



SOUTH
KESTEVEN
DISTRICT
COUNCIL

Report of an investigation by Wilkin Chapman LLP, appointed by the Monitoring Officer for South Kesteven District Council, into allegations concerning Councillor Steven Cunnington.

5 November 2024

VOLUME 1 REPORT

wilkin chapman llp
solicitors

Cartergate House
26 Chantry Lane
Grimsby
DN31 2LJ

a limited liability partnership registered in England no. OC343261,
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Appendix A Schedule of evidence taken into account and list of unused material

1. Executive Summary

- 1.1 The Subject Member, Councillor Steven Cunnington, is a member of South Kesteven District Council ("the Council"). He represents the Earlesfield ward.
- 1.2 The Complainant, Councillor Penny Milnes, is also a member of the Council.
- 1.3 Councillor Milnes submitted a complaint against Councillor Cunnington alleging that he had not adhered to the Nolan principles and had been disrespectful.
- 1.4 In August 2023, the Committee for Standards in Public Life (CSPL) responded to a Freedom of Information (FOI) request. The request asked for the process by which someone could raise a complaint that a government department or other public body had breached the Nolan Principles.
- 1.5 In response to the FOI, the CSPL stated that they held no information in the scope of the request because:

"the Seven Principles of Public Life are intended to be high level statements and there is no formal mechanism for holding people to account under those principles. The Principles are not a rulebook. They are a guide to institutional administration and personal conduct. It is organisations' codes of conduct against which complaints may be made so if you wish to hold an individual to account or make a complaint about an individual's behaviour, this would be done against the relevant organisation's code of conduct."

- 1.6 This statement from the CSPL means that, although the Nolan Principles underpin the Code of Conduct, a claim cannot be made that a councillor is in breach of the Nolan Principles. A claim of breach must be related to the behaviours listed in the Code of Conduct. Therefore, we have considered the issues of disrespect and disrepute.
- 1.7 Following investigation, we have concluded that Councillor Cunnington:
 - failed to treat Councillor Green with respect;
 - did not bring the role of councillor and/or the Council into disrepute; and
 - failed to cooperate with a Code of Conduct investigation.

2. Councillor Cunnington's Official Details

2.1 Councillor Cunnington was first elected to the Council on 9 May 2023. He is a member of the Grantham Independent group representing Earlesfield ward. He is a member of the alliance of independent members and groups which is the Administration of the Council.

2.2 At the time of alleged conduct, Councillor Cunnington sat on the following committees:

- Alcohol, Entertainment & Late Night Refreshment Licensing;
- Budget – Joint Overview and Scrutiny;
- Community Governance Review Working Group;
- Environment Overview and Scrutiny;
- Licensing; and
- Rural and Communities Overview and Scrutiny (Vice Chairman).

2.3 Since his election, Councillor Cunnington has not attended Code of Conduct training. In 2024, he has completed the following training:

- 17/06/2024 – Equalities, Diversity & Inclusion;
- 10/06/2024 – Safeguarding;
- 20/05/2024 – Licensing Committee Annual Refresh Training.

3. Relevant Legislation and Protocols

- 3.1 Section 27 of the Localism Act 2011 (“the Act”) provides that a relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority. In discharging this duty, the authority must adopt a code dealing with the conduct that is expected of members when they are acting in that capacity.
- 3.2 Under section 28(6) of the Act, principal authorities (which includes district councils) must have in place (a) arrangements under which allegations can be investigated; and (b) arrangements under which decisions on allegations can be made.
- 3.3 Under section 28(7), arrangements put in place under section 28(6)(b) must include provision for the appointment by the authority of at least one Independent Person (“IP”) whose views are to be sought, and taken into account, by the authority before it makes its decision on an allegation that it has decided to investigate.
- 3.4 Section 28(11) of the Act provides that if a relevant authority finds that a member or a co-opted member of the authority has failed to comply with its code of conduct it may have regard to the failure in deciding (a) whether to take action in relation to the member or co-opted member and (b) what action to take.
- 3.5 The Council has adopted a Code of Conduct (“the Code”) (attached at WC 1) which includes the following:

“General Conduct

1. Respect

As a Councillor:

1.1 I treat other Councillors and members of the public with respect.

1.2 I treat local authority employees, employees and representatives of partner organisations and those volunteering for the local authority with respect and respect the role they play.

Respect means politeness and courtesy in behaviour, speech and in the written word. Debate and having different views are all part of a healthy democracy. As a Councillor, you can express, challenge, criticise and disagree with views, ideas and opinions and policies in a robust but civil manner.

You should not, however, subject individuals, groups of people or organisations to personal attack.

In your contact with the public, you should treat them politely and courteously. Rude and offensive behaviour lowers the public’s expectations and confidence in Councillors.

In return, you have a right to expect respectful behaviour from the public. If members of the public are being abusive, intimidatory or threatening you are entitled to stop any conversation or interaction in person or online and report them to the local authority, the relevant social media provider, or the Police. This also applies to fellow Councillors, where action could then be taken under the Members’ Code of Conduct, and local authority employees, where concerns should be raised in line with the local authority’s councillor officer protocol.

5. Disrepute

As a councillor:

5.1 I do not bring my role or local authority into disrepute.

As a Councillor, you are trusted to make decisions on behalf of your community and your actions and behaviour are subject to greater scrutiny than that of ordinary members of the public. You should be aware that your actions might have an adverse impact on you, other councillors and/or your local authority and may lower the public's confidence in your or your local authority's ability to discharge your/its functions. For example, behaviour that is considered dishonest and/or deceitful can bring your local authority into disrepute.

You are able to hold the local authority and fellow councillors to account and are able to constructively challenge and express concern about decisions and processes undertaken by the council whilst continuing to adhere to other aspects of this Code of Conduct.

8. Complying with the Code of Conduct

As a Councillor:

...

8.2 I cooperate with any Code of Conduct investigation and/or determination

...

It is extremely important for you as a councillor to demonstrate high standards, for you to have your actions open to scrutiny and for you not to undermine public trust in the local authority or its governance. If you do not understand or are concerned about the local authority's processes in handling a complaint you should raise this with your Monitoring Officer."

3.6 We have also considered other relevant legislation as follows:

Freedom of Expression and Article 10 of the European Convention on Human Rights 1998

3.7 Article 10 of the European Convention on Human Rights (Article 10 ECHR) states:

- *Art 10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by a public authority...*
- *Art 10(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and necessary in a democratic society...*

- 3.8 Article 10 ECHR has been enshrined in UK domestic law by Section 1 of the Human Rights Act 1998 (HRA 1998) and Section 3 of the HRA 1998 states that the Act must be interpreted as far as possible so that it is in line with Article 10 ECHR.

4. Background and Evidence

Our appointment

- 4.1 The Council's arrangements for dealing with code of conduct complaints provide that Monitoring Officer ("MO"), in consultation with the appointed IP, shall decide whether or not to investigate a complaint.
- 4.2 On 20 May 2024, having consulted with two IPs, the MO issued his Decision Notice in respect of the complaint. The Decision Notice confirmed the MO's decision to refer the complaint for investigation. The complaint is attached at WC 2 and the Decision Notice is attached at WC 3.
- 4.3 On 28 May 2024, the MO instructed Wilkin Chapman LLP to conduct an investigation into the complaint.
- 4.4 Wilkin Chapman LLP is a solicitors' firm based in Lincolnshire and East Yorkshire with a national local government legal practice. Work in relation to this investigation was undertaken by Estelle Culligan, Gill Thompson, and Emily Briggs.

The investigation

- 4.5 During the investigation we undertook formal interviews with:
 - Councillor Milnes (the Complainant); and
 - Councillor Green (witness).
- 4.6 We obtained signed statements from Councillor Milnes (attached at WC 4) and Councillor Green (attached at WC 5).
- 4.7 Despite writing to Councillor Cunningham on 18 June, 3 July and 17 July 2024 he has not responded to our correspondence. Copies of our correspondence are attached at WC 6.
- 4.8 The MO wrote to Councillor Cunningham on 1 August 2024 asking that he contact the investigators and reminding him that a lack of cooperation with the investigation could also be a breach of the Code of Conduct. This email is attached at WC 7.
- 4.9 Copies of the above, together with other relevant documents are annexed to this report.
- 4.10 We wish to record our thanks for the co-operation and courtesy shown to us by Councillor Milnes and Councillor Green. We regret that Councillor Cunningham did not engage in the investigation.

The Complaint

- 4.11 Councillor Penny Milnes is a South Kesteven Independent councillor, forming part of the South Kesteven Coalition Group. She represents the Loveden Heath ward. She was first elected on 2 May 2019. The South Kesteven Coalition Group are in opposition.
- 4.12 On 1 May 2024 Councillor Green posted on Facebook a link to a Lincsoline article which contained a picture of Councillor Patsy Ellis. Councillor Green wrote:

“Former portfolio holder for bins at SKDC, Cllr Patsy Ellis, has left the Cabinet and the Green Party. Did she jump before she was binned? 😊”

- 4.13 Councillor [REDACTED] shared the original post by Councillor Green to his own Councillor facebook page and commented. In the chain of comments underneath his shared post, including a comment from Councillor [REDACTED], Councillor Cunningham responded to that comment, as follows:

“Vile disrespectful insensitive scum !!”

- 4.14 Councillor Milnes submitted her complaint on 8 May 2024. In her complaint, Councillor Milnes stated:

“I would like to make a Code of Conduct complaint against Cllr Steve Cunningham.

*Please see the attached social media post where Cllr Cunningham describes Cllr Green as “Vile disrespectful insensitive **scum** !!”*

I see this as a clear breach of the council code of conduct, showing a lack of respect and the not adhering to the Nolan principles.

This is not the kind of language we should be using to describe each other; criticize but not in those terms.”

- 4.15 Councillor Milnes was not certain that the phrase was aimed solely at Councillor Green, or at the Conservative group in general. She stated:

I don't think it is just about Councillor Green. The way Councillor [REDACTED]'s post is written there seems to be a wider aspersion that this is to all Conservatives, but it was brought on by Councillor Green's social media post.

- 4.16 This incident was referred for investigation by the MO. Councillor Green's original post shared to Councillor [REDACTED]'s page is at WC 8. The Facebook comments, including Councillor Cunningham's comment, are at WC 2.

Councillor Cunningham

- 4.17 We initially wrote to Councillor Cunningham on 18 June 2024 seeking his availability to speak with us. Councillor Cunningham did not respond.
- 4.18 We then wrote to him again on 3 July and 17 July 2024. Again, Councillor Cunningham did not respond to us.
- 4.19 The MO wrote to Councillor Cunningham on 1 August 2024 asking him to contact investigators. However, at the time of preparing this report, we have not been contacted by Councillor Cunningham.

5. Councillor Milnes and Councillor Cunningham's Additional Submissions

- 5.1 The following comments were received from Councillor Milnes on the draft version of this report:

*"Thank you for sight of the Draft Report which I have viewed.
This is very thorough and on first reading it I have no further comments to make.*

*Many thanks,
Penny"*

- 5.2 No comments were received from Councillor Cunningham on the draft version of this report.

6. Reasoning As To Whether There Have Been Failures To Comply With The Code Of Conduct

- 6.1 The relevant sections of the Code and of the relevant protocols which must be considered are set out in Section 3 above.

Capacity

- 6.2 Section 27(2) of the Localism Act 2011 requires the Authority to adopt a Code of Conduct dealing with the conduct that is expected of members of the Council “when they are acting in that capacity”.
- 6.3 The Council’s Code of Conduct reflects the requirement of Section 27(2) of the Localism Act.
- 6.4 The Council’s Code is expressed to apply whenever a member is acting in their capacity as a Councillor. We therefore first have to consider whether Councillor Green was acting in an official capacity at the time of the alleged incidents.
- 6.5 The Local Government Association Guidance on the Model Code of Conduct (“the LGA Guidance”) states that:

“The Code of Conduct applies to you when you are acting in your capacity as a councillor which may include when:

- *You misuse your position as a councillor*
- *Your actions would give the impression to a reasonable member of the public with knowledge of all the facts that you are acting as a councillor.*

This means it applies when you are carrying out your official duties, for example when you are considering or discussing local authority business, either as a councillor or representing the local authority on an outside body.

...

The code does not, therefore, apply solely when you are in local authority meetings or on local authority premises.

The code applies to all forms of communication and interaction, including:

- *At face-to-face meetings*
- *At online or telephone meetings*
- *In written communication*
- *In verbal communication*
- *In non-verbal communications*
- *In electronic and social media communication, posts, statements, and comments.*

The includes interactions with the public as well as with fellow councillors and local authority officers.”

- 6.6 Councillor Cunnington’s Facebook page is under the name “Cllr Steven Cunnington Earlesfield”. The introduction reads “SKDC Councillor.”

- 6.7 It is clear from the LGA Guidance that this alone does not mean that Councillor Cunningham was acting in his capacity when commenting on Facebook:

“Simply describing yourself as a councillor in a social media posting or at the top of your page or in your username or profile, for example, does not of itself mean that every posting you make is covered by the Code. There must be a link within the individual posting or thread to your role as a councillor or to local authority business.”

- 6.8 However, Councillor Cunningham’s comment relates to a Facebook post by Councillor Green shared to Councillor [REDACTED]’s councillor Facebook page, which related to Council business.

- 6.9 Our view is therefore that Councillor Cunningham was acting in an official capacity and was subject to the Code of Conduct.

Respect

- 6.10 The definition of Respect in the Code is set out above in paragraph 3.5. We have considered the Local Government Association Guidance (LGA Guidance) and relevant case law below.

- 6.11 When describing ‘Disrespectful Behaviour’ the LGA Guidance states:

“Failure to treat others with respect will occur when unreasonable or demeaning behaviour is directed by one person against or about another. The circumstances in which the behaviour occurs are relevant in assessing whether the behaviour is disrespectful. The circumstances include the place where the behaviour occurs, who observes the behaviour, the character and relationship of the people involved and the behaviour of anyone who prompts the alleged disrespect.”

Examples of disrespect in a local government context might include rude or angry outbursts in meetings, use of inappropriate language in meetings or written communications such as swearing, ignoring someone who is attempting to contribute to a discussion, attempts to shame or humiliate others in public, nit-picking and fault finding, the use of inappropriate sarcasm in communications and the sharing of malicious gossip or rumours.

Disrespectful behaviour can be harmful to both you and to others. It can lower the public’s expectations and confidence in you and your local authority and councillors and politicians more generally. It influences the willingness of fellow councillors, officers, and the public to speak up or interact with you because they expect the encounter will be unpleasant or uncomfortable. Ongoing disrespectful behaviour can undermine willingness of officers to give frank advice, damage morale at a local authority, and ultimately create a toxic culture and has been associated with instances of governance failure.”

- 6.12 The requirement to treat others with respect must be viewed objectively. Account should be taken of the member’s intent and how their behaviour would reasonably be perceived.

- 6.13 In *Boughton, Dartmouth Town Council* (2009) APE 0419 at paragraph 3.3.6, the Tribunal described a failure to treat with respect as follows:

“A failure to treat others with respect will occur when unfair, unreasonable or demeaning behaviour is directed by one person against another. The circumstances in which the behaviour including the place, who observed it, the character and relationship of the people involved will all be relevant in assessing whether the behaviour was disrespectful.”

- 6.14 In *Buchanan, Somerset County Council* (2009) APE 0409, in relation to a complaint made by a chief executive, the Tribunal said at paragraph 51:

“In the Tribunal’s view it was desirable that the threshold for a failure to treat another with respect be set at a level that allowed for the minor annoyances and on occasions bad manners which are part of life. During the course of their work people often show a lack of consideration or bad manners but it is not desirable that every such slight should be considered a breach of the Code. To set too low a level might lead to complaints that were about little other than a difference of opinion over the wording of a letter or what amounts to rudeness and for this reason the Tribunal thinks that not every instance of bad manners or insensitive comment should amount to a failure to treat another with respect.”

- 6.15 The key elements of finding a failure to treat others with respect are that the conduct is unreasonable or demeaning and directed by one person against another.

- 6.16 The LGA Guidance states that disrespectful behaviour is *“when unreasonable or demeaning behaviour is directed by one person against or about another.”*

- 6.17 The Oxford dictionary definition of ‘unreasonable’ is:

“beyond the limits of acceptability or fairness”

- 6.18 The Oxford dictionary meaning of ‘demeaning’ is:

“causing someone to lose their dignity and the respect of others.”

Freedom of Speech and the right to enhanced protection in freedom of speech within political comment - Article 10 European Convention on Human Rights

- 6.19 It is important to have regard to the right to freedom of speech as set out in Article 10 of the European Convention on Human Rights (Article 10 ECHR) above.

- 6.20 A number of European court cases have established not only the right to free speech but also an enhanced level afforded to freedom of speech in a political context, and that any interference with that freedom should be carefully scrutinised.

- 6.21 The case of *Heesom v Public Services Ombudsman for Wales* [2014] EWHC 1504, held that:

- Article 10 of ECHR protects not only the substance of political comment but the form in which it is conveyed;
- a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, non-rational and aggressive is to be tolerated;

- political comment includes comment on public administration and the adequacy of the performance of public duties by others, but not gratuitous personal comments;

6.22 The case of *Jerusalem v Austria* (2003) 37 EHHR 25 held that:

“In this respect the court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to its pre-occupations and defends its interests. Accordingly, interference with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the court.”

6.23 In *Sanders v Kingston (No.1)* [2005] EWHC 1145 (Admin) the original tribunal held that, in the Leader of Peterborough Council’s responses to a letter circulated by Carrickfergus Council to other councils in the UK asking for support on a particular issue relating to the personal tragedy of soldiers’ suicides, his comments and other comments made publicly, amounted to personal abuse.

6.24 In summary, the facts were that the leader wrote a response on a letter passed to him by the Chief Executive, in response to a request made by Carrickfergus Council.

6.25 Councillor Sanders wrote a handwritten note on a copy of the letter and returned it to the Carrickfergus Chief Executive as follows:

“Members of the Armed Forces DO get killed be it accident or design — THAT is what they are paid for.”

6.26 He then signed the comment and identified himself as Leader.

6.27 There were further exchanges between the Leader of Carrickfergus Council and Councillor Sanders, the matter was leaked to the press and Councillor Sanders continued to make highly offensive comments. Councillor Sanders also used aggressive and rude language in various conversations with journalists covering the story.

6.28 During the investigation into the subsequent Standards complaint against Councillor Sanders, he claimed that Article 10 was engaged and that he was exercising his right to free speech.

6.29 The Standards Board for England found that Councillor Sanders had breached the Code of Conduct both in his written comments and in his conversations with journalists.

6.30 In Councillor Sanders’ appeal, the judge stated that, on the issue of freedom of speech, there were three questions to answer:

- “1. Was the Case Tribunal entitled as a matter of fact to conclude that Councillor Sanders’ conduct was in breach of the Code of Conduct ?
2. If so, was the finding in itself or the imposition of a sanction *prima facie* a breach of Article 10 ?
3. If so, was the restriction involved one which was justified by reason of the requirements of Article 10(2) ?

- 6.31 The appeal held that, on the first point, the Standards Board were entitled to conclude that Councillor Sanders was in breach. The tone and disrespectful nature of his comments on the letter and subsequently and in interviews with journalists was not what would be expected of a council leader. The court held also that, on the second point, Article 10 was engaged because of the issues of free speech, but Councillor Sanders' comments were not expressions of political opinions that attracted the higher protection afforded by article 10. They were simply expressions of personal anger and abuse.
- 6.32 On the final point, the court considered whether the restrictions imposed on Councillor Sanders were justified under Article 10 (2) – i.e. *necessary in a democratic society for the protection of the rights of others*. The court held that the adoption of a Code of Conduct was required by law and ensured a minimum set of standards in councillors' conduct. Councillor Sanders had signed up to the council's Code of Conduct and, as his actions and words were not held to be expressions of political opinion, the interference in his right to freedom of speech, by the finding of the Standards Board that he was in breach, was justified under Article 10(2).
- 6.33 The three part test was applied in the case of (*Calver*) v *Adjudication Panel for Wales* (2013). This was a judicial review case in which a councillor sought judicial review of the decision of a county council's standards committee which found that comments he made about the community council and its members on the internet failed to comply with paragraphs 2(b) and 4 of the Code of Conduct by, respectively, not treating others with respect, and bringing the community council into disrepute.
- 6.34 The court adopted the three questions identified in *Sanders v Kingston* and found that the committee and the panel were entitled to conclude that the councillor's comments breached the Code of Conduct.
- 6.35 In answering the second and third questions, the court concluded that the panel's decision that the councillor's comments were in breach of the Code of Conduct was a disproportionate interference with his rights under Article 10.
- 6.36 The approach was also adopted in the recent case of *R (on the application of Clive Robinson) v Buckinghamshire Council* (2021), when the court held that a finding by a local authority monitoring officer that a parish councillor had breached a code of conduct by making statements about the motivations, intentions and integrity of the other councillors at a public meeting to discuss green belt development had been an interference with his right to freedom of expression under ECHR Art.10. His statements attracted the enhanced protection afforded to political speech and debate, and the interference was not proportionate to the aim of protecting the reputation of the other councillors.
- 6.37 Councillor Green put a post on social media on 1 May 2024 which was subsequently shared by Councillor [REDACTED]
- 6.38 Councillor Green's post contained a link to a Lincsonline article, a picture of Councillor Patsy Ellis and the words, "*Former portfolio holder for bins at SKDC, Cllr Patsy Ellis, has left the Cabinet and the Green Party. Did she jump before she was binned?* 🤔"
- 6.39 When Councillor [REDACTED] shared Councillor Green's post, in a chain of comments underneath, including from members of the public and Councillor [REDACTED] himself, Councillor Cunningham commented:

"Vile disrespectful insensitive scum !!"

6.40 In her statement, Councillor Milnes stated:

“Councillor Ben Green is quite well known for his sense of humour. At the time of Councillor Green’s social media post we were having trouble with the bins. There are still issues around the bins. Councillor Green’s post referred to the Cabinet Member for waste stepping down from her Cabinet role and from her Group on the Council. This post triggered all the nastiness.

...

This complaint is about a comment from Councillor Cunningham on a post by Councillor [REDACTED], replying to a post from Councillor Green. Councillor [REDACTED] made claims against Councillor Green after he posted a Grantham Journal news article on his Facebook feed that reported that Councillor Ellis had resigned from Cabinet at 8pm on a Friday night after months of chaos in her portfolio. Councillor Green asked, “did she resign or was she binned?” – a question many of us had.

...

My view is that you do not respond to a social media post with totally unacceptable language ... The public are listening and watching, inciting other people to respond in a more toxic way. Though the issue was obviously political, it has a knock-on effect.

...

When the toxic and awful comments are made in public, I think it is a real problem. I don’t think Councillor Cunningham has tried to apologise or delete the post or to be supportive of an informal resolution.”

6.41 In his statement, Councillor Green stated:

First and foremost, it is about putting across a counter narrative. There is an expectation from the public that we hold the administration to account. It is important for democracy for rival opinions to be put across. It is something I feel my residents would expect me to do. I don’t believe they would feel I was doing a good job if I did not hold the administration to account.

I believe this comment fits the grounds of incitement and falls far outside the boundaries of robust political debate. The language and terminology were dehumanising, particularly the words ‘vile’ and ‘scum’. Such language is unbecoming of a councillor.

When I saw Councillor Cunningham’s social media comment I was gravely distressed by the use of base language, particularly the words ‘vile’ and ‘scum’. Such comments are likely to stir up strong negative public opinion against me. Such characterisations are wildly off-base, hyperbolic and inaccurate.”

6.42 Councillor Cunningham has not responded to our correspondence. Therefore, he has not been interviewed and we have not been able to speak with him about the complaint.

6.43 We have considered the three stage test set out in *Sanders v Kingston*:

1 - Is the conduct a breach of the Code of Conduct?

- 6.44 We consider that quite obviously the comment is disrespectful. Even if the comment is also aimed more generally at the Conservative group, it is made beneath Councillor [REDACTED]'s post and is obviously also about Councillor Green. Calling someone "vile disrespectful scum" is clearly quite offensive. It is also clear that Councillor Green was quite shocked by the comment, even considering the robust nature of the exchanges between members of the different groups.

2 - Are the findings in themselves or the imposition of a sanction prima facie a breach of Article 10 ?

- 6.45 Article 10 is clearly engaged, as these matters involve issues of freedom of expression.

- 6.46 The case of *Patrick Heesom v The Public Services Ombudsman for Wales v the Welsh Ministers* (2014) states, in the context of political commentary:

"a degree of the immoderate, offensive, shocking, disturbing, exaggerated, provocative, polemical, colourful, non-rational and aggressive is to be tolerated..."

- 6.47 However, we also take into account the guidance in *Sanders v Kingston*, where the Leader of Peterborough Council's comments were held to fall outside of the realm of political commentary and to be simply personal abuse. There were not found to attract the enhanced degree of protection afforded to political commentary. Councillor Cunningham's comment was posted on Facebook in response to a post by Councillor Green which Councillor [REDACTED] shared to his own page. This could be seen by a wide audience. It is clear that Councillor Cunningham is commenting on a post relating to Council business – Councillor Green's commentary on Councillor Ellis' departure from her Cabinet role. Councillor Cunningham, like others in his group, is upset by Councillor Green's clear mocking and sarcastic comment about the reasons for Councillor Ellis leaving her role. However, we consider that Councillor Cunningham could have expressed his dislike at Councillor Green's Facebook post without using such offensive and belittling language, which reads as simply personally abusive.

- 6.48 The LGA Guidance states that disrespectful behaviour is *"when unreasonable or demeaning behaviour is directed by one person against or about another."*

- 6.49 The Oxford dictionary definition of 'unreasonable' is:

"beyond the limits of acceptability or fairness"

- 6.50 The Oxford dictionary meaning of 'demeaning' is:

"causing someone to lose their dignity and the respect of others."

- 6.51 We consider that Councillor Cunningham's comment is gratuitously offensive towards Councillor Green and possibly others, and therefore falls outside the enhanced protection of political freedom of expression.

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

6.52 The restriction in this case would be a finding of breach under the Code of Conduct. As we have found that Councillor Cunningham's comment is simply gratuitous abuse, it does not benefit from the enhanced protection of political freedom of expression. This follows the finding in *Sanders v Kingston* in which the judge held that Councillor Sanders' comments were not expressions of political opinions that attracted the higher protection afforded by article 10. They were simply expressions of personal anger and abuse. We find similarly in the case of Councillor Cunningham's comments. His comments are disrespectful under the Code of Conduct. The Code of Conduct is a lawful restriction under the Localism Act 2011 and Councillor Cunningham signed up to abide by that Code of Conduct when he was elected as Councillor. Therefore, our finding of a breach of paragraph 1 (Respect) of the Code of Conduct is justified in the circumstances.

Disrepute

6.53 We have also considered whether Councillor Cunningham's comment amounts to bringing his office or the Council into disrepute.

6.54 The definition of Disrepute in the Code is set out above in paragraph 3.5. The LGA Guidance states:

"As a councillor, you are trusted to make decisions on behalf of your community and your actions and behaviour are subject to greater scrutiny than that of ordinary members of the public. Article 10 of the European Convention on Human Rights protects your right to freedom of expression, and political speech as a councillor is given enhanced protection but this right is not unrestricted. You should be aware that your actions might have an adverse impact on your role, other councillors and/or your local authority and may lower the public's confidence in your ability to discharge your functions as a councillor or your local authority's ability to discharge its functions."

In general terms, disrepute can be defined as a lack of good reputation or respectability. In the context of the Code of Conduct, a councillor's behaviour in office will bring their role into disrepute if the conduct could reasonably be regarded as either:

- 1. reducing the public's confidence in them being able to fulfil their role; or*
- 2. adversely affecting the reputation of your authority's councillors, in being able to fulfil their role.*

Conduct by a councillor which could reasonably be regarded as reducing the public confidence in their local authority being able to fulfil its functions and duties will bring the authority into disrepute."

6.55 In applying the Code to the circumstances of an alleged breach of disrepute, it is established that it is not necessary for the member's actions to have actually diminished the public confidence or harmed the reputation of the authority. The test is whether or not the conduct could 'reasonably be regarded' as having these effects. However, the conduct must be sufficient to damage the reputation of the member's office of the Council, not just the reputation of Councillor Cunningham as an individual.

- 6.56 We must consider an objective view, i.e. whether Councillor Cunningham's comment is such that a member of the public, knowing all the relevant facts, would reasonably think that his actions were so significant that it would impact on the Council's ability to properly carry out its functions.
- 6.57 As discussed above, the issue relates to one post by Councillor Green commenting on a press report about Councillor Ellis' departure. It is an emotive subject, both for Councillor Green, who is critical of her role as Cabinet member, and for Councillor Cunningham and his colleagues, who are aware of other, more personal reasons for Councillor Ellis' departure. The comment is not a main post but is contained within a chain of comments underneath Councillor [REDACTED]'s sharing of Councillor Green's post. The other comments are by members of the public and Councillor [REDACTED].
- 6.58 In addition, although the phrase is personally abusive and not how the public would expect members to address each other, it is not the most egregious of terms to use. Councillor Milnes also thought that, because of how the comment appeared among the other comments, it might have been aimed more generally at the Conservative group. It is also clear from the chain of comments that many members of the public were supportive both of Councillor Ellis and of Councillor Cunningham's strong support for her.
- 6.59 We therefore do not consider Councillor Cunningham's conduct would adversely affect the reputation of the Council in being able to fulfil its functions and duties. Neither do we consider that Councillor Cunningham's conduct was sufficient to damage his role as a councillor.
- 6.60 We have therefore concluded that Councillor Cunningham's conduct did not cause him to breach paragraph 5 (Disrepute) of the Council's Code of Conduct.

Failure to comply with a Code of Conduct investigation

- 6.61 As Councillor Cunningham has not responded to our correspondence or that of the MO, we have considered whether Councillor Cunningham's conduct is a breach of paragraph 8.2 of the Council's Code of Conduct.
- 6.62 The importance of complying with a Code of Conduct investigation is set out above in paragraph 3.5.
- 6.63 The LGA Guidance states:
- "While being the subject of a complaint that you have breached the Code of Conduct and having your conduct investigated may at times be unpleasant and stressful it is essential that councillors cooperate with any code investigations and determinations. Failure to cooperate will not stop an investigation but may simply drag matters and does not allow you to put your side of the story so increases the risk that inferences are drawn about your unwillingness to cooperate and that you will be found in breach of the Code."*
- 6.64 As stated above, we wrote to Councillor Cunningham on 18 June, 3 July and 17 July 2024 but received no response.
- 6.65 The MO then wrote to Councillor Cunningham on 1 August 2024 asking that he contact us and explaining that failure to co-operate with a Code of Conduct investigation could also be considered a breach of the Code of Conduct.

- 6.66 At the time of writing this report we have had no contact from Councillor Cunningham. We have only heard Councillor Milnes and Councillor Green's detailed comments on the issue and have had to make findings on the complaint based on their comments only.
- 6.67 We have concluded that Councillor Cunningham's lack of co-operation in the investigation is a breach of paragraph 8.2 of the Council's Code of Conduct.

7. Conclusion

- 7.1 Our conclusion is that Councillor Cunningham has failed to comply with paragraph 1 (Respect) of the Code of Conduct.
- 7.2 Our conclusion is that Councillor Cunningham has not failed to comply with paragraph 5 (Disrepute) of the Code of Conduct.
- 7.3 In addition, our conclusion is that there has been a failure by Councillor Cunningham to comply with paragraph 8.2 of the Council's Code of Conduct in that he has failed to cooperate with the investigation.

5 November 2024

Wilkin Chapman LLP
Investigating Solicitors