

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