

Freedom of Speech and Standards Complaints

| | |
|------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|
| Is it likely to result in spending or saving £250k or more, or to have a significant effect on two or more electoral wards? | Yes / No or “not applicable” If yes give reason why N/A |
| Is it in the Council’s Forward Plan? | Yes/ No or “not applicable” If yes give date it first went in N/A |
| Is it eligible for “call in” by Scrutiny? | Yes/ No or “not applicable” If no give reason why not N/A |
| Cabinet member portfolio | Corporate |

Electoral wards affected and ward councillors consulted: N/A

Public or Private: Public

1. Purpose of Report

To provide information to Committee on the issue of freedom of speech and the operation of the Code of Conduct.

2. Key Points

As an annex to this report is a note on this issue by reference to the caselaw usefully summarised in the recent decision of the Adjudication Panel for England under Ref APE 0414 in relation to a complaint about a councillor at Berwick-upon-Tweed Borough Council.

3. Implications for the Council

It is useful for the Standards Committee to have an awareness of some of the legal issues which arise when standards complaints are dealt with.

4. Consultees and their opinions

N/a

5. Officer recommendations and reasons

That committee consider the issues raised in the note.

6. Cabinet portfolio holder recommendation

N/a

7. Next steps

N/a

8. Contact officer and relevant papers

Dermot Pearson

Senior Legal Officer

Telephone: 01484 221437

Internal: 860 1437

E-mail: Dermot.pearson@kirklees.gov.uk

Background Papers: Decision reference APE 0414 on the Adjudication Panel for England website at www.adjudicationpanel.co.uk

FREEDOM OF SPEECH AND STANDARDS COMPLAINTS

The Council's Code of Conduct imposes obligations upon members to treat others with respect, not to bully anyone and not to conduct themselves in a manner which could reasonably be regarded as bringing their office or authority into disrepute. Article 10 of the European Convention of Human Rights provides:

FREEDOM OF EXPRESSION

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Section 1 of the Human Rights Act 1998 identifies the rights under the European Convention of Human Rights (ECHR) which have effect for the purposes of that Act. They include Article 10 of the ECHR. Section 3(1) of the 1998 Act provides that so far as it is possible to do so.....subordinate legislation must be read and given effect in a way which is compatible with the convention rights.

Section 6 of the 1998 Act provides as follows:

(1) It is unlawful for a public authority to act in a way which is incompatible with a convention right.

Subsection (2) Disapplies the section in certain very limited circumstances concerning primary legislation. This does not apply to the standards cases where the matters raised by subject members concern subordinate legislation.

Section 7 provides:

(1) A person who claims that a public authority has acted in a way which is made unlawful by section 6(1) may –

(b) rely on the convention right or rights concerned in any legal proceedings...

There is a potential conflict between a member's right to freedom of expression and the provisions of the Code of Conduct which would allow complaints to be made on the basis of what a member had said or written. This issue has been considered by the UK courts on several occasions.

In *Sanders v Steven Kingston [2005]* the High Court had to consider the relationship between Article 10 and the paragraphs of the then Code of Conduct dealing with treating others with respect and disrepute. In his judgment, Wilkie J reviewed a number of authorities and identified relevant passages from the judgments in previous cases. These included:

This extract from the judgment in *Lingens v Austria*:

“ In this connection the court has to recall that freedom of expression...constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self fulfilment. Subject to paragraph 2, it is applicable not only to “information or ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broad mindedness without which there is no democratic society...More generally freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the convention...In such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues. ”

The following extract from Lord Justice Hoffman's judgment in *R v Central Independent Television Ltd (1994)*:

“Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which “right thinking people” regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute....It cannot be too strongly emphasised that outside the established exceptions, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.”

The following extract from Lord Nichols' judgment in *Reynolds v Times Newspapers Ltd (2001)*L

“My starting point is freedom of expression. The high importance of freedom to impart and receive information and ideas has been stated so often and so eloquently that this point calls for no elaboration in this case. At a pragmatic

level, freedom to disseminate and receive information on political matters is essential to the proper functioning of the system of parliamentary democracy cherished in this country. This freedom enables those who elect representatives to parliament to make an informed choice, regarding individuals as well as policies, and those elected to make informed decisions....To be justified, any curtailment of freedom of expression must be convincing established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.”

When he turned to the facts of the Sanders case, which related to the Leader of Peterborough City Council's comments in relation to a request from a Northern Irish council for support for the holding of a public inquiry into the deaths of military personnel, Wilkie J found that Article 10 was engaged and that the finding of a breach of the Code of Conduct and the imposition of a sanction were prima facie a breach of Article 10. However Wilkie J found that, on the facts of the case, the restriction on the right to freedom of expression was justified having regard to the requirements of Article 10(2). In particular the learned judge concluded that the words spoken and written by Councillor Saunders amounted to no more than expressions of personal anger and personal abuse and did not constitute political expression which attracts the higher level of protection and went on to say:

I recognise that, were this machinery to be used against a member of a local authority who did give expression to political opinions of an offensive nature or expressed political opinions in an offensive way, then there might be circumstances in which the Case Tribunal could not find a breach of the code of conduct without involving itself in an unlawful infringement of the rights protected by Article 10. However, as a matter of fact, this is not such a case.”

In his judgment in the case of *Livingstone v The Adjudication Panel for England* [2006], which concerned comments made by the Mayor of London to a journalist after a function at City Hall, Collins J said:

“The burden is on [the Adjudication Panel for England] to justify interference with freedom of speech. However offensive and undeserving of protection the appellant's outburst may have appeared to some, it is important that any individual knows that he can say what he likes, provided it is not unlawful, unless there are clear and satisfactory reasons within the terms of Article 10(2) to render him liable to sanctions”.

The issue of the Article 10 right to freedom of expression does arise in the decisions of the Adjudication Panel. For example:

- (i) In case ref APE 410, which is summarised in a separate report on this agenda, the Panel considered whether the member's call for the council's chief executive to resign was protected by the member's

Article 10 rights. The Panel concluded that when the councillor departed from his focused attack on the ruling Conservative group and turned his attention to the chief executive he moved away from the cloak provided by Article 10 and moved into the ambit of the Code. Accordingly the member's actions and comments relating to the chief executive were to be adjudged against the terms of the Code and Article 10 could not be used to afford him a defence.

- (ii) In case ref APE 401, the allegations concerned a member's visit to a branch of the Open College Network and his comments and emails to staff. The Panel considered the application of Article 10 and the Code requirements as to disrepute. The Panel found that the member's threat to the staff was an expression of anger and frustration and not political expression entitled to a higher level of protection. Accordingly there was no breach of Article 10 in the local standards committee's decision.

- (iii) In case ref APE 378, the allegations concerned the member's treatment of others, including a senior Police officer and council officers. On the issue of her treatment of the Police officer the Panel found that the member's behaviour was simple rudeness and that the higher degree of protection accorded to political expression was not engaged. Similarly the views the member had expressed about the honesty and competence of officers were her personal views with the policy of the council not being an issue and in the absence of a political element her views did not attract the higher degree of protection. The member had also made comments which the Panel found to be racist and the Panel noted from the European Court of Human Rights caselaw that racist speech is "virtually unprotected" in terms of Article 10.

The Tribunal found that the words of the Respondent were expressions of personal anger, frustration and personal abuse and thus did not constitute political expression which attracts the higher level of protection. In these circumstances, in the Tribunal's judgment, a finding that the Respondent had breached the code of conduct, while an interference with freedom of expression, would be one which was lawful under to Article 10(2) of the European Convention on Human Rights.

Summary

There is a potential conflict between the Code of Conduct and the right to freedom of expression. Where political views are being expressed by the member there may be circumstances where the right to freedom of expression overrides the member's obligations under the Code of Conduct. To date the relevant decisions of the Adjudication Panel and the courts have not had to deal with that issue directly because the words used by the members concerned have not been an expression of political views and have often been expressions of anger, frustration or personal abuse. However the right to freedom of expression is a very important right, as confirmed in the legal judgments referred to above and must be borne in mind whenever a complaint is made about what a member has said or written.