

MEETING	STANDARDS COMMITTEE
DATE	27 NOVEMBER, 2012
TITLE	THE OMBUDSMAN'S GUIDELINES
PURPOSE	SUBMIT AN UPDATE ON DEVELOPMENTS
AUTHOR	DILYS PHILLIPS, MONITORING OFFICER

1. On 17 September the Ombudsman sent a letter to the Chief Executive of every Council following a decision in the High Court on the case of Calver - v- The Adjudication Panel for Wales. I append a copy of the letter to the report. It should be noted that the letter was sent in English only.
2. A copy of the letter was also sent to the Welsh Local Government Association.
3. The thrust of the letter is that the Ombudsman will take a stricter attitude when deciding if an investigation will be held, if it appears that the complaint involves what could be called an expression of political views. To all intents and purposes, he is raising the threshold for commencing an investigation.
4. The Ombudsman has reached this decision as a result of the Calver case. In that case a complaint was made that a member of a community council had made malicious comments about his fellow councillors on a social website. The matter was brought before the Standards Committee and he was reprimanded. He made an appeal to the Adjudication Panel for Wales who agreed that the councillor had breached the Code of Conduct and that the reprimand was an appropriate punishment. The councillor further appealed to the High Court on the grounds that the decision made by the Standards Committee and the Adjudication Panel affected his right to freedom of expression, and he won his case.
5. The High Court's decision explains that the requirements of the Code of Conduct of respect for others must be considered in the context of the human right to freedom of expression, and that the code must be interpreted in accordance with these rights. Given the contents of the councillor's comments, the tradition of robust debate between politicians, that those who offer themselves for a public post are expected to accept an element of lampooning and that politicians are expected to have a thicker skin than others, the court was of the opinion that the decision that the councillor had breached the code in this case was inconsistent with his rights to freedom of expression. The court noted that comments did not have to express a political view as long as they were expressed in the political arena.
6. The Ombudsman's letter caused a degree of uproar amongst members and monitoring officers as some believed that it set the threshold too high in relation to the case. Discussions were held between the Ombudsman and the Local Government Association and he also discussed the letter in a meeting

with the Monitoring Officers of Wales. He agreed that he would be willing to review the wording of his guidelines in light of experience and should other proposals come forward.

7. In Gwynedd the letter was reported upon in the meeting of the Political Group Leaders on 25 September and I reminded them that the Gwynedd Standard dealt with matters that would not necessarily be investigated by the Ombudsman. The Political Leaders agreed that a copy of the Gwynedd Standard should be distributed to all the members once again, and the committee's support is requested in this.
8. The Ombudsman published amendments to these guidelines on the Code of Conduct around the same time as he sent his letter. The amendments include an amendment that was made as a result of the Calver case, but they also deal with matters that had been the subject of discussion prior to the case hearing.
9. One course of action the Ombudsman has taken is to separate the guidelines for members of community councils from the guidelines for members of the County Council. The two sets of guidelines are now separate and some of the town and community councils' guidelines have now been tailored for that level of council.

The other amendments that have been made to the guidelines are as follows:-

Local Resolution Process – The Ombudsman explains his expectation for authorities across Wales to adopt a procedure to resolve complaints by a member against another member locally.

Using a Whip in Scrutiny Committees – Section 78 of the Local Government (Wales) Measure 2011 prohibits a member of a scrutiny committee from voting in a meeting of the committee if, before the meeting, the member has been given a party whip relating to the matter. The Ombudsman notes the evidence that would be needed in order to investigate complaints of acting in breach of this clause.

Interest in Ward Matters – Paragraph 10 (2)(b) of the Code of Conduct states that if a member of the public could reasonably conclude that ward matters have a greater influence on a member when making a decision on behalf of the authority than the interests of the authority as a whole, then that is a personal interest that would need to be disclosed. The Ombudsman offers guidance on how he will interpret this paragraph and notes that he will not adopt a literal interpretation as a matter of course, but that he will base his decision to commence an investigation on the assumption that the paragraph is aimed at individual members exercising executive functions such as in planning committees or licensing committees. Whilst welcoming the fact that the Ombudsman does not take this interpretation literally, more clarity is needed on the guidelines as planning and licensing decisions are not “executive functions”.

Treating People with Respect – Following the decision reached in the Calver case noted above, the guidelines now note that it is unlikely that the Ombudsman will investigate complaints made generally regarding policies or political opponents as councillors need to be more thick skinned when dealing with comments that have a political incentive. They also note that robust and open discussions should be expected with senior officers on political matters.

10. The committee is requested to:

- (a) Note and accept the report.
- (b) Support the proposal to send a copy of the Gwynedd Standard to all of the County Council members.
- (c) Consider what action should be taken to bring the guidelines to the attention of the county and community members.

Note – A full copy of the Ombudsman’s guidelines can be seen on the website www.ombudsman-wales.org.uk/en/publications.aspx

Our ref: PT/KS/mm

Ask for: **Katrin Shaw**

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Date: 17 September 2012

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COPY

Dear Mr Thomas

I thought it would be helpful to contact you in the light of a recent decision of the High Court concerning the Code of Conduct for members.¹⁰

As you may be aware a member challenged the findings of the Adjudication Panel for Wales to uphold his Council's Standards Committee's decision to censure him for breaching paragraph 4(b) of the code of conduct by failing to show respect and consideration to his fellow Councillors. The court found that whilst the comments which were posted on a website operated by the member were sarcastic and mocking and the tone ridiculed his fellow Councillors, because the majority of the comments related to the way in which the Council was run and the competence of the Councillors, the comments were "political expression". The ruling found that the Panel took an over-narrow view of what amounts to political expression and no account had been taken of the need for politicians to have "thicker skins". In view of the member's entitlement to freedom of expression, and the fact that the majority of comments were directed at fellow Councillors, the finding of a breach of the Code in this case was a disproportionate interference with the member's rights under Article 10 of the European Convention on Human Rights. The Standards Committee's decision to censure the member was therefore set aside.

The impact of this ruling is that my staff will have to apply a higher threshold when deciding whether to investigate any conduct complained about which may be regarded as being "political expression". I will not therefore investigate such cases where 'political' criticisms are made, regardless of the tone of the exchange.

¹⁰ Calver, R (On the Application Of) v The Adjudication Panel for Wales (Rev 1) [2012] EWHC 1172 (Admin) (03 May 2012).

Allegations of disrespectful behaviour towards officers, particularly those who may hold senior positions, must also be considered in the light of this ruling.

I have today issued my revised Guidance on the Code of Conduct which includes the impact of this ruling and other amendments. It is available on my website www.ombudsman-wales.org.uk.

I would be grateful if you would bring this issue to the attention of your members so as to avoid complaints being made which stand no prospect of being investigated in the light of this ruling.

Yours sincerely



Peter Tyndall
Ombudsman

Copy: Monitoring Officer

