to be able to make a decision about whether or not there had been any breaches of the Councillors' Code of Conduct. The Hearing Panel proceeded to make this decision.

The Hearing Panel noted that the CESPLS considered that there had been six breaches of the Councillors' Code of Conduct.

The Hearing Panel considered all of the submissions, including the presentations made during the Hearing by the CESPLS and Respondent, and found as follows:-

1. The Councillors' Code of Conduct applied to the Respondent.
2. The Hearing Panel found that the Respondent had breached paragraph 3.3, and paragraph 20 of Annex C, of the Code of Conduct in respect of an email to the Council's Head of Governance on 29 December 2014.
3. The Hearing Panel did not find that the other five alleged breaches amounted to a breach of the Code.

Reasons for Decision

The Hearing Panel:

1. Considered that, in respect of the Respondent's email to the Council's Head of Governance of 29 December 2014, he had breached paragraph 3.3, and paragraph 20 of Annex C, of the Code of Conduct by circulating it to a number of individuals, before the

Head of Governance had the opportunity to reply. While the Hearing Panel accepted the Respondent's contention that he had not provided it to the 'ForArgyll' website, it considered it was the Respondent's actions in circulating the email to a number of individuals had resulted in it being published on the website. Publication on this website resulted in highly critical and unwarranted comments being directed at the Head of Governance. This demonstrated a lack of courtesy and respect to the Officer. The Hearing Panel considered that, by his actions, the Respondent had undermined mutual trust and respect between himself and a senior officer of the Council. Given the Respondent's position that the content of the email was already a matter of significant public interest, the Hearing Panel was of the view that he must have been aware, or could reasonably have expected, that the circulation of the email might result in it being published.

2. Considered that the email contained criticism of the Head of Governance. The Hearing Panel determined that, in circulating an email containing such criticism before providing the Head of Governance with the opportunity to respond, the Respondent failed to treat the officer with courtesy and respect and also failed to comply with the prohibition on raising matters relating to the conduct of officers in public.
3. Did not consider that the email of 29 December 2014 fell within the protection of freedom of expression under Article 10 of the ECHR. This is because the Hearing Panel's decision was not based solely on the content of the email, but rather the fact that the Respondent enabled a critical email to go in to the public domain without giving the officer the chance to respond. The Hearing Panel observed that councillors should exercise extreme care about either making public criticisms about officers, or allowing critical comments about officers to be made public, as such criticisms may not always fall within the protection provided by Article 10 of the ECHR.

The Hearing Panel did not find that the Respondent breached the Code of Conduct in respect of any of the other five matters considered to be breaches by the CESPLS, which involved correspondence from the Respondent relating to matters concerning the:

- Email from the Respondent to all Argyll & Bute councillors of 5 February 2015 relating to the proposal to purchase Castle Toward by the South Cowal Community Development Company;
- Email from the Respondent to the Council's Executive Director of Community Services of 25 February 2015 relating to the terms and conditions of contracted care workers employed by external contractors;
- Emails between 25 August and 4 October 2014 from the Respondent to the Council's Executive Director of Development and Infrastructure Services relating to a disagreement over the circulation of emails concerning Rothesay Harbour to third parties;
- Emails of 2 December 2014 and 11 January 2015 from the Respondent to the Council's Executive Director of Development and Infrastructure Services relating to the issue of safety equipment issued to staff working at Rothesay Harbour; and
- Email of 25 February 2015 from the Respondent to the Council's Executive Director of Development and Infrastructure Services relating to previous emails concerning operational issues at Rothesay Harbour.

This was because:

1. The Hearing Panel considered whether the comments made by the Respondent in the email of 5 February 2015 fell within the parameters of 'political expression' allowed in terms of the enhanced protection provided to politicians under Article 10 of the ECHR and/or whether any limitation in respect of the public interest in protecting public servants from unwarranted criticism applied. It decided the comments in the email of 5 February 2015 were protected by Article 10 as they concerned a matter of public interest. The Respondent, in making the comments, was expressing a value judgement and challenging the veracity of a quote made by another councillor. This quote had been published in a newspaper and the matter was, therefore, already in the public domain.
2. The Hearing Panel considered that while the language and tone used in the Respondent's email of 25 February 2015 concerning the terms and conditions of contracted care workers was robust, he addressed it to the appropriate officer who had responsibility for the matter. The Hearing Panel considered the Respondent was raising legitimate concerns on behalf of constituents, which he was entitled to do.
3. In terms of emails about Rothesay Harbour, the Hearing Panel determined that the Respondent was asking questions and raising issues in his role as a Member of the Harbour Authority and on the reasonable understanding that, in undertaking the role, he had a responsibility for health and safety issues at the harbour. The Hearing Panel considered that Respondent raised what he clearly believed to be legitimate issues in a polite and factual manner.

Evidence in Mitigation

The Respondent submitted a number of supportive affidavits and statements from constituents affected by, or concerned about, the matters that were the subject of the Respondent's correspondence, the Council's governance arrangements and/or the conduct of the Council's officers. He also submitted supportive affidavits and statements from four fellow councillors and from the MSP for Argyll & Bute.

In addition, the Hearing Panel heard evidence from three witnesses, being two fellow councillors and one member of the press, to the effect that the Respondent was known as someone who actively engaged with his constituents and was committed to representing their interests. He took his responsibilities as a councillor very seriously and was an excellent local representative. All three witnesses attested to the Respondent's honesty and decency and confirmed that he was committed to, and passionate about, working hard in the public interest.

The Respondent explained that he had not intended the Head of Governance to have been the subject of public criticism and expressed regret that this had happened. The Respondent reiterated that his sole aim and sincere motive had been to act in the interests of his constituents.

SANCTION

The decision of the Hearing Panel was to censure the Respondent.

The sanction was made under the terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000 section 19(1)(a).

Reason for Sanction

The Respondent had breached the Councillors' Code of Conduct. In reaching their decision, the Hearing Panel:

1. Noted it had found a breach in respect of one of the six allegations.
2. Was obliged by the 2000 Act to impose a sanction where a breach had been found. It considered the Respondent's actions in circulating his email had resulted in unwarranted and highly critical public criticism of an officer.
3. Noted it had not found the language used in the Respondent's email of 29 December 2014 to be offensive or abusive.
4. Noted the submissions made by the Respondent in mitigation, in particular, the Hearing Panel noted the Respondent demonstrated regret and insight into the impact of the circulation of his email on the Council officer concerned.
5. Accepted the evidence given on behalf of the Respondent by three witnesses, who provided detailed examples both verbally and in writing that the Respondent was hard-working, tenacious and fully committed to representing the interests of his constituents.
6. Took account of the written statements provided by other individuals on the Respondent's behalf.
7. Acknowledged the contribution to public life made by the Respondent as a councillor.

RIGHT OF APPEAL

The attention of the Respondent was drawn to Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000 as amended which details the right of appeal in respect of this decision.

Date: 26 October 2016



**Ian A. Gordon OBE, QPM, LL.B (Hons)
Chair of the Hearing Panel**