

## **PLEASE NOTE START TIME OF MEETING**

# **STANDARDS COMMITTEE AGENDA**



**Tuesday 13 December 2011**

**at 3.00 p.m.**

**in Committee Room 'C',  
Civic Centre, Hartlepool.**

**MEMBERS: STANDARDS COMMITTEE:**

Councillors Barclay, Fleet, Griffin, Morris, Preece, Shaw and Sutheran.

Co-opted Members: B Footitt, B Gray, T Jackson and Reverend John Lund.

Parish Councillors: A Bell, Hart Parish Council, R Musgrave, Elwick Parish Council and 1 vacancy.

**1. APOLOGIES FOR ABSENCE**

**2. TO RECEIVE ANY DECLARATIONS OF INTEREST BY MEMBERS**

**3. MINUTES**

3.1 To confirm the minutes of the meeting held on 22 November 2011

**4. ITEMS FOR DECISION / INFORMATION**

4.1 The Local Government Ombudsman Annual Review 2010/11 and Visit to Hartlepool Borough Council – *Chief Solicitor*

4.2 Business Report – *Chief Solicitor*

**5. ANY OTHER ITEMS WHICH THE CHAIRMAN CONSIDERS ARE URGENT**

# **STANDARDS COMMITTEE**

## **MINUTES AND DECISION RECORD**

22<sup>nd</sup> November 2011

The meeting commenced at 4.00 pm in the Civic Centre, Hartlepool

**Present:**

Mr B Gray (In the Chair)

Councillors .Griffin, Morris, Preece and Sutheran

Co-opted Members: Mr Jackson, Reverend Lund

Parish Councillor Bell (Hart Parish Council), Parish Councillor Musgrave (Elwick Parish Council)

**18. Apologies for absence**

Councillors Fleet and Shaw and Professor Footitt

**19. Declarations of interest by members**

None

**20. Minutes**

The minutes of the meeting held on 11 October 2011 were confirmed

**21. Local Government (Access to Information)(Variation) Order 2006**

Under Section 100(A)(4) of the Local Government Act 1972, the press and public were excluded from the meeting for the following item of business on the grounds that it involved the likely disclosure of exempt information as defined in paragraphs 1 and 7 (c) of Part 1 of Schedule 12A of the Local Government Act 1972 as amended by the Local Government (Access to Information) (Variation) Order 2006.

Minute 22 [Local Assessment of Complaints – Case References SC015 and SC04-2010] (Paragraph 1 namely information relating to any individual and Paragraph 7(c), information presented to a Standards Committee or a to a Sub-Committee of a Standards Committee, set up to consider any matter under Regulation 13 or 16 to 20 of the Standards Committee (England) Regulations, 2008, or referred under Section 58(1) (c) of the Local Government Act 2000).

**22. Local Assessment of Complaints – Case References  
SCO15-2009 and SCO4-2010** (*Chief Solicitor and Monitoring  
Officer*)

Further to the meeting of this Committee held on 11 October 2011, the Chief Solicitor and Monitoring Officer presented a report which provided the background and outcome to the investigation relating to case references SCO15-2009 and SCO4-2010.

**Decision**

The decision is set out in the exempt section of the minutes.

The meeting concluded at 4.45 p.m.

CHAIR

## **STANDARDS COMMITTEE**

13 December 2011



**Report of:** Chief Solicitor

**Subject:** THE LOCAL GOVERNMENT OMBUDSMAN  
ANNUAL REVIEW 2010/11 AND VISIT TO  
HARTLEPOOL BOROUGH COUNCIL

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### **1. PURPOSE OF REPORT**

To provide members with the Local Government Ombudsman's Annual Review 2010/11 (a copy of which is attached for members reference, at **Appendix 1**)

### **2. BACKGROUND**

On the 9 August 2011 members were presented with a copy of the Annual Review of the Local Government Ombudsman 2010/11 for Hartlepool Borough Council. Reference was made to an invitation for the Local Government Ombudsman or one of his senior colleagues to meet with Standards Committee and discuss the Annual Review and any aspects of the Local Government Ombudsman's work. Mrs Bailey, Assistant Ombudsman, will be in attendance at the meeting to discuss the Annual Review with members.

### **3. BACKGROUND PAPERS**

Copy of the report to Standards Committee of 24 August 2010, together with a copy of the Local Government Ombudsman's Annual Review for Hartlepool 2010/11.

### **4. PROPOSALS**

To welcome the Assistant Local Government Ombudsman to the Standards Committee and invite questions further to her talk on the work of the Local Government Ombudsman both in the present and the future.

### **5. CONTACT OFFICER**

Peter Devlin  
Chief Solicitor and Monitoring Officer.

Local Government  
**OMBUDSMAN**

24 June 2011

Mr Paul Walker  
Chief Executive  
Hartlepool Borough Council  
Civic Centre  
HARTLEPOOL  
TS24 8AY

Our Ref: Annual Review /AS/DH

(Please quote our reference when contacting us and, if using email, please put the reference number in the email subject header)

Dear Mr Walker

**Annual Review Letter**

I am writing with our annual summary of statistics on the complaints made to me about your authority for the year ending 31 March 2011. I hope the information set out in the enclosed tables will be useful to you.

The statistics include the number of enquiries and complaints received by our Advice Team, the number that the Advice Team forwarded to my office and decisions made on complaints about your council. Not all complaints are decided in the same year that they are received. This means that the number of complaints received and the number decided will be different.

The statistics also show the time taken by your authority to respond to written enquiries and the average response times by type of authority.

***Communicating decisions***

We want our work to be transparent and our decisions to be clear and comprehensible. During the past year we changed the way we communicate our decisions and reasons. We now provide a stand-alone statement of reasons for every decision we make to both the citizen who has complained and to the council. These statements replace our former practice of communicating decisions by letter to citizens that are copied to councils. We hope this change has been beneficial and welcome comments on this or any other aspect of our work.

Beverley House  
17 Shipton Road  
York  
YO30 5FZ

T: 01904 380200  
F: 01904 380269  
W: [www.lgo.org.uk](http://www.lgo.org.uk)

Advice Team: 0300 061 0614

**Anne Seex**  
Local Government Ombudsman  
**Michael King**  
Deputy Ombudsman



In April 2011 we introduced a new IT system for case management and revised the brief descriptions of our decisions. My next annual letter will use the different decision descriptions that are intended to give a more precise representation of complaint outcomes and also add further transparency to our work.

### ***Extended powers***

During 2010/11 our powers were extended to deal with complaints in two significant areas.

In October 2010 all complaints about injustice connected to adult social care services came under our jurisdiction. The greater use of direct payments and personalised budgets mean that it is particularly important for us to be able to deal with such complaints irrespective of whether a council has arranged the care. The increasing number of people who arrange and pay for their own social care now have the right to an independent and impartial examination of any complaints and concerns they may have about their care provider.

In the six months to April 2011 we received 75 complaints under our new adult social care powers. Between 2009/10 and 2010/11 complaints about care arranged or funded by councils doubled from 657 to 1,351.

The Apprenticeships, Skills, Children & Learning Act 2009 introduced powers for us to deal with complaints about schools by pupils or their parents. This was to be introduced in phases and currently applies in 14 council areas. By the end of 2010/11 we had received 169 complaints about schools in those areas and 183 about schools in other areas where we had no power to investigate. The Education Bill currently before Parliament proposes to rescind our new jurisdiction from July 2012.

Our new powers coincided with the introduction of Treasury controls on expenditure by government departments and sponsored bodies designed to reduce the public spending deficit. This has constrained our ability to inform care service users, pupils and their parents of their new rights.

### ***Assisting councils to improve***

For many years we have made our experience and expertise available to councils by offering training in complaint handling. We regard supporting good complaint handling in councils as an important part of our work. During 2010/11 we surveyed a number of councils that had taken up the training and some that had not. Responses from councils where we had provided training were encouraging:

- 90% said it had helped them to improve their complaint handling
- 68% gave examples of how the knowledge and skills gained from the training had been applied in practice
- 55% said that complaints were resolved at an earlier stage than previously
- almost 50% said that citizens who complained were more satisfied.

These findings will inform how we develop and provide training in the future. For example, the survey identified that councils are interested in short complaint handling modules and e-learning.

Details of training opportunities are on our web site at [www.lgo.org.uk/training-councils/](http://www.lgo.org.uk/training-councils/)

More details of our work over the year will be included in the 2010/11 Annual Report. This will be published on our website at the same time as the annual review letters for all councils (14 July).

If it would be helpful to your Council I should be pleased to arrange for me or a senior manager to meet and explain our work in greater detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Anne Seex'.

Anne Seex  
Local Government Ombudsman

## Local authority report - Hartlepool BC

for the period ending - 31/03/2011

For further information on interpretation of statistics click on this link to go to [www.lgo.org.uk/CouncilsPerformance](http://www.lgo.org.uk/CouncilsPerformance)

### LGO Advice Team

Enquiries and complaints received	Adult Care Services	Benefits & Tax	Corporate & Other Services	Education & Childrens Services	Environmental Services & Public Protection & Regulation	Highways & Transport	Housing	Other	Planning & Development	Total
Formal/informal premature complaints	0	1	0	0	1	1	0	0	1	4
Advice given	2	1	1	1	0	0	0	0	0	5
Forwarded in investigative team (resubmitted)	0	0	0	0	3	0	0	0	1	4
Forwarded to investigative team (new)	1	1	4	2	0	1	4	0	1	14
Total	3	3	5	3	4	2	4	0	3	27

### Investigative Team

Decisions	Reports: maladministration and injustice	Local settlements (no report)	Reports: Maladministration no injustice	Reports: no Maladministration	No Maladministration (no report)	Ombudsman's discretion (no report)	Outside jurisdiction	Total
2010 / 2011	0	4	0	0	4	4	0	12



# Adult social care decisions made from 1 Oct 2010\*

	To discontinue investigation, injustice remedied	Total
2010 - 2011	1	1

\*These decisions are not included in the main decisions table above. They use the new decision reasons from 1/10/10.

## Response times

	First enquiries	
	No of first Enquiries	Avg no of days to respond
01/04/2010 / 31/03/2011	6	27.3
2008 / 2009	5	21.2

## Provisional comparative response times 01/04/2010 to 31/03/20 11

Types of authority	<= 28 days %	29 - 35 days %	> = 36 days %
District councils	65	23	12
Unitary authorities	59	28	13
Metropolitan authorities	64	19	17
County councils	66	17	17
London boroughs	64	30	6
National parks authorities	75	25	0

## Response times adult social care 1/10/10 - 31/3/11

	First enquiries	
	No of first Enquiries	Avg no of days to respond
2010/2011	1	11.0

## STANDARDS COMMITTEE

13<sup>th</sup> December 2011



**Report of:** Chief Solicitor

**Subject:** BUSINESS REPORT

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### 1. LOCALISM ACT, 2011

#### INTRODUCTION

1.1 Previous reports have been brought to the Committee as to the implications contained within the then Localism Bill, which was proceeding through Parliament. The Localism Act, 2011, received Royal Assent on the 15<sup>th</sup> November 2011 and this report covers the salient parts of this legislation and its application to standards within local authorities. Briefly, the Act, provides for the following:

- the abolition of the 'Standards Board regime'
- a new general duty to promote and maintain high standards of conduct
- the adoption of a Code which must be consistent with a new set of general principles
- a new definition (through Regulations) of "disclosable pecuniary interests"
- introduction of a criminal offence of failing to notify and disclose such an interest without reasonable excuse
- an authority must have in place "arrangements" under which allegations of a breach of the Code can be investigated or through which decisions on allegations can be taken, with or without an investigation or hearing. However, there would be no sanctions other than censure and the possibility of withdrawal of facilities in some cases
- authorities must appoint an 'Independent Person' who is to be consulted in relation to investigations and may be consulted on other complaints. Principal Authorities would operate these 'arrangements' on behalf of a Parish Council

1.2 The Government intends the legislation to take effect from April, 2012, but Regulations are awaited which would also cover transitional arrangements.

**GENERAL DUTY AND THE CODE OF CONDUCT**

- 1.3 Section 27 of the Act provides for a duty *‘to promote and maintain high standards of conduct by members and co-opted Members’*. The definition of ‘co-opted’ Members entails an individual with ‘voting’ rights. Further, *‘a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity’* (Section 28 refers).
- 1.4 Previously the Local Government Act, 2000, had required the Secretary of State through Order to specify the principles which are to govern the conduct of members and co-opted members of relevant authorities. This led to the introduction of ‘The Relevant Authorities’ (General Principles) Order, 2001, otherwise known as ‘The Ten General Principles of Public Life’ which presently forms the preamble to the Council’s own code of conduct and to which further reference is made below. The 2000 Act therefore imposed a duty upon relevant authorities to adopt a code of conduct and for compliance with that code when an individual was acting in an ‘official capacity’. For the avoidance of doubt, a ‘relevant authority’ covers, amongst others, a District Council, Parish Council and a Fire and Rescue Authority in England as constituted by a scheme under section 2 of the Fire and Rescue Services Act, 2004, or a scheme to which section 4 of that Act applies, as well as the current Police Authority as established under section 3 of the Police Act, 1996.
- 1.5 Under section 28 of the Act, *‘A relevant authority must secure that a code adopted by it under section 27(2)(a) ‘Code of Conduct’ is, when viewed as a whole, consistent with the following principals –*
- (a) Selflessness;
  - (b) Integrity;
  - (c) Objectivity;
  - (d) Accountability;
  - (e) Openness;
  - (f) Honesty;
  - (g) Leadership;
- 1.6 This largely replicates the ‘General Principles’ as mentioned above, although the additional principles relating to personal judgement, respect for others, duty to uphold the law and stewardship, are omitted. However, it is open for an authority to include such ‘additional’ at its discretion. Consequently, a relevant authority may –
- (a) revise its existing Code of Conduct, or
  - (b) adopt a Code of Conduct to replace its existing Code of Conduct
- 1.7 A code must also secure by way of a provision within its code of conduct the registration and disclosure of –
- (a) Pecuniary interests, and

- (b) Interests other than pecuniary interests.
- 1.8 A decision would not be invalidated *‘just because something that occurred in the process of making the decision involved a failure to comply with the code’*.

### **ARRANGEMENTS FOR INVESTIGATIONS ETC**

- 1.9 Although, the arrangements for a Parish Council differ, a relevant authority must have in place –
- (a) arrangements under which allocations can be investigated, and
  - (b) arrangements under which decisions on allegations can be made.
- 1.10 Such arrangements must include the provision for the appointment by the authority of at least one ‘Independent Person’, whose views would need to be taken into account by the authority before any decision is taken on whether to pursue an investigation in relation to an allegation of breach of the Code of Conduct. The same qualifications behind an ‘Independent Person’ are generally those which currently apply, namely;
- cannot be a member or co-opted member or officer of the authority, or a relative/close friend or have been a member/co-opted member in the last five years (which appears to prohibit the involvement of existing Independent Members, but which requires clarification from Government),
  - appointed following a public advertisement and a vote at Full Council.
- 1.11 If there is a finding of fault (whether or not this follows an investigation) regard must be had to the nature of the failure in deciding what action (if any) should be taken. There are no statutory sanctions as at present, the view being taken that ‘naming and shaming’ should suffice. However, there could be the exercise of ‘political group’ discipline if a Member was affiliated to a political group and the authority itself could potentially withdraw access to facilities, provided this was a reasonable and proportionate response.

### **DISCLOSURE AND REGISTRATION OF INTERESTS**

- 1.12 The Monitoring Officer, as is currently the case, must establish and maintain a ‘Register of Interests’ of members and co-opted members of the authority. Such a register must be available for public inspection and published on the authority’s website, which again, presently takes place. The Localism Act also places an obligation on the Monitoring Officer to assist a Parish Council in this regard. Generally, there needs to be a disclosure of pecuniary interests before the end of a period of 28 days beginning on the day on which the person becomes a member or co-opted member of the authority. If a member or co-opted member has such a disclosable pecuniary interest, then they may not –

- (a) Participate, or participate further in any discussion of the matter at the meeting, or
  - (b) Participate in any vote, or further vote, taken on the matter at the meeting.
- 1.13 Dispensations, from such restrictions can be initiated by application to the proper officer of the authority and a determination by the authority (presumably delegated to a committee or to an officer), having regard to all the relevant circumstances. Further, any 'sensitive' interests must be brought to the attention of the authority's Monitoring Officer for consideration as to whether or not such details should be included upon a public register. As previously indicated, a person commits an offence if, without reasonable excuse, he/she contravenes the provision surrounding the disclosure of pecuniary interests on taking office or otherwise fails to disclose a pecuniary interest in matters being considered at a meeting of the local authority. A person will also commit an offence if in providing information that is false or misleading, the person –
- (a) knows that the information is false or misleading,
  - (b) is reckless as to whether the information is true and not misleading.
- 1.14 A person who is guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale (currently £5,000). Furthermore, a court dealing with the person who has commissioned such an offence may disqualify the person, for a period not exceeding 5 years from becoming a member or co-opted member of a relevant authority. Such a prosecution can only proceed through the Director of Public Prosecutions. Such proceedings may be brought within a period of 12 months, beginning with the date on which evidence was deemed sufficient in the opinion of the prosecutor to warrant proceedings and no proceedings may be brought more than three years after the commission of the offence, or in the case of a continuous contravention, after the last date from which the offence was committed. Members of the committee will therefore observe that the previous sanctions which were available through the local assessment and determination process and also through the powers of the Standards Board for England and the Adjudication Panel to disqualify a member would now be provided for through a court sanction, following a conviction, as described above. If an investigation were to take place in relation to an allegation of breach of a code of conduct as adopted under the provisions of the Localism Act, 2011, they would still be the need to decide what action should be taken, together with any attendant publicity requirements surrounding any findings. However, further guidance is awaited on the procedural aspects of an investigatory framework and what other sanctions (if any) could be available.



**CONCLUSION**

- 1.15 The defining feature of the Localism Act, 2011 is the proposed abolition of the Standards Board for England, to which previous reports have made reference. It is anticipated that regulations may appear as early as January, 2012, which would contain transitional arrangements for the abolition of the Standards Board for England potentially in March/April, 2012. Further reports will therefore be brought back to Standards Committee once further developments have been made known through the Secretary of State. Members of the committee will also be aware that a review of the Constitution is presently taking place which is also taking account of the likely implementation of the final recommendations of the Local Government Boundary Commission for England, which has recommended a reduction in Council size from its present composition of 47 members (excluding the elected Mayor) to 33 councillors. Again, details behind this constitutional review will be brought to the attention of Standards Committee as and when the detail of proposals are made known.

**2. UPPER TRIBUNAL DECISION: MC -v- STANDARDS COMMITTEE OF THE LONDON BOROUGH OF RICHMOND**

- 2.1 In the above decision, comments were made by the presiding Judge over a phrase ‘acting as a representative of your authority’, which in turn relates to paragraph 2(1) (b) of the present Code of Conduct. Members of the committee will be aware that there is a requirement under the code to comply with the code when a member/co-opted member is conducting the business of the authority or,

when you –

*‘Act, claim to act or give the impression you are acting as a representative of your authority’*

- 2.2 In this case, the appellant had been adjudged by the Standards Hearing Sub-Committee to have breached paragraphs 3(1) (respect for others) and 3(2)(b) (bullying) of the code through their behaviour towards council officers in sending out certain e-mails and was suspended for a period of 28 days. The Subject Member appealed on the basis that he was not acting in his official capacity when he sent those e-mails. His appeal was dismissed by the First Tier Tribunal but was allowed by the Upper Tribunal and remitted back to the First Tier Tribunal for a continuation of the hearing. During the course of that appeal hearing the Judge said the following:

*“When one is acting (etc) ‘as a representative’ of an authority is....a matter for determination by the tribunal of fact (i.e. a Standards Committee, or, on appeal, the First Tier Tribunal). I do however consider that, reading the model code as a whole, it is evident that ‘representatives’ is not to be equated to ‘member’. The model uses both terms and must be taken to have done so deliberately. Accordingly, merely to act, claim to act or give*

*the impression one is acting (etc) as a member is in my view of itself not sufficient unless there is material on which the tribunal of fact can properly conclude that one is acting (etc) specifically 'as a representative' of the authority."*

- 2.3 This commentary appears to suggest that to make a finding that a member was acting, claiming to act or giving the impression that he or she was acting as a representative of their authority, there must be something about their conduct which amounts to more than simply acting, claiming to act or giving the impression that one is acting as a member. Where official capacity is raised as an issue in cases, it would appear that the Upper Tribunal is going to expect the body hearing the case to address official capacity in future by making references to the conduct of the member that amounts to acting (etc), as a representative of the authority. The Standards Board for England (now termed Standards for England) deem that this could have significant ramifications for members' activity on blogs, twitter and other internet sites as well as in relation to other political material. Depending on the circumstances of each case, such communications might be regarded as conducting the business of the authority by a member, if such an impression is conveyed. This is largely because, it is reasonable to regard communicating with constituents at large about issues of local political interest as being part of the business of a councillor.
- 2.4 On the 4<sup>th</sup> November, 2011, communication was received from the guidance and information team of Standards for England to all Monitoring Officers which suggested that this case could have serious implications for the interpretation of members' activity on blogs, twitter and other internet sites. As such, the Standards for England have now considered and revised their guide to blogging. Although the changes are relatively minor this revised guidance as appended herewith (**Appendix 1**) incorporates the commentary from the Judge that 'official capacity' should make reference to the conduct of the member that amounts to acting (etc) as a representative of the authority.

### 3. CONTACT OFFICER

Peter Devlin  
Chief Solicitor and Monitoring Officer.

**GLGSE/0391/2011**

**DECISION OF THE UPPER TRIBUNAL  
(ADMINISTRATIVE APPEALS CHAMBER)**

Permission to appeal against the decision of the First-tier Tribunal (made on 21 October 2010 under reference LGS/2010/0513) is given.

As the decision involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

**REASONS FOR DECISION**

**A. INTRODUCTION**

1. This is my decision following an oral reconsideration of Mr Fahn' application for permission to appeal against the decision of the First-tier Tribunal, Upper Tribunal Judge Ward having refused permission on the papers on 25 March 2011. The hearing took place at Harp House in London on 18 August 2011. Mr Fahn attended and was represented by Ms Estelle Dehon of counsel. The Standards Committee was represented by Mr Mark Woolsey of counsel. I am grateful to them both for their submissions. They agreed that, if I were to grant permission, their submissions could stand as on the appeal.

**B. THE DECISION OF THE STANDARDS COMMITTEE**

2. The Standards Committee considered a number of complaints against Mr Fahn made by Paul Howard of Denial Promotions on behalf of himself and six others. The Committee found that Mr Fahn had breached the Code of Conduct in these three respects: (i) he had failed to treat two named persons with respect; (ii) he had bullied those persons; and (iii) he had brought the Council into disrepute. It imposed a sanction of two months suspension from 28 May 2010. In doing so, it said that 'the finding of bullying ... made the matter more serious.'

3. The powers of the Committee are contained in regulation 19 of the Standards Committee (England) Regulations 2008 (SI No 1085):

**19 Findings of standards committees**

(1) Following a hearing held under regulation 18, a standards committee shall make one of the following findings-

**GLGSE/0391/2011**

- (a) that the member who was the subject of the hearing had not failed to comply with the code of conduct of any authority concerned;
- (b) that the member who was the subject of the hearing had failed to comply with the code of conduct of an authority concerned but that no action needs to be taken in respect of the matters which were considered at the hearing; or
- (c) that the member who was the subject of the hearing had failed to comply with the code of conduct of an authority concerned and that a sanction under paragraph (2) or (3) should be imposed.

**C. THE LAW THAT THE FIRST-TIER TRIBUNAL HAD TO APPLY**

4. Mr Fahn applied for permission to appeal to the First-tier Tribunal on 28 June 2010. This is governed by regulation 21:

**21 Appeal to the First-tier Tribunal**

(1) Where a standards committee makes a finding under regulation 19(1)(b) or (c), the member who is the subject of that finding may ...-

- (a) seek permission to appeal to the First-tier Tribunal; and, if appropriate,
- (b) apply to the First-tier Tribunal for the suspension of any sanction imposed under regulation 19(3)(b) to (k) until such time as any appeal is determined.

...

(4) In deciding whether to give permission to appeal the First-tier Tribunal shall have regard to whether, in its opinion, there is a reasonable prospect of the appeal being successful (either in whole or in part).

(5) Permission to appeal or to suspend a sanction may be given in relation to the whole or any specified part of the finding or sanction.

5. The application was put before Judge Laverick, who gave permission on 26 July 2011. Along with the grant of permission, the judge gave a series of initial directions. Two are relevant to this appeal. The judge directed the Standards Committee to provide a response to the appeal. Then he directed:

4. The response must include a statement as to whether the Standards Committee seeks to contest the Appellant's case and if so on what grounds. The Standards

**GLGSE/0391/2011**

Committee is required by the Tribunal Rules to send a copy of any response directly to the Appellant at the same time it provides the response to the Tribunal.

5. The Standards Committee is also asked to provide the Tribunal with copies of all relevant documents including reports and exhibits (if not already supplied) considered at the original hearing and if available, any relevant minutes.
6. The judge gave permission on limited grounds. Those grounds are discernible from his grant of permission, but appear more clearly in his subsequent directions on 20 September 2010. They are:
- (a) whether Mr Fahn's actions towards the two people constituted bullying, the issue essentially being the interpretation of the word 'bullying' in the Code of Conduct; and
  - (b) whether at the time of the actions giving rise to such a finding, he was acting in his official capacity.

It is clear both from the wording of those grounds and from the judge's detailed directions on how the tribunal should proceed that permission was limited solely to the issue of bullying.

7. The First-tier Tribunal decided the appeal on the papers. It found that Mr Fahn's conduct did not amount to bullying, but that he had been acting in his official capacity at the time of the incidents. It remarked that permission had not been given in respect of the sanction, but considered that the two months suspension remained proportionate.

8. Section 78A of the Local Government Act 2000 imposes a duty on the First-tier Tribunal in respect of an appeal:

**78A Decisions of First-tier Tribunal**

...

- (2) Where the First-tier Tribunal adjudicates on any matter under this Act, it must decide whether or not any person to which that matter relates has failed to comply with the code of conduct of the relevant authority concerned.

Consistently with that duty, regulation 25 deals with the outcome of an appeal:



**25 Outcome of appeals**

- (1) The First-tier Tribunal must uphold or reject the finding or, where permission to appeal was granted as to only part of the finding, that part of the finding, to which the appeal relates, or may allow the appeal as regards a specified part of the finding.
- (2) Where the First-tier Tribunal rejects the finding, the decision of the standards committee (including any sanction imposed) shall cease to have effect from the date of the rejection.
- (3) Where the First-tier Tribunal upholds the finding of a standards committee made under regulation 19(1)(b), it may confirm the decision of that committee to impose no sanction or it may impose any sanction which was available to the standards committee.
- (4) Where the First-tier Tribunal upholds the finding, or part of a finding, of a standards committee made under regulation 19(1)(c), it may confirm any sanction imposed by that committee, or vary it by substituting any other sanction which was available to the standards committee.
- (5) Subject to paragraph (6), any sanction imposed under this regulation shall take effect immediately after its imposition.
- (6) The First-tier Tribunal may direct that any sanction imposed under this regulation shall take effect on such date, within the period of six months after its imposition, as the First-tier Tribunal may specify.

This regulation reinforces section 78A(2) by making clear that the tribunal must decide afresh the facts and the nature of any sanction that is appropriate.

**D. THE LAW THAT THE UPPER TRIBUNAL HAS TO APPLY**

9. There are two rights of appeal to the Upper Tribunal. An appeal lies on ‘any point of law arising from a decision’ under section 11(1) of the Tribunals, Courts and Enforcement Act 2007. And an appeal lies on any other ground under section 78B(4) and (5) of the Local Government Act 2000. There is a discretion to give permission to appeal if there is a realistic prospect that the decision was erroneous in law or if there is some other good reason to do so (Lord Woolf MR in *Smith v Cosworth Casting Processes Ltd* [1997] 1 WLR 1538).

10. Judge Laverick gave detailed reasons for refusing permission to appeal. I am not reviewing those reasons: *CIS 4772/00* at [2]-[11]. Nor may they be used to show that a point of law arises from the decision: *Albion Water Ltd v Dŵr Cymru Cyf* [2009] 2 All ER 279 at [67].

E. ANALYSIS

11. I have given permission to appeal on the following grounds.

*Document not before the First-tier Tribunal*

12. I was shown a printout of a MSN conversation involving Mr Fahn on 9 February 2008. It was before the Standards Committee when it made its decision, but it appears not to have been put to the First-tier Tribunal.

13. Judge Ward remarked that it was Mr Fahn's responsibility to ensure that all relevant evidence was before the tribunal. As a general proposition, that is undoubtedly correct. However, Judge Ward did not have Judge Laverick's initial directions before him. He could not, therefore, have known of the contrast between direction 4 and direction 5. The Committee's response had to be copied to Mr Fahn, but the documents had to be sent only to the tribunal. As the hearing was conducted on the papers alone, Mr Fahn could not have known that all the relevant documents were not before the tribunal. In those circumstances, there was a failure to disclose to the First-tier Tribunal, which is analogous to a breach of natural justice: *Al-Medhawi v Secretary of State for the Home Department* [1990] 1 AC 876. The panel members could not have been aware of this problem.

14. This error would not alone have secured either permission to appeal or a rehearing. Ms Dehon argued that it was significant for two reasons. First, it showed that the tribunal had made a mistake as to the date of the bullying. Second, it showed the nature of the relationship between Mr Fahn and those involved in the allegations around that date. I am far from persuaded that either of those points are likely to have affected the ultimate outcome on the official capacity issue. However, that is now a matter for the rehearing.

*Official capacity*

15. The issue is whether Mr Fahn was within the scope of paragraph 2 of the Code of Conduct:

... you must comply with this Code whenever you-

- (a) conduct the business of your authority (which, in this Code, includes the business of the office to which you are elected or appointed); or
- (b) act, claim to act or give the impression that you are acting as a representative of your authority.

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16. The tribunal considered and distinguished *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin). The terms of the Code that applied in that case are different from those I have set out above. The authoritative decision on this issue is now that of Judge Ward in *MC v Standards Committee of the London Borough of Richmond* [2011] UKUT 232 (AAC). That decision was not available to the First-tier Tribunal when it decided this case and the panel cannot be criticised for not following it. However, it applies (like all judicial decisions) retrospectively. I accept Ms Dehon's argument that the tribunal misdirected itself by failing to distinguish the questions whether Mr Fahn was acting as a councillor and whether he was acting as a representative of the authority. The tribunal did, in paragraph 24 of its reasons, express its conclusion in terms that Mr Fahn 'acted or gave the impression that he was acting as a representative of the Town Council', but the tribunal's analysis of the evidence does not show that it distinguished between paragraphs 2(a) and (b) of the Code.

17. There is also another aspect of official capacity that concerns me. I mentioned it at the hearing, but it did not form part of Ms Dehon's submissions. The way in which limited permission was given left open this possibility. The tribunal might find that Mr Fahn had not been acting in an official capacity at the time of the 'bullying' incidents, while the Committee's findings that he was acting in an official capacity in respect of the other breaches would remain. I have not considered all the evidence on this, but it is possible that the circumstances of all the incidents were indistinguishable. That would leave Mr Fahn in an unfortunate position, with contradictory findings and perhaps not knowing for the future when he was and was not within the Code. The tribunal might have considered that, in those circumstances, it was appropriate to extend the grant of permission.

*Sanction*

18. Mr Fahn did not challenge the suspension in his application for permission to appeal to the First-tier Tribunal, but that simply reflected the fact that he predicted (correctly) that he would have served his suspension before the appeal was heard. It did not mean that he had no interest in it.

19. If the tribunal was right that the issue of the sanction was not before it, it was left in an invidious position. It had decided that the bullying allegation had not been established and the Committee had considered that the allegation made matters more serious. The suspension had been served and history could not be rewritten, but it was possible to vindicate Mr Fahn by reducing the sanction that would be recorded against him. If the tribunal was right, the proper course in those circumstances was to extend the permission to appeal to include the sanction.

20. I consider that the tribunal was wrong and the sanction issue was before it. It was not part of the direction given by Judge Laverick, but it was implicitly within its jurisdiction under regulation 25. Paragraphs (3) and (4) expressly authorise a tribunal to vary the Committee's

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decision on sanction if it upholds its findings. It confers that power on the tribunal independently of the terms of the grant of permission. It would be anomalous if the tribunal were not allowed to vary a sanction if it did not uphold the Committee's finding. The regulation was probably drafted on the assumption that the sanction would naturally fall with the finding. That does not take account of cases like this, in which a single sanction was imposed for a number of findings. The tribunal should have considered whether to vary the sanction.

21. Mr Woolsey pointed out that the tribunal had given its views on sanction, even if it believed that the issue was not before it. I have considered whether they are sufficient to justify leaving the sanction unchanged, but they are not. Given that the Committee specifically singled out the bullying issue as an aggravating factor, it is surprising that the tribunal should consider no reduction in sanction was appropriate and its remarks are not sufficient to justify that conclusion. The tribunal did say that the other breaches were significant. It is possible that the panel considered that two months was lenient for the breaches found by the Committee and was appropriate even without the finding on bullying. If that is what it meant, it did not say so.

22. The tribunal may have found it difficult to remove the bullying element from the sanction when the other breaches were not before it, especially given the form in which the Committee's report was presented. This serves to underline the difficulty in giving only limited permission in the circumstances of this case.

**F. WHY I HAVE SET ASIDE THE FIRST-TIER TRIBUNAL'S DECISION**

23. One analysis of the First-tier Tribunal's decision is this. Despite the errors I have identified, Mr Fahn won. He was given permission in respect of bullying and the tribunal accepted that what he did was not bullying. He lost on the official capacity issue, but the capacity in which he did not bully is irrelevant. The sanction was served and passed. He had vindication and moral victory in the tribunal overturning the Committee's finding. On that analysis, the errors that the tribunal made were immaterial to the outcome. I should either refuse permission to appeal or acknowledge the tribunal's error without setting aside its decision, as authorised by section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

24. Ms Dehon argued that the outcome was material to Mr Fahn as it left in place the official capacity finding, which had led to criticism both in the Council and in the press. I accept that argument and have taken into account this dimension, which is not generally present in appeals to this Chamber. That is why I have set the tribunal's decision aside for the errors it made.

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25. Mr Fahn runs the risk that the First-tier Tribunal may now decide both the bullying issue and the official capacity issue against him, leaving him worse off than if he had not brought this appeal. It could even increase his sanction, leaving him worse off than if he had not brought his appeal to the First-tier Tribunal. However, he is legally advised, is aware of the risk and is willing to take it.

**G. WHY I HAVE DIRECTED A REHEARING RATHER THAN DECIDE THE CASE MYSELF**

26. In part, the outcome of this case requires an assessment of whether Mr Fahn was acting or appearing to act as a representative of his local authority. That will benefit from the experience and understanding of the panel members of the First-tier Tribunal. That is why I have directed a rehearing and not decided the case myself.

**Signed on original  
on 18 August 2011**

**Edward Jacobs  
Upper Tribunal Judge**