

the Case Review

number three

the Case Review

number three

First published in Great Britain 2005

The Standards Board for England

First floor, Cottons Centre, Cottons Lane, London SE1 2QG

Designed and Produced by Corporate Edge

Printed in Great Britain by Belmont Press

© The Standards Board for England 2005

Contributors: David Abrahams, Bridget Beale, Graham Lee,
Storm Westmaas, Michelle Witton

ISSN 1740-7680 (print)

ISSN 1742-2191 (online)

This paper includes at least 75% recycled material. The remainder comes
from forests managed using sustainable development practices.

contents

Preface and disclaimer	4
Introduction <i>Sir Anthony Holland, Chair</i>	6
Chapter 1: Considering complaints	7
Chapter 2: Confidentiality and the public interest	19
Chapter 3: Local determinations	25
Chapter 4: High Court appeals	35
Chapter 5: Significant others	50

PREFACE TO THE SERIES

The Case Review shares with its readers the Standards Board for England's experience of conducting investigations, giving legal advice and developing policy in relation to the Code of Conduct.

Each edition uses case examples drawn from this experience to pose questions, spark debate and propose conclusions. These examples focus on new, problematic or interesting developments in the interpretation of the Code of Conduct arising from investigations of those cases. The ethical standards officers, and legal and policy advisers, are consulted extensively when writing each *Case Review*.

The Case Review also aims to reflect on, and inform about, new developments in the interpretation and working of the Code of Conduct.

Although these publications are not statutory guidance, the Standards Board for England regards them as practical advice kits on the interpretation of the Code of Conduct, offering useful guidance to members, monitoring officers and others.

CASE EXAMPLES

Our policy with the *Case Review* is to remove names of individuals and authorities from the accounts of cases used, in order to avoid subjecting those involved in cases to unnecessary further publicity. But as in life, there are always exceptions, and you will find some members named in chapter 2 and chapter 4. The case at the heart of chapter 2 will be so familiar to readers, and the details of the case so identifiable, that withholding the member's name would have served no purpose. The members named in chapter 4 were all involved in high court appeals, where convention takes their names as the case reference.

We have provided references to some of the significant cases covered here, to help those who wish to consider them in greater depth. SBE numbers relate to case summaries available from our website, www.standardsboard.co.uk; APE numbers relate to the Adjudication Panel for England's decisions, available from www.adjudicationpanel.co.uk.

Summaries of cases where there was no evidence of a breach of the Code of Conduct are removed from our website after six months. Summaries of other cases remain on our site for no more than two years after the end of any sanction, or following either the determination or issue of a final report if no sanction is imposed, in line with our policy of not subjecting those who have broken the Code of Conduct to disproportionate publicity.

DISCLAIMER

The views expressed in this publication are those of the Standards Board for England and should not be treated as formal legal advice. Further guidance on the interpretation of the Code of Conduct will be obtained from the decisions of the Adjudication Panel for England and the courts. These decisions will be reported in future editions of the *Case Review*; several high court rulings are examined in chapter 4 of this issue.

INTRODUCTION

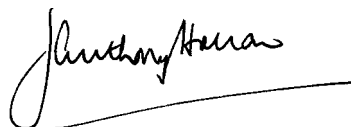
Sir Anthony Holland, *Chair*

Few laws and regulations are carved in stone: most sets of rules are more fluid, subject to interpretation and a process of continual development. So it is with the Code of Conduct. Since the Code came into force in 2001, it has been subject to the scrutiny and analysis of ethical standards officers, monitoring officers and the courts. And as our understanding of the Code grows, so too does its effectiveness as a tool for promoting good conduct.

This third volume of the *Case Review* examines the impact of cases, appeals and precedent on the Code of Conduct. The first chapter starts, appropriately enough, at the beginning of the process, with the initial consideration of a complaint in our Referrals Unit. Another chapter looks at the impact of human rights legislation on the rules governing disclosure of confidential information, with significant implications for members who claim to release information in the public interest. Other chapters deal with standards committee determinations, High Court appeals, and significant individual cases.

These chapters help us advance our understanding of the Code of Conduct, but this may be the last *Case Review* to examine the Code in its present form. The Standards Board for England is currently reviewing the Code and has just conducted a major consultation exercise on its future. We received over 1,200 written submissions and spoke to around a thousand people at roadshows from Newcastle to Plymouth. We are now ready to present proposals to the government for a simpler Code, one which reflects knowledge gained from three years' experience of working with it. Although analysis is ongoing, recommendations could touch on rules governing personal and prejudicial interests, disclosure of confidential information and the role of the Code in members' private lives, and may include further provisions to protect officers and employees from bullying.

We are optimistic that a revised Code of Conduct will play a greater part in increasing public confidence in local democracy, focusing on what is effective and important in calling to account the minority of members whose behaviour falls short of the public's expectations. But whatever the outcome of the review, the process of scrutiny and investigation will continue, with the *Case Review* at the fore. *August 2005*



Chapter 1

Considering complaints

The Standards Board for England is obliged to consider every complaint on its merits, so the final decision is often one of judgement. It is therefore not possible to produce a definitive list of what types of cases will, or will not, be referred for investigation. But by examining the referral criteria set by the organisation's Board of ten members, it is possible to gain an insight into the decision-making process and a general indication of the types of cases that are unlikely to reach the threshold for referral.

The Standards Board for England is obliged to consider every complaint made to it in writing and decide whether to refer it to an ethical standards officer for formal investigation. At this initial stage, the Standards Board for England does not make any findings of fact or come to any conclusion as to whether a breach has occurred. Rather, it filters complaints to ensure only those cases that disclose a potentially serious breach of the Code of Conduct are investigated. The Standards Board for England is obliged to provide reasons for its decisions in cases that are not referred for investigation and it does this in writing to the complainant. In the 2004–05 financial year, 24% of complaints received were referred to be investigated.

These functions are carried out by officers in the Referrals Unit under powers delegated to them by the Board. When considering a complaint, officers follow a two-stage process. They look initially at whether the complaint falls within the Standards Board for England's jurisdiction and discloses a potential breach of the Code of Conduct. If it does, they consider whether the potential breach is sufficiently serious to warrant being investigated and, if a breach is found, any consequent action.

Jurisdiction

In order for the Standards Board for England to have authority to consider a complaint, it must first pass several jurisdictional tests:

- the complaint must be made in writing
- it must be about something that happened after the Code of Conduct came into effect
- it must be about a member of a relevant authority
- the member must have been a member at the time of the incident
- the complaint must be about something covered by the Code of Conduct

WRITTEN ALLEGATIONS

Under the *Local Government Act 2000*, allegations must be made to the Standards Board for England in writing. One consequence of this is that officers of the Standards Board for England are not able to consider over the telephone whether a particular matter might be referred for investigation. Although complaints have to be in writing, officers help complainants with disabilities or language difficulties with their complaints when requested.

AFTER ADOPTION OF THE CODE

The conduct complained of has to have occurred after the authority in question adopted the Code of Conduct – between 30 November 2001 and 5 May 2002, depending on the authority. As the Standards Board for England’s jurisdiction is not retrospective, matters that occurred before the adoption of the Code cannot be considered.

One such case involved a councillor who was alleged to have been involved in an instance of maladministration in 1990 following an investigation by the Local Government Ombudsman. The member became leader of his authority in 2005 and the complainant alleged that this was improper and had the potential to bring his authority into disrepute in light of the past finding of maladministration. This matter was not referred for investigation because the Board does not have power to refer for investigation allegations that relate to conduct that occurred prior to the date on which the Code of Conduct was adopted by the authority concerned. It was further considered that the information provided about the member’s conduct since that date did not disclose a failure to comply with the Code of Conduct.

MEMBER OF A RELEVANT AUTHORITY

The types of authority over which the Standards Board for England has jurisdiction are listed in the *Local Government Act 2000*. However, the Standards Board for England only has jurisdiction over individual members of these authorities. For this reason, complaints against the authority as a whole cannot be considered. On occasion, a complainant lists every member of the council as a

way of bringing his or her complaint within the Standards Board for England's jurisdiction. Although this means that the Standards Board for England is obliged to consider the complaint, it is unlikely that it would pass the referrals criteria described later on.

MEMBER AT THE TIME OF THE INCIDENT

The member who is the subject of the complaint has to have been a member of a relevant authority at the time of the alleged incident. For instance, if a recently elected member is alleged to have treated an opposing candidate with disrespect during their election campaign it is unlikely that the matter would fall within the jurisdiction of the Standards Board for England, unless the conduct complained of continued after the subject member was elected.

BEHAVIOUR COVERED BY THE CODE

A matter will also be outside the jurisdiction of the Standards Board for England if the complaint does not disclose that a member has failed, or may have failed, to comply with the Code of Conduct. In the 2004–05 financial year, over half of complaints (56%) not referred for investigation did not disclose a potential breach of the Code (see figure 1 on page 11).

Additionally, the Standards Board for England's jurisdiction is limited in that it cannot consider complaints that a member may fail to comply with the Code of Conduct in the future.

In a case that was not referred for investigation, a complainant reported that he had submitted a planning application due to be considered shortly. He alleged that a district councillor was likely to oppose the application at planning committee without declaring an interest, even though the member was a friend of the complainant's neighbour who opposed the development. This matter was not referred for investigation because the Board is unable to consider anticipated breaches of the Code of Conduct.

Referral criteria

If a complaint passes all the jurisdictional tests, it is considered against guidelines created by the Board. The *Local Government Act 2000* gives the Standards Board for England a wide discretion to decide whether or not complaints should be

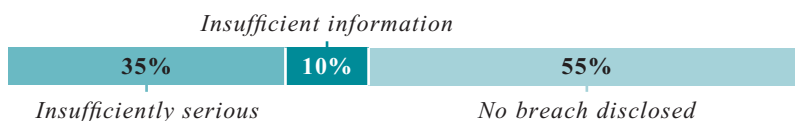
investigated. The guidelines set out the criteria by which complaints may or may not be referred for investigation. They state that a matter will be referred for investigation if it is believed to meet one of the following criteria:

- it is serious enough, if proven, to justify the range of sanctions available to the Adjudication Panel for England or the local standards committee
- it is part of a continuing pattern of less serious misconduct which is unreasonably disrupting the business of the authority and there is no other avenue left to deal with it short of investigation

Although it is not possible to state whether a particular complaint will be referred for investigation without seeing all the facts of the case, there are certain categories of complaint that are unlikely to be referred – except perhaps in rare circumstances:

- it is believed to be malicious, relatively minor or tit-for-tat
- the same, or a substantially similar, complaint has already been the subject of an investigation or inquiry and there is nothing further to be gained by seeking the sanctions available to the Adjudication Panel for England or the local standards committee
- the complaint concerns acts carried out in the member's private life which are unlikely to affect his or her fitness for public office
- it appears that the grievance is really about dissatisfaction with a council's decision
- there is insufficient information currently available to justify a decision to refer the matter for investigation

Figure 1: reasons why complaints were not referred for investigation 2004–05



Making the cut

Once officers are satisfied that the complaint is within the Standards Board for England's jurisdiction and it concerns a potential breach of the Code of Conduct, they consider whether the alleged conduct would be likely to attract a sanction from a standards committee or the Adjudication Panel for England. If it is, then officers will normally refer it for investigation.

Repeated minor breaches of the Code will also be referred for investigation if the conduct appears to be causing unreasonable disruption to the business of the authority. For example, if a member fails to treat a fellow member with respect at a council meeting it is unlikely to be referred for investigation. If, however, a member repeatedly disrupts meetings with disrespectful outbursts they are more likely to be referred than a member who does so on a one-off basis.

Complaints which don't appear to fall into these categories would normally not be referred, for the reasons described below.

MINOR MATTERS

When deciding which matters should be referred for investigation, the Board requires officers to respond proportionately and allocate resources to cases which appear to be the more serious breaches of the Code of Conduct. Deciding where to draw this line is a matter of judgement and must take into account the wider public interest, as well as the views of the complainant. In the 2004–05 financial year, just over a third (35%) of complaints not referred for investigation were considered to be insufficiently serious (see figure 1 on page 11).

The Board has stated publicly that it does not wish to be used as a political football. Nor does it see its role as refereeing quarrels between members. The Board also recognises that members have a political platform from which to defend themselves against political attack. As a result, the referrals threshold for bad behaviour towards another member is higher than that for similar conduct directed at officers or members of the public. As a general rule, ill-considered or rude language between members and dubious or arguable claims in political leaflets are unlikely to be referred for investigation unless the alleged conduct is particularly offensive or forms a pattern of behaviour (one of the criteria for referring a case, as described previously).

An example of disrespectful conduct between members that was considered to reach the higher threshold involved a parish councillor who was allegedly aggressive and disrespectful towards other members during a council meeting. He allegedly approached a fellow councillor in an aggressive manner, shouted at him to address his comments through the chair, and banged his clenched fist down on the table. The complainant stated that his mobile phone was damaged by this action and he was in fear of physical violence. The member complained about was also alleged to have disrupted the meeting with disrespectful and rude comments addressed to other members.

Conversely, a complaint involving a councillor who published a leaflet during a parish council by-election did not reach the threshold for referral. The leaflet allegedly contained inaccurate and unfairly negative information about the council's finances. The councillor was allegedly in a position to know the information he published was incorrect, as he received copies of the accounts each month. The Board noted that if the councillor had published claims he knew to be false, he might potentially be seen to have brought his authority into disrepute. But as the claims were made as part of an election campaign and the opposition would have had full opportunity to respond, it was decided not to refer the complaint for investigation.

MALICIOUS AND TIT-FOR-TAT

The Standards Board for England takes into account whether a complaint is malicious, politically motivated or tit-for-tat when deciding whether it ought to be referred for investigation. However, this will not automatically preclude a matter from being referred. The Standards Board is still obliged to consider every complaint on its own merits, as a politically motivated complaint, for example, could still reveal a potentially serious breach of the Code of Conduct.

ALREADY INVESTIGATED

The Board takes a view that it is not a good use of resources to refer duplicate complaints about the same alleged incident for formal investigation. Therefore, wherever possible, if the Standards Board for England receives a complaint about a matter that has already been considered and referred for investigation, the normal procedure is to close the subsequent complaint and pass it to the ethical standards

officer for information only. In such instances, a member of the ethical standards officer's staff may contact the complainant if it is deemed appropriate to do so but progress on a case is generally only communicated to the parties involved in the original case. However, at the conclusion of the matter, a summary of the complaint and the outcome is posted on the Standards Board for England's website.

PRIVATE LIFE

Complaints that a member has brought his or her office or authority into disrepute because of actions carried out in their capacity as a private individual will be assessed on the merits of the case. The general policy of the Board is to refer for investigation only those allegations where the private conduct is significant enough to reduce public confidence in the member's ability to carry out official duties or otherwise calls into question the member's fitness for office.

Unlawful conduct will often (but not always) meet the tests set out above, particularly where there is a criminal conviction or caution.

Where the allegedly disreputable private conduct concerns the expression of views that are extreme, controversial, or derogatory, the balance is against referral for investigation except where the form of expression in question amounts to a criminal offence, unlawful discrimination or the promotion of racial inequality.

For example, one member was alleged to have conducted a campaign of harassment against his neighbours, culminating in the member unlawfully shooting and killing their pet dog. The member was arrested and released on police bail for this incident. At the time of assessing the case, the Crown Prosecution Service was deciding whether to press charges against the member. The complainants also referred to a number of previous incidents, including the member's guns being removed by an armed response unit in 2003, after he had shot in the direction of their home and garden. The member subsequently had his firearms' licence revoked, but when his guns were returned to him in 2004 he allegedly shouted at the complainants that their dog should be shot and so should its owners. The Standards Board for England decided to refer this matter for investigation. Although the allegations purely concerned the member's private capacity, it was noted that the Crown Prosecution Service was considering prosecuting the member and it was considered that the nature and severity of the alleged incidents had the potential to bring the member's office or authority into disrepute.

In another case, a metropolitan borough councillor allegedly verbally abused ambulance officers during a call-out to the member's family home. He allegedly became aggressive and abusive towards the ambulance crew, questioned their professionalism, said that he would go to the media and claimed that, as a councillor, he could cause them to lose their jobs. Both ambulance officers allegedly felt seriously threatened at the time and remained shaken for a considerable period afterwards. In deciding to refer the complaint for investigation, the Standards Board for England noted that the member had allegedly referred to his position as a councillor during the incident and used this to threaten the ambulance officers. It was considered that this had the potential to bring the member's office or authority into disrepute and also had the potential to amount to an improper use of his position.

DISSATISFACTION WITH COUNCIL DECISION

The Standards Board for England investigates complaints about the ethical conduct of individual councillors rather than a council's decision-making process or decisions taken by the council. It has no jurisdiction over complaints of maladministration or officer conduct, and there are other channels of complaint for such issues. Certainly, the Standards Board for England is not a substitute for other regulators or for court challenges on the administrative legality of council decisions.

A case that illustrates this principle concerned the complainant's worries about the way the planning system operated at a district council. The complaint included matters such as the public not being allowed to speak at meetings, the style of minutes, the composition of the executive and the roles of certain members within the planning process. In deciding not to refer the complaint for investigation, the Standards Board for England noted that these matters were outside its jurisdiction. As far as the individual members complained about were mentioned, it was considered that the complaint was unrelated to their ethical conduct and did not disclose a potential breach of the Code of Conduct.

In another case, a complainant was upset with the way a district council planning committee meeting had been chaired. The meeting was allegedly held too close to Christmas, the applicant's agent was allowed to speak for longer than the three minutes allocated to objectors, and the agent also made comments that the complainant considered to be defamatory. The complaint was against the chair of

the committee for allowing these things to happen. The Standards Board for England did not refer this case for investigation and noted that it concerned the conduct of a planning committee meeting and the information provided to members in reaching their decision. The Standards Board for England has no jurisdiction over the decisions of a local authority or, generally speaking, the conduct or timing of the meetings at which it reaches them. Although the complainant felt that the meeting could have been better chaired, the Code of Conduct governs members' ethical behaviour rather than their competence or efficiency.

Chapter 1

INSUFFICIENT INFORMATION

Finally, a complaint is unlikely to be referred for investigation if the complainant has not provided sufficient information for officers to make an informed referral decision. Where a complainant has not provided enough information, the Standards Board for England informs them of the areas where further information is required. For example, if the complaint is about an alleged failure to treat others with respect it is difficult to decide how serious the alleged incident is unless the complainant provides details of what happened. On occasion, the Standards Board for England receives complaints where a complainant states that they have been spoken to disrespectfully but fail to include what the member said to cause offence.

In cases such as this, the original case is closed when the decision is issued. If the complainant subsequently provides the requested information this is considered as a new case.

To reduce the number of insufficient-information decisions, officers in the Referrals Unit often undertake preliminary enquiries with monitoring officers, and in some instances, clerks, other council officers or complainants. Preliminary enquiries are distinct from the investigative process carried out after a complaint has been referred to an ethical standards officer. They are used only to check easily-established matters of fact. For example, if the complaint relates to a straightforward factual matter – such as whether a member declared an interest at a particular meeting, rather than a matter of opinion or interpretation – officers will normally contact the monitoring officer to find out whether the complainant's version of events is correct. During a pilot scheme, in almost all cases (91%) where a preliminary enquiry was carried out, it helped officers to make a definite decision whether to refer the case or not.

Scrutiny of decisions

Although officers have a wide statutory discretion to exercise their judgement, the consistency of their decision-making is closely monitored by a panel of Board members who meet regularly to examine a sample of decisions.

Additionally, complainants whose cases were not referred for investigation can appeal to the chief executive of the Standards Board for England for a review of the decision. The chief executive will overturn the original decision if he is persuaded that the referral criteria were not properly applied. He also overturns decisions in cases where the complainant provides him with additional information that did not form part of their original complaint but which discloses a potentially serious breach of the Code of Conduct.

For example, a complaint that was not originally referred for investigation but was subsequently overturned by the chief executive and referred to an ethical standards officer concerned problems a complainant had with his neighbours since commencing building work, for which he had planning permission. It was alleged that one neighbour in particular — the parish councillor complained about — had caused delays to the complainant's development by ringing service providers in an attempt to stop them connecting to the complainant's property. He was also alleged to have canvassed neighbours in an attempt to get them to object to the complainant's connection to the drainage system. The complainant felt the member had taken his position as a councillor "far beyond the limits of the job description".

When the Standards Board for England originally decided not to refer the complaint for investigation, it noted that the actions described by the complainant did not appear to bear any relation to the member's position on the parish council. There was no information to suggest that he used his position as a councillor to add weight to his alleged endeavours as a neighbour to stop the complainant's development from progressing. It was also noted that the complainant did not allege that the member failed to declare an interest when the planning application was before the parish council or provide any other information to suggest that he acted improperly in an official capacity.

However, when the complainant wrote to the chief executive to ask for the decision to be reviewed, he included information that showed that the councillor had failed to declare an interest when the planning application was considered by the council. For this reason, the original decision was overturned and the case was referred to an ethical standards officer.

In the 2004–05 financial year, the chief executive was asked to review 13% of decisions not to refer complaints (379 cases). He upheld 91% of the decisions that he reviewed and overturned 9% (31).

The Board panels and review process exist to ensure that officers are making reasonable decisions under the powers delegated to them. This decision-making process puts into action the referral criteria that have been examined in this chapter. But it is important to remember that the Standards Board for England has a wide statutory discretion to make these decisions and each case is assessed on its individual merits.

Chapter 2

Confidentiality and the public interest

The Adjudication Panel for England has reached a landmark decision on the impact of European human rights legislation on the rules governing disclosure of confidential information in the Code of Conduct. In the case of Westminster City Councillor Paul Dimoldenberg, it ruled that the Code of Conduct should allow for the disclosure of confidential information when it is in the public interest.

Councillor Dimoldenberg was alleged to have disclosed confidential information in breach of paragraph 3(a) of the Code of Conduct, but argued in his defence that he acted in the public interest. He leaked confidential documents about the council's former leader, Dame Shirley Porter, to a BBC journalist on three separate occasions in 2003. The documents concerned the council's attempts to recover £27 million in compensation from Dame Shirley for gerrymandering in the 'homes for votes' scandal. The councillor said he was acting in the public interest to encourage the council to recover the money.

The ethical standards officer considered that Councillor Dimoldenberg had breached paragraph 3(a) of the Code of Conduct by disclosing the confidential documents and referred the matter to the Adjudication Panel for England for determination by a tribunal.

Chapter 2

INTERPRETING THE CODE

At first glance, paragraph 3(a) of the Code of Conduct seems relatively straightforward. It states that a member must not:

...disclose information given to him in confidence by anyone, or information acquired which he believes is of a confidential nature, without the consent of a person authorised to give it, or unless he is required by law to do so...

It seems to follow that a breach of paragraph 3(a) would be committed whenever information was disclosed which was given in confidence or which the member believed was confidential when acquired, regardless of the legal or contractual status of the information. The status of the information and the circumstances surrounding its disclosure would be taken into account when deciding the seriousness of the breach and what sanction to apply – including any arguments that the information had been disclosed in the public interest.

However, many of our stakeholders and other commentators believed that considering a public-interest defence in relation to the sanction did not go far enough. They argued that a public-interest defence should be relevant to whether there had been a breach of the Code at all.

It was also unclear to what extent the paragraph was compatible with human rights legislation. At best, they appeared to sit uncomfortably together.

The Standards Board for England and its Board members had similar reservations, and the possible introduction of a public-interest defence was one of the issues recently consulted on in the review of the Code of Conduct.

HUMAN RIGHTS

Councillor Dimoldenberg argued at the tribunal that he was entitled to disclose confidential information under human rights legislation. He also sought the ruling of the Adjudication Panel on a preliminary issue: would his public interest defence only go to what sanction, if any, should flow from the breach, or could it mean he had committed no breach of the Code at all? The debate centred on Article 10 of the *European Convention on Human Rights*, which states:

- 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...*
- 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*

Chapter 2

The Adjudication Panel for England found that paragraph 3(a) of the Code of Conduct failed to take the right to freedom of expression properly into account. It also criticised the paragraph for failing to allow consideration of the circumstances surrounding a disclosure of confidential information when determining whether there had been a breach, and concluded:

...paragraph 3(a), in order to be compatible with Article 10, should be read so as to allow for the disclosure of information of a confidential nature in circumstances where it is appropriate in the public interest to do so.

In other words, it is necessary to take into account the circumstances surrounding the disclosure of confidential information when determining whether there is a

breach of the Code of Conduct – particularly whether the member acted in the public interest.

But it is important to recognise that there may be many competing public interests. Article 10(2) acknowledges that, in certain circumstances, there may be an overriding public interest in maintaining confidence and preventing the disclosure of confidential information. The Adjudication Panel for England observed that each tribunal has to conduct a “balancing exercise”, with the “public interest in maintaining confidence” weighed against “a countervailing public interest favouring disclosure”.

IN THE PUBLIC INTEREST?

Chapter 2

The tribunal then turned to the particular facts of Councillor Dimoldenberg’s case to determine if his actions could be judged to have been in the public interest.

The tribunal found that Councillor Dimoldenberg had taken a personal and persistent interest in ensuring that the council took action to recover the money owed by Dame Shirley. As part of the council’s pursuit of the debt, diverse orders were obtained against named third parties. Those orders were subject to gagging orders by a sequence of High Court judges, prohibiting disclosure not only of the contents of the orders but also of their existence. Councillor Dimoldenberg was fully aware of the existence and nature of those orders when he shared documents and information on the gagging orders with a BBC journalist and two other individuals.

The tribunal was satisfied that, in disclosing the confidential information, the councillor had exercised his right to freedom of expression afforded him by Article 10 of the *European Convention on Human Rights*. To determine whether the disclosure had been in the public interest, it took the full range of facts into consideration, applying the balancing act that it earlier described.

The tribunal found the following facts to be in favour of permitting disclosure in the public interest:

- the councillor had the right to freedom of expression under Article 10(1) of the *European Convention on Human Rights*
- Councillor Dimoldenberg was a journalistic source – section 12(4) of the *Human Rights Act 1998* states that the court must have particular regard to the importance of freedom of expression in matters of journalism

- it is important to maintain a free press and protect the media's watchdog role, particularly on matters of public concern
- the BBC journalist had given Councillor Dimoldenberg an assurance that the information was required as 'deep background' only
- the public had an interest in the inactivity of Westminster City Council to recover the money
- Councillor Dimoldenberg was untroubled in disclosing the information and his motives were not self serving or wanton

The tribunal weighed those points against the following facts:

- it is necessary for councillors to comply with the statutory declaration of office – and consequently the Code of Conduct – in order to be able to receive confidential information
- there was a risk that disclosure would have hindered the recovery of the surcharge or that active steps in the recovery process would have been revealed
- the High Court had imposed Restriction on Communication Orders, which are rarely given; they were considered, deliberate, specific restrictions imposed only for the length of time necessary to aid the recovery of the sums owed by Westminster City Council

Chapter 2

In the end, the tribunal decided that the overriding public interest was in helping with the recovery of the money, rather than exposing the council's alleged inactivity. It regarded the High Court gagging orders as proportionate restrictions on freedom of expression given the ability of Dame Shirley to move money out of the reach of the council. The tribunal therefore concluded that Councillor Dimoldenberg had breached the Code of Conduct when he disclosed the confidential information. It concluded:

...in this case the Article 10 right of freedom of expression was rightly subject to an Article 10(2) exception and whilst the threshold is a high one to cross, because of the recognised importance of press freedom, it was the responsibility of Councillor Dimoldenberg in the light of the Restriction on Communication Orders to prevent the disclosure of information relating to

the third party disclosure orders that he had received in confidence. As a consequence, the case tribunal concludes that Councillor Dimoldenberg was not acting in the public interest in passing confidential information to a journalist in order to expose Westminster City Council's inactivity in recovery of the surcharge and that in disclosing the confidential information he breached paragraph 3(a) of the Code of Conduct.

The case tribunal noted that Councillor Dimoldenberg did not gain financially or politically by his actions and that the disclosure did not harm the council's recovery process. It therefore decided not to impose any sanction.

FUTURE CASES

Chapter 2

The Standards Board for England is currently examining how it should approach cases similar to this in future, and will be looking to clarify the meaning of paragraph 3(a) in the review of the Code of Conduct. It is also planning to issue guidance in this area.

It is clear just from this case that a public-interest defence can raise complex issues of fact and law. There is no one definition of the public interest which can be applied to all cases. Each case may bring with it many unique aggravating and mitigating factors. And clearly, monitoring officers and other advisors may well need a working knowledge of European and domestic law on confidentiality, breach of confidence and related areas, in order to advise properly in this area.

In the long term, the Standards Board for England will want to ensure that members are best placed to distinguish information which is genuinely in the public interest from that which may simply be politically advantageous, balancing the public's right to receive information with an authority's need to maintain confidentiality in certain areas if it is to function in the public's best interest.

Chapter 3

Local determinations

Standards committees have been helping to tackle local issues by holding hearings on cases referred by ethical standards officers for almost two years. They have in most cases censured or suspended members for misconduct, but they have also been able to address local problems by requiring members to complete training or apologise for their behaviour. The success of standards committee hearings creates a promising precedent for local investigations.

Ethical standards officers have been referring completed investigations to standards committees since June 2003. 84 standards committee hearings were held between September 2003 and March 2005. These hearings were held by 62 standards committees and involved members of 70 different authorities.

More recently, ethical standards officers have started to refer allegations to monitoring officers for investigation, following the introduction of regulations in November 2004. 74 cases had been referred for local investigation by February 2005. We hope to analyse the outcomes of these cases in future issues of the *Case Review*, but this chapter is confined to those cases investigated by the Standards Board for England and referred locally for determination.

STANDARDS COMMITTEE SANCTIONS

Cases are referred to standards committees for determination where there seems to have been a breach of the Code of Conduct that warrants a (relatively) moderate penalty or another form of redress at the local level. Cases are also referred where there has been a minor breach of the Code of Conduct but the member refuses to accept they have acted improperly.

Standards committees have the power to impose a range of sanctions. They can:

- suspend members for up to three months
- partially suspend members for up to three months
- restrict members' access to resources
- censure members

Standards committees are also able to require members to:

- take training on the Code of Conduct
- take part in conciliation
- apologise for their behaviour

Standards committees can make these last three sanctions a condition of avoiding a partial or total suspension. Many standards committees have used these conditions to try to address the behaviour of members or resolve the problem that gave rise to the complaint. The use of these conditional suspensions can help draw a line under an issue and encourage good conduct in the future.

Standards committees do not have the sanctions available to the Adjudication Panel for England to disqualify members for up to five years or to suspend them for up to a year. These penalties are, however, reserved for the cases involving the most serious misconduct, and are unlikely to be referred to the local level.

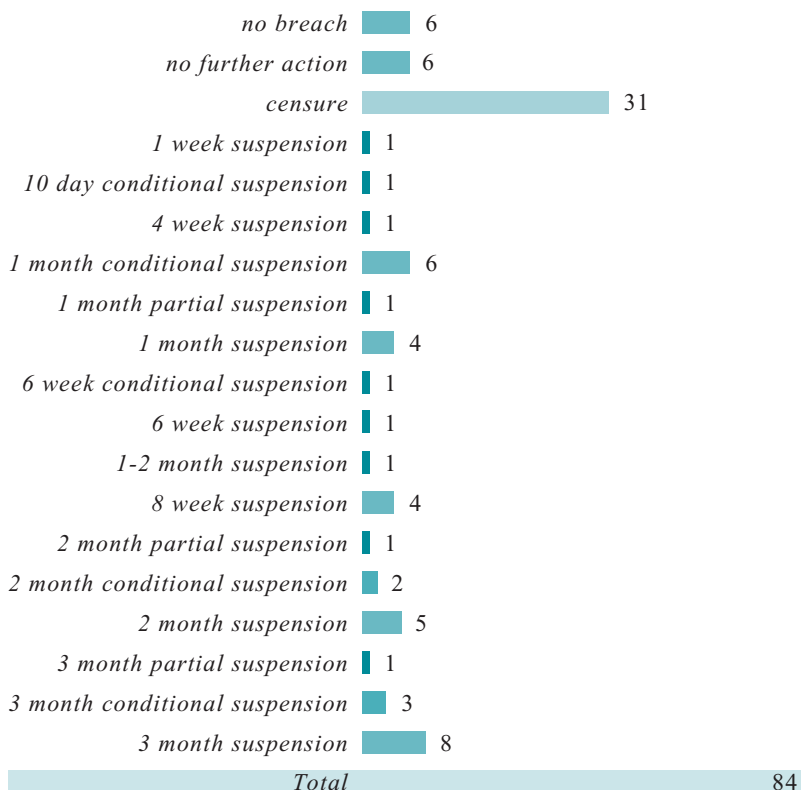
STANDARDS COMMITTEE DECISIONS

Standards committees agreed with ethical standards officers' conclusions in most of the cases. Between September 2003 and March 2005:

- members were found to have breached the Code of Conduct in 78 (93%) of the hearings
- most of the hearings resulted in some kind of sanction – standards committees recommended a penalty in 72 cases (86%)
- 31 members were censured for their misconduct (37%)
- 41 members were partially or completely suspended for between one week and three months (48%)
- eight members were suspended for the maximum period of three months, with another three members given conditional suspensions for three months
- three members were partially suspended for one, two and three months respectively

Some of the suspensions were conditional, dependent on whether members took action to remedy their misconduct. For example, four parish councillors were suspended for a month unless they agreed to take training within a six-week period. Another parish councillor was suspended for ten working days, on the condition that the suspension would end if she provided a full written apology to the chair of the parish council and the monitoring officer.

**Figure 1: outcomes of standards committee hearings
(September 2003 to March 2005)**



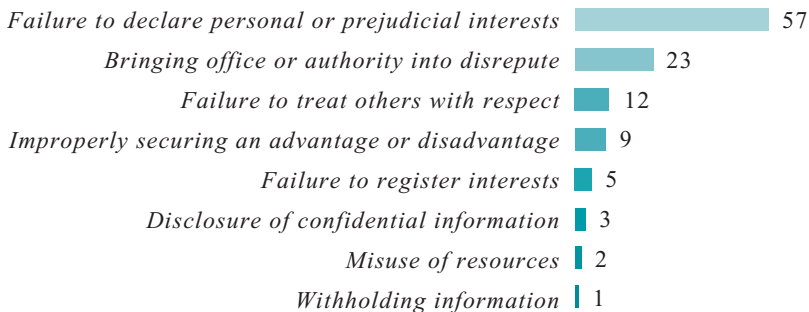
Seven members appealed to the Adjudication Panel for England against standards committee decisions. In all cases, appeal tribunals upheld the standards committee's decision and rejected the appeal.

In only six cases (7% of the total), standards committees decided that there was no need for any further action, usually because there were mitigating circumstances. For instance, in one case a new member had made an error of judgement, for which he apologised. The standards committee decided in another case that there was no evidence that the member had intended to act improperly.

TYPES OF MISCONDUCT

Standards committees have considered a range of different allegations, from failures to treat others with respect to failures to register interests (see figure 2 below). However, most of the hearings concerned members with alleged personal and prejudicial interests. These cases accounted for two-thirds of the hearings.

Figure 2: allegations in standards committee cases*
(September 2003 to March 2005)



* Cases involving a number of allegations may be counted in more than one category

About one-seventh of the hearings involved alleged failures to treat others with respect. Just over a quarter included alleged disrepute, but these often overlapped with other alleged breaches of the Code of Conduct. So, for example, some members who failed to treat others with respect also brought their offices or authorities into disrepute. Similarly, alleged attempts to secure an improper advantage or disadvantage and alleged failures to register interests were often considered alongside other allegations. A small number of cases involved the disclosure of confidential information, the misuse of the authority's resources, and the withholding of information to which the public were entitled.

PERSONAL AND PREJUDICIAL INTERESTS

A total of 57 hearings involved members who had either failed to declare a personal interest or had taken part in a meeting in which they had a prejudicial interest. Standards committees decided that the members had breached the Code of Conduct in all cases but one, and they decided to suspend members in 29, or over half, of the cases.

Seven members were suspended for the maximum period of three months. In one of those cases (SBE1502.02B), the member had personal and prejudicial interests in several items at council meetings over an eight-month period. He did not declare an interest or leave the room when the council discussed a tree preservation order and a conservation order that covered his property, or when the council awarded a grant to a group of which he was a member.

Another member improperly sought to influence a decision on the application for a development close to his home (case SBE1922.02). The standards committee decided that his misconduct was serious and that he should, as a senior councillor, at least have been more aware of his obligations at council meetings.

A third member failed to declare a personal interest and failed to withdraw from two meetings that considered his landlord's planning applications, in which he had a prejudicial interest (case SBE1247.02).

One member was partially suspended for three months (case SBE4879.03). He failed to declare an interest in an application to build a bungalow on land opposite his daughter's house. He also attended a site visit and tried to influence a decision on the application. The member was suspended from attending planning committee meetings and from representing the authority on any planning matters for three months, or until he had taken appropriate training on the Code of Conduct.

Other members have faced lesser penalties, including 23 members who were censured for their misconduct. For example, a parish councillor failed to declare a personal and prejudicial interest and failed to withdraw from a meeting about a churchyard, despite his close association with the church (case SBE2781.03). The standards committee took into account the fact that the councillor did not have a full understanding of the Code of Conduct at the time

of the meeting. The committee also noted that there was no indication that the member intended to derive any personal benefit from taking part in the meeting.

FAILURE TO TREAT OTHERS WITH RESPECT

12 hearings involved members who had allegedly failed to treat others with respect.

Most of these cases involved isolated offensive remarks, and resulted in the standards committees either asking for an apology from the member or censuring the member for their conduct.

A member of a town council was suspended for three months for failing to treat another person with respect after he insulted a fellow councillor at a council meeting. The standards committee stipulated that the suspension would end if he apologised for his remark and attended training on the Code of Conduct. Another town councillor was suspended for three months for calling the clerk a “nasty bastard”, with the condition that the suspension would end if the member apologised for her behaviour.

Members were often censured for failing to treat others with respect. One member was censured and required to take training after he made offensive racist comments during and after a parish council meeting. Another member was censured for calling a colleague a “bald headed git” and for saying “I’ll wait for you outside”. And a member of a national park authority was censured for saying to another member: “If you don’t shut up, I’ll come back and shut you up.”

BRINGING OFFICE OR AUTHORITY INTO DISREPUTE

As we have already indicated, although over a quarter of the hearings involved allegations that the member had brought his or her office and authority into disrepute, most of these cases also involved other breaches of the Code of Conduct. However, there were a number of cases where ‘disrepute’ was the sole breach.

For instance, one member of a town council brought her office and authority into disrepute by drink-driving (case SBE5779.04). The standards committee suspended her for one month.

A member of two authorities hit a woman in public after she had been involved in an altercation with the member’s daughter (case SBE4876.03). The standards committee noted that there were mitigating factors leading up to the

incident, but concluded that the member had brought her office and the authorities into disrepute by using physical force in a public place and censured her.

A borough councillor brought his office and authority into disrepute by taking advantage of a council mistake and failing to prevent council-employed contractors from working on his privately-owned home (case SBE4939.03). The council mistakenly sent decorators to the home, an ex-council property. The member only told the council about the mistake after the work had been completed and then said he could not be charged for the work. The standards committee suspended the member from the roles of deputy chair and chair of the council's overview and scrutiny committee for one month.

Another member was suspended from being the chair of his council's planning committee for two months after he discussed a number of planning applications with an applicant before the planning meeting, in breach of the council's guidelines on planning matters (case SBE3402.03(a)).

Chapter 3

DISCLOSURE OF CONFIDENTIAL INFORMATION

Three hearings involved members who had allegedly disclosed confidential information.

In one case, a member removed electoral registration forms from the town hall and took them to the offices of a local newspaper. The member was concerned to highlight security problems, and it was unclear whether he believed the information on the forms was confidential. However, the committee decided that he brought his authority into disrepute, and suspended him for two months. The standards committee deferred the suspension for six months to allow the member to undergo training on the Code of Conduct (SBE1731.02).

In another case, a member leaked confidential information about the council's proposed purchase of a plot of land (case SBE1028.02 – Part 2). The standards committee censured the member for releasing information that could have hampered the council's negotiations over the land.

WITHHOLDING INFORMATION

One member prevented a member of the public from gaining access to information to which they were legally entitled (case SBE2316.03). The member failed to give a member of the public interview panel notes relating to her job application. The standards committee suspended the member for a month, or two months if he failed to apologise to the member of the public and failed to ask for the release of the information.

IMPROPER ADVANTAGE OR DISADVANTAGE

Nine cases concerned members who had allegedly improperly used their positions to secure an advantage for themselves or others, or to confer a disadvantage on someone else. However, most of these alleged improper advantages or disadvantages were in connection with matters in which the members had personal and prejudicial interests, which we have dealt with separately above.

In another case, a member of a parish council improperly secured an advantage for a member of the public by asking the parish clerk to make a payment which had not been approved by the council (case SBE4099.03). The payment was for repairs to a private road used by the member to get to his allotment. The standards committee suspended the member for two months, with the condition that the suspension would end if he received training on the Code of Conduct.

MISUSE OF RESOURCES

Two cases were about the alleged misuse of the authority's resources. In one, a member used personal computer facilities provided by the council to store a number of emails containing pornography (case SBE3095.03). He failed to comply with the Code of Conduct by failing to act in accordance with his authority's requirements for the use of its resources. However, he apologised for his misconduct and agreed to training. In view of this, the standards committee decided to suspend him for one month without allowances, and to require him to take training on the Code of Conduct and the authority's email policy.

FAILURE TO REGISTER INTERESTS

Five members allegedly failed to register interests. Three members failed to register their membership of campaign groups, and one member failed to register interests in his land.

One member failed to register his financial and other interests following his re-election to the authority (case SBE3709.03). He questioned the need to register his interests a second time. The standards committee decided that he had a duty either to register his interests or to write to his monitoring officer to indicate that there had been no change in his interests. The standards committee suspended him for the maximum period of three months, with the condition that the suspension would end if he registered his interests or declared that they remained unchanged.

CONCLUSION

Chapter 3

The patterns identified in the previous *Case Review* regarding standards committee determinations still hold true a year later. Standards committees still generally either censure or suspend members. Two-thirds of standards committee cases still concern members who failed to disclose personal interests or failed to withdraw from meetings in which they had prejudicial interests.

However, as we have seen, there is no automatic penalty that applies to particular kinds of misconduct. Standards committees have exercised considerable discretion in reaching their decisions. They have closely attended to the specific circumstances of the cases, and sought to rectify misconduct by using the most appropriate sanctions at their disposal. Sometimes they have decided that a censure is the right punishment for a failure to disclose a personal interest; at other times they have concluded that a suspension is more fitting. They have in many cases only enforced suspensions if members failed to take remedial action. Standards committees' decisions have been in keeping with the types of cases referred to them, which have involved misjudgements, momentary lapses in the member's behaviour, or less serious failures to comply with the Code of Conduct.

The success of the hearings has helped to vindicate the devolution of powers to standards committees. It seems that local issues are often best addressed at the local level, and this is something which the Standards Board for England is keen to support in the future, not least through local investigations.

Chapter 4

High Court appeals

The High Court can become involved in the statutory process of determining complaints of misconduct against members in two ways. One is by way of the subject member's right of appeal to the High Court against decisions of the Adjudication Panel for England, established by section 79(15) of the *Local Government Act 2000*. The other way is through judicial review proceedings. Both kinds of appeal have come before the High Court in recent months, resulting in a number of important decisions.

Judicial review

Judicial review is generally available in respect of the decisions of public bodies where no alternative route of challenge or appeal is available. So, for example, a complainant could seek judicial review of a decision by the Standards Board for England not to refer a complaint for investigation, or a decision by an ethical standards officer that no action needs be taken in a particular case. In practice, such challenges are rare, and before a challenge can be mounted permission must be given by the courts to proceed. In judicial review proceedings, the court simply reviews whether the public body has exercised its powers lawfully. It will not substitute its own view of the merits of the case for that of the original decision-maker.

DAWKINS

One recent judicial review challenge which was successfully mounted was directed not against the Standards Board for England or an ethical standards officer but against a standards committee which had held a local determination under the *Local Authorities (Code of Conduct) (Local Determination) Regulations 2003*. This case, *R (on the application of Dawkins) v Standards Committee of Bolsover District Council [2004] EWHC 2998*, provides important lessons for all standards committees holding local determination hearings.

The case concerned the timetabling of the standards committee hearing. Regulation 6(2)(b) of the local determinations regulations states:

- 2 *The standards committee of an authority shall ensure that –*
 - b) *...the hearing is held within the period of three months beginning on the date on which the monitoring officer first received a report pursuant to section 64(2) or 71(2) of the Act;*

In Councillor Dawkins' case, the standards committee hearing was held considerably after the three-month period had expired. The court was faced with two questions:

- 1 Did the fact that the standards committee hearing was held after the three-month period had expired mean that the hearing was automatically unlawful? If that had been the case, it would have made it impossible for the standards committee to proceed with the hearing after three months.

- 2 If the court decided that the expiry of the three-month period did not lead to an automatic loss of jurisdiction on the part of the standards committee, in the light of all the relevant facts, what should be the consequence of non-compliance with regulation 6(2)(b)?

Automatically unlawful?

The court had to consider whether the standards committee automatically lost its powers to deal with a referral once the three-month period had passed. The court's approach to this question was guided by the decision of the Court of Appeal in *R v Secretary of State for the Home Department Ex Parte Jeyeanthan* [2000] 1 WLR 354. In that case, the court held that, when considering the consequences of non-compliance with a procedural requirement, three questions ought to be asked:

- a) *Is substantial, as opposed to strict, compliance sufficient to fulfil the requirement and, if so, has there been substantial compliance?*
- b) *Is the non-compliance capable of being waived and, if so, has it been or should it be in the particular case?*
- c) *If the non-compliance cannot be waived what should be the consequences of the non-compliance?*

In relation to the first question, Mr Justice Hughes reached the clear view that substantial (as opposed to strict) compliance with regulation 6(2)(b) would be sufficient to fulfil the statutory requirement. It would therefore be wrong to regard the standards committee as automatically losing jurisdiction as soon as the three-month period expired.

The judge noted that, once the pre-hearing process recommended by the Standards Board for England in its guidance for standards committees had been conducted, it was entirely possible that the hearing would be scheduled for a date towards the end of the three-month period. From time to time, situations would arise where an individual involved in the hearing – whether the subject member, a vital witness or a member of the standards committee – would, for unforeseen reasons, be unable to attend the hearing through illness, travel delays or other similar reasons. It would not be in the public interest for short delays caused by unforeseen circumstances of that kind to deprive the standards committee of the ability to deal with the matter lawfully.

However, the judge issued a warning against any practice of arranging “token hearings” within the specified three-month period with a view simply to adjourning the matter to a date outside the three-month period. The judge considered that such a practice would be likely not to constitute substantial compliance with regulation 6(2)(b) and, therefore, to be unlawful.

The judge concluded:

I should make it clear that the decision at which I have arrived on this principal question must not be taken as creating in a standards committee the freedom not to make a genuine and determined effort to hold the hearing within the three month period. It is not permissible to plan on the basis that it will be all right to slip past the deadline, perhaps not by very much. That will not do. Substantial compliance with the regulations must be achieved. That betokens giving priority, amongst the many other commitments that everybody will have, to what has been provided as a statutory deadline.

Chapter 4

Substantial compliance

The judge carefully considered the reasons for the delay in holding the standards committee hearing. His overall conclusion was that there had not been substantial compliance. It followed that the decision of the standards committee was unlawful and had to be quashed. The failure to comply substantially with the three-month deadline meant that the standards committee could not lawfully consider the referral. The result was that the referral ceased without any lawful determination by the standards committee.

The judge considered that “it was assumed that as long as the difficulties encountered were understandable, passing the deadline would not matter”. This was not an acceptable approach:

The deadline is not simply a target which the standards committee should try to get as close to as is reasonable. The test is not whether one can sympathise with hindsight, nor is it whether it is understandable, to an extent, that the deadline was not treated with the importance which the statute gives it. The test is whether there was substantial compliance with it.

Lessons for local authorities

Although the local determination regulations were amended in 2004 to provide for local investigations, regulation 6(2)(b) remains substantially the same. The Dawkins case has practical implications for standards committee hearings and sets a high standard for standards committees. They must plan to meet the statutory time limit in every hearing. This means that the ethical standards officer's report should be sent to the subject member for comment and a draft timetable set up as soon as the report is received. Any delay will put the committee at risk of breaching the three-month deadline. It may well be sensible to check the availability of the standards committee members, the subject member, and any witnesses at this early stage, so that a provisional hearing date can be fixed.

Authorities need to be wary of being overly flexible towards the subject member when scheduling the hearing. It is easy for a member who wishes to delay matters to ask for more time to prepare the case. Such requests should be treated with caution. The fact that the subject member has asked for the hearing be held outside the three-month period does not make it good practice or, more importantly, lawful. The Dawkins case demonstrates the central importance of complying with the statutory deadline where at all possible.

Appealing case tribunals

Section 79(15) of the *Local Government Act 2000* gives subject members an automatic right of appeal to the High Court against decisions of the Adjudication Panel for England. There is no requirement for permission to appeal, so it is to be expected that such appeals will be relatively frequent. In appeals of this kind, the court can overturn any decisions it believes are wrong in principle but will hesitate to interfere with the decision of a specialist tribunal.

MURPHY

One of the first of these appeals to be heard was *Murphy v Ethical Standards Officer of the Standards Board for England [2004] EWHC 2377 (Admin)*. At issue was Councillor Murphy's participation in the consideration of a report by the Local Government Ombudsman. The report dealt with matters that took place before the adoption of the Model Code of Conduct. It criticised Councillor Murphy for failing

to declare an interest and withdraw from a meeting of the council’s planning committee. The ethical standards officer concluded that Councillor Murphy had had a personal and prejudicial interest in the consideration of the Ombudsman’s report and, therefore, should have withdrawn from the meeting discussing the report. The matter was referred to the Adjudication Panel for England and a hearing was held. The case tribunal agreed with the ethical standards officer and decided to suspend Councillor Murphy for one year.

On appeal, Councillor Murphy put forward four principal arguments:

- 1 the case tribunal had wrongly concluded that he had a personal interest because it had erred in its approach to the phrase ‘wellbeing’ in the Model Code
- 2 the case tribunal had wrongly concluded that Councillor Murphy’s interest was prejudicial
- 3 the case tribunal’s decision infringed Councillor Murphy’s human rights
- 4 the sanction imposed by the case tribunal was disproportionate

Chapter 4

Wellbeing and personal and prejudicial interest

In considering the meaning of the phrase ‘wellbeing’, Mr Justice Keith cited with approval the following passage from the first issue of the *Case Review, the Code Q&A*:

‘Wellbeing’ can be described as a condition of contentedness, healthiness and happiness. Anything that could be said to affect a person’s quality of life, either positively or negatively, is likely to affect their wellbeing. It is not restricted to matters affecting a person’s financial position. The range of personal interests is, accordingly, likely to be very broad.

Mr Justice Keith considered that it would have been “entirely natural for [Councillor Murphy]... to want to salvage his reputation by getting his council to express dissatisfaction with the report”. The case tribunal was, therefore, right to regard the matter as affecting Councillor Murphy’s wellbeing. Councillor Murphy argued that, in fact, he was not unduly troubled by the Ombudsman’s report and, therefore, had no personal interest. This argument failed because the case tribunal had to consider whether the issue “might reasonably be regarded” as affecting a

member's wellbeing. The case tribunal had to consider the matter objectively from the point of view of "an informed outsider".

The judge had no difficulty in upholding the case tribunal's conclusion that Councillor Murphy had a personal and prejudicial interest.

Human rights

Councillor Murphy complained that the composition of the case tribunal was lacking in impartiality, and therefore infringed his right to a fair hearing by an independent and impartial tribunal under Article 6 of the *European Convention on Human Rights*. The tribunal consisted of a solicitor with a London borough, a retired local government officer and a retired civil servant. Councillor Murphy did not question their integrity but argued that their background and profile was such that they were likely to share the ethical standards officer's interpretation of the Code of Conduct and his belief that Councillor Murphy had had a personal and prejudicial interest in the Ombudsman's report. The judge rejected this suggestion. This was a specialist tribunal. Its members' knowledge of the workings of local government particularly qualified them to make judgements of the kind called for in Councillor Murphy's case. There was no basis to suggest any unconscious tendency to adopt the views put forward by the ethical standards officer.

Councillor Murphy also argued that interpreting the Code of Conduct in such a way as to prevent him speaking about the Ombudsman's report amounted to an infringement of his right to freedom of expression under Article 10 of the convention. This argument was also rejected. Mr Justice Keith observed:

The exercise of one's right to freedom of expression is expressly subject to such conditions as are necessary in a democratic society and for the protection of the rights of others. There is an obvious need to protect the reputation of local authorities as one of the democratic elements of society. In that connection, there is a need to maintain public trust and confidence in the decision-making process of local authorities. The provisions of the Code which are engaged in the present case are plainly intended to ensure that that trust and confidence is not misplaced. They must, of course, go no further than is necessary for the achievement of that purpose, but it cannot seriously be gainsaid that the decision-making process of local authorities, and public confidence in it, would be

substantially undermined if councillors who have an interest in the outcome of the process could remain at a meeting at which the topic in which they have an interest is to be discussed and could influence the council's decision on the topic by speaking at the meeting on it.

Sanction

Councillor Murphy's appeal was successful on one point, in relation to the sanction. Although the judge was satisfied that this was a case which merited suspension he decided to reduce the period of suspension imposed from one year to four months, stating:

I am extremely hesitant to interfere with the sanction which a specialised tribunal thinks appropriate, but I have concluded that the case tribunal could not have given sufficient weight to the unusual feature of this case, namely that Councillor Murphy's interest in the Ombudsman's report was known to everyone...

Chapter 4

SLOAM

The decision in Murphy to reduce the sanction imposed by the case tribunal can be contrasted with another decision heard three months' later – that of *Sloam v Standards Board for England [2005] EWHC 124 (Admin)*.

Mr Sloam had been convicted of attempting, by deception, to evade dishonestly a liability relating to parking penalties. The case tribunal found that this was conduct that could reasonably be regarded as bringing his office or authority into disrepute, contrary to paragraph 4 of the Code of Conduct. By using council notepaper in relation to this matter, Mr Sloam had also improperly used his position to gain an advantage for a relative, contrary to paragraph 5(a) of the Code of Conduct. The tribunal also found that Mr Sloam had breached paragraph 4 of the Code of Conduct by dishonestly attempting to renew a parking permit for disabled drivers. The case tribunal stated that:

This was a serious breach of the Code that would, under normal circumstances, warrant a disqualification of two years. The tribunal had regard, however, to the respondent's record of public service and to the testimonials that had been presented on his behalf. Consequently the tribunal decided that the respondent should be disqualified for the lesser period of one year...

Mr Justice Bennett had no hesitation in rejecting Mr Sloam’s challenge to the finding that he had improperly used his position to gain an advantage for his relative. The tribunal had had no doubt that, by using council notepaper for a letter asking for the parking penalty to be cancelled, Mr Sloam had intended to use his position as a councillor improperly to secure an advantage for his relative. Mr Justice Bennett considered the inference drawn by the case tribunal as to Mr Sloam’s improper intentions to be “irresistible”.

Mr Sloam also argued that the decision to disqualify him was excessive and that he should have only been suspended.

Although the judge expressed the greatest sympathy for Mr Sloam, who was deeply remorseful for what he had done, he did not think it would be right, in all the circumstances, to interfere with the case tribunal’s decision. In considering sanctions imposed by a case tribunal, the High Court was acting as a court of review and would be slow to intervene in matters decided by a specially trained tribunal.

The judge drew particular attention to guidance issued by the Adjudication Panel for England on action to take when a member is found to have failed to comply with the Code of Conduct:

The action on which the case tribunal decides will be directed toward upholding and improving the standards of conduct expected of members of the various bodies to which the Codes of Conduct apply. Thus, the action will be designed both to discourage or prevent the particular respondent from any future non-compliance but also to discourage similar action by others.

The tribunal had to bear in mind the wider picture and, in particular, the effect on public confidence of the conduct which it was called upon to consider.

SCRIVENS

Scrivens v Ethical Standards Officer [2005] EWHC 529 (Admin) was the first appeal under section 79(15) of the *Local Government Act 2000* in which the appellant was legally represented. Councillor Scrivens had been found to have failed to withdraw from an agenda item in which he had a prejudicial interest and, furthermore, to have improperly sought to influence the authority’s decision. He

had also, on another occasion, failed to declare a personal interest. The councillor was suspended for four months.

The appeal raised a narrow but extremely important point concerning the proper approach to the tests for personal and prejudicial interests under the Model Code of Conduct. Councillor Scrivens argued that, in determining whether a member had a personal and prejudicial interest, the proper approach was for the case tribunal to consider whether the member concerned could rationally have come to the view that they did not have a personal or prejudicial interest. This approach suggests that there may be a range of reasonable responses to a given set of facts. So, for example, two reasonable people might disagree as to the existence of a prejudicial interest. According to Councillor Scrivens, the tribunal could properly find that there had been a failure to comply with the Code of Conduct only where a member's conclusion that he or she did not have a prejudicial interest was unreasonable.

Chapter 4

The ethical standards officer argued that the case tribunal had to consider whether, viewed objectively, the member had a personal and prejudicial interest. There could only be one correct answer to that question, on a given set of facts. If the case tribunal considered that the member had a prejudicial interest and that member failed to withdraw from the item under discussion, the member would have failed to comply with the Code of Conduct.

Mr Justice Stanley Burnton accepted the ethical standards officer's submissions that there was nothing in the tests for personal and prejudicial interests which indicated a subjective approach was appropriate. The Code of Conduct would require substantial rewriting to fit the position argued for by Councillor Scrivens.

The judge considered that a subjective approach would seriously detract from the aims of the Code of Conduct, to promote and maintain high standards of conduct by members:

The effect of the appellant's contention, which is that a member of a local authority may participate with impunity in its consideration of a matter in which a fair-minded person would think that he has a disqualifying prejudicial interest, if the member wrongly but reasonably believes that he does not have such an interest, would be to damage public confidence in the affairs of local authorities.

The judge also pointed out that Councillor Scrivens' arguments would create an unhelpful inconsistency between the Code of Conduct and the law on bias. The test for bias was undoubtedly an objective one.

Councillor Scrivens relied very strongly on paragraph 76 of the Court of Appeal's judgment in *R (Richardson) v North Yorkshire County Council* [2004] 1 WLR 1920 (considered in the *Case Review* number 2):

The first point to make is that the initial and principle judgment on the question is for the individual councillor himself. This is plain both from the consultation paper and also from several of the provisions in the Code itself, for example paragraphs 8(1) and 11(1). But there comes a point at which it would clearly be irrational and therefore unlawful for the councillor to conclude that he does not have a personal interest under paragraph 8(1) or, as the case may be, a prejudicial interest under 10(1).

The councillor argued that the words "irrational and therefore unlawful" showed that it was only where a member's conclusion that he or she did not have a prejudicial interest was "irrational" that the member could properly be said to have failed to comply with the Code of Conduct. Accordingly, the Court of Appeal's judgment, which was binding authority, clearly pointed to a subjective test.

The judge considered this argument very carefully but was unable to accept it. He pointed out that immediately after paragraph 76 of the Richardson judgment, Lord Justice Simon Brown quoted with approval the judgment of Mr Justice Richards at first instance. That first instance judgment clearly pointed to an objective test. The judge could not accept that Lord Justice Simon Brown would have cited those extracts from Mr Justice Richards's judgment if he had disagreed with them. Furthermore, paragraph 77 of Lord Justice Simon Brown's judgment drew an express parallel with the (objective) test for bias. That pointed clearly to an objective test under the Code of Conduct. Mr Justice Stanley Burnton was driven to the conclusion that paragraphs 76 and 77 of Lord Justice Simon Brown's judgment were inconsistent.

The judge considered that the explanation for the inconsistency was simply that the argument put forward by Councillor Scrivens was not argued before the Court of Appeal in Richardson. Where a proposition of law appears in the court's judgment in a particular case but is not the subject of any argument in

that case, judges deciding other cases are not bound by that proposition of law. The judge bore in mind the warning in *R (Khadim) v Brent London Borough Council* [2001] 2 WLR 1674 that this exception to the strict rule of precedent should only be applied “in the most obvious of cases, and limited with great care”. However, in the light of the inconsistency identified in the Court of Appeal’s judgment and the absence of any indication of any argument on the point in the skeleton arguments before the Court of Appeal, the judge had no doubt that the crucial sentence in paragraph 76 of the Richardson judgment did not represent the considered view of the Court of Appeal. He concluded:

Whether a member has a personal or a prejudicial interest is a question to be determined objectively. The mistaken but reasonable view of the member that he has no such interest is irrelevant. The test for a failure to comply with the Code by failing to comply with [the paragraphs dealing with personal and prejudicial interests] is similarly objective.

Chapter 4

In the view of the Standards Board for England, it would have created immense difficulties for those responsible for advising on and implementing the ethical framework if the court had accepted Councillor Scrivens’ arguments. In one stroke, the aim of applying a consistent standard of conduct to all members would have been fatally undermined.

SANDERS

Sanders v Kingston [2005] EWHC 1145 arose from certain remarks made by Councillor Sanders as leader of Peterborough City Council concerning the death of a young soldier in Northern Ireland.

The chief executive of Carrickfergus Borough Council had written to the chief executive of Peterborough City Council seeking support for a request for a full and independent enquiry into unexplained deaths among army personnel. This letter was passed to Councillor Sanders who returned the letter to the chief executive of Carrickfergus Borough Council with a short handwritten note stating:

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

The correspondence between the chief executive and Councillor Sanders continued and become increasingly heated. It also became the subject of considerable media interest. As a result, Councillor Sanders gave an interview to BBC Northern Ireland's News Line programme in which he made the following remarks:

I believe in my heart of hearts that Paul Cochrane's family owe me an abject apology for the amount of time that I have spent on this particular cause because it is absolutely nothing to do with me. I do not know why, I do not know when, I do not know how their son was either killed or committed suicide. The circumstances are not within my power to investigate.

You've killed hundreds of my friends. You've killed people in Peterborough. You've caused distress to hundreds of families in England. Now that one of your own has committed suicide – I presume in your own country – yet it suddenly becomes an Englishman's fault.

When do I get my apology from the Cochrane family and when will the English people get an apology from the people of Northern Ireland for killing so many of our soldiers over the past 25 years?

I think you should all hang your heads deeply in shame for involving the English people in your own quarrel.

In September 2004, a case tribunal of the Adjudication Panel for England concluded that Councillor Sanders' conduct, both in his correspondence with Carrickfergus Borough Council and his media interviews, constituted a failure to treat others with respect and brought his office or authority into disrepute contrary to paragraphs 2(b) and 4 of the Code of Conduct. The tribunal noted that Councillor Sanders' conduct was "disrespectful and deeply offensive to any reasonable person, particularly to the Cochrane family..." The councillor was disqualified for two years.

Councillor Sanders appealed to the High Court. His main argument was that the tribunal's findings breached his right to freedom of expression under Article 10 of the *European Convention on Human Rights*, but a number of other points were argued before the Court as well.

Scope of the appeal

In considering the scope of the appeal, Mr Justice Wilkie considered a number of authorities and concluded:

I am not exercising a purely supervisory function. I am permitted to engage with the merits. In doing so, however, I must pay due deference to the role of the tribunal in particular where it is a specialist tribunal selected for its expertise and trained to the task.

The quality of the decision

Councillor Sanders' criticised the tribunal for failing to specify which elements of his conduct had been found to have breached the Code of Conduct. The judge rejected this criticism. He felt it was clear that the tribunal's approach was to take the comments to the media in the round and not to compartmentalise them. It was legitimate to consider the overall effect of what Councillor Sanders had said.

Article 10

Chapter 4

Councillor Sanders raised two points in relation to Article 10 of the *European Convention on Human Rights*.

His first point was that paragraphs 2(b) and 4 of the Code of Conduct were not precise enough to enable a person to foresee when they might be in breach. It followed, therefore, that they were not "prescribed by law" within the meaning of Article 10. The judge rejected this contention. Both paragraphs were specific in describing either the nature of the conduct or its consequence.

The more substantial point in relation to Article 10 was Councillor Sanders' suggestion that his comments should be accorded the extremely high level of protection which must be given to political expression because of its fundamental importance for the maintenance of a democratic society. He argued that the tribunal was, therefore, wrong to conclude that he had breached paragraphs 2(b) and 4 of the Code of Conduct.

Although the judge accepted that Article 10 was engaged, he rejected this contention on the facts of the case. In relation to the correspondence with Carrickfergus Borough Council, the judge concluded that it amounted to "little more than an expression of personal anger at his time being wasted by

Carrickfergus’s request. It does not contain anything which could be dignified with the description of a political opinion or the importation of information.”

Similarly, the judge concluded that Councillor Sanders’ comments to the BBC amounted to “no more than a personal attack upon the family of Paul Cochrane and the people of Northern Ireland”. It was “little more than vulgar abuse”.

Having concluded that Article 10 was engaged, the judge had to consider whether the restrictions imposed by the Code of Conduct were “necessary in a democratic society for the protection of the rights of others”. That consideration required three questions to be asked (see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532):

- 1 Was the legislative objective behind these provisions sufficiently important to justify limiting freedom of speech?
- 2 Were the measures adopted rationally connected to the legislative objective?
- 3 Were the means used to impair the right or freedom of speech no more than was necessary to accomplish the legislative objective?

Councillor Sanders did not challenge the validity of the ethical framework as a whole. The judge concluded that it was therefore implicit that Councillor Sanders accepted that the provisions of the Code of Conduct satisfied these three conditions. Having concluded that the member’s comments amounted to no more than expressions of personal anger and personal abuse, rather than political expression, the judge found that the case tribunal’s finding was not in breach of Article 10.

Sanction

Cllr Sanders’ also challenged the sanction imposed by the case tribunal. This aspect of his appeal was successful. The judge reduced the sanction imposed to one year’s suspension from holding office as leader of the council. At the time of writing, the ethical standards officer was seeking permission to appeal against this aspect of the decision.

Chapter 5

Significant others

Other chapters in this volume of the *Case Review* consider broad issues in ethical behaviour, using a range of cases to illustrate points and draw conclusions. This chapter turns that approach on its head, and considers a handful of individual cases that raise issues of particular significance.

Cases in this chapter concern:

- indecent images
- an attack on a member of the public
- the manipulation of the electoral process
- a conflict of interest
- offensive statements

Indecent images

Cases SBE3483.03 (APE0188), SBE6004 (APE0208), and SBE5711.03 (APE0225) involved members who were charged with criminal offences involving indecent pictures of children.

- One member, a member of a city council and a county council, was convicted of downloading indecent images of children from the internet on 18 occasions. A magistrates' court sentenced him to pay a fine or, in default, to serve two months' imprisonment.
- Another member, a district councillor, was convicted of the offence of possessing and making indecent pseudo photos of children. A magistrates' court sentenced him to a three-year community rehabilitation order and 100 hours of community service.
- The third member, a member of a district council and a town council, was charged with ten counts of downloading indecent photos of a child, and was given a police caution.

All three members were placed on the sex offenders' register for five years, and it was alleged that their behaviour brought their offices and authorities into disrepute.

Ethical standards officers referred all of these cases to the Adjudication Panel for England, which held case tribunals between August 2004 and February 2005.

HONESTY AND INTEGRITY

The *Relevant Authorities (General Principles) Order 2001 (SI 2001/1401)*, which underpins the Code of Conduct, states that members should:

“...not place themselves in positions where their honesty or integrity may be questioned”

and:

“...uphold the law and...act in accordance with the trust that the public is entitled to place in them.”

The behaviour in these cases was clearly at odds with the public’s trust in the honesty and integrity of its members. They had failed to uphold the law by committing criminal offences for which they were either convicted or cautioned. One tribunal noted that a criminal conviction placed the member in a position where his honesty and integrity was called into question and the public would no longer trust him. Another tribunal found that the member’s conduct was such that it would undermine the public’s confidence in its elected members, especially as the member’s authorities provide services to children, families and young people.

Chapter 5

PUBLIC DISREPUTE

The case tribunals all reached the view that the members had failed to comply with paragraph 4 of the Code of Conduct. Each of the members had acted in a way that could reasonably be regarded as bringing their office or authority into disrepute.

In one case, the member’s arrest and court appearance were prominently covered in local newspaper articles, where he was clearly identified as a member of two councils. In addition, one of his councils publicly censured him for his conduct. This was therefore an instance where the member did in fact bring his office and authorities in disrepute.

In two of the cases, the tribunals decided that it would be inappropriate for the members to serve as councillors while they were on the sex offenders’ register. Although the police caution accepted by one member would have been spent in three years (under the *Rehabilitation of Offenders Act 1974*), the tribunal was mindful of the fact that he would nevertheless remain on the sex offenders’ register for five years.

SANCTION

The tribunals regarded these breaches of the Code of Conduct as particularly serious, meriting long disqualifications. Two members were disqualified for five years, the maximum period, and the member in the third case was disqualified for four years. These sanctions were consistent with the decision in an earlier case (SBE921.02 (APE0153)), where a member was disqualified for five years for downloading child pornography.

LESSONS FROM THE CASES

These cases reinforce lessons from previous tribunals. We noted in the previous issue of the *Case Review* that a member's involvement in unlawful behaviour will often be relevant to the issue of public confidence in local democracy, and that members have brought their offices and authority into disrepute by breaking the law.

The repugnance with which the public regards child pornography means that these cases had the potential to be particularly damaging. The members not only failed to uphold the law, but they also fatally undermined the public's trust in them and called into question their own honesty and integrity. In addition, the members had, through their actions, been placed on the sex offenders' register. Such cases have tended to warrant the heaviest sanction available to the Adjudication Panel for England – a five-year disqualification from holding public office.

An attack on a member of the public

In case SBE4540.04 (APE0196), a member of a borough council was involved in a violent incident at a weekend festival organised by his political party. During the event, the member was accused of causing a nuisance by his drunken behaviour and was approached by a member of the party responsible for security. The member hit this person with a sharp object, cutting his cheek so badly that he required seven stitches. The incident was later reported in the local and national press.

PUBLIC AND PRIVATE

Although this incident took place at a private function and was not reported to the police, the ethical standards officer believed that a member of the public would have had a low opinion of the member for harming another person in an unprovoked attack. This would have had an impact on the member's authority and

his position as a councillor, particularly as the attack happened at a family weekend festival. The incident was reported in the press and the member's own party regarded the behaviour as serious enough to expel him from the party.

The Adjudication Panel for England found that the member acted in a way which could reasonably be regarded as bringing his office or authority into disrepute, contrary to paragraph 4 of the Code of Conduct.

SANCTION

The Adjudication Panel for England took into account the General Principles that members should “uphold the law” and that they should “act in a way that secures or preserves public confidence”.

This was not a one-off occurrence, as the member had been involved in a disturbance at the same event on the previous evening. The tribunal believed that the behaviour brought public service into considerable disrepute and showed the member was unfit for office.

The member was disqualified for three years from being or becoming a member.

Chapter 5

LESSONS FROM THE CASE

We have already noted that members who break the law may bring their office or authority into disrepute. This case underlined the heavy sanctions that members can face for acting in an unacceptable way, even if this is in their private capacity. An attack on a member of the public is particularly unacceptable, as members are supposed to provide a degree of moral leadership in the community by upholding the principles of public life.

The manipulation of the electoral process

In case SBE3426.03 (APE0224), a member of a parish council manipulated the electoral process by persuading three candidates to withdraw their nominations. There were ten candidates for seven seats in his ward, which meant that a contested election had to be held. This would have had cost implications for the parish. Seven of the candidates were existing members, and three had not previously been parish councillors. The member told the three new candidates that

the council would co-opt them at a later date if they stood down, even though he was not in a position to give such an assurance.

ABUSE OF POSITION

The member breached paragraph 5(a) of the Code of Conduct, which states that a member:

...must not in his official capacity, or any other circumstance, use his position as a member improperly to confer on or secure for himself or any other person, an advantage or disadvantage.

This is informed by the first of the General Principles, that of selflessness, which states that:

Members should serve only the public interest and should never improperly confer an advantage or disadvantage on any person.

The member tried to save his authority the cost of an election, and felt that he had done nothing wrong because all the candidates eventually became councillors. However, he also protected his own and existing councillors' positions, and saved himself and the other councillors the task of fighting the election.

Chapter 5

The member improperly conferred an advantage on the existing members by ensuring that they did not have to stand for re-election and improperly secured an advantage for himself by protecting his own seat. He also improperly conferred a disadvantage on the new candidates by persuading them to stand down, with no guarantee that they would be co-opted.

Most importantly, however, the member conferred a disadvantage on the electorate. The member faced criticism from some constituents for preventing them from expressing their opinions at the ballot box. One constituent wrote to a local newspaper about the loss of a "rare and...welcome opportunity for villagers to genuinely reflect their wishes as to who represents them via the ballot box". The constituent went on to say:

[The member's] 'concern for the people of [the parish]' evidently does not extend to their having opportunities to cast votes in the election!

The Adjudication Panel for England's tribunal noted:

[The member] improperly conferred a disadvantage on the electorate of the parish by interfering with the democratic process and thereby denying them the right to vote for the candidates of their choice.

The tribunal concluded that the member's actions brought his office and authority into disrepute, in breach of paragraph 4 of the Code of Conduct.

SANCTION

The tribunal believed it was a very serious matter to interfere with the democratic process. However, it took into account the fact the member was trying to save the parish council money. The tribunal also took into account his long record of public service and disqualified him for nine months.

LESSONS FROM THE CASE

The Code of Conduct and the Standards Board for England exist to promote confidence in local democracy. The member's behaviour in this case undermined the democratic process itself. Notwithstanding the member's motivation in asking candidates to withdraw from the election, he deprived local people of the chance of exercising their democratic rights. The case showed the consequences of members overstepping the bounds of their authority and presuming to second-guess the wishes of the electorate.

Chapter 5

A conflict of interest

In case SBE2657.02 and SBE2889.03 (APE0201), a member, who was the leader of a borough council, represented an applicant for a taxi licence in a professional capacity at the council's licensing committee meeting. The councillor was not a member of the committee and was not involved in taking the decision on the application. He said that he was representing a client in a private capacity, as a solicitor.

PROFESSIONAL WORK AND PUBLIC SERVICE

The member was asked for help in making the application and believed he could separate his roles as a councillor and solicitor. However, this was a serious misjudgement.

The Adjudication Panel for England for the first time directly applied the judgment in the Court of Appeal case involving Councillor Richardson of North Yorkshire County Council – *R. (on the application of Richardson) v North Yorkshire CC [2003] EWCA Civ 1860*. The Court of Appeal decided that members cannot avoid the rules on interests by claiming that they were present at meetings in a private capacity. He or she will still be a member, and will still be regarded as conducting the business of his office. (The judgment is covered in detail in the previous issue of the *Case Review*.)

The Code of Conduct does not prevent members from acting as advocates for their constituents before council committees. The problem in this case was that the member was acting in a professional capacity, and was being paid to represent a client (albeit only a nominal fee). There was a clear conflict of interest between the councillor's role as a member and his attempt to represent a private client. His interest in representing the client was so significant that it was likely to prejudice his judgement of the public interest in deciding on the application. The case tribunal decided that the member had a prejudicial interest and failed to comply with the Code of Conduct by failing to withdraw from the meeting. The member was also found to have brought his office and authority into disrepute.

SANCTION

The Adjudication Panel for England's case tribunal believed that the member had committed very serious breaches of the Code of Conduct. However, it appeared that this was due to a misjudgement, rather than an improper motive. It decided to suspend the member for six months.

LESSONS FROM THE CASE

The case established the principle that it is disreputable for members to appear in a professional capacity before committees of their own authority. The tribunal noted that public confidence in local authorities requires members not only to act impartially and without bringing undue pressure and influence to bear, but to be seen to be doing so. Members who professionally represent the private interests of applicants before their own authority are acting inappropriately and inevitably give a damaging impression.

Offensive statements

Unlike the other examples in this chapter, case SBE8701.04 involved a member who did not fail to comply with the Code of Conduct, and whose case was not referred to the Adjudication Panel for England for determination. The case nevertheless raised interesting questions about whether offensive comments are covered by the Code of Conduct.

In the case, a member of a borough council published an article in a local newspaper under his own name criticising Islam.

The title of the article referred to terrorism and the article set out a list of recent terrorist acts in different countries and the responses of governments. He went on to say:

The horrible fact is that there exists a religion, one of the fundamental tenets of which is that it should be the only religion on the planet. Another horrible fact is that, from its outset, the religion has been a political and military movement. Personally I am finding it difficult to ‘celebrate the diversity’ of a culture which seems determined to destroy my own.

Chapter 5

DISCRIMINATION, DISRESPECT AND DISREPUTE

It is possible that offensive comments about people of a different religion, race or ethnic group could be covered by paragraphs 2 and 4 of the Code of Conduct. These deal with discrimination, disrespect and disrepute. Members must not:

- discriminate unlawfully against others
- treat others disrespectfully
- bring their office or authority into disrepute

The obligations to treat others with respect and not to discriminate unlawfully against others, under paragraph 2 of the Code of Conduct, only apply to members’ official conduct. The member clearly wrote the article as a member of the public, and not as a councillor. He did not use his official title and he was not on official business or representing his authority so there was no breach under these terms.

However, it could be argued that such an article could bring a member’s office or authority into disrepute. Members, as public figures, have to be mindful

of the consequences of their actions in all circumstances, as what they do could have an effect on the reputation of their office and authority.

OFFENSIVENESS AND OFFENCES

A member of a local community group who was offended by the article reported the member to the police in the belief that he had committed an offence.

The member had not committed a criminal offence in writing the article. The police formally responded by saying that:

The article does not incite anyone to do anything against Muslims, nor has the content resulted in any public disorder. The article may be offensive or upsetting to the complainant but its content is perfectly legal. No offences have been committed in the writing and publication of such an article.

The member therefore acted within the law, even if his article might have offended or upset people.

RACE RELATIONS

Authorities also have legal obligations under the *Race Relations (Amendment) Act 2000*. This act imposes a duty on authorities to eliminate unlawful racial discrimination, promote equality of opportunity and promote good relations between people of different racial groups. However, Muslims are not defined in the act as a racial group, and the ethical standards officer did not accept that the act imposed a lawful obligation on the authority to promote good relations between people belonging to different religions. The member, accordingly, did not act in a way that was inconsistent with the authority's duties under race relations legislation.

EQUAL OPPORTUNITIES

The member also had an obligation to uphold the authority's equal opportunities policy. The policy includes a pledge not to discriminate on a number of grounds, including race, ethnic background and religious belief.

The ethical standards officer concluded that the member showed no intention of discriminating, in his capacity as a councillor, on the grounds of race, ethnic background or religious belief. The member did not therefore fail to uphold the council's policy of promoting equal opportunities.

HUMAN RIGHTS

Freedom of expression is a human right, enshrined in Article 10 of the *European Convention on Human Rights*, and incorporated into UK law by the *Human Rights Act 1998*. The exercise of members' right to freedom of expression is nevertheless expressly subject to such conditions as are necessary in a democratic society for the protection of the rights of others. There is an obvious need to protect the reputation of local authorities as one of the democratic elements of society. In that connection, there is a need to ensure the conduct of members does not erode public trust and confidence in local authorities.

In this case, the ethical standards officer did not find any evidence that the views in the article were likely to lead to public disorder, to put individuals or groups at risk of harm, or to erode public trust and confidence in local authorities. The member accordingly had the right to express his views.

GOOD GOVERNANCE

The authority's constitution sets out members' roles and their responsibility to contribute towards the good governance of the area. Members arguably have a responsibility, as part of good governance, to promote harmony between all sections of the community. Words aimed at provoking fear or hatred of a group of people not on the basis of their religious belief, but on the basis of their ethnicity or racial origin, could cause conflict in the community, and so affect the governance of the area. This would be the case if the references to a group of believers were no more than disguised attacks on individuals identifiable by their race.

The expression of controversial opinions that may divide groups in a community does not, however, necessarily lead to disrepute. There was no evidence that the member in this case was abusive, deliberately dishonest, or that he maliciously intended to harm individuals or groups.

The member therefore did not act in a way that would provoke conflict in the community, undermine good governance or bring his office or authority into disrepute.

LESSONS FROM THE CASE

This case clarified a number of issues around offensive statements and the Code of Conduct. The member expressed, in a personal capacity, a controversial opinion about a religion but this did not damage public confidence in his office or authority. Some people were offended by the comments, but there was no evidence of any breach of the Code of Conduct. Members may express the strongest dislike or criticism of a particular ideology, religion, moral tenet or political stance, even if that expression gives offence, so long as they are not abusive, in breach of the law or in conflict with their authority's legal obligations or policies.

