

DECISION REPORT

TRIBUNAL REFERENCE NUMBER: APW/002/2016-017/CT

**REFERENCE IN RELATION TO A POSSIBLE FAILURE TO FOLLOW THE
CODE OF CONDUCT**

RESPONDENT: Councillor Neil McEvoy

RELEVANT AUTHORITY: Cardiff Council

1. INTRODUCTION

1.1 A Case Tribunal convened by the President of the Adjudication Panel for Wales has considered a reference in respect of the above Respondent.

1.2 A hearing was held by the Case Tribunal at 10 am on 2 and 3 March 2017 at the Cardiff and Vale Magistrates Court. The hearing was open to the public.

1.3 Cllr McEvoy attended and was represented by Mr Mendus Edwards, Counsel.

2. PRELIMINARY DOCUMENTS

2.1 Reference from the Public Services Ombudsman for Wales

2.1.1 In a letter dated 9 November 2016, the Adjudication Panel for Wales received a referral from the Public Services Ombudsman for Wales ("the Ombudsman") in relation to allegations made against Cllr McEvoy. The allegations were that Cllr McEvoy had breached Cardiff Council's Code of Conduct by way of his conduct towards a council official following a court hearing at the Cardiff Civil and Family Justice Centre on 23 July 2015. The Ombudsman's Director of Investigations made the reference as the evidence suggested Cllr McEvoy had failed to show respect and consideration to the official (paragraph 4(b) of the Code of Conduct), had conducted himself in a bullying manner to the official (paragraph 4(c) of the Code of Conduct), and had brought his office or the relevant authority into disrepute by such conduct (paragraph 6(1)(a) of the Code of Conduct).

2.1.2 The complaint had been made to the Ombudsman by the Monitoring Officer of Cardiff Council on behalf of Cllr Paul Mitchell. Cllr Mitchell also submitted a complaint form to the Ombudsman. At first, Cllr McEvoy's Counsel referred to the council officer as the complainant in the formal response to the

reference by the Ombudsman; by the final stages of the proceedings, Cllr Mitchell was described by Mr Mendus Edwards as the complainant. The entity who brought these proceedings to the Case Tribunal was the Ombudsman, whose staff attended the hearing and was legally represented.

2.1.3 On 23 July 2015, Cllr McEvoy attended the hearing of the second application to suspend a warrant for possession obtained by Cardiff Council as the “Mackenzie friend” of his constituent, Ms Amanda Williams. Cllr McEvoy had not attended the previous hearing. The hearing took place in the County Court at Cardiff (based in the Cardiff Civil and Family Justice Centre) before District Judge Morgan. The application was dismissed and Ms Williams was evicted later that day. Mrs Deborah Carter, Finance Team Manager, and Mr Dale Skinner, Welfare Liaison Officer, attended the hearing on behalf of the Council. Mrs Carter was the person who addressed the Judge on behalf of the Council.

2.1.4 Following the hearing, Ms Williams, Cllr McEvoy, Mrs Carter and Mr Skinner exited the courtroom and entered the secure corridor which led to the usher’s point and the public waiting area. It was accepted by all four persons that during the period of time they were in the secure corridor, Cllr McEvoy said “I can’t wait until May 2017 when the restructure of the Council happens”. What was disputed was whether the comment was directed at or meant to be overheard by Mrs Carter and was a threat against her continued employment by the Council, or whether it was part of a conversation between Cllr McEvoy and his constituent, overheard by the officers. It was also disputed as to how the words were uttered – were they spoken with “a degree of spite and anger”, or merely spoken as part of normal conversation?

2.2 The Councillor’s Written Response to the Reference

2.2.1 Mr Mendus Edwards on behalf of Cllr McEvoy responded to the report from the Ombudsman’s Director of Investigations. He made a number of allegations regarding the Ombudsman and his Director of Investigations. It was alleged that the investigation was motivated by politics and that the complaint included elements which had previously been dismissed by the Investigating Officer. Mr Mendus Edwards said the Ombudsman had previously been in business with a person who was a member of the Labour party (and now an Assembly Member) and had asked a member of Plaid Cymru to persuade Cllr McEvoy to co-operate with the investigation.

2.2.2 Mr Mendus Edwards alleged that the Director of Investigations was biased due to his previous employment in the Highways Department of Cardiff Council and in the Finance Department of South Glamorgan Council. It was also alleged that Cllr Mitchell was obsessed with damaging Cllr McEvoy’s political career and the Labour party felt similarly. Mr Mendus Edwards asked the Case Tribunal to investigate the Ombudsman and his staff, and to hear from witnesses about the conspiracy against Cllr McEvoy.

2.2.2 Matters commented on by Mr Mendus Edwards referred to by paragraph numbers of the Ombudsman’s report:

- a) **Paragraph 38** – it was accepted that Cllr McEvoy did say the words “I can’t wait until May 2017 when the restructure of the Council happens”.
- b) **Paragraph 54** – it was denied that the words were directed at Mrs Carter; Cllr McEvoy’s position was that the words were addressed to Ms Williams. He accepted that it was possible that his words were overheard by Mrs Carter, but they were part of a personal conversation with a constituent. Cllr McEvoy also said the words were a reference to a political policy of Plaid Cymru, and denied that they were a threat to Mrs Carter.

2.3 The Ombudsman’s Written Representations

2.3.1 In a letter dated 15 January 2017, Mr Hughes of Counsel made further representations on behalf of the Ombudsman. He noted the acceptance of the words said by Cllr McEvoy and commented that the proceedings would centre on whether the words were directed at Mrs Carter, what the words meant, and what was intended by those words when uttered. He denied that the proceedings were an abuse of process and noted the lack of any legal or factual basis for the arguments raised in the response on this subject.

2.4 Listing Direction

2.4.1 The members of the Case Tribunal considered the above arguments and on 27 January 2017 issued its listing direction. In summary, the Case Tribunal determined that a pre-hearing review would not facilitate its final adjudication. It noted that it had no power to dismiss a reference from the Ombudsman once made; it pointed out that if a party wished to challenge a decision made by a public body, it was open to that party to seek a judicial review from the High Court.

2.4.2 The Case Tribunal went on to note that the reference was about what happened in a court corridor on 23 July 2015. It was not persuaded that hearing evidence of an alleged conspiracy against Cllr McEvoy and from witnesses who were not present during the event would assist its adjudication. It decided that it would only hear from witnesses who were present and would limit its adjudication to the issues which it was required to determine.

2.5 Applications prior to the hearing

2.5.1 On 8 December 2016, Cllr McEvoy asked for an extension of time to submit his response to the report of the Ombudsman. He said that the future of the City of Cardiff was at stake. The President of the Adjudication Panel for Wales refused the application as all that was required was for Cllr McEvoy to set out his position. On 9 December 2016, Cllr McEvoy made allegations against the Ombudsman’s Director of Investigations and made other observations. The President notified him that these were points best dealt within his response.

2.5.2 On 18 December 2016, Cllr McEvoy required the President to investigate and obtain on his behalf full disclosure of the Ombudsman's emails in relation to his case. On 19 December 2016, the President declined on the basis that it was not her role to investigate the Ombudsman, and pointed out that the Case Tribunal would consider relevant evidence submitted by the parties and could request further evidence if it decided that it was required to fairly determine the proceedings. Cllr McEvoy asked the President to reconsider without success. On 9 January 2017, he again asked the President to order full disclosure of the Ombudsman's emails; the President reiterated her previous decision on 12 January 2017. It was a matter for the Case Tribunal as to what evidence it wished to consider, but it would consider relevant evidence submitted by the parties.

2.5.3 On 16 February 2017, eight applications were received from Mr Mendus Edwards on behalf of Cllr McEvoy. They were dealt with on the basis of the written representations from Mr Mendus Edwards by the Case Tribunal due to the short period of time until the public hearing was listed to take place, with the exception of three applications regarding the listing direction which were dealt with at the outset of the public hearing. The Case Tribunal dismissed the other five applications which sought a postponement of the public hearing, alleged the members of the Case Tribunal were biased against Cllr McEvoy on the basis of their gender, sought a permanent stay of the proceedings on the grounds the proceedings were an abuse of process, applied again for witnesses to give evidence about the wider political conspiracy against Cllr McEvoy, and for a preliminary hearing to take place. The decision of the Case Tribunal dated 21 February 2017 set out why these applications were dismissed.

2.6 Applications dealt with during the public hearing

2.6.1 A number of applications required consideration by the Case Tribunal during the hearing. Three applications were considered at the outset of the hearing regarding amendments to the listing direction after Mr Mendus Edwards confirmed the applications were not withdrawn:

2.6.1.1 Mr Mendus Edwards sought an additional undisputed fact to be added to the Annex to the listing direction, namely that Mrs Carter (i) is a Finance Team Manager and (ii) has 25-27 years' experience and (iii) had conduct of Court proceedings in serious matters. Mr Hughes on behalf of the Ombudsman submitted that these appeared to be relevant disputed facts. Mr Mendus Edwards did not object, and made the point that either way the relevant facts would need to be determined. The Case Tribunal decided to add 2.5 to the Annex – "Was Mrs Carter as at the 23 July 2015 (i) a Finance Team manager; (ii) had 25-27 years' experience, and (iii) had conduct of court proceedings in serious matters?"

2.6.1.2 Mr Mendus Edwards sought redrafting of relevant disputed fact 2.3. He thought that "lack of respect and consideration" should be mentioned and references made to whether or not there had been a breach of the Code of Conduct. The Case Tribunal observed that it was not its standard

practice to include issues for the second stage of its proceedings in the factual matrix. Mr Hughes concurred. The Case Tribunal proposed that the issue could be resolved by simply adding a reference to “lack of respect and consideration” to point 2.3. Neither party objected. Accordingly, the Case Tribunal determined to amend 2.3 of the Annex – “Were the words used in a manner which could reasonably be interpreted as bullying and/or harassment and/or showing a lack of respect and/or consideration?”

2.6.1.3 Mr Mendus Edwards objected to use of the word “loudly” in paragraph 4.5(iii) of the listing direction. Mr Hughes submitted that how the words were said was a matter for the Case Tribunal to determine. The Case Tribunal noted the deletion of the word “loudly” would not prevent it finding facts about how the words were uttered. Neither party disagreed. The Case Tribunal deleted the word “loudly” from paragraph 4.5 (iii) of the listing direction.

2.6.2 Mr Mendus Edwards applied for the late submission of evidence from Cllr McEvoy during his cross examination of Mrs Carter in the morning of 2 March 2017. This evidence consisted of five budget proposals for the years 2013 to 2018 by the Plaid Cymru group for Cardiff Council (drafted by Cllr McEvoy) and the response to a freedom of information request to Cardiff Council made on 21 December 2016. After an adjournment to enable Mr Hughes to review the documentation, no objection was made to the inclusion of the bundle, marked “R1”.

2.6.3 Mr Mendus Edwards, following lunch on 2 March 2017, applied for the hearing to be moved to a larger room or a video link arranged so those members of the public not able to enter the hearing could still watch the proceedings. The Case Tribunal pointed out that it was the guest of Her Majesty’s Court and Tribunals Service and therefore it could not require a larger room to be provided. It did not believe that there was a larger room available within the building and the President had previously concluded that the Cardiff Civil and Family Justice Centre was not an appropriate venue given the circumstances of this case. The Case Tribunal noted that the room was of a reasonable size and larger than many tribunal rooms. The press had been afforded priority in order to ensure the proceedings could be reported to the wider public. The Case Tribunal had of its own volition ordered live tweeting by accredited journalists to be permitted and had allowed additional members of the public to be present and standing to hear the opening of the proceedings and understand the background. Regrettably, the Case Tribunal had by this point in the proceedings had to issue a number of warnings to the members of the public in attendance regarding their behaviour during the hearing; additional security and the police had been summoned as a result. It considered that it was not required to arrange a video link in the circumstances. The Case Tribunal did not have its own resources to arrange such a video link, and concluded it had taken sufficient steps to enable public access without unduly adjourning the hearing to another date, which in all likelihood would cause an adjournment of some months’ duration.

2.6.4 Mr Mendus Edwards, following the Case Tribunal’s decision on 3 March 2017 that Cllr McEvoy had breached two elements of the Code of Conduct,

applied for the proceedings to be permanently stayed on the basis that they were an abuse of process. He accepted in essence this was the same application as made on 16 February 2017, but with the difference that the Case Tribunal had now found facts and that there was an underlying case to be considered. Mr Mendus Edwards reminded the Case Tribunal of the case of *JSC BTA Bank v Ablyazov* [2011] EWHC 1136, a decision of the High Court. He submitted that despite the existence of an underlying case in these proceedings, a permanent stay should be put in place due to the political reasons behind a “manufactured complaint”.

2.6.5 Mr Hughes objected to the application and pointed out that the Case Tribunal had already considered the conspiracy arguments put to Mrs Carter and Mr Skinner by Mr Mendus Edwards, and had rejected those arguments. He submitted the *JSC* case was a civil case and about one party using the litigation process to gain a collateral advantage. Mr Hughes said it was akin to the situation when a party uses insolvency proceedings in order to stop litigation. He noted this case, which was about public law and the Code of Conduct for councillors, had been brought by a statutory independent body (the Ombudsman) to another statutory independent body (the Adjudication Panel for Wales).

2.6.6 Mr Mendus Edwards responded with an allegation that Wales was a “one party state”, and both the Ombudsman and the members of the Case Tribunal were appointed by members of the Labour party. Mr Hughes submitted if Mr Mendus Edwards was correct, the entire system in Wales was unworkable. He reminded the Case Tribunal of its findings of fact and its view of Cllr McEvoy’s evidence.

2.6.7 The Case Tribunal determined not to impose a permanent stay of proceedings. It noted that *JSC* case was not binding upon it, though persuasive, and emanated from a very different set of facts than those in the current proceedings. It pointed out that in its listing direction and subsequent decisions it had made it plain that if a party wished to challenge the actions of a public body, an application for judicial review to the High Court would be required. As at the date of the hearing, no such application had, to the Tribunal’s knowledge, been made.

2.6.8 The Case Tribunal considered that the responses under cross examination of Mrs Carter and Mr Skinner showed that they had no knowledge of Cllr Mitchell. Mrs Carter had explained she had reported to a more senior manager, Jane Thomas, about what had happened on 23 July 2015 on her return to the office, and that manager had taken the matter forward. Mrs Carter stated that she thought the manager’s response was an appropriate means to deal with the concerns she had reported. There was no evidence that Mrs Carter or Mr Skinner had any involvement in any conspiracy against Cllr McEvoy. The Ombudsman’s staff had investigated and interviewed a number of witnesses regarding the events of 23 July 2015. The Tribunal had heard from all the witnesses to the incident. The Case Tribunal did not accept that there was a collateral purpose on the part of Mrs Carter, Mr Skinner or the independent Ombudsman in bringing these proceedings to an independent

tribunal designed to consider potential breaches of the Code of Conduct. It had, as Mr Mendus Edwards accepted, found facts and breaches which constituted an underlying case which required resolution.

2.6.9 The Case Tribunal also concluded that it was appropriate to consider Mr Mendus Edwards' application as a new bias argument, particularly as during the announcement of the findings of fact Cllr McEvoy had asserted that the panel had been appointed by the Labour party. The Case Tribunal explained that all the members of the Adjudication Panel for Wales had been selected on the grounds of merit by the Judicial Appointments Commission. The Commission had recommended the members for appointment to the First Minister for Wales, who was a member of the Labour party. The same process is used for the appointment of members of the judiciary, albeit the identity of the appointor changes from time to time (in the past, the Lord Chancellor was the appointor even after the role ceased to be held by a member of the judiciary; currently the Lord Chief Justice appoints new members of the judiciary). It is notable that judges appointed by Conservative or Labour Lord Chancellors are able to hear cases involving those parties. There is no scope in the process to select members on the basis of their political allegiance; in any event, no member of the Case Tribunal in this case was a member of any political party.

2.6.10 The Case Tribunal confirmed that it did not have any actual bias against Cllr McEvoy or members of Plaid Cymru. It applied again the test for apparent bias as outlined in the case of *Porter v Magill* [2002] AC 357 and judged that a fair-minded and informed observer, a person who would have knowledge of the appointments process, would not conclude that there was a real possibility the tribunal was biased because the First Minister was a member of the Labour party.

3. ORAL SUBMISSIONS

3.1. The Case Tribunal considered the contents of the hearing bundle and R1, and heard oral evidence and submissions as follows:

Public Services Ombudsman for Wales - submissions

3.2 Mr Hughes presented the report of the Ombudsman's Director for Investigations into this matter. The background set out was as outlined in paragraphs 2.1.3 and 2.1.4 above. Mr Hughes alleged that Cllr McEvoy had not been co-operative with the investigation, though he had eventually attended an interview with the Investigating Officer. He accepted that the witnesses (Tenant, Cashmore and Williams) who had not directly observed the encounter between Cllr McEvoy and Mrs Carter was not the strongest evidence, but he asserted that all three of these witnesses agreed that Mrs Carter had been upset following that encounter. Mr Hughes submitted Cllr McEvoy's words were meant in exactly the way they were interpreted – that if Plaid Cymru controlled the council from May 2017, there would be restructuring and Mrs Carter may find her job at risk as a result. He submitted that during his oral evidence Cllr McEvoy stated that only the ruling party had influence and that officers could

not be removed easily except through restructuring. Mr Hughes said those were exactly the circumstances Cllr McEvoy described in the words he used.

Cllr McEvoy's submissions

3.3 Mr Mendus Edwards on behalf of Cllr McEvoy submitted that Mrs Carter did not complain about his client's behaviour and the Ombudsman was scraping the bottom of the barrel. He said Cllr McEvoy was an experienced politician who made waves and was the subject of a sustained conspiracy by members of the Labour party. Mr Mendus Edwards accepted Mr Skinner was not a deceitful witness, but in essence politics in Wales could be compared to a number of films, such as *On the Waterfront*. He disputed that the words were directed at Mrs Carter, and said that they were not bullying or harassment, which required repetition. Mr Mendus Edwards said Mrs Carter was not a "snowflake" and could not be sacked by Cllr McEvoy. He also submitted that the words were a reference to a Plaid Cymru policy and said to reassure Ms Williams. Mr Mendus Edwards said Jane Thomas, an assistant director, was behind these proceedings and Mrs Carter had misled the court in 2015 and was not a credible witness.

Mrs Deborah Carter

3.4 Mrs Carter's evidence was that following a contentious hearing, she left the courtroom with Mr Skinner, behind Ms Williams and Cllr McEvoy. Mrs Carter saw Cllr McEvoy take a photo of the nameplate on the courtroom door, while Ms Williams went on ahead. Cllr McEvoy then caught up with Ms Williams. When all the parties were in the straight section of the secure corridor before reaching the usher's point, Mrs Carter said she asked Ms Williams if she needed transport to get back to her property, and Cllr McEvoy in a tight-lipped manner said that he was taking his constituent home. Her evidence was that Cllr McEvoy went on to say the eviction should not go ahead that day as it might be a "flashpoint".

3.5 Mrs Carter said Cllr McEvoy and Ms Williams then continued down the corridor; the Cllr then turned to Mrs Carter and said with a "degree of spite and anger" that "I can't wait until May 2017 when the restructure of the Council happens". Mrs Carter's evidence was that she perceived this to be a threat against her job and was upset. She did not respond and continued with her duties.

3.6 Mrs Carter then said she reported the taking of the photo to the court authorities, returned to her office and as her line manager was out, reported both what happened in the hearing and afterwards to the next senior person Jane Thomas, an assistant director. She made two factual statements on 23 July 2015 (one handwritten and one typed), and responded to emails asking for more details about her interpretation of the words on 24 and 27 July 2015. Mrs Carter confirmed she later gave a witness statement to the Ombudsman, which included answers to questions his staff had asked her.

3.7 Under cross-examination, Mrs Carter confirmed she did not know Cllr Mitchell, and did not know exactly who Cllr McEvoy was (former deputy leader of the Council) when she attended the hearing. She also said councillors usually raise issues with directors or the chief executive, not with staff of her level. She agreed her employment was protected due to her length of service (about 35 years) and the need to follow due process; Mrs Carter did however make the point that Cardiff Council was member-led and she viewed councillors as being her employers. She found such comments from an employer distressing. Mrs Carter did accept once shown the Plaid Cymru group's shadow budgets that her role was not of such seniority that it would be affected by that restructuring process. She also accepted that she was a robust person undertaking a difficult job and that she had not made a formal complaint – Mrs Carter said she had reported the incident to a more senior manager, who in her view had taken the correct action to take the matter further.

3.8 Mrs Carter denied misleading the court during the hearing. She said she told the District Judge that the arrears were one of the highest in Cardiff and commented that transcripts were not always perfect. Mrs Carter also confirmed that there was a beneficial transfer scheme to avoid evictions and on the two occasions she had needed the scheme, it had worked.

Mr Dale Skinner

3.9 Mr Skinner said following the court hearing, he and Mrs Carter exited the courtroom behind Cllr McEvoy. Ms Williams was in front of the Cllr. He saw Cllr McEvoy take a photo of the nameplate on the courtroom door and catch up with Ms Williams in the corridor. Mr Skinner stated that in the straight section of the secure corridor leading to the usher's point, Cllr McEvoy said that there may be a flashpoint at the property if the eviction went ahead. Mrs Carter asked Ms Williams if she needed transport home. Cllr McEvoy responded brusquely that he would take Ms Williams back to the property. Mr Skinner described Cllr McEvoy as "emotional".

3.10 Mr Skinner said as everyone moved down the corridor, Cllr McEvoy then directed the words to Mrs Carter "I can't wait until May 2017 when the restructure of the Council happens". He thought that this was a direct threat against Mrs Carter's job caused by Cllr McEvoy's frustration, though Mr Skinner observed the words seemed to have been said in the heat of the moment. He doubted if Cllr McEvoy really could threaten Mrs Carter's job, but said he would have been concerned if his employer had said that to him.

3.11 Mr Skinner said Mrs Carter did not respond, but was clearly upset. He described Mrs Carter as "hard", and usually able to respond to comments made to her, but said her voice was quavering as she spoke to people on the phone about the eviction. Mr Skinner confirmed that he did not know Cllr Mitchell and that councillors generally raised issues with senior staff.

Cllr Neil McEvoy

3.12 Cllr McEvoy confirmed that he had taken a photo of the nameplate of the courtroom room so he could remember the name of the District Judge involved in the hearing. He explained that he believed Mrs Carter had lied and misled the court during the hearing, particularly in relation to two points – a) whether his constituent had the highest amount of arrears in Cardiff at the time, and b) whether she had recently been offered a property and could be moved to a smaller property to avoid homelessness. He believed Mrs Carter reported his conduct in order to deflect from her lies, and he had chosen not to complain about her due to the pressure of his other work.

3.13 Cllr McEvoy under questioning from the Case Tribunal said after he had taken the photo, he caught up with Ms Williams, his constituent. He was very concerned about her, particularly as she told him while he was taking the photo, she'd had an altercation with a security guard and swore at him. Cllr McEvoy said that there was a brief conversation with the two council officers about transport and his concern that the eviction site would be a flashpoint for violence. He agreed that he was tight-lipped as he was frustrated with himself for letting his constituent down.

3.14 Cllr McEvoy said he then stopped in the corridor and held Ms Williams' arms to reason with her. He thought this might have been near the usher's point, but explained his focus was not on location, but on his constituent. His evidence was that Ms Williams was threatening to punch Mrs Carter or a security guard on the basis she would have a bed for the night. Cllr McEvoy said he told her to think about her 17 year old daughter who needed her, which seemed to calm Ms Williams down. He stated she then appeared to disassociate herself from the situation and asked about how to stop this happening to anyone else. Cllr McEvoy said he told her Plaid Cymru would not allow this kind of situation to happen and "I can't wait until May 2017 when the restructure of the Council happens". He was adamant that he was looking at Ms Williams when he said these words. Cllr McEvoy then said he left the building with Ms Williams without further incident.

3.15 Cllr McEvoy also explained that he had drafted the Plaid Cymru group's shadow budget proposals, including the one covering July 2015. He said that a £1m could be saved if the role of assistant director was deleted and senior staff salaries reduced. He confirmed these proposals did not cover staff at the rank held by Mrs Carter, though restructuring generally did mean job losses. Cllr McEvoy confirmed that he normally raised issues with directors and the chief executive, and noted that as his party was not currently controlling Cardiff Council, he was usually ignored until his election as an assembly member in 2016. He denied that councillors could in reality threaten a council official's job. When asked if councillors could ever get people sacked, Cllr McEvoy said that they could only do so through restructures.

Ms Amanda Williams

3.16 Ms Williams in her oral evidence said that the two council officers who attended the hearing were both women. She denied that any council officers were in the secure corridor after the hearing and alleged that they stayed

behind to chat to the Judge. Ms Williams said Cllr McEvoy took a photo of the door of the courtroom while she had an altercation with a security guard and swore at him. Her evidence was that Cllr McEvoy then tried to calm her down as she was angry at the council officers. Ms Williams said Cllr McEvoy took her down the stairs and straight out of the building.

3.17 In her witness statement, Ms Williams said Cllr McEvoy said “I can’t wait until May 2017 when the restructure of the Council happens” to her; under cross examination she said he mentioned restructuring to her.

The Case Tribunal’s assessment of the witnesses

3.18 The Case Tribunal found Mrs Carter to be a reliable and credible witness. Having considered the judgment of District Judge Morgan, it was evident the application to suspend the warrant of possession failed due to the amount of arrears and the history of non-payment. Nothing was said by the learned judge in his decision about the two points where Cllr McEvoy and Ms Williams alleged Mrs Carter was lying. That of course does not mean any possible misleading of the court would not be serious, but does mean Mrs Carter understood the basis for the judge’s decision to be simply the amount of arrears. The issue of whether they were the highest or one of the highest arrears in the city was irrelevant as a matter of law. Mrs Carter’s evidence under oath was that she did not know Cllr Mitchell and was effectively not part of the conspiracy alleged by Cllr McEvoy throughout the course of these proceedings. The Case Tribunal accepted that evidence and found no evidence existed that supported the argument Mrs Carter was seeking to “get her retaliation in first” or was part of any conspiracy.

3.19 Mrs Carter explained clearly why she reported the incident to the assistant director and was satisfied that action was then taken. The Case Tribunal found Mrs Carter made a number of concessions in her evidence and was a honest witness. It noted the failure of Mr Mendus Edwards to put the account of Cllr McEvoy to her – she was not asked whether she heard the alleged altercation between Ms Williams and the security guard, and she was not asked whether Cllr McEvoy stopped in the corridor and was holding Ms Williams’ arms. Mrs Carter’s evidence has been consistent since 23 July 2015; the only additional information has come from questioning by managers and the statement takers. Even as early as 27 July 2015, Mrs Carter confirmed her interpretation of the words and how they were delivered.

3.20 Mr Skinner was similarly not asked under cross-examination about Cllr McEvoy’s account. His version of the incident has also remained consistent, and the Case Tribunal noted Mr Skinner’s scepticism about whether Cllr McEvoy could really threaten Mrs Carter’s job. Mr Skinner explained clearly why he believed Mrs Carter was being threatened, but not him – his evidence was Cllr McEvoy looked at Mrs Carter when he said “I can’t wait until May 2017 when the restructure of the Council happens” and said those words in a manner which showed it was a threat. Both Mr Skinner and Mrs Carter explained that councillors were viewed by them as their employers. The Case Tribunal found Mr Skinner to be a reliable and honest witness.

3.21 Cllr McEvoy's evidence in stark contrast to Mrs Carter and Mr Skinner was evasive and unclear at critical moments. He was unwilling to answer the questions which he was asked, as opposed to the questions he wished he'd been asked. It was not until the Case Tribunal asked questions that Cllr McEvoy tried to explain exactly what happened in the corridor. His formal response to the Ombudsman's Director of Investigation's report did not contain many of the points made by Cllr McEvoy in his oral evidence. The Case Tribunal found the account given by Cllr McEvoy unclear at times. It did not find his account credible – it did not accept that there was time for the lengthy conversation alleged by Cllr McEvoy to have taken place in the corridor while people were walking to the usher's point. His account was not put to the council officers.

3.22 The Case Tribunal appreciated that for Ms Williams, the most important part of that day's event was not what happened in the corridor following the eviction hearing. It was not able to place a great deal of weight on her account. Ms Williams' repeated denials that any council officials were in the corridor when everyone agreed that they were, and her confusion over the gender of one of the officers, meant her account in the judgement of the Case Tribunal could not be relied upon in its entirety. She accepted the word "restructure" was used, but said it was used to her as there was no-one else in the corridor. Ms Williams did not mention Cllr McEvoy holding her arms.

3.23 Fundamentally, this was a case where the panel has to decide whose evidence to prefer. There were two witnesses asserting the words were directed to Mrs Carter, and two witnesses who say otherwise. The Case Tribunal preferred the evidence of Mrs Carter and Mr Skinner for the reasons given above.

3.24 The Case Tribunal also noted the surrounding evidence from observers who did not hear what was said. While it could place little weight on those accounts as their contents conflicted sharply with the accounts of those who heard the words of Cllr McEvoy, the statements of Mr Tenant, Ms Cashmore and Mr Williams and the reports they made at the time confirmed something happened in the corridor. The panel concluded those reports confirmed Mrs Carter was upset, and it was noteworthy Mrs Carter was known to those staff members before due to her 18-20 years' experience of attending eviction hearings. These were people likely to notice an unusual change of attitude by Mrs Carter, particularly as she and Mr Skinner had to stay and make statements regarding the photo taken by Cllr McEvoy on court premises.

4. FINDINGS OF FACT

4.1 The Case Tribunal found the following **undisputed** material facts:

4.1.1 At the relevant time Cllr McEvoy was a member of Cardiff Council;

4.1.2 On the 8 May 2012 Cllr McEvoy signed a declaration to confirm that he agreed to observe the Code of Conduct of Cardiff Council;

4.1.3 On 23 July 2015, Cllr McEvoy attended Cardiff Civil and Family Justice Centre in order to speak on behalf of his constituent Ms Amanda Williams;

4.1.4 Ms Williams' application to suspend the warrant for possession obtained by Cardiff Council in the Cardiff County Court was unsuccessful;

4.1.5 Following the hearing, Cllr McEvoy was outside the courtroom, where Ms Williams, Mrs Carter and other persons were present;

4.1.6 Cllr McEvoy said "I can't wait until May 2017 when the restructure of the Council happens".

4.2 The Case Tribunal found the following **disputed** material facts:

4.2.1 The words of Cllr McEvoy were directed at Mrs Carter;

4.2.2 Cllr McEvoy intended by the use of the words to upset Mrs Carter and make her feel her job could be at risk if Plaid Cymru controlled Cardiff Council from May 2017;

4.2.3 The words were using in a manner which could reasonably be interpreted as bullying, showing a lack of respect and showing a lack of consideration;

4.2.4 The words were not a political expression;

4.2.5 Mrs Carter was a finance team manager with 18-20 years' experience of attending eviction hearings.

4.3 The Case Tribunal found the following in respect of the disputed facts:

4.3.1 The panel preferred the evidence of Mrs Carter and Mr Skinner and found that Cllr McEvoy turned to look at Mrs Carter when he said "I can't wait until May 2017 when the restructure of the Council happens". Both believed the comment to be addressed to Mrs Carter alone, and the panel accepts that evidence. It did not accept that Cllr McEvoy uttered the words as part of a lengthy conversation while he held the arms of Ms Williams.

4.3.2 The panel having found that the words were directed at Mrs Carter reflected on the evidence that it had heard, particularly that all parties in the corridor agreed that Cllr McEvoy was frustrated and unhappy about the outcome of the court hearing. The Case Tribunal found Cllr McEvoy's intention when uttering the words was not to reassure Ms Williams. It made little sense how a policy to cut jobs in two years' time could reassure a person about to lose their home that day. The Case Tribunal found Cllr McEvoy wanted to show the power he could hold in the future to Mrs Carter and Ms Williams, and was annoyed with Mrs Carter. The point that he was making was in the future he could do something if in power; by his own admission, restructuring meant job losses. The Case Tribunal judged that Cllr McEvoy wanted Mrs Carter to be

upset and to sow the seed that her job in the future could be at risk if his party was in control of the council.

4.3.3 The panel referred to the decision of Mr Justice Hickinbottom sitting in the High Court in the case of *Heesom v Public Service Ombudsman for Wales* [2014] EWHC 1504 (Admin), and in particular paragraph 42:

“Civil servants are, of course, open to criticism, including public criticism; but they are involved in assisting with and implementing policies, not (like politicians) making them. As well as in their own private interests in terms of honour, dignity and reputation, it is in the public interest that they are not subject to unwarranted comments that disenable them from performing their public duties and undermine public confidence in the administration. Therefore, in the public interest, it is a legitimate aim of the State to protect public servants from unwarranted comments that have, or may have, that adverse effect on good administration.”

The Case Tribunal also noted the observation in paragraph 85 of the same judgement that *“there is a mutual bond of trust and confidence between councillors and their officers. Indeed, local government in this country could not sensibly function without it.”* Between councillors and council officers, there is a quasi-employment relationship.

Mrs Carter was performing her job, one which at times is difficult and unpleasant. Cllr McEvoy objected to the action that the council had taken, and expressed his frustration to Mrs Carter in a manner perceived as intimidating by both Mrs Carter and Mr Skinner.

The Case Tribunal considered that the words themselves could mean a number of things. The key to unlocking their meaning was the tone and context of their delivery by Cllr McEvoy to Mrs Carter. It accepted the evidence of both Mrs Carter and Mr Skinner that the tone was consistent with a threat; Mrs Carter described the words as being delivered with “a degree of spite and anger”.

The incident was a one-off event, but one which clearly upset Mrs Carter according to both her evidence and that of several other independent witnesses. While bullying often involves repetition, it can occur in a single incident too by a more powerful individual to a weaker one. Bullying attempts to undermine the victim, and is detrimental to their confidence and capability. The guidance from the Ombudsman to councillors, and the case law from the employment tribunal field, confirms this. The view of the victim must be considered, but an objective view is also required. Mrs Carter believed she had been threatened, but strikingly Mr Skinner also perceived Cllr McEvoy’s words as a threat to Mrs Carter. The Case Tribunal reached the same conclusion. The tone used by Cllr McEvoy, the directing of the words to Mrs Carter, and the knowledge that restructuring usually meant job losses combined to make it clear to Mrs Carter and objective observers that her job in the future may be at risk if Plaid Cymru controlled the council from May 2017. The words were not a plain statement of a party’s political policy.

The panel noted that there was a significant power differential between Mrs Carter, who was of a rank considerably more junior than a director, and Cllr McEvoy, a quasi employer of Mrs Carter. Cllr McEvoy had channels to complain about Mrs Carter, but chose not to use them. The incident occurred in a court corridor and it would have been very difficult for Mrs Carter to defend herself in the circumstances; indeed she did not do so. In a quasi employer-employee situation, such words implying a further threat to Mrs Carter's job uttered in the manner found was bullying behaviour in the judgment of the Case Tribunal. Cllr McEvoy was more powerful than Mrs Carter and he intended to affect her confidence and undermine her performance of her duties. It was axiomatic that bullying behaviour in itself constitutes behaviour that showed a lack of respect and consideration to Mrs Carter. The panel was however not persuaded that this conduct was harassment as it was a one-off incident.

4.3.4 The Case Tribunal concluded that the words "I can't wait until May 2017 when the restructure of the Council happens" was not a political expression. Given its finding that the words were addressed to Mrs Carter with the intention to upset her and cause her to fear for her job in the future, the panel could not accept Cllr McEvoy was expressing a political view. No policy argument was being made to a council officer; there was no public meeting taking place in the corridor. The words at their highest could be viewed as a reference to a policy drafted by Cllr McEvoy, but were not a political expression in themselves.

4.3.5 The Case Tribunal had no difficulty in finding Mrs Carter was a finance team manager. Mrs Carter's evidence was that she had employed by Cardiff Council or its predecessor authority for 35 years. Of more relevance in the panel's view was her evidence that she had been attending eviction hearings for 18-20 years, which it accepted.

5. FINDINGS OF WHETHER MATERIAL FACTS DISCLOSE A FAILURE TO COMPLY WITH THE CODE OF CONDUCT

5.1 The Ombudsman's Submissions

5.1.1 It was contended by Mr Hughes that the Case Tribunal, as set out in the *Heesom* case, had to carry out a balancing act between Cllr McEvoy's freedom of expression and unwarranted attacks on council officers. He suggested Incident 1 in the *Heesom* case, where a statement in a public meeting about job losses directed at two senior council officers was found to be a breach of the relevant Code of Conduct, was similar to this case. Mr Hughes submitted that in light of the Case Tribunal's findings of fact, the allegation that Cllr McEvoy had bullied Mrs Carter and failed to show her respect and consideration was made out. He said whether the office of councillor or Cardiff Council had been brought into disrepute was a matter for the Case Tribunal.

5.2 The Respondent's Submissions

5.2.1 Mr Mendus Edwards on behalf of Cllr McEvoy reminded the Case Tribunal that the incident on 23 July 2015 was temporary, and not followed up

by Cllr McEvoy. It followed a tense court hearing. Mr Mendus Edwards also noted the panel had yet to analyse in detail the seniority of Mrs Carter, and it was time to do so. He said the more senior Mrs Carter was, the more it mitigated the seriousness of what had happened. He again submitted that bullying required repetition. Mr Mendus Edwards said the incident was at the lower end of the scale of seriousness and Cardiff Council brought itself into disrepute. He accepted the conduct found may constitute a failure to show respect and consideration, but not bullying.

5.3 Case Tribunal's Decision

5.3.1 On the basis of the findings of fact, the Case Tribunal found by a unanimous decision that there was a failure to comply with the Cardiff Council's Code of Conduct as follows:

5.3.2 Paragraph 4(b) of the code of conduct states that [You must] show respect and consideration for others.

5.3.3 The Case Tribunal found that Cllr McEvoy failed to show respect or consideration to Mrs Carter – his conduct was intended to upset her and cause her to fear for her job in the future. The panel considered Cllr McEvoy's right to freedom of expression did not outweigh Mrs Carter's right not to be subject to unwarranted comments or the public interest in council officers being able to carry out their duties. The panel's analysis for convenience's sake is set out in paragraph 5.3.7 below but the balancing exercise was carried out separately for each alleged breach of the Code of Conduct. For both this alleged breach and the next, the Case Tribunal applied the three stage approach recommended by Mr Justice Wilkie in the case of *Sanders v Kingston (No 1)* [2005] EWHC 1145. The Case Tribunal concluded that it was justified to restrict Cllr McEvoy's freedom of expression.

5.3.4 Paragraph 4(c) of the code of conduct states that [You must] not use bullying behaviour or harass any person.

5.3.5 The Case Tribunal found that Cllr McEvoy did not harass Mrs Carter, but did use bullying behaviour towards her. It reflected on its earlier findings. The panel noted Mrs Carter managed a team of 10-12 people and half an administrative assistant (shared with another team) in an organisation with thousands of employees. Her role as finance team manager was two rungs below the rank of assistant director. Mrs Carter was not a junior member of staff, but was in the view of the Case Tribunal at the most at the level of middle management. Cllr McEvoy in contrast was an elected councillor and Mrs Carter's quasi-employer. There was a clear power differential between them.

5.3.6 It was a one-off incident which occurred in the heat of the moment following a difficult court hearing. Cllr McEvoy made no attempt to contact Mrs Carter following the incident. On the other hand, it occurred in a court corridor and in front of another council officer and a member of the public. As the *Heesom* case reminded the Case Tribunal, Mrs Carter was performing her duties and Cllr McEvoy's words were found to have been an unwarranted

comment made while Mrs Carter was carrying out her job. Mrs Carter had a private interest in not being subjected to such comments by a councillor and the words were not a political expression which attracted enhanced protection under Article 10 of the European Convention of Human Rights.

5.3.7 Mrs Carter's personal robustness is not the test adopted by the senior courts when weighing a councillor's general right to freedom of expression (for non-political expressions); the senior courts have made it clear that senior council officers, such as directors or chief executives, should be robust in their dealings with councillors and tolerate a level of expression which might otherwise be unacceptable in order to ensure elected representatives can fully exercise their Article 10 rights. Mrs Carter was not in such a senior role. She was a role significantly more junior to Cllr McEvoy's, performing her duties. Cllr McEvoy disagreed with the council's decision and made that clear in the court hearing, which was entirely appropriate. His conduct outside the court hearing however was not appropriate and was bullying; the Case Tribunal also thought its conclusions set out in paragraph 4.3.3 above were of relevance here. The Case Tribunal found that Mrs Carter's private interest as a quasi-employee combined with the public interest to ensure her ability to perform her role was not undermined outweighed Cllr McEvoy's freedom of expression, particularly given the intent behind his words found by the panel. It was justified to make the finding that Cllr McEvoy had conducted himself in a bullying manner towards Mrs Carter.

5.3.8 Paragraph 6.1(a) of the code of conduct states that you must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.

5.3.5 The Case Tribunal found that Cllr McEvoy had not brought either the office of councillor or Cardiff Council into disrepute. The incident was a one-off event in a court corridor, as opposed to a public waiting area, and witnessed by only a few persons. The words were uttered in the heat of the moment and following a difficult eviction hearing. While the conduct of Cllr McEvoy was far from ideal, the Case Tribunal concluded that it did not in itself bring either the office of councillor or Cardiff Council into disrepute.

6. SUBMISSIONS ON ACTION TO BE TAKEN

6.1 The Ombudsman's submissions

6.1.1 Mr Hughes on behalf of the Ombudsman contended the Case Tribunal should consider both mitigating and aggravating factors. He pointed out its earlier finding that the incident occurred in the heat of the moment in a stressful situation and was a one-off. However, Mr Hughes also submitted that Cllr McEvoy refused to acknowledge the impropriety of his behaviour or that he had made an error. There was no evidence of any insight, and Mr Hughes said Cllr McEvoy had not fully co-operated with the Ombudsman's investigation – he had been difficult to interview. Mr Hughes also highlighted Cllr McEvoy's unwillingness to deal with the facts of the incident and his preference to blame

others and allege a number of conspiracies against him. Mr Hughes thought disqualification would not be a proportionate sanction in the circumstances.

6.2 The Respondent's Submissions

6.2.1 Mr Mendus Edwards on behalf of Cllr McEvoy contended the Case Tribunal should bear in mind the sanctions guidance of the Adjudication Panel for Wales. He submitted disqualification was too severe a sanction in the circumstances of the case, and it would be more appropriate for no action to be taken. Mr Mendus Edwards submitted Cllr McEvoy had inadvertently failed to comply with the Code of Conduct, had not caused any harm by his conduct towards Mrs Carter and there was no risk of repetition as he was an experienced politician.

6.2.2 Mr Mendus Edwards went on to say if the Case Tribunal felt action was required, a short period of suspension of perhaps one month would suffice and ensure Cllr McEvoy could stand for election in May 2017. He cautioned the panel from encouraging future complaints against Cllr McEvoy.

6.3 Case Tribunal's Decision

6.3.1 The Case Tribunal considered all the facts of the case and in particular the its earlier findings. It was not persuaded no action should be taken – harm had clearly been caused to Mrs Carter and there was a potential risk of harm by causing council officers to be concerned for their job security when performing their public duties. The Case Tribunal did not accept Cllr McEvoy had inadvertently breached the Code of Conduct. It also could not find that there was no risk of repetition as Cllr McEvoy displayed no insight into his behaviour and its impropriety. There had been two breaches of the Code of Conduct and action was required.

6.3.2 The Case Tribunal reflected on whether suspension was the proportionate and appropriate sanction in the circumstances. In mitigation, Cllr McEvoy had a lengthy unblemished record of public service as a councillor. He undertook constituency duties. The incident was a one-off and occurred in the heat of the moment following a difficult eviction hearing, attended by Cllr McEvoy in order to support a constituent. The hearing was on a topic which generates strong emotions.

6.3.3 The Case Tribunal found there were also aggravating features. Cllr McEvoy had not apologised at any time for the distress caused to Mrs Carter, indeed he refused to accept that she had been distressed. He displayed no insight and failed to acknowledge his error. Rather than address the facts of what happened, Cllr McEvoy chose to make a series of serious allegations against others.

6.3.4 The Case Tribunal concluded that although using bullying behaviour is a serious matter, the misconduct of Cllr McEvoy was not of the most severe end of the spectrum of bullying behaviour or failure to show respect and consideration. While the election cycle is not relevant to a suspension, the Case

Tribunal had no wish to make it harder for Cllr McEvoy to stand for election in May. It also bore in mind that Cllr McEvoy's freedom of expression had been restricted to the extent prescribed by law and only to the extent necessary in a democratic society. Councillors' freedom of expression comes with duties and responsibilities, which includes not bullying council officers.

6.3.2 The Case Tribunal concluded by unanimous decision that Cllr Neil McEvoy should be suspended from acting as a member of Cardiff Council for a period of one month or, if shorter, the remainder of his term of office. This period marks the severity of the misconduct by Cllr McEvoy, and is designed to ensure such behaviour is not repeated. Councillors are required to treat council officers with respect and consideration, particularly when they are not senior officials, and not subject them to bullying behaviour.

6.2.3 Cardiff Council and its Standards Committee are notified accordingly.

6.2.4 The Respondent has the right to seek the permission of the High Court to appeal the above decision. A person considering an appeal is advised to take independent legal advice about how to appeal.

Signed



Date: 14 March 2017

Claire Sharp
Chairperson of the Case Tribunal

Glenda Jones
Panel Member

Susan Hurds
Panel Member

