



ASSESSMENT DECISION NOTICE

A BREACH OF THE CODE HAS BEEN FOUND

ACTION REQUIRED

Reference:	CCN004/18/19
Complainant:	Ms Roni Jones
Subject Member:	Cllr Kevin Johnson, St. Cleer Parish Council
Person conducting the Assessment:	Simon Mansell, Corporate & Information Governance Manager
Date of Assessment:	15 June 2018

Complaint

On 15 June 2018 the Monitoring Officer considered a complaint from Ms Roni Jones concerning the alleged conduct of Cllr Kevin Johnson of St. Cleer Parish Council. A general summary of the complaint is set out below:

The Complainant has alleged that the Subject Member has breached the Code of Conduct through a series of emails and posts on social media as referenced in this notice.

Decision and Action

That, for the reasons set out in this notice, the Subject Member has breached the Code of Conduct and that the following actions are recommended to St Cleer Parish Council;

- The Subject Member is censured;
- The Subject Member has no part in employment matters relating to the Complainant for a minimum period of 1 year, with this to be reviewed by the Council 12 months after the date of this notice; and
- The Subject Member be prevented from directly contacting the Clerk for a minimum period of 1 year and that any communications with the Clerk are to

be made to a third party Councillor to be determined by the Council's employment sub-committee.

Breaches of the Code Found

2.1 You must treat others with respect

2.3 You must not bully any person; this includes other councillors, council officers or members of the public.

2.8 You must not disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature

2.10 You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or the Council into disrepute

Para 2.5 - You must not conduct yourself in a manner which is contrary to the Council's duty to promote and maintain high standards of conduct by Members

Reasons

In assessing this complaint I have had regard to the following:

- The complaint;
- A response from the Subject Member;
- The views of the Independent Person assigned to this matter.

The Complainant has alleged that the Subject Member has breached the Code of Conduct through a series of emails and posts on social media.

In submitting her complaint the Complainant has provided a large amount of supporting information, which is her right to do, and, in responding to the complaint, the Subject Member has also exercised this right. In assessing this matter the full submissions made by both the Complainant and the Subject Member have been read but only those areas that are relevant to a potential breach of the Code are set out below.

It should be noted that the case of *Heesom v Public Services Ombudsman for Wales* and *Hughes v Ledbury Town Council* have been referenced in this assessment.

The case law makes it clear that a the quasi employer/employee status exists between a Councillor and an officer of the Council and whilst the management of the officer may be delegated to either a Committee or a Head of a Paid Service, this does not remove the fact the Council, and therefore the Subject Member in this case, is the employer.

Application of the Code.

I am satisfied that the Subject Member was acting in his official capacity at the time of the alleged conduct and was therefore bound by the Code of Conduct at that time.

As part of this I have noted the Facebook group that has been established by the Subject Member, 'St Cleer Councillors' and consider that posts on this page by the Subject Member are made in his official capacity as at all times when posting he is either acting, or holding himself out as acting or his posts would give a third party the impression that he is acting, as a representative of the Council.

Points that will be considered within this assessment are;

- Has the Subject Member failed to treat the Complainant with respect or bullied the Complainant, due to emails sent and posts made on social media.
- Has the Subject Member by his actions, brought his office or his authority into disrepute.
- Has the Subject Member breached confidentiality by publishing a confidential minute on Facebook.
- If a breach of the Code is found has the Subject Member failed to comply with his obligation to uphold and maintain high standards of conduct.

The Subject Member has set out in his response to the complaint that he considers his response is a vehicle that can be used to highlight the deficiencies in practice and procedures at the Council.

It should be noted that Cornwall Council only has the power under the Localism Act 2011 to consider complaints that a member has failed to comply with the Code of Conduct and therefore the wider actions of the Complainant and the Council are not within the jurisdiction of this assessment and are not considered further.

I have also noted the number of people who are named as witnesses to the conduct of the Subject Member and the fact that the Subject Member has set out he has a substantial numbers of followers on social media. In conducting this assessment it is based on the facts as presented when set against the provisions of the Code and the assessment is not judged by how well either party may be supported as this does not mean that the conduct was either correct or incorrect.

2.1 You must treat others with respect

In considering if this, or any other provision of the Code of Conduct has been breached the matter has to be considered objectively and on the balance of probabilities, that is would a reasonable person, in possession of all the facts consider it more likely than not that there was a breach of the Code of Conduct.

As the Complainant is an employee of the Council and the Subject Member her employer as a member of the Council a relationship of mutual trust and confidence has to be maintained between and employer and employee. In order to maintain this as in any employment relationship the Subject Member, as the Complainant's employer has a route open to him under employment law to raise performance issues regarding the Complainant.

In assessing this matter I have also taken into account the right of the Subject Member to be critical and that non-elected public officials are subject to wider levels of criticism, though the *Heesom* case notes that, 'it is in the public interest that they

[the non-elected public officials] are not subject to unwarranted comments that disenable them from performing their duties’.

In considering the posts on social media first I do not consider the majority of these to be a breach of the Code. Whilst the tone of these posts may not be to the liking of the Parish Council the right to political free speech afforded to all members of the Parish Council would mean that when viewing the posts objectively, whilst the Subject Member is critical, and adopts his own writing style, not all the posts are disrespectful.

However, with regards to the posting made on social media on 26 April 2018 @15.40 and the section that relates to the sequencing of the minutes;

In this post the Subject Member references the sequencing in the minutes and then, after stating the errors were made by the person employed to ensure accuracy, goes onto draw a comparison with primary school children who the complainant considers would get the sequencing right. Whilst the Complainant is not directly named in this part of the post as there is only one person employed by the Council to undertake this role it is reasonable to assume that it is the Complainant that is being referred to.

I do, when considering this post objectively believe that on the balance of probabilities this goes beyond the right to free speech and is designed to undermine and even degrade the Complainant and therefore I consider this comment in the posting is disrespectful.

With regards to email correspondence supplied as part of this complaint, it is only the emails below that I consider to be a breach of the Code of Conduct, it is appreciated that the Complainant may find the other emails supplied as part of this complaint to be challenging however, as with the social media posts, this does not mean they are a breach of the Code;

Email sent on 17 April 2018 @ 12.17. At the end of this email, in the last line, the Subject Member has set out a comment relating to the confidence he has in the Complainant. It is considered that on reading this comment that this is disrespectful to the Complainant as whilst the Subject Member may not be of this view, no employee would like to be addressed in this manner by their employer and it is therefore disrespectful.

Email sent on 17 April 2018 @ 13.00 which sought to ‘red pen’ and earlier email sent by the Complainant and was copied to all members of the Council. I consider this was a deliberate attempt to undermine the Complainant and is therefore disrespectful, this is perhaps compounded by the final comment in the email made by the Subject Member, ‘fixed that for you’. If the Subject Member considers that there are inaccuracies in the information that has been provided by the Complainant these should be as a performance issue via the Employment Sub Committee who the Subject Member acknowledges is responsible for the management of the Complainant.

Email sent 10 April 2018 @22.09. This email is addressed to the Complainant and is CC’d to other members of the Council and states by saying, ‘Here’s another email that wont get an answer.....’

In responding to this on 11 April 2018 @ 13.11 the Subject Member has set out that this was not directed at the Complainant but is a boarder observation of the tendencies within the Council.

Having reviewed the thread I do not agree with the Subject Member as the email was addressed to the Complainant and only copied to other members of the Council indicating that it was for the Complainant to respond and the line about not responding was, objectively, directed at the Complainant. Whilst there may be a wider Council problem that is not the impression an objective observer would gain from reading the email it is considered this comment lacked respect.

Email sent on 3 April 2018 @ 14.33. This is an email in which the Subject Member has opted to put his own comments in after doing a line by line examination of the email, then copying in all members of the Council. Whilst I note the Subject Member's comments that he was only replying to all recipients if he has issues relating to the Complainant there is a correct route by which these can be managed and a reply of this nature is not considered to be conducive to maintaining a good working relationship. Therefore after reviewing the comments made I consider this to be disrespectful to the Complainant.

In reviewing the threads above there has been a concerted effort on the part of the Subject Member to take the Complainant to task on what the Subject Member considers are inaccuracies in her work. However, whether these inaccuracies exist or not, there is a set route by which these have to be considered. By copying in all other members of the Council the Subject Member, when viewing the facts objectively, is taking steps to undermine the Complainant that can only have the effect in a small Parish of disabling her from undertaking her duties.

As a result it is considered that the Subject Member has breached paragraph 2.1 of the Code of Conduct for St Cleer Parish Council.

2.3 You must not bully any person; this includes other councillors, council officers or members of the public.

Bullying, as defined in the Code, follows the ACAS guide and may be characterised as offensive, intimidating, malicious, insulting or humiliating behaviour. Such behaviour may happen once or be part of a pattern of behaviour directed at a weaker person or person over whom you have some actual or perceived influence. Bullying behaviour attempts to undermine an individual or a group of individuals, is detrimental to their confidence and capability, and may adversely affect their health.

The Subject Member has set out that there is no evidence in the submission to support the allegation of bullying and the Subject Member has also sets out he has always adopted the tone and manner in email correspondence equal to that received from the Complainant.

When considering if bullying exists one of the guiding principles is in dealing with officers that it is important that issues about poor performance are raised in the correct way and at the proper forum and if this is not done it crosses the line into what is considered unacceptable behaviour.

In reviewing the email threads that are referenced under the consideration of paragraph 2.1, whilst the views of the Subject Member are noted it is considered, objectively, that this is a pattern of conduct that can be viewed as intimidating, insulting and humiliating and is directed at someone over which the Subject Member, as the Complainant's employer, has influence. The conduct exhibited by the Subject Member is such that it is something that could be considered detrimental to the confidence and capability of the Complainant.

Given the Subject Member has the opportunity as the employer of the Complainant to deal with any concerns he may have about the Complainant through formal channels within the Council it is not considered that the tone and content of the emails falls within what would be considered to be acceptable conduct between a Councillor and a Council officer.

As a result of way pattern of behaviour exhibited by the Subject Member, and viewing the facts objectively against the definition of bullying. I am satisfied that the Subject Member has entered into a pattern of bullying conduct against the Complainant and therefore it is considered that the Subject Member has breached paragraph 2.3 of the Code of Conduct for St Cleer Parish Council.

2.8 You must not disclose information given to you in confidence by anyone, or information acquired by you which you believe, or ought reasonably to be aware, is of a confidential nature

In considering this part of the complaint the matter being considered is a struck out minute that relates to the employment of the Complainant.

On considering the minute I do not consider that the entire minute is confidential and there are only a few small sections that relate to the performance of the Complainant that would be confidential.

The complainant has stated that the minute was never placed in the public domain but was circulated to Councillors by the then Clerk.

The Subject Member has responded to this part of the Complainant and has stated that he considers that the information provided has been previously published but no proof has been provided of this.

Whilst I do not agree that all of the minute is confidential I also do not consider that the assertion that this was public domain is correct. As the Complainant's employer the subject Member should have been reasonably aware that there were some statements in the document that were personal to the Complainant and that should have been redacted before the publication on social media, even if this had been previously published this would not mean that all of the document is in the public domain.

In applying the above to the tests as set out in the Code;

(i) you have the consent of a person authorised to give it;

Nothing has been provided by the Subject Member to show that he has the consent of the Data Controller, the Council, to publish the information as he did.

(ii) you are required by law to do so;

There is no legal basis for the publication of the data.

(iii) the disclosure is made to a third party for the purpose of obtaining professional advice provided that the third party agrees in writing not to disclose the information to any other person before the information is provided to them;

The disclosure was not made for these purposes.

or

- (iv) the disclosure is –*
- (a) reasonable and in the public interest;*

The Subject Member has set out his reasoning why the minutes should be in the public domain and that the Nolan principles override the caveats applied to the documents.

The Nolan principles do not play not part in the protection of personal data, the control of this being set out in several different pieces of statute and guidance. However, I do agree, but for different reasons that a large amount of the document was incorrectly considered as confidential. Only those statements that relate to the performance of the Complainant should have been redacted and that, considering the requirements of the Transparency Code the remainder of the minute could correctly be placed in the public domain.

- (b) made in good faith;*

I have not noted in any of the submissions made by the Subject Member why he would consider that placing details of the Complainant's performance into the public domain was done in good faith.

- (c) in compliance with the reasonable requirements of the authority, which requirements must be demonstrable by reference to an adopted policy, procedure or similar document of the Council or evidenced by advice provided by the Monitoring Officer or his nominee.*

As set out above even though it is for different reasons I do agree that a large amount of the minute could be placed in the public domain however, with regards to the comments that related to the performance of the Complainant I do not consider that this was published in accordance with the reasonable requirements of the authority.

As a result of the above reasoning I do consider that the Subject Member has breached paragraph 2.8 of the Code of Conduct for St Cleer Parish Council. However, I consider this is a technical breach as it relates to a small portion of the document only.

As a result this breach is not further considered in the recommended actions below. However, all members may soon be data controllers in their own right the Subject Member is strongly advised to take professional advice to ensure that information he places in the public domain is not confidential and not exercise his own subjective opinion when doing so.

2.10 You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or the Council into disrepute

In considering this part of the complaint it is, as with the rest of the complaint considered objectively and based on a reasonable person test.

A large amount of the commentary received from the Subject Member relates to the performance of the Council and whilst the frustration of the Subject Member is accepted this does not then mean that the Subject Member can then do as he wishes.

There are set procedures for dealing with employees and in taking a reasonable persons view of the actions of the Subject Member I also have to consider how would a reasonable person expect to be treated as an employee.

Whilst a large amount of the communications are internal to the Parish Council it is considered that they are disrespectful and bullying in their content and there is a pattern of conduct that has been designed to humiliate the Complainant and to undermine her position as the Proper Officer to the Council.

Therefore as a result it is considered that a reasonable person would consider that the Subject Member has breached paragraph 2.10 of the Code of Conduct for St Cleer Parish Council by bringing his office into disrepute.

Para 2.5 - You must not conduct yourself in a manner which is contrary to the Council's duty to promote and maintain high standards of conduct by Members

For the reasons set out above as I consider the Subject Member has failed to adhere to the general principles of public life underpinning the Code and has therefore conducted himself in a manner contrary to the Council's statutory duty to promote and maintain high standards of conduct.

I do not consider that with regards to the complaint as set out at the start of this notice there have been any other breaches of the Code of Conduct.

Actions to remedy the breach

In considering the actions that are required to remedy this breach I have taken into account the Subject Member's right to be critical and to challenge. As a result of the above I do not consider that some of the communications complained of go beyond this right and I have noted in all cases the Subject Member considers he has raised legitimate points of concern and it is agreed that the Subject member can do this. However, it is the way that a few of these concerns have been addressed that has then resulted in a breach of the Code.

There is a need to ensure that trust and confidence important to the employer/employee relationship is maintained between both parties and whilst the Subject Member may not agree with the actions of the Complainant, there is a recognised route by which these concerns should be raised.

The *Ledbury* case has shown that, whilst an employee can seek restitution against an employer as a whole via the employment route, this route cannot impose restrictions or sanctions on someone if they are an elected member, this can only be done via the Code of Conduct.

It is clear there is friction within the Council and whilst the Subject Member is free to raise concerns he should ensure that he treats the Complainant, as her employer, with respect and should raise performance concerns through the correct employment procedures.

As a result of the above it is suggested to the Parish Council that the following actions are imposed as a suitable remedy for the breach;

- The Subject Member is censured;
- The Subject Member has no part in employment matters relating to the Complainant for a minimum period of 1 year with this to be reviewed by the Council 12 months after the date of this notice; and
- The Subject Member be prevented from directly contacting the Clerk and that any communications with the Clerk are to be made to a third party Councillor to be determined by the Councils employment sub-committee.

What happens now?

This decision notice is sent to the Complainant, the member against whom the allegation has been made and the Clerk to St. Cleer Parish Council.

Right of review

At the written request of the Subject Member, the Monitoring Officer can review and is able to change a decision not to refer an allegation for investigation or other action. A different Officer to that involved in the original decision will undertake the review.

We must receive a written request from the subject member to review this decision within 15 days from the date of this notice, explaining in detail on what grounds the decision should be reviewed.

If we receive a request for a review, we will write to all the parties mentioned above, notifying them of the request to review the decision.

It should be noted reviews will not be conducted by the same person who did the initial assessment.

Additional help

If you have difficulty reading this notice we can make reasonable adjustments to assist you, in line with the requirements of the Equality Act 2010.

We can also help if English is not your first language.



SJR Mansell MBE
Corporate and Information Governance Manager
On behalf of the Monitoring Officer
Date: 15 June 2018