

## **DECISION REPORT**

**TRIBUNAL REFERENCE NUMBER:** APW/003/2017-018/CT

### **REFERENCE ABOUT ALLEGED BREACH OF THE CODE OF CONDUCT**

**RESPONDENT:** Former County Councillor (currently Community Councillor) Graham Down.

**RELEVANT AUTHORITIES:** Monmouthshire County Council (currently Mathern 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 A hearing was held by the Case Tribunal at 10.00am on 19<sup>th</sup> July 2018 at Cwmbran Magistrates Court, Tudor Road, Cwmbran, NP44 3YA. The hearing was open to the public.

1.3 Cllr Down attended and represented himself.

## **2. PRELIMINARY DOCUMENTS**

### **2.1 Reference from the Public Services Ombudsman for Wales**

2.1.1 In a letter dated 20<sup>th</sup> December 2017, the Adjudication Panel for Wales received a referral from the Public Services Ombudsman for Wales (“the Ombudsman”) in relation to allegations made against Cllr Down. The allegations were that Cllr Down had breached the code of conduct of Monmouthshire County Council (MCC) by failing to show respect and consideration for others by sending e-mails to the Chief Executive of MCC, Mr Paul Mathews, containing homophobic statements in alleged breach of Paragraph 4(b) of the code.

2.1.2 The Ombudsman’s investigation related to two sets of e-mails forwarded by the Respondent to the Chief Executive of MCC, the first set sent in February 2016 and the second in October 2016.

## **2.2 The Councillor's Written Response to the Ombudsman's Report and Reference**

2.2.1 Cllr Down forwarded a letter to the Ombudsman's Investigation Officer on 27<sup>th</sup> November 2017 in response to the Ombudsman's draft report. It was highly critical of that report and the delay in concluding it.

2.2.2 Cllr Down stated that there had been three conferences or events organised by MCC which had caused him concern in a period of little over six months and he said that he was "concerned at the direction of travel in these matters, and found arrangement of the events to be offensive and demonstrating a lack of respect to those [sic] faith or who object to these issues for any other reason."

2.2.3 He also made the points that the e-mails which formed the subject of the complaint were e-mails passing between two individuals which were not intended for a wider audience and that any distribution to others was none of his doing, being entirely the choice of the Chief Executive. He stated that he made no secret of his views about homosexuality and stated that he did not feel any embarrassment about the fact that: "I believe homosexuality to be unnatural, perverted, immoral and wrong." He stated that this was not only his view as it was also the traditional, mainstream teaching; "of virtually every major world religion."

2.2.4 In his letter, Cllr Down addressed various paragraphs of the Ombudsman's report in detail and the Case Tribunal had regard to these further views. He repeated that in his view; "both homosexual and paedophile acts are unnatural, perverted and immoral. In that sense both are, therefore, I contend, comparable in substance." He further stated; "I therefore stand by my comment without qualification."

2.2.5 Finally, Cllr Down stated that he would not use the language he used for addressing a wider audience or, specifically, someone of "homosexual persuasion" and that the language used must be seen in the context of the recipient of the message. He felt that it was not at all inappropriate that he should express himself in terms which reflected his strength of feeling.

2.2.6 On 26<sup>th</sup> January 2018, Cllr Down forwarded his reply to the Notice of Reference and again referred to his letter dated 27<sup>th</sup> November 2017. He contended that the Ombudsman had made a number of uncorroborated and speculative assumptions and that the investigation was; "based on a desire to reach a pre-determined conclusion." He also referred to freedom of expression, freedom of religious expression and also the public interest.

## **2.3 The Ombudsman's Written Representations**

No further representations were made by the Ombudsman.

### **3. APPLICATIONS MADE PRIOR TO HEARING/LISTING DIRECTION**

No applications were made further to the issue of standard Listing Directions on 10<sup>th</sup> May 2018.

### **4. APPLICATIONS MADE AND DIRECTIONS GIVEN DURING THE HEARING**

4.1 No formal applications were made during the hearing, although the Chairman acceded to Cllr Down's request to put relevant questions, through the Chairman, to the Ombudsman's representative regarding various aspects of the Ombudsman's report.

4.2 The Chairman explained that as there were no disputed material facts in this case, the first two stages of the proceedings would be conflated, namely resolution of facts and determination of whether there has been a failure to comply with the code of conduct. There were no objections from either party to this proposed course of action.

### **5. THE HEARING**

5.1. The Case Tribunal went on to hear oral evidence and submissions as follows:-

#### **Public Services Ombudsman for Wales – presentation of the investigation report**

5.1.1 In presenting the investigation report, the Ombudsman provided an overview of events, explaining that Cllr Down had not stood for re-election as a County Councillor in 2017, however had become a Community Councillor for Mathern Community Council. The complaint related to two sets of e-mail exchanges, one in February 2016 and the other in October 2016, comprising of a number of comments which were each considered by the Ombudsman's Investigator.

5.1.2 The Ombudsman's representative made it clear that the right to challenge Council spending was not being questioned. The Ombudsman was mindful of the European Convention on Human Rights, Article 10 being the right to freedom of expression; however, it was asserted that in this case, the level of inflammatory, offensive and abusive language crossed the line. In response to points of clarification, the Ombudsman's representative provided an explanation for the length of time taken to investigate this matter. The reasons for not pursuing investigation in relation to Paragraphs 4(a) and 6(1)(a) were also clarified.

**5.2 Witness: Mr Paul Mathews**, Chief Executive of Monmouthshire County Council gave evidence further to his statement dated 16<sup>th</sup> January 2017.

5.2.1 Mr Mathews stated that he had worked in public service for thirty years and had been Deputy Chief Executive or Chief Executive for fifteen years and had seen a lot in that time, however when he received the February e-mails from Cllr Down, he thought that they were totally at odds with what MCC was all about, albeit that he was not personally offended.

5.2.2 With regard to Cllr Down's comparison between homosexuality and paedophilia, he felt that this was an outrageous and abhorrent statement. He had pondered the matter; however he did not make a referral at that time and the matter was not handled internally at the time.

5.2.3 Due to the ethos of the Council, giving rights and opportunities to fulfil potential regardless of how people chose to live their lives and his duty of care as the Head of Paid Service, he considered it reasonable to set an appropriate tone and rhythm to the Council's work and he struggled to validate that with some of the comments made by Cllr Down.

5.2.4 It was Mr Mathews' view that Councillors can strongly challenge the Council's actions, however that there are rules within which they must operate. As a councillor, it is a privilege and an honour to represent all constituents and it is part of the role to promote the well-being of all. He did not make the referral lightly and had never previously made a referral, however following the second set of e-mails, he felt that Cllr Down's comments showed a pattern of behaviour, were unacceptable and needed to be addressed.

5.2.5 Mr Mathews said in evidence that he could receive several hundred e-mails in a day and these usually needed to be routed to another part of the organisation and he would have expected Cllr Down to have understood that. Cllr Down did not revert to him to object to the matter being referred. Mr Mathews accepted the need for humour on occasions, however in this instance a line had been crossed. He did not accept that the correspondence was private as it was addressed to the Chief Executive as representative of the organisation. In this case, the question raised by Cllr Down was forwarded, as was normal and routine, to the appropriate Cabinet Member with responsibility for equalities, who also happened to be openly gay.

5.2.6 Following questions from Cllr Down, Mr Mathews confirmed that Usk was Mr Mathews' 'normal' place of work as he spent the greatest proportion of his time, about 35%, in that locality. He also acknowledged that certain tragic events in Orlando, associated with homosexual community had been marked by the flying of the 'rainbow' flag at County Hall, whereas other atrocities had not been marked by the flying of the relevant national flags.

5.2.7 Mr Mathews confirmed that he had never previously had occasion to consider that Cllr Down had placed employees in a vulnerable position or dealt with them disrespectfully. He said in evidence that a person with certain religious beliefs would, as would any other candidate standing for election, need to reconcile themselves with undertaking to abide by the Councillors' code of conduct and if they could not do so, they should not stand for election.

5.2.8 Mr Mathews did not accept that referral was a ploy to get rid of Cllr Down and he stated that Cllr Down was not in a particular position of power and had a marginal role and the complaint was instigated purely by Cllr Down's use of language.

**5.3 The Respondent, Cllr Down** gave evidence as follows. The Case Tribunal had also read the relevant e-mails, the transcript of Cllr Down's interview of 24<sup>th</sup> August 2017 and Cllr Down's response to the Ombudsman's report dated 27<sup>th</sup> November 2017.

5.3.1 Cllr Down accepted that the exchange of e-mails was about Council business. He contended that the e-mails were private e-mails to the Chief Executive however and that it was the Chief Executive who had further circulated the e-mail. He also stressed that the Chief Executive was not personally offended by the comments. Cllr Down felt that Mr Mathews could have 'cut and pasted' e-mails so as not to send any part of them which the Chief Executive thought could cause offence.

5.3.2 He referred to a recent report of the Office for National Statistics. In terms of the sexual orientation of the population, 93.4% of the population described themselves as heterosexual. He said that if it is fair to describe a location where one spends only 35% of one's time as a 'normal' place of work, then it must be fairer to describe 93.4% of the population as 'normal.' He said that it was Mr Mathews who had read something into the term and nevertheless forwarded it on to the Cabinet Member.

5.3.3 Cllr Down was offended that the Council was promoting homosexuality and he argued that the Council had no duty to do so. Cllr Down asserted that he was not against individuals who are gay but that he disagreed with their lifestyle. By way of example, he explained that he had employed an openly gay person, who had been a valued member of his team, this was not to say that he approved of her lifestyle. Cllr Down found it wrong and deeply offensive as a tax-payer, that the Council should be seen to be promoting homosexuality. There had been three events within just over six months and he felt that 'his nose was being rubbed in it' and he said that he was not alone in believing this.

5.3.4 He said that his views had not changed and that it would be against his conscience to recant. Despite agreeing that people can do what they like in the privacy of their own homes, he did not expect it to be demonstrated in public and celebrated. He appreciated that paedophilia is unlawful, whereas homosexuality is lawful. Also children are not able to give consent whereas adults can do so. He believed that both were perverted and unnatural however.

5.3.5 Cllr Down explained that he was very angry at the time, however if he had been writing to a stranger or making a speech in Council, he might have used different terminology, although he would have said substantially the same thing. Following questions, he said that as an employer, he was aware of the provisions of the Equality Act 2010 and was aware of protected characteristics under the Act and the duty to treat people fairly and without discrimination. He continued to believe that he had done nothing wrong and, when pressed, was

not sure whether he would have made the 'paedophilia' comparison with the benefit of hindsight and would probably have chosen different words.

5.3.6 Cllr Downs agreed that he had not attended the training sessions referred to in the Ombudsman's report, however he noted that attendance generally at those training sessions had been low and that he had read and understood the code in any event.

## **Submissions**

### **5.4 Submissions by the representative of the Public Services Ombudsman for Wales.**

5.4.1. The Ombudsman's representative referred to relevant case-law with regard to Article 10 of the European Convention on Human Rights namely *Sanders v Kingston (No 1)* [2005] EWHC 1145 (Admin) and *R (Calver) v Adjudication Panel for Wales* [2012] EWHC 1172 (Admin) and in particular the three-stage approach as promulgated in the *Sanders* case. Reference was also made to an earlier decision of the Adjudication Panel for Wales in 2009 in relation to Cllr William A Pritchard of Barmouth Town Council where it was decided that there had been a breach of the Code when the Respondent made a comment, amongst others, that homosexuality was a 'notorious disability'. The Ombudsman's representative acknowledged that there were differences between the two cases. In the 'Barmouth' case, the comment was directed at an employee and had been disseminated widely by the Councillor and personal offence had been caused to an individual, unlike in the present case. The Ombudsman submitted however that the wording of Paragraph 4(b) was wide and it was not necessary to show that personal offence had been caused.

5.4.2 The Ombudsman was not questioning the right to personal or religious beliefs. It was the manner in which the views were expressed to the Chief Executive that was an issue as he had a duty of care towards a large workforce. The Ombudsman acknowledged that each case must be considered on its own merits, that a finding of breach would be an interference with Cllr Down's Article 10 rights, however in this case, it was submitted that the interference would be justified

5.4.3 The Ombudsman's representative submitted that within his e-mails, Cllr Down was conducting Council business as he had written in his capacity as a Councillor about public funding and public administration and the Ombudsman was of the view that the Code provisions were fully engaged.

5.4.4 There was no issue with Cllr Down's initial questions to the Chief Executive, which were entirely appropriate. It was submitted however that the e-mails became more egregious and, even bearing in mind the enhanced protection held as an elected member, the Ombudsman considered that the relevant e-mails were inflammatory and abusive. Reference to a "ridiculous rag" to describe the rainbow flag would cause offence to the homosexual community and others. Comparison between homosexuality and paedophilia was plainly offensive.

5.4.5 In the October e-mails it was clear from the context of the e-mails that Cllr Down was suggesting that anyone who was not 'normal' in the sense of being heterosexual, was abnormal. The Ombudsman's representative submitted that in conducting Council business, it could not be expected that the Chief Executive would redact Councillor e-mails and remove offensive material.

5.4.6 The Ombudsman's representative referred to the Ombudsman's Guidance as mentioned in Cllr Down's evidence in relation to senior officers requiring a thicker skin, however this was not the issue and was to do with the Chief Executive doing the right thing and standing up for his duties and the equalities legislation. If a person did not feel that they could sign up to the code of conduct then they shouldn't become a Member.

5.4.7 The Ombudsman considered that this was an unusual, but serious case. The Chief Executive had made the complaint via the Monitoring Officer and it was felt in the circumstances that it was neither practical nor easy for a Standards Committee to hear this case and that it would also be useful for Standards Committees generally to receive guidance from the Case Tribunal in view of the complex Convention issues in this case.

## **5.5 Submissions made by Cllr Down**

5.5.1 Cllr Down submitted that the Ombudsman had adduced no evidence to show that he had prevented officers from carrying out their functions in any way. He felt that the Ombudsman had tried to put words into his mouth and that they had carried out no work to find out the probability or otherwise of anyone being offended.

5.5.2 With regard to the February e-mails, the Ombudsman had accepted that there was nothing offensive in the e-mail sent on the 12<sup>th</sup> February 2016 at 11.22am and he had received no reply or objection to his e-mail sent at 15.01pm on the same date. It was only in relation to an e-mail in October that Mr Mathews used the word 'inappropriate'. In his further e-mail on 3<sup>rd</sup> October 2016 at 13.15pm, Cllr Down said that this was simply explaining the position and that it was more measured than his e-mail of 12<sup>th</sup> February 2016. If an e-mail was so offensive, then he queried why the Chief Executive would send it to someone who was openly gay.

5.5.3 Cllr Down referred to the Local Government Act 1988 Act and the repeal of the prohibition on promoting homosexuality and he said that MCC's Equality Policy referred to ensuring that there was no discrimination but did not refer to promotion of homosexuality and no resolution of the Cabinet had changed that. He felt that the conferences which had been organised were going further than treating people fairly, they were promoting homosexuality.

5.5.4 With regard to the ability to redact Members' e-mails, Cllr Down said that Chief Executives regularly received politically sensitive e-mails and needed to cut and paste information from time to time.

5.5.5 Cllr Down stated that the code of conduct refers to all Members, whether they are for or against homosexuality and he said that it was abundantly clear

that the Council, through its Cabinet Member with responsibility for equalities issues, was not treating those with religious views with any sort of consideration whatsoever and was blind to the fact that people may hold different views to them.

5.5.6 With regard to the reference to a 'ridiculous rag', he said that it was not unknown for Union Jack towels to be taken on holiday and for sun-tan lotion to be dropped onto them. To suggest that there is something magical about a flag which does not represent the Council and that you cannot 'take the mick out of it' is absurd. He did not consider that this reference was a breach of the code.

5.5.7 Cllr Down also referred to the Barmouth Town Council case which he said was very, very different. In that case, the Councillor's comments were contained in a letter to a third party, external to the Council and the onward transmission was an action of the Councillor, not an action of the Council. The only similarity was that it happened to deal with homosexuality.

5.5.8 Finally Cllr Down referred to the right to freedom of expression and the ability to impart ideas. He said that the only way in which the right could be removed was where just and where morality and the well-being of society required it and this was not the case here.

## **5.6 The Case Tribunal's assessment of the Witnesses**

5.6.1 The Tribunal found Mr Paul Mathews to be a considered and straightforward witness. He readily accepted that he had not had any cause for concern for Cllr Down's behaviour towards officers over many years previously. He readily accepted that Cllr Down had not referred his e-mails to any third party. He was less clear however as to why Cllr Downs had not been challenged or warned by Mr Mathews following the February exchange of e-mails.

5.6.2 Likewise the Tribunal found Cllr Downs to be a considered and straightforward witness. He did not waiver from his strongly held views whilst giving evidence. His evidence in relation to his use of the word 'normal' to denote 'the majority of people' however, was at odds with the context of the use of the word in his e-mail to the Chief Executive dated 1<sup>st</sup> October 2017.

## **6. FINDINGS OF FACT**

6.1 The facts were agreed and the Case Tribunal therefore found the following **undisputed** material facts;

6.1.1 At the relevant time, Councillor Down was a Member of MCC

6.1.2 Cllr Down is currently a Member of Mathern Community Council

6.1.3 Cllr Down signed an undertaking to observe the code of conduct of MCC on 8<sup>th</sup> May 2012.



6.1.4 Cllr Down forwarded e-mails to the Chief Executive of MCC on the 12<sup>th</sup> February 2016 and on the 1<sup>st</sup> to 13<sup>th</sup> October 2016, the contents of which are not in dispute.

## **7. FINDINGS OF WHETHER MATERIAL FACTS AND EVIDENCE DISCLOSE A FAILURE TO COMPLY WITH THE CODE OF CONDUCT**

### **7.1 Case Tribunal's Decision**

7.1.1 On the basis of the findings of fact and the evidence, the Case Tribunal found by a unanimous decision that Cllr Down had failed to comply with the code of conduct for Monmouthshire County Council as follows.

7.1.2 As well as looking at the e-mails as a whole, the Case Tribunal considered each of Cllr Down's e-mail comments which were alleged to contain homophobic statements in the light of the following.

7.1.3 Paragraph 4(b) of the code of conduct states;

"You must show respect and consideration for others".

The code is underpinned by certain principles. Paragraph 2(2) of the code of conduct states that; "You should read this code together with the general principles prescribed under section 49(2) of the Local Government Act 2000 in relation to Wales" (the Welsh Principles). The relevant principle states;

"Members must carry out their duties and responsibilities with due regard to the need to promote equality of opportunity for all people, regardless of their gender, race, disability, sexual orientation, age or religion, and show respect and consideration for others."

Paragraph 4(b) of the code must also be carefully considered in the light of the Articles of the European Convention on Human Rights however.

7.1.4 Article 8(1) of the Convention as embodied in the Human Rights Act 1998 states as follows:-

"Everyone has the right to respect for his private and family life,..."

7.1.4 Article 9 of the Convention states as follows:-

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

7.1.5 Article 10 of the Convention 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...”

7.1.6 In this context, the Case Tribunal referred to the cases of Calver, Sanders (No1) as well as Heesom v Public Services Ombudsman for Wales [2014] EWHC 1504 (Admin) which was within the knowledge of the Case Tribunal and followed the three-stage approach in Sanders (No 1) as follows:-

“1. Was the Case Tribunal entitled as a matter of fact to conclude that [Cllr Down’s] conduct was in breach of Paragraph [4(b)] of the code of conduct?

2. If so, was the finding in itself or the imposition of a sanction prima facie a breach of Article 10?

3. If so, was the restriction involved one which was justified by reason of the requirements of Article 10(2)?”

7.1.7 The Case Tribunal also noted the references to the Equality Act 2010 duties from the evidence and submissions. Under the Act, protected characteristics include sexual orientation. Section 149(5) states as follows:-

“Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to-

(a) Tackle prejudice, and

(b) Promote understanding.”

7.1.8 The Tribunal was mindful that Cllr Down’s comments had not been directed at any particular individual, however it considered that Paragraph 4(b) of the Code required respect and consideration to be shown by Councillors to others, whether this be an individual, a group or the electorate as a whole. It considered that Cllr Down’s e-mails had been directed to the Chief Executive who represented the Authority and the community as a whole and who, as Head of Paid Service, had a duty towards all staff.

7.1.9 The Tribunal was satisfied that the e-mails were sent to the organisation by Cllr Down in his official capacity as a representative of his community, as confirmed in his interview with the Ombudsman’s Investigating Officer. Moreover, the e-mails had not been sent as private and confidential documents,

Cllr Down was aware that they were, in some instances, being circulated more widely, yet he did not object at the time and it is also a fact that he had been willing to repeat these comments more widely and ultimately publicly in his letter to the Ombudsman dated 27<sup>th</sup> November 2017. Paragraph 4(b) was therefore engaged.

7.1.10 The Case Tribunal gave careful consideration to the right of freedom of thought, conscience and religion under Article 9 of the Convention. Within his e-mails, Cllr Down referred to being a Christian. In his letter dated 27<sup>th</sup> November 2017, Cllr Down had quoted from the Old Testament and referred to other religious teachings to justify his comments. The Tribunal accepted that on a wide reading, Article 9(1) was engaged, as some of Cllr Down's comments directly expressed one narrow element of his belief and could therefore be interpreted to be a manifestation of his religion or belief, such manifestation not being limited simply to acts of worship or devotion.

7.1.11 The Case Tribunal was satisfied in relation to Article 10(1) of the Convention that all relevant e-mail comments attracted full and enhanced protection afforded to politicians expressing their political views as they were all made in the context of public administration, including the use of Council property namely the flag-pole on Council premises, the organisation of Council conferences/events and the cost of such conferences/ events and Cllr Down's comments in connection with them were considered to be political expression in its widest sense.

## **7.2 Case Tribunal's Decision.**

The Case Tribunal therefore considered each relevant e-mail comment in the light of all of the above.

7.2.1 E-mail dated 12<sup>th</sup> February 2016 11:28 headed; "Monmouthshire Youth LBGXYZ Conference". Comments as follows:-

*"There seems to be some ridiculous multi-coloured rag flying from the flagpoles outside County Hall"*.

The Case Tribunal considered that Cllr Down's comment was disrespectful, however it accepted that, in the light of the enhanced protection for political expression, this flippant and impatient comment, despite being likely to be offensive to some, was not so egregious as to justify the restriction of Cllr Down's right to freedom of expression justifying a finding of a breach of the code. The Panel considered that this would have been the case even without enhanced protection.

7.2.2 E-mail dated 12<sup>th</sup> February 2016 15.01 Comments as follows:-

*"I am, and have been, always quite open that I agree with the teachings of just about every major world religion in that homosexuality is an immoral perversion to be condemned, not promoted"*.

The Case Tribunal was clear that these comments did not show respect and consideration for a section of society with protected characteristics under the Equality Act 2010.

The Tribunal carefully considered Cllr Down's rights under Articles 9(1) and 10(1) of the European Convention on Human Rights. Although the comments attracted enhanced protection as they comprised of political expression, the Tribunal considered that the comments were so unnecessary, offensive and egregious that they amounted to a blatant disregard for equality principles and legislation, the public interest in good administration and the duty of trust and confidence between all councillors and their Council's workforce. It was a deliberate challenge to the inclusive ethos of the Council and although not directed at a particular individual, the comments were an affront to the private life of a whole section of the community with protected characteristics, including staff and Members of MCC who also had the right to respect for their private and family lives by virtue of Article 8.

It concluded that, even having given a narrow construction to Articles 9(2) and 10(2) of the Convention, a finding of a breach of Paragraph 4(b) of the Code as underpinned by the Welsh Principles, was nevertheless "necessary in a democratic society...for the protection of the rights and interests of others." The comments were gratuitous and homophobic and in clear breach of Paragraph 4(b) of MCC's code of conduct.

7.2.3 Comments as follows:-

*"Indeed as a matter of straightforward logic I do not understand why a homosexual act is apparently acceptable but not a paedophile act. Both are unnatural and I struggle to see a difference of substance".*

The Case Tribunal considered that this comment demonstrated an extreme homophobic view which was wholly incompatible with the code and its underpinning Welsh Principles.

Although the comments attracted protection under Article 9(1) and full, enhanced protection under Article 10(1) of the European Convention on Human Rights, they demonstrated complete failure to show respect and consideration for others, including staff and Members of Monmouthshire County Council as well as the wider community with protected characteristics. It was the Tribunal's view that the comment which made a comparison between lawful relations and child abuse was outrageous, inflammatory, gratuitous and abhorrent. It consisted of a flagrant disregard for equality principles and the Equality Act 2010, the public interest in good administration and the duty of trust and confidence between all councillors and their Council's workforce. It deliberately challenged the inclusive ethos of the Council.

The Tribunal concluded that, even having given a narrow reading of Articles 9(2) and 10(2) of the Convention, a finding of a breach of Paragraph 4(b) of the Code as underpinned by the Welsh Principles, was nevertheless "necessary in a democratic society...for the protection of the rights and interests of others", and to uphold standards in public life.

7.2.4 E-mail dated 1<sup>st</sup> October 2016 20:24 headed 'LBGTQIYGVGI Conference. Comment as follows:-

*"I see that MCC apparently had yet another LBGTQIYGVGI conference yesterday, although there's still no sign of a similar conference for normal people".*

The Case Tribunal considered that Cllr Down's comment was pejorative and disrespectful, however it accepted that in the light of the enhanced protection for political expression that this provocative comment, despite being likely to be offensive to some, did not justify the restriction of Cllr Down's rights to freedom of expression so as to justify a finding of a breach of the code. Indeed the Panel considered that this would have been the case even without enhanced protection.

7.2.5 E-mail dated 1<sup>st</sup> October 2016 20:24 Comments as follows:-

*"I believe homosexuality, transgenderism, etc are immoral perversions. I do not accept the activities as being "normal" in any way".*

The Case Tribunal were clear that this comment did not show respect and consideration for a section of society with protected characteristics under the Equality Act 2010.

The Tribunal carefully considered Cllr Down's Convention rights and concluded that the comments attracted protection under Article 9(1) and full, enhanced protection under Article 10(1).

Despite having been challenged by Mr Matthews at the relevant time in this instance, Cllr Down repeated his view that 'the activities' were not normal, however on this occasion he linked the pejorative use of the word 'normal' to his view of the activities being 'immoral perversions' as opposed to being activities conducted by a minority of the population as Cllr Down argued in his submissions. In the circumstances, the Case Tribunal decided that, although the comments attracted full enhanced protection, they were wholly unnecessary, abusive and egregious and demonstrated complete failure to show respect and consideration for others, including staff and Members of Monmouthshire County Council as well as the wider community with protected characteristics. It was a deliberate and gratuitous challenge to the inclusive ethos of the Council, taking no account of equality principles, let alone the public sector equality duty.

It concluded that, even having given a narrow reading of Articles 9(1) and 10(2), a finding of a breach of Paragraph 4(b) of the code as underpinned by the Welsh Principles, was nevertheless "necessary in a democratic society...for the protection of the rights and interests of others."

7.2.6 E-mail dated 13<sup>th</sup> October 2016 8:28:55 headed 'Our recent exchanges' Comment as follows:-

*“Perhaps you would also be kind enough to let me know the difference in principle between flying the striped flag outside County Hall, even though that may offend some, and erecting a banner saying something like “homosexuality is perverted,” which may offend others”.*

The Case Tribunal considered that Cllr Down’s comment was disrespectful, however it accepted that in the light of the enhanced protection for political expression that this provocative yet rhetorical question, despite being likely to be offensive to some, did not justify the restriction of Cllr Down’s rights to freedom of expression justifying a finding of a breach of the code. Indeed the Panel considered that this would have been the case even without enhanced protection.

## **8. SUBMISSIONS ON ACTION TO BE TAKEN**

### **8.1 Evidence of previous conduct**

No evidence was produced of any previous breaches of the code of conduct by Cllr Down.

### **8.2 The Ombudsman’s submissions**

8.2.1 The Ombudsman contended that although Cllr Down was no longer a member of MCC, by virtue of Sections 79 (4) (a) and 79 (13) (b) of the Local Government Act 2000, the legislation allowed the Case Tribunal to suspend the Councillor from a different Authority to that in which the conduct occurred, in this case, Mathern Community Council. Cllr Down had become a Member of Mathern Community Council in May 2017.

8.2.2 The Ombudsman’s representative acknowledged that there may be mitigating factors, in that the code provisions to do with bringing the office or the Council into disrepute had not been invoked, that Cllr Down had co-operated with the investigation and that some of the comments had been made in the ‘heat of the moment’.

8.2.3 With regard to aggravating factors, the comments escalated following challenge by Mr Mathews. Although Cllr Down said that he had read and understood the code of conduct, his non-attendance of training on the code over the years showed a poor attitude to code matters and that there was a failure to look at a councillor’s role from a distance.

### **8.3 Cllr Down’s Submissions**

8.3.1 Cllr Down contended that he could not and would not recant and quoted Martin Luther on this point. He felt that the whole episode was bizarre and a breach of natural justice and he felt that there was a tacit understanding between chief executives and the Ombudsman’s office that investigations would be long and drawn-out. He felt that the delay was a sanction in itself.

8.3.2 He also stated that no-one had been offended by the e-mails and the Chief Executive had not been offended personally. The only person who had been offended was himself. He felt that blind assumptions had been made by MCC. As to the Chief Executive's duty to protect staff, it had been acknowledged that there was not a single example or incident of poor treatment of anyone by Cllr Down. He felt that the nub of this was that he was being expected to give up his faith and he would not do so.

### **8.3 Case Tribunal's Decision**

8.3.1 The Case Tribunal considered the nature of the three e-mails which were found to breach the code of conduct and in particular the comment which compared homosexuality to paedophilia. Cllr Down had reluctantly indicated that, in retrospect, he would 'probably' have used different words. They were not words used in the 'heat of the moment' however as having had ample time to reflect, he used similar wording and went on to justify the comments in his letter to the Ombudsman dated 27<sup>th</sup> November 2017.

8.3.2 In accordance with the Adjudication Panel for Wales' current Sanctions Guidance, the Case Tribunal also had regard to the following mitigating factors: that the breaches arose from a genuinely and strongly held view and that Cllr Down had a previous record of good service. It also had regard to the following aggravating factors: non-attendance of training with the October e-mail showing a repeat pattern of behaviour and a lack of remorse or insight. The Case Tribunal recognised that in other circumstances, this may have been a matter which would have been appropriate for Standards Committee hearing and therefore also took into account the upper limit of sanction for Standards Committees.

8.3.3 The Case Tribunal gave very careful consideration to all submissions on sanction and once again considered sanction in the light of Articles 9 and 10 and the principles of proportionality and although it found that the imposition of a sanction was a prima facie interference with the right to manifest one's religion or belief under Article 9 and freedom of expression under Article 10, it was proportionate and justified under Articles 9(2) and 10(2), as the breaches of the code had been gratuitous and egregious and was necessary to reinforce the fact that the code of conduct and Welsh Principles are key to the proper operation of and public confidence in local democracy. The Case Tribunal considered the least intrusive measure possible, without unacceptably compromising the achievement of the objective.

8.3.4 It has also considered Sections 79 (4) (a) and 79 (13) (b) of the Local Government Act 2000 in relation to sanction and it accepted the Ombudsman's submissions that suspension as well as disqualification were within the powers of the Case Tribunal.

8.3.5 The Case Tribunal had regard to sanctions in other cases. The 'Barmouth' case had led to disqualification for one year, however the Case Tribunal recognised that Cllr Down had not directed his behaviour towards a particular individual and wrote solely to the Chief Executive. In *Sanders v Kingston (No 2)* [2005] EWHC 2132 (Admin), Sullivan J considered that a

suspension of six months would have been appropriate in place of the disqualification for 18 months originally imposed by the relevant Tribunal. The Sanders (No 2) case involved a one-off incident of poor behaviour towards an officer.

8.3.6 Due to the mitigating factors described in Paragraph 8.3.2 above, the Case Tribunal considered that a short period of suspension would be proportionate and two months was considered to be the minimum sanction necessary, bearing in mind that many Town and Community Councils do not hold any formal Council meetings during August, whilst aiming to discourage the Respondent and any other Councillor from conducting himself/herself in a similar manner in future.

8.3.7 The Case Tribunal concluded by unanimous decision that Cllr Down 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.

8.3.8 MCC and Mathern Community Councils and their Standards Committee are notified accordingly.

8.2.9 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.

## **9. CASE TRIBUNAL RECOMMENDATIONS**

9.1 Although this does not form part of the Case Tribunal's formal findings, the Case Tribunal would recommend that Cllr Down uses the two months' suspension to seek code of conduct and equalities training through MCC and Mathern Community Council and their Monitoring Officer.

Signed:



Date: 10 August 2018

Claire N Jones  
Chairman of the Case Tribunal

Susan Hurds  
Panel Member

Glenda Jones  
Panel Member