


Our ref: 202005902/SJ/CH

Ask for: Sarah Jones

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Mr Robert Edgecombe
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Dear Mr Edgecombe

**Code of Conduct complaint made against Councillor Terry Davies of
Llanelli Town Council by Councillor Andre McPherson**

I write further to the Standards Committee's Listing Direction of 17 November 2022.
The Ombudsman was asked to provide written submissions on the following points:

- a) Whether the Facebook post forming part of the complaint was made as part of Councillor Davies' role as a councillor.
- b) The relevance of the right of Freedom of Expression (particularly the enhanced right of political expression) and the ruling of the High Court in the "Calver" case.
- c) Should the matter reach stage 3, what sanctions if any, should be imposed.

a) The Facebook post

When interviewed, Councillor Davies said that the Facebook post was made on his personal page and it was unrelated to the interaction between him and Councillors McPherson and Curry. He said that the post was made on his private Facebook page and that he used his private Facebook page to post about Council matters.

Councillor Davies also said that the post was to raise awareness of problems in the Ward. It referred to “a genuine party,” “social decisions,” “promises made to us that ended up as lies for the vote.” He also deleted the post when advised to do so by the Clerk. Therefore, I am of the view that Councillor Davies was using Facebook to make political comment as the representative of the Ward. As such, the Facebook post was made in Councillor Davies’ capacity as an elected Member when the Facebook post was published and the Code of Conduct applied to his actions in its entirety. It should be noted that paragraph 6(1)(a) of the Code of Conduct applies at all times. Even if Councillor Davies was acting in his private capacity, he would still need to ensure he did not act in a way which could reasonably be regarded as bringing his office or authority into disrepute.

b) Freedom of expression

In *Calver, R (on the application of) v The Adjudication Panel for Wales [2012]* the Adjudication Panel for Wales had dismissed an appeal by a community councillor against a decision of the local Standards Committee that he had failed to show respect and consideration for others by posting various online comments criticising the other Members and the way in which the Council was run. The High Court found that, whilst the comments were sarcastic and mocking and the tone ridiculed his fellow Members, because the majority of the comments related to the way in which the Council was run, how its decisions were recorded and the competence of the Members, the comments were “political expression”. The ruling said no account had been taken of the need for politicians to have “thicker skins”. In view of the member’s freedom of expression and the fact that the majority of comments were directed at fellow councillors, the finding of a breach in this case was a disproportionate interference with the Member’s rights under Article 10 of the European Convention on Human Rights (ECHR). The Adjudication Panel’s decision was, therefore, set aside.

In *Heesom v Public Services Ombudsman for Wales [2014]* the High Court heard an appeal against the decision of the Adjudication Panel that a member of a county council had committed 14 breaches of the Code by failing to show respect and consideration for officers of the Council, using bullying behaviour, attempting to compromise the impartiality of officers and bringing the Member’s office into disrepute. The breaches occurred over a period of 2 years and included comments and conduct which were critical of, and threatening towards, both senior and junior officers. The Court found that all of the breaches were intentional and some of the misconduct was serious. Some of the breaches involved deliberately dishonest and misleading conduct towards officers, other Members and members of the public. In respect of officers, much of the conduct was intended to undermine them personally and was performed when officers were trying to do their jobs, which the Member was intent on frustrating. All but 3 of the breaches found by the Adjudication Panel were upheld by the Court.

One of the important issues that had to be determined by the Court was the scope of, and legitimate restrictions to, a politician’s right of freedom of expression under Article 10 of the ECHR and at common law. The Court reiterated that the law

requires politicians to have thick skin and be tolerant of criticism and other adverse comment. However, the Court also noted that while public servants are open to criticism, including public criticism, it is in the public interest that they are not subject to unwarranted comments that dis-enable them from performing their public duties and undermine confidence in the administration.

Councillor Davies said that the “whole incident was a robust political debate between one councillor and initially two political opponents”.

When acting as an elected Member and expressing political views or conducting political business, a Member’s freedom of expression is afforded enhanced protection, more so than an ordinary member of the public. Article 10 of the ECHR, which affords Councillor Davies the right to free speech, means that he can say things which may be shocking or offensive to some people. Further, as politicians, Members are likely to be afforded protection even where the language used by them may be inflammatory, provided the focus of it is political. However, a Member’s right to freedom of expression is not absolute and must be balanced against the need to protect the rights and interests of others. Freedom of expression is not limitless and the more egregious the conduct concerned, the more justified it becomes to restrict expression using the provisions of the Code of Conduct.

Enhanced protection of freedom of expression does not extend to gratuitous or offensive personal comments, neither does it extend to “hate speech” directed at denigrating race and/or nationality, which includes national origin. As such, I do not consider that the comments made by Councillor Davies were afforded enhanced protection. It is the Ombudsman’s view that a finding of a breach in this case would be a proportionate interference with the Member’s rights under Article 10 of the European Convention on Human Rights (ECHR).

c) Sanction

I have set out here the Ombudsman’s submissions on relevant factors that should be considered, should the Standards Committee find that Councillor Davies has breached the Code of Conduct.

The purpose of the ethical standards framework is to promote high standards amongst members of councils in Wales and maintain public confidence in local democracy. The Ombudsman generally takes the view that the issue of sanction is a matter for the Standards Committee to determine, having considered the facts of the case and the seriousness of the breaches of the Code of Conduct found. Whilst we take the view that the nature of any sanction is a matter for the Standards Committee, we recognise that the purpose of a sanction is to:

- Provide a disciplinary response to an individual member’s breach of the Code.
- Place the misconduct and appropriate sanction on public record.
- Deter future misconduct on the part of the individual and others.
- Promote a culture of compliance across the relevant authorities.
- Foster public confidence in local democracy.

As a means of assisting the Standards Committee, the Ombudsman wishes to highlight some of the relevant factors from the Adjudication Panel for Wales' Sanctions Guidance ("the Guidance") which may assist in the consideration of the five-stage process for determining sanction.

Mitigating

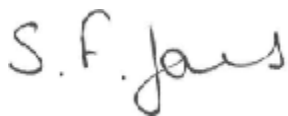
- Previous record of good service over a long period of time.
- Cooperation with the Investigation Officer and Standards Committee.

Aggravating

- Long experience in role of Town Councillor.
- Expression of views which are not worthy of respect in a democratic society, are incompatible with human dignity and conflict with the fundamental rights of others.
- Councillor Davies has failed to recognise the seriousness of his actions.
- Councillor Davies has not shown any remorse for his behaviour or reflected upon the impact of his actions.

If the Standards Committee is so satisfied that a breach is found as suggested within the report, the Ombudsman would suggest that the nature of the breach is serious. Therefore, we would invite the Standards Committee to consider a period of suspension from Llanelli Town Council for up to 6 months in this case.

Yours sincerely



Sarah Jones

Own Initiative Lead Officer/Swyddog Arwain ar ei Liwt ei Hun