



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

CASE NO: LGS\2012\0577

ON APPEAL FROM:

Standards Committee of: Hull City Council

Decision Notice No: 2011/03 & 04

Dated: 11 January 2012

APPELLANT:

**Councillor John Fareham ('the Appellant') of
Hull City Council ('the Council')**

RESPONDENT:

**Hull City Council Standards Committee ('the
Respondent')**

DATE OF HEARING:

20 July 2012

DATE OF DECISION:

21 July 2012

BEFORE

Judge: Patrick Mulvenna

Judge: David Laverick

Member: Chris Perrett

Attendances:

For the Appellant:

In person

For the Respondent:

Mr Peter Dearing

Subject matter:

**Appeal by a member of a local authority
against a Standards Committee decision**

Cases: MC v Standards Committee of LB Richmond [2011] UKUT 232 (AAC)
Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin)
Barras v Aberdeen Sea Trawling and Fishing Co Ltd [1933] AC 402
Mullaney v The Adjudication Panel for England [2009] EWHC 72 (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 appealed against the Respondent's finding that the Appellant had failed to follow paragraphs 3.2.1 and 3.4 of the Code of Conduct by posting on the social networking medium, Twitter, a short message ('tweet') after a meeting of the Council on 24 February 2011 in the following terms, '15 hours in Council today very hard hitting day and the usual collection of retards in the public gallery spoiling it for real people'.
2. As a result of the Respondent's finding, the Respondent decided that the Appellant be suspended for a period of 20 weeks and that he be required to undertake further diversity training.
3. Permission to appeal was granted by Judge David Laverick with an indication in Directions dated 2 May 2012 that 'the issues to be determined in deciding whether there has been a breach of the Council's Code of Conduct are:

1 Whether the Appellant was acting in his official capacity when sending the tweet, i.e. produced at paragraph 2.2 of the decision of the Standards Committee.

2 If he was so acting whether that tweet may have caused Hull City Council to breach the Equality Act 2010.

3 Whether the tweet brought into disrepute the Council or his office as a councillor.

4 Whether the application of the Code of Conduct and the consideration of the complaint against him were an infringement of the right to Freedom of Expression provided by Article 10 of the European Convention on human rights.'

4. The relevant paragraphs of the Code of Conduct are as follows:

Paragraph 2.1 – 'Subject to paragraphs 2.2 to 2.5 you must comply with this Code whenever you:

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

2.1.2 act, claim to act or give the impression you are acting as a representative of the Council

and references to your official capacity are construed accordingly.

2.2 Subject to paragraphs 2.3 and 2.4, this Code does not have effect in relation to your conduct other than where it is in your official capacity.'

[Paragraphs 2.3 and 2.4 relate to criminal offences and are not relevant to the present case.]

Paragraph 3.1 - 'You must treat others with respect.'

Paragraph 3.2 - 'You must not: ...'

Paragraph 3.2.1 - '...do anything which may cause your authority to breach any of equality enactments (as defined in section 33 of the Equality Act 2006).'

Paragraph 3.4 - 'You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or the Council into disrepute.'

5. The material facts are as follows:

- 5.1 The Appellant was elected to the Council in 1983 and undertook to observe the Council's Code of Conduct (most recently) on 7 May 2010.
 - 5.2 The Appellant attended training concerning the Code of Conduct on 6 September 2010 entitled 'Conduct beyond the Code' and, on 3 February 2011, he received training concerning equality and diversity entitled 'Getting a fair deal' in compliance with a sanction imposed by a hearing of the Standards Committee in relation to a previous and unrelated complaint.
 - 5.3 The Appellant attended a meeting of the Council on 24 February 2011. The agenda for the meeting included consideration of the revenue budget for the ensuing financial year. There were proposals for reducing expenditure which gave rise to considerable opposition from those who might be affected. There were demonstrations outside the Guildhall and a large number of people were present in the public gallery to the council chamber. There is evidence of disruption of the meeting and of pejorative and insulting attacks on councillors, including the Appellant. After the meeting, the Appellant posted a tweet in the following terms, '15 hours in Council today very hard hitting day and the usual collection of retards in the public gallery spoiling it for real people'.
 - 5.4 The tweet was given wider publicity in the press and on other social networking media (including Facebook) as a result of which the Council received two complaints which led to an investigation and a hearing of the Council's Determinations Sub-Committee at which the decisions and sanctions now under appeal were made. In addition to the appealed decisions, the Sub-Committee dismissed an allegation that the Appellant had failed to treat others with respect contrary to paragraph 3.1 of the Code of Conduct.
- 6 The Tribunal first considered whether or not the Appellant had been acting in his official capacity when composing and sending the tweet. In this respect, the Tribunal advised the parties that, on the face of the record of the Standard Committee's deliberations and decision, they did not appear to have had regard to the definition of 'official capacity' in Paragraph 2 of the Code of Conduct nor to have considered the implications of the decision in **MC v Standards Committee of LB Richmond [2011] UKUT 232 (AAC)**. The Tribunal adjourned for a short period and invited the parties to consider these matters with a view to making submissions on the point.
- 7 On resumption of the hearing, the parties confirmed that they had had sufficient time to consider the position and to address the issue identified by the Tribunal. Mr Dearing submitted that the Tribunal had to make a decision based on the facts. The material facts included the following factors: the remark had been made as a response to a Council

meeting; the Appellant was a well known figure, a former Lord Mayor and the leader of the Conservative group on the Council; a linkage would be made by most people and that was evidenced by reportage of the tweet in the local press. In these circumstances, it was reasonable to conclude that the Appellant had been acting in his official capacity. The Appellant submitted that he was only well known within the context of his political activities and confirmed that his intention had not been to post the tweet as a councillor but in his private capacity. He observed that there were inherent difficulties in differentiating between what he did as a councillor and what he did as a private individual, but that that should not impact on his private capacity.

- 8 In **MC v Standards Committee of LB Richmond**, Upper Tribunal Judge Ward reviewed and restated the approach to be adopted in considering official capacity. He observed that the decision of Collins J in **Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin)** had been taken 'under the 2001 Model Code, which was not then in the form of the 2007 Code with which the present case is concerned, though there were similarities.' The 2001 Model Code, at Paragraph 4, provided that (emphasis added): '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.' Upper Tribunal Judge Ward also observed that 'The 2007 Code was issued after, and so with knowledge of, the judgement in **Livingstone**. It should be taken to have drawn the line which it now does advisedly, having regard to that decision, under the principle in **Barras v Aberdeen Sea Trawling and Fishing Co Ltd [1933] AC 402 at 411**. Under **Livingstone** matters which were not within official capacity, but which involved the misuse of a member's position, were within "any other circumstance". A materially identical formulation as to "official capacity" in the 2007 Code carries with it the same limitation. This does not in any way conflict with the fact-sensitive approach envisaged by [**Mullaney v The Adjudication Panel for England [2009] EWHC 72 (Admin)**] but does define the scope for its operation in the light of the replacement of the 2001 Code by the 2007 Code.' He went on to say that 'The test under paragraph 2(1)(a) is accordingly whether in [respect of the matters under consideration], the Appellant was, as a matter of ordinary English, (actually) conducting the business of his authority, including the business of the office of councillor to which he had been elected?' He continued, 'this requires a fact-sensitive approach: see **Mullaney**.' The Tribunal would emphasise the parenthetic word 'actually'. There can be no question of implied action.
- 9 Having regard to these principles, the Tribunal finds as material facts that the tweet does not refer to the Appellant as a councillor, does not refer to the Council, does not identify the issues discussed by the Council, does not (as also found by the Respondent) refer to identifiable persons. Nothing expressly contained in the tweet could reasonably be considered to be a comment by a Hull councillor on a Hull Council meeting without drawing inferences based on the personal knowledge of the reader. The factors submitted as being relevant by Mr Dearing would justify such inferences, but they do not address the correct test. A person is not bound by the Code of Conduct simply by being a councillor or by being known to be a councillor, he is bound by acting in his official capacity. 'Official capacity' is defined in Paragraph 2 of the Code of Conduct as set out in paragraph 4 (above) of this decision. Assessing the position against that definition, the Tribunal finds, as a matter of fact, that the Appellant was acting in his private capacity in making the tweet. There is no sustainable evidence that the Appellant was conducting the business of the Council or the business of his office; or that he was acting, claiming to act or giving the impression he was acting as a representative of the Council. The Tribunal has concluded that, in posting the tweet, the Appellant was not acting in his official capacity. He was not, therefore, at the material time bound by the Code of Conduct. Accordingly, the Tribunal has determined that the Appellant did not fail to follow the provisions of the Code. His appeal is allowed.
- 10 The decision of the Standards Committee ceases immediately to have effect.

- 11 In reaching this decision, the Tribunal emphasises that it does not condone or underestimate the effects of the Appellant's use of the words 'retards' and 'real people' in the context of the tweet. They were gratuitous and could reasonably have been foreseen to cause offence. However, as Collins J pointed out in **Livingstone** (albeit in relation to his consideration of the applicability of Article 10 of the 1950 European Convention for the Protection of Human Rights) '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'. No matter how egregious the actions of a councillor, if he is not acting within his official capacity, his actions cannot be impugned under the Code of Conduct, unless there is some criminal or other material element expressly referred to in the Code. In the event, the Tribunal is satisfied, from the Appellant's unreserved apology prior to the Respondent's decision and from his comments and demeanour at the hearing before the Tribunal, that he recognises the folly of his actions and has true contrition.
- 12 The written reasons for the Tribunal's decision will be published on the Tribunals website at www.adjudicationpanel.tribunals.gov.uk.
- 13 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

21 July 2012