



RHONDDA CYNON TAF COUNTY BOROUGH COUNCIL

STANDARDS COMMITTEE

27 NOVEMBER 2020

ADJUDICATION PANEL FOR WALES – RECENT TRIBUNAL DECISIONS

INFORMATION REPORT OF THE MONITORING OFFICER

1. PURPOSE OF REPORT

To allow Members the opportunity to consider recent decisions made by the Adjudication Panel for Wales (APW).

2. RECOMMENDATION

- 2.1 It is recommended the Committee considers the copies of the recent decisions made by the Adjudication Panel for Wales (as appended to the report); and
- 2.2 Determines whether there are any possible messages or lessons to be learnt arising out of those decisions that could be communicated as part of future training for Members on the Code of Conduct.

3. BACKGROUND

- 3.1 The ethical framework set under Part III of the Local Government Act 2000 included the establishment of the Adjudication Panel for Wales (APW) as an independent, judicial body with powers to form tribunals to deal with alleged breaches of the Members' Code of Conduct. The operation of the Panel is governed by Regulations issued by the Welsh Government.
- 3.2 The APW issues decision notices following the conclusion of the cases it considers and in that respect Members will find copies of the following decisions appended to the report:

Appendix 1 - APW001/2018-019/CT - Councillor Graham Down

Appendix 2 - APW/002/2018-019/CT - Councillor Roderick

Appendix 3 - APW/001/2019-020/CT - Councillor Aaron Shotton

Appendix 4 - APW/002/2019-020/AT - Councillor Neil McEvoy (Appeal against Standards Committee determination)

3.3 The Committee may find it helpful to consider those decisions and the approach adopted by the APW in formulating its decision and sanctions (where relevant) in light of its own role when conducting Code of Conduct hearings with reference to the decision at Appendix 4 in particular.

3.4 The Committee may also wish to consider whether there are any possible messages or lessons to be learnt arising out of those decisions that could be communicated as part of future training for Members on the Code of Conduct.

4. LEGAL IMPLICATIONS

4.1 There are no legal implications arising from this report.

5. CONSULTATION

5.1 There are no consultation implications arising from this report.

6. EQUALITY AND DIVERSITY IMPLICATIONS

6.1 There are no equality and diversity implications arising from this report.

7. FINANCIAL AND RESOURCE IMPLICATIONS

7.1 There are no financial implications arising from this report.

LOCAL GOVERNMENT ACT 1972

AS AMENDED BY

THE LOCAL GOVERNMENT (ACCESS TO INFORMATION) ACT 1985

STANDARDS COMMITTEE

27 NOVEMBER 2020

REPORT OF MONITORING OFFICER

ADJUDICATION PANEL FOR WALES – RECENT TRIBUNAL DECISIONS

BACKGROUND PAPERS

Freestanding Matter

Contact: Mr. Andy Wilkins (Director of Legal Services & Monitoring Officer)
– 01443 424105



DECISION REPORT

TRIBUNAL REFERENCE NUMBER: APW001/2018-019/CT

RE: REFERENCE ABOUT ALLEGED BREACH OF THE CODE OF CONDUCT- COUNCILLOR GRAHAM DOWN

RESPONDENT: Councillor Graham Down

RELEVANT AUTHORITY: Mathern Community Council (formerly of Monmouthshire County Council).

Procedural background.

- 1 On 22nd March 2019 the Case Tribunal was convened to hear the substantive hearing of this matter, preparatory steps having been taken by the parties following a listing direction dated 19th February 2019.
- 2 The Case Tribunal was to determine whether the Respondent had breached paragraph 6(1)(a) of the Code of Conduct for members and co-opted members of Mathern Community Council (“the Code”). The failures alleged and referred by the Public Services Ombudsman for Wales (“PSOW”) were:
 - i. That at a public hearing of the Adjudication Panel for Wales (“APW”) on 19th July 2018 after the Panel announced its decision the Respondent said;

“I cannot be part of a system where I am required to suppress my conscience. I will not do so, nor will I stand up for, defend or promote the hideous and sickening perversions of shirt-lifters.”
 - ii. On 24th July 2018, the Respondent wrote to the APW and stated;

“I believe homosexuality to be a sickening, depraved practice and I shall continue to say so.”

These matters, the subject of this decision, will be described as ‘the second referral’.

3. In responding to the initial Notice of Reference from the PSOW to the APW, the Respondent in his Reply form and covering letter dated 22nd November 2018 said “.....it is questionable as a matter of law that there are any grounds for referral to the Panel.” He did not elaborate further. The PSOW in his response to the APW commented on Councillor Down’s letter and indicated that the legal basis for the referral was set out in section 69(4)(d) of the Local Government Act 2000 (“the Act”) and the Ombudsman was satisfied that the referral was in the public interest.
4. The Panel considered the various documentation, submissions and evidence before issuing the listing direction. The Panel in that direction said, in relation to the Respondents contention about the legality of the referral

“With regard to the first point, the Ombudsman suggests, in his representation to the panel that the legal basis for the referral is set out in paragraph 69(4)(d) of the Local Government Act 2000. The Case Tribunal agrees that this is a correct statement of the law and that the referral was lawful, that is, it was based on legal grounds.”

5. Upon further consideration of the matter prior to the substantive hearing, the Case tribunal was concerned that, whilst section 69(4)(d) of the Act does indeed empower the PSOW to refer matters that are the subject of the PSOW’s investigation to the president of the APW, that (notwithstanding the view expressed in the listing direction that the referral was based on lawful grounds), in fact the Case tribunal required further information about the investigation and whether it accorded with section 69 (1) of the Act with regards to the alleged breaches of the Code in this case. The Case tribunal was also mindful that it had not heard any detailed argument or submissions on this point prior to completing the listing direction and that it was procedurally fair and correct to raise the issue of the investigation with the parties.
6. At the hearing on 22 March 2019, Miss Sinead Cook on behalf of the PSOW confirmed that the written allegation relied upon as the basis for the Ombudsman’s investigation in the current case (the second referral) was the same written allegation as for case number APW/003/2017 – 018/CT (the first referral). Councillor Down argued that the comments that are the subject of the first allegation in this case were made during a previous legal hearing and therefore cannot constitute a fresh breach of the Code of Conduct. The Case tribunal gave directions for both parties to provide submissions and argument on the question of whether the Ombudsman’s investigation in this case has been undertaken in accordance with section 69 (1) the Act.
7. The parties duly provided their submissions. The Respondent’s submissions were to have been filed by 3 May 2019. In the event they were not received by the APW until 7 May 2019 however, in the circumstances nothing turns upon this short delay. The PSOW by email of 9th of May 2019 asked whether the Panel would consider this matter without a hearing in order to save public funds and the tribunal by letter of 5th of June 2019 to the Respondent asked if he was in agreement with this suggestion. By letter of 13th of June 2019 (received by the APW on 18th 2019) the Respondent agreed that this aspect of the case should be dealt with on the papers. Under regulation 15 of The Adjudications by Case

Tribunal's and Interim Case Tribunal's (Wales) Regulations 2001 the tribunal may determine an adjudication or any particular issue without a hearing if every accused person so agrees in writing. Accordingly this matter has been determined on the basis of the totality of the written evidence and representations without an oral hearing.

Factual background.

8. The first referral (case number APW/003/2017 – 018/CT) related to breaches of the Code of Conduct by the Respondent Councillor Down when he was a County Councillor at Monmouthshire County Council. Full details can be found in the decision report of the APW dated 10 August 2018 following a hearing on 19 July 2018. Broadly, the PSOW investigated two sets of email exchanges between the Respondent and Mr Paul Matthews the Chief Executive of Monmouthshire County Council. Mr Matthews written complaint was received by the PSOW on 12 October 2016 and it related to email exchanges on 12 February 2016 (the first day of Monmouthshire County Council's LGBT+ youth conference) and further exchanges in early October 2016.
9. On 1st November 2016 the PSOW wrote to Councillor Down to inform him that he would be investigating the complaint made against him by Mr Paul Matthews. On 18 July 2017 the Ombudsman wrote to Councillor Down and explained that the first stage of the investigation into the complaint made against him by Paul Matthews had now been completed and invited him for interview. On 24th of August 2017 Councillor Down was duly interviewed by the PSOW's representatives.
10. The first referral Case Tribunal found the Respondent's comments in three of his emails were in clear breach of paragraph 4(b) of the Council's Code of Conduct, and concluded that the Respondent should be suspended from acting as a member of Mathern Community Council for a period of two months, or, if shorter, the remainder of his term of office.
11. It was at the announcement of the tribunal's findings at the conclusion of the hearing on 19 July 2018 that the Respondent made the comments recorded at paragraph 2 i above. Councillor Down was sent the APW's decision by letter of 20th July 2018 and he responded to the Panel by letter of July 24th 2018 and included the comment that *"...I believe homosexuality activity to be a sickening, depraved practice and I shall continue to say so."* Councillor Down, by letter of 23rd August 2018 to the PSOW, included a copy of his letter of July 24th to the APW. The Ombudsman said *"I decided to investigate whether Councillor Down's actions at the public hearing may amount to a further failure to comply with the Code."* (Paragraph 3 on page 3 of "The investigation of a complaint against Councillor Graham Down of Mathern Community Council" A report by the Public Services Ombudsman for Wales 26th October 2018).
12. That investigation report was duly sent to the APW by the Ombudsman by letter of 26 October 2018 (the second referral) and thereafter preparatory steps were undertaken to hear this case including the listing direction and the subsequent directions given at the hearing on 22 March 2019.

The law.

13. The relevant law is to be found in Chapter III of the Local Government Act 2000 as amended. The sections relating to our considerations starting with section 69 are set out below;

“69— Investigations by the Public Services Ombudsman for Wales.

(1) *The Public Services Ombudsman for Wales may investigate—*

*(a) **cases in which a written allegation is made to him by any person** that a member or co-opted member (or former member or co-opted member) of a relevant authority has failed, or may have failed, to comply with the authority's code of conduct, and*

*(b) **other cases** in which he considers that a member or co-opted member (or former member or co-opted member) of a relevant authority has failed, or may have failed, to comply with the authority's code of conduct and **which have come to his attention as a result of an investigation under paragraph (a).***

(2) If the Public Services Ombudsman for Wales considers that a written allegation under subsection (1)(a) should not be investigated, he must take reasonable steps to give written notification to the person who made the allegation of the decision and the reasons for the decision.

(3) The purpose of an investigation under this section is to determine which of the findings mentioned in subsection (4) is appropriate.

(4) Those findings are—

(a) that there is no evidence of any failure to comply with the code of conduct of the relevant authority concerned,

(b) that no action needs to be taken in respect of the matters which are the subject of the investigation,

(c) that the matters which are the subject of the investigation should be referred to the monitoring officer of the relevant authority concerned, or

*(d) **that the matters which are the subject of the investigation should be referred to the president of the Adjudication Panel for Wales for adjudication by a tribunal falling within section 76(1).***

(5) Where a person is no longer a member or co-opted member of the relevant authority concerned but is a member or co-opted member of another relevant authority, the reference in subsection (4)(c) to the monitoring officer of the relevant authority concerned is to be treated as a reference either to the monitoring officer of the relevant authority concerned or to the monitoring officer of that other relevant authority (and accordingly if the Public Services Ombudsman for Wales reaches a finding under subsection (4)(c) he must decide to which of those monitoring officers to refer the matters concerned).

70— Investigations: further provisions.

(1) *The National Assembly for Wales may by order make provision with respect to investigations under section 69 (including provision with respect to the obtaining or disclosure of documents or information).*

(2) *The provision which may be made by virtue of subsection (1) includes provision which applies or reproduces (with or without modifications)—*

(a) any provisions of sections 60 to 63 as those sections had effect immediately before their repeal by the Localism Act 2011, or

(b) any provisions of sections 13 to 15 and Part 2B of the Public Services Ombudsman (Wales) Act 2005.

(3) *The Public Services Ombudsman for Wales may cease an investigation under section 69 at any stage before its completion.*

(4) *Where the Public Services Ombudsman for Wales ceases an investigation under section 69 before its completion, he may refer the matters which are the subject of the investigation to the monitoring officer of the relevant authority concerned.*

(5) *Where a person is no longer a member or co-opted member of the relevant authority concerned but is a member or co-opted member of another relevant authority, the Public Services Ombudsman for Wales may, if he thinks it more appropriate than making such a reference as is mentioned in subsection (4), refer the matters which are the subject of the investigation to the monitoring officer of that other relevant authority.*

71— Reports etc.

(1) *Where the Public Services Ombudsman for Wales determines in relation to any case that a finding under section 69(4)(a) or (b) is appropriate—*

(a) he may produce a report on the outcome of his investigation,

(b) he may provide a summary of any such report to any newspapers circulating in the area of the relevant authority concerned,

(c) he must send to the monitoring officer of the relevant authority concerned a copy of any such report, and

(d) where he does not produce any such report, he must inform the monitoring officer of the relevant authority concerned of the outcome of the investigation.

(2) *Where the Public Services Ombudsman for Wales determines in relation to any case that a finding under section 69(4)(c) is appropriate he must—*

(a) produce a report on the outcome of his investigation,

(b) subject to subsection (4)(b), refer the matters which are the subject of the investigation to the monitoring officer of the relevant authority concerned, and

(c) send a copy of the report to the monitoring officer, and the standards committee, of the relevant authority concerned.

- (3) *Where the Public Services Ombudsman for Wales determines in relation to any case that a finding under section 69(4)(d) is appropriate he must—*
- (a) produce a report on the outcome of his investigation,*
 - (b) refer the matters which are the subject of the investigation to the president of the Adjudication Panel for Wales for adjudication by a tribunal falling within section 76(1), and*
 - (c) send a copy of the report to the monitoring officer of the relevant authority concerned and to the president of the Adjudication Panel for Wales.*
- (4) *Where a person is no longer a member or co-opted member of the relevant authority concerned but is a member or co-opted member of another relevant authority –*
- (a) the references in subsections (1)(b), (c) and (d), (2)(c) and (3)(c) to the relevant authority concerned are to be treated as including references to that other relevant authority, and*
 - (b) if the Public Services Ombudsman for Wales reaches a finding under section 69(4)(c) he must refer the matters concerned either to the monitoring officer of the relevant authority concerned or to the monitoring officer of that other relevant authority.*
- (5) *A report under this section may cover more than one investigation under section 69 in relation to any members or co-opted members (or former members or co-opted members) of the same relevant authority.*
- (6) *The Public Services Ombudsman for Wales must—*
- (a) inform any person who is the subject of an investigation under section 69, and*
 - (b) take reasonable steps to inform any person who made any allegation which gave rise to the investigation, of the outcome of the investigation.*

72— Interim reports.

- (1) *Where he considers it necessary in the public interest, the Public Services Ombudsman for Wales may, **before the completion of an investigation under section 69**, produce an interim report on that investigation.*
- (2) *An interim report under this section may cover more than one investigation under section 69 in relation to any members or co-opted members (or former members or co-opted members) of the same relevant authority.*
- (3) *Where the prima facie evidence is such that it appears to the Public Services Ombudsman for Wales –*
- (a) that the person who is the subject of the interim report has failed to comply with the code of conduct of the relevant authority concerned,*
 - (b) that the nature of that failure is such as to be likely to lead to disqualification under section 79(4)(b), and*
 - (c) that it is in the public interest to suspend or partially suspend that person immediately,*

the interim report may include a recommendation that that person should be suspended or partially suspended from being a member or co-opted member of the relevant authority concerned for a period which does not exceed six months or (if shorter) the remainder of the person's term of office.

- (4) *Where the Public Services Ombudsman for Wales produces an interim report under this section which contains such a recommendation as is mentioned in subsection (3), he must refer the matters which are the subject of the report to the president of the Adjudication Panel for Wales for adjudication by a tribunal falling within section 76(2).*
- (5) *A copy of any report under this section must be given—*
 - (a) to any person who is the subject of the report,*
 - (b) to the monitoring officer of the relevant authority concerned, and*
 - (c) to the president of the Adjudication Panel for Wales.*
- (6) *Where a person is no longer a member or co-opted member of the relevant authority concerned but is a member or co-opted member of another relevant authority –*
 - (a) the second reference in subsection (3) to the relevant authority concerned is to be treated as a reference to that other relevant authority, and*
 - (b) the reference in subsection (5)(b) to the relevant authority concerned is to be treated as including a reference to that other relevant authority.*

74. Law of defamation.

For the purposes of the law of defamation, any statement (whether written or oral) made by the Public Services Ombudsman for Wales in connection with the exercise of his functions under this Part shall be absolutely privileged.”

Save for the headings of the sections above, the other highlighted sections in bold are to emphasise wording of particular relevance to this decision.

The Ombudsman's written representations.

- 14. The Ombudsman cited section 69 (1) of the 2000 Act and submitted that this effectively creates two ways in which the PSOW can acquire the jurisdiction to undertake an investigation, firstly cases where he receives a written allegation that a breach of the code has been committed or may have been committed and secondly “cases” where the PSOW “considers” that a breach of the code has or may have been committed “and which have come to his attention as a result of an investigation under paragraph (a).” The PSOW received a written allegation in relation to what they described as the first referral (namely the earlier proceedings in case number APW/003/2017 – 018/CT arising from the email exchanges of February and October 2016) and relied upon section 69 (1) (a) as the jurisdiction to investigate that first referral complaint. The PSOW “did not receive a written allegation regarding the events which led to the PSOW’s investigation and the current case being referred to the APW. (APW/001/2018 – 019/C T – the second referral).”
- 15. The PSOW “contends that the wording in section 69 (1) (b) “which have come to his attention as a result of an investigation under paragraph (a)” is sufficiently

broad enough to cover information which came to the PSOW's attention at the case tribunal hearing which was a culmination of "an investigation under paragraph (a)". The Ombudsman further adds "such information came to the attention of the PSOW as a result of his earlier investigation under paragraph (a) because the hearing on 19th of July would not have occurred but for the PSOW's previous investigation under section 69 (1) (a) (APW/003/2017 – 018/CT).

16. At the hearing on 22 March 2019 Councillor Down argued that as the comments which the PSOW investigated and which led to the current referral to the APW were made during a previous legal hearing, they cannot constitute a fresh breach of the Code of Conduct. The Ombudsman made representations on this issue and on the question of core immunity with reference to the cases of *Darker v Chief Constable West Midlands* [2001] 1 AC 435, and *A & B v Chief Constable of Hampshire* [2012] EWHC1517, submitting that there is no legal basis for the argument that core immunity gives any councillor core immunity from an investigation under the 2000 Act by the PSOW or an adjudication by the APW for things said during an APW hearing.

The Respondent's written representations.

17. Councillor Down submitted that the Ombudsman's case must fail on two grounds, firstly that he fails to specify which authority's code of conduct he alleges has been breached; and secondly that the alleged breach did not come to his attention as a result of his investigation. He pointed out that the first referral was instigated following a written complaint by the Chief Executive of Monmouthshire County Council in October 2016 at which time he was a member of that County Council. By the time of 19 July 2018 and the incident that led to the 2nd referral he had ceased to be a member of Monmouthshire County Council and argued that he was not bound by the provisions of its code of conduct.
18. The Respondent argues that section 69(1)(b) refers to "authority" in the singular and submits that the PSOW cannot stretch his investigation to alleged breaches of a second authority's code about which there has been no written complaint. He argues that he cannot have been in breach of Monmouthshire County Council's Code of Conduct because he was not a member of that council on 19 July 2018 and there has not been any complaint, written or otherwise that he has breached Mathern Community Council's Code of Conduct.
19. The Respondent submits that the investigation that gave rise to the first referral commenced on or about 1 November 2016 and concluded with the publication of the Ombudsman's report some months later and the referral of the allegations to the panel. He argues that *"it would be manifestly unjust for any further allegations which happen to come to the attention of the PSOW to be "tagged on" to that investigation once it was concluded. I contend that there should be a new investigation initiated in the proper way, that is to say by way of a written complaint under section 69 (1)(b)."* He adds; *"furthermore, the expression used and upon which the PSOW bases his referral was not "a result of an investigation" but a result of the decision of the Panel. It was made in a highly charged, emotional moment and whilst I do not retract the words used, I regret my conduct and apologise to the Panel for the outburst."*

20. The Respondent also argued, (by reference to the two cases cited in paragraph 16 above), that participants in court proceedings have the benefit of immunity and that his statement which formed the basis of the report and the second referral by the PSOW was made during the course of proceedings before the Panel on 19th July 2018 and was therefore covered by immunity.

Case tribunal's decision.

21. We do not find the Respondent's submissions in relation to the wording of section 69(1)(b) as referring to 'authority' in the singular to be persuasive, on the basis that the section clearly refers to member of former member of a relevant authority in Wales, however in the light of our conclusions below, this is not central to the decision.
22. There is no dispute of fact that Councillor Down said the words attributed to him at the hearing on 19 July 2018 or that he wrote the comments in his letter of 24 July 2018 which together comprise the second referral to the APW. The preliminary issue for the Case Tribunal is whether this case has been properly referred to the APW in accordance with the law? There was no written allegation received by the PSOW in respect of the second referral matters at all as acknowledged by the PSOW. In the Ombudsman's letter to the Respondent of 17th August 2018 the Ombudsman's Investigation and Improvement Officer Sinead Cook wrote;

"Section 69(1)(b) states that the Public Services Ombudsman for Wales may investigate cases in which he considers a member of a relevant authority in Wales has failed, or may have failed, to comply with the authority's Code of Conduct and which has come to his attention as a result of an investigation.

The Ombudsman has decided to investigate whether your actions at the hearing may amount to a failure to comply with paragraph 6(1)(a) of the Code...."

23. However the Case Tribunal consider that to be a misleading and inaccurate statement of the law, since section 69(1)(b) actually says "*which have come to his attention as a result of an investigation under paragraph (a).*" Section 69(1)(a) says that the PSOW may investigate "*cases in which **a written allegation** is made to him by any person...*". There is a clear and obvious connection between the written allegation and the investigation in section 69(1)(a) that is triggered by it. Section 69(1)(b) is conjunctive with 69(1)(a). The Case Tribunal is of the unanimous view that the meaning of 69(1)(b) is that, where the PSOW is investigating the particular written allegations that he receives, if during the course of that investigation, other apparent breaches of the code by a member of a relevant authority in Wales come to his attention that were not the subject of the initial written allegations, then the PSOW may also investigate such apparent breaches. In other words the investigation is not constrained solely by the written allegation. This is a perfectly practical provision since it may hypothetically be the case that an investigation into a written allegation against a certain member may, reveal other behaviour of which the original complainant was unaware by that member or others which may also constitute a breach of

the code. It would plainly be perverse if the Ombudsman in such a scenario was unable to investigate and refer such matters.

24. The Case Tribunal notes the PSOW's contention in the written submissions that the wording in section 69 (1)(b) "*which have come to his attention as a result of an investigation under paragraph (a)*" is sufficiently broad enough to cover information which came to the PSOW's attention at the case tribunal hearing **which was a culmination of "an investigation under paragraph (a)"**. Such information came to the attention of the PSOW as a result of his earlier investigation under paragraph (a) because the hearing on 19th July would not have occurred but for the PSOW's previous investigation under section 69(1)(a)(APW/00302017-018/CT)". (our emphasis).
25. The Case Tribunal do not accept this submission nor the reasoning behind it. The hearing was not a culmination of the investigation. The Case Tribunal find that the investigation into the first referral was completed on 20th December 2017 when the Ombudsman said that "my report on this investigation should be referred to the President of the Adjudication Panel for Wales for adjudication by a tribunal." Indeed in the PSOW's submissions there are contradictions as there is reference to the PSOW's previous investigation, thereby tacitly accepting that the previous investigation was complete.
26. It is clear that in investigating the first referral matters that the focus was on whether e mails sent in February and October 2016 constituted a breach of the code. When the Respondent was interviewed on 24th August 2017 about this, he was told by the PSOW's interviewer that once the Ombudsman has considered the information and the available evidence, that if there were not any further enquiries he can reach his determination. It was explained that one of those determinations or options was referral to the APW (see page 34 of the transcript of the Respondent's interview). Indeed the Respondent was encouraged to provide any further information that he wanted to be taken into account in the two weeks whilst waiting for the interview transcript to be produced and told that "*we will strive to give you a determination on this then as quickly as we possibly can.*"
27. Section 71(3) of the Act (see paragraph 13 above) relates to reports when the PSOW determines that a referral to the President of the APW is appropriate. Section 71(3)(a) requires the PSOW to produce a report on the "**outcome of his investigation**." In other words, the investigation is clearly concluded and the report will refer to that. The investigation does not remain open ended to be added to at a future date. Further, at 71(6)(b) the Ombudsman is to take reasonable steps to inform any person who made any allegation which gave rise to the investigation, of the **outcome** of the investigation.
28. Section 72 of the Act on Interim Reports allows the PSOW "*before the completion of an investigation under section 69*" to produce an interim report. Whilst there were no interim reports in either the first or second referral against the Respondent, the wording of this section with reference to the completion of the investigation further fortifies the Case Tribunal's view that the investigation report of the PSOW that is referred to the APW constitutes the completed report and the conclusion of the investigation. The subsequent hearing before the

Case Tribunal is not the culmination or the continuance of the investigation by the PSOW but the testing of the allegations and evidence revealed by that investigation.

29. It is also noteworthy that the first referral investigation report related to potential breaches of 4(b) of the Code which were pursued before the July 2018 Case Tribunal, whereas the second referral and investigation report related to paragraph 6(1)(a) of the Code. The Case Tribunal does not accept that the second referral information has come to the attention of the PSOW as a result of the first referral investigation. That first investigation related to events of 2016 and had been completed in December 2017, many months before the events of July 2018. **It follows that the Case Tribunal find that the second referral to the APW and the subject matter of this case was not in accordance with the requirements of section 69(1)(a) or (b) of the Act in that there was no written complaint about the alleged breaches of the Code and the potential breaches of the Code did not come to the PSOW's attention as a result of an investigation under 69(1)(a) and accordingly we dismiss the application.**
30. There are very obvious practical policy (as well as legal) reasons for the requirements of section 69 and the need for a written complaint from any individual outside the PSOW's office to be observed. Under the Act the PSOW is to investigate complaints from third parties, not to **initiate** the complaints or the investigation himself. It is not for the PSOW to proactively investigate potential breaches of the Code absent a written allegation (save for in the circumstances in section 69(1)(b) that the Case Tribunal has determined do not apply here.)
31. In the light of the Case Tribunal's decision to dismiss the case, it is not necessary to examine the respective submissions on core immunity.



Signed..... Date 17th July 2019
Richard Payne
Chairperson of the Case Tribunal

Sian Jones
Panel Member

Richard Nicholas
Panel Member

DECISION REPORT

TRIBUNAL REFERENCE NUMBER: APW/002/2018-019/CT

REFERENCE IN RELATION TO A POSSIBLE FAILURE TO FOLLOW THE CODE OF CONDUCT

RESPONDENT: Councillor Roderick

RELEVANT AUTHORITIES: Powys County Council
Brecon Beacons National Park Authority

1. INTRODUCTION

- 1.1 A Case Tribunal convened by the President of the Adjudication Panel for Wales considered a reference in respect of the above Respondent.
- 1.2 A hearing was held by the Case Tribunal on 19 November 2019 at the Welshpool Magistrates Court. The hearing was open to the public.
- 1.3 The Public Services Ombudsman for Wales was represented by Mr Hughes, counsel and Councillor Roderick attended and was represented by Mr Daycock, counsel. The Monitoring Officers of both relevant authorities were also present.
- 1.4 References in square brackets within this Decision Report are to pages within the bundle of Tribunal Case Papers unless otherwise stated.

2. PRELIMINARY DOCUMENTS

2.1 Reference from the Public Services Ombudsman for Wales

- 2.1.1 In a letter dated 7 December 2018, the Adjudication Panel for Wales received a referral from the Public Services Ombudsman for Wales (“the Ombudsman”) in relation to allegations made against Councillor Roderick. The allegations were that Councillor Roderick had breached Codes of Conduct of the Council and the Authority by;
 - (i) Slapping the bottom of a female Councillor before a meeting of the Authority (alleged breaches of paragraphs 4 (b) and 6 (1)(a) of the Code); and
 - (ii) Threatening to divulge information about the Councillor if she pursued the complaint (alleged breaches of paragraphs 4 (b), 6 (1)(a) and 7 (a)).

- 2.1.2 The circumstances of the first complaint were that, shortly before the start of a meeting of the Brecon Beacons National Park Authority in the Meeting Committee Room in Plas Y Ffynon, Brecon on 8 December 2017, Councillor Roderick allegedly slapped the complainant's bottom as councillors were gathering at the start of the meeting. The complainant lodged a complaint on 5 January 2018 [B21].
- 2.1.3 The second complaint arose from two conversations which Councillor Roderick subsequently had with Ms Doel, the then Chairman of the Authority, and Ms Foxley, the then Monitoring Officer. During the first conversation on 15 January 2018, Councillor Roderick indicated that he had information about the complainant's behaviour which her husband would have been interested in. Ms Doel understood that he was threatening the disclosure of the information if the complaint was pursued. During the second conversation on 23 January, it was alleged that Councillor Roderick said that he would make public something that the complainant would not have liked and that he would "*hang her out to dry*". Ms Doel's complaint was dated 4 April 2018 [B23-4].

2.2 The Councillor's responses to the Complaints and Reference

- 2.2.1 Councillor Roderick responded to the complaints on a number of separate occasions;

(i) In respect of the first complaint;

- On 17 January 2018, Councillor Roderick emailed the Ombudsman and stated that he had given the complainant a "*friendly tap on the backside*"..*"with the back of [his] hand"* [B196-7];
- On 16 October 2018, during an interview, Councillor Roderick further stated that he had "*just tapped her with the back of [his] hand, on the bottom*". He denied that the contact had been a slap and described it as a '*flick*'. He stated that she had reacted by turning around sharply and saying "*oi don't do that*" [B159-177];
- In the Councillor's solicitors' letter of 22 November 2018, the contact was described as a "*light tap with the back of his hand*" [B200-2];
- In the Reply to the Notice of Reference dated 23 January 2019, the Councillor restated his position and denied breaches of the Code of Conduct ([C3-16] and [C33-38]).

(ii) In respect of the second complaint;

- Councillor Roderick emailed the Ombudsman on 14 May 2018 and stated that he did not accept that Ms Doel's complaint accurately reflected the words which she had used. He nevertheless accepted the 'thrust' of the account and accepted that he may have inadvertently breached paragraph 4 (b) of the Code of Conduct [B198-9];
- During the further interview which took place on 16 October 2018, the Councillor stated that he had been "*looking for payback*" when

he had spoken to Ms Doel and Ms Foxley on 15 and 23 January because he felt that the complaint had been defamatory [B176-192];

- In his Reply to the Notice of Reference dated 22 March 2019, no further details of the response were put forward [C19-32].

2.3 The Ombudsman's Written Representations

- 2.3.1 The Ombudsman responded to the Councillor's representations on 10 April 2019 [D3-7].

2.4 The Councillor's further representations

- 2.4.1 By a letter dated 12 November 2019, Councillor Roderick's solicitors wrote to indicate a significant change of stance to the allegations;

"Having reviewed matters with our client, our client has instructed us that he will not seek to contest the facts as presented to the Tribunal and accepts that he has breached the code in relation to the two complaints that the panel will be considering."

3. EVIDENCE

- 3.1. The Case Tribunal received a bundle comprising the Tribunal Case Papers and a DVD.
- 3.2 In light of the change of stance to the allegations referred to in paragraph 2.4.1 above, the Case Tribunal heard no oral evidence from the witnesses to the complaints who had been identified within the Ombudsman's report.
- 3.3 The Tribunal did, however, hear evidence from two character witnesses (see further below).

4. FINDINGS OF FACT

- 4.1 In light of Councillor Roderick's solicitors' letter of 12 November, the Case Tribunal found the following material facts. Where there were discrepancies between the witnesses' accounts within the Ombudsman's Report, the Tribunal made findings on the balance of those accounts as follows, although those discrepancies were not considered material to the issues:

First complaint

- 4.1.1 The Respondent and the complainant to the first complaint are Councillors. They are members of the Brecon Beacons National Park Authority and of the Powys County Council.
- 4.1.2 The Respondent received training on the National Park Authority's Code of Conduct on 16 June 2017 and signed an undertaking to observe it on that date too ([B40] and [B43]). He signed a similar declaration in relation to the Powys County Council Code on 9 May 2017 [B42].

- 4.1.3 There was a meeting of the National Park Authority on 8 December 2017 in the Meeting Committee Room, on the first floor of Plas Y Ffynnon, Brecon. A plan and photographs of the room were produced [F10-18]. The distances shown on the plan were set out within paragraphs 10-12 of Mr O'Connor's witness statement [F6-7].
- 4.1.4 The Respondent and a female Councillor, ('the complainant'), were both present. In total, approximately 21 people were present.
- 4.1.5 At the beginning of the meeting, some members were moving around the room and gaining access to the register of gift declarations. The complainant was signing the register when there was physical contact between the Respondent's hand and her bottom. She described the Respondent as having used the open palm of his hand to make contact with the force of a smack or slap. She reacted by saying "*I could have you struck off for that*" and some others in the room, but certainly not all, recalled her reacting, either by saying the words she maintained, or by exclaiming with surprise and/or by standing up and looking around. One Councillor remembered her appearing to have been close to tears at the start of the meeting (Ms Perkin [B130]).
- 4.1.6 On 5 January 2018, Councillor Durrant made a complaint to the Ombudsman about the Respondent's conduct on 8 December 2017. The Respondent was informed of the complaint on 8 January.

Second complaint

- 4.1.7 There was a conversation between the Respondent and Ms Doel, the Chairman of the National Park Authority, on 15 January 2018 during which he asked if a roundtable discussion could have been arranged to resolve the complaint which he then knew was being investigated by the Ombudsman. He then indicated that, if the complaint was pursued, he had information about the complainant's conduct or behaviour that her husband would have been interested in.
- 4.1.8 There was a subsequent conversation between the Respondent and Ms Foxley, the Monitoring Officer of the National Park Authority, on 23 January 2018 during which he said that, if the matter (i.e. the complaint) went against him, he would make something public that the complainant would not have liked and/or that he would '*hang her out to dry*' and involve his lawyer.
- 4.1.9 During the interview which took place on 16 October 2018, the Respondent stated that he had been "*looking for payback*" when he had spoken to Ms Doel and Ms Foxley because he felt that the complaint had been defamatory [B176-192].

5. FINDINGS OF WHETHER MATERIAL FACTS DISCLOSED A FAILURE TO COMPLY WITH THE CODE OF CONDUCT

5.1 The Code of Conduct

- 5.1.1 The relevant parts of the Code of conduct were as follows;

Paragraph 4 (b);

*“You must-
(b) show respect and consideration for others;”*

Paragraph 6 (1)(a);

*“(1) You must –
(a) not conduct yourself in a manner which could reasonably be
regarded as bringing your office or authority into disrepute;”*

Paragraph 7 (a);

*“You must not –
(a) in your official capacity or otherwise, use or attempt to use your
position improperly to confer on or secure yourself, or any other
person, an advantage or create or avoid for yourself, or any other
person, a disadvantage;”*

5.2 Case Tribunal’s Decision

5.2.1 In light of the contents of the Respondent’s solicitor’s letter of 12 November 2019 and the evidence set out above, the Tribunal confirmed their unanimous view that breaches occurred as follows;

- (i) In respect of the first complaint; breaches of paragraphs 4 (b) and 6 (1)(a);
- (ii) In respect of the second complaint; breaches of paragraphs 4 (b), 6 (1)(a) and 7 (a).

6. ACTION TO BE TAKEN

6.1 The Respondent’s Evidence and Submissions

6.1.1 Councillor Roderick called evidence as to his character from;

- Councillor Pritchard [C51];
- County Councillor Van-Rees [C45].

6.1.2 He also relied upon a number of written character references which the Case Tribunal read and considered;

- County Councillor Harris [C40];
- Councillor Weale [C41];
- Mrs Lynette Thomas [C42];
- Councillor Alexander [C43];
- Councillor Price [C44];
- Mr Chris Davies MP [C46];
- Mrs Janet Watkins [C48-9];
- Mrs Ann Webb [C50];
- Councillor Pugh [C56].

6.1.3 Lengthy submissions were made on his behalf by Mr Daycock, in which it was contended that Councillor Roderick was apologetic and contrite. Mr Daycock alluded to his lack of experience as a councillor, having

been elected in 2017, but he also referred to his extensive work for his ward and community over many years.

6.1.4 In relation to the first complaint, it was important to note that the Respondent had accepted that his actions had not been appropriate and/or intended as disrespectful with hindsight and that he offered to apologise [B174-5].

6.1.5 In relation to the second complaint, it was noteworthy that the Respondent had accepted that he had not expressed himself as thoughtfully as he would have liked and had admitted an inadvertent breach of paragraph 4 (b) of the Code at an early stage [B198-9].

6.2 Case Tribunal's Decision

6.2.1 The Case Tribunal considered all of the facts of the case and the Respondent's submissions in mitigation (see above). It applied The Guidance issued by the President under s. 75 (10) of the Local Government Act 2000, it considered the Nolan Committee's Principles for Public Life from which the National Assembly for Wales' core principles were derived.

6.2.2 First, the Case Tribunal had to assess the seriousness of the breaches and their consequences. It considered that the Respondent's conduct on 8 December had degraded and humiliated the complainant and had long been considered wholly unacceptable in any public arena. It was described by Mr Hughes on behalf of the Ombudsman as '*shocking and extraordinary*'.

6.2.3 In relation to the second complaint, however, the Case Tribunal considered that the threats that the Respondent made could have been described as akin to blackmail. It was not clear to the Tribunal on what basis the Respondent had denied breaches of the Code, despite admitting the thrust of the allegations in relation to the complaint. Mr Daycock realistically accepted that it was the more serious complaint, an issue with which the Tribunal readily agreed, not only because his conduct had been repeated on 15 and 23 January, but also because the conduct itself was more likely to have brought his office as a Councillor and/or the Authority into disrepute. It was short sighted and naive for him to have believed that two similar conversations with the Chair and Monitoring Officer would not have resulted in action having been taken against him.

6.2.4 In terms of the broad sanction that was appropriate in the circumstances, the Tribunal considered that the option of suspension was most applicable. The Tribunal started its considerations by considering whether it could take no action and then a partial suspension but, in the case of the former, it considered the conduct to have been too serious and, in the case of the latter, there was no particular aspect of the Respondent's conduct which made a partial suspension appropriate. The Tribunal was also conscious that the Respondent's role on the Authority had been derived from his role as a County Councillor.

- 6.2.5 The Tribunal then considered both mitigating and aggravating features of the breaches.
- 6.2.6 In the Respondent's mitigation in relation to the first complaint, the Tribunal noted that a degree of contrition had been expressed at a relatively early stage in interview and that it had been a one-off incident. There was no systemic conduct or protracted harassment.
- 6.2.7 Mr Daycock informed us that Councillor Roderick was inexperienced and was described by Councillor Van Rees as '*not a sophisticate*'. He was not familiar with the heightened level of formality and the ethos of committee environment. He accepted that he had made an error of judgment but that no malice had been meant. The Tribunal accepted as much.
- 6.2.8 Unfortunately, the Respondent had denied the gravity and nature of the incident until recently, thereby potentially extending the period of upset to the complainant. It was a concession nevertheless which had to stand to his credit. Mr Daycock informed the Tribunal that the delay was attributable to the fact that the Councillor's representatives did not have a good understanding of the code of conduct.
- 6.2.9 In relation to the second complaint, the Tribunal noted the Respondent's degree of insight; that he '*didn't express himself as thoughtfully as he would have liked and accepted and inadvertent code breach*'. Nevertheless, the conduct had been repeated and, by its very nature, there had been an attempt to use his position for gain.
- 6.2.10 In more general terms, the Tribunal considered a strong set of character references. The Respondent clearly commanded a broad range of respect and trust, which made his conduct all the more surprising and out of character. His level of dedication to his community was impressive. He had no prior record of misconduct with the Ombudsman.
- 6.2.11 The Case Tribunal considered whether and how to adjust the sanction in order to achieve an appropriate deterrent effect and to maintain public confidence in the standards expected in public life. It concluded by unanimous decision that **Councillor Roderick should be suspended from acting as a member of authorities for a period of 4 months.**
- 6.2.12 The sanction applied to both positions held by the Councillor. The Tribunal could discern nothing in the nature of the conduct and/or the breaches which suggested that the Respondent's behaviour was peculiar to, or specifically arose from, his work with the Authority. His position on the Authority was derived from his role with the Council and both the Council and Authority were relevant authorities under ss. 69 and 79 for these purposes.
- 6.2.13 The authorities and their Standards Committees have been notified accordingly.

6.2.14 The Respondent has the right to seek the permission of the High Court to appeal the above decision. Any person considering an appeal was advised to take independent legal advice about how to appeal.

7. CASE TRIBUNAL RECOMMENDATIONS

7.1 The Case Tribunal made the following recommendation to the authorities;

7.1.1 That Councillor Roderick receive further training in relation to his duties under the code of conduct from or on behalf of the Monitoring Officer of the Brecon Beacons National Parks Authority by 31 January 2020.



Signed.....
John Livesey
Chairperson of the Case Tribunal

Date...20 November 2019.....

Ms C Jones
Panel Member

Dr G Jones
Panel Member

DECISION REPORT

TRIBUNAL REFERENCE NUMBER: APW/001/2019-020/CT

REFERENCE IN RELATION TO AN ALLEGED BREACH OF THE CODE OF CONDUCT

RESPONDENT: Councillor Aaron Shotton

RELEVANT AUTHORITY: Flintshire County Council

1. INTRODUCTION

1.1 A Case Tribunal convened by the President of the Adjudication Panel for Wales has considered a reference in respect of the above Respondent.

1.2 A hearing was held by the Case Tribunal at Llandudno Magistrates Court on 27, 28 and 29 January 2020. The majority of the hearing was open to the public and only a limited amount of evidence in relation to the precise extent of any relationship was heard in private.

1.3 Councillor Shotton attended and was represented by Ms Joanne Clement, Counsel and the Public Services Ombudsman for Wales ("the Ombudsman") was represented by Mr Gwydion Hughes, Counsel. The Monitoring Officer or Deputy Monitoring Officers of Flintshire County Council were also present throughout the proceedings.

1.4 *References in square brackets within this Decision Report are to pages within the bundle of Tribunal Case Papers unless otherwise stated.*

2. PRELIMINARY DOCUMENTS

2.1 Reference from the Public Services Ombudsman for Wales

In a letter dated 10 June 2019 [B1], the Adjudication Panel for Wales received a referral from the Ombudsman in relation to allegations made against the Respondent. The allegations were that the Respondent had breached the Code of Conduct of the Relevant Authority by failing to comply with Paragraphs 6(1)(a), 7(a) and 7(b) of the Code of Conduct in relation to certain events connected to interactions with his Personal Assistant ("PA") in 2012 and also in 2016 and 2017.

2.2 The alleged breaches of the Code of Conduct

The three alleged failures under consideration were as follows:-

2.2.1 Allegation 1

Whether the Respondent, in his official capacity or otherwise, used or attempted to use his position improperly to confer on or secure for himself or his PA, an advantage or create or avoid for himself or his PA a disadvantage by providing an opportunity to view questions before her interview for the permanent role of PA and also whether he thereby conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute.

2.2.2 Allegation 2

Whether the Respondent used, or authorised his PA to use the resources of the authority (hire of vehicles):-

- (i) imprudently;
- (ii) in breach of the authority's requirements;
- (iii) unlawfully;
- (iv) other than in a manner which is calculated to facilitate, or to be conducive to, the discharge of the functions of the authority or of the office to which he had been elected or appointed;
- (v) improperly for political purposes; or
- (vi) improperly for private purposes.

and also whether he thereby conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute.

2.2.3 Allegation 3

Whether the Respondent conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute by sending and/or encouraging his PA to send inappropriate messages, to include messages of a sexual nature, during office hours.

2.3 Summary of circumstances leading to alleged breach.

2.3.1 The three allegations arose as a result of the discovery by the PA's husband of a series of "WhatsApp" messages and a subsequent complaint to the Chief Executive of the Relevant Authority and an investigation leading to disciplinary proceedings involving the PA.

2.3.2 The circumstances surrounding **Allegation 1** were that the PA had been seconded to the role of PA to the Leader in May 2012 and had previously supported Councillor Woolley who had been Leader and was succeeded by the Respondent as Leader in May 2012. An interview took place for the permanent PA role on 29 November 2012. The PA was the only remaining candidate by that time, another candidate having withdrawn her application the week before.

2.3.3 **Allegation 2** arose during the course of the disciplinary investigation when e-mails recovered from the Council's computer systems revealed private hotel bookings made by the Respondent using his Council e-mail address which, in three cases, coincided with hire-car bookings made by the PA using the Council's booking system and paid for by the Council. In each case the cost of hire was £11 per day.

2.3.4 **Allegation 3** arose from the discovery of WhatsApp messages which were forwarded to the Chief Executive and Monitoring Officer of the Relevant Authority, some of the messages apparently having been sent during working hours.

2.4 The Councillor's Response to the Investigation and Reference

2.4.1 The Respondent e-mailed the Ombudsman's investigating officer on 2 July 2018 [B533] following notification of the complaint and said that he and his family had been extremely distressed by the complaint, level of press coverage and social media comments it attracted.

2.4.2 Two officers from the Ombudsman's office conducted a lengthy interview with the Respondent on 12 November 2018 in which he denied **Allegations 1 and 2**. The Respondent agreed that a certain WhatsApp exchange between himself and his PA was not appropriate however in relation to **Allegation 3** [B286].

2.4.3 The Respondent's solicitor, Ms Randle of Steel and Shamash, (later Edwards Duthie Shamash), wrote a detailed response to the Ombudsman's draft Report on 31 May 2019 [B533] stating; "We note that you have provided a very clear and concise report into the allegations made against Councillor Shotton in spite of the huge amount of material which you had to take into account, evidenced by the 497 pages of appendices with the draft report. As a consequence of your efforts to distil some of this evidence into a comprehensive narrative, we are concerned to note, however, that some important details have been omitted. On a few occasions, we are concerned that this gives an impression, albeit unintentionally, of our client's conduct or the context which he found himself, which is not entirely accurate." The solicitor then urged the Ombudsman to accept a number of points to expand certain paragraphs of the Report.

2.4.4 Ms Randle completed a formal Reply to the Notice of Reference from the Ombudsman on 5 July 2019 [C1]-[C23] and provided a detailed response to the material facts set out in the Ombudsman's Report.

2.5 The Ombudsman's Written Representations

2.5.1 The Ombudsman responded to Ms Randle's letter of 31 May 2019 on 10 June 2019 [B543] and stated that the investigating officer had carefully considered the comments in the letter and had made some minor amendments to her analysis as a result, however stated that the overall conclusions were unchanged. It was also stated that consideration is generally given at pre-hearing stage of any requirement to conduct a hearing in private based on the assessment of the public interest.

2.5.2 The Ombudsman provided a concise formal response to the Reply to the Notice of Reference on 18 July 2019 [D1]-[D7].

3. PRE-HEARING REVIEW AND DIRECTIONS

3.1 General Directions were issued on 10 October 2019 [A1]-[A5] which included the listing of the matter for pre-hearing review on 10 December 2019. The Case Tribunal convened the Pre-Hearing Review of its own motion for the efficient discharge of the proceedings.

3.2 Listing Directions were issued following the pre-hearing review on 18 December 2019 [A6]-[A15] to identify the list of relevant disputed and undisputed facts, to confirm the allegations, to direct that certain limited evidence on the precise extent of any relationship would be heard in private at the final hearing, to make directions accordingly with regard to the Tribunal Bundle and to agree the list of witnesses to be called.

3.3 General Directions were also issued on the 22 January 2020 [A16]-[A17] in relation to the Tribunal Bundle.

4. PRELIMINARY MATTERS AND APPLICATIONS MADE DURING THE HEARING

At the outset of the hearing and during the course of proceedings the following applications were made and the following issues arose:-

4.1 A small number of documents had been omitted from the Bundle and these were numbered B395(a) to (n). The quality was not particularly good and clearer copies were agreed by the parties and the Case Tribunal directed that these be included in the Bundle.

4.2 The Directions Section (A) of the Bundle had been expanded and numbered to include the General Directions dated 10 October 2019 [A1] to [A5], Listing Directions dated 18 December 2019 [A6] to [A15] and further General Directions dated 22 January 2020 [A16] to [A17].

4.3 Ms Clement made an application to file a witness statement on behalf of the Respondent and the Case Tribunal directed that the statement be admitted into the Bundle.

4.4 At the pre-hearing review the parties had indicated that they would wish the first witness to provide evidence as to character as well as evidence as to fact at the first stage of the proceedings. Mr Hughes did not object on behalf of the Ombudsman and the Case Tribunal duly directed this course of action.

4.5 Ms Clement raised a preliminary point during the proceedings with regard to the particular points that could be raised during the public and private sessions of the hearing and wished to receive precise legal directions as she considered there to be

one or two grey areas. In particular Ms Clement did not consider that cross-examination of the issues as to the hire-car allegation, **Allegation 2**, could be easily separated into issues which could be examined in public and those which could be examined in private. The Case Tribunal did not agree and directed that the administrative and practical matters relating to the hire-cars be heard in public as it related to financial probity and that it could be separated from cross-examination regarding the motivation for and relationship background given that an inappropriate relationship was an undisputed fact. The Case Tribunal directed that questions to Mr Everett regarding the precise extent of the relationship would be heard in private and evidence regarding the PA's interview for a permanent post, **Allegation 1**, would be heard in public. **Allegation 3**, with regard to the inappropriate messages during office hours, would be heard in private only to the extent that it would go to the precise nature of any relationship.

4.6 Ms Clement also requested clarity with regard to **Allegation 3** at Paragraph 4.3.3 [A7] and whether this allegation extended to messages outside office hours. The Case Tribunal confirmed that the wording should read; "Whether Councillor Shotton conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute by sending and/or encouraging his PA to send inappropriate messages, to include messages of a sexual nature, during office hours" (the comma having previously been omitted).

4.7 During the course of the hearing, the PA said that she wished to correct one of her witness statements. As a result, the Respondent's representative applied for disclosure of the transcript and recording of the interview together with all correspondence between the Ombudsman's investigator and the PA relating to the drafting and finalisation of the PA's witness statement. In the interests of proportionality, the interests of justice and expeditious disposal of the case, the Case Tribunal did not order disclosure of the transcript and recording. It did however order the disclosure of draft statements and all related written correspondence [H1] to [H38] in the interests of natural justice and these were supplied during the course of the hearing.

4.8 In connection with this matter, Ms Clement also invited the Case Tribunal to issue a warning to the PA with regard to giving evidence on oath and the Tribunal Chairperson duly proceeded with this course of action.

4.9 During the adjournment to arrange for disclosure as per 4.7 above, the Monitoring Officer also provided the parties with additional documentation with regard to **Allegation 1** and it was agreed by the parties and directed by the Case Tribunal that this be included in the Bundle [G1] to [G5].

4.10 An agreed position statement was read out to the Tribunal and then submitted in written format with regard to the question of whether there had been a second candidate for the post of PA. (There had been a second candidate who withdrew her application a week before the interview).

4.11 Finally, Ms Clement applied for the witnesses as to character who were due to provide oral evidence, to give their evidence before submissions on the Disputed Facts were made by Counsel for each of the parties. There being no objection from

Mr Hughes, the Case Tribunal agreed to this course of action in order to release the witnesses.

5. THE HEARING

The Case Tribunal considered the contents of the Bundle including the witness statements of the witnesses who provided oral evidence as well as the complainant's witness statement and heard submissions and oral evidence as follows. The Monitoring Officer and Deputy Monitoring Officer were provided with opportunities throughout the proceedings to comment on the evidence and to clarify policy and governance issues in relation to the Relevant Authority.

5.1 The Ombudsman's presentation of the investigation report

Mr Hughes briefly introduced the Ombudsman's investigation report.

5.2 Witnesses as to Fact

5.2.1 Mr Everett, Chief Executive at the Relevant Authority

Mr Everett gave evidence as to the layout of the open plan Executive office where the PA worked and as to the dates of the 2017 local government and general elections. He was however unable to assist the Case Tribunal as to the precise details of the Council's flexible work/home-working scheme. With regard to the Respondent's working hours as Leader, these were not fixed or standard working hours although the Leader should make his availability known generally. Mr Everett was aware of the arrangement for hiring vehicles for official purposes but unaware of any policy or the specific procedures for booking such vehicles, although a PA would normally make travel arrangements for senior Members and he was not sure of any approval processes either at the relevant time or currently. Mr Everett said there was no ban on the use of private mobile phones and that such a ban would be unrealistic.

Between 2016 and 2017 Mr Everett had some temporary line management responsibilities for the PA in view of the absence of the line manager due to ill-health. Before 2017, he had no concerns about the nature of the relationship between the Respondent and the PA and he would have expected to have known if there were any concerns as the Executive team was close-knit and as the offices were highly visible.

It was confirmed that the press coverage surrounding this case had impacted negatively after Mr Everett had worked hard with the Respondent to improve the Council and to build a good reputation. In response to questions from Ms Clement regarding salacious reports in certain newspapers which focused on sexual claims which did not form the basis of the allegations, Mr Everett made it clear that he did not read the same.

Mr Everett then gave limited evidence in private session.

5.2.2 Ms Sharron Jones, former Executive Office Manager

Ms Jones stated that the PA had given a good interview. Ms Jones did not recall having said that the PA must have received the questions in advance. She might have said it in jest but did not think so as that would not have been very professional. If she had, it would have been a compliment and never a suggestion that the PA had the questions in advance. She did not recall any joke in the office on the subject either and nothing was said in her presence as manager.

Ms Jones had not had any concerns about the Leader and the PA and thought that the relationship was professional.

With regard to interview questions, these would have been written by the HR officer and Ms Jones explained the type of questions that would have been asked. Different questions would have been asked at the interview for the permanent role as compared with the initial secondment which would not have been formal. No-one else had expressed interest in that secondment opportunity.

5.2.3 Ms Hayley Selvester, former PA

The former PA was asked by Mr Hughes to confirm the contents of her witness statements and her signature, one dated 9 August 2018 [190]-[B194] and the other 1 May 2019 [B204]-[206]. She stated that not all of her first statement was true and that paragraphs 12, 14 and 15 of that statement were incorrect. It was correct that the Respondent was meant to be interviewing her and that he told her that the questions were on his desk, however it was incorrect to say that he was joking by saying that the questions were on his desk or that it was a joke that she had seen the questions. He did allow her to see the questions and she did look at them. She said that there had been another internal applicant for the post of PA.

The PA continued to give her evidence on the second day of the hearing and, following Ms Clement's invitation to issue the same, the Tribunal Chairperson warned the PA of the consequences of providing a false statement, informed of the duty to tell the truth to the Tribunal and of the right to refuse to answer questions which could leave her or her spouse open to criminal proceedings.

The parties' representatives had agreed a statement overnight to the effect that the second applicant for the role of PA had withdrawn her application and the PA was the only remaining candidate interviewed on 11 December, had scored highly in interview and was appointed to the role.

The PA confirmed that she had not been in a personal relationship with the Respondent at the time of the interview in 2012.

Allegation 1

The PA confirmed her application for the role of PA [G1]. She would like to think that she placed the interview in the Respondent's diary, however confirmed that the

Respondent in fact attended a School Budget Forum meeting instead and not a Scrutiny meeting as she had previously stated [B345].

The PA could not remember Ms Jones giving the Respondent an interview pack, however he must have been given a pack. She could not remember the words as this was back in 2012, however he made it clear that if she wanted to, she could have a look and that they were on his desk and that the text messages in 2017 make that clear. The PA said that this admission in the hearing was just as damaging for her as it was for the Respondent.

She could not remember the exact detail but said that the pack contained her application, questions and a sheet for the interviewer's own notes. She said she did not take the questions home or copy them. Following interview, she couldn't recall being told that she had done well and did not recall being teased by anyone.

Ms Clement then cross-examined the PA on the contents of a WhatsApp exchange with the Respondent dated 26 March 2017 [B53] where she expressed an interest in working with an AM. The exchange progressed and referred to flirting one's way into a job, progressing to; "Can you not remember leaving me the questions for the interview!" The response was "Did I" and culminating in three messages from the PA within the same minute 12:12 as follows: "Nope...you were meant to interview me with shaz and hr", "You gave me the questions the night before", "Then you didn't turn up for interview...still in committee so told shaz to go ahead without you!" then a 'shocked face emoji'. The Respondent wrote 12:13; "Oh...yea I forgot about that". The PA believed that he was referring to the interview questions.

Ms Clement referred to the Investigatory Interview of the PA on 29 June 2018 [B451], where the importance of being open and honest had been stressed, however she accepted that she had tried to hide the truth in certain respects. She agreed that she had also referenced joking about the questions being on his desk and agreed that at the time she had said; "no I would never [look at questions left on the desk]". She said that she had lied as she was under extreme pressure in her personal and family life at the time, so she panicked and lied.

The PA was also taken to her witness statement [B190] and to the Ombudsman's correspondence with regard to signature of statements [H1-H38] and opportunities to add or better explain her position and to the disciplinary hearing outcome [B477] where it was recorded that the PA had strongly refuted that she had looked at the interview questions and that she had no motivation for lying when she had come clean about the other allegations. The PA said she was now being truthful as she was under oath although she had lied to a number of previous investigators. She said it would have been easier to have said the same to this Tribunal, however the Respondent did leave the questions for her.

The PA was referred to newspaper articles and she responded that it was absolutely ridiculous to suggest that she was the source of any leak. She had not been angry about losing her job, she did not seek revenge against the Respondent and did not want to see him 'go down'.

When asked to compare her interview answers to the model answers which had accompanied the questions in the interview pack, she agreed that they were very similar and she recognised interview question/model answers sheet [G2-G3].

Allegation 2

The PA agreed that she booked hire cars through the Council system for private journeys in question. She was referred to her second statement [B204] and she explained the standard system for booking cars at the relevant time, including an “authorisation summary” [B395]. Normally a Member would not authorise such a booking and would simply request the arrangement of travel. She agreed that in her statement she had referred to booking hire cars for three separate occasions “at his request and/or with his knowledge”.

The PA described each of the three occasions 27-29 February 2016, 11-13 April 2016 and 20-23 May 2016 when she had booked hire cars for private purposes [B395-B399]. She said that she had discussed arrangements with the Respondent as to how to arrange meetings. She said that she would see if they could hire a car as they were at good rates however she was aware that they couldn’t be booked in this way for personal use. She said that the Respondent did not offer to pay personally for the bookings and she did not say that she would do so. The Respondent paid for the petrol.

The PA agreed that the Respondent would not be copied in to the booking and he would not have seen the details. The cost of hire at that time was £11 per day however Ms Clement asked the PA whether she was asking the Tribunal to believe that the Respondent would indeed risk it all to save a few pounds, she answered “yes”.

It was put to the PA that when made aware of this allegation, she realised that she would get into yet more trouble and that she had been looking for someone else to take the blame. The PA denied this and said that there was equal blame. She explained her reluctance to sign her second witness statement and to engage with the process at that time.

On the third day of the hearing, the PA gave a limited amount of her evidence in private in accordance with the Listing Directions dated 18 December 2019 in relation to **Allegation 3**.

5.2.4 Councillor Shotton, the Respondent

The Respondent’s evidence in chief was comprised firstly of the witness statement forwarded to the Tribunal on the evening of 24 January 2020 and the Respondent confirmed the contents of this statement and his signature. Ms Clement asked further questions in chief.

Allegation 1

The Respondent explained that his experience of staff interviews was in relation to senior officers where questions may have been considered in advance then taken back and only handed to Members just prior to interview to make sure that nothing untoward happened. In relation to the PA's interview, he could not recall an interview pack and did not know what happened to any pack that may have been prepared for him. He said he hadn't seen the interview questions [G2] before and he would have recalled seeing them. When asked whether he might have been allocated questions to ask, he said that he had no idea. He said he was struggling with the question as to whether or not he was intended to be part of the interview process. He attended the Schools Forum at the same time set for the interview, it may have been the first of the administration as it did not meet regularly and as Finance Cabinet Member and Leader, he would not have missed them.

His initial stance was that no interview had taken place [B117]. He agreed that it was fair to say that he had been expected to take part in the interview in view of the evidence contained in two e-mails from Ms Jones, one preparing for interview, the other on the day of interview referring to the Respondent putting the interview back to 10.30 [B518]-[B519]. He did not know how he responded however and could not recall whether he was hoping to do both, however he could not "for the life of him" understand why he would attend the interview and thought it would have been irregular for him to have been observing, let alone to have been participating in the interview. He accepted however that there had been a lot of water under the bridge since 2012 and that the interview would have been utterly routine and that it would not have required much preparation.

He agreed that the questions were quite generic and easy to answer if you had experience of the role; for instance, the Authority's priorities were well known as there was focus in the new administration on injecting pace and political direction. There was a detailed manifesto which was translated into documents such as the Council's improvement plan. Boards were set up across a range of Directorates to consider sub-priorities.

The Respondent agreed that the PA had scored highly at interview [G4] and did not recall the PA's good performance in interview as being a big issue and he would have expected her to have performed well as she had already been doing the job for some time. He said he would not have made it clear that the PA could look at the questions.

It was accepted by the Respondent that there would be no reason to be lying in the WhatsApp messages between himself and the PA as these were unguarded messages and neither expected them to be shared with anyone else. He agreed that by the reference to flirting her way into a separate employment role, the PA was making the link with her own position. As to which previous message "Oh yes I forgot about that" was referring to, the Respondent said that it was difficult to recall, however he said that there was a WhatsApp etiquette around answering each question in turn and he felt confident that he was answering the first in the sequence. If the PA had read the questions in advance, the Respondent said that it would be inappropriate to speculate as to how else she could have received them.

Allegation 2

The Respondent had not seen any policy on the use of hire cars for private purposes and never saw documents in relation to car-hire bookings.

On 27 February 2016, he filled the hire car up with petrol with the corporate credit card in connection with the official council business [B395a]. He would always fill the car up with petrol before taking it back. In connection with what he thought was a separate and private hire event on 28 February, he would have filled up the car again and would have paid this out of his own pocket. He had never been accused of misusing funds before and had never done so.

The Respondent said that he wanted to be confident about how he and the PA would reach their meetings and did not want to travel in either of their private cars and he did also look into booking a hire car privately. In his witness statement, he stated that the PA had said that staff could hire cars at the rates within the Council contract. He contended that she had assured him that she would arrange the car hire and pay for it as he was paying other expenses associated with their meetings. He further stated that he asked the PA on a number of occasions as to whether he could pay for the car hire and he was given the clear response that as he was paying for the hotels, she was adamant that she would “sort” or “cover” the hire car.

With regards the February booking, he was surprised that the hire car had been booked later than he had believed as he had committed and paid for a hotel meeting on the 5th February on a non-refundable basis. It was later that the Cardiff business trip was mentioned. He accepted what the PA said and had no reason to question her so he did not check the arrangements.

It was put to the Respondent that as he usually paid for his own mileage and did not claim legitimate expenses, he might regard the small occasional cost for private use of hire cars as a case of “swings and roundabouts”. The Respondent denied this and said it was not a political stance but it was not in his character. Members would have known his stance and he would not have needed to do what was suggested. On other occasions, he would refuse to go to meetings and use video conferencing instead to save money for the Council.

If the PA had told her that she was not paying, he would not have put himself at risk for this amount. She did not tell him however.

The Respondent then gave a limited amount of his evidence in private in accordance with the Listing Directions dated 18 December 2019 in relation to **Allegation 3**.

5.3 Witnesses as to Character

The Respondent called evidence as to character as follows:-

Mr Everett

Mr Everett had known the Respondent in his Council roles for 13 years and for 2 to 3 years previously in a WLGA context. He referred to the special relationship between CE and Leader. They co-lead and co-run the Council, dealing with many sensitive issues along the way. Trust is an absolute requisite. Mr Everett considered that the Respondent had been an excellent Leader who had demonstrated vision, determination and wished to make a positive difference. They held similar values in terms of public ethos and had worked hard in the context of housing and an anti-poverty strategy. He also referred to high profile work on the Regional Ambition Board in North Wales and within the WLGA where the Respondent had been highly regarded and respected. He had no concerns regarding the Respondent although he referred to one unrelated private matter. There had been no suggestions previously of any misuse of public funds and there was scrutiny and publication of expenses. In any event, the Respondent did not claim the mileage which he was entitled to claim. Mr Everett had continued to work with the Respondent following the allegations and their professional relationship remained as strong through tense and turbulent times. He had felt mixed emotions regarding the Leader's resignation.

Evidence as to character was also given by the following:-

Councillor Roberts

Councillor Thomas

Councillor Bithell

The three Councillors provided oral evidence regarding the Respondent's good character, integrity, public commitment, leadership qualities through difficult economic times and his WLGA and North Wales Economic Ambition Board roles. He had steered a smooth ship, showed vision and taken his Finance portfolio role seriously. He had been respected and his resignation was seen as a serious loss by many colleagues

The Respondent also relied upon a number of written character references which the Case Tribunal read and considered;

Councillor Jones

Councillor Butler

Councillor Mullin

Councillor Wilcox, Baroness Wilcox of Newport

Councillor Siencyn, Leader of Gwynedd Council

5.4 The Monitoring Officer

The Monitoring Officer clarified certain points which had been raised in Mr Everett's evidence. Firstly with regard to the Member/Officer protocol, this had been reviewed in 2014/15 and approved by the Council. The Officer Code had also been reviewed in 2015 and again in 2019. With regard to the Council's flexible working scheme, there were no "core hours" but there were "band-widths" which varied depending on the needs of the service. With regard to the relevant IT policy, it does allow use of official e-mail for private use which must not be excessive. Certain specified uses such as shopping and social media accounts were prohibited however.

5.5 The Ombudsman's Submissions

Mr Hughes said that for the large part, the determination of Disputed Facts 2.1 and 2.2 depended on whether the Case Tribunal preferred the evidence of the Respondent or the PA. Disputed Facts 2.3 and 2.4 coalesced to a degree and there had been agreement for the most part regarding the messages and the factual position.

Much of what had been said regarding an inappropriate relationship involved dishonesty as both parties will have lied to their respective spouses and the motive will have been the product of fear of discovery and the consequences of discovery for political and/or employment prospects. Both lied to Mr Everett as to the nature of the relationship.

The Tribunal may feel that the path to the current evidence of the PA may be relevant. Her evidence had moved from a position of limited or no culpability to an admission of everything which was the conventional path. What the Respondent was saying was that the path had been from honest denial to dishonest culpability. This would be an odd progression and improbable.

Mr Hughes submitted that one reason for there being more evidence of the PA's less than honest answers than for the Respondent was that her disciplinary process had progressed and was now over.

He also submitted that there was independent evidence to assist. If there was confusion over who to believe, it was possible to look at the text messages themselves and also the close correlation between model answers and answers given by the PA at interview [G2] and [G4] which spoke for themselves. The texts contained unguarded and honest comments, albeit including lightweight comments, jokes and fantasy and no-one expected this lengthy review at that time. The exchanges were relatively independent and with regard to the interview questions, indicated that the Respondent allowed the PA to have sight of the questions and that was the most straightforward meaning. The Respondent's interpretation was strained.

5.6 The Respondent's Submissions

Ms Clement said that only Disputed Facts 2.1 and 2.2 remained and that there was common ground on Disputed Fact 2.3 and it was in the context of acceptance that there were only a small number of inappropriate messages and that these were sent on the 7 April 2017. The question of office hours was complex in view of the nature of the flexible working scheme and that there were minimum break times. The Respondent accepted that it was probable that some were sent during office hours however.

The PA confirmed that they frequently sent work-related messages and that the inappropriate messages were limited and she had thought she was on lunch break. With regard to Disputed Fact 2.4, no-one had previously probed what had been meant by the language used by the PA in describing the relationship in her second draft statement [H11] and due to the now common view, cross-examination had been unnecessary.

Ms Clement addressed the Tribunal as to the respective credibility of the Respondent and the PA, she asserted that the former was a high-flying deeply committed public servant who had never had a previous complaint against him and who had co-operated with the investigation and the other being a self-acknowledged liar when it suited her own interests and who "took delight" in changing her formal witness statement in court. She also referred to the view expressed in the disciplinary hearing outcome letter [B480]. There was a motive to lie in order to destroy the Respondent's career as he was still in a job and she was not. Ms Clement submitted that the current event met the description of the anonymous source in a newspaper article, "predicting fireworks".

Ms Clement submitted that retrieved electronic information previously deleted by the PA regarding the hire-cars showed that the PA was in trouble and all she could do was confer "equal blame" and shift as much of the responsibility as possible.

With regard to the Respondent, it was submitted that he had made early admissions where appropriate and had not sought to hide from the truth. He deeply regretted his error of judgment in entering an inappropriate relationship and was paying for it to this day.

He did not lie to the Chief Executive however wished that he had been more frank. Ms Clement also sought to differentiate between lying to a spouse and lying during formal investigations.

Regarding the WhatsApp exchange referring to the interview, it was submitted that the last response referred to the first point (that the Respondent was supposed to attend the interview) and that it was unclear whether the Respondent ever had the interview pack or if he was intended to be at the interview in the light of the timing of the Schools Forum. The PA could not remember any details of what was said and she had previously been equally adamant that she had not had prior sight of the interview questions. As to the similarity between the model answers and the actual answers, the PA did not get a perfect score and was simply good at her job. It was submitted that the evidence therefore fell far short on the balance of probabilities test.

As for the Respondent, he had been too honourable to speculate as to what occurred and whether he was the only person who may have had access to the interview questions.

Ms Clement referred to the Ombudsman's own Report [B29] as he had not been persuaded that there had been improper use of the Respondent's position in relation to the interview process.

With regard to the car hire, it was the PA who booked the hire-cars, received the invoices and without a shadow of a doubt knew that the Council had paid for private use. The Respondent did not and never saw any of the documents. It made no sense that he would have filled the car up twice with petrol in relation to the February 2017 booking, one on the corporate card and one personally if he was then allowing the Council to pay for the private element of the hire.

Finally Ms Clement submitted that the only thing the PA could do was to attribute equal blame to the Respondent and to try to shift as much of the responsibility as possible and that the Respondent did not know and had no reason to suspect that the Council was paying for car-hire for private purposes, particularly as Cabinet Member of Finance who had denied himself expense claims.

6. FINDINGS OF FACT

6.1 The Case Tribunal found the following **undisputed** material facts

- 6.1.1. The Respondent is a Councillor and the former Leader at Flintshire County Council ("the Council"). He was first elected to the Council in 1999 and was Leader of the Council from 2012 until his resignation in April 2019.
- 6.1.2 The personal assistant ("PA") was seconded to the role of PA to the Leader and Deputy Leader on 28 May 2012. The PA was interviewed for the permanent role of PA on 29 November 2012 and was duly appointed to the role. The Respondent was due to take part in the interview however did not attend in the end.
- 6.1.3 The Respondent received training on the Council's Code of Conduct for Members in 2013 and signed an undertaking to observe the Code.
- 6.1.4 The Respondent conducted an inappropriate close personal relationship with the PA which involved hotel meetings and 'sexting' between January 2016 and May 2017.
- 6.1.5 The Respondent used hire cars paid for by the County Council on 27 and 28 February 2016, 11 to 13 April 2016 and 21 and 22 May 2016 which included personal purposes in relation to the hotel meetings.

6.2 The Case Tribunal found the following in respect of the **disputed** material facts:

- 6.2.1 The Respondent did use his position improperly to confer an advantage on the PA by providing an opportunity to view questions before her interview.
- 6.2.2 The Respondent was not aware nor could he have been expected to be aware that he was using hire vehicles for private purposes at the Council's cost.
- 6.2.3 The Respondent sent and encouraged the PA to send inappropriate messages, to include messages of a sexual nature, during office hours.
- 6.2.4 Insofar as there was any difference in accounts, Disputed Fact 2.4 in relation to the precise extent of any relationship required no formal finding and therefore did not impact on the assessment of credibility of either the Respondent or the PA.

6.3 Credibility of the Witnesses

- 6.3.1 The Case Tribunal found Mr Everett and Ms Jones to have been honest witnesses in relation to the background and contextual issues, although certain policy issues and issues regarding the PA's interview needed to be corrected, clarified or expanded by the Monitoring Officer during the course of the hearing.
- 6.3.2 The Case Tribunal noted that the PA had been evasive in interview with the Chief Executive, had been adamant as to her innocence in relation to the interview questions during her disciplinary interview and had signed a witness statement during the Ombudsman's investigation to this effect, a position from which she now resiled. The Tribunal considered this to be a serious matter, however it found her evidence on oath to be compelling in relation to the interview questions, in particular as that evidence was not only detrimental to the Respondent but also detrimental to herself. The interview was a life-event of great significance to a PA on a temporary secondment and a permanent role would have meant employment security and a considerable degree of prestige. The events running up to interview would have been memorable for her.
- 6.3.3 With regard to the hire-car bookings, the PA's evidence was that the cars had been booked at the Respondent's "request and/or with his knowledge." She believed that the Respondent would have been aware that the Council would be paying for the car on each occasion "as they were usually booked on the back of council or political events". When her attention was drawn to the relevant documentation however, the PA conceded this was the case in only one instance and she was not able to recall the detail of any discussions with the Respondent about the arrangements for using

hire cars. The Case Tribunal found her evidence on this matter to be vague to the point that it lacked credibility.

- 6.3.4 In relation to the third allegation, her recollection broadly matched that of the Respondent.
- 6.3.5 The Case Tribunal found the Respondent to be a credible and honest witness with regard to **Allegations 2 and 3**. In relation to the interview questions, the Respondent could barely recall the event and indeed in his initial communication with the Ombudsman [B117], doubted that the PA had any job interview during his time as Council Leader. During his interview with the Ombudsman's investigator he could not recall anything about the interview process. In giving evidence at this hearing, he said that he struggled to accept that it had been intended that he should participate in the interview process, despite the written evidence in the bundle to the contrary [B518] and [B519]. The Case Tribunal did not find this surprising as this would not have been a memorable or high-level event in the early days of being a Leader of a new administration with far more pressing duties and where there was only one candidate for a job which the PA had already been doing for quite some time.
- 6.3.6 With regard to the hire-cars, the Respondent was clear that he understood that the car-hire for meetings with the PA was a private arrangement made independently of the Council contract. He was consistent in his assertion that the PA had said that she was paying for the car and that when he had offered to pay for the private bookings, she said that she had "sorted" or "covered" this element of cost as her contribution. In this respect, the Tribunal found the Respondent to be far more reliable in his recollection than the PA. His wish to pay was consistent with his strong ethos in terms of financial probity and his unwillingness to claim expenses to which he was entitled.

6.4 The bases for the above findings are as follows:-

Allegation 1

- 6.4.1 Having considered the credibility of each witness and in particular that of the PA and the Respondent, on the balance of probabilities, the Case Tribunal found the PA's evidence on oath to be consistent with the unguarded and unstructured remarks made in the WhatsApp exchange of 26 March 2017 in the context of an unconnected job role [B54] and [B55]. The exchange contained the clear statement; "You gave me the questions the night before". The inappropriate exchange of 7 April 2017 showed that the Respondent and the PA had not concluded their WhatsApp relationship and there was therefore evidence of a trusting relationship at that time with no reason to be joking about this statement.
- 6.4.2 The Respondent had no recollection of the interview or the surrounding circumstances. This is not in the least surprising in the first year of a new administration when there would have been a huge number of events,

meetings and responsibilities to attend to. The interview of a PA who was the only remaining candidate and who had already been carrying out the role for a lengthy period of time meant that she was almost certain to gain the role of PA. The sharing of interview questions with a candidate was wholly inappropriate as the Leader was in a position of power and would have been expected to lead by example, however this would not necessarily have been a memorable event or one that was given any proper thought and consideration.

- 6.4.3 The Tribunal also agreed that for the PA to move from a position of honest denial to a position of dishonest culpability would be unusual. It did not accept that the comment “Oh...yea i forgot about that” naturally referred to the initial comment only in the series of three comments and agreed that this would be a strained construction. It was more likely to refer to all three, including the comment; “You gave me the questions the night before”.
- 6.4.4 In her answers during disciplinary interview [B465], the PA clarified that the Respondent had hinted that the questions were on his desk rather than him having physically given them to her. Although the PA could not recall the exact wording, it was apparent to the Tribunal that the PA had seen model answers to the interview questions, the similarity in answers to the model answers was too great to be a mere coincidence. More directly, in her evidence on oath she confirmed that she recognised the questions and those model answers and that she had seen them the day before interview. The most obvious explanation was that the Respondent had allowed the PA to view the questions. No other explanation was advanced to explain how the PA could have accessed those questions and answers. As the Respondent conceded, any other explanation would have been speculation. In conclusion, the Case Tribunal accepted the PA’s evidence on **Allegation 1** and preferred it to the Respondent’s evidence. The Case Tribunal’s conclusions included consideration of the character evidence called on the Respondent’s behalf.

Allegation 2

- 6.4.5 Conversely, having considered the credibility of each witness, the Tribunal accepted the Respondent’s evidence on **Allegation 2**. As Cabinet Member for Finance who led by example in terms of Members expenses, having not claimed significant sums to which he was entitled and which the Independent Remuneration Panel for Wales expected Members to claim, it would be extremely unlikely for the Respondent to knowingly or recklessly allow or encourage the PA to book travel for private purposes at the cost of the Council and to risk financial criticism for relatively small sums.
- 6.4.6 The Respondent’s evidence with regard to filling the car with petrol using the Council’s corporate card to pay for the official purposes and then filling the car at his own expense for private purposes supported his account that, at the time, he believed there to be two entirely separate bookings, one for business use and one for private use. In the view of the Case

Tribunal, this corroborated the evidence of lack of intention to travel for private purposes at the Council's expense.

- 6.4.7 The PA had been responsible for booking the hire-cars, for the paperwork and for liaising with the hire company. She was the expert in that respect and at the relevant time, there were no additional checks and balances with regard to authorisation and as such, she was in a position of knowledge and power.
- 6.4.8 The Tribunal preferred the evidence of the Respondent that he had been led to believe that the PA had "sorted" and was "taking care" of the cost of the hire cars for private purposes and that he had offered to pay for this on each occasion. It came as a shock to him that the hire cars were paid for by the Council. In his statement he said that it had "floored" him and that he would not have travelled in the cars if he had "thought for one second" that the Council was paying for them. [B303].
- 6.4.9 As to whether the Respondent used the resources of the Council "imprudently", the Case Tribunal considered that this required an element of knowledge on the part of the Respondent, which the Tribunal found to be absent. The phraseology "improperly for private purposes" likewise implied knowledge and a dishonest intent which the Tribunal found to be absent. As to "in breach of the authority's requirements", there was no formal policy in place, nor formal requirements (although it would have been patently obvious that the Council would not pay for private use).

Allegation 3

- 6.4.10 The Respondent and the PA had by the last day of the Tribunal hearing reached an agreed position that the Respondent had sent and/or encouraged his PA to send inappropriate messages, to include messages of a sexual nature, during office hours on the 7 April 2017.
- 6.4.11 In the circumstances, the Tribunal noted that this was no longer a Disputed Fact or allegation.

7. FINDINGS OF WHETHER DECIDED FACTS/ALLEGATIONS AMOUNT TO A FAILURE TO COMPLY WITH THE CODE OF CONDUCT

7.1 The Ombudsman's Submissions

7.1.1 With regard to **Allegation 1**, Mr Hughes stated that the finding led to the inevitable finding of a breach of Paragraph 7(a) of the Code of Conduct and was also capable of bringing the office and authority into disrepute.

7.1.2 It was stated that with regard to **Allegation 3**, this was more complex in the context of Paragraph 6(1)(a) of the Code of Conduct. He referred to the need for a fine balancing exercise between the Code and Article 8 of the ECHR in relation

to the text messages during working hours and the need to differentiate between the man and the office. He urged caution in relation to the Livingstone judgment which referred to an earlier version of the statutory regime with reference to Section 52 of the Local Government Act 2000.

7.1.3 Mr Hughes referred to numerous paragraphs of the judgment, however he contended that each case was fact sensitive. He said that Section 52 was framed in such a way that interference in private issues was more limited than in a councillor's public role.

7.1.4 In the context of Article 8 ECHR, consideration would need to be given as to what extent the state should interfere in relation to private texts exchanged in work time.

7.2 The Respondent's Submissions

7.2.1 With regard to **Allegation 1**, Ms Clement acknowledged the cross-over between Disputed Fact 2.1 and Paragraph 7(a) of the Code of Conduct and the factual finding would determine that there was a breach, however she resisted an additional finding of breach of Paragraph 6(1)(a), particularly as the factual circumstances were not so serious in the light of the surrounding circumstances, being that there was only one candidate, that the PA was well qualified and would have got the job in any event.

7.2.2 Ms Clement contended with regard to **Allegation 3** that the following were the reasons as to why the finding did not lead to breach of the Code. With regard to Livingstone, there were two distinct aspects. One argument was around the Respondent being 'off-duty', which she conceded was not an argument open to her in this Case. The alternative argument however was binding and that related to the distinction between the man and the office [paragraph 40].

7.2.3 Ms Clement also produced a report regarding a Code of Conduct investigation concerning a Member of Parliament which she acknowledged was not binding on the Case Tribunal but potentially persuasive in illustrating actions that should be taken in cases of this nature. She referred to various paragraphs of the relevant report and drew parallels with the Respondent's case. She submitted that the Respondent had not brought his office into disrepute because he had damaged his own reputation rather than that of the role.

7.2.4 Ms Clement's second line of argument built on the first and she contended that these were entirely private messages in relation to private actions using private phones. The allegation came about not through the Respondent's actions but through the unlawful actions of a third party who showed private messages to members of the public and a third party who had leaked highly personal data to the Press. She therefore submitted that any damage to reputation occurred not so much because of the actions of the Respondent but because of the actions of another. The messages upon which much of this case was based should never have been made public.

7.2.5 Ms Clements' third line of argument was to look at what had caused the damage to reputation. She submitted that it was based on an untrue version of the nature of the Respondent's personal relationship with his PA and not based upon the facts which had been found by this Case Tribunal. She contended that the Respondent did not cause the disrepute because any disrepute was due to false press reporting. In fact, there were a small number of inappropriate messages sent from private phones over a very short period, over one working day and this was not capable of amounting to disrepute.

7.2.6 The final line of argument on behalf of the Respondent was in relation to Article 8 of the ECHR. Finding that there had been a breach of the Code of Conduct based on the limited messages would amount to a disproportionate interference with the Respondent's right to a private life in Ms Clement's submission. She contended that there were two ways in which it could apply. Firstly, the facts said to constitute a breach fell squarely within the scope of the Respondent's right to a private life, and therefore "right at the heart" of that which is protected by Article 8. If one interprets the Code of Conduct properly so as to avoid a breach of Article 8, the conclusion should be that these private matters cannot truly amount to "disrepute". Secondly, even if it is necessary in a democratic society to find a breach when one considers the protection of the "rights and freedoms of others", the pursuit of any such legitimate aim has to take account of the weight of the Respondent's right to a private life. The importance of the Respondent's right to a private life outweighs any legitimacy in punishing the Respondent's behaviour by characterising it as "disrepute" and so the Case Tribunal should refrain from doing so. In effect, Ms Clement contended that any legitimate aim in this case was not sufficiently weighty to trump Article 8.

7.3 Relevant Paragraphs of the Code and Article 8 ECHR

The relevant Paragraphs of the Code which were considered by the Case Tribunal were as follows:-

7.3.1 Paragraph 6(1) of the Code states that; "You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.

7.3.2 Paragraph 7(a) of the Code states that; " You must not in your official capacity or otherwise, use or attempt to use your position improperly to confer on or to secure for yourself, or any other person, an advantage or create or avoid for yourself, or any other person, a disadvantage;

7.3.3 Paragraph 7(b) of the Code states that; "You must not use, or authorised others to use, the resources of your authority-

- (i) imprudently;
- (ii) in breach of the authority's requirements;
- (iii) unlawfully;

- (iv) other than in a manner which is calculated to facilitate, or to be conducive to, the discharge of the functions of the authority or of the office to which he had been elected or appointed;
- (v) improperly for political purposes; or
- (vi) improperly for private purposes.

Article 8 of the ECHR states as follows:-

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

7.4 The Case Tribunal's Decision

On the basis of the findings of fact, the Case Tribunal found by a unanimous decision that there was a failure to comply with the Relevant Authority's code of conduct as follows:-

7.4.1 The Case Tribunal found **Allegation 1** proved and found that the Respondent had breached Paragraphs 6(1)(a) and 7(a) of the Code of Conduct for Members of Flintshire County Council.

7.4.2 The Tribunal agreed with Counsel for the Respondent that there was a cross-over between the finding of Disputed Fact 2.1 and the wording of Paragraph 7(a) and by necessity, this amounted to a breach of the Code.

7.4.3 The Case Tribunal was also satisfied that the facts amounted to a breach of Paragraph 6(1)(a). The type of behaviour complained of was the type of behaviour which dented the reputation of local authorities. The Leader was in a position of power and influence and whereas he showed commendable passion for leading and acting with financial prudence and integrity, employment practice was another area of local authority work which naturally attracted the attention and scrutiny of the public who would expect complete integrity and transparency in the employment of staff to roles within the Council. The internal workforce also deserved to know that appointments would be made entirely on merit and with no suggestion of interference or manipulation of process. The Leader would be expected to lead by example in this respect.

7.4.4 The PA role was a key role which demanded integrity and a close and trusting professional relationship with the Leader and his Deputy and the process for the appointment to such a role equally demanded trust, integrity and professionalism. The Case Tribunal was therefore satisfied that allowing a candidate, albeit a lone

candidate who was almost certain to succeed in interview, to view the questions in advance of their interview could reasonably be regarded as an action which could bring the office of Leader and the Authority into disrepute.

7.4.5 The Case Tribunal also found **Allegation 3** proved and that the Respondent had breached Paragraph 6(1)(a) of the Code of Conduct.

7.4.6 The Case Tribunal agreed that the wording of Section 52 of the Local Government Act 2000 had since changed and also agreed with Ms Clements that, whilst binding on the Tribunal in certain respects, *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin) (“the Livingstone case”) could not be directly translated into the legal position in Wales where the legislation and the mandatory provisions of the Code set out in the relevant Welsh Regulations had, by clear wording, spelt out that Paragraph 6(1)(a) extended to a Member’s conduct “at all times and in any capacity” as per Paragraph 2(1)(d) of the Code.

7.4.7 The Respondent and the PA had used their personal mobile phones interchangeably for work and private purposes and it was the Respondent’s evidence that he preferred to use this method of communication for work purposes over his Council-provided “BlackBerry” device. The PA’s evidence was that inappropriate messages were not usually exchanged during working hours, however the Case Tribunal considered that this blurred proper boundaries of communication. The evidence was clear however that the Respondent was well aware that on 7 April 2017 he was sending and encouraging his PA to send inappropriate message during working hours.

7.4.8 The Case Tribunal considered that the close professional working relationship between Leader and PA had likewise become blurred at the relevant time with an inappropriate close personal relationship. Members have a duty of trust and confidence towards staff and vice versa and the Case Tribunal considered that the exchange of inappropriate messages during working hours inevitably conflicted with work itself as well as that fundamental duty. Time spent engaging in such activities would have been at the cost of the Council and ultimately the public purse. Such inappropriate exchanges during work hours would adversely affect the working environment, leave Members and officers open to criticism, pressure, mistrust, resentment and ultimately could lead to lies and at worst, blackmail. In a situation where there is a power differential such as that between Leader of the Council and a relatively junior member of staff who works directly for the Leader and Deputy Leader, the risks are even greater.

7.4.9 The Case Tribunal was clear that the mere fact of any personal relationship between a Member and Officer did not amount to a breach of the Code of Conduct although it could clearly lead to difficulties, hence the wording of paragraph 9.1 of the Protocol on Office/Member relations of the Relevant Council; “Members and Officers will not allow a working relationship to become so close or appear to be so close as to bring into question the Officer’s ability to deal impartially with other members, political groups and other Officers.” [B97]. **Allegation 3** related purely to sending and/or encouraging the PA to send inappropriate messages during office hours however.

7.4.10 In conclusion, the Case Tribunal considered that the Respondent could not divorce himself from his role as the PA's quasi-employer and that when sending or encouraging his PA to send inappropriate messages during working hours, unlike the Livingstone case, the Respondent was acting in his official capacity when engaging in message exchanges during his PA's working hours on 7 April 2017.

7.4.11 Even if it could be argued that the Respondent was acting in an entirely private capacity rather in connection with his role as Leader and Member when exchanging messages from the Labour Conference, the Case Tribunal considered that the Respondent's conduct would nevertheless have breached Paragraph 6(1)(a) of the Code as the Welsh Code was clear and specific in stating that a Member may bring the office and/or authority into disrepute by his actions in a private capacity and also as the behaviour was so serious and so integrally linked to his role as Leader and therefore to his role as quasi-employer.

7.4.12 With regard to the Respondent's second line of argument, the Case Tribunal disagreed that the messages were entirely private, relating to private actions, using private phones. The Respondent's phone was used interchangeably for official and private purposes with the PA and the series of e-mails of 7 April 2017 started with a commentary relating to party political issues and then went on to discuss what was happening in the office, that is, that one member of staff was finishing early and that there was no-one else down at the bottom end of the office, about an office communication system called "Same Time" as referred to in the Respondent's interview [B280] and about office furniture. Exchanging inappropriate messages did bring the office and the authority into disrepute in this instance due to a third party copying private texts which referred to the office context and then leaking them to the Press. More fundamentally however, the conduct itself "could reasonably be regarded as bringing the office or authority into disrepute" in any event.

7.4.13 Thirdly, and linked to the above, the Case Tribunal did not agree that the damage to reputation was caused by newspaper reporting which was based on inaccurate information rather than the facts which have been found in this case. The basis for the damage to reputation was the inappropriate close personal relationship involving inappropriate messages during office hours. Nevertheless, reports referred to messages regarding the office and from the contents of the reports it is highly probable that these included the WhatsApp exchange of 7 April 2017 [e.g. B508], albeit that the newspapers provided exaggerated interpretations of the messages.

7.4.14 Finally, with regard to Article 8(1) of the ECHR, everyone has the right to respect for his private life and his correspondence. Article 8(2) states that there shall be no interference with the exercise of this right except as is in accordance with the law and is necessary in a democratic society...for the protection of health and morals, or for the protection of the rights and freedoms of others. The Code of Conduct is a Code of ethics and it governs the behaviour of Members to ensure, for example, that the public can expect public resources to be used and staff to provide public services and so that employees can expect a dignified working environment where each staff member is treated fairly and equally with no special privileges such as lax, unprofessional and inappropriate working arrangements or allowing inappropriate message exchanges [B142]. This is exemplified by the disciplinary

interview where the PA stated “As we are more than work colleagues, the relationship is less formal” [B473]

7.4.15 The Respondent had accepted that he had sent inappropriate messages to his PA during office hours and albeit that the messages may have been intended to be private and not sent by the Respondent whilst exclusively engaged in his Leader and Member function, they nevertheless could not be divorced from the fact that he was writing to a member of staff during working hours and talking about working arrangements amongst other more personal matters. There could not be the same expectation of privacy in the circumstances. This was taken fully into account in the careful balancing of Article 8(1) rights with Code duties. The public would expect behaviour of this nature to be regulated by the Code and the Respondent could not hide behind the shield of privacy when the behaviour was so inappropriate and so serious and breached the relationship of trust and confidence between employer and employee. It is for good reason that the Protocol on Member/Officer Relations paragraph 9.1 of the Relevant Authority [B97] stated that; “Members and Officers will not allow a working relationship to become so close or appear to be so close as to bring into question the Officer’s ability to deal impartially with other Officers”. Any penalty or sanction implied in characterising such inappropriate behaviour as “disrepute” is a legitimate and proportionate interference with the Respondent’s Article 8 rights that is “necessary in a democratic society in the interests of...the protection of the rights and freedoms of others.”

7.4.16 Finally, the Case Tribunal considered that the Decision of the Parliamentary Commissioner in relation to the alleged breach of the House of Commons, Code of Conduct for Members, whilst helpful so far as it explored a separate standards regime, had limited value in relation to the case under consideration. The facts were significantly different, there being no employment connection between the parties in that case.

8. SUBMISSIONS ON ACTION TO BE TAKEN

8.1 Evidence of previous conduct

The Clerk to the Tribunal reported that there had been no previously reported instances of breach of the Code of Conduct with regard to the Respondent.

8.2 The Ombudsman’s submissions

8.2.1 Mr Hughes said that it was not the practice of the Ombudsman to suggest a particular penalty to the Case Tribunal.

8.2.2 With regard to mitigating factors, he said that there was evidence of good public service by the Respondent over a long period of time and that the behaviour which had been established was relatively confined.

8.2.3 Regarding aggravating factors, the length of service and extent of responsibilities was relevant. In relation to the interview questions, it was also deliberate conduct resulting in advantage for another, albeit not someone who was

particularly close to him at that stage and the Respondent was therefore exploiting his position of trust. In one sense there was lack of acceptance of the behaviour in question in that the Respondent had continued to deny the allegations.

8.3 The Respondent's Submissions

8.3.1 In mitigation, Ms Clement also referred to the Respondent's previous record of dedicated and long service. She said that, in her experience, it was unprecedented for the numbers of character witnesses to coming forward in such numbers and in the way in which they spoke of the Respondent. She said that the incidents were one-off incidents within a long timeframe.

8.3.2 The Respondent had expressed deep regret for his behaviour and had acknowledged that none of this should have happened. He had apologised to all affected by his behaviour, although not in relation to the interview questions which he said he did not provide. He had co-operated with the Ombudsman's investigation and there had been no suggestion of any breach of the Code since the adjudication.

8.3.3 With regard to his previous long service, Ms Clement noted that this could be an aggravating as well as a mitigating feature. She contended that this was not a case of deliberate exploitation for gain however and this was not a case of numerous breaches of the Code. She argued that the aggravating factor in relation to disrepute did not apply and that there had been no previous adverse determinations against the Respondent. She reminded the Case Tribunal that the Respondent had resigned from his role as Leader and she stated that neither incident will ever be repeated.

8.3.4 Ms Clements contended that the appropriate sanction would be no sanction at all in relation to **Allegation 1** in the factual context. There had been limited consequential harm and the Respondent stepped down as Leader voluntarily. Ms Clements contended that if the Case Tribunal did not agree that a "no action" finding was appropriate, a warning or partial suspension from the role of Leader could be appropriate.

8.4 Case Tribunal's Decision

8.4.1 The Case Tribunal considered all the facts of the case and considered in particular the mitigating and aggravating factors referred to in the APW Sanctions Guidance.

8.4.2 The Case Tribunal concluded by unanimous decision that the Respondent should be suspended from acting as a member of Flintshire County Council for a period of three months or, if shorter, the remainder of his term of office.

8.4.3 It considered that both proven **Allegations 1** and **3** were serious, **Allegation 3** being particularly egregious, both comprising of the type of behaviour that would normally attract lengthy suspension or disqualification, particularly in the light of a Leader's vital role in improving a Council's culture and building its good reputation.

8.4.4 As well as the factual context of each proven Allegation, the Case Tribunal carefully considered its published Sanctions Guidance. It took account of the aggravating factors which also included long experience, seniority and position of responsibility, deliberate conduct and abuse and exploitation of a position of trust. It also consisted of deliberate or reckless conduct with little or no concern for the Code.

8.4.5 In terms of mitigating factors however, the Case Tribunal accepted that the Respondent had a previous record of good service over a long period of time and was a deeply committed politician who worked hard for his community and his Authority. With regard to **Allegation 3**, the Respondent had recognised his failure to abide by the Code, he had also shown deep remorse for the misconduct and its consequences, he was contrite and had apologised early in the investigation and throughout to all those affected, he had co-operated throughout the investigation and co-operated with the Adjudication Panel for Wales and finally, he had voluntarily resigned his position as Leader together with the relevant senior responsibility allowance. The Case Tribunal also accepted that the Respondent, as well as others, had already suffered a form of punishment through public humiliation and adverse publicity over a considerable period of time and the Case Tribunal was satisfied that the behaviour would never be repeated.

8.4.6 In all of the above circumstances and taking full regard of Article 8 of the ECHR, the Case Tribunal considered that a relatively short suspension of three months properly reflected all of the relevant mitigating and aggravating factors and the facts of the case. It considered that a period of three months' suspension was proportionate in all the circumstances and was the minimum sanction necessary to uphold the Code of Conduct. It noted that even if the Case Tribunal had considered that the Respondent had been acting in his private capacity in relation to sending and encouraging his PA to send inappropriate messages during office hours, it would nevertheless have considered that a short suspension of this nature would have been appropriate and proportionate having regard to Article 8 of the ECHR.

8.3.7 Flintshire County Council and its Standards Committee are notified accordingly.

8.2.8 The Respondent has the right to seek the permission of the High Court to appeal the above decision. A person considering an appeal is advised to take independent legal advice about how to appeal.

Signed 

Date: 14 February 2020

Tribunal Judge Jones
Chairperson of the Case Tribunal

Ms Susan Hurds
Panel Member

Mr Tom Mitchell
Panel Member

DECISION REPORT

TRIBUNAL REFERENCE NUMBER: APW/002/2019-020/AT

**APPEAL AGAINST STANDARDS COMMITTEE DETERMINATION IN
RELATION TO AN ALLEGED BREACH OF THE CODE OF CONDUCT**

APPELLANT: Councillor Neil McEvoy

RELEVANT AUTHORITY: Cardiff County Council

1. INTRODUCTION

1.1 An Appeal Tribunal convened by the President of the Adjudication Panel for Wales has considered an appeal by Cllr Neil McEvoy (“Cllr McEvoy”) against the decision of Cardiff County Council Standards Committee (“the Committee”) of 14th January 2020 that he had breached the Cardiff County Council Code of Conduct and should be suspended as a Councillor for four months.

1.2 In accordance with the direction of the President of the Adjudication Panel for Wales dated 5th March 2020, the Appeal Tribunal only considered the sanction imposed, based on the findings of the Standards Committee about facts and breach alone.

1.3 In accordance with Cllr McEvoy’s wishes, the Appeal Tribunal determined its adjudication by way of written representations on 22nd June 2020 at a meeting held remotely.

2. PRELIMINARY DOCUMENTS

2.1 Appeal Against Decision of Standards Committee

2.1.1 This is an appeal against a decision of the Standards and Ethics Sub Committee (Hearings Panel) of the County Council of the City and County of Cardiff taken on 14th January 2020, to suspend the Appellant, Councillor Neil McEvoy, as a Councillor, for a period of four months. The Appellant is an elected Member of Cardiff Council. He is also Member of the Senedd Cymru for South Wales Central, a constituency that covers the area he represents as a Councillor.

2.1.2 In his signed declaration of acceptance of office dated 8th May 2017, the Appellant undertook:

“to observe the Code for the time being as to the conduct which is expected of Members of the County Council for the City and County of Cardiff and which may be revised from time to time.”

2.1.3 On 25th May 2017 and again on 24th May 2018, the Appellant signed “The Cardiff Undertaking for Councillors” in which he formally recognised his duty to uphold the law and undertook to:

- a. “Adhere to and respect the Members’ Code of Conduct and have proper regard to the advice and guidance issued by the Standards & Ethics Committee; and
- b. Adhere to and respect the provisions of any Local resolution Protocol proposed by the Standards & Ethics Committee and adopted by Council.”

2.1.4 The Code of Conduct for Members and Co-opted Members of the County Council of the City and County of Cardiff (“The Code of Conduct” or “Code”) was adopted by the Authority on 15th May 2008 and amended on 26th May 2016. At Part II, paragraph 4 of the Code of Conduct reads as follows:

“You must –

- b. Show respect and consideration for others.
- c. Not use bullying behaviour or harass any person.”

2.1.5 Paragraph 6(1) of the Code of Conduct reads as follows:

“You must –

- a. Not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.”

2.2.1 By letter dated 7th June 2019, the Monitoring Officer for Cardiff Council received a referral from the Public Service Ombudsman for Wales (“The PSOW” or “Ombudsman”) in relation to misconduct allegations made against Cllr McEvoy. The Ombudsman’s referral followed an investigation carried out in relation to a complaint submitted to the Ombudsman by the director of a private care home contracted to provide services to the Council. The complaint alleged that Cllr McEvoy’s conduct on 29th April 2018; and on 11th May 2018 towards three employees of the private care home and his involvement in the case of a

child in its care (referred to as Child X) had been inappropriate, intimidating and bullying, in breach of the Members' Code of Conduct.

2.2.2 Having considered the complaint, the Ombudsman decided to investigate whether Cllr McEvoy had failed to comply with those provisions of the Code of Conduct requiring him:

- a. To show respect and consideration for other (paragraph 4b).
- b. Not to use bullying behaviour or harass any person (paragraph 4c); and
- b. Not to conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute (paragraph 6(1)(a)).

2.2.3 Having investigated the allegations, the Ombudsman concluded that there was evidence to suggest that Cllr McEvoy's conduct may have amounted to a breach of the Members' Code of Conduct, specifically:

- a. On 29th April 2018, there was evidence of a breach of paragraphs 4(b), 4(c) and 6(1)(a) of the Code; and
- b. On 11th May 2018, there was evidence of a breach of paragraphs 4 (b) and 6(1) (a) of the Code.

2.2.4 A Hearings Panel (sub-Committee of the Standards and Ethics Committee) was convened, in accordance with arrangements approved by the Committee on 1st July 2019, to consider the allegations in relation to Cllr McEvoy. A hearing was held between 6th and 14th January 2020 at City Hall, Cardiff. The hearing was open to the public, except for certain parts of the proceedings when the Committee resolved to exclude the public. Cllr McEvoy attended the hearing. He chose not to be legally represented, but he was assisted by Ms Jacqueline Hurst, a social worker employed by Cllr McEvoy.

2.2.5 On 14th January, given its findings of fact, the Committee decided that:

- a. In respect of the incident on 29th April 2018, Cllr McEvoy breached paragraphs 4(b), 4(c) and 6(1)(a) of the Code of Conduct; and that
- b. In respect of the incident on 11th May 2018, Cllr McEvoy breached paragraph 6(1)(a) of the Code of Conduct.

2.2.6 The Committee then further decided that having regard to the number of aggravating circumstances, as well as the mitigation, Cllr McEvoy would be suspended as a Councillor for four months.

2.3.1 Notice of the Committee's decision was emailed to the Appellant on 24th January 2020. On 14th February 2020, the Appellant gave written Notice of Appeal against the Committee's decision, within 21 days, under Regulation 10 of the Local Government Investigations (Functions of Monitoring Officers and Standards Committees) (Wales)) Regulations 2001. The Appellant's notice was received on 14th February 2020. He did not send a copy of the Committee's decision with his appeal form but the President of the Adjudication Panel for Wales decided that it would be in the interests of justice to ask for a copy from both the Appellant and the Monitoring Officer of Cardiff Council. This was provided to the President by the relevant authority on 18th February 2020, together with the bundle of papers provided to the Committee (including late evidence submitted during its hearing), draft minutes, and a copy of its hearing procedure (together with email correspondence with the Appellant regarding the issuing of the decision report).

2.3.2 In her decision dated 5th March 2020, the President considered all the grounds of appeal raised by the Appellant. At paragraph 8h of the Notice of Decision on permission to appeal, the President gave permission to appeal in the following terms:

"While the Appellant framed his objection to the sanction imposed primarily in terms that it was disproportionate due to discrimination, he did also comment that it was harsh in light of the findings made by the standards Committee. I cannot say in all the circumstances that there is no reasonable prospect of success for this ground of appeal, given an Appeal Tribunal considering the findings made by the standards Committee on both facts and breach of the Code may conclude that the sanction is disproportionate. I also note that there is no evidence as to whether the standards Committee took into account any sanctions guidance when reaching its decision, though it appears to have considered relevant factors and the use of such guidance is not mandatory. I make the decision to allow an appeal on this point, notwithstanding the fact that the Appellant refused to make any submission to the standards Committee on the issue of sanction. I remind the parties that if the Appeal Tribunal chooses to recommend that the sanction be reconsidered by the standards Committee, the tribunal has the ability to recommend a reduction or increase in the period of suspension. It therefore will be considered by an Appeal Tribunal in due course, but its consideration will be based on the findings of the standards Committee about facts and breach alone."

2.3.3 This Appeal Tribunal has therefore been convened by the President of the Adjudication Panel for Wales to consider the remaining ground of the Appellant's appeal.

3. THE HEARING

3.1 The role of this Appeal Tribunal

3.1.1 Noting the President's direction to this Tribunal, and that its "...consideration will be based on the findings of the standards Committee about facts and breach alone", the Tribunal has considered the question of sanction afresh, setting on one side the reasoning of the Committee in order to form its own independent determination.

3.1.2 We remind ourselves that per Regulation 11 of the said Regulations: -

(1) Appeals from a determination of a Standards Committee will be conducted:

(b) by way of an oral hearing unless every person who has given notice of appeal consents to the appeal being conducted by way of written representations...

As noted, Cllr McEvoy has consented to this appeal being conducted by way of written representations.

3.1.3 We further remind ourselves that per regulation 12 of the said Regulations: -

An appeals tribunal must:

(a) uphold the determination of the relevant authority's Standards Committee that any person who was subject to the investigation breached the code of conduct and either:

(i) endorse any penalty imposed, or

(ii) refer the matter back to the Standards Committee with a recommendation that a different penalty be imposed;

....

and must inform any person subject to the investigation, the Local Commissioner for Wales and the Standards Committee of the relevant authority accordingly, giving reasons for the decision.

3.2 The findings of facts and breach

3.2.1 The Appeal Tribunal examined the Committee's findings on facts and breach. The Committee found that the following material facts were undisputed.

a. At the relevant time, Cllr McEvoy was a member of Cardiff Council and was acting in his capacity as a Cardiff Councillor (albeit, apparently in a “twin-hatted” capacity, in relation to his role as (then) a Welsh Assembly Member).

b. In January 2016, the Council adopted a Protocol on the Role of Elected Members in Safeguarding Vulnerable Children and Adults, which includes the following provisions:

i. The Council as a whole is ‘the corporate parent’ of all Looked After Children, which means that elected Members, relevant Council managers and staff all need to work together to discharge their different roles and responsibilities.

ii. It is not generally appropriate for an elected Member to act as an advocate for a service user, due to the potential conflict of interest and confusion over the role in which the Member is acting.

iii. If a Member has any information which raises concerns about harm or potential harm to any child, a child protection referral should be made immediately to the Children’s Access Point or, if outside of office hours, to the Emergency Duty Team.

3.2.2 In the case relating to the events of 29th April 2018, the Committee found that the following material facts were undisputed.

a. On 29th April 2018 a telephone call was made by Cllr McEvoy to a residential children’s care home and the telephone call was answered by “Witness 2”.

b. Cllr McEvoy introduced himself as Assembly Member and Corporate Parent and said he wanted to visit a resident, Child X, at the care home that day.

c. Witness 2 said that Cllr McEvoy could not visit Child X because he was not named on the child’s care plan, and she advised Cllr McEvoy to arrange a visit through a social worker.

d. Cllr McEvoy said that he would be attending that day and that he would be bringing a colleague with him.

e. Witness 2 maintained that Cllr McEvoy was not authorised to visit Child X.

f. Cllr McEvoy said that he would be raising the matter at the Welsh Assembly.

g. Witness 2 said that if Cllr McEvoy attended at the care home without authorisation, she would have to call the police, because of her duty to safeguard the residents of the home.

h. Cllr McEvoy asked Witness 2 to speak with her Director and get back to him within a deadline that day.

i. Witness 2 called Cllr McEvoy back and repeated her previous advice.

j. Cllr McEvoy did not attend at the care home that day.

3.2.3 In relation to the telephone call on 29th April 2018, the Committee found the following disputed material facts to have been proved.

a. Another witness, "Witness 1" was physically present to witness part of the telephone call but could only hear a limited amount of the conversation. However, Witness 1 did provide evidence about the impact of the telephone call upon Witness 2.

b. Witness 2 was a credible and persuasive witness as to the event on 29th April.

c. On the basis that Cllr McEvoy insisted that he would be attending the care home, bringing a colleague with him, would raise the matter at the Welsh Assembly and giving her a deadline to speak to a Director and arrange authorisation for his visit, Witness 2 felt bullied and intimidated by Cllr McEvoy.

d. Witness 2 felt undermined by Cllr McEvoy's insistence, against her advice, that he would be attending the home.

3.2.4 On the basis of these findings, the Committee found that Cllr McEvoy failed to show respect and consideration for Witness 2 on 29th April 2018, in breach of paragraph 4(b) of the Code.

3.2.5 The Committee also found that Cllr McEvoy used bullying behaviour and harassment towards Witness 2, in breach of paragraph 4(c) of the Code. His conduct was intended to undermine her in her role and to exert pressure to ensure that she agreed to permit him to visit the care home that day. Cllr McEvoy would not accept the witness's decision that she was not going to allow him into the care home to visit the child as he was not mentioned on the child's care plan. Cllr McEvoy persisted with his view that he would be attending the care home

that day to the extent where Witness 2 advised Cllr McEvoy that she would contact the police if he attended the care home. During the telephone conversation, Cllr McEvoy advised Witness 2 that he would be attending the care home with a colleague. Witness 2 was a senior residential care worker in contrast to Cllr McEvoy who was an elected Councillor and Assembly Member and there is a power imbalance between them. Cllr McEvoy was aware of this power imbalance between himself and Witness 2 as he advised Witness 2 that he worked for the Welsh Assembly and was a corporate parent for Child X and used his position in an attempt to gain access to Child X.

3.2.6 Finally, in relation to the incident that took place on 29th April 2018, the Committee also found that Cllr McEvoy brought Cardiff Council into disrepute, in breach of paragraph 6(1)(a) of the Code. Cllr McEvoy persisted in his telephone call with Witness 2 that he would be attending the care home that day and continued to challenge the witness's decision. Cllr McEvoy also gave the witness a deadline to return his call on the issues he raised and would not accept the decision made that he could not attend the care home to the extent that the witness referred to requesting police assistance in the event that Cllr McEvoy did attend. This telephone call went on for approximately 15 minutes and given the limited issues discussed, it was the Committee's view that this evidenced persistence on the part of Cllr McEvoy. Whilst he may not have liked the decision of the witness, as a Councillor he should have accepted the decision that he could not attend the home and recognised that the witness was doing her job in safeguarding those children in her care. In the Committee's opinion, Cllr McEvoy should have understood that it was inappropriate to attend a care home to visit a child he had never met without the parents or a social worker present. His conduct had the potential to cause difficulties in the relationship between the parents and the child and Cardiff Children's Services and the care home who were responsible for safeguarding and meeting the needs of Child X and others in their care.

3.2.7 In the case relating to the events of 11th May 2018, the Committee found that the following material facts were undisputed.

- a. On 11th May 2018, Cllr McEvoy attended the head office of the care home with the father of Child X with the aim of attending a scheduled therapy meeting for X. They gained access to the building.
- b. Cllr McEvoy was invited to attend the therapy meeting by the Father, but he did not personally receive confirmation from the Council agreeing to his attendance at the meeting.
- c. Cllr McEvoy and the father were met shortly after entering the building by "Witness 4". Cllr McEvoy and the father had two interactions with Witness 4.

d. Cllr McEvoy and the father subsequently had an interaction with “Witness 3”. Witness 3 passed on a message to the father and Cllr McEvoy telling them that the therapy meeting had been cancelled by a (referred to as “the”) social worker.

e. Part of the interaction with Witness 3 was covertly recorded by the father under the instructions of Cllr McEvoy. During this recorded interaction, Cllr McEvoy was on the telephone to the Council’s former Assistant Director of Social Services.

f. Cllr McEvoy said to the Assistant Director that he wished to make a complaint about Witness 3 and gave a description of him, which included the term ‘slightly overweight’.

g. Cllr McEvoy left the building with father.

3.2.8 In relation to the events of 11th May 2018, the Committee found the following disputed material facts to have been proved.

a. By the time Cllr McEvoy interacted with Witness 3, matters had escalated, and the situation had become heated within an increasingly hostile environment. The Committee did not consider that Cllr McEvoy behaved aggressively in terms of speaking with a raised voice. However, the Committee found that Cllr McEvoy followed Witness 3 to an office.

b. The social worker involved did not agree to Cllr McEvoy attending the therapy meeting.

3.2.9 On the basis of these findings, the Committee did not find that Cllr McEvoy’s conduct amounted to a lack of respect and consideration of others. The events that took place on 11th May were difficult for both the care home staff and Cllr McEvoy. Given that the witness would not provide his name to Cllr McEvoy, it inevitably followed that a physical description would be necessary, given that Cllr McEvoy wished to complain. The Committee considered the fact that this description did not necessarily have to be given in the presence of the witness himself. There were, however, clear inconsistencies in both Cllr McEvoy’s and Witness 3’s recollection of how Witness 3 was described by Cllr McEvoy. The interaction between them were difficult exchanges, which created tensions for all parties. The Committee found that whilst it was unfortunate that Cllr McEvoy chose to use the description he did of Witness 3, that was to be balanced with the hostile environment that clearly existed during the interaction between them, in terms of Cllr McEvoy requesting information and Witness 3 not readily providing this. Therefore, having considered the evidence, the Committee

was not satisfied that this amounted to a breach of paragraph 4(b) of the Code of Conduct.

3.2.10 However, the Committee was satisfied on the basis of these findings that Cllr McEvoy's conduct on 11th May 2018 brought Cardiff Council into disrepute, in breach of paragraph 6(1)(a) of the Code. Cllr McEvoy provided no evidence that he had the agreement to attend the meeting. He instructed Child X's father to record Cllr McEvoy's interactions with staff members and a telephone discussion. This recording was done covertly, without all parties present being aware of it at that time. There were three unfortunate interactions that took place in the presence of Child X's father and the father was also privy to a telephone conversation between Cllr McEvoy and the former Assistant Director of Cardiff Children's Services. In the Committee's view, the father should not have witnessed these events. He was vulnerable in his own right, as advised by Cllr McEvoy and witnessing these events would not have assisted him in his relationship with either Cardiff Children's Services or indeed the care home staff, particularly in light of the allegations made by Child X to his mother. The father in his evidence advised the Committee that he had a poor working relationship with Cardiff Children's Services, but that Cllr McEvoy had always encouraged them to engage with the service. Cllr McEvoy's conduct on 11th May 2018 would not have served to promote a positive working relationship with Child X's father, Cardiff Children's Services or indeed with the care home.

3.2.11 The Committee also found that the interactions between Cllr McEvoy and Witness 3 and Witness 4, led to a hostile environment, where Witness 3 actively made a decision not to share information with Cllr McEvoy about how to make a complaint. Given the confrontation, Cllr McEvoy should have removed himself from the building when initially asked to leave and pursued making a complaint through formal channels.

3.2.12 The Committee found it difficult to accept Cllr McEvoy's suggestion that he feared he would be assaulted, given that he chose to remain in a situation he had opportunity to leave.

3.2.13 It was the Committee's view that it was not appropriate for Cllr McEvoy to continue to challenge staff, who were in effect delivering a message on behalf of Cardiff Children's Services, given that Cllr McEvoy was acting as a representative for Cardiff Council in his capacity as an elected Member.

3.2.14 The Committee therefore concluded in the light of these findings on breach that Cllr McEvoy should be suspended from acting as a member of Cardiff Council for a period of four months.

3.3 Further evidence and documents submitted to and considered by the Tribunal

3.3.1 From Cllr McEvoy, correspondence to the Adjudication Panel for Wales:

- a. Cllr McEvoy's Notice of Appeal, in so far as it relates to sanction.
- b. An email dated 21st April 2020 in response to the President's decision on permission to appeal.
- c. An email dated 5th June 2020 in response to the Tribunal Chair's direction to both parties on further submissions.

3.3.2 From Cllr McEvoy, character evidence provided by:

- a. Lady Lloyd Jones, of Cardiff.
- b. Anne O'Regan, of Cardiff.
- c. Bethan Phillips, a former employee of Cllr McEvoy.

3.3.3 From the PSOW:

- a. Their response to Cllr McEvoy's Notice of Appeal, in so far as it relates to sanction.
- b. A letter dated 11th June 2020 in response to the Tribunal Chair's direction to both parties on further submissions.
- c. Two previous standards decisions, taken in relation to other Councillors.

3.3.4 From Cardiff Council by letter dated 9th April 2020 copies of:

- a. A Hearings Panel decision made regarding Cllr McEvoy on 26th May 2014, following referral from the Ombudsman. This Tribunal notes that this finding was on a very different matter and was relatively minor, reflected in the fact that the Panel imposed no sanction.
- b. A Hearings Panel decision made regarding Cllr McEvoy on 3rd October 2014, made under the Council's Local resolution Protocol. This Tribunal notes that the Hearings Panel found no breach of the Code of Conduct in this case but did make a number of recommendations to Cllr McEvoy in respect of his conduct.

3.3.5 The decision report of the Adjudication Panel for Wales APW/002/2016-017/CT in re Cllr Neil McEvoy, dated 14th March 2017.

3.3.6 'Sanctions Guidance' issued by the President of the Adjudication Panel for Wales under 75(1) of the Local Government Act 2000.

3.4 Submissions to the Tribunal

3.4.1 The Appellant submits that a suspension of four months is "undemocratic", "excessive" and may have been unduly influenced by the disruptive behaviour of others, responding to the Committee's decisions, for which he was in no way responsible. If anything, he submits, he sought to calm others down and to assist.

3.4.2 Cllr McEvoy submits that those who would suffer from the sanction are those in the community who would benefit financially from his Councillor allowance, which he further submits that he donates to community and political causes and does not spend on himself. He nonetheless committed to representing his constituents as their elected Member of the Senedd in any event.

3.4.3 Cllr McEvoy also submits that "any reasonable person, without prejudice, would not approve of a 4 months suspension."

3.4.4 The Ombudsman disputes that the sanction was disproportionate due to discrimination; and further disputes that it was harsh in the light of the findings made. The Ombudsman submits that the sanction was considered in the light of the 'Sanctions Guidance'.

3.4.5 The Ombudsman further submits that the sanction is proportionate when considered in the context of other comparable cases; and when considered in the context of earlier findings against the Appellant.

3.4.6 The Ombudsman submits on the Committee's findings that the nature of the behaviour which has resulted in the breaches found clearly falls below the standards of behaviour expected of an elected member and is capable of undermining public confidence in the role of elected member more generally and ultimately the Council itself. The Ombudsman notes the potential impact on relations between Cardiff Council and the family at the heart of this complaint. They also noted the effect of Cllr McEvoy's behaviour, particularly on Witness 2, given the awareness of the "power imbalance" between them.

3.4.7 The Ombudsman submits that the Appellant's conduct demonstrated "a blatant disregard" for advice provided to members of Cardiff Council in the

Protocol explaining the role of elected Members in safeguarding vulnerable children and adults.

3.4.8 The Ombudsman also conducted an analysis of mitigating and aggravating factors involved.

4. THE APPEAL TRIBUNAL'S DECISION

4.1.1 Whilst they may be persuasive, the Tribunal attaches little weight to decisions taken by other panels or Committees on different facts in relation to different people, preferring instead to apply the 'Sanctions Guidance' in conjunction with directly relevant material and the operation of its collective judgment. This approach accords with best practice in other areas of law where sanctions guidance or guidelines have largely overtaken the citation of previous decisions. The Tribunal prefers to assess the facts of the case against the 'Sanctions Guidance' and come to a view as to any available range; and as appropriate, the Appellant's position within the available range.

4.1.2 Per paragraph 18 of the 'Sanctions Guidance', the purpose of the sanctions available to Adjudication Panel for Wales case and appeal tribunals are to:

- a. Provide a disciplinary response to an individual member's breach of the Code.
- b. Place the misconduct and appropriate sanction on public record.
- c. Deter future misconduct on the part of the individual and others.
- d. Promote a culture of compliance across the relevant authorities.
- e. Foster public confidence in local democracy.

4.1.3 The sanctions available to an appeal tribunal that has found a breach of the Code are:

- a. Censure.
- b. To suspend or partially suspend the member from the authority concerned for up to 6 months.

4.1.4 The Guidance offers broad principles for consideration, whilst respecting the details that make each case different. It does not propose a firm tariff from which to calculate the length of, for example, suspension that should be applied

to specific breaches of the Code. This Tribunal therefore exercises its own judgment as to the relevant sanction in line with the nature and impact of the breach, and any other relevant factors and taking into account the Tribunal's wider judicial obligations in regard to fairness, the public interest, proportionality, consistency, equality, impartiality and relevant human rights law.

4.1.5 This Tribunal adopts the five-stage process referred to in paragraph 33 of the Guidance.

4.1.6 The first step is the assessment of the seriousness of the breach and any consequences for individuals and/or Cardiff Council.

4.1.7 Whilst not of the utmost severity, the Tribunal considers this series of breaches to nonetheless be quite serious, bordering on very serious when considered in themselves and against other types of breach. Taken in the round, Cllr McEvoy's behaviour was perhaps not persistent, but it was certainly repeated. The Tribunal observes that he had time to consider his position and his actions between 29th April and 11th May but nonetheless he acted as he did on two occasions, incurring a total of four breaches of the Code. These incidents were not isolated, nor can they be considered sporadic, given the fact that Cllr McEvoy has been subject to previous sanction by the Adjudication Panel for Wales in March 2017 for a not-dissimilar matter.

4.1.8 However well they were intended, Cllr McEvoy's actions bore the potential to damage the Council's relationship with both a vulnerable child and a vulnerable family. To disregard protocols enacted to assist Councillors, families and Looked After Children is a serious feature of this case. The right approach to this situation was that identified by the Council and the sense in the relevant protocol was self-evident. Cllr McEvoy's taking matters into his own hands was very much the wrong approach. The protocol was not a matter for him to disregard. Cllr McEvoy is an experienced Councillor, not the mention, at that time an Assembly Member, now Member of the Welsh Parliament. To bring the Council and/or his office into disrepute in such a manner on two separate occasions was quite wrong.

4.1.9 Turning to the effect on others, we note the findings that Witness 2 felt "bullied", "intimidated" and "undermined" by Cllr McEvoy's behaviour. There was a clear differential of power between Cllr McEvoy and Witness 2, that would have been obvious to both parties. We accept the submission that she should not have been subject to such behaviour when providing advice in the performance of her duties in safeguarding the children in her care.

4.1.10 We also accept the submission by the PSOW that it should be noted that because of Cllr McEvoy's refusal to accept her advice, Witness 2 requested

police assistance in the event that he did attend. The potential for causing disrepute in this incident was exacerbated and aggravated by Cllr McEvoy's later behaviour on 11th May, when, as found, it was not agreed that Cllr McEvoy could attend the therapy meeting.

4.2.1 The Tribunal then moves to step two, to identify the broad type of sanction considered most likely to be appropriate, having regard to the severity of the breaches found. The Tribunal notes paragraph 39 of the Guidance and that in line with the principles of fairness and proportionality, the Tribunal should start its consideration of possible sanctions with that of least impact.

4.2.2 Given the Tribunal's assessment of the severity of this case taken together with the fact that none of the suggested circumstances at paragraph 39.1 of the Guidance apply to this case, the Tribunal cannot find that this is a case where no action is appropriate. Nor is it a case where a warning or the seeking of assurances as to future behaviour would be appropriate, given repeated breaches of the Code over a substantial period of time, because the Tribunal is not confident that there would not be a repeat of the misconduct, given the lack of insight shown.

4.2.3 The Tribunal therefore considers the options of suspension, for up to six months, and partial suspension. Cllr McEvoy's behaviour brought his office or authority into disrepute more than once, and other breaches of the Code have been incurred. His correspondence demonstrates that he shows no insight into his behaviour and offers no apology.

4.2.4 The Tribunal notes the observation in the Guidance at paragraph 39.5 that:

"A suspension of less than a month is unlikely to meet the objectives of the sanctions regime and risks undermining its overall ambitions"; and that

"It is possible for appeal tribunals to recommend an increase in the sanction originally imposed by the Standards Committee".

4.2.5 Taking these observations together with the fact that Cllr McEvoy has already been suspended as a Councillor for a month by the Adjudication Panel for Wales, the Tribunal takes the view that this is a case that:

- a. Merits suspension from office.
- b. For a period of more than one month; and that
- c. Partial suspension is not appropriate.

4.2.6 The Tribunal has then considered the range of sanction applicable, bearing in mind the maximum period of suspension possible is six months. Given findings to that point, this Tribunal takes the view that the appropriate range for sanction in this case that is quite serious, bordering on very serious, is a period of suspension of three to four months, subject to further adjustment as appropriate within that range, allowing for aggravating and mitigating circumstances (step three); and any further adjustment necessary to ensure the sanction achieves an appropriate effect in terms of fulfilling the purposes of the sanctions such as the wider public interest (step four).

4.2.7 Given that the original decision was taken before the current national emergency, this Tribunal has considered the wider effect of suspension for such a period on Cllr McEvoy's electorate at this time.

4.2.8 Unusually, Cllr McEvoy's Council electorate has a voice in him, even if he is suspended as a Councillor because he is a member of the Welsh Parliament. Cllr McEvoy noted as much in his most recent correspondence to this Tribunal. Accordingly, the effect of any suspension in his case is not as harsh on his electorate as it might otherwise be at this time.

4.2.9 Using the Tribunal's knowledge and experience, upon which it is entitled to rely in its judgment, it also seems likely that for the period of any suspension, Cllr McEvoy may well be able to refer his constituents to another Councillor who may be able to take that constituent's concerns forward.

4.2.10 For these reasons, having considered the current national emergency, the Tribunal does not consider that it makes a material difference to the nature and quality of sanction in this case.

4.3.1 The Tribunal has then addressed step three and considered any relevant mitigating or aggravating circumstances and how these might affect the level of sanction under consideration. The Tribunal has worked through the examples set out at paragraph 42 of the Guidance, reminding itself that the list is not exhaustive, and reminding itself not to "double-count" any feature already accounted for in an earlier step.

4.3.2 In fairness to Cllr McEvoy, the Tribunal has considered neutrally the manner in which he conducted himself both at first instance and on appeal, preferring to simply deal with that as subject to his general right to argue his case and bring an appeal should he so wish, a process which he chose to invoke and to deal with by way of written submissions.

4.3.3 Mitigating features

- a. Whilst the Tribunal accepts that Cllr McEvoy acted out of genuine concern and in the interests of a child, he did so in a manner that was badly misguided. This point is therefore of limited assistance to him.
- b. The Tribunal does however note the character evidence relied upon and the general suggestion that Cllr McEvoy supports the rights of others, particularly the vulnerable. That is to his credit.
- c. We therefore specifically reject any possible suggestion that Cllr McEvoy sought to assist Child X's family for their personal benefit.
- d. The PSOW agrees that Cllr McEvoy has co-operated with their investigation into this case.

4.3.4 Aggravating features

- a. Cllr McEvoy has long experience as a Councillor. We note that he had seniority due his position (then) as an Assembly Member. This factor has already been accounted for in the assessment of seriousness.
- b. However, Cllr McEvoy has conducted himself before those who decided his case, it is nonetheless true that he has sought to unfairly blame others for his own actions and mistakes.
- c. As already observed, Cllr McEvoy's behaviour, if not persistent, involved repeated and numerous breaches of the Code and engaging in a pattern of behaviour that involved repeatedly failing to abide by the Code; and recklessly and repetitiously ignoring the Council's protocol. In fairness, this factor has already been considered in the assessment on severity and so is of limited effect at this point.
- d. Cllr McEvoy has shown a lack of understanding or acceptance of his misconduct and any consequences thereof.
- e. As already noted, Cllr McEvoy's actions have brought Cardiff Council into disrepute.
- f. The previous finding by the Adjudication Panel for Wales of failure to follow the Code is also an aggravating feature.

4.3.5 The Tribunal has taken the view that the seriousness of the case, taken together with the number of aggravating factors pushed this case towards the top of the available range.

4.4.1 The Tribunal then turns to step four, considering any further adjustment necessary to ensure the sanction achieves and appropriate effect in terms of fulfilling the purposes of the sanctions.


a. The public interest in upholding the standards of conduct in public life and maintaining confidence in local democracy is engaged, when reviewed against the previous decision taken by the Adjudication Panel for Wales against Cllr McEvoy; and considered against the value of a deterrent effect upon Councillors in general and wider public credibility.

b. The impact on the electorate has already been considered in so far as it is relevant. For the reasons already expressed, it does not act to mitigate the available sanction at this stage.

4.5.1 Taking all matters into account, the Tribunal therefore has moved to step five of the process and unanimously confirmed the decision on sanction taken at first instance. This was a serious case, that merited a sanction at the top of the identified, appropriate range.

4.5.2 This Appeal Tribunal therefore finds that Cllr McEvoy's suspension from office for four months was therefore justified, proportionate and appropriate in all the circumstances, given the findings of the Standards Committee about facts and breach alone. We endorse the sanction imposed. Therefore, this appeal is dismissed.

4.5.3 Cardiff County Council and its Standards Committee are notified accordingly.

Signed: 

Date: 26 June 2020

Mr T Mitchell
Chairperson of the Appeal Tribunal

Mrs S McRobie
Panel Member

Mr E Jones
Panel Member

