

**PANEL DYFARNU CYMRU
ADJUDICATION PANEL FOR WALES**

DECISION REPORT

TRIBUNAL REFERENCE NUMBER: APW/009/2010-011/A

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

APPELLANT: Councillor (Lewis) Malcolm Calver

RELEVANT AUTHORITY: Manorbier Community Council

1. INTRODUCTION

1.1 An Appeal Tribunal convened by the President of the Adjudication Panel for Wales has considered an appeal by Cllr Malcolm Calver against the decision of Pembrokeshire County Council's Standards Committee ("the Standards Committee") that he had breached Manorbier Community Council's code of conduct and should be censured and undertake training on the code.

1.2 A hearing was held by the Appeal Tribunal commencing at 10.00am on Wednesday 25 May 2011 at the Lamphey Court Hotel, Lamphey, Pembrokeshire. The hearing was open to the public.

1.3 Cllr Calver attended and was represented by Mr Matthew Paul, Counsel.

1.4 The Ombudsman was represented by Mr Gwydion Hughes, Counsel

2. PRELIMINARY DOCUMENTS

2.1 Appeal Against Decision of Standards Committee

2.1.1 In a letter dated 23 November 2010, the Adjudication Panel for Wales received an appeal from William Graham Law, Solicitors on behalf of Cllr Calver against the determination of the Standards Committee on 5 November 2010 that he had breached Manorbier Community Council's code of conduct.

2.1.2 The Standards Committee's determination followed its consideration of a report by the Public Services Ombudsman for Wales ("the Ombudsman") under the terms of sections 69(4)(c) and 71(2) of the Local Government Act 2000 and the Monitoring Officer of Pembrokeshire County Council under the terms of the 'Local Government Investigations (Functions of Monitoring Officers and Standards Committees) (Wales) Regulations 2001'.

2.1.3 During the course of an investigation under Part III of the Local Government Act 2000 (“the 2000 Act”) into the conduct of another person, the Ombudsman became aware of potential breaches of the code of conduct by Cllr Calver. The Ombudsman exercised his powers under section 69(1)(b) of the 2000 Act to investigate those potential breaches. Following investigation, the Ombudsman found evidence to suggest that Cllr Calver had failed to comply with the code of conduct in that:

- i. in publishing the draft minutes of the Community Council without permission, he failed to show respect and consideration for the Council and its members;
- ii. his behaviour in publishing website comments about Cllr Gourlay’s ability, and Cllr Hughes’ integrity constituted bullying and harassment and/or failed to show them respect and consideration;
- iii. he disclosed without authority confidential information, including information of a financial nature, not yet in the public domain; and
- iv. some of Cllr Calver's comments on his website brought his office and/or Manorbier Community Council into disrepute.

2.1.4 The circumstances leading to alleged breach are evident from the material facts set out in this Decision Report.

2.1.5 In reaching its determination dated 5 November 2010, the Standards Committee found:

- i. no evidence to prove Cllr Calver had disclosed confidential information in breach of paragraph 5(a) of the code of conduct;
- ii. there was insufficient evidence of bullying or harassment by Cllr Calver in breach of paragraph 4(c);
- iii. there was evidence to prove Cllr Calver had failed to show respect and consideration to others in breach of paragraph 4(b); and
- iv. there was evidence to support a finding that Cllr Calver had brought his authority, Manorbier Community Council, into disrepute in breach of paragraph 6(1)(a) of the code.

2.1.6 Accordingly, the function of the Appeal Tribunal was to consider whether, in publishing derogatory remarks on a website, Cllr Calver failed to comply with paragraphs 4(b) and 6(1)(a) of the code of conduct of Manorbier Community Council.

2.2 The Appellant’s Written Response to the Determination of the Standards Committee

2.2.1 Cllr Calver appealed the decision. His grounds for appeal are set out in the written appeal submitted on his behalf on 23 November 2010. These were: -

2.2.1.1 He was not acting in his official capacity as a councillor, performing his functions as a councillor or in any way misusing his position as a councillor in making the comments which are the subject of the Ombudsman's complaints.

2.2.1.2 The comments are incapable, taken singly or together, of bringing the Manorbier Community Council into disrepute.

2.2.1.3 The comments do not demonstrate a lack of respect or consideration for others.

2.2.1.4 Any reporting on the website of discreditable behaviour by the Manorbier Community Council or by individual councillors is truthful and factually accurate.

2.2.1.5 All relevant comments are legitimate political comment on the actions of the Manorbier Community Council itself or of individual councillors.

2.2.1.6 A finding that the comments constituted a breach of the code is an unnecessary and disproportionate infringement of Cllr Calver's Article 10 ECHR right to free expression.

2.2.2 Cllr Calver's response to the Ombudsman's Report and his reasons for disputing the Ombudsman's reasoning are annexed to this Decision Report.

2.3 The Ombudsman's Response to Cllr Calver's Appeal

2.3.1 The Ombudsman's response is annexed to this Decision Report.

3. ORAL SUBMISSIONS

3.1 Counsel for the Appellant and Counsel for the Ombudsman agree that there are no disputed material facts and that the undisputed material facts are accurately presented in the Decision dated 5 November 2010 of the Standards Committee as follows: -

3.1.1 Cllr Calver is a member of Manorbier Community Council.

3.1.2 Cllr Calver undertook to comply with Manorbier Community Council's Code of Conduct for Councillors on 1 September 2008.

3.1.3 Cllr Calver is an elected member of Pembrokeshire County Council.

3.1.4 The County Electoral Division that Cllr Calver represents includes Manorbier Community.

3.1.5 Cllr Calver undertook to comply with Pembrokeshire County Council's Code of Conduct for Members on 10 June 2008.

3.1.6 Councillors on Manorbier Community Council received training from the Monitoring Officer of Pembrokeshire County Council on the code of conduct at a community council meeting on 8 December 2008.

3.1.7 The website www.manorbier.com is registered to Wales National Parks Holidays, a business.

3.1.8 Cllr Calver is the registered owner of the business known as Wales National Parks Holidays.

3.1.9 Cllr Calver owns the website www.manorbier.com.

3.1.10 Cllr Calver is solely responsible for the content of the website and is its only contributor.

3.1.11 Cllr Calver had received advice from Mr Huw Miller, Head of Legal and Committee Services at Pembrokeshire County Council, on publishing the draft minutes of Manorbier Community Council.

3.1.12 The approved minutes record that Manorbier Community Council passed a resolution on 1 September 2008 stating that no minutes should be published until approved by the Manorbier Community Council.

3.1.13 The draft minutes were not marked "confidential".

3.1.14 The website www.manorbier.com published the draft minutes of Manorbier Community Council's meetings.

3.1.15 The website www.manorbier.com also contained comments by Cllr Calver concerning the events occurring at Manorbier Community Council meetings.

3.1.16 The website www.manorbier.com also contained comments concerning the statements and actions of individual Manorbier Community Councillors.

3.1.17 The extracts of the website www.manorbier.com included in Appendices D to D32 to the Ombudsman's report are true copies of the information published on the website.

3.2 Both Counsel agree that the issue for the Appeal Tribunal is whether those undisputed material facts amount to a breach of the code of conduct and made the following submissions: -

Public Services Ombudsman for Wales

3.2.1 Mr Hughes submitted that the starting point for the Appeal Tribunal is, when does the (2008) code of conduct apply? This is specifically set out in paragraph 2 of the code of conduct. The code of conduct applies whenever a councillor acts, claims to act or gives the impression of acting, in the role of member (paragraph 2(1)(b)), whenever the councillor acts, claims to act or gives the impression of

acting, as a representative of his authority (paragraph 2(1)(c)) and at all times and in any capacity in respect of conduct identified in paragraph 6(1)(a) (paragraph 2(1)(d)). Accordingly, Cllr Calver's actions are capable of amounting to a breach of paragraph 6(1)(a) of the code of conduct regardless of whether he was acting in his official capacity; his actions are capable of breaching paragraph 4(a) of the code of conduct if he was acting, claiming to act or giving the impression of acting, in the role of member or as a representative of his authority.

3.2.2 In Ken Livingstone v The Adjudication Panel for England [2006] EWHC 2533 (Admin) 2006 WL 2929548 ("Livingstone") Mr Justice Collins deals with what "official capacity" means; but the Appeal Tribunal should remember that the new (2008) code of conduct post-dates the judgment in Livingstone and should approach it with caution.

3.2.3 Lord Justice Collins also deals with what might be an "unwarranted interference" with Article 10 rights and what sort of conduct may bring the office of member and/or the authority into "disrepute".

3.2.4 It is the Ombudsman's position that Cllr Calver's website was his principle way of communicating with his constituents and its content was almost exclusively the business of the Community Council, the conduct of fellow community councillors and the decisions of the Community Council. These factors, says the Ombudsman (and as found by the Standards Committee) allow a finding that the code of conduct is engaged, ie. Cllr Calver was acting in his official capacity, within the definition of paragraph 2 of the code of conduct. Further, by reference to the Ombudsman's guidelines about when the code of conduct applies, there is a clear connection between Cllr Calver's role as a councillor and the content of his website.

3.2.5 The Article 10 issue may be more difficult. The starting point for the Appeal Tribunal is, Neville Buckle Sanders v Steven Kingston [2005] EDHC 1145 (Admin) 2005 WL 1352269 ("Sanders"). Mr Justice Wilkie found no infringement having adopted a three stage approach, which this Appeal Tribunal should follow. Firstly, as a matter of fact, is there a breach of the code of conduct; secondly, if so, is the finding in itself or the imposition of a sanction prima facie breach of Article 10; thirdly, if so, was the restriction involved one which was justified by reason of the requirements of Article 10(2).

3.2.6 It is the Ombudsman's position that the Appeal Tribunal is entitled, as a matter of fact, to conclude that Cllr Calver has breached paragraphs 4(b) and 6(1)(a) of the code of conduct; that inevitably there has been an infringement of his Article 10 rights; such interference was justified in terms of Article 10(2) - the provisions of the code of conduct were proscribed by law and the comments made by Cllr Calver were not expression of political opinions affording him higher protection - he made snide comments, remarks of a generally derogatory nature in a sarcastic tone and remotely (ie. on a website).

3.2.7 Evidently Manorbier Community Council was a "disaster zone"; this was acknowledged by the Monitoring Officer and was public knowledge. Relations between community councillors appear to have broken down. The code of conduct

is all about maintaining standards in public life and maintaining public confidence and it is appropriate to require Cllr Calver to behave in accordance with the minimum standards required. The Appeal Tribunal is cautioned against regarding Sanders and Gaunt and OFCOM and Liberty as the benchmark for appropriate conduct. In these cases the conduct was atrocious, the worst possible. Cllr Calver's conduct is very different. However, it does not follow that his conduct does not fall below that reasonably required by the code of conduct.

3.2.8 The Appeal Tribunal is entitled, in considering the level of interference with Cllr Calver's Article 10 rights, to consider the Ombudsman's actions; the Ombudsman referred the complaint to the Standards Committee, which was wholly proportional, indicating that this was a matter capable of being dealt with by the Standards Committee within their sanction capability.

3.3 The following oral submissions were made by Counsel on behalf of Cllr Calver.

3.3.1 Mr Paul advanced Cllr Calver's skeleton argument a copy of which is annexed to this decision report.

3.3.2 Mr Hughes is wrong in law in suggesting that the wording of the code applying to Cllr Calver is different from that applying in Livingstone; it applies in exactly the same way. If he suggests that the code of conduct had changed after Livingstone that would be ultra vires as would be suggesting that the code applies at all times to anything done. The code is constructed narrowly, applying only when a member performs his official functions. The Ombudsman's guidelines about when the code of conduct applies were issued after Cllr Calver's conduct and the Appeal Tribunal should give no weight to them. If the Appeal Tribunal gives consideration to those guidelines, they have been shown as faulty. It is wrong to say that if an elected member refers to himself as "councillor" he is acting in his official capacity; nor is it the case that when an elected member talks about his authority, he is inevitably acting as a councillor. Cllr Calver did not go out of his way to publish that he was the author of the blog; the blog referred to the Community Council but that does not mean that he was acting in his official capacity. This was his anonymous, independent voice and platform, he was not performing his official function and the code of conduct does not apply; there is no case to answer of any breach.

3.3.3 Freedom of expression has a very special status and there must be a very powerful reason to interfere with the right to free speech. Mr Hughes is correct in saying that the purpose of the code is to uphold standards in public life and to encourage public confidence, but the main concern behind the code of conduct was corruption and other provisions to encourage civility by and between councillors were "thrown in". Mr Hughes acknowledges that the Manorbier Community Council was a "disaster area" and his submissions are extraordinary. All of that which Cllr Calver said was true; the Community Council had no competent clerk, it had wasted public money, was excessively secret, the leader had failed to declare interests and a now former community councillor had shown a video which was a disgraceful manipulation of children. It is ridiculous to suggest that this should have been kept from the public domain or that a councillor cannot

aver to such appalling mis-management, secrecy and connivance in a blog. The term "political expression" includes matters of general public concern; Gaunt draws the distinction between value judgments, statements which have a basis in fact and gratuitously offensive remarks. Cllr Calver's comments cannot reasonably be regarded as even being offensive; they were as described by Mr Hughes "snide" occasionally mocking and negative. Even if the Appeal Tribunal were to find the remarks offensive, they were political expression of value judgments having a basis in fact and contextual.

Cllr Malcolm Calver

3.4 Cllr Calver responded to specific questions put to him by the Appeal Tribunal. He said as he recalled, he had asked for advice from the Legal Officer as there had been a complaint about his publishing draft minutes on his website; however he could not specifically recall precisely when he sought the advice, whether before or after the council had passed its resolution that he should not do so. He said he had put his postings on the website as the public had the right to know what was happening in the Manorbier Community Council and he felt there was a lack of information in the public domain.

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

4.1 Appeal Tribunal's Decision

4.1.1 On the basis of the findings of fact, the Appeal Tribunal found by a unanimous decision that there was a failure to comply with the Manorbier Community Council's code of conduct.

4.1.2 Paragraph (4b) of the Code of Conduct states: *'You must show respect and consideration for others.'*

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

4.1.4 The Appeal Tribunal found that by his conduct Cllr Calver had breached paragraph 4(b) and paragraph 6(1)(a) of the code of conduct.

4.1.5 In relation to breach of paragraph 4(b), the code of conduct applies only when a member is acting in his official capacity. The content of Cllr Calver's website postings or blogs comprised of draft, unapproved, minutes of the Community Council, his opinion and comments about those minutes and about the character and ability of some of the members of the Community Council, the Community Council as a body and how it and certain members conducted themselves. He also alluded to secrecy, connivance, mal-administration, financial mis-management and incompetence and much of this was within his knowledge only because he was an elected member of that authority. He was discussing the affairs and business of his council and his purpose and intention was to inform the

people of the community about council business or, as he put it, what was going on. Whilst Cllr Calver did not identify himself as the blogger or the owner of the website, those details were easily ascertainable, ie. that the blogger was Malcolm Calver and that he was a member of that authority. Whilst Cllr Calver says he was not acting in his official capacity, it is an objective test which applies. The Appeal Tribunal concluded that a member of the public reading the website would have the impression, and reasonably so, that Cllr Calver was acting as a member of the Manorbier Community Council.

4.1.6 In relation to paragraph 4(b), having concluded that Cllr Calver was acting in his official capacity, the Appeal Tribunal then considered whether Cllr Calver's posting failed to show respect and consideration for others. The Appeal Tribunal is aware that Cllr Calver asserts that everything he said was true and is aware, from the information before it, of the failings of the Manorbier Community Council. The Appeal Tribunal also notes that Cllr Calver asserts that his motivation was informing the public.

It nevertheless remains the case that Cllr Calver published draft, unapproved, minutes after the Community Council had passed a resolution that he should not do so; that he criticised the draft minutes as not being an accurate record of the meeting and the competence of their author; he made personal, snide, remarks about the competence, integrity and character of members of the authority and alluded to alleged breaches by some members of the code of conduct. Whether or not what was said is true does not detract from the rudeness, lack of respect and consideration all of this shows to individual members of the council and the council as a body.

Cllr Calver could have properly addressed his concerns at the next meeting/s thereby allowing others to respond to his views and have their say, allowing a debate and if needs be, a vote. It would have been respectful and considerate for him with the benefit of his experience as a longstanding community and county councillor, to have offered help to those he considered to be less competent and able than himself. Indeed if he was so utterly disgusted with his fellow members on the Community Council, he could have resigned. Instead, he chose to "bitch from the sidelines" to coin a phrase used by Mr Gwydion Hughes.

4.1.7 Inevitably, the Appeal Tribunal's finding that Cllr Calver has breached the code of conduct by speaking in a way which was inconsiderate and disrespectful to others is, on a superficial level, a breach of his right to freedom of expression under Article 10(1). The Appeal Tribunal does not consider that Cllr Calver's blogs were political expression in the true sense of that meaning; he anonymously blogged on his website by publishing draft unapproved minutes, criticising their content and the competence of their author and made personal comments about the integrity, etc. of the members and the council. It was all very one-sided. It was not an expression of Cllr Calver's political views or allegiances, nor a response to those expressed by others, nor a critique of any other political view or party.

The higher level of protection afforded by Article 10(2) to political expression does not apply here therefore. The provisions of the 2008 code of conduct were prescribed by law and the code of conduct is the ethical framework within which local government operates. It sets minimum standards of conduct in public life and upholds those standards of conduct so as to engender public confidence in local democracy. It goes far beyond dealing with corruption; it includes, obviously, a

requirement that councillors should treat each other and others with respect and consideration and, as a matter of fact, it is of course perfectly possible to be critical of others without also showing them disrespect or lack of consideration.

4.1.8 Although the Appeal Tribunal has decided that Cllr Calver was acting in his official capacity, it is worth noting that by virtue of paragraph 2(1)(s) the (2008) code of conduct is engaged "at all times and in any capacity" in respect of conduct identified in paragraph 6(1)(a) (ie. conduct capable of bringing the office of member or the authority into disrepute).

4.1.9 Cllr Calver was a longstanding and experienced member of the failing Manorbier Community Council; he was also a county councillor. There were various options available to Cllr Calver including seeking to assist those he regarded as incompetent and inexperienced, distancing himself entirely from the failing council by resigning, or seeking the assistance of the monitoring officer. He did none of these. He publicly ridiculed his fellow members and the authority of which he was a member. The Appeal Tribunal conclude that if the reasonable man were asked for his view of Cllr Calver's behaviour, he would say it fell short of that expected, under the code of conduct, of an elected member; and to such extent that it brought his office and his authority into disrepute.

4.1.10 The Appeal Tribunal accordingly decided by unanimous decision to uphold the Standards Committee's determination dated 5 November 2010, that Cllr Calver had breached Manorbier Community Council's code of conduct.

5. SUBMISSIONS ON ACTION TO BE TAKEN

5.1 The Appellant's Submissions

5.1.1 Cllr Calver's representative contended that the matter is not of major significance and that no higher sanction than that imposed by the Standards Committee could be justified.

5.1.2 Cllr Calver contended that his proper duty was to make the electorate aware of what was happening in Manorbier Community Council and that he was concerned that they will not now be made so aware.

5.2 Appeal Tribunal's Decision

5.2.1 The Appeal Tribunal considered all of the facts, submissions and representations made and its own sanction guidelines in appeal tribunals. The Appeal Tribunal saw no compelling reason here to interfere with the sanction imposed by the Standards Committee

5.2.2 The Manorbier Community Council and Pembrokeshire County Council's Standards Committee are notified accordingly.

Signed.....
Helen Cole
Chairperson of the Appeal Tribunal

Date.....

Andrew Bellamy
Panel Member

Gwyn Davies
Panel Member