

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held at online, on Wednesday 17 January 2024.

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

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/AC/3812, concerning an alleged contravention of the Councillors' Code of Conduct (the Code) by Councillor M Tauqeer Malik (the Respondent).

The ESC was represented by Ms Angela Glen, Senior Investigating Officer. The Respondent was represented by Mrs Frances Randle, Solicitor, of Edwards, Duthie, Shamash.

Referral

Following an investigation into a complaint received on 16 October 2022 about the conduct of the Respondent, the ESC referred a report to the Standards Commission on 26 September 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 paragraph 3.1, which is as follows:

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.

The ESC had also considered whether there had been any contravention by the Respondent of paragraphs 3.3 and 3.11 of the Code, which are as follows:

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.

3.11: I will respect and comply with rulings from the chair or convener during meetings of the Council, its committees or sub-committees.

Evidence Presented at the Hearing

Submissions made by the ESC's Representative

The ESC's representative advised that the Respondent was first elected in May 2021 and was subsequently re-elected twice. The ESC's representative advised that the Respondent had been the Convener of the Council's Pension Committee until the local government election in May 2022, when he was succeeded by the Complainer (a member of the Council's Administration). After that election, he remained a member of the Pension Committee until October 2022.

The ESC's representative advised that, until his term of office expired in September 2022, the Respondent had also served on the Executive Committee of the Local Authority Pension Fund Forum (LAPFF), (being a UK wide voluntary association of public sector pension funds).

The ESC's representative noted that the following matters were not in dispute, and were found to have been established during the investigation:

- On 10 August 2022, an email was circulated seeking nominations to LAPFF Executive Committee. The email noted that the nomination form had to be signed by the Chair of the nominee's local authority Pensions Committee.
- A third-party councillor, Councillor A, sent the Complainer an email on 11 August 2022 advising that he wished to nominate the Respondent for a further term.
- The Complainer replied by email on 15 August 2022 advising that "while we remain committed to LAPFF, we don't think it would be appropriate to nominate Councillor Malik for another term".
- The North-East Scotland Pension Fund (NESPF), which was a member of the LAPFF, sent the Respondent an email on 15 August 2022 advising on the process for getting his nomination form signed in light of Councillor A's request that he be nominated.
- On 17 August 2022, the NESPF sent the Respondent a further email, asking whether his nomination form had been passed to the Complainer for signature
- Councillor A sent the Complainer an email on 18 August 2022 asking him to reconsider nominating the Respondent. Councillor A noted that the Respondent was important to the LAPFF "as a Scottish representative and the only ethnic minority member of the leadership".
- The Complainer sent the Respondent an email on 22 August 2022 advising that "we have decided not to make any nominations to the LAPFF Executive, but to continue to engage with the LAPFF at officer level".
- The Respondent telephoned the Complainer in September 2022 and left a voicemail asking him to return the call. It was not in dispute that the Respondent did not mention the LAPFF in the voicemail and that the Complainer did not return the call. The Complainer advised the ESC's Investigator that it had slipped his mind to do so.
- The Respondent attended a LAPFF Executive meeting on 5 October 2022. Other members of the Executive indicated that they were disappointed that he was not being nominated for another term, particularly given he was only ethnic minority member. The Respondent was he said, again urged to seek re-nomination.
- At a Pension Committee meeting later that day (5 October 2022), the Respondent sought to move an urgent motion to note that the Council had been well served by having a member on the LAPFF and to agree to endorse his nomination to its Executive Committee. The Complainer did not accept the matter was urgent so refused to put the motion to the Committee (which he was entitled to do under the Council's Standing Orders). Dissent was recorded from a councillor from the same political party as the Respondent, and two others elected members voiced concern at the Complainer's decision.

The ESC's representative advised that the Respondent was then quoted in an article on a news website, *Aberdeen Live*, published on 14 October 2022, as stating that the Complainer, as Convenor of the Council's Pension Committee, had "showed his prejudice" by refusing to sign the Respondent's nomination to the LAPFF. The Respondent noted this was despite the LAPFF's Executive Committee having confirmed that day that there was a place for him on the Executive Committee as the only ethnic minority member. The Respondent stated that the LAPFF "were desperate for an ethnic minority member to remain on their Executive". The Respondent further stated in the article that the Council's Pension Committee "should lead the way when it comes to equality and diversity rather than allow prejudice and discrimination against councillors like me who represent ethnic minorities."

The ESC's representative explained that the Complainer had submitted the complaint to the ESC about the Respondent's claims, as quoted in the article, on 16 October 2022. The Complainer advised that the Respondent's accusations were both baseless and vexatious. On the following day, the Respondent submitted a complaint to the Council, alleging that it had breached its duty to him under the Equality Act 2010.

The ESC's representative advised that the Council had undertaken an internal investigation into the matter. This concluded that the Complainer's decision not to nominate the Respondent to the LAPFF was made on 15 August 2022, before there had been any mention of ethnic diversity or any suggestion it may have been

a factor. The Council's investigation had found no evidence to suggest the Respondent's ethnicity was a factor in the decision.

The ESC's representative noted that there was no dispute that the Respondent was acting as a councillor and provided his comments to *Aberdeen Live* in that capacity. The ESC's representative noted that this meant the Code applied to the Respondent at the time he supplied the comments in question. The ESC's representative further noted that there was also no dispute that the article reflected accurately the Respondent's statements and, therefore, the factual basis of the complaint had been established.

The ESC's representative contended that the Respondent's comments in the article were disrespectful as they suggested the Complainer was prejudiced against ethnic minorities. The ESC's representative noted that, given the Complainer is a politician, such a suggestion could alienate him from a portion of the electorate. The ESC's representative advised that, following investigation, the ESC had not found any evidence to support the contention that the Complainer had in fact been prejudiced when making the decision not to nominate the Respondent, or indeed anyone else, to the LAPFF. The Commissioner had found that the Respondent's ethnicity played no part in the Complainer's decision not to nominate him to the LAPFF. The ESC's representative noted that the first mention of ethnic diversity was made by Councillor A, in his email of 18 August 2022. This was after the decision not to nominate any elected member had been made, and after the Complainer had already stated he would not be supporting the Respondent's nomination. The ESC's representative advised that the decision not to nominate the Respondent, or any other elected member, to the LAPFF was made by the Complainer and his senior colleagues in the Liberal Democrat / SNP partnership administration on the basis that they could see no particular benefit to the Council, or the NESPF, from having an elected member from Aberdeen City Council on the LAPFF's Executive Committee, and that they were content that it was sufficient for engagement to take place at officer level.

The ESC's representative noted, however, that the Respondent had not been advised of the reasons for the decision and suggested that, at the time of making his comment to the effect that the Complainer was motivated by prejudice, the Respondent "would not have known otherwise".

The ESC's representative further argued that the comments were discourteous given they had been made publicly, with the intention of 'naming and shaming' the Complainer. The ESC's representative noted that the Respondent had publicly accused the Complainer of being prejudiced against him on the grounds of his ethnicity, when this had not been the case.

The ESC's representative asserted that the Respondent must have known that by stating the Complainer 'showed prejudice' and 'discrimination' would be very likely to invoke a negative reaction from members of the public, who could be upset or offended by the alleged discrimination against individuals from ethnic minority backgrounds. The ESC's representative noted that, instead of raising his concerns clearly and seeking to establish what the Complainer's reasons for rejecting his nomination were, the Respondent chose to contact the press in the first instance. The ESC's representative contended, therefore, that the Respondent's actions in making the comments to the press were deliberate and intended to be discourteous and, therefore, amounted, on the face of it, to a breach of paragraph 3.1 of the Code.

The ESC's representative advised that the Commissioner had also considered whether the Respondent's conduct amounted to a breach of paragraph 3.3 of the Code, which required councillors to refrain from engaging in any behaviour that could constitute bullying and harassment; or paragraph 3.11, which requires councillors to respect and comply with rulings from the Chair or Convener during meetings of Council, its committees or sub-committees.

The ESC's representative advised the Commissioner had concluded the Respondent's conduct was not so serious as to be classified as bullying or harassment, and so considered there was no breach of paragraph 3.3

of the Code. In reaching this view, the Commissioner noted there was no evidence of a course of conduct, such as repeated comments by the Respondent about the Complainer in the press or repeated comments at Council meetings. In addition, the Respondent had resigned from the Committee before the article was published. The ESC's representative further noted that while the Commissioner had concluded that the Respondent's conduct in making the comments were, at least in part, politically motivated; they also stemmed from a genuine belief that his ethnicity was not taken properly into account in the decision not to support nomination.

The ESC's representative noted that the Complainer considered the Respondent failed to accept his decision (as Convener) not to allow the Respondent's urgent motion to be heard by the Pension Committee on 5 October 2022, which resulted in the comments as quoted in the article. The ESC's representative advised, however, that there was no evidence or suggestion that the Respondent disrupted the meeting or was in any other way disrespectful or discourteous during it. As such, the Commissioner had concluded there had not been a breach of paragraph 3.11 of the Code.

The ESC's representative argued, nevertheless, that the Respondent would attract enhanced protection in respect of his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR), as he was commenting on a matter of public interest; namely the nomination to the LAPFF Executive, being a UK wide association of public sector pension funds.

The ESC's representative contended a restriction of the Respondent's enhanced right to freedom of expression, that a finding of a breach of the Code, and the subsequent imposition of a sanction would entail, was not justified. This was because while an individual's right to freedom of expression could be restricted to protect the rights and reputations of others, the Courts have found that a level of criticism properly directed at a fellow politician is wider than that which it is acceptable to direct at members of the public or council officers.

The ESC's representative further argued that the Respondent had been expressing a value judgement about the Complainer's conduct and how he had been treated. The ESC's representative advised that the Commissioner considered the Respondent had made his comments (to the effect that the Complainer's decision was based on prejudice) in good faith and, further, that they had "a factual basis" as the Respondent "genuinely believed that the Complainer acted contrary to the Equality Act 2010". In support of this view, the ESC's representative noted that there was nothing to indicate that, at the time of making the comments to the press, the Respondent was aware that:

- the Complainer had already made the decision in August 2022, in consultation with the Council Administration, not to nominate any councillor to the LAPFF Executive; and
- the reason for this decision was because the Administration considered engagement at an officer level was sufficient.

The ESC's representative contended this meant that the Respondent was unaware that ethnicity was never a factor in the decision. The ESC's representative noted that no written explanation or reason had been provided to the Respondent as to why the Complainer had declined to sign his nomination form. The ESC's representative further noted that the Respondent did not have the benefit of the Council's internal investigation outcomes (which concluded in January 2023). The ESC's representative also observed that, at the time of making his comments to the press, the Respondent knew only that the Complainer had refused his nomination and prevented his urgent motion from being considered, despite being aware that the Respondent and others considered it was important to have an LAPFF executive member from an ethnic minority background.

The ESC's representative further observed that the Courts have held that, in a political context, language (or other forms of expression) which might be offensive, or even aggressive can be tolerated. The ESC's

representative contended that the Respondent's comments were not so bad or shocking as to justify a restriction on his right to freedom of expression, as they were not gratuitous or of a particularly egregious or offensive in nature. The ESC's representative further contended that the comments did not amount to "an overtly personal attack" on the Complainer.

The ESC's representative concluded, therefore, that while the Respondent had, on the face of it, contravened paragraph 3.1, a restriction on his right to freedom of expression that a formal finding of breach Respondent's rights would entail was not justifiable.

In response to a question from the Panel as to why the ESC did not consider that an accusation that the Complainer being motivated by prejudice was a 'personal attack', the ESC's representative argued that the comments in the article had to be taken as a whole. The ESC's representative noted that the Respondent had also referred to the LAPFF's Executive Committee in his comments. The ESC's representative further contended that the Respondent's comments amounted to a statement of what he had considered to be a genuinely held belief, as opposed to being a comment about the Complainer's personal characteristics. The ESC's representative accepted, nevertheless, that the comments had focused sharply on the conduct of the Complainer as an individual.

When questioned by the Panel about whether, given the serious nature of his accusation, it was incumbent on the Respondent to have established the reason for the Complainer's refusal to endorse the nomination or to have, at least, sought to check whether his understanding that it was based on prejudice was correct, the ESC's representative agreed that it was. The ESC's representative argued that the Respondent had attempted to do so by telephoning the Complainer. The ESC's representative noted that the Respondent had left a voicemail, but that his message had not been returned. The ESC's representative advised that the Complainer did not dispute having received such a voicemail; his position was that he had simply forgotten to return the call.

Introductory Submissions by the Respondent's Representative

The Respondent's representative noted that the ESC's report, and the ESC's representative in her submissions, had referred to the Complainer's failure to appoint or nominate the Respondent to the LAPFF. The Respondent's representative advised that this was not quite correct and contended that the Respondent's issue with the Complainer stemmed from the Complainer having failed to allow him to stand for election to the LAPFF.

By way of background, the Respondent's representative advised that the Respondent is one of the longest serving members of Aberdeen City Council, having been elected for the first time in 2012. The Respondent's representative confirmed that the Respondent had been on the Executive Committee of the LAPFF for four years and used this position to provide regular reports to the Council's Pensions Committee. The Respondent's representative advised that the Respondent had not received any complaints about his performance in either role and, indeed, had received very positive feedback.

The Respondent's representative advised that the Respondent was always mindful, in relation to his role on the Pensions Committee, of the duties imposed by the Equalities Act and the obligation on members of the committee to avoid making decisions on party-political grounds.

The Respondent's representative advised that after Councillor A sent the Complainer his email on 11 August 2022, asking that he endorse the Respondent's nomination for a further term on the LAPFF, the Complainer had only sent an one-line response, on 15 August 2022, in which he stated that he did not think it appropriate to nominate the Respondent for a further term. The Respondent's representative noted that the Complainer gave no reason for this decision and did not explain that a decision had been made not to nominate any elected member. The Respondent's representative contended that the Complainer's naming of the

Respondent and reference to him alone in the response indicated that the refusal to nominate the Respondent was personal.

The Respondent's representative highlighted the further email from Councillor A to the Complainer on 18 August 2022, in which more reasons were provided for the proposed nomination of the Respondent and specifically, that the Respondent was important to the LAPFF "as a Scottish representative and as the only ethnic minority member of the leadership". The Respondent's representative noted that the Complainer had not responded to this email.

The Respondent's representative noted that the Complainer had then failed to return the Respondent's telephone call of 21 September 2022, despite the Respondent having left a voicemail asking the Complainer to call him back. The Respondent's representative contended that, when taken together, these incidents had left the Respondent with the clear impression that the Complainer did not want him on the LAPFF, without any consistent explanation for this having been provided.

Witness Evidence

The Respondent's representative led evidence from the Respondent, Councillor Malik:

The Respondent advised that when he learned he would not be allowed to stand for election to the LAPFF, he had been very disappointed, but had accepted the decision.

The Respondent advised that when he then attended a LAPFF Executive Committee meeting on 21 September 2022, he informed other members that he would be standing down from his position on the LAPFF as his nomination had not been signed by the Complainer, as Convener of the local authority pension committee. The Respondent advised that, in response to this news, the Chair of the LAPFF stated that it was a "pity" that the Respondent had not been nominated, and that as the only ethnic minority member of the LAPFF, the lack of nomination was for him "an issue". The Respondent advised that the Chair of the LAPFF asked him to try to persuade the Complainer to endorse the nomination as soon as possible.

The Respondent advised that when the meeting ended, he had called the Complainer to discuss the matter. The Respondent stated he had left a voicemail asking the Complainer to call him back to discuss an "important matter", albeit he had not provided any information as to what this was. The Respondent advised that as he had never previously telephoned the Complainer, so doing so was unusual. The Respondent confirmed that the Respondent had, nevertheless, failed to return the call. The Respondent further confirmed that he had not attempted to contact the Complainer about the matter again, either by telephone or any other means.

The Respondent advised that he attended two online meetings on 5 October 2022, the first being the AGM of the LAPFF, at which the issue of his departure from the Executive Committee was again raised. The Respondent advised it was agreed by other members, during the ensuing discussion, that as he was the sole ethnic minority member, he should attempt to be re-nominated. The Respondent further advised that he received a call from the Executive Committee's Chair a few minutes after the AGM, imploring him to "try his best" to secure a re-nomination.

The Respondent advised he then attended a meeting of the Council's Pensions Committee later that day. The Respondent stated that he had submitted an urgent motion asking the Committee to agree to the endorsement of his nomination. The Respondent advised that despite him explaining that the motion was urgent because he had just come from a LAPFF forum where the importance of his nomination and the benefit of ethnic minority representation had been discussed and stressed, it was not accepted by the Complainer.

In response to cross-examination by the ESC's representative, the Respondent advised that as the Complainer had not been present at the LAPFF meeting on the morning of 5 October 2022, he could not have been aware of what had been discussed at it regarding the Respondent's re-nomination. The Respondent confirmed that at the Council's Pension Committee meeting later that day, he had explained the reasons why he wished to move his urgent motion. The Respondent stated that he believed these had been understood by the Complainer, albeit the Complainer had not responded. The Respondent advised that the Committee Clerk had confirmed he could move the motion and that it was up to the Complainer to decide whether to accept it.

In response to questions from the Hearing Panel as to whether he had considered the potential impact of his accusation on the Complainer and his reputation, the Respondent advised that he did not say that the Complainer had been motivated by prejudice, but rather that he had shown his prejudice. The Respondent advised that if he had thought the Complainer had been motivated by prejudice, he would have made a complaint to the ESC himself.

In response to questions from the Hearing Panel as to what he considered the Complainer's motivation for failing to nominate him to be, the Respondent stated that he considered that the Complainer had breached the Equalities Act 2010 in failing to consider his position as the only ethnic minority member of the LAPFF. The Respondent further stated that he did not consider he had been disrespectful towards the Complainer and his motivation in making the comments to the press had been to outline "the facts", not just for himself but also for those he represented. In response to a question as to whether it was possible the Complainer had a political reason for his decision, the Respondent advised that he considered that as the LAPFF was a non-party aligned forum, the Complainer was obliged to take politics out of his decision.

Submissions made by the Respondent's representative

The Respondent's representative noted the Respondent's passion for diversity and his belief in equality, and advised that he was very aware of the uniqueness of his position as the only ethnic minority member of the LAPFF, and how important it was for the LAPFF to demonstrate diversity. The Respondent's representative contended that, effectively, the Complainer had removed the Respondent from his position on the LAPFF Executive Committee without providing any reasons for his decision. The Respondent's representative contended that, in doing so, the Complainer ignored the arguments presented to him about the importance of ethnic diversity.

The Respondent's representative contended that the Respondent had provided his comments to the press because he wished to highlight and criticise the Complainers failure, as a representative of the Council, to comply with the duty on public authorities, imposed by the Equality Act 2010, to advance equality of opportunity by ensuring ethnic minority representation on the LAPFF Executive Committee. The Respondent's representative contended that a reasonable member of the public, with knowledge of the relevant facts, would not consider that the Respondent had acted disrespectfully in the circumstances.

The Respondent's representative noted that the ESC's representative's position was that the Respondent's allegation (that the Complainer had showed prejudice) was disrespectful because there was no evidence to support it. The Respondent's representative argued, however, that there was indirect, cumulative evidence; being that the Complainer:

- gave no reason for his refusal to nominate the Respondent;
- did not respond to the third-party councillor's email of 18 August 2022 highlighting the importance of having an ethnic minority elected member on the LAPFF Executive Committee;
- failed to return the Respondent's call on 21 September 2022;
- gave no reason for refusing the Respondent's urgent motion at the Pensions Committee meeting of 5 October 2022; and

- claimed that the Respondent's ethnicity had not been mentioned at all until the 5 October 2022 meeting, despite it having been raised in the third-party councillor's email of 18 August 2022.

The Respondent's representative argued that, in light of "rational and consistent" reasons for the Complainer's conduct as outlined, it was not "entirely unreasonable" for the Respondent to have concluded that the Complainer's decision was based on the Respondent's ethnicity.

The Respondent's representative contended that the Respondent's comments did not amount to a personal attack on the Complainer as the Respondent had not used any offensive or impolite language or made any derogatory comments. As such, the Respondent's representative argued that the Respondent had not been disrespectful towards the Complainer and had not bullied or harassed him.

The Respondent's representative acknowledged, nevertheless, that if the Panel disagreed and determined that there had, on the face of it, been a contravention of the Code then it would be obliged to consider the application of Article 10 of the ECHR.

The Respondent's representative advised that she agreed with the ESC's conclusions that the Respondent would be entitled to enhanced protection in respect of his right to freedom of expression under Article 10. The Respondent's representative noted that the Respondent was entitled to contact the press in order to publicise his valid concerns about the Complainer's refusal to endorse his nomination. The Respondent's representative agreed with the ESC's representative that the Respondent's comments concerned matters of public interest.

The Respondent's representative noted that restrictions could be placed on an individual's right to freedom of expression in order to ensure public debate did not fall below a minimum level. The Respondent's representative argued, however, that in this case the Respondent's comments were not offensive, abusive or gratuitous.

The Respondent's representative reiterated that comments made in a political context, which amount to value judgements, are tolerated even if untrue, as long as they have some or any factual basis. Even a statement that something is a fact, where that statement is inaccurate, will be tolerated if what was expressed was said in good faith and there is some reasonable (even if incorrect) factual basis for saying it.

The Respondent's representative contended that it was clear that the Respondent's comments had been made in good faith. The Respondent's representative further contended that the Respondent's belief, as expressed in the quotes attributed to him, that the Complainer had showed his prejudice was a value judgement based on his belief that the Council's had failed to meet its duties under the Equality Act 2010. The Respondent's representative accepted that the Council's duty did not extend to outside bodies, such as the LAPFF. The Respondent's representative argued, nonetheless, that it was not unreasonable to conclude that the respondent's allegation had a factual basis given:

- the importance of ethnic minority representation on the LAPFF Executive Committee; and
- the failure by the Complainer to provide any "good or consistent" reasons for the refusal to nominate the Respondent,

The Respondent's representative accepted that the Respondent's comments could be detrimental to the Complainer's reputation but argued that all criticism is potentially damaging and was simply part of the normal cut and thrust of politics. The Respondent's representative contended that there was some justification for the Respondent's criticisms in light of the Complainer's conduct as outlined above and the duty on public bodies under the Equality Act 2010. The Respondent's representative noted that the Complainer was given, and indeed took, the opportunity to respond to the Respondent's comments. The Respondent's representative noted that the Complainer's response was published in the same article,

therefore reducing the possibility of any damage to his reputation. The Respondent's representative concluded, therefore, that a restriction on the Respondent's enhanced right to freedom of expression could not be justified.

In response to a question from the Panel as to whether the duty under the Equality Act 2010 extended to the Complainer as an individual, rather than simply to the Council as a public body, the Respondent's representative argued that the Complainer, as convener of the Pensions Committee, could reasonably be perceived as acting on behalf of the Council. The Respondent's representative contended that if the Complainer had taken on board the requirement to promote diversity, he would have seen the merits in the Respondent's re-nomination to the LAPFF Executive Committee. The Respondent's representative argued that the by not allowing the nomination, the Complainer showed his prejudice by not taking into account the Respondent's ethnicity.

In response to a question about whether the Respondent's comments were personal in nature, the Respondent's representative argued that a distinction could be drawn between saying an individual had showed prejudice and stating that they were racially prejudiced. The Respondent's representative contended that the former was not a personal comment. When questioned on whether the Respondent's comments could be taken or understood to mean that the Complainer was racially prejudiced, the Respondent's representative reiterated the argument that there was a difference between commenting on an individual's actions and labelling them.

The Respondent's representative confirmed, when asked, that while the Complainer, as Convener of the Pensions Committee, was obliged to sign any nomination form, there was no requirement for the Council to have nominated any elected member to the LAPFF Executive Committee.

DECISION

The Hearing Panel considered 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 Malik.
2. The Respondent, had on the face of it, breached the courtesy and respect provision outlined at paragraph 3.1 of the Code.
3. A restriction on the Respondent's right to freedom of expression under Article 10 of the ECHR was justified. As such, a formal finding of a breach of paragraph 3.1 of the Code was found.

Reasons for Decision

In reaching its decision as to whether there had been a breach of the Code, the Panel took the following three-stage approach, as outlined in the Standards Commission's Advice Note on the Application of Article 10 of the ECHR:

- First, it would consider whether the facts found led it to conclude, on the balance of probabilities, that the Respondent had failed to comply with the Code.
- Secondly, if so, it would then consider whether such a finding in itself was, on the face of it, a breach of the Respondent's right to freedom of expression under Article 10.
- Thirdly, if so, the Panel would proceed to consider whether the restriction involved by the finding was justified by Article 10(2), which allows restrictions that are necessary in a democratic society (and, in particular, in this case, for the protection of the reputation or rights of others).

Stage 1: Whether the Respondent's conduct amounted, on the face of it, to a breach of the Code

The Panel considered carefully the evidence led, and the submissions made orally at the Hearing and in writing. The Panel noted that it was not in dispute that, in an online news article published on 14 October 2022, the Respondent was quoted as stating that the Complainer, as Convenor of Aberdeen City Council's Pension Fund, had "showed his prejudice" by refusing to sign the Respondent's nomination to serve an additional term on the LAPFF. The Respondent was further quoted as stating that the Council's Pension Committee should lead the way when it comes to equality and diversity "rather than allow prejudice and discrimination against councillors like me who represent ethnic minorities."

The Panel noted that the Code applies in all situations, and at all times, where an individual is acting as a councillor, has referred to themselves as a councillor, or could be considered objectively to be acting as a councillor. In this case, the Panel noted that there was no dispute that the Respondent was acting in his capacity as a councillor, both at the committee meeting at which the urgent motion was refused and when providing his comments to the press on a council-related matter. The Panel further noted that the Respondent had identified himself as a councillor in the comments he provided to the press. The Panel was satisfied, therefore, that the Code applied to the Respondent at the time of the events in question.

The Panel noted that the online article was entitled: "*Prejudice*" claims after Aberdeen councillor denied spot on pension fund body'. The Panel noted the Respondent had suggested there was a distinction between, on the one hand, stating (as the Respondent had in the quotes provided and published in the article) that a named individual had 'showed' prejudice on the grounds of ethnicity and, on the other hand, of accusing that individual of being prejudiced on that basis. The Panel considered this argument to be disingenuous and was satisfied that it was evident from both the title of the article, and the full statements attributed to the Respondent within it, that the Complainer was being accused of prejudice towards, and of discriminating against, the Respondent on the grounds of his ethnicity.

The Panel acknowledged that both the Respondent and other Executive Committee members of the LAPFF considered that his continued membership of, and ethnic minority perspective on, the Executive Committee was important. The Panel further acknowledged that the Respondent had been mindful of the Council's duty to promote equality and advance diversity, and his passion for, and commitment to, these issues.

As noted above, the Panel considered, nevertheless, that the clear implication from the article was that the Complainer, as an individual, had been prejudiced and had discriminated against the Respondent on the grounds of ethnicity. The Panel was not satisfied that there had been any compelling evidence to support the Respondent's belief or assumption that this had been the case.

The Panel noted, in the first instance, that the Complainer had used the term 'we' in his correspondence to both Councillor A and the Respondent advising them of the decision not to nominate the Respondent, or any other elected member, to the LAPFF. The Panel considered this suggested that the decision had not been taken by the Complainer alone. While the Panel accepted that it was the Complainer's responsibility, as the Pension Committee Convenor, to sign any nomination form, it noted that there was no evidence or suggestion that, at the time of receipt of the Complainer's correspondence or before the comments were provided to the media, the Respondent or Councillor A had queried the use of the term 'we' in the emails they received. The Panel noted, however, that the Respondent nevertheless singled out the Complainer, in his quotes to the media, as being responsible for not just refusing his urgent motion, but also for the decision not to agree to the nomination. The Panel noted there was now no dispute that the decision had in fact been made by the Complainer, in conjunction with his Administration colleagues.

The Panel noted that in his email to the Respondent of 22 August 2022, sent before the statements were issued to the press, the Complainer advised that "we have decided not to make any nominations to the LAPFF Executive, but to continue to engage with the LAPFF at officer level". The Panel considered this should have

at least alerted the Respondent to the fact that at least one reason for decision, if not the sole explanation, was because it was felt that engagement at officer level alone was sufficient.

The Panel did not, therefore, accept the suggestion that the Respondent had not been advised of any reasons for the decision at the time of making his comments, and that this had led him to form the conclusion that the decision could only be the result of prejudice on the part of the Complainer.

The Panel accepted that the Complainer had not commented on the suggestions made to him that the nomination should be supported as it was important for there to be ethnic minority membership of the LAPFF Executive Committee. The Panel noted the Respondent's representative had suggested that this was a breach of the requirement for public bodies to give reasons for its decisions. The Panel did not accept a councillor had a duty (other than potentially in a quasi-judicial or regulatory setting) to give reasons for any decision they made as an individual or on behalf of the Administration. The Panel was satisfied that it was evident from the fact that he had singled out the Complainer in his comments to the press, that it had not been the Respondent's belief, at the time, that the decision was a public body one, which would involve any duty to provide reasons.

The Panel noted, in any event, there was no evidence that, other than leaving a voicemail, the Respondent had sought an explanation from the Complainer for the decision not to endorse his nomination. The Panel further noted that the Respondent accepted that he had not made any mention in the voicemail of the reason for his call, and had only stated that he wished to discuss an important matter.

The Panel noted that the ESC's representative stated that the Commissioner had concluded while the Respondent's motivation in making the comments were likely to have been politically motivated (at least to some extent); they also stemmed from a genuine belief that his ethnicity was not taken into account properly when the decision not to support his nomination to the LAPFF was made. The Panel accepted that this may well have been the case. It noted, however, that the decision had been made before any suggestion that the LAPFF would benefit from ethnic minority representation had been raised.

The Panel was of the view, in any event, that there was a clear distinction between:

- claiming that an individual had failed to take someone's ethnicity into account properly when making a decision and /or claiming that a public body had failed to comply with the public sector equality duty under the Equalities Act 2010; and
- accusing a specific individual of making a decision on the basis of prejudice on the grounds of ethnicity, race or any other protected characteristic.

While the Panel acknowledged that nominating the Respondent to the LAPFF's Executive Committee may have promoted equality and helped the Council to meet its duties under the Equalities Act 2010, it did not accept that it followed logically or inherently that a decision on the part of an individual councillor not to endorse the nomination of a colleague must be due to prejudice. The Panel noted that there could be any number of other reasons why the Complainer might choose not to endorse the nomination, including (but not limited to):

- the actual stated reason (being that the Administration did not consider it necessary to nominate any elected member to the forum); and
- party-political considerations (even if the LAPFF was intended to be a non-party political forum).

The Panel further noted that there would have been no reason for the Complainer or anyone else in the Administration to consider that equality could only have been promoted through the Respondent's re-election to the LAPFF Executive Committee, given the Committee represented a UK-wide forum with nominations being sought from various local authorities.

For the reasons outlined above, the Panel did not consider, from the circumstances and factors available to him at the time, that it was reasonable for the Respondent to have formed the belief that the Complainer's decision was based on prejudice. This was particularly the case given that the Respondent:

- was aware that the decision not to nominate him had been made before any issues about the ethnic minority representation had been raised; and
- had been advised that no elected members were to be nominated as it was considered that engagement at officer level was sufficient.

The Panel was of the view that making a public statement that inferred a fellow councillor had been motivated by prejudice on the grounds of ethnicity, without having a reasonable factual basis for such a claim, was entirely disrespectful. The Panel considered this was particularly the case given the Respondent must have known it was likely that such a serious accusation would damage the Complainer's reputation and standing among the electorate.

The Panel agreed with the Commissioner's representative, therefore, that the Respondent's overall conduct was objectively disrespectful. The Panel concluded that the Respondent had, on the face of it, contravened the requirement in paragraph 3.1 of the Code for councillors to treat everyone with courtesy and respect.

The Panel noted that bullying usually arises as a result of an individual misusing their power over another individual (usually derived from status or some other position of strength). The Panel was not satisfied that the Respondent was in a position of power over the Complainer, or that his conduct could be described reasonably as bullying. While the Panel accepted that harassment could be an isolated incident, it noted that it would have been reasonable for the Respondent to have expected that the Complainer would be given a right of reply before the article was published (as indeed he was). In the circumstances and, on balance, the Panel was not satisfied that the Respondent's conduct amounted to harassment. It concluded, therefore, that the Respondent had not breached paragraph 3.3 of the Code.

The Panel noted that it was evident from the statement he gave to the media that the Respondent failed to accept the Convener's decision not to allow his urgent motion to be heard by the Pension Committee at its meeting on 5 October 2022. The Panel noted, however, that there is no requirement under the Code for councillors to abide by the principle of collective responsibility. In any event, the Panel noted it was clear from its wording that paragraph 3.11 of the Code only required councillors to respect and comply with rulings from the chair or convener during meetings. The Panel agreed with the ESC's representative that there was no evidence or suggestion that the Respondent had disrupted the Pension Committee meeting on 5 October 2022. As such, the Panel concluded there had not been a breach of paragraph 3.11 of the Code.

Stage 2: Whether a finding of a contravention of the Code would be a breach of the Respondent's right to freedom of expression under Article 10 of the ECHR

Having found, on the face of it, that the Respondent had breached paragraph 3.1 of the Code, the Panel proceeded to consider the applicability of Article 10.

The Panel noted that enhanced protection of freedom of expression under Article 10 applies to all levels of politics, including local politics. The Panel further noted that the Courts have held that political expression is a broad concept and that there is little distinction between political discussion and discussion of matters of public concern¹. In this case, the Panel was satisfied that the Respondent's conduct occurred in the context of him expressing his views on nomination to a UK-wide public sector pension fund forum, being a matter of public concern. In the circumstances, the Panel considered that the Respondent would attract the enhanced protection of freedom of expression afforded to politicians, including local politicians, under Article 10.

¹ *Thorgeirson v Iceland (1992) 14 EHRR 843*

Stage 3: Whether any restriction on the Respondent's right to freedom of expression involved by a finding of a contravention of the Code would be justified by Article 10(2) of the ECHR

The Panel nevertheless noted that the right to freedom of expression is not absolute. Article 10(2) states that restrictions can be imposed, provided they are necessary in order to achieve a legitimate aim. As noted by the ESC's representative, legitimate aims can include ensuring that the conduct of public life at the local government level, including public debate, does not fall below a minimum level so that public confidence in democracy is not eroded. The Panel noted a restriction can also be imposed to protect the reputation and rights of others and to ensure or maintain confidence in elected members and the council itself.

The Panel noted, however, that the Courts have found any restriction on freedom of expression must also be proportionate to the legitimate aim being pursued. As such, the Panel was required to undertake a balancing exercise, weighing the enhanced protection to freedom of expression enjoyed by the Respondent against any restriction imposed by the application of the Code and the imposition of any sanction. In this case, as the issues being discussed by the Respondent concerned matters of public interest or concern, the Panel noted there was limited scope under Article 10(2) for a restriction on the Respondent's right to freedom of expression. The Panel proceeded to consider whether the restriction involved by the finding that the Code had been breached was therefore proportionate and justified, in terms of Article 10(2).

The Panel accepted that Courts have held that comments made in a political context, which amount to value judgements, are tolerated even if untrue, as long as they have some or any factual basis. Even a statement of fact will be tolerated if what was expressed was said in good faith and there is some reasonable (even if incorrect) factual basis for saying it. The Panel noted, however that the Courts have found that the more serious the allegation, then the stronger the factual basis for such a statement must be for it to be protected². and, further, that if there is a lack of a factual basis for a statement, and the applicant is unable to evidence the claim, then there is no violation of Article 10³.

While the Panel accepted that the Respondent may have made his comments in good faith, it did not consider, for the reasons outlined under Stage 1 above, that there was any compelling evidence to support the claim that there was any reasonable factual basis to support the Respondent's serious allegation that the Complainer had been motivated by prejudice against him based on his ethnicity.

The Panel noted that the Courts have also held that, in a political context, a degree of the immoderate, offensive, shocking, exaggerated, provocative, controversial, colourful and emotive, that would not be acceptable outside that context, is tolerated. The Panel further noted that the Courts have held that the less egregious the conduct in question, the harder it would be for a Panel, when undertaking its balancing exercise, to justifiably conclude that a restriction on an individual's right to freedom of expression is required.

The Panel considered, however, that the Respondent's serious and unfounded accusation that the Complainer had been prejudice on the grounds of ethnicity fell outwith the degree of tolerable behaviour and could properly be classified as egregious. This was because the Panel considered the comments were shocking, provocative and emotive in nature.

The Panel agreed with the Respondent's representative's argument that criticism is a part of the cut and thrust of politics and that there is always a risk of reputational damage. The Panel was of the view, however, that an unfounded accusation of prejudice on the grounds of ethnicity was so serious that it could be distinguished from normal everyday political sniping. The Panel agreed that the Respondent would have known such a serious and public accusation would be likely to lead to negative press coverage and have the

² *John Anthony Mizzi v Malta* (2011) ECHR 251

³ *Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal* (2011) 4035/08

potential to cause serious damage to the Complainer's standing in society and with the electorate. As such it was likely to cause damage to the Complainer's reputation and, potentially, his career.

The Panel did not accept the argument that, in this case, a distinction could be made between commenting on the Complainer's actions being prejudiced and labelling him as prejudiced. As outlined under Stage 1 above, the Panel considered the clear inference from the Respondent's comments was that the Complainer was prejudiced against him because of his ethnicity and that he had discriminated against the Complainer and made his decision not to endorse the nomination on that basis. The Panel further considered that the implication from this was that the Complainer was a bigot. The Panel considered that not only would this have been deeply offensive to the Complainer; but that it would be likely that members of the public would have been shocked at such an accusation being made by a fellow councillor about a member of the Administration. In support of its view that the comments were emotive and shocking, the Panel noted the Respondent's accusation was repeated in the article's headline. While the Panel accepted that the media outlet gave the Complainer the opportunity to reply and outlined his response in the article, it considered that this would only have the potential to mitigate partly any damage caused, particularly given the headline the Respondent's comments had generated.

While, as noted under Stage 1 above, the Panel accepted the Respondent may have made his accusation in good faith, it could not rule out the possibility of it being made, at least in part, for political gain. In considering this possibility, the Panel noted that there was no evidence that, before going public with his accusation, the Respondent notified the Complainer of his apparent concerns about the decision not to nominate him being based on the Complainer's personal prejudice on the grounds of ethnicity, and therefore did not provide the Complainer with the opportunity to respond.

The Panel further considered that the Respondent's comments had been gratuitous in nature, as it was of the view that there had been nothing to prevent him from raising his concerns with the Complainer privately, or from raising them with the press without the inclusion of a direct, personal accusation of prejudice on the part of the Complainer. The Panel considered that given the serious and personal nature of the accusation, the Respondent should have checked his understanding of the reason behind the decision not to endorse his nomination before going public with his accusation. The Panel accepted the ESC's representative's argument that the Respondent had used the opportunity to name and shame the Complainer. The Panel noted that while the Respondent had argued that he was concerned the Council had failed to meet its duties under the Equality Act 2010, his comments went far beyond this and amounted to an overt and unwarranted personal attack on the Complainer, as an individual.

The Panel was satisfied, therefore, that the imposition of a restriction on the Respondent's right to freedom of expression in the circumstances was relevant, sufficient and proportionate. The Panel concluded, therefore, that it was satisfied that a finding of breach, and the subsequent application of a sanction, would not contravene Article 10. It concluded a finding of a breach of paragraph 3.1 could be made.

Evidence in Mitigation

The Respondent's representative contended that the Respondent had acted, as he always did, with a firm belief in and commitment to equality particularly for under-represented communities. The Respondent's representative noted that the Respondent's conduct had been limited to the comments given to the press, contained in one press release, and advised that he had not repeated the assertions they contained since the article was published. The Respondent's representative noted that the Complainer had been provided with, and indeed, took the opportunity to rebut the comments in the article before it was published.

The Respondent's representative advised that the Respondent had participated fully in both the ESC's investigative process and the Standards Commission's Hearing process. The Respondent's representative noted that there had been no personal gain or benefit to the Respondent, other than an opportunity on his

part to express his opinion and to advise the people of Aberdeen of how he had been affected by the decision not to nominate him.

The Respondent's representative contended that there was no deliberate intention, on the part of the Respondent, to be disrespectful to the Complainer. Instead, he had simply wished to make his views known and understood.

The Respondent's representative advised the Panel of the Respondent's long and unblemished history of service to the people of Aberdeen, as both a councillor and a member of various internal and external committees and bodies, including the LAPFF.

SANCTION

The decision of the Hearing Panel was to suspend, for a period of one month with effect from the date of this decision, the Respondent, Councillor Malik, from all meetings of the council and of any committee or sub-committee thereof and of any other body on which the councillor is a representative or nominee of the council or body.

This sanction is made under section 19(1)(c) terms of the Ethical Standards in Public Life etc. (Scotland) Act 2000.

Reasons for Sanction

In determining the appropriate sanction, the Panel considered:

- first, whether the interference (i.e. the proposed sanction) was the minimum necessary, or whether less restrictive means could be employed; and then
- second, whether the benefit of that least necessary measure outweighs its adverse impact on the Respondent's right to freedom of expression. For example, whether any benefit in applying a sanction in respect of protecting the rights and reputations of others, and to ensure good administration which enables local government to function effectively, would outweigh any impact on the Respondent.

In making its decision on sanction, the Panel had regard to the Standards Commission's Policy on the Application of Sanctions. A copy of the policy can be found on the Standards Commission's website, here: <https://www.standardscommissionscotland.org.uk/cases/hearing-rules>.

The Panel began by assessing the nature and seriousness of the breach of the Code. The Panel noted that the requirement for councillors behave with courtesy and respect is a key requirement of the Code. The Panel noted that a failure to do so can lower the standards of public debate and erode public confidence in politicians and the democratic institutions they represent.

The Panel acknowledged that the Respondent was firmly committed to promoting equality and diversity. The Panel accepted fully that the Respondent had every right to challenge the Complainer about the decision not to nominate him and to raise his concerns publicly that, by not nominating him, the Council was failing to advance equality and promote diversity. The Panel was concerned, however, that the Respondent had accused publicly the Complainer of being motivated by prejudice, without any reasonable basis to support such a contention. The Panel was further concerned that the Respondent had chosen to do so, despite having already been advised that the basis of the decision was that the Administration could not see any benefit in nominating any elected members to the forum and that engagement with it was to be undertaken at officer level. The Panel agreed that there was no reason why the Respondent could not have raised his concerns about a failure to consider whether the LAPFF Executive Committee would benefit from the perspective of an ethnic minority member, without making the serious and unfounded personal comment he had.

The Panel was concerned that the Respondent had subjected a fellow councillor to such an unfounded personal attack. The Panel considered that in making such comments to the media, which were published in an online article, the Respondent had reduced the standards of public debate to a level that could erode public confidence in politics and the role of a councillor. The Panel accepted that being the subject of such a serious accusation would have been wholly distressing for the Complainer.

Having considered the nature of the breach and the seriousness of the accusation levelled by the Respondent, the Panel concluded, in the circumstances of the case, that a suspension was the appropriate sanction. Given the limited duration of the conduct, the Panel did not consider that a disqualification was warranted or justified. The Panel was of the view, however, that a censure, being the minimum sanction available to the Panel, was not appropriate in light of the serious nature of the conduct and the impact it would or could have had on the Complainer.

The Panel then considered the aggravating and mitigating factors as set out in the Policy on the Application of Sanctions, beginning with those in mitigation. The Panel noted that mitigating factors are those which may lessen the severity or culpability of the breach.

The Panel was pleased to note, in mitigation, that the Respondent had co-operated fully with the investigative and Hearing processes. In addition, the Panel accepted that there was no evidence of repeated behaviour over a long period of time, or of dishonesty or concealment, or of any previous or subsequent contraventions of the Code by the Respondent.

The Panel acknowledged the Respondent's contribution to public life and also his commitment to equality and diversity as well as to championing those who were underrepresented in society. The Panel further acknowledged that the Respondent had been attempting to highlight what he perceived, incorrectly, to be prejudice.

The Panel then proceeded to consider the aggravating factors; being ones that may increase the severity or culpability of the breach.

The Panel noted that the Respondent had agreed, as part of his acceptance of office as a councillor, that he would abide by the terms of the Code, which clearly included the requirement to behave with courtesy and respect towards everyone, at all times, when acting as a councillor.

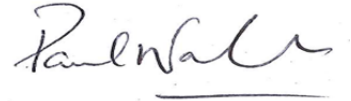
While the Panel noted that the Respondent had indicated it had not been his intention to treat the Complainer disrespectfully, it also noted that he had not apologised for his actions or demonstrated any insight or understanding whatsoever in respect of the likely impact his conduct would have had on the Complainer.

In the circumstances, and after a great deal of consideration, the Panel concluded, on balance, that a suspension of one month was the appropriate sanction. In reaching this decision, the Panel was mindful that it was obliged to select a sanction that involved the minimum interference necessary with the Respondent's right to freedom of expression under Article 10, while achieving the aims of maintaining standards in public life and protecting the rights and reputation of the Complainer. The Panel noted that the serious nature of the accusation might, in other circumstances, have merited a longer suspension, but given the mitigatory circumstances outlined above, and in particular the Respondent's cooperation with the Hearing process, and his long and otherwise unblemished record as a public servant, the Panel considered that a suspension of one month was proportionate, necessary and justified.

RIGHT OF APPEAL

The Respondent has a right of appeal in respect of this decision, as outlined in Section 22 of the Ethical Standards in Public Life etc. (Scotland) Act 2000, as amended.

Date: 23 January 2024



**Paul Walker
Chair of the Hearing Panel**