

DECISION REPORT

TRIBUNAL REFERENCE NUMBER: APW/002/2020-021/CT

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

RESPONDENT: Former Community Councillor Baguley

RELEVANT AUTHORITY: Sully and Lavernock Community Council

1. INTRODUCTION

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

1.2 The Case Tribunal determined its adjudication on the basis of the papers, at a meeting on 16 December 2020 conducted by means of remote attendance.

2. DOCUMENTS

2.1 Reference from the Public Services Ombudsman for Wales

2.1.1 In a letter dated 16 September 2020, the Adjudication Panel for Wales received a referral from the Public Services Ombudsman for Wales (“the Ombudsman”) in relation to allegations made against former Community Councillor Baguley (“the Respondent”).

2.1.2 **Allegation 1** was that the Respondent had breached the Code of Conduct for Members of Sully and Lavernock Community Council (“the Code”) as follows: That the Respondent posted three public Facebook messages on 10th January, 9th March and 11th March 2019, which it was alleged could reasonably be regarded as bringing the Councillor’s office or authority into disrepute and thereby breached Paragraph 6(1) of the Code.

2.1.3 During the course of the investigation, the Ombudsman extended the investigation to include **Allegation 2** as follows: That the Respondent allegedly failed to supply information and evidence in respect of the privacy status of the relevant posts, in non-compliance with requests of the Ombudsman in

connection with an investigation conducted in accordance with his statutory powers and thereby breached Paragraph 6(2) of the Code.

2.2 The Details of Allegation 1: Three Facebook Posts

2.2.1 The three Facebook posts referenced in **Allegation 1** are as follows:

i) On 10 January 2019, responding to a Telegraph article titled “What if...Yvette Cooper was Labour leader”, Councillor Baguley wrote: “imagine this! This bitch is driving remain when the people of her constituency overwhelmingly [sic] voted out. A traitorous cow and one I hope she ends up with a noose around her neck!”

ii) On 9 March 2019 Councillor Baguley posted an online article about Shamima Begum and stated the following: “I hope that it [sic]she does carry out some atrocity Anna Soubry would be my chosen target”

iii) On 11 March 2019 Councillor Baguley commented on a video of Diane Abbott speaking at a conference. He wrote: “fucking idiot! Get me a gun please!”

2.2.2 The evidence was comprised of a bundle of Tribunal case papers including copies of numerous Facebook posts and correspondence to and from the Council’s Monitoring Officer, the Ombudsman and the Respondent.

The Respondent’s response to Allegation 1.

2.2.3 In an e-mail to the Ombudsman dated 10 July 2019, the Respondent stated “(a) Facebook have their own code of conduct which I have not fallen foul of as they would have censored the comments and (b) many of the comments made are of friends of mine and not my own.”

2.2.4 On 20 August 2019, he wrote as follows to the Ombudsman; “my comments on Facebook are my own beliefs and have not been censored by Facebook.”

2.2.5 On 17 October 2019 he wrote to the Ombudsman to say that he had consulted a solicitor and; “he feels (as would any fair minded person) that they are political opinions and I fully stand by them.”

2.2.6 On 12 November 2019, he said that; “Facebook generally remove offensive sexist and racist comments automatically as they have identifiers built into the algorithm so if they were offensive they would have been removed.”

2.2.7 On 8 June 2020, in response to written interview questions, the Respondent responded as follows;

- In relation to Paragraph 6(1)(a); “This is ambiguous as the word reasonably is subjective and open to interpretation.”

- With regard to the Facebook post, dated 10 January 2019, the Respondent explained that he had a; “long held personal dislike of this individual from my days living in her constituency and I agree my comments are a bit strong.”

- As to the public nature of the postings; “I assumed it was locked down but was obviously wrong.”

- With regard to the Facebook post, dated 9 March 2019, he explained what he meant as; “I would rather turn a gun on myself rather than listen to her” and as to the status of the post, he said; “I did not know whether public or not.”

- In relation to the Facebook post, dated 11 March 2019, the Respondent explained; “I dislike Anna Soubry” and as to the status of the post, he said; “Didn’t know it was public or private”.

-As to the nature of the posts, the Respondent stated; “Facebook always remove comments and posts they feel are offensive but they remained which shows they were ok with them”.

-Finally, the Respondent explained his; “long standing dislike of the labour party and its officials and followers” from negative childhood experience.

-As to freedom of expression; “I am also allowed to hold my views as free speech and opinions is not yet illegal in the UK”.

2.3 Allegation 2: Failure to comply with Ombudsman’s requests

2.3.1 The Ombudsman’s requests referenced in **Allegation 2** and the Respondent’s responses are as follows:

i) On 8 November 2019: “In your email of 10 July 2019, you said that you had it confirmed by Facebook support that your posts are not visible to anyone but your friends and this has been the case since 2013. It would assist the investigation if you could send me a copy of the activity log on your Facebook account to show when your privacy settings were changed and also a copy of the confirmation by Facebook that your posts have not been visible to anyone but your friends since 2013.” The Respondent replied almost immediately by sending a screenshot of his settings.

ii) On 12 November 2019: an e-mail advising the Respondent that the screenshot he had sent in response to i) above was of his current settings and asking again for his historical activity log. The Respondent was also asked to provide confirmation from Facebook to support his claim that it had confirmed his posts were not visible to anyone since 2013 and to confirm how he received this confirmation (e.g. by email or verbally by phone). Councillor Baguley responded the same day by e-mail; “No idea how to do that sorry can you tell me how?”.

iii) On 15 November: an e-mail to the Respondent, advising him how he could access his activity log. The Respondent did not respond to the email.

2.3.2 In response to the written interview questions on 8 June 2020, the Respondent stated as follows;

- With regard to his original comment that his posts had not been visible to anyone but his friend since 2013, he said that he had meant; "I checked my settings" and explained that he had contacted Facebook; "I phoned them and after a long and convoluted goose chase I got nowhere basically."

- As to whether he was aware of how Facebook settings work; "Not really" and as to his failure to provide a historical activity log, he said; "I didn't know how" and as to his continued failure to provide the same following guidance, he repeated; "No idea how to do it".

- As to the discrepancy between the posts being visible in 2019 and the Respondent's version of events that the posts had been visible to friends only from 2013 onwards, he said; "I thought this was the case".

-Finally, when asked when he changed to private or "friends" setting, the Respondent replied; "When I found out they had been strangely changed to public, maybe by my eldest son who has access and sometimes uses pictures I post".

2.3.3 The evidence was again comprised in the bundle of Tribunal case papers including correspondence from the Ombudsman and the Respondent.

3. FINDINGS OF FACT

3.1 The Case Tribunal noted the following **undisputed** material facts;

3.1.1 The Respondent was co-opted as a Community Councillor to Sully and Lavernock Community Council in May 2017. He resigned from this role in September 2020.

3.1.2 The Respondent signed a Declaration of Office and Undertaking regarding the Code of Conduct on 27th June 2017.

3.1.3 The Respondent did not attend any training in relation to the Code of Conduct or in relation to the use of social media during his period of office.

3.1.4 The Respondent posted three public Facebook messages on 10th January, 9th March and 11th March 2019 about three high profile UK politicians, the contents of which are not in dispute.

3.2 The Case Tribunal found the following in relation to the **disputed** material facts;

Allegation 1

3.2.1 That the Respondent was acting in a private capacity when he posted the three public Facebook messages in question. Certain Facebook posts sent by the Respondent did refer to the Relevant Authority, however the Facebook posts referenced in **Allegation 1** were not sent in this context. No evidence had been provided as to whether the Respondent's Facebook profile referred to his Community Council status.

3.2.2 That although the Facebook posts were written in the context of sharing political views on Facebook, the comments complained of went far beyond what could reasonably be considered to be political expression. It was however straightforward to separate the political debate from the comments which were the subject of **Allegation 1**. The comments were inflammatory and an expression of views which were extreme, threatening in nature and promoted violence towards individuals. The comments could not be dignified by the description of political expression.

3.2.3 That even if the Respondent was not aware of the status of his posts at the time of posting, despite the visible icon of a globe which showed that it was public, the Respondent was at the very least, reckless to that fact and the Tribunal found that on the balance of probabilities the Respondent was aware of their public status. He was well versed in the use of social media and sent regular and frequent posts and was reckless as to the consequences. In one of his posts not related to the Allegation, he had stated; "I will get another Facebook ban for saying it...". His responses to the written interview questions demonstrated that Respondent had little concern for whether his page was public or private.

3.2.4 The Case Tribunal considered that high profile politicians, by entering public life, lay themselves open to close scrutiny and indeed mockery and sarcasm. They were expected to possess thick skins and display a greater degree of tolerance than ordinary citizens, however such tolerance should not have to extend to personal, inflammatory and egregious comments which comprised of threats or inciting extreme violence and death from other politicians, albeit acting in their private capacity, including at a Community Councillor level. The comments were personal, disturbing and gratuitous verbal attacks, not political expression.

Allegation 2

3.2.5 That the Respondent failed to comply with the Ombudsman's requests for information with regard to the change in his privacy settings. The Panel found that on the balance of probability, the Respondent's initial response that Facebook had confirmed that the settings had been private since 2013 was not a candid response and was written to attempt to minimise the nature and impact of the Facebook posts.

3.2.6 The Case Tribunal considered that the Respondent's subsequent responses contained a variety of excuses and no evidence or detail was forthcoming as to any relevant discussion with Facebook to confirm that the

Respondent's Facebook posts had been private since 2013. There was reference to a discussion with Facebook but the Respondent said that he had "got nowhere" in that instance. He then stated that he did not know how to check any change of settings that took place in 2013, although he was clearly an experienced user of Facebook and the Tribunal did not consider that this was an entirely candid response. Further to guidance supplied by the Ombudsman's Investigator, the Respondent failed to reply. Finally, in reply to written interview questions, the Respondent provided yet another explanation, stating that his settings had been "strangely changed" to public by a third party.

3.2.7 In conclusion the Panel considered that the Respondent had deliberately avoided providing information and full and frank responses to the reasonable requests of the Ombudsman's Investigating Officer in completing the investigation.

4. FINDINGS OF WHETHER MATERIAL FACTS DISCLOSE A FAILURE TO COMPLY WITH THE CODE OF CONDUCT

4.1 The Code of Conduct for Members

4.1.1 The relevant parts of the Code are as follows;

Allegation 1

Paragraph 2(1)(d) of the Code states; "...You must observe this code of conduct at all times and in any capacity, in respect of conduct identified in paragraphs 6(1)(a) and 7."

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

Allegation 2

Paragraph 6(2) states; "You must comply with any request of your authority's monitoring officer, or the Public Services Ombudsman for Wales, in connection with an investigation conducted in accordance with their respective statutory powers."

4.2 Article 10 ECHR Considerations in relation to Allegation 1

4.2.1 Article 10 of the European Convention on Human Rights states as follows;

"1. Everyone has the right to freedom of expression. This 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 interests of...public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others...”

4.2.2 The Case Tribunal adopted the following three-stage approach formulated in *Sanders v Kingston* [2005] EWHC 1145 in relation to **Allegation 1** and the three Facebook posts;

(i) Did the Respondent’s conduct breach Paragraph 6(1)(a) of the Code of Conduct?

(ii) Would the finding in itself comprise of a prima facie breach of Article 10?

(iii) If so, would the restriction involved be one which was justified by reason of the requirements of Article 10(2)?

4.3 Case Tribunal’s Decision – Allegation 1

Paragraph 6(1)(a) of the Code

4.3.1 On the basis of the findings of fact, the Case Tribunal found by unanimous decision that the Respondent failed to comply with Paragraph 6(1) of the Code for the following reasons;

Conduct within private capacity

4.3.2 In accordance with Paragraph 2(1)(d) of the Code, Members must observe the Code at all times and in any capacity in respect of conduct which could reasonably be regarded as bringing a Councillor’s office or authority into disrepute and it therefore applied regardless of the fact that the Respondent was acting in his private capacity.

4.3.3 The Case Tribunal were mindful of the Ombudsman’s Guidance in this respect which states that;

- “...as there may be circumstances in which your behaviour in your private life can impact on the reputation and integrity of your Council, some of the provisions of the code apply to you at all times.”

-It also refers to the significant rise in complaints to the Ombudsman concerning the use of Facebook, blogs and Twitter; “Even if you do not refer to your role as Councillor, your comments may have the effect of bringing your office or authority into disrepute and could therefore breach paragraph 6(1)(a) of the Code.

- “As a Member, your actions and behaviour are subject to greater scrutiny than those of ordinary members of the public. You should be aware that your actions in both your public and private life might have an adverse impact on your Council.”

- "Inappropriate e-mails to constituents or posts on social media might well bring the office of member into disrepute".

4.3.4 The Case Tribunal was mindful of the case of *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 which set out the very limited circumstances in which the relevant Code in would apply in England where a Member was acting in his private capacity. The position in Wales can be distinguished however, as the legislation has spelt out in clear terms what is covered by the Code in Wales. It extends unequivocally to conduct in private life in relevant circumstances. Section 52 of the Localism Act 2011 also omits reference to "in performing his duties" in Wales in relation to the undertaking to observe the Code which Members must sign.

4.3.5 The three Facebook posts in this case were all extreme and gratuitous in referring to violence or methods of killing in relation to three high-profile politicians. Even if the comments were glib, reckless or expressed to be part of perceived normalisation of such language on social media platforms, the Case Tribunal was satisfied that it was of a sufficiently serious nature that it could reasonably be regarded as bringing the Respondent's office and authority into disrepute;

(i) In relation to the Facebook post of 10 January 2019, the Respondent implies a wish that the subject of the post is hanged. He concedes that his comment was "a bit strong".

(ii) The post of 9 March again had no reasonable alternative reading. The Respondent was expressing a wish the subject of the post to be the subject of an atrocity.

(iii) The Respondent had argued that in relation to the 11 March post that the comment, "Get me a gun" was a reference to the Respondent turning a gun on himself. The Case Tribunal considered that this was an artificial construction of the plain meaning of the words in the context of the previous comment, that he wished to shoot the subject of the post.

4.3.6 The Respondent posted public comments on a frequent and regular basis which came to the attention of a member of the public and the Relevant Authority's Monitoring Officer and prompted a complaint in the light of the Respondent's public role as a Community Councillor. As an outspoken public figure, many in the community would have been aware that the Respondent was a Councillor and the three Facebook posts would have adversely reflected on both his role and his authority.

4.3.7 The Principles governing the conduct of elected and co-opted members of local authorities in Wales, which reflect and expand the "Nolan Principles" include the principles of "Integrity" and of "Leadership" whereby; "Members must promote and support these principles by leadership and example so as to promote public confidence in their role and in the authority". The Respondent's conduct had fallen well below the standards of conduct in public life which the Nolan Principles and the Code seek to uphold.

4.3.8 The Case Tribunal concluded that the three Facebook posts which are the subject of **Allegation 1** were so egregious, inflammatory and violent, that they offended against all notions of peace, safety, decency and democracy within society. In view of their extreme and public nature, the Case Tribunal had no difficulty in finding that the contents of the posts could reasonably be regarded as bringing the Respondent's office and also his authority into disrepute (quite apart from bringing the Respondent as an individual into disrepute).

Article 10(1) ECHR

4.3.9 Despite the finding that the Respondent breached Paragraph 6(1)(a) of the Code, the Case Tribunal nevertheless considered that the finding did comprise of a prima facie breach of Article 10 in that the finding could be deemed to restrict his right to freedom of expression.

Article 10(2) ECHR

4.3.10 The Case Tribunal were of the view that freedom of expression is a cornerstone of democracy and should not be readily displaced in any balancing exercise with competing rights of individuals, particularly of public figures who are expected to have "thick skin". The Case Tribunal gave extremely careful consideration to this issue, cognisant that anything which impeded political debate should be exercised with extreme caution.

4.3.11 As the Respondent's posts had been made in a private capacity and the Case Tribunal had found that they did not comprise of political expression, they did not attract the enhanced protection afforded to politicians. The Tribunal nevertheless concluded that even if enhanced protection had applied, the comments were so extreme and egregious, that the finding of a breach of the Code would nevertheless have been justified.

4.3.12 Article 10(2) makes it clear that the freedom of expression carries with it duties and responsibilities and may be subject to restrictions such as those contained in the Code (which are prescribed by law) and are necessary in a democratic society, in the interests of; "public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others."

4.3.13 The Case Tribunal noted that although the three Facebook posts which formed the subject of **Allegation 1** were made during the course of otherwise political exchanges, the comments themselves stood out as being quite distinct from that exchange and introduced a different and disturbing tone to the exchange.

4.3.14 As to the Respondent's argument that Facebook had its own code of conduct, the Case Tribunal stated that Member behaviour was governed by the statutory Code of Conduct by which Members had undertaken to abide and not by any procedure or code operated by a social media platform which may or may not identify threatening comments.

4.3.15 In conclusion, the three Facebook posts had been found by the Case Tribunal to be so extreme and egregious that, despite the fact that freedom of expression was a fundamental human right, there were necessary limits. The posts went well beyond what could be reasonably tolerated in a democratic society. It was necessary for the public interest in proper standards of conduct by Members of local authorities to be upheld by a finding that the Respondent had breached Paragraph 6(1)(a) of the Code, in order to safeguard public safety and the reputation and rights of others.

4.4 Case Tribunal's Decision – Allegation 2

Paragraph 6(2) of the Code

4.4.1 On the basis of the findings of fact, the Case Tribunal found by a unanimous decision that the Respondent had failed to comply with Paragraph 6(2) of the Code for the following reasons;

4.4.2 The Case Tribunal had reached the finding of fact that the Respondent had deliberately avoided answering the Ombudsman's reasonable requests in his Investigating Officer's efforts to complete the investigation in accordance with the Ombudsman's statutory powers.

4.4.3 It inevitably followed that there had therefore been a breach of Paragraph 6(2) of the Code.

5. FINDINGS IN RELATION TO SANCTION

5.1 The Case Tribunal considered all the facts of the case and concluded by unanimous decision that the Respondent should be disqualified for 15 months from being or becoming a member of Sully and Lavernock Community Council or of any other relevant authority within the meaning of the Local Government Act 2000 for the following reasons;

5.2. The Case Tribunal carefully considered the current Sanctions Guidance of the Adjudication Panel for Wales in particular and noted the public interest considerations as follows in paragraph 44;

- "The overriding purpose of the sanctions regime is to uphold the standards of conduct in public life and maintain confidence in local democracy. Tribunals should review their chosen sanction against previous decisions of the Adjudication Panel for Wales and consider the value of its chosen sanction in terms of a deterrent effect upon councillors in general and its impact in terms of wider public credibility. If the facts giving rise to a breach of the code are such as to render the member entirely unfit for public office, then disqualification rather than suspension is likely to be the more appropriate sanction.

5.3 The Case Tribunal also considered paragraph 47 of the Guidance with regard to former Councillors which reads as follows;

- “In circumstances where the tribunal would normally apply a suspension but the Respondent is no longer a member, a short period of disqualification may be appropriate... This will ensure that the Respondent is unable to return to public office, through co-option for example, sooner than the expiry of the period of suspension that would have been applied but for their resignation or not being re-elected...”

5.4 The Case Tribunal considered that the facts leading to breach of the Code in relation to **Allegation 1** were particularly serious and were of the view that if the Respondent had not resigned and remained in office, it would not have considered that suspension was a sufficient sanction to recognise the extremely serious nature of the breach.

5.5 The Case Tribunal had regard to sanctions imposed in previous cases. It was also mindful that the comments were directed at individuals who were national political figures, rather than officers of the Relevant Authority or members of the local community. The public figures would be unlikely to become aware of, or be directly affected by, the comments directed at them. The Case Tribunal nevertheless considered that as this was an extremely serious breach, the sanction was proportionate in all the circumstances.

5.6 In conclusion, the Case Tribunal considered that the Sanction imposed was the minimum necessary to uphold the standards of conduct in public life and maintain confidence in local democracy. It reflected the fact that the behaviour demonstrated that the Respondent was unfit for public office and required a significant period of time in order to reflect on his conduct before contemplating re-entering local politics.

5.7 With regard to **Allegation 2**, the Case Tribunal considered that the lack of full co-operation and compliance with the Ombudsman’s requests during investigation and lack of candour was a matter of concern, however it did not consider that a separate penalty should be imposed in relation to this breach.

5.8 The Case Tribunal came to the above conclusion having considered the following Mitigating and Aggravating factors which are highlighted in the Sanctions Guidance.

Mitigating Factors;

5.9 The Case Tribunal noted that the Respondent had a relatively short length of service and would have been inexperienced in the role of Community Councillor. There had been no record of a previous breach during this short period of service. The Respondent expressed a minimal amount of regret, for example by referring to his post of 10 January 2019 as “a bit strong”.

Aggravating Factors;

5.10 The Case Tribunal noted that the Respondent’s conduct was blatant and largely unapologetic. He stood by his comments although he regretted that his comments had been public. The behaviour was deliberate, reckless and

repeated and there appeared to be little or no concern for the Code and a lack of understanding or acceptance of the misconduct and any consequences.

5.11 In conclusion, the Case Tribunal found that the three Facebook posts consisted of the expression of views which were not worthy of respect in a democratic society, and were incompatible with human dignity and conflicted with the fundamental rights of others.

5.12 Article 10 ECHR Considerations

5.12.1 The Case Tribunal recognised that the sanction comprised of a prima facie breach of Article 10 in that the finding could be deemed to restrict the Respondent's right to freedom of expression.

5.12.2 It considered however that the sanction of disqualification was a penalty prescribed by law and was of a length which was proportionate bearing in mind the interests of public safety and the need in a democratic society to prevent disorder or crime, for the protection of health or morals and for the protection of the reputation or rights of others in a democratic society.

5.12.3 The Case Tribunal recognised that disqualification would breach the Respondent's Article 10 rights. It was satisfied however that disqualification for 15 months was the minimum necessary to recognise the seriousness of the Respondent's breach of the Code. The sanction was necessary in this case in order to maintain the integrity of the Nolan principles as extended in the Welsh context as well as the Code of Conduct for Members, but also to protect others from gratuitous, offensive personal comment and 'hate speech' and to protect the health, safety and rights of others.

5.13 Sully and Lavernock Community Council and its Standards Committee is notified accordingly.

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

Signed



Date 12/01/2021

C Jones
Chairperson of the Case Tribunal

S Hurds
Panel Member

G Jones
Panel Member