

REPORT FOR: **STANDARDS COMMITTEE**

Date of Meeting: 16 June 2011

Subject: Standards Decisions

Responsible Officer: Hugh Peart, Director of Legal and Governance Services

Exempt: No

Enclosures: Appendix 1:
Appeals Tribunal Decision – London Borough of Hillingdon (Member: Councillor Cox)

Appendix 2:
Appeals Tribunal Decision – Shepway District Council (Member: Councillor Capon)

Appendix 3:
First Tier Tribunal Decision – Blaby District Council (Member: Councillor Gutteridge)

Appendix 4:
First Tier Tribunal Decision – Brentwood Borough Council (Member: Councillor Barry Aspinell)

Section 1 – Summary and Recommendations

Recommendation:

That the committee:-

- 1. notes the attached standards decisions.**
- 2. notes the progress of the working group on the future of the standards regime.**

Section 2 – Report

1. While the majority of investigations into complaints that members of local authorities have breached their authority's Code of Conduct are conducted locally, the most serious cases are referred to Standards for England. Where a Standards for England investigation reveals evidence of a serious breach of the Code, the case is referred to the First Tier Tribunal (Local Government Standards in England), part of the General Regulatory Chamber, for a decision. The First Tier Tribunal is also the body that hears appeals against Standards Committee decisions.
2. Standards for England publishes summaries of the cases it investigates on its website. The decisions of the First Tier Tribunal are also publicly available. There is therefore an expanding body of local government standards case decisions available, which can assist authorities and their Standards Committees in interpreting the Code, and help Standards Committees to decide the cases they hear.
3. Attached to this Report at Appendixes 1, 2 and 3 are four standards decisions: two of which have been considered by the former Adjudication Panel (on 18 January 2010 the functions of the Adjudication Panel for England were transferred to the First-Tier Tribunal and the Adjudication Panel for England was abolished) and two cases which have been considered by the First Tier Tribunal. Several of the cases are all on bullying and disrespect to officers and members contrary to paragraphs 3 and 5 of the Code of Conduct for members.
4. The cases are summarised as follows:

APE 0425

A councillor had inadvertently and under the pressure of barracking and his own strong feelings described the conservative ruling group as 'corrupt'. On appeal this was held to have been disrespectful, and brought his office and the council into disrepute. However the decision of the standards committee not to impose a sanction was upheld.

APE 0399

A tribunal considered the threshold for a failure to treat others with respect. The councillor made comments about the town clerk at a parish meeting saying that an officer found her "difficult to get on with". The councillor added that "this is also the view of many towns' people who say that when they try to contact the town clerk, she is downright rude to them".

The Tribunal considered that the threshold for a failure to treat another with respect has to be set at a level that allows for the passion and frustration that often accompanies political debate and the discussion of the efficient running of a council. It should also be set within the context of who was involved in the exchange.

In this case, the comments were opinions of other individuals which the member honestly believed to be true. The member's conduct was not unfair, unreasonable or demeaning to the town clerk and not made in a malicious or bullying manner. The town clerk was very experienced in her dealings with councillors and given her

seniority was entirely able to defend her position. Therefore, the tribunal decided that the threshold was not reached

LGS/2010/495

This case concerned how much a senior officer should be prepared to accept robust criticism made in public. In this case the words were personal and highly critical and made in a public arena where the clerk had no right of reply, no opportunity to contradict and where she was largely defenceless. The subject member was suspended for four months or until such time as she apologised to the clerk in a form to be provided by the standards committee.

LGS/2010/0521

This case concerned an appeal against the decision of the Standards Committee to suspend the Councillor for seven weeks for a breach of paragraph 5 of the Code of Conduct (bringing your office or authority into disrepute).

5. Members are requested to note the attached decisions.
6. At the Standards Committee meeting on 26 April, it was agreed that a member and officer working group be established to consider and produce recommendations about the type and content of a future standards regime and then to report back to the Committee. It was agreed that the working group would be comprised of 2 Labour Members, 2 Conservative Members and 1 Independent Member and that nominations would be requested from the Group Leaders.
7. At the time of writing, we have had one Labour group volunteer. The Conservative group have yet to make any nominations although the deadline for nominations is 10 June.

Risk Management Implications

Failing to stay informed about developments in the standards framework may impact on the ability of the Standards Committee to perform its role to a high standard.

Relevant Objectives of the Standards Committee

This report contributes towards the objective of 'Internal Control', as being aware of standards cases that are reported nationally will help the Committee to ensure that it deals with ethical governance issues in accordance with the law and in line with best practice.

Corporate Priorities

This Report is relevant to the corporate priority of united and involved communities: a council that listens and leads.

Financial Implications

There are no financial implications associated with this report.

Section 3 - Statutory Officer Clearance

Name: Steve Tingle	<input checked="" type="checkbox"/>	on behalf of the* Chief Financial Officer
Date: 8 June 2011		
Name: Matthew Adams	<input checked="" type="checkbox"/>	on behalf of the* Monitoring Officer
Date: 8 June 2011		

Section 4 - Contact Details and Background Papers

Contact:

Jessica Farmer, Head of Legal Services – Legal Services, 0208 420 9889
Vishal Seegoolam, Acting Senior Professional – Democratic Services, 020 8424 1883

Background Papers: None

If appropriate, does the report include the following considerations?

1.	Consultation	NO
2.	Corporate Priorities	YES

Appeals Tribunal Decision

Case Ref:	APE 0425
Date of Appeals Tribunal:	23 June 2009
Relevant Standards Committee:	London Borough of Hillingdon
Date of Standards Committee Decision:	3 March 2009
Name of member concerned:	Councillor Michael Cox of same authority
Monitoring Officer:	Raj Alagh
Independent Investigator:	David Lunn
<u>Appeals Tribunal Members</u>	
Chairman:	Chris Hughes
Member:	Trevor Jex
Member:	Peter Dawson

1. The Appeals Tribunal has considered an appeal from the Appellant about the above decision.
2. The Appeals Tribunal has considered written and oral submissions from both parties and has heard evidence from a number of witnesses called on behalf of the parties.
3. The Appellant had appealed against the decision of the Hearing Sub-Committee of London Borough of Hillingdon's Standards Committee (the Standards Committee) that he had failed to follow paragraphs 3(1) and 5 of the Code of Conduct when he used the word 'corrupt' against Conservative members at a full council meeting on 17 January 2008.
4. Paragraph 3(1) of the Code provides:

"You must treat others with respect."
5. Paragraph 5 of the Code provides:

"You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute."
6. In this appeal by way of re-hearing from that decision the Appeals Tribunal has determined that the Appellant did fail to follow the provisions of the Code.
 - 6.1. The subject matter of this appeal was within a very tight focus. During a contribution to a council debate on 17th January 2008 it was alleged that Councillor Cox referred to the ruling Conservative group on the council as corrupt. The Tribunal heard evidence from councillors as well as an officer and the public.

- 6.2. In his evidence Councillor Cox stated that he was not a good public speaker and the tribunal accepted that. To make up for this deficiency it was his custom to prepare a statement and deliver it as his contribution to debate. In the written statement (which was in evidence before the Tribunal) he referred to a "corrupt system of democracy". From his evidence to the Appeals Tribunal it was clear that Councillor Cox believes that the Conservative Group acted corruptly in its approval of changes to the governance arrangements for the council. A number of witnesses gave evidence that they could not recall him using the word corrupt. Others had heard it. In particular Councillor Lewis recalled the comment "You're all corrupt" being made by Councillor Cox as a throwaway remark as he was being heckled. Mr Revell, who was at the time Interim Head of Democratic Services and responsible for keeping a record of the meeting recalled Councillor Cox describing Conservative councillors as corrupt.
- 6.3. The Appeals Tribunal was satisfied that all the witnesses who gave evidence were giving their honest recollections of a fleeting event which happened over a year ago. No one was trying to mislead the Tribunal. In considering the evidence the Tribunal has had to weigh competing recollections of the events in the light of the quality of the evidence. Like the Standards Committee it was particularly impressed by the evidence of Mr Revell which the Appeals Tribunal found impartial, credible and compelling. The Appeals Tribunal also found the evidence of Councillor Lewis particularly persuasive. The Tribunal has weighed all the evidence before it and is satisfied, on the balance of probabilities that Councillor Cox, under the pressure of barracking and his own strong feelings about the behaviour of the majority group, inadvertently referred to that group as corrupt.
- 6.4. The Appeals Tribunal was satisfied that this was a throwaway remark made without malicious intent. However it was said in a full council meeting at which councillors, council officers and members of the public were present. By making that comment Councillor Cox failed to treat his fellow councillors with respect. By making such a claim without justification he brought his own office into disrepute. By making an unjustified claim that the majority group of the Council was corrupt he brought the authority itself into disrepute.
7. The Appeals Tribunal has upheld the finding of the Standards Committee that there was a breach of the Code of Conduct.
8. The Standards Committee concluded that in all the circumstances it was appropriate to impose no sanction with respect to this conduct. The Appeals Tribunal shares that view.
9. A copy of this determination is being given to the Appellant, the Standards Board, the Standards Committee and any person who made the allegation that gave rise to the investigation.
10. This determination will be published in a newspaper circulating in the area of the relevant local authority and also published on the Adjudication Panel's website at www.adjudicationpanel.tribunals.gov.uk.

Chris Hughes
Chairman of the Appeals Tribunal
4th July 2009

Appeals Tribunal Decision

Case Ref:	APE 0399
Date of Appeal Tribunal Hearing:	16 May 2008
Relevant Standards Committee:	Shepway District Council
Date of Standards Committee Decision:	26 February 2008
Name of member concerned: <i>(Appellant & his authority)</i>	Councillor Capon of Hythe Town Council
Ethical Standards Officer (ESO):	Ms Jennifer Rogers
Monitoring Officer:	Mr Peter Wignall
Independent Investigator:	Mr Kris Malde
<u>Appeals Tribunal Members:</u>	
Chairman	Mr Steve Wells
Member	Mr Chris Perrett
Member	Mr Darryl Stephenson

1. The Appeals Tribunal has considered an appeal from the Appellant in respect of a decision of the Shepway District Council Standards Committee. It has been agreed, both by the Appellant and the Shepway District Council Standards Committee, that the Appeal be considered in the absence of the parties and by way of written representations.
2. The Appeals Tribunal has considered the written submissions from the Appellant and the Monitoring Officer, Mr Wignall, on behalf of the Shepway District Council Standards Committee and determined that it is appropriate to deal with the Appeal by way of the written representations.
3. The Appellant appealed against the Standards Committee's finding that he had failed to follow paragraphs 2(b), 2(c) and 4 of the Code of Conduct through the comments he made about the Town Clerk on 20 July 2006 at a meeting of the Charity Trustees. Councillor Capon made the comment that the Public Rights of Way Officer had found the Town Clerk 'difficult to get on with' and further commented very shortly afterwards in the same meeting that 'this is also the view of many towns' people who say that when they try to contact the Town Clerk she is downright rude to them....'
4. Findings of Fact
 - 4.1. The facts found in the original Investigating Officer's report were undisputed namely:

4.1.1. That on 20 July 2006, at a meeting of the Charity Trustees, Councillor Capon made the comment that the Public Rights of Way Officer had found the Town Clerk 'difficult to get on with.'

4.1.2. That Councillor Capon further commented 'this is also the view of many townspeople who say that when they try to contact the Town Clerk she is downright rude to them ...'

4.2 The findings of fact were adopted by the Standards Committee at its hearing on 20 February 2008.

5. Paragraph 2(b) of the Code provides:

"A member must treat others with respect."

6. Paragraph 2(c) of the Code provides:

"A member must not do anything which compromises or is likely to compromise the impartiality of those who work for or on behalf of the authority."

7. Paragraph 4 of the Code provides:

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

8. The Appellant has appealed against the action which the Standards Committee decided to take in the light of the failure to follow the provisions of the Code of Conduct. That action was to censure the Appellant.

9. The Appellant, in his grounds of appeal cites a number of procedural matters in respect of the Standards Committee hearing which in his view amounted to a breach of natural justice. The Monitoring Officer provides explanations to counter each of the perceived procedural breaches. However, in view of the fact that the Appeals Tribunal is able to determine the facts and whether there has been a failure to follow the provisions of the Code of Conduct by way of a review it does not propose to adjudicate on any procedural flaws other than to comment on two procedural matters which the Standards Committee may wish to consider in respect of future hearings namely:

9.1 It is important that the hearing (including the evidence of witnesses and their cross examination) is heard in public, subject to the usual caveats in respect of confidential or privileged evidence, and that access by the public to the hearing venue is facilitated by clear signage and appropriate notice. Where a hearing or part of a hearing is to be convened in private the reasons for so doing should be clearly expressed to the public present and preferably reduced to writing.

9.2 Where the facts of the case are undisputed and the case is being heard in the absence of the respondent councillor on the basis of papers served on him or her before the hearing, further evidence should not be introduced to the Committee without giving the respondent councillor the opportunity to have sight of the substance of that evidence so that a decision could be made whether or not he/she should attend the hearing to rebut the evidence or to make written representations in respect of it.

10. From the documentation presented to the Appeals Tribunal it appears that the Shepway District Council Standards Committee chose not fully to follow the guidance produced by the

Standards Board to Monitoring Officers and Standards Committees in respect of the conduct of hearings and the pre-hearing process. Whilst The Appeals Tribunal acknowledges that Standards Committees are free to regulate their own procedures, following the guidance provides a firm procedural foundation for the hearings of the Committee. Not doing so in respect of Councillor Capon's case this may have led to a degree of unfairness at the hearing on 20 February 2008.

11. The Appeals Tribunal has determined that the Appellant did not fail to follow the provisions of the Code for the following reasons:

Paragraph 2(b) of the Code

- 11.1 The Standards Committee's reasons for finding that Councillor Capon failed to comply with paragraph 2(b) of the Code of Conduct were that Councillor Capon failed to treat the Town Clerk with respect by using inappropriate language in a public forum and failed to rectify this when the opportunity arose and reinforced his point by further additional remarks. There is no suggestion in the evidence that the comments made by Councillor Capon, which form the undisputed facts of this case, were anything other than the opinion of individuals other than the councillor. Nor is it suggested that Councillor Capon was doing anything other than report the comments of others to the 20 July meeting. There is evidence to suggest that Councillor Capon and the Town Clerk had previously had disagreements in respect of council matters and that Councillor Capon had been opposed to the manner of her appointment. However, the Appeals Tribunal finds no evidence to suggest that the councillor's conduct was unfair, unreasonable or demeaning towards the Town Clerk. The Investigating Officer, Mr Malde is clear in his report about the allegations that having listened to the tape of the 20 July meeting, Councillor Capon's comments were not made in a malicious or bullying manner. The context of the first comment was entirely within the compass of the meeting since it related to comments attributed to Mr Denne, a Kent County Council Public Rights of Way Officer, in the context of a discussion related to a public bridleway, aspects of access to which was apparently disputed. The fact that Councillor Capon refused to apologise for comments that he honestly believed to be true and was simply reporting and then failing to apologise, cannot, in the opinion of the Appeals Tribunal, amount to treating the Town Clerk disrespectfully. Consequently, the Appeals Tribunal dismisses the finding of the Standards Committee that Councillor Capon was in breach paragraph 2(b) of the Code.

Paragraph 2(c) of the Code

- 11.2 The Standards Committee's reasons for finding that Councillor Capon failed to comply with this aspect of the Code (although the Committee attributed this reasoning to its decision about paragraph 4) was that Councillor Capon had behaved in a way that was likely to compromise the impartiality, in this case, of the Town Clerk by acting in a manner that was likely to inhibit the ability of the Town Clerk in fulfilling her functions effectively when dealing with officers and officials at Kent County Council. It is undisputed that the Town Clerk deals on a professional basis with local members and officers from neighbouring authorities. Whilst the Town Clerk, in evidence at the Standards Committee hearing, may have expressed an opinion about her ability to fulfil her duties with local members and officers as a result of Councillor Capon's comments this is not included in the decision of the Standards Committee and can only be a matter of speculation for the Appeals Tribunal. The Investigating Officer's report attributes Councillor Matthews in his response to the Draft Investigation report as stating that "Mr Denne and the Town Clerk were able and willing to be 'very' friendly towards each other at a subsequent

site visit". As this evidence comes from the original complainant in this case, the Appeals Tribunal finds it compelling in determining that the Town Clerk's dealings with Mr Denne were in no way inhibited by the comments made by Councillor Capon. Additionally, there is no evidence to suggest that the comments made inhibited the ability of the Town Clerk to fulfil her functions in other aspects of her work. The positive dealings between Mr Denne and the Town Clerk reported by Councillor Matthews and the lack of any evidence of other problems leads the Appeals Tribunal to conclude that Councillor Capon's comments would not be likely to lead to the Town Clerk being unable to fulfil her functions and would not appear to have compromised the impartiality of the Town Clerk working on behalf of the authority. Consequently, the Appeals Tribunal dismisses the finding of the Standards Committee that Councillor Capon was in breach paragraph 2(c) of the Code.

Paragraph 4 of the Code

- 11.3 The Standards Committee's reasoning for finding Councillor Capon to be in breach of this aspect of the Code was his failure to apologise, compromise or cooperate during a public forum, namely the Extra-ordinary Charity Trustees Meeting held on 20 July 2006.
- 11.4 The Oxford English Dictionary defines disrepute as a 'lack of good reputation or respectability'. A member will have failed to comply with the Code if his or her conduct could 'reasonably be regarded' by an objective observer as bringing the member's office or authority into disrepute. Anything which diminishes public confidence in either a member's office or their authority, or which harms, or could harm, the reputation of an authority, will bring that office or authority into disrepute.
- 11.5 In the Appeals Tribunal's view, it is important that members should be able to express in robust terms concerns that they have about any aspect of the running of the council and that this can include expressing disagreement with officers and can include criticism of the way in which an officer handles particular matters. During the 20 July meeting the Town Clerk chose to publicly question Councillor Capon about a letter that she believed should have been passed to her (it is interesting to note that the minutes of the meeting suggest that the letter had been previously circulated, a fact seemingly corroborated by the statement made by the Town Mayor during the verbal exchange that the letter made 'some quite startling statements').

Councillor Capon then made the first of the two undisputed comments that is the subject of this Appeal. The Appeals Tribunal considers that the threshold for a failure to treat another with respect has to be set at a level that allowed for the passion and frustration that often accompanies political debate and the discussion of the efficient running of a council and within the context of those involved in the exchange. The Appeals Tribunal is of the opinion that the Town Clerk, who had been in post since the middle of 1999 and was clearly very experienced in her dealings with councillors chose to debate the letter with Councillor Capon, and given her seniority within the administration of the council, was entirely able to defend her position. In the transcript of the tape recording of the relevant part of the meeting the Town Clerk sought an apology, did not receive one and then Councillor Carroll suggested that he be allowed to put forward a motion that Councillor Capon apologise or leave the room. At this point Councillor Capon refused to apologise, made the second undisputed comment and then left the room. The Appeals Tribunal sees nothing in the evidence submitted to suggest that

Councillor Capon conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute. He was engaging in political debate, and in doing so was simply publicly expressing the opinion of others about their ability to engage with the Town Clerk in a manner which was acknowledged to be neither bullying nor malicious. Whilst this was undoubtedly uncomfortable for the Town Clerk and it could be argued that it might have been better expressed in a more appropriate forum, the Appeals Tribunal does not believe that a reasonable objective observer of the proceedings would think that the comments would bring the office of councillor or the authority into disrepute. Consequently, the Appeals Tribunal dismisses the finding of the Standards Committee that Councillor Capon was in breach paragraph 4 of the Code.

12. The Appeals Tribunal has dismissed the findings of the Standards Committee.
13. The decision of the Appeals Tribunal is unanimous
14. A copy of this determination is being sent to the Appellant, the Ethical Standards Officer, the Standards Committee and any person who made the allegation that gave rise to the investigation.
15. The decision of the Standards Committee ceases immediately to have effect.
16. This determination will be published in a newspaper circulating in the area of the local authority and will also be published on the Adjudication Panel's website at www.adjudicationpanel.co.uk.

Steve Wells

Chairman of the Appeals Tribunal

16 May 2008



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(Local Government Standards in England)**

CASE NO: LGS/2010/0495

ON APPEAL FROM:

Standards Committee of: Blaby District Council
Decision Notice No: SC-09-01
Dated: 5 February 2010

APPELLANT: Councillor Lorna Gutteridge of Blaby Parish Council

RESPONDENT: Blaby District Council Standards Committee

DATE OF HEARING: 21 May 2010

HEARD AT: Holiday Inn, Leicester

DATE OF DECISION: 3 June 2010

BEFORE

**Judge: Sally Lister
Member: Stan Szaroleta
Member: Richard Enderby**

ATTENDANCES:

For the Appellant: Appeared in person
For the Respondent: Mr A Cross (Investigating Officer)

Subject matter: Appeal by a member of a local authority
against a Standards Committee decision

Cases: Sanders v Steven Kingston [2005] EWHC
1145 (Admin)
Livingstone v The Adjudication Panel
for England [2006] EWHC 2533 (Admin)

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal has been partly upheld in that the Appellant did bring her office but not her authority into disrepute. The other findings of the Standards Committee that the Appellant had failed to comply with the Code of Conduct were upheld. The Tribunal has varied the sanctions imposed by the Standards Committee.

REASONS FOR DECISION

1. The Tribunal has considered an appeal from Councillor Lorna Gutteridge, the Appellant, about the decision of Blaby District Council's Standards Committee on 5 February 2010.
2. The Tribunal has considered written and oral submissions from Mr Anthony Cross on behalf of the Standards Committee and the Appellant. No oral evidence was given.
3. The Appellant has appealed against the Standards Committee's finding that she had failed to follow the Code of Conduct when she submitted a written report to the General Purposes Committee which inappropriately included her views of the Parish Clerk and against its decision that the Appellant be suspended for a period of up to three months, which was suspended until May 2011 and submit a personal written apology to the Parish Clerk and Blaby Parish Council in a form specified by the Standards Committee within three months of the full decision being delivered. It was also decided that failure to submit the written apologies would result in suspension. In addition to this, Blaby Parish Council was to undertake appropriate training to be arranged by the Monitoring Officer within this [2010] calendar year.

Preliminary matters

4. Prior to the hearing the Principle Judge had directed the parties to submit written submissions on whether the Appellant had failed to treat others with respect and whether the Appellant had conducted herself in a manner that could reasonably be regarded as bringing her office or authority into disrepute, as neither parties in their submissions to the Tribunal prior to the hearing had addressed these key issues.
5. It was then necessary for a further direction to be given by the Tribunal Judge as it appeared both parties needed clarification of the issues to be determined by the Tribunal. That direction confirmed that the Tribunal would not be acting as a disciplinary committee in respect of the conduct of the Parish Clerk but would be considering whether the Appellant's conduct breached the Parish Council's Code of Conduct.
6. Both parties confirmed at a preliminary stage of the hearing that it was unlikely that they would call witnesses and agreed the following facts which were found by the Tribunal.

Findings of Facts

7. The Appellant was first appointed to Blaby Parish Council in 1976. She was also a councillor on the District Council until 1992.
8. The Appellant was not a parish councillor between 1991 and 2002.
9. The Appellant signed an undertaking to observe the Council's Code of Conduct on 12 June 2007 and undertook training which included training on the Code of Conduct on 11 July 2007.
10. The Appellant is currently Chair of the Council's Staff and Finance Committee, Vice Chair of the Council's General Purposes Committee and Chair of the Parish Council's Future Events Working Party.
11. On or around the summer of 2008, the Appellant began to have concerns about the performance of Ms Hansford, the Parish Clerk.
12. After the September General Purposes Committee meeting, the Appellant wrote two formal letters of complaint against the Parish Clerk to the Chair of the Parish Council, Mr Harding, listing a number of concerns, which the Tribunal was led to understand was in excess of 30 matters.
13. The Parish Clerk subsequently instituted a grievance against the Appellant.
14. On the 13 February 2009 the Council's Disciplinary Committee considered the Parish Clerk's grievance and did not uphold it.
15. On the 18 February 2009 the Disciplinary Committee considered the Appellant's complaints against the Parish Clerk and upheld the majority, but not all of the Appellant's complaints. The Parish Clerk was given a "final written warning".
16. The Parish Clerk appealed the decisions of the Disciplinary Committee and on 15 April 2009 the Appeals Committee down graded the decision of the Disciplinary Committee to a "written warning". It also reaffirmed the Disciplinary Committee's decision not to uphold the Parish Clerk's grievance against the Appellant.
17. On the 13 April 2009 a car boot sale took place organised by the Council's Future Events Working party.
18. The Appellant wrote a report of the event which stated:

"OVERALL:

The banners should have been up for seven days in a prominent place and this did not happen. They were ordered wrongly and too late and not placed on site in the position as requested. The low number of booters must be attributed [to] very poor banner display and to the incompetent and lack of support of the parish back office management.

That the take from this Car Boot was £412.80 was in no small way due to the in-village poster publicity organised by Mr & Mrs Cawrey. Over 600 people and their children visited the Car Boot and made the day a success in spite of having had to 'push the steam roller uphill' to achieve it.

As a councillor I am a volunteer and not paid for my services but it seems that I do much work and spend many hours on council work that should be done by the parish office. Any manager in a similar situation would be ashamed to have this level of incompetence and lack of support attributed to their office. Blaby parish clerk is paid a substantial salary to

serve this parish council but clearly this abysmal and inefficient service and support is totally inadequate, inefficient and unacceptable.”

19. That report was considered by the Future Events Working Party at its meeting on the 20 April 2009. That meeting was open to the public.
20. The Parish Clerk did not attend the meeting of the 20 April 2009. The minutes of the meeting were prepared by the Appellant who later submitted them to the Parish Clerk by email in PDF format which meant they could not be amended.
21. The minutes of the Future Events Working Party of the 20 April 2009 and the report of the Appellant were considered by the General Purposes Committee of the Parish Council on 28 April 2009. That meeting was open to the public and the Appellant’s report was available to the public.

The Paragraphs of the Code relevant to this appeal.

22. Paragraph 3(1) of the Parish Council’s Code of Conduct provides:

“You must treat others with respect”

23. Paragraph 5 of the Parish Council’s Code of Conduct provides:

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

Findings as to whether the Appellant failed to follow the Code

24. The two matters to be determined on the basis of the facts as found are whether the Appellant’s comments about the Parish Clerk, contained in her report of 13 April 2009 and which was considered by the Future Events Working Party and the General Purposes Committee of the Parish Council, was conduct which failed to treat others with respect and/or could reasonably be regarded as bringing her office or authority into disrepute.
25. The Tribunal finds and the Appellant does not dispute that she was acting in her official capacity when she wrote her report about the car boot sale and when the report was considered at the two meetings of the Parish Council on the 20 and 28 April 2009, both of which the Appellant attended in her capacity as Chair and Vice Chair respectively.

Submission made on behalf of the Appellant

26. In summary the Appellant disputed that her comments contained in her report in respect of the Parish Clerk breached the Code of Conduct.
27. In the Appellant’s opinion many things went wrong with the organisation of the car boot sale which was due to the lack of support she felt she received from the Parish Clerk and her office. This had caused her a great deal of frustration. In her opinion her report was factual, to the point and true.
28. The Appellant did not think the Parish Clerk would have taken much notice of the content of her report and that in her opinion the Parish Clerk viewed herself as a chief executive above criticism, rather than as an administrator and would just shake any criticism off. Had the Parish Clerk had any concerns about the report she could have requested that the General Proposes Committee move to “Closed session” which she did not do.

29. In her written submission the Appellant stated that her concerted and continuous efforts leading up to the time of the car boot sale were done with the intention of keeping Blaby Parish Council's good name intact. She stated that for many years she had helped to build up the good reputation of Blaby Parish Council and was determined to keep it that way. All her requests and enquiries relevant to this car boot sale were aimed at averting the possible cancellation of the event due, in her words "to the incompetence of the Clerk".
30. The six annual car boot sales were always well advertised and publicised in advance of the event and had become very welcome events in Blaby Parish. If the car boot sale had had to be cancelled then, in her opinion, the name of Blaby Parish Council would have been brought into disrepute.
31. In the Appellant's view her Easter Sunday was far from peaceful as it was spent running around doing jobs that, in her opinion the Clerk should have done and is paid to do. The Appellant stated that no apology for this incompetence has ever been received from the Clerk. Her frustration at what she saw as the "inadequacy, inefficiency and unacceptable incompetence of the Clerk" resulted in her decision to write the report in order that all Blaby Parish councillors were aware of the Clerk's dreadful incompetence and lack of support for the general public and their parish council events.
32. With reference to the wording used in the final paragraph of her report, she wished to exercise her right to freedom of thought and expression as enshrined in Article 10 of the European Commission on Human Rights. In English Law this is expressed in the Human Rights Act 1988, Chapter 42 and section 6(1).
33. Further, she has never caused a breach of the Equality Enactments as regards the Parish Clerk. She has never bullied, intimidated or been disrespectful towards her and has never tried to compromise her in any way. She does not feel she has questioned the Parish Clerk's integrity or her impartiality. All she has done, in the Appellant's submission, is to criticise her incompetence which, as a councillor, she feels obliged to do in the interests and welfare of Blaby parishioners.

Submission made on behalf of the Standards Committee

34. In summary it was submitted on behalf of the Standards Committee that the Committee was correct in deciding that the concluding paragraph of the Appellant's report of the car boot sale on 13 April 2009 had breached Blaby Parish Council's Code of Conduct.
35. Whether the Appellant's behaviour in terms of what she wrote in the concluding paragraph of the report is acceptable has to be looked at objectively, i.e. how what she wrote would reasonably be perceived as well as her intention in writing it.
36. A balance has to be drawn as to how far the Appellant can go in criticising the Parish Council's Clerk. Care has to be taken to avoid treating the Clerk in a way which is unfair, unreasonable and demeaning. The comments, especially the reference to "incompetence", would clearly be perceived as an expression of anger and abuse. The tone of the concluding paragraph is offensive and intimidating and is clearly disrespectful to the Clerk.
37. The Appellant's concerns could and should have been expressed differently, such as in a private meeting involving the Parish Council's Chairman and the Clerk or in a more moderately worded report.
38. The comments were not endorsed subsequently by the Parish Council. Some of the earlier comments made in the report were not found to be correct.

39. It is submitted that the concluding paragraph is clearly unreasonable in the way it is worded. The Clerk was not able to amend the report, given it had been submitted in PDF format, and it was circulated with the agenda of the General Purposes Committee of 28 April 2009. The report was in the public domain.
40. The disciplinary situation pertaining to the Clerk made it difficult for her to defend herself at the Council meetings.
41. Although not proven and expressly denied by the Appellant, an objective observer might consider that her motives in writing the report might have had some link to the ongoing disciplinary process involving the Clerk.
42. Although the focus is on the concluding paragraph, the tone of the report in terms of disrepute is extremely negative. It is hard not to read the concluding paragraph as anything other than a personal attack on the Parish Council's Clerk. This would clearly affect the Clerk's confidence and therefore her ability to continue.
43. The Appellant's conduct towards the Parish Council's Clerk appears to have created some instability at the Parish Council with particular reference to the number of resignations of councillors and the "real" reasons causing their resignations. This also results in a lessening of public confidence in the Parish Council.
44. It is accepted that Article 10 is engaged. If the Tribunal do find breaches of the Code on the facts, it is appropriate by reference to Article 10(2).
45. In the local government context, as stated in the Investigation Report, there is an expectation that Members should be able to express in robust terms concerns they may have about any aspect of the running of the Council, which can include disagreement with other members or officers and this can include criticism. The Code, however, by introducing the concept of "treating others with respect" engages the balance required by Article 10(2), as does "bringing office into disrepute".
46. It is implicit in the Investigation Report that the threshold for failure to treat someone with respect and/or "bringing office into disrepute" has to be set at a level that allows for councillors to be able to discuss the efficient running of a council, which includes appropriate criticism where performance has been unsatisfactory. This, however, has to be balanced with the rights of the Clerk and her right to have her reputation protected.
47. As accepted in the report, the Appellant was seeking to raise concerns about what had happened at the car boot sale but did so in a way that was unacceptably harsh in that it was demeaning of the Clerk. It does, as stated previously, come over as a personal attack.
48. It is submitted that it is important to remember that what was being complained about could be seen in reality as something relatively minor which was then blown out of all proportion. The Appellant makes reference to what might have happened if the car boot sale had not taken place. It is perhaps worth mentioning that in any event car boot sales are subject to the vagaries of the weather and it is difficult to accept that if a car boot sale cannot take place the Parish Council would in fact be brought into disrepute. Reference is made in the report to how an objective outsider might view the circumstances in the knowledge of the Appellant's action that resulted in disciplinary action being taken against the Clerk. The Investigation Report observed that when the Parish Council had considered the Appellant's complaints about the car boot sale, not all of them in any event appeared to have been upheld.

49. The Appellant's comments alleging "incompetence" are not, it is submitted, comments that could be construed as political on matters such as policy issues that therefore attract a higher level of protection. These comments were a personal attack and should be construed as a personal criticism of a Parish Council Clerk. It is understood that the situation might be different, in terms of critical comments of a chief executive or a highly paid corporate director employed to manage a large department and deliver services. It is submitted that it was inappropriate to make such a personal criticism in an open report circulated to Parish Councillors. The Clerk was placed in a difficult position and effectively had no right of reply. It has previously been stated that if the Appellant had any concerns about the Clerk's performance, these could have been made in a more objective, appropriate and moderate way.
50. It is therefore submitted that the decision of Blaby District Council's Standards Committee to find the Appellant in breach of the Blaby Parish Council's Code of Conduct arising from her written comments about the Clerk is a proportionate restriction on the Appellant's right to freedom of expression.
51. The Appellant was an experienced councillor and not a novice. It was therefore unfortunate that someone so experienced with so much to give wrote such strident criticism of the Parish Clerk in a report that was widely circulated to other councillors and which was capable of being read by members of the public.

The Tribunal's findings in relation to breach

Failure to treat with respect and disrepute

52. In the Tribunal's view, failure to treat others with respect will occur when unfair, unreasonable or demeaning behaviour is directed by one person against another. The circumstances in which the behaviour occurred is relevant in assessing whether the behaviour is disrespectful. The circumstances include the place where the behaviour occurred, who observed the behaviour, the character and relationship of the people involved, and the behaviour of anyone who prompted the alleged disrespect.
53. It is understood, and the Tribunal accepts that the term "disrepute" means a "lack of good reputation or respectability". A councillor will have failed to comply with the Code of Conduct if their conduct could "reasonably be regarded" by an objective observer as bringing the member's office or their authority into disrepute. Anything which diminishes the member's office or their authority, or which harms or could harm the reputation of an authority, will bring that office or authority into disrepute.
54. In considering whether the Appellant has breached the Code of Conduct, in particular paragraphs 3(1) and 5, the Tribunal has had regard to Article 10 of the European Convention on Human Rights which provides:

"(1) Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers..."

"(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of ...the protection of the reputation or rights of others,...."

55. Section 1 of the Human Rights Act 1998 identifies the rights under the European Convention of Human Rights which have effect for the purpose of that Act. They include Articles 6 and 10 of the ECHR. Section 3(1) of the 1998 Act provides that so far as it is possible to do so...

subordinate legislation must be read and given effect in a way which is compatible with the convention rights.

56. In the Tribunal's view freedom of expression must be recognised as one of the fundamental rights in a democratic society which may only be interfered with where there are convincing and compelling reasons within Article 10(2) justifying that interference and any such interference must be reasonable, necessary and proportionate.

57. In Sanders v Steven Kingston [2005] EWHC 1145 (Admin) Mr. Justice Wilkie considered the relationship between Article 10 and paragraphs 2(b) and 4 of the then Code of Conduct. These provisions equate to paragraph 3(1) and 5 of the Parish Council's Code of Conduct. Mr Justice Wilkie considering whether, on the facts of that case, a finding of breach and/or the imposition of a sanction would breach Article 10. He held that Article 10 was engaged, that the finding of a breach of itself and the imposition of a sanction was prima facie a breach of Article 10 but that the restriction of the right to freedom of expression was, on the facts, one which was justified by reason of the requirements of Article 10(2). He stated:

"...The purpose of the [Local Government Act 2000] was to encourage and impose certain minimum standards of behaviour in respect of local government.... I have concluded that the words and writing of the appellant amounted to no more than expressions of personal anger and personal abuse and did not constitute political expression which attracts the higher level of protection. In those circumstances, in my judgement the finding by the case tribunal that the appellant had breached the code of conduct and its notification of that finding to his local authority constituted an interference with freedom of expression but one which was lawful pursuant to Article 10(2)..."

58. In the case of Livingstone v Adjudication Panel for England [2006] EWHC 2533 (Admin) Mr Justice Collins stated:

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

59. The Tribunal is of the view that Article 10 is engaged here and therefore the issues to be determined are whether a finding of a breach of the Code on the facts as found, would be justified under Article 10(2).

60. This required a factual investigation of the nature of the words used by the Appellant in order to determine whether they constituted legitimate expression relating to matters within the legitimate concern of the Appellant (political or quasi political comment which benefit from a high level of protection,) or whether they constituted expressions of personal criticism or abuse which would not benefit from such a level of protection.

61. The Tribunal considered whether the restraints imposed by the Code, in order to protect the reputation and rights of others represented no greater an impairment to the Appellant's rights to freedom of expression than is necessary to accomplish the legislative objective of the Code which is to maintain and uphold standards of conduct in public life.

62. In looking at the nature of the words, the Tribunal recognises that the threshold for breaches of this nature has to be set at a level that allows for the passion and fervour of political debate relating to the efficient running of a council and which allows for appropriate and robust criticism of the performance of a council function. This is consistent with the

objective of maintaining proper standards in public life. However, this was to be balanced with the rights of others, including the right to protection of reputation.

63. The Appellant's use of some of the words contained in her report of the 13 April 2009 about the Parish Clerk, such as "incompetent", "abysmal" and "totally inadequate" could not be construed as political or quasi political comments attracting a high level of protection. These comments were in the nature of personal abuse and personal criticism of an officer.
64. It was inappropriate to make these personal criticisms in a report which was circulated widely to all members of the Future Events Working Party and the General Purposes Committee, both of which were open to the public and where the document was put in the public domain. The Appellant's report could have been written in a more temperate, moderate manner, without making such highly critical comments about the Parish Clerk and her office so publicly. Indeed in the Appellant's submission to the Tribunal she has made it clear that it was her intention to circulate her criticisms about the Parish Clerk widely which, any reasonable person would have known would have caused the Parish Clerk embarrassment and humiliation.
65. Whilst the Tribunal recognised that the Parish Clerk, as a senior officer should be prepared to accept more robust criticism than more junior officers, in this case the words used were so personal and highly critical that they should not have been made in a public arena where the Parish Clerk had no right of reply, no opportunity to contradict what was said about her and where she was largely defenceless against these criticisms. The words used and the manner in which they were made were unreasonable, unfair and demeaning.
66. The Appellant should have known from her previous complaint against the Parish Clerk of the correct procedure for dealing with her concerns about the organisation of the car boot sale. This should have been taken up separately and it was wholly inappropriate to raise them in the manner she did. The Respondent therefore failed to treat Ms Hansford with respect and has breached paragraph 3(1) of the Code.
67. The Tribunal also finds that the Appellant has breached paragraph 5 of the Code of Conduct. Making such strident and intemperate public criticisms about the Parish Clerk and by implication her office, in a report, rather than using internal disciplinary procedures to make her complaints would reasonably be regarded by an objective observer as diminishing the Appellant's reputation and the reputation of her office. Alternatives were open to the Appellant of which she was aware, but chose not to use. The Tribunal therefore finds that the Appellant has brought her office into disrepute.

Sanction

Submission on behalf of the Standards Committee

68. On behalf of the Standards Committee, it is now accepted that in reaching their decision the Committee misunderstood regulation 19(5). Accordingly, the Standards Committee accepts that it had no power to impose this additional "suspended" suspension. If the Tribunal uphold one or more breaches of the Code of Conduct, it is submitted that given the Appellant still does not appear to accept that the wording she used in the report was inappropriate; the sanction of suspension should apply.

Submission on behalf of the Appellant

69. The Appellant was of the view that a censure was more appropriate than a suspension and that if the Tribunal thought it appropriate she would undertake further training in the Code.

Decision on Sanction

70. The Tribunal has taken account of the representations of the parties, and the guidance issued by Standards for England, entitled "Standards Committee Determinations".
71. The Tribunal has found that the disrespect shown to the Parish Clerk was serious, sufficiently so to also amount to a breach of paragraph 5 of the Code of Conduct.
72. The Tribunal has accepted that the Appellant is a hard working councillor who is committed to serving the Parish Council and the people of Blaby. However, she is not an inexperienced new councillor and is familiar with the Code of Conduct and the internal disciplinary procedures of the Council which she ignored in order to make her views about the Parish Clerk widely known.
73. During the course of the hearing and in her submission to the Tribunal it was made clear that the Appellant continues to believe that she had done nothing wrong and that she is justified in taking the action she did. The Tribunal is therefore led to conclude that there is a serious risk that in the absence of a clear indication that this behaviour is wholly unacceptable, the Appellant may breach the Code of Conduct again.
74. The Tribunal has therefore concluded that a fair, reasonable and proportionate sanction here is that the Appellant should be suspended for a period of four months or until such time as she has submitted a written apology to the Parish Clerk in a form specified by the Standards Committee.
75. Unfortunately the Standards Committee Notice of Decision, which gave rise to this appeal, was confusing and inadequate. It did not explain its findings of fact, save to conclude erroneously, that it was not disputed that the Appellant's written report to the General Purposes Committee contained inappropriate wording. It did not adequately give its reasons for finding there had been a failure to comply with the Code or whether all or part of paragraph 5 was breached. Perhaps more importantly, some of the sanctions imposed by the Standards Committee were confusing and were ultra vires.
76. The Tribunal has partly upheld the findings of the Standards Committee and varied the sanctions imposed. The Standards Committee is required to impose the penalty specified in paragraph 74.
77. The written reasons for the Tribunal's decision will be published on the Tribunals website at www.adjudicationpanel.tribunals.gov.uk.
78. Any request for the decision to be reviewed or for permission to appeal needs usually to be made to the First-tier Tribunal within 28 days of receipt of the Tribunal's reasoned decision. Such applications need to be in writing.

Sally Lister
Judge
3 June 2010



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(Local Government Standards in England)**

CASE NO: LGS/2010/0521

ON APPEAL FROM:

Standards Committee of: Brentwood Borough Council
Decision dated: 2 August 2010

APPELLANT: Councillor Barry Aspinell of Brentwood Borough Council

RESPONDENT: Brentwood Borough Council Standards Committee

Determined on the papers on 5 November 2010

DATE OF DECISION: 5 November 2010

BEFORE

**Judge: Patrick Mulvenna
Member: David Billing
Member: Alison Lowton**

Subject matter: Appeal by a member of a local authority
against a Standards Committee decision

Cases: R -v- Sussex Justices, ex parte McCarthy [1924] 1KB 256
Richardson -v- North Yorkshire County Council [2003] EWHC 764 (Admin)
Ken Livingstone v The Adjudication Panel for England [2006] EWHC 2533
(Admin)
Sanders -v- Kingston [2005] EWHC 2132 (Admin)

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal has been upheld and the decision of the Standards Committee has been rejected

REASONS FOR DECISION

- 1 The Appellant has been found by the Respondent to have breached paragraph 5 of the Code of Conduct and has been suspended for seven weeks. The Appellant has appealed to the Tribunal, although it appears that his suspension might actually have been served.
- 2 Principal Judge Laverick, on considering the application to appeal, granted permission on the bases that
 - there might be concern in relation to the Appellant's suggestion of political bias in the composition of the Hearing and Consideration Sub-Committee ('the Sub-Committee'); and
 - on his own motion, that there was a need to take account of a councillor's right to express his opinions as enshrined in Article 10 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention') which appeared not to have been considered.

The parties have responded to Principal Judge Laverick's subsequent Directions on those bases and have raised no further issues. The Tribunal proceeded accordingly and also addressed issues which became apparent during their consideration of the web cast recording of the Sub-Committee's proceedings ('the Web Cast').

- 3 The Tribunal has considered written evidence and submissions from both the Appellant and the Respondent.
- 4 Some of the facts which gave rise to the finding are not in dispute. They may be summarised as follows;
 - 4.1 In Spring 2009, the Appellant produced a leaflet ('the Leaflet') prior to the Essex County Council elections which were to be held in June 2009. The Leaflet was one of three distributed by hand during April/May 2009 to households in Pilgrims Hatch, Brentwood North and Shenfield 'to inform the residents of current issues at both Brentwood Borough and Essex County Councils.'

4.2 The front page of the Leaflet contained the following passage,

'The Council Offices are looking more and more like the Marie Celeste – empty Planning Department, empty Highways Department, empty Finance Department, empty Chief Executives office – where will it end! Those rooms were full and bustling with activity on our residents behalf when the Lib Dems ran the Council, and we still successfully balanced our annual budget.'

4.3 On the reverse page of the Leaflet, it said,

'FIVE QUESTIONS TO ASK YOUR TORY CANDIDATE (IF YOU SEE THEM)

...5. Why are the Tories dismembering Brentwood Borough Council piece by piece, i.e. no Chief Executive, no Planning Department, no Finance Department and no Highways Department?'

4.4 The Appellant disputes the extent, but not the nature, of what subsequently happened. The Investigating Officer was told, and accepted, that complaints were received from local residents which expressed concern that the leaflet gave the impression that Brentwood Borough Council was not effectively discharging its functions. The Appellant believes that there was only one complainant. The Investigating Officer says in her report that there were three complaints. They are not before the Tribunal but it is safe to conclude that, measured by the number of complaints, the leaflet did not give rise to widespread concern.

4.5 The Investigating Officer formed a view that the leaflet 'could reasonably be regarded as reducing public confidence in Brentwood Council being able to fulfil its functions and duties and therefore brought the authority into disrepute.' Subsequently, the Sub-Committee considered the Report and found that the Appellant had breached paragraph 5 of the Code of Conduct, which provides:

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

and imposed the sanction referred to in paragraph 1 above.

5 The Tribunal has considered the appeal on the bases of the political composition of the Sub-Committee and Article 10 of the Convention and also in relation to issues arising from the Web Cast.

6 The starting point in any proceedings which have a judicial or quasi-judicial element is fairness which is a fundamental feature of English law. The guiding principle was expressed by Lord Hewart CJ in R -v- Sussex Justices, ex parte McCarthy [1924] 1KB 256, in the following terms,

'...it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

7 In addition, regard must be had to Article 6 of the Convention as given effect in English law by the Human Rights Act 1998 which gives a right to a fair trial.

8 The Appellant claims that some members of the Sub-Committee were potentially biased against him. There were four members in number;

- Mr C Van-Holby, an independent chairman,
- Mr P Baggott, an independent parish council member,
- Councillor Mrs J McGinley, a Conservative Party member, and
- Councillor R Straw, a Liberal Democrat Party member.

The Appellant contends that, because of past conflicts between them, Councillor Mrs McGinley could not be seen as an objective and fair member of the Sub-Committee and that both Mr Van-Holby and Mr Baggott, although independent, were known to be supporters of the Conservative Party and, therefore, possibly biased against him.

9 It is evident that the alleged bias was considered to some degree by the Sub-Committee, but it appears that no reasons were given for dismissing the Appellant's allegations. In fact, from the Web Cast, it appears that the decision was taken by the Chairman without consultation

with his colleague members, save for hearing from Councillor Mrs McGinley that she considered that she was not biased. The Tribunal considers that a Standards Committee has a duty to consider any allegation of bias and should hear those allegations. The duty is a continuing one and is relevant in relation to any bias shown or perceived at a hearing. It is good practice for a Standards Committee to ensure that its proceedings are free from actual bias or perceived bias. In this respect, a Committee should take a proactive role rather than relying on individuals to declare interests or to express subjective views as to their impartiality. The Tribunal does not find that Councillor Mrs McGinley was biased (there is insufficient evidence to draw a conclusion either way) but observes that insufficient consideration was given to the issue by the Sub-Committee and that this was compounded by the absence of reasons for their decision. The Tribunal would add that the inclusion in the Sub-Committee of members of a different party political persuasion does not in itself give rise to bias. The Monitoring Officer gave appropriate advice on this aspect at the Sub-Committee hearing.

- 10 The Chairman of the Sub-Committee was alleged to have treated the Appellant and his witnesses unfairly and to have curtailed their evidence. It is the Chairman's duty to exercise control and ensure that the proceedings are run smoothly and efficiently. It requires a fine balance and support from competent advisers. It appears that such support was present at the hearing.
- 11 The Tribunal notes that the Sub-Committee was properly advised at the outset of its role and on the standard of proof (incorrectly referred to in the minutes as the burden of proof) but not on the burden of proof. The Tribunal also notes that the decision of the Sub-Committee appears to have been unanimous.
- 12 Having considered all the evidence, the Tribunal does not find that there was actual bias against the appellant, but does express concern that the Sub-Committee appears not to have addressed the Appellant's concerns by allowing him to express them fully and responding to them with adequate and cogent reasons.
- 13 The Tribunal does, however, have concerns as to the proceedings. The Sub-Committee:
 - 13.1 appears not to have considered whether or not the Appellant was acting in his capacity as a councillor;
 - 13.2 gave inadequate reasons for
 - finding that the Appellant had breached the Code of Conduct and
 - deciding upon the sanction to be imposed; and
 - 13.3 appears not to have considered Article 10 of the Convention.
- 14 The Appellant produced the Leaflet to further his candidacy for election to Essex County Council. The Investigating Officer considered the question of the capacity in which the Appellant was acting. She considered the guidance from Standards for England which expressed the view that a member when canvassing for re-election was likely to be acting in a private capacity as a political candidate because it is not the function of a councillor to get re-elected. The Investigating Officer distinguished the Appellant's position, and appears to have concluded that he was acting in his capacity as a councillor, because he was seeking election to the county council whilst remaining a borough councillor. It is not, however, within the role of a councillor from one authority to campaign for election to another. Moreover, the Investigating Officer's reasoning is not sustainable. It appears to suggest that a councillor could criticise his own council when seeking re-election to that council, but could not if seeking election or re-election to another council. There must be a proper assessment of the

position with a reasoned conclusion. The Sub-Committee did not address the position at all, but simply seems to have accepted the Investigating Officer's view without further enquiry.

- 15 The Sub-Committee's findings were announced by the Monitoring Officer. In announcing the finding that there had been a breach of the Code of Conduct, he said that the Sub-Committee had found that the Leaflet was inaccurate and that 'there was no evidence either way' as to whether or not the inaccuracy arose from a clerical error, as suggested by and on behalf of the Appellant. The Appellant had stated that the words 'of its own' included in the other leaflets which had been provided to the Tribunal, had accidentally been omitted in the leaflet after the list of departments. The Sub-Committee appears on that basis to have found against the Appellant. It ignores the burden of proof which lies with those who allege the breach of the Code of Conduct. No reasons have been given to support the Sub-Committee's findings, either as to the accuracy of the Leaflet or as to their apparent conclusion that it was not inadvertent.
- 16 It is observed in passing that no party other than the Appellant was represented at the hearing before the Sub-Committee. The Investigating Officer was ill and could not be present – but, in any event, it was not her complaint. It is unsatisfactory that nobody was present to prosecute the allegation and to be put to proof and to have witnesses cross-examined by or on behalf of the Appellant. It gives the impression that the Investigating Officer's report was simply adopted by the Sub-Committee without due enquiry.
- 17 In relation to the sanction, the Monitoring Officer advised the Sub-Committee of the relevant guidance prior to their retiring to reach a decision. On reporting their decision, he made reference to only two issues which had been taken into account: the Appellant's length of service as a councillor and the fact that the Council was entering into a period in which there would be little transaction of business. There is no reason given as to why the Sub-Committee decided that a suspension was the appropriate sanction.
- 18 In reaching their decision, the Sub-Committee does not appear to have had regard to Article 10 of the Convention.
- 19 In the absence of consideration by the Sub-Committee of the capacity in which the Appellant was acting in producing the Leaflet and of Article 10 of the Convention and in the absence of reasoned decisions by the Sub-Committee as to their finding that the Code of Conduct had been breached, the Tribunal has determined to consider those matters by the exercise of its own judgement.
- 20 In relation to capacity, the Leaflet was produced by the Appellant to further his candidacy for election to Essex County Council. The Tribunal notes the guidance issued by Standards for England, but would observe that there are inherent dangers in expressing general views. Each case will turn on its own facts and must be considered on its merits. The Investigating Officer properly expressed the process of assessment as being objective. Regrettably, she then adopted a subjective approach: 'As an objective observer, I find...' The proper approach is to consider what view would be taken by a reasonable person, properly informed and taking account of all material considerations whilst ignoring immaterial considerations.
- 21 There is little to assist the Tribunal in setting the Leaflet in context. The Investigating Officer's report refers to documentation taken into account, but that was not before the Tribunal, save for the Leaflet: it could not be provided by the Respondent because it had not been considered by the Sub-Committee. In the absence of any evidence, the Tribunal has addressed the issues using their own experience and expertise. The elements of the Leaflet which gave rise to the allegations relate to the basis upon which Brentwood Borough Council delivers its services. It is probable that the administrative processes leading to the adoption of the present model included considerable research and negotiation, both with those with whom

partnerships were to be entered and with representatives of existing staff. That would have led to reports to the relevant committees and debate amongst councillors. It is likely that, if not considered to be controversial, such measures would excite much interest, not least amongst those who might perceive their jobs and careers to be at risk. A properly informed, objective observer would be aware of this background. It is evident that there is a party political dimension to the issue. The new regime has been devised and implemented by the Conservative Party. It has been opposed by the Liberal Democrats. A properly informed, objective observer would also be aware of this factor.

- 22 An objective observer would place the Leaflet within the context of these factors and would form a view, given the party political dimension, that the primary purpose of the Leaflet was to promote the Appellant at the expense of his political opponents. It was not unreasonable for the Appellant to raise the issue in the Leaflet as Essex County Council had a role to play in the Brentwood administration (a shared chief executive and a highways agreement are both referred to by the Investigating Officer). In these circumstances, the Tribunal finds that an objective observer, taking into account material factors and ignoring immaterial factors, would view the Appellant as acting in his capacity as a candidate for election to Essex County Council rather than as a councillor of Brentwood Borough Council.
- 23 The Tribunal emphasises that not all material published in an election leaflet would necessarily lead to the same conclusion. Each case turns on its own facts and there might be factors which could lead to a conclusion that a member was acting in that capacity and, if appropriate, to a sustainable finding that there had been a breach of a Code of Conduct.
- 24 Article 10 of the Convention provides:

'(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers...

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of ... the protection of the reputation or rights of others...'

- 25 It is not an absolute right. The Article permits an exception in accordance with the law and in so far as is necessary in a democratic society for the protection of the rights of others. As submitted by the Respondent, it was held in Richardson -v- North Yorkshire County Council [2003] EWHC 764 (Admin) that the Code of Conduct provides a lawful check on Article 10. It does not, however, oust the right entirely. The rights of the Appellant have to be weighed against the rights of the public as a whole to enjoy transparent and open government at both a local and national level.
- 26 Collins J said in Ken Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin), in relation to Article 10,

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

- 27 There has been no attempt to justify an interference with the Appellant's right to say what he did in the Leaflet. It appears that the issue is a matter of political party interest and debate. It

is appropriate for such issues to be canvassed in the electoral process. There is no evidence that the Appellant's right to raise the issue is outweighed by any public interest. It is open to those holding opposing views to express them in the same way. The Tribunal finds that there has been a breach of the Appellant's Article 10 rights.

- 28 It follows from the Tribunal's findings that the Appellant was not acting in his capacity as a councillor and that his Article 10 rights have been breached, that he did not breach the Code of Conduct. The Tribunal has, nonetheless, considered the position in relation to the alleged inaccuracy on its merits.
- 29 The finding against the Appellant, unreasoned as it might be, appears to be on the basis that the Leaflet was inaccurate. That finding was predicated on a belief that a reasonable person would form a view that Brentwood Borough Council was not properly exercising its statutory functions. The objective test to be applied is dealt with fully in paragraphs 19 to 21 above and, for the reasons given in those paragraphs, which include putting the information contained in the Leaflet into the context of other known information. The Tribunal finds that an objective observer, taking into account material factors and ignoring immaterial factors, would not in the slightest be misled by the words used by the Appellant. It would reasonably be inferred that the Appellant was referring not to an absence of any staff or departments at all, but to directly employed staff and directly administered departments. Indeed, as is explained in the section of the Leaflet following that quoted in paragraph 6 above, 'We no longer have a local Planning function as such – we now have to rely on planning officers from Chelmsford Borough Council.' An objective observer would not, in these circumstances, form a view that the Council had been brought into disrepute. The Tribunal finds, for these reasons that the Appellant has not breached of the Code of Conduct.
- 30 Having made these findings, it would be idle to speculate on the sanction to be imposed if a breach of the Code of Conduct had been found on the basis of sustainable reasons. Suffice it to say that the total absence of reasons given by the Sub-Committee, particularly in the light of the advice on sanctions given by the Monitoring Officer, would have exposed the decided sanction to the closest of scrutinies. In particular, the Tribunal has in mind the Guidance on Decisions issued in March 2010 ('the Guidance') also to the decision of Sullivan J in Sanders - v- Kingston [2005] EWHC 2132 (Admin). The Guidance, at paragraphs 13 and 14 provides:

'In deciding what action to take, the Tribunal should bear in mind an aim of upholding and improving the standard of conduct expected of members of the various bodies to which the Codes of Conduct apply, as part of the process of fostering public confidence in local democracy. Thus, the action taken by the Tribunal should be designed both to discourage or prevent the particular Respondent from any future non-compliance and also to discourage similar action by others.

Tribunals should take account of the actual consequences which have followed as a result of the member's actions while at the same time bearing in mind what the possible consequences may have been even if they did not come about.'

- 31 The Guidance also provides, at paragraph 27, that a decision not to impose disqualification, suspension or partial suspension might be appropriate in circumstances which might include:

'An inadvertent failure to abide by the Code of Conduct.

An acceptance that despite the lack of suspension or partial suspension, there is not likely to be any further failure to comply on the part of the Respondent.

The absence of any harm having been caused or the potential for such harm as a result of the failure to comply with the Code of Conduct.'

- 32 At least some of these factors were present in this case which should have informed the Sub-Committee in its decision making process.
- 33 The Tribunal has rejected the findings of the Sub-Committee.
- 34 The written reasons for the Tribunal's decision will be published on the Tribunals website at www.adjudicationpanel.tribunals.gov.uk.
- 35 Any request for permission to appeal needs usually to be made to the First-tier Tribunal within 28 days of receipt of the Tribunal's reasoned decision. Such applications need to be in writing.

Patrick Mulvenna
Judge
5 November 2010