

Decision of the Hearing Panel of the Standards Commission for Scotland following the Hearing held online, on Tuesday 2 April 2024.

Panel Members: Ms Helen Donaldson, Chair of the Hearing Panel
Mr Paul Walker
Ms Suzanne Vestri

The Hearing arose in respect of a Report referred by Mr Ian Bruce, the Ethical Standards Commissioner (the ESC), further to complaint reference LA/H/3838, concerning an alleged contravention of the Councillors' Code of Conduct dated December 2021 (the Code) by Councillor Andrew Jarvie (the Respondent).

The Respondent represented himself. The ESC was represented by Mrs Angela Glen, Senior Investigating Officer.

Referral

Following an investigation into a complaint received on 6 January 2023 about the conduct of the Respondent, the ESC referred a report to the Standards Commission on 30 November 2023, in accordance with the Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act).

The ESC advised that he had considered whether the Respondent had failed to comply with the Code, and, in particular, whether he had contravened paragraphs 3.1, 3.8 and 3.10, 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.

3.8 I will not undermine any individual employee or group of employees, or raise concerns about their performance, conduct or capability in public.

3.10 I will follow the Protocol for Relations between Councillors and Employees at Annex A and note that a breach of the Protocol will be considered a breach of this Code. I will also comply with any internal protocol the Council has on councillor / employee relations.

Annex A: Protocol for Relations between Councillors and Employees

2. Councillors and employees should work in an atmosphere of mutual trust and respect, with neither party seeking to take unfair advantage of their position or influence.

25. Councillors should not raise any adverse matters relating to the performance, conduct or capability of employees in public. Employees must ensure they treat councillors with similar respect and courtesy.

Evidence Presented at the Hearing

Joint Statement of Facts

The Panel noted that a joint statement of facts had been agreed between the ESC and the Respondent. This recorded that it was not in dispute that, on 27 September 2022, the Respondent attended (in-person) a hybrid meeting at which the Council's then Chief Executive, Chief Social Work Officer and six other elected members were also present.

The joint statement of facts recorded that at the meeting of 27 September 2022, media coverage of the potential closure of a children's home (the home) in Wick was discussed.

The joint statement of facts recorded that, on 8 December 2022, the Respondent attended (remotely) a hybrid meeting of the full Council. During consideration of agenda item 12, being the Chief Social Work Officer's Annual Report, the Respondent spoke about the closure of two children's homes (including the one in Wick) and stated:

*"I have two questions about this. Did the Council deliberately let standards slip so low at [the Children's home in Wick] that it ended up being closed so the Council didn't do it itself"; and
"And in view of this am I wrong in feeling the Chief Executive came to Caithness and lied to us".*

Submissions made by the ESC's Representative

The ESC's representative advised that the Respondent represented the Wick and East Caithness ward and that he had signed a declaration of acceptance of office, confirming that he would abide by the Code, in May 2022.

The ESC's representative explained that a children's home in the Respondent's ward had been the subject of an urgent improvement notice issued by the Care Inspectorate in the first half of 2022. Following the issuing of this notice, the Council had issued a press release stating that the Council intended to close the home. The ESC's representative advised that the first notice elected members had of this proposal was on 28 August 2022, when the media reported the contents of the press release.

The ESC's representative explained that it was not in dispute that the then Council Chief Executive and its Chief Social Work Officer had agreed to meet elected members at a meeting, held both in person in Wick and online on 27 September 2022, to discuss the future of the home. The Respondent had attended the meeting in person.

The ESC's representative advised that the ESC's Investigating Officer had attempted to interview all elected members who had attended the meeting. One of these attendees advised that the then Chief Executive had stated that the Council had no intention of closing the home. Another attendee stated that the then Chief Executive had said that the Council would enter into discussions with staff at the home to ensure that it would not close. A third attendee advised that he believed the then Chief Executive had given an unequivocal guarantee that the home would not close. The attendee advised that when he had questioned the then Chief Executive about the Council's press release, she had advised that it was a mistake, that the home was not to close and, instead, that its future would be reviewed. A fourth attendee confirmed that the press release was a mistake, with yet another attendee reporting that the then Chief Executive had provided assurances that the home was not to close and that the press release was incorrect. The Chief Social Work Officer confirmed that the meeting had been arranged to discuss the future of the home, following the media report, and that while she recalled elected members being advised that its future would be reviewed, she could not remember exactly what had been said. The ESC's representative advised that the then Chief Executive had not responded to requests to be interviewed by the Investigating Officer.

The ESC's representative advised that the Respondent had attended the Council meeting on 8 December 2022 remotely. The ESC's representative confirmed that there was an audio recording of the meeting and that there was no dispute that the Respondent had made the comments as outlined in the joint statement of facts, during a discussion on item 12 (being the Chief Social Work Officer's annual report). The ESC's representative noted that the meeting was broadcast via a livestream that members of the public could access.

The ESC's representative noted that paragraph 3.1 of the Code obliges councillors to treat everyone with courtesy and respect at all times, even where they disagree with their views. Paragraph 3.8 covers the relationship between elected members and council employees, and requires councillors to refrain from undermining any individual employee or group of employees, or from raising concerns about their performance, conduct or capability in public. Paragraph 3.10 requires elected members to follow the protocol

for relations between councillors and employees at Annex A. The protocol obliges councillors to work with council officers in an atmosphere of mutual trust and respect.

The ESC's representative contended that, when suggesting that the then Chief Executive had lied to him and others, the Respondent had called into question her integrity. The ESC's representative noted that integrity was a matter that was important to everyone and particularly those who hold public positions. The ESC's representative contended, therefore, that the Respondent's accusation was serious, disrespectful and discourteous and was, on the face of it, a breach of paragraph 3.1 of the Code.

The ESC's representative further argued that by making comments, during the livestreamed Council meeting on 8 December 2022, to the effect that he felt the then Chief Executive had lied to him and other councillors, the Respondent had raised concerns about her conduct in a public forum, in breach of the requirement to work with council officers in an atmosphere of mutual respect. The ESC's representative contended, therefore, that the Respondent had also, on the face of it, breached of paragraphs 3.8 and 3.10 of the Code.

The ESC's representative stated that the Commissioner had concluded the Respondent's conduct was not so serious as to be classified as bullying or harassment, given it was a one-off incident for which he had apologised. The ESC's representative advised that, as such, the Commissioner there had not been a breach of paragraph 3.3 of the Code.

The ESC's representative noted 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; being the Chief Social Work Officer's annual report and the closure of a children's home.

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. The ESC's representative noted that an individual's right to freedom of expression could be restricted to:

- protect the rights and reputations of others from serious and unwarranted personal attacks;
- enable local government to function effectively; and
- ensure public confidence in local government was not undermined and that a council was not brought into disrepute.

The ESC's representative nevertheless noted that elected members have a right to challenge council officers and to scrutinise robustly the performance of their council. The ESC's representative further noted that the Courts have found that the level of criticism that might be properly directed at council officers is wider than that which is acceptable to direct at members of the public (albeit it is narrower than that which politicians can direct at their fellow elected members). In addition, the Courts have found that there is little scope for restricting freedom of expression when a matter of public interest is under consideration and, further, that in a political context language that might be offensive, or even aggressive can be tolerated. The ESC's representative noted that the Courts also have held that, in the context of political debate, comments can be tolerated even if untrue or incorrect, providing they have an element of factual basis.

The ESC's representative noted that, in his comments, the Respondent had referred to how he was feeling. The ESC's representative advised, therefore, that the Commissioner had concluded that it was evident that the Respondent had been expressing a value judgement (or an opinion) about how he felt about the then Chief Executive's conduct, as opposed to expressing a factual statement to the effect that she had lied. The ESC's representative contended that, objectively, it could be concluded that this value judgement had a basis in fact, given there was evidence that the Respondent had found out the day before the Council meeting that the home was to close, despite the then Chief Executive previously having informed him and others (or, at the very least having left them with the clear impression) that this would not happen. The ESC's

representative advised that the Commissioner had accepted the Respondent's position that he had felt that he had been misled and, therefore, that his comments had been made in good faith.

The ESC's representative argued that, as the Council's most senior officer, the then Chief Executive could expect to be the subject of more scrutiny than other employees, and that the Respondent was entitled to express an opinion on her reliability. The ESC's representative contended, in any event, that the Respondent's comments at the meeting were not particularly gratuitous or shocking. The ESC's representative noted that the Respondent had not used any profanities and had apologised unconditionally when asked to do so. The ESC's representative accepted that no public figure, such as the then Chief Executive, would wish to be accused of lying on a matter of importance. The ESC's representative contended, nevertheless, that as support for her had been forthcoming from other councillors later in the meeting, she had not been undermined by the Respondent's comments. The ESC's representative further argued that the fact that the then Chief Executive had accepted a post in another local authority demonstrated that her reputation had not been affected adversely by the Respondent's conduct. The ESC's representative advised that the Commissioner had concluded, therefore, that a restriction on the Respondent's right to freedom of expression that a formal finding of a breach of the Code and imposition of a sanction would entail, could not be justified.

The Panel asked why the remarks made by the Respondent at the meeting on 8 December 2022, in respect of the previous item of business, to the effect that council officers may not have been truthful when preparing reports, had been discounted during the investigation and not referred to the Standards Commission. The Panel noted this was despite the Complainer having raised concerns that these remarks had been made deliberately to prepare the meeting for his subsequent comments. In response, the ESC's representative advised that the remarks had been discounted and not considered as part of any course of conduct, as they had concerned a different agenda item.

The ESC's representative accepted that it was evident from the recording of the meeting that the then Chief Executive had been distressed by the Respondent's comments and noted that the Commissioner did not wish to downplay her reaction. The ESC's representative reiterated, however, that the then Chief Executive had been asked for her views on what had happened, but had not responded to the Investigating Officer.

The ESC's representative acknowledged that the Respondent could have used other words to express how he felt about the conduct of the Council and the then Chief Executive. The ESC's representative further accepted that it was entirely possible that the position in respect of the home may have changed after the meeting in Wick and, therefore, that any statement she made on 27 September 2022 could have been accurate at that time. The ESC's representative contended, nevertheless, that the fact that the position had changed in such a short period of time demonstrated that there was some basis in fact for the Respondent to have reached the view that he had been misled.

In response to a question about why accusing an individual of lying was not considered to be an overt personal attack, the ESC's representative again noted that the Respondent had not stated she had been untruthful, but instead had referred simply to that being the feeling he was experiencing.

Witness Evidence

The Respondent led evidence from one witness, Councillor Matthew Reiss.

Councillor Reiss advised that he had been an elected member since November 2013, having previously been a police officer. Councillor Reiss explained he had first become aware that there were problems in respect of the children's home in Wick sometime in, or around, early 2022 when he discovered that issues at the home meant that some children were living at a facility in a different ward (a facility that was only intended to provide respite care). Councillor Reiss advised he had then been shocked to read the media article published on 28 August 2022, quoting from the Council's press release, stating that the home in Wick was to close.

Councillor Reiss advised that he had been unable to reconcile this with the second Council press release, issued and reported in the media on 5 September 2022, in which it was stated that the home was not to be closed, but that it was under review. Councillor Reiss advised that he had therefore raised his concerns “stridently” at the meeting with the then Chief Executive and Chief Social Work Officer in Wick on 27 September 2022.

Councillor Reiss advised that he had asked, at the meeting on 27 September 2022, why two clearly contradictory and contrasting press statements had been released by the Council in such a short period of time. Councillor Reiss stated that the then Chief Executive had stated, without any explanation, that the initial press release was a mistake and the home was not going to be closed. Councillor Reiss advised that as the then Chief Executive had not elaborated on why the initial press release was a mistake, he had remained concerned and had subsequently contacted the Council’s local media officer to try to discover why the first press release had stated the home was to close.

Submissions made by the Respondent

The Respondent stated that after the two press releases were issued by the Council, on 28 August and 5 September 2022 respectively, elected members had sought a meeting with the then Chief Executive to find out why the first statement said the home was to close, when the second reported that it was not to close and was only being “temporarily vacated”. As a result, the then Chief Executive had agreed to discuss the issue with a number of elected members at the meeting held in person in Wick and online on 27 September 2022. The Respondent advised that, as confirmed by other elected members in attendance, the then Chief Executive gave a categorical assurance, at the meeting, that the home was not going to be closed and had promised, unequivocally, that the Council would do everything it could to resource the facility and bring it back to the previous standards it had enjoyed (as reflected in previous Care Inspectorate reports). The Respondent contended that the then Chief Executive had stated that the first press release was a mistake and that the officer responsible had no authority to issue it to the media.

The Respondent advised that he had reached the view that the then Chief Executive had lied at that meeting, when it transpired that the home was indeed going to close by mid-December 2022. The Respondent explained that he had left the meeting in Wick feeling positive about the future of the home and the assurance given. The Respondent advised, however, that he had lost confidence when he then received an email from a young person who was a resident of the home asking what was to happen to it, and when no further information was forthcoming from officers over the following few weeks. The Respondent advised that this email seemed to contradict assurances given by the Council that those affected by the issues with the home were being consulted on its future. The Respondent explained that concerns about this had led to him and other elected members sending council officers weekly emails between the meeting in Wick on 27 September 2022 and the Council meeting on 8 December 2022, in which they had tried to ascertain what was happening with the home. The Respondent stated that, despite this, no substantive information had been forthcoming. The Respondent advised that he had asked the then Chief Executive to provide a written briefing on the home, but that this request had been declined.

The Respondent stated that he had been shocked to read, in the press, on 7 December 2022, that the home was to be closed at the end of the month, as no warning or explanation as to why had been provided. The Respondent contended that the Council meeting on 8 December 2022 represented his only opportunity to take any action on the matter. The Respondent advised that he had been desperate to find a solution and noted that given the imminent closure of the home, and the fact that previous attempts to seek information by email had been unsuccessful, he had felt he had no choice but to raise the issue in the manner he had at the meeting on 8 December 2022. The Respondent advised he had been under no illusions about the seriousness of accusing the then Chief Executive of lying, but explained he had reached the conclusion that was “irrefutably” the case, given the categorical assurance she had given that the home would not close, only weeks beforehand.

The Respondent advised that, at the time, he had long considered that council officers were resistant to scrutiny by elected members. The Respondent stated that the environment in which opposition councillors operated was particularly hostile, with the threat of referrals being made to the Ethical Standards Commissioner being used as a deterrent to any challenge. The Respondent noted that his position in this regard was supported by the statement provided to the Standards Commission by Councillor Struan Mackie (as included in the written productions).

The Respondent explained that he had not made the comments at the Council meeting on 8 December 2022 on the spur of the moment, but rather had made them following much thought and consideration of the Councillors' Code and the Standards Commission's supporting Guidance and Advice Notes. The Respondent advised that his decision to question whether the then Chief Executive had lied was based on his judgement of her conduct and the factual situation. The Respondent contended that, as such, he was entitled to protection of his right to freedom of expression under Article 10 of the ECHR.

In support of this, the Respondent argued that as he had exhausted all available options for seeking information on what was happening with the home, and as it was to close within a week, his comments at the meeting on 8 December 2022 had not been gratuitous. The Respondent advised that, having reflected on the matter and in light of the "vast contradiction", between the assurance given by the then Chief Executive and the reality of the situation, he remained of the view that there had been no other way to draw attention to the importance of the issue and urgency of the matter. The Respondent reiterated his position that as the then Chief Executive had given a clear and categorical promise at the meeting in Wick on 27 September 2022 that the home would not be closed, without any caveat being given about this being dependent on resources being available, he had concluded she had not been truthful and had felt that he had no alternative but to raise the issue in the manner he had.

In response to questions from the Panel, the Respondent confirmed that he had considered the Code and Standards Commission's Guidance before the meeting on 8 December 2022.

When asked whether it was possible that the then Chief Executive had conveyed the position accurately at the meeting on 27 September 2022, but that the circumstances had subsequently changed (and that she had not therefore lied), the Respondent emphasised that because of the categorical nature of her statement that the home would not close, he had spent a great deal of time following the meeting trying to establish whether that was the case. The Respondent advised, however, that there was no evidence of any external factors having affected the status of the home. The Respondent indicated that he would not have felt that he had been lied to, and may have accepted that a mistake may have been made, or that circumstances beyond the Council's control had occurred, had there been any communication in advance of the meeting on 8 December 2022 to explain what had happened that meant the home now needed to close.

The Respondent advised that his motivation was to seek clarity and a solution to the matter, and that he had not intended to cause any distress. The Respondent explained that was why he had tried to provide context before making his comments. The Respondent confirmed, nevertheless, that he had intended to use the phrase "lied to" after spending the day before the Council meeting trying to think of any reason as to why the home was to close (given the then Chief Executive's assurances that it would not), and being unable to identify any. The Respondent explained that he had referred specifically to the then Chief Executive, rather than the Chief Social Work Officer (despite the comments being made when her report was being considered), because it had been the then Chief Executive who had taken charge of the meeting in Wick and who had provided the categorical assurance that the home would not close.

In response to a query about whether his comments amounted to rhetorical questions, the Respondent advised that he had been seeking answers about why the position in respect of the home had changed as he had been shocked to learn, from the press release the day before, that it was to close.

In response to questions about why he had apologised at the Council meeting on 8 December 2022, the Respondent reiterated that it had not been his intention to cause the then Chief Executive any distress and advised that he had not been particularly aware of the impact of his comments. The Respondent said that he had apologised to avoid being ejected from the meeting. When asked whether, therefore, his apology was not sincere, the Respondent stated that he had been caught off guard when asked to say sorry. The Respondent indicated that as he had been very clear in advance of the meeting about what he intended to say, and had been confident his comments would not amount to a breach of the Code, he had not anticipated he would be asked to apologise and had not planned for that eventuality. The Respondent advised that he had been surprised that the Convener of the meeting had asked him to apologise, rather than giving the then Chief Executive the opportunity to respond to the comments. The Respondent explained this was because the then Chief Executive spoke regularly at Council meetings and he would have expected her to have replied. The Respondent reiterated that he had been seeking and had expected a response.

Turning to questions about whether his conduct had been disrespectful, the Respondent advised he considered that it had not been. This was because he had outlined the events that led him to consider the then Chief Executive had lied and had assumed she would be afforded the opportunity to respond. The Respondent acknowledged that his comments may have been near the threshold for a breach of the Code, but advised that he had anticipated they would be protected by Article 10 of the ECHR.

The Respondent explained that he did not consider his comments had been gratuitous because he considered they had a factual basis. While the Respondent accepted the then Chief Executive may not have deliberately been untruthful, in the absence of any other information at the time, he had considered this to be the only reasonable explanation. The Respondent accepted that just because a promise had been broken did not mean it was a lie in the first place. The Respondent contended nevertheless that in this case, the absence of any explanation or apology as to why the home was to close despite the categorical assurance to the contrary, resulted in him feeling that the then Chief Executive had lied.

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 Jarvie.
2. A formal finding that the Respondent had breached paragraphs 3.1, 3.8 and 3.10 of the Code could not be made.

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 noted the complaint concerned the Respondent, Councillor Jarvie's, conduct at a full meeting of the Council on 8 December 2022, which the public could watch via a livestream. The Panel was satisfied that as the Respondent attended the meeting in his capacity as an elected member, the Councillors' Code of Conduct applied.

The Panel found, and noted it was not in dispute, that the Respondent stated at the meeting that: “in view of this am I wrong in feeling the Chief Executive came to Caithness and lied to us”, when discussing the Chief Social Work Officer’s Annual Report and the closure of a children’s home in the Respondent’s ward.

The Panel noted that the Respondent’s position was that after the press release about the home was issued by the Council in June 2022, the then Chief Executive met local councillors in Caithness, stated that the press release was incorrect and promised that the home would not close. The Panel accepted that when it was then reported in a local media outlet, on 7 December 2022, that the home was to close, the Respondent had a right to raise the matter and question why the position had changed.

The Panel agreed with the ESC’s representative, however, that the Respondent had effectively, and publicly, accused the then Chief Executive of lying. The Panel further agreed that such an accusation was particularly serious, given it had called into question the integrity of the then Chief Executive and potentially could be perceived as labelling her as dishonest. The Panel was of the view that such a public attack on the then Chief Executive’s character and honesty could have been highly damaging, not only to her reputation as an individual, but also to the Council itself, given she was its senior officer at the time. The Panel accepted that the position in respect of the closure of the home may have changed between June and the Council meeting in December 2022 and, therefore, that the then Chief Executive’s statement in June may have been accurate and made in good faith at that time.

The Panel found, therefore, that the Respondent’s conduct amounted, on the face of it, to a breach of:

- paragraph 3.1 of the Code (which requires councillors to treat others with courtesy and respect); and
- paragraphs 3.8 and 3.10 (which require councillors to refrain from criticising the conduct of individual officers in public and to work with them in an atmosphere of mutual trust and respect).

The Panel nevertheless agreed with the ESC’s representative that as the conduct was a one-off incident, for which the Respondent had apologised (albeit the Panel was of the view that he had done so reluctantly and only after having been threatened with expulsion from the meeting), it did not amount to a breach of the bullying and harassment provisions in 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 paragraphs 3.1, 3.8 and 3.10 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 noted that the Respondent’s statement was made during a full Council meeting, and related to the closure of a children’s home, being a matter of public interest and concern. In the circumstances, therefore, the Panel considered that the Respondent would attract the enhanced protection of freedom of expression afforded to politicians, including local politicians, under Article 10.

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. The Panel noted that 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. As noted by the ESC’s representative, a restriction can also be imposed to protect the reputation and

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

rights of others (including members of the public) and to ensure or maintain confidence in elected members and the council itself.

The Panel accepted, 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). In doing so, the Panel had regard to the following findings that have been made by the Courts:

- 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.
- In a political context, a degree of the immoderate, offensive, shocking, exaggerated, provocative, controversial, colourful and emotive language, that would not be acceptable outside that context, is tolerated².
- While council officers are open to criticism, it is in the public interest that they are not subject to unwarranted comments that disenable them from performing their public duties and undermine confidence in the effective administration of the council. Notwithstanding this, the Panel noted that the acceptable limits of criticism are wider for council officers acting in their official capacity than for private individuals, as a result of their being in public service and it being appropriate that their actions and behaviours are subject to more thorough scrutiny³. The Panel also noted that the level of the post occupied by an officer was the criterion for assessing the degree of tolerance expected from them⁴, and that therefore more senior officers would be expected to be more tolerant of criticism. The Panel also noted that, in instances where critical comment is made of a council officer, the requirement to protect that officer must be weighed against the interest of open discussion of matters of public concern and the right to freedom of expression of the maker of the comment in question⁵.
- A careful distinction must be drawn between factual statements and value judgements, and that while the existence of facts can be demonstrated, the truth of value judgements is not susceptible to proof⁶. The Panel further noted, however, that even where a statement amounts to a value judgement, there must exist a sufficient factual basis to support it, failing which it will be excessive⁷.

In this case, the Panel accepted that the Respondent's accusation that the former Chief Executive had lied was a value judgement that was made in good faith. In considering it was made in good faith, the Panel accepted that the Respondent was motivated by concerns about the closure of the home, rather than being an attempt to question the then Chief Executive's integrity in general. The Panel further considered that there was evidence to demonstrate that, while not necessarily accurate, the accusation had a basis in fact, given it appeared the position had changed in respect of the potential closure of the home, despite the apparently categorical assurances that the then Chief Executive had given at the meeting in Caithness. The Panel was satisfied, therefore, that in the very specific and particular circumstances of the case, the Respondent's comment amounted to a value judgement that was not excessive.

² *Heesom v Public Service Ombudsman for Wales (2014) EWHC 1504 (Admin)*

³ *Mamère v France (2009) 49 EHRR 39*

⁴ *De Carolis and France Télévisions v. France, 2016 no. 29313/10*

⁵ *Mamère v France, ibid*

⁶ *Lingens v Austria (1986) Series A no. 103*

⁷ *Pedersen and Baadsgaard v Denmark, [GC], no. 49017/99, ECHR 2004-XI*

The Panel considered that the Respondent's accusation that the former Chief Executive had lied was a personal attack on her and her character, and that he must have known that the making of such an accusation, in the context of a discussion on such an emotive subject, had the potential to have a significant, detrimental impact on her reputation. The Panel noted that there had been nothing to prevent the Respondent from raising his concerns about the apparent change in position in respect of the potential closure of the home in a respectful manner.

The Panel did not consider the fact that the then Chief Executive had received support from other councillors later in the meeting may have meant that her reputation could not have been affected to any great extent by the Respondent's comments. This was because the Panel noted that members of the public or press may not have viewed the meeting in its entirety. The Panel further did not accept, to any extent, the argument that the fact that the Chief Executive had, or may have, been offered a senior role in another local authority demonstrated there was no impact on her reputation. The Panel noted it was entirely possible that there was an adverse impact on the then Chief Executive's reputation in the Highland local authority area, regardless of whether and when she had sought and gained employment elsewhere.

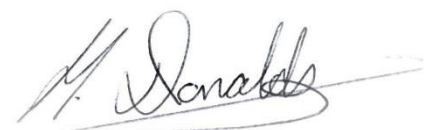
The Panel noted the ESC's representative argument that the Respondent's comments had not been particularly egregious because he had issued an "unconditional" public apology immediately thereafter. Having listened to the recording of the meeting and having noted the Respondent's submissions as to why he had apologised, the Panel was of the view that it was evident the apology had been forced and made in an attempt to avoid expulsion from the meeting, rather than being an attempt to convey meaningful contrition.

The Panel concluded, nevertheless, that while the Respondent's comments were emotive, it did not consider that they were sufficiently offensive, personally abusive or gratuitous as to justify a restriction on his right to freedom of expression. In reaching this view, the Panel took account of its finding that the Respondent had expressed an opinion in good faith. It also took account the Respondent's position (which had not been challenged at the Hearing) that he and others had sought information on the position in respect of the home in advance of the Council meeting on 8 December 2022, and that this had not been provided. The Panel was satisfied, therefore, that the Respondent had attempted to seek clarification about whether the Chief Executive's position, as outlined at the meeting in Caithness, was accurate or had changed. On balance, the Panel accepted it was apparent, from the overall context, that the Respondent was seeking to raise concerns about and establish why the then Chief Executive had previously given such a categorical assurance regarding the future of the home when only a few months later it had been decided it was to close. This was rather than accusing her of deliberately telling a lie. The Panel lastly noted that the then Chief Executive, as the Council's most senior officer, would have been expected to have a greater degree of tolerance to criticism than more junior officers.

In the circumstances, the Panel determined the imposition of a restriction on the Respondent's right to freedom of expression would not be relevant, sufficient and proportionate.

The Panel concluded, therefore, that a formal finding of a breach of the Code could not be made.

Date: 5 April 2024



**Helen Donaldson
Chair of the Hearing Panel**