

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at Midlothian House, 40-46 Buccleuch Street, Dalkeith, EH22 1DN, on 23 August 2023.

Panel Members: Ms Helen Donaldson, Chair of the Hearing Panel
Ms Ashleigh Dunn
Mr Paul Walker

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/Mi/3803, concerning an alleged contravention of the Councillors' Code of Conduct dated December 2021 (the Code) by Councillor Bryan Pottinger (the Respondent).

The ESC was represented at the Hearing by Dr Kirsty Hood, KC. The Respondent was represented by Frances Randle, Solicitor, of Edwards Duthie Shamash.

REFERRAL

Following an investigation into a complaint received on 22 September 2022 about the conduct of the Respondent, the ESC referred a report to the Standards Commission on 2 June 2023, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The substance of the referral was that the Respondent had failed to comply with the provisions of the Code and, in particular, that he had contravened paragraphs 3.1 and 3.3, which are as follows:

Respect and Courtesy

3.1 I will treat everyone with courtesy and respect. This includes in person, in writing, at meetings, when I am online and when I am using social media.

3.3 I will not engage in any conduct that could amount to bullying or harassment (which includes sexual harassment). I accept that such conduct is completely unacceptable and will be considered to be a breach of this Code.

EVIDENCE

Joint Statement of Facts

The Panel noted that a joint statement of facts had been agreed between the ESC and the Respondent's representative. This recorded that it was not in dispute that the Respondent and the Complainer, Councillor Kelly Parry, had a discussion while attending an event held by Midlothian Disabled People's Assembly at a church in Dalkeith on 21 September 2022. Both the Respondent and Complainer had been invited to the event in their roles as elected members.

It was agreed that:

- The Respondent greeted the Complainer at the event by standing up from his seat and saying, "hello there".
- The Respondent said words to the effect that he wanted to arrange a date in the Complainer's diary;
- The Complainer asked the Respondent whether he meant "a date-date".
- The Respondent explained that the 'date' related to a date for a photoshoot to publicise the Council's Fair Tax Policy.
- The Complainer was wearing a red top during the discussion and said to the Respondent "I'll even wear red", or words to that effect, to the photoshoot.

- The Respondent is significantly taller than the Complainer, so his gaze was turned downward to speak to her during the discussion.

The joint statement of facts recorded that the matters that were in dispute were whether:

1. the Respondent said to the Complainer “ah I really like that top” and “maybe you can wear red underwear” or words to that effect; and
2. the Respondent, when looking down at the Complainer during their discussion, also looked at her chest.

Witness Evidence on behalf of the ESC

The ESC’s representative led evidence from three witnesses: the Complainer, Councillor Kelly Parry; Councillor Connor McManus; and Councillor Colin Cassidy.

The Complainer: The Complainer advised that she was first elected as a councillor in 2015, that she represented the SNP and had been Council Leader since June 2022. The Complainer advised that she had known the Respondent since her days as a student activist as they had both attended some of the same protests and rallies.

The Complainer advised that she had arrived at the event on 21 September 2022 just before the speeches started. The Complainer stated that the event was busy with lots of stalls and attendees. While the Complainer accepted that the number of conversations had created a “general din”, she said she had been able to engage in, and hear clearly, any one-to-one conversations.

The Complainer advised that she had approached the Respondent to say hello, and that they had both been standing during the subsequent conversation. The Complainer stated that the Respondent had advised that he had been looking for her, as he wanted to go on a date. The Complainer stated that the Respondent repeated that he wanted to go on a date. The Complainer advised that she found this odd and, as no context had been given, she had asked him what he meant. The Complainer stated that the Respondent clarified this by saying that he wanted to organise a photoshoot with her to publicise a motion he had put forward on behalf of the Labour and Cooperative Party, that had been approved by the Council, to support the ‘Councils for Fair Tax Declaration’. The Complainer noted the Respondent had referred to her holding a placard with a Fair Tax logo for the photoshoot.

The Complainer advised that after the Respondent mentioned speaking to the Council’s Communications Team about arranging the photoshoot, she had referred to the vibrant red top she was wearing and had said to him, in a “jokey way”, that she could wear it again for the photoshoot. The Complainer explained she had made the comment about her red top as it was the colour adopted by the Labour Party.

The Complainer stated that the Respondent had then said he liked her top and that, while doing so, she “felt he looked at my chest area”. The Complainer advised that the Respondent then proceeded to make a clear comment to the effect that he would really like it if she wore red underwear, either “for me” or “for it” [being the photoshoot]. The Complainer stated that she was “absolutely crystal clear” about what had been said and noted that, as it had been such a strange comment, it was not something she would forget in a hurry.

The Complainer advised that she was taken aback and, as such, had ended the conversation “quite abruptly”, by saying she was going to move on. The Complainer stated that the Respondent’s demeanour was deadpan and that he had not laughed or done anything else that might have suggested he was joking.

The Complainer stated that she had then walked over to the other side of the room to where two of her fellow SNP colleagues were standing. As one had been talking to a stallholder, she had approached the other, Councillor McManus. The Complainer advised that Councillor McManus had asked her what her conversation

with the Respondent had been about and had stated that he had been about to come over to “save her”. The Complainer stated that she had then relayed her conversation with the Respondent to Councillor McManus. The Complainer noted that, after she had done so, various speeches had been made. The Complainer stated that, after the speeches had concluded, she had spotted another colleague, Councillor Cassidy, entering the venue. The Complainer advised that she had engaged in a brief discussion with Councillor Cassidy about her exchange with the Respondent, which included telling Councillor Cassidy she did not know what to do about it, before exiting the event as quickly as she could.

The Complainer advised that her conversation with the Respondent had left her feeling shocked, alarmed and “recoiling inside”. As such, she had arranged a meeting with the Council’s Monitoring Officer and Chief Executive later that day to advise about what had happened. The Complainer noted that, following her meeting with the Monitoring Officer and Chief Executive, the next morning, she had decided to speak to the Labour Group leader, Councillor Milligan. The Complainer explained she had done so as she was unsure as to whether she wished to make a formal complaint to the ESC, given the potential consequences of doing so on the Council as a whole. The Complainer advised that she had been encouraged by Councillor Milligan’s response, as he had confirmed the matter would be investigated.

The Complainer noted that she had nevertheless felt uncomfortable as she was often in her office, located just outside the Council Chambers, by herself. As such, she had spoken to the Council’s Head of Human Resources, who had undertaken a risk assessment and identified and put in place measures to ensure both the Complainer and Respondent could continue their work as councillors, without the possibility of them being in a situation where they were alone together.

In response to cross-examination, the Complainer accepted that by the time she had her discussion with Councillor Milligan on 22 September 2022 about the incident, she had already submitted a formal complaint to the ESC. The Complainer stated that she had advised Councillor Milligan that she had done so. The Complainer was questioned as to why she had not waited for the Labour Party’s investigation or attempted to resolve the matter through the Council’s internal complaint process. In response, the Complainer advised that, having considered the incident the evening before, and having slept on it, she had decided that she had a responsibility, as an experienced councillor and Council Leader, to take action against sexism and misogyny. As such, she had concluded that making a formal complaint to the ESC was the right approach.

When asked whether she knew that the Respondent had voluntarily handed in the pass that allowed him access to the Council building, the Complainer advised she did, but could not recall whether she was aware of this at the time she had asked for the risk assessment to be undertaken. The Complainer confirmed that she had asked the ESC to consider requesting that the Standards Commission impose an interim suspension on the Respondent while the formal investigation into her complaint was ongoing.

The Complainer stated that while she had said to the Respondent, during their conversation, that she would wear a red top during the photoshoot, she had not said she would do so “for you”. The Complainer advised she had offered to wear a red top as she was trying to convey that the initiative had cross-party support.

The Complainer accepted that she had not stated, in an email to the Monitoring Officer and Chief Executive Officer outlining what had been said during the conversation, that the Respondent had stated he liked her top. The Complainer noted that she may simply have missed this out and that she was trying to be as factual and objective as possible when recounting the exchange. The Complainer stated that she was sure there was no possibility that she had misheard the Respondent during their conversation.

In response to a question from the Panel, the Complainer advised that she had been wearing a blazer over her red top.

Councillor Connor McManus: Councillor McManus advised that he was elected as a councillor in May 2022 and that he represented the SNP. Councillor McManus advised that while he had not heard the discussion between the Complainer and Respondent, he had observed that they were in conversation when he was walking across the room. Councillor McManus stated that he noticed that the Respondent was standing close to the Complainer and that she appeared to be somewhat uncomfortable, which was why he had then stopped to watch for the remaining 20-30 seconds that they were in conversation. Councillor McManus stated that his perception, from the Complainer's "closed" body language, was that she did not want to continue with the discussion. Councillor McManus observed that there was a significant height difference between the Complainer and Respondent and stated that it appeared the Respondent was standing too close and was arching over her.

Councillor McManus stated that when the conversation ended, the Respondent had come straight across to him and that she looked "visibly upset", which was unusual. Councillor McManus advised that he had said to the Complainer words to the effect that he had wanted to save her from the conversation with the Respondent. Councillor McManus stated that the Complainer had advised him that after she had made a joke to the Respondent about wearing Labour red to the photoshoot, the Respondent had stated that he "would like to see her red bra and pants".

In response to cross-examination, Councillor McManus advised that he worked for the Complainer's (now) husband (an MSP) and that, as the Council Leader, the Complainer was in effect his boss.

Councillor McManus confirmed that the Complainer had told him the Respondent had mentioned her wearing a "red bra and pants", as opposed to "red underwear".

In response to a question from the Panel, Councillor McManus advised that when he observed the conversation, he could initially see both the Complainer and Respondent as they were side-on, but as he was moving, he had then only been able to see the Respondent over the Complainer's shoulder. Councillor McManus advised that he had observed that the Complainer was not smiling and looked serious and that she had her arms "closed".

On re-examination by Dr Hood, Councillor McManus indicated that the Complainer could either have said "red underwear" or "red bra and pants".

Councillor Colin Cassidy: Councillor Cassidy advised that he had been a councillor for some six years and that he represented the SNP.

Councillor Cassidy advised that he had not heard or seen the conversation between the Complainer and Respondent as he had arrived late to the event. Councillor Cassidy stated that he had been standing with some SNP colleagues when the Complainer came over to him. Councillor Cassidy stated that the Complainer "seemed to be a cross between angry and shocked", which was unusual as she was not normally as visibly emotional. Councillor Cassidy advised that when he had asked the Complainer how things were going, she had replied "not good" and had explained that the Respondent had approached her and advised that he needed a date. Councillor Cassidy stated that the Complainer said that when she told the Respondent she was engaged to be married, he had explained the 'date' was a photoshoot. Councillor Cassidy stated that the Complainer advised that when she had then made a joke about wearing a red top, the Respondent had replied asking her to wear her red underwear too. Councillor Cassidy advised that the Complainer had told him she had then ended the conversation and walked away from the Respondent as soon as she could.

In response to cross-examination, Councillor Cassidy advised that while he was quite angry and upset as a result of what he had been told by the Complainer, he had decided it was not appropriate for him to approach the Respondent when he felt like that. Councillor Cassidy confirmed that he was aware that the Council had

an internal complaints procedure but advised he had not suggested local resolution to the Complainer as she had indicated she intended to refer the matter to the ESC.

Submissions made by the ESC's Representative

The ESC's representative noted that there was a clear disagreement between the Complainer and Respondent as to how he had been standing and whether he looked at her chest during their conversation, and whether he made remarks to the effect that he liked her top and wanted her to wear red underwear to the photoshoot.

The ESC's representative contended that the Panel should accept the Complainer's evidence as reliable and credible. The ESC's representative argued that the Complainer's testimony was supported or strengthened by the evidence given by Councillors McManus and Cassidy as to how she had recounted the conversation to them at the event. The ESC's representative noted that both Councillors McManus and Cassidy had testified that the Complainer had appeared visibly distressed after the conversation and contended that this lent credence to her version of events. The ESC's representative further argued that the Complainer's evidence was supported by the account of the conversation she had provided in writing to the Monitoring Officer and Chief Executive, and verbally to Councillor Milligan, the following day.

The ESC's representative noted that the Panel was due to hear from a member of the public, Witness A, who contended she had overheard the conversation between the Complainer and Respondent. The ESC's representative argued that Witness A should not be viewed as entirely independent as it was clear from her statements that she had a form of friendship with the Respondent and saw herself as being supportive of him. The ESC's representative further argued that the Panel should not place too much reliance on Witness A's testimony as there had been an element of change in the accounts of the conversation she had provided to the Labour Party (as part of its investigation), the ESC's office (during his investigation), and the Respondent's representative.

The ESC's representative noted that the Respondent's representative had submitted a statement she had taken from another member of the public, Witness B, who had been sitting at the same table as the Respondent and Witness A when the Complainer had approached the Respondent. The ESC's representative noted that Witness B confirmed in this statement that she had not heard the conversation between the Complainer and Respondent but had observed that it appeared friendly. The ESC's representative contended that the Panel should not place much reliance on this observation either, given it appeared to be at odds with Councillor McManus' and Witness A's recollections.

The ESC's representative argued that given the general agreement between the Complainer and Respondent about the content of significant parts of their conversation, the event had not been so noisy that it was not possible to hear what was being said in any one-to-one conversation. The ESC's representative accepted that the Respondent was significantly taller than the Complainer, which would have necessitated a downward gaze when he was engaged in the conversation with her. The ESC's representative argued, nevertheless, that the Panel could be satisfied, from the evidence led and on the balance of probabilities, that the Respondent had looked towards the Complainer's chest and made a remark about her wearing red underwear, and that his conduct in doing so had made her feel uncomfortable and distressed.

The ESC's representative suggested that the Panel should not consider, or take into account, any potential motive the Complainer may have had in making her formal complaint to the ESC, unless it could relate to the credibility and reliability of the evidence of any of the witnesses.

The ESC's representative noted that the crux of the matter was whether the Respondent sexually harassed and intimidated the Complainer by making unwanted comments during their discussion. The ESC's representative suggested that if the Panel was satisfied that the Respondent had engaged in the behaviour

as alleged, it would be required to consider whether his conduct amounted to a breach of the courtesy and respect, and bullying and harassment provisions outlined, respectively at paragraphs 3.1 and 3.3 of the Code. The ESC's representative drew the Panel's attention to the Standards Commission's Guidance on the Code, which noted that even if behaviour in question was unintentional, it can still be classed as bullying and / or harassment and that it was the impact of the behaviour, not the intent, that was the key.

The ESC's representative further drew the Panel's attention to the Standards Commission's Advice Note for Councillors on Bullying and Harassment, which stated that harassment:

- was any unwelcome behaviour or conduct that made someone feel offended, humiliated, intimidated, frightened and / or uncomfortable;
- could occur as an isolated incident or as a course of persistent behaviour; and
- had no legitimate workplace purpose.

The ESC's representative noted that the Advice Note listed examples of harassment, which included making inappropriate remarks, lewd comments, misogynistic behaviour, and offensive jokes. The ESC's representative noted that not only had the Complainer considered the Respondent's alleged remark about her underwear to be a lewd remark that was inappropriate, offensive and sexually suggestive, but that it would be perceived objectively as being of such a nature.

The ESC's representative argued, therefore, that in engaging in the conduct as alleged, the Respondent had harassed the Complainer, in breach of paragraph 3.3 of the Code. The ESC's representative further argued that it was inherently discourteous and disrespectful to harass a colleague and contended, therefore, that the Respondent had also contravened paragraph 3.1 of the Code.

The ESC's representative noted that if the Panel found, on the face of it, that the Respondent had breached the Code, it would be required to consider his rights to freedom of expression under Article 10 of the European Convention on Human Rights. The ESC's representative argued that the enhanced protection afforded to politicians when discussing politics, or matters of public interest or concern, would not apply. This was because while the conversation between the Complainer and Respondent had concerned a council related photoshoot, any comments about the Complainer's top and underwear were of a personal and private nature. The ESC's representative contended, in any event, that an interference with the Respondent's Article 10 rights that a finding of a breach of the Code and the subsequent imposition of a sanction that it would entail, would be justified in order to protect the right of the Complainer not to be harassed in a workplace setting and in order to maintain standards.

Witness Evidence on behalf of the Respondent

The Respondent's representative led evidence from four witnesses: the Respondent, Councillor Bryan Pottinger; Witness A, a member of the public; Councillor Derek Milligan; and Councillor William McEwan.

The Respondent (Councillor Pottinger): The Respondent advised that, in total, he had been a councillor for some 15 years and, during that time, had held various offices, including being Chair of the Council's first Equal Opportunities Committee. The Respondent advised that he had known the Complainer for over 20 years as they had been involved in a few campaigns together, including one relating to the automatic early release of prisoners. The Respondent stated that the Complainer was aware that he had been happily married for a long time, having met his wife on various occasions, including at the counts on election nights. The Respondent stated he had not ever previously been the subject of a complaint about inappropriate conduct.

The Respondent advised that, after the motion he had put forward on behalf of the Labour and Cooperative Party to support the 'Councils for Fair Tax Declaration' had been approved on 23 August 2022, he had approached the Council's Communications Team to discuss how best to promote the initiative. The Respondent noted that the advice he had received was that a photoshoot should be arranged to display the

Fair Tax Declaration, along with Midlothian Council's logo, and that he should ask the Council Leader (the Complainer) to be involved.

The Respondent advised that when he arrived at the Midlothian Disabled People's Assembly event the following day, he had spoken to various attendees and visited several stalls before taking a seat at a table towards the far end of the room which was already occupied by three members of the public he knew, including Witnesses A and B. The Respondent advised that when he saw the Complainer approach the table, he had stood up with the intention of asking her whether she was willing to be involved in the photoshoot. The Respondent stated that the Complainer was "smiley", and her demeanour was "friendly and confident".

The Respondent advised that after he had told the Complainer he wanted to get a date in the diary, she had asked whether he meant "a date-date". The Respondent stated that he had explained he meant a date for a photoshoot to promote the Fair Tax Declaration. The Respondent stated that when the Complainer agreed, they had then engaged in a brief discussion about where and when the photoshoot could take place. The Respondent stated that the Complainer had advised that while she was due to attend an online meeting on the proposed day, she had noted she could leave this temporarily in order to join the photoshoot.

The Respondent stated that the Complainer had then leaned slightly towards him, had indicated her top and had said she would even wear red to the photoshoot "for him". The Respondent advised he glanced at the Complainer's top (and in doing so noted she was wearing a red top with a black jacket), before telling her he did not care what colour she wore. The Respondent stated he had said this, as he considered the Complainer's remark about the colour of top she was going to wear to be "silly and frivolous". The Respondent stated that as the conversation then ended, he had re-taken his seat at the table next to Witness A.

The Respondent stated that he had "certainly not" mentioned the Complainer's underwear, bra or pants.

The Respondent advised that he had no concerns whatsoever about the conversation, which was why he had been "shocked and stunned" to be told by Councillor Milligan the next day that the Complainer had made a complaint. The Respondent advised that he had no idea what the complaint could be about and, when advised accordingly by Councillor Milligan, had immediately noted that as three members of the public had been sitting at the table next to where the conversation had taken place, they should be approached to see if they had overheard it.

The Respondent noted that he had also told Councillor Milligan that he wanted to speak to the Complainer to try to clear up the matter, but that Councillor Milligan had advised that was not a good idea. The Respondent stated that he had later volunteered to hand in his pass to access the council building and had agreed to be escorted into meetings by council officers, while the investigation into the Complainer's concerns was ongoing.

The Respondent advised that he had been deeply affected and insulted by the accusations and could not understand why the Complainer had made them. The Respondent noted that it had caused him a great deal of stress and anxiety, with his sleep and health being detrimentally affected.

In response to cross-examination, the Respondent confirmed that he was "absolutely sure" that he had not mentioned the Complainer's underwear at any stage, even in jest or banter as part of a jokey conversation and that he would never do that.

The Respondent accepted that, in a contemporaneous written account of the conversation he had provided to Councillor Milligan he had referred to himself as having greeted the Complainer by saying "hi", as opposed

to “hello there”. The Respondent advised, however, that the account was intended as a summary of the discussion, rather than a verbatim account.

In response to a question about why Witness A had stated to the ESC that he looked visibly embarrassed when he had sat down at the table, following the conversation with the Complainer, the Respondent stated that, with hindsight, he supposed it was because the Complainer had made a personal comment about wearing red for him.

In response to a question from the Panel, the Respondent confirmed that he was unaware of any concern or distress on the part of the Complainer, and that her demeanour did not change during their conversation. The Respondent accepted that he quite often spoke quickly and noted it was possible he had mentioned something, during the conversation, about it not making any difference what the Complainer wore as the underlying reason for the photoshoot was the fair tax initiative.

Witness A: Witness A, a member of the public, advised that she knew the Respondent as he had visited her home to introduce himself as an elected member of her ward. Witness A advised that it had transpired that the Respondent also knew some of her family as he had attended school with some of her brothers.

Witness A advised that she had been at the event on 21 September 2022 as she was a member of the church where it was held and was also involved in groups for the elderly. Witness A stated that when she arrived at the event, she had met a friend and they had sat down together at a table before another elderly lady, who was profoundly deaf, and the Respondent had then joined them.

Witness A advised that when he saw the Complainer approach, the Respondent stated that it was someone he needed to talk to and had stood up. Witness A stated that the Complainer had been standing so close to her chair, she could have easily reached out and touched her. Witness A further stated that the Respondent was standing opposite the Complainer, with his hand on the back of his chair to steady himself. Witness A advised that the Respondent was facing in her direction, and she heard him say to the Complainer that he needed to make a date with her. Witness A said that the Respondent looked somewhat flustered and embarrassed when the Complainer asked whether he meant ‘a date-date’ and that he had proceeded to explain it was a date for a photoshoot.

Witness A stated that the Complainer and Respondent had then spent a few moments discussing arrangements for the photoshoot, before the Complainer said, “I’ll wear red for you”. Witness A advised that the Respondent had replied that it did not matter what colour the Complainer wore as the photoshoot was not being held for the Labour Party. Witness A stated that the Complainer had then turned and walked away to the other side of the room and that she appeared “chirpy and happy” when doing so.

Witness A advised that the Respondent did not say anything further and had not made any mention of the Complainer’s underwear. Witness A stated that the Respondent had then sat back down. Witness A advised that she considered he had looked embarrassed and thought that was because of the Complainer’s mention of ‘a date-date’.

Witness A advised that she was entirely sure that she had heard the full conversation between the Complainer and Respondent.

Witness A stated that the Respondent had visited her the following day [22 September 2022] to advise her a complaint had been made. Witness A advised that she was giving evidence because she felt the complaint was wrong and not because she simply wanted to support the Respondent. Witness A advised that if had she heard the Respondent make any comment about the Complainer’s underwear, she would not be giving

evidence and would have stood up at the event and challenged or reprimanded him at the time for being inappropriate.

In response to cross-examination, Witness A confirmed that she had been a Labour Party councillor previously in another part of the country. Witness A advised that she had been to school with the Respondent's wife's mother, albeit she did not know the Respondent's wife at the time of the events in question.

Witness A confirmed that she had been unable to see the Complainer's face during her exchange with the Respondent but stated she could clearly see the Respondent and had heard the full conversation between them.

In response to a question about why she had told the ESC's investigating officer that she recalled the Complainer mentioning her underwear, Witness A confirmed that while she had been sent a copy of the statement taken by the investigating officer, she was surprised to hear she had been recorded as having said that. Witness A accepted that the statement she had given to the councillor who had investigated the matter on behalf of the Labour Party on 24 September 2022 recorded that she had stated that she had "maybe misheard the odd word" given the conversation had been quite long. Witness A explained, however, that she was confident she had heard all the conversation after the Complainer had mentioned 'a date-date', as she had thought that was odd and had started listening more closely.

Councillor Derek Milligan: Councillor Milligan advised that he was the leader of the Labour Group. Councillor Milligan explained that the Respondent was both a member of the Labour Party and the Labour and Co-operative Party.

Councillor Milligan advised that he had not been at the Midlothian Disabled People's Assembly event on 21 September 2022 and had first heard about the complaint when the Council's Chief Executive contacted him the following day and advised that the Complainer intended to contact him to tell him what she alleged had happened. Councillor Milligan stated that he had then telephoned the Respondent to ask him whether he was aware that a complaint had been made. Councillor Milligan stated that the Respondent was unaware of any complaint, was shocked and bemused, and indicated he did not understand what it could be about. Councillor Milligan advised that the Respondent had asked whether he should contact the Complainer, but that he [Councillor Milligan] had told him not to.

Councillor Milligan stated that he had then spoken to the Complainer the next day and that she had outlined her complaint. Councillor Milligan explained that he had asked the Complainer to provide him with a written verbatim account of her conversation with the Respondent. Councillor Milligan stated that when he then contacted him, the Respondent had entirely denied the accusation and expressed unhappiness that it had been made. Councillor Milligan advised that he had also asked the Respondent to provide him with a written verbatim account of the exchange.

Councillor Milligan stated that the Respondent had advised that the three members of the public who had been sitting at the table with him (including Witnesses A and B) may have heard the conversation between him and the Respondent. Councillor Milligan advised that he had then asked another Labour Party councillor to try to contact the three potential witnesses. Councillor Milligan noted that the other councillor had interviewed both Witness A and B. Witness A had corroborated the respondent's version of events, while Witness B advised she had not heard the conversation. Councillor Milligan advised that he had then interviewed the Respondent and, despite him having not given the Respondent "an easy time", the Respondent was steadfast in his denial that he had not made the comment about the Complainer's underwear, as alleged. Councillor Milligan advised that the Respondent had volunteered to work from home and to hand in his building pass while the formal complaint process was ongoing.

Councillor William McEwan: Councillor McEwan advised that he had been a councillor since May 2022 and that he represented the Labour Party. Councillor McEwan advised that he shared an office space with the Respondent. Councillor McEwan advised that as this space was between the Labour Group's offices, anyone wanting to see Councillor Milligan had to walk through it to get to his office. Councillor McEwan stated that, as Council leader, the Complainer often walked through the space on her way to see Councillor Milligan, the Labour Group leader. Councillor McEwan stated that the Complainer was always friendly, would make small talk with him and the Respondent and that she referred to the Respondent by his first name. Councillor McEwan stated that he had never heard the Respondent make inappropriate jokes about women or sexual innuendos.

Submissions made by the Respondent's Representative

The Respondent's representative advised that the Respondent was a devoted husband and local councillor, who was very involved in work with the elderly and disabled in his community. The Respondent's representative advised that the Respondent had been pleased that his motion had passed the previous day and that he had been keen to publicise the fair tax initiative. The Respondent's representative advised that, as such, he had agreed with the Council's Communications Team that it would be a good idea to ask the Complainer to attend the photoshoot and hold the placard advertising it, along with the Council's logo. The Respondent's representative indicated that the Respondent had, therefore, been pleased to see the Complainer when she had approached him at the event on 21 September 2022.

The Respondent's representative contended that it was when the Complainer stated she would wear her red top to the photo shoot, it was human nature for the Respondent to have glanced down at the top momentarily. The Respondent's representative noted that the Complainer thought she had heard the Respondent mention her underwear, but confirmed he categorically denied having done so. The Respondent's representative noted that the acoustics in the church where the event was held may have made it difficult to hear and that it was possible the Complainer thought she had heard the Respondent say 'underwear' when he had not in fact done so.

The Respondent's representative contended that the Respondent had been consistent about what had been said during the conversation and that his version of events was corroborated by the only other person who had heard the exchange, being Witness A. The Respondent's representative noted that Witness B had seen the conversation and advised she considered it to be a friendly exchange. The Respondent's representative advised that the Respondent had been dumbfounded when Councillor Milligan told him about the complaint and contended that this reaction also supported his version of events.

The Respondent's representative noted that the Respondent had advised Councillor Milligan that the three members of the public who had been sitting at the table with him may have heard the conversation and suggested that they should be interviewed. The Respondent's representative argued that it was unlikely that the Respondent would have made such a suggestion if he had made the remark about the Complainer's underwear, as alleged, or had been in any way worried about his conduct during their exchange.

The Respondent's representative noted that neither Councillor McManus nor Councillor Cassidy had heard the conversation between the Complainer and the Respondent. The Respondent's representative noted that Councillors McManus and Cassidy had given different accounts of what the Complainer had told them about her conversation with the Respondent with, on the one hand, Councillor McManus being clear that she had said the Respondent had referred explicitly to her 'bra and pants', while Councillor Cassidy, on the other hand, recalled the Complainer stating that the Respondent had used the term 'underwear'.

The Respondent's representative argued that while there was no direct evidence to support the Complainer's contention that the Respondent had referred to her underwear, Witness A, being the only person who had

overheard the conversation, was clear in her testimony before the Panel that he had not done so. The Respondent's representative reminded the Panel that Witness A had stated she would have challenged the Respondent at the time if she had heard him making any comment to that effect.

The Respondent's representative advised that she was not suggesting that the Complainer was lying or that there was any doubt she had been upset. The Respondent's representative noted, however, that the Respondent had a tendency to talk quickly, with his words "tumbling over each other". The Respondent's representative argued that the Respondent's diction sometimes made him difficult to understand and, therefore, she considered it was a possibility that the Complainer had simply misheard something he had said.

DECISION

The Hearing Panel considered carefully the witness evidence and the submissions made both in writing and orally at the Hearing. It concluded that:

1. The Councillors' Code of Conduct applied to the Respondent, Councillor Pottinger at the time of the events that were the subject of the complaint.
2. The Respondent had not breached the Code.

Reasons for Decision

The Panel noted that it was not in dispute that the Respondent was acting, or could be perceived to be acting, as a councillor at the event on 21 September 2022 and, as such, the Code applied to him during the exchange that was the subject of the complaint.

The Panel noted that standard of proof to be applied was the balance of probabilities, meaning that it was required to consider whether it was satisfied, from the evidence and submissions before it, that a breach of the Code was more likely than not to have occurred. The Panel also noted that this standard of proof applied regardless of the seriousness of the allegation before it.

The Panel noted that conflicting accounts of the conversation had been provided, both to the ESC during his investigation and at the Hearing. The Panel noted that there was no dispute that the Respondent mentioned, during the conversation, that he wanted to arrange a date with the Complainer, but that he had quickly clarified he had meant an upcoming photoshoot, as opposed to any romantic or otherwise non-platonic date. The Panel noted that there was also no dispute that the Complainer mentioned that she would wear a red top to the photoshoot, being her understanding of the Respondent's political party's colour. The Panel noted, however, that while the Complainer contended that the Respondent proceeded to look at her chest and suggested that she also wore red underwear, the Respondent categorically denied having done so.

The Panel was not satisfied that there was sufficient evidence for it to conclude, on balance, that the Respondent had done anything other than glance at the Complainer's chest while speaking to her. The Panel agreed that it would be a natural reaction for an individual to glance at someone else's top, if that top had been mentioned in conversation. The Panel noted that there was a dispute about whether the Respondent had advised the Complainer that he liked the top in question. The Panel agreed, nevertheless, that it would not be unusual for an individual to compliment an item of clothing if that item had just been mentioned and that, in the circumstances, there would be nothing inherently discourteous or disrespectful about doing so. As such, the Panel concluded that these aspects of the complaint should not be upheld.

In attempting to determine whether the alleged comment about the Complainer's underwear had been made, the Panel noted that there were three possible scenarios, being that:

1. the Respondent had made the comment about the Complainer's underwear, as alleged;
2. the Respondent had not made the comment; and
3. the Respondent had not made the comment, but that the Complainer had misheard him and was convinced he had.

The Panel found both the Complainer and Respondent to be credible and reliable witnesses, who had both been consistent about their versions of events since the incident. As such, the Panel reviewed carefully the evidence provided by other witnesses to determine if these could help it establish whether either scenario one or two was more likely than not to have occurred.

The Panel noted that all the witnesses that appeared before it had some form of existing connection, at the time of the events in question, with either the Complainer or Respondent by virtue of their party membership, their employment and / or friendships with their family members. While the Panel accepted that this did not necessarily make their evidence any less credible or reliable, it noted that none of the witnesses that had provided evidence in support of either the Complainer's or Respondent's positions could be described as entirely independent.

The Panel noted that various witnesses had testified to the Complainer being upset after the conversation. While the Panel agreed this served to support her version of events, it noted that this was not in itself conclusive evidence that any comment about her underwear had been made. The Panel noted that it was likely that the Complainer would have been upset if she had misheard what had been said and had concluded erroneously that reference had been made to her wearing red underwear. While it considered it unlikely, given its acceptance of her credibility as a witness, the Panel was also obliged to recognise that the Complainer could have feigned being upset, had she been attempting to create a scenario with the aim of making a vexatious complaint.

The Panel noted that Councillors McManus and Cassidy had testified that the Complainer had given them differing accounts in terms of whether the Respondent had allegedly referred to the Complainer's 'underwear' or her 'bra and pants'. The Panel was unable to conclude, however, that this was of any real significance, given the terms were, to an extent, largely interchangeable. The Panel noted, in this regard, that there was a clear possibility that the Complainer had simply paraphrased, in two different ways, what she thought had been said.

The Panel noted that Councillor McManus also testified that the Complainer looked uncomfortable during her conversation with the Respondent. The Panel again considered that even if that was the case, it did not necessarily mean any comment about the Complainer's underwear had been made. The Panel noted that the Complainer could well have felt uncomfortable following the apparent misunderstanding about whether the Respondent was asking her on a 'date-date' or, if as the Respondent alleged, she had made a joke about wearing his party's colours that had fallen flat.

The Panel had no reason to doubt the testimony of Councillor McEwan to the effect that the Complainer and Respondent had a relatively friendly relationship, and that the Respondent was not someone who made inappropriate jokes about women or sexual innuendo. The Panel agreed, however, that the fact that the Respondent may have been on relatively friendly terms with the Complainer did not mean he did not make the comment as alleged. On the contrary, the Panel noted that it was possible that the existence of a more informal relationship with the Complainer may have meant the Respondent felt comfortable in making what he thought was a joke or even some form of sexual advance. Similarly, the Panel noted that the fact that Councillor McEwan had never previously witnessed the Respondent engaging in a certain type of behaviour did not necessarily mean that he had not done so either before, or on, the occasion in question.

The Panel noted that Councillor Milligan had testified to the Respondent being shocked and bemused when advised of the complaint. The Panel agreed this served to support the Respondent's version of events as it would have expected him to have been anticipating some form of repercussion, had he made the alleged comment and witnessed the Complainer being upset or annoyed. The Panel noted, however, that this was not in itself conclusive evidence that any comment about the Complainer's underwear had not been made. While it considered it unlikely, given its acceptance of his credibility as a witness, the Panel was also obliged to recognise that the Respondent could have feigned being surprised or confused had he decided he would deny categorically having made the comment.

The Panel noted that Witness A had testified that the Respondent looked embarrassed when he had sat back down at the table following his conversation with the Complainer. The Panel noted that while this could be because he was ashamed of making the alleged comment about the Complainer's underwear, it could equally have been because he felt uncomfortable about the apparent misunderstanding about whether the Respondent was asking her on a 'date-date' and /or the Complainer's reference to what she might wear to the photoshoot (as Witness A had assumed).

The Panel noted that Witness A was the only individual who claimed to have overheard the conversation between the Complainer and Respondent. The Panel noted that Witness A had been clear in her testimony, on oath before the Panel, and in the accounts she provided to the Labour Party and the ESC, that the Respondent had not mentioned the Complainer's underwear.

The Panel noted, however, that while Witness A had also testified at the Hearing that no mention of underwear had been made by the Complainer during the conversation, she had been recorded, by the ESC's investigating officer as having stated that she recalled the Complainer mentioning her underwear. The Panel noted that Witness A had been sent a copy of the statement taken by the investigating officer and, therefore, would have had the opportunity to correct it had she considered the officer had recorded something incorrectly. The Panel accepted, nevertheless, that Witness A testified that she had been surprised to hear she had been recorded as having said that the Complainer had mentioned her underwear. The Panel noted, therefore, that it could not rule out the possibility that Witness A had not checked her statement properly. The Panel further noted that Witness A made no mention of the Complainer having referred to her underwear in the interview conducted by the Labour Party's representative on 24 September 2022 (which was recorded and transcribed). The Panel noted that there was no evidence to suggest that the ESC had asked Witness A about this apparent discrepancy. As such, the Panel agreed it could not rule out the possibility that, by the time the ESC's investigating officer interviewed Witness A in February 2023, her recollection of events had been tainted by her knowledge of the complaint or any rumours about it.

Having heard from the Respondent, the Panel accepted his representative's argument that he spoke quickly and, on occasion, was difficult to understand. While the Panel accepted the Complainer's position was that she was sure she had heard the whole conversation clearly, it was unable to rule out the possibility that she had misheard what was said.

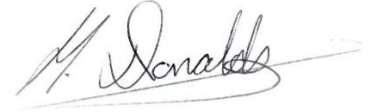
The Panel agreed that as:

- it could not rule out the possibility that the Complainer had misheard what had been said;
- the only witness who had overheard the conversation between the Complainer and Respondent had been clear in her testimony, on oath before the Panel, and at all other times that the Respondent had not mentioned the Complainer's underwear; and
- it was unable to choose between the Complainer's and Respondent's versions of events,

it was unable to conclude, on balance, that it was more likely than not that the Respondent had made the comment as alleged.

The Panel therefore was unable to conclude overall and on the balance of probabilities that the Respondent had breached the Code.

Date: 29 August 2023



**Helen Donaldson
Chair of the Hearing Panel**