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Ms Freda Sharkey
Standards for England
Ethical Standards Officer
Fourth Floor
Griffin House
Manchester
M1 1BB

Our Ref: GLGSE/2465/2010

5 Aug 2011

RECEIVED

08 AUG 2011

Dear Ms Sharkey,

Re: Mr Neil Fulcher
144 Pear Tree Avenue
Bramley
Rotherham
S66 2NF

I enclose a copy of the decision of the Upper Tribunal. A copy has been sent to all the parties involved.

The enclosed notes tell you how a decision of the Upper Tribunal may be challenged by any party.

Yours sincerely,

Lata Shah
Clerk to the Upper Tribunal

Enc.

Please note that it is the policy of this Office to destroy case files one year after the date of the last judicial action. Accordingly, you should be aware that if you consider that you may require any of the documents of appeal for some purpose in the future, then you should retain the copy of them that this office or the First-tier Tribunal has issued to you.





IN THE UPPER TRIBUNAL **Appeal No. GLGSE/2465/2010**
ADMINISTRATIVE APPEALS CHAMBER

Appellant: Neil Fulcher
Respondent: Ethical Standards Officer

DECISION OF THE UPPER TRIBUNAL

Upper Tribunal Judge Ward

ON APPEAL FROM:

Tribunal: The First-Tier Tribunal (General Regulatory Chamber)
Tribunal Case No: LGS/2010/0504
Tribunal Venue: Not known
Hearing Date: 19 July 2010

Before UPPER TRIBUNAL JUDGE WARD

Decision: The appeal is allowed to the limited extent indicated below. The decision of the First-tier Tribunal sitting on 19 July 2010 under reference LGS/2010/0504 involved the making of an error of law and is set aside.

Acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 I remake the tribunal's decision (as set out in its notice of decision dated 19 July 2010) as follows:

Paragraph 5 of that notice – which in its original form referred to additional matters- shall be deleted and replaced with the following:
“Cllr Fulcher breached paragraphs 3(1) and 5 of the Code of Conduct by mounting a sustained attack on the integrity and character of a Council Officer, in a manner which was pejorative, unjustified and probably defamatory.”

Except as stated above, the decision is remade in identical terms.

REASONS FOR DECISION

1. Cllr Fulcher was elected to Bramley Parish Council on 3 May 2007 for a term of four years in an uncontested election. He gave a written undertaking to observe the Code of Conduct in May 2007.

2. Two allegations were referred by the Standards Board to the Ethical Standards Officer (“ESO”) for investigation. In the course of investigating these allegations, the ESO considered that there was evidence that Cllr Fulcher might have failed to comply with the Code in three other respects. The ESO was empowered by section 59(1)(b) of the Local Government Act 2000 to investigate these other matters also and by a letter dated 18 September 2009 informed Cllr Fulcher of his intention to do so.

3. We need not be concerned in the present proceedings with allegation 1, which was not upheld by the First-tier Tribunal (“FtT”). As a result of the matters referred to in paragraph 2 above, allegation 2 may for convenience be subdivided as follows:

Allegation 2a: related to Cllr Fulcher's conduct in sending an email dated 14 March 2009 to a Mr Waller, Deputy Monitoring Officer at Rotherham MBC, and subsequently sending it to the Rotherham Advertiser where it was printed on 20 March 2009

Allegation 2b: related to a letter published by Cllr Fulcher in the Rotherham Advertiser on 24 July 2009 which was critical of named officers of Rotherham MBC and of another councillor

Allegation 2c: related to a letter published by Cllr Fulcher in the Rotherham Advertiser on 7 August 2009 following up the previous letter

Allegation 2d: related to email correspondence in August 2009 between Cllr Fulcher and two officers in the Environment and Development Services Directorate of Rotherham MBC.

4. The ESO made a report covering all the above allegations, alleging breaches of paragraphs 3(1) of the Code of Conduct (treating with respect), 3(2)(b) (bullying) and 5 (bringing your office or authority into disrepute.) The matter came before the FtT on 19 July 2010. For reasons which it is not necessary to go into, the case was dealt with on the papers, neither party attending.

5. The key parts of the FtT's decision dated 19 July 2010 are as follows (underlinings in original):

"3. The Respondent did not fail to comply with paragraph 3(2)(b) [of] the Code of Conduct, but did fail to comply with paragraphs 3(1) and 5 of the Code of Conduct.

...

5. The Respondent breached paragraphs 3(1) and 5 of the Code of Conduct by mounting continuing and sustained attacks on the integrity and character of two Council officers and another Councillor which were pejorative, unjustified and probably defamatory.

...

6. The Tribunal decided to impose the following sanction:

6.1 To suspend the Respondent for a period of six months.

7. The date such sanction is to take effect is 1 August 2010

..."

6. The FtT then issued a statement of its reasons, in a 30 page document dated 20 July 2010. I return to this below.

7. Permission to appeal was refused by the FtT. On an application to the Upper Tribunal, I held an oral hearing of the application at Doncaster County Court on 17 December 2010. I refused permission to appeal on the great majority of Cllr Fulcher's 18 grounds, but gave limited permission, essentially because the statement of reasons appeared not to be consistent with the decision as regards the matters in allegations 2b, 2c and 2d.

8. Ground a on which I gave permission was:

"Allegation 2 (as set out in the Tribunal's Reasons for decision and notwithstanding the email* of 18 September 2009 from the Ethical Standards Officer) concerned (only) sending an email to Mr Waller and subsequently sending it to the Rotherham Advertiser. Did the tribunal err by indicating in its notice of decision that [Cllr Fulcher] breached the

Code "by mounting continuing and sustained attacks on the integrity of two Council officers and another Councillor which were pejorative, unjustified and probably defamatory" (my emphasis) when (save as regards Mr Waller) these were not – at any rate according to the tribunal – the subject of the allegations before it?"

* I was in error in referring to an email: it was a letter, but nothing turns on the point.

9. Linked to that was ground b:

"Did the tribunal err by issuing a notice of decision and a statement of reasons which, in the respect above, were materially non-congruent, or otherwise by giving inadequate reasons for its decision?"

10. I also gave permission on grounds c and d:

c. If it was (and was properly) part of the tribunal's decision that the appellant made attacks on a second officer and another Councillor:
(i) did the tribunal make sufficient findings of fact?
(ii) did the tribunal adopt a fair procedure in considering such allegations when the appellant had not been interviewed about one or more of them?

d. Was the sanction imposed legally flawed on the grounds that regard was had to a legally irrelevant consideration, namely the matters (as set out at [a] above) not forming part of the allegations?

11. Ms Broadfoot, counsel for the ESO, in written submissions accepts that the relevant section of the tribunal's reasons is in paragraphs 5.3.10 to 5.3.17 (paras 5.3.10 and 5.3.11 deal with particular matters which need not concern us). Para 5.3.17 contains the following passage:

"The Tribunal accepts the ESO's reasoning that the equally damaging (and probably defamatory) remarks made by the Respondent in relation to Mr Mumford, Mr Battersby and Councillor Bradley (which were not formally included in the reference) would not amount to bullying – that reasoning is essentially the same as that applied by the Tribunal to the remarks relating to Mr Waller. The remarks did, however, have the potential to bring the respondent's office into disrepute,"

12. Counsel submits:

(a) that paras 5.3.12 to 5.3.16 specifically deal only with Mr Waller

(b) that para 5.3.17 decides that the conduct did not amount to bullying of Mr Waller.

(c) that there is no finding that the remarks made in relation to Mr Mumford, Mr Battersby and Cllr Bradley amounted to disrespect and a breach of paragraph 3 of the Code or that they brought the respondent's office into disrepute and

(d) that "it... appears from the words "(which were not formally included in the reference)" that the Tribunal (wrongly) did not consider that the additional matters were before them and that is why they did not make findings of breach of the Code in respect of them.

13. Therefore, Counsel submits, correctly in my view, that:

(a) the FtT erred in failing to consider that the additional matters were before it (I return to a further aspect of this submission below)

(b) paragraph 5 of the Notice of Decision insofar as it refers to attacks on "two Council officers and another Councillor" is not supported by the Tribunal's detailed reasons and

(c) that for the reasons summarised above, the FtT did err by issuing a notice of decision and a statement of reasons which, in the respects discussed above, were materially non-congruent, or otherwise by giving inadequate reasons for its decision.

14. It follows therefore that the decision of the tribunal was in error of law on grounds a and b on which I gave permission.

15. At this point it is right to record that Ms Broadfoot also submitted that the FtT erred in failing to conclude that the additional matters before it also amounted to a breach of the Code and that there were sufficient facts found by it to enable it to do so. By further Direction, I enquired whether the ESO still sought ultimately to have the additional matters upheld as breaches of the Code also. I was told that the ESO does not do so, on the basis of what was described as "a pragmatic decision, made in the overall interests of finality and costs", while reserving the right to do so and to pursue related arguments if the matter proceeded to an oral hearing, or further. I deal with the remaining grounds on which permission to appeal was given and with the disposal of the case having regard to this concession.

16. I do not find it necessary to address ground c in this decision, in the light of the concession made that the FtT was in error of law on grounds a and b and the concession recorded in para 15 above. The ESO strongly rejects any suggestion that the procedure adopted was unfair. However, such value as there might otherwise have been in the Upper Tribunal examining the procedure in a case where other errors of law have been established is further reduced by the impending abolition of the local government standards regime by the Localism Bill currently before Parliament.

17. As to ground d, the FtT in section 6.3 of its decision directed itself to relevant case law and guidance before concluding that (I have corrected what

appear to be inadvertent references to the Appellant when the Respondent was intended):

"6.3.5 Having regard to this Guidance the Tribunal considered that there had been a breach of the Code of Conduct which caused harm to others, principally the integrity and character of Mr Waller who had been unfairly criticised in pejorative and insensitive language raising doubts in a public arena as to his ability to do his job in circumstances in which he would not have a reasonable opportunity to defend himself and which only marginally failed to cross the threshold into bullying. The impact of such actions is serious and inherently harmful. The [Respondent's] actions fall short of the threshold on which disqualification was upheld in Hathaway v Ethical Standards Officer [2004] EWHC 120 (Admin) and Sloam v Standards Board for England [2005] EWHC 124 (Admin) in which there were offences of violence and dishonesty, respectively, and which threshold was said by Collins J in [R(Chegwyn) v Standards Board for England [2010] EWHC 471 (Admin)] to be a "high one". The [Respondent's] actions do, however, correspond to those of the Appellant in Sanders (above) in which the sanction was commuted from disqualification to suspension for six months.

6.3.6 It was evident to the Tribunal, having regard to the way in which the Respondent had conducted himself during the ESO's investigations and by his written submissions that he had failed to understand the seriousness of the actions which he had taken or of their effects and the resultant breach of the Code of Conduct. He has showed no sense of the responsibilities imposed upon him by the Code of Conduct.

6.3.7 In all these circumstances, the Tribunal considers that it would be reasonable and proportionate to suspend the Respondent for a period of six months. In deciding a period of six months, the Tribunal had regard to the impact on others of the Respondent's conduct. A suspension for six months will bring home to the Respondent the seriousness of what he has done and send the right message to all concerned that a serious view was indeed being taken of what he had done (see Chegwyn). It will give him an appropriate period of time in which to reflect on his actions and take the steps necessary to avoid a repetition of his behaviour."

18. I am unable to accept the submission from Ms Broadfoot that "it is clear from 6.3.5 that the Tribunal only considered the matters in relation to Mr Waller when considering sanction." The FtT refers in paragraph 6.3.5 to "...harm to others, principally the integrity and character of Mr Waller"... (my emphasis). Paragraph 6.3.7 indicates that "the Tribunal had regard to the impact on others [note the plural] of the Respondent's conduct". I consider that the FtT's consideration of sanction was tainted by matters which it considered were not before it and which it had not found to amount to a breach of the Code on Cllr Fulcher's part. I conclude that the FtT was thereby also in error of law.

19. As to the disposal of this case, Cllr Fulcher has been found to be in breach of the Code in respect of the matters relating to Mr Waller and I have previously refused permission to appeal on any ground which would enable him to challenge that conclusion. Cllr Fulcher seeks a full re-hearing, with a time estimate of four days. His reasons for doing so appear to be to enable him to have a renewed platform on which to argue that he was not in breach of the Code in respect of his dealings with Mr Waller (a matter which it is not open to him to challenge in view of the basis on which permission to appeal was given) and to give a public airing to his critical views in relation to some or all of Rotherham MBC, Standards for England and the Standards Board regime. None of these are good reasons for remitting the case for a further hearing. It is not the function of the tribunal system to provide a vehicle for the airing of personal or political views. The outcome of the present proceedings is that Cllr Fulcher has not been found to be in breach of the Code in respect to his dealings with Mr Mumford, Mr Battersby or Cllr Bradley and the ESO does not now seek to press for a finding on those matters, while I have adjudged the findings in relation to his dealings with Mr Waller to be not capable of challenge in law. That outcome makes a further hearing redundant.

20. Rather, this matter can be dealt with by re-making the FtT's decision. As regards remaking paragraph 5 so as to refer only to Mr Waller, the necessary amendment is straightforward. As regards the penalty the situation is a little more complex. If six months was the appropriate penalty for Cllr Fulcher's actions in relation to Mr Waller plus actions in relation to others to the extent that the FtT (wrongly, on the basis on which it tackled the case) took them into account, then it is arguable that logically, the appropriate penalty should be less than six months. However, if that is so, it should not be much less than six months, as in my judgment the FtT was fully entitled to view Cllr Fulcher's actions in relation to Mr Waller as serious, for the reasons it gave.

21. I did canvass with the parties whether it would be appropriate to reduce the period of suspension to five months, while acknowledging that it was academic (save for the record), in that Cllr Fulcher had served his original six month suspension by 1 February 2011. Ms Broadfoot submits that the sanction was justifiable on the basis of the conduct towards Mr Waller alone, Cllr Fulcher's submission was in terms that made very clear that he felt that such a reduction would be "meaningless" and of no value in terms of public perception of the events that had occurred. On that basis, I consider that no useful purpose would be achieved by reducing the period of the suspension, now past in any event, and so do not do so.

CG Ward
Judge of the Upper Tribunal
27 July 2011



UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Challenging an Upper Tribunal decision.

A decision of the Upper Tribunal is final. The only ways in which it is open to challenge are set out below.

Set aside. A decision may be set aside by the Upper Tribunal judge if there has been a procedural irregularity in the proceedings and the judge considers that it is in the interests of justice to do so. For example, if a document relating to the proceedings has gone astray or a party or his representative was not present at a hearing. If you wish to apply to set aside you must do so in writing with reasons so that your application is received **within one month** from the date of the attached letter.

Appeal. There is provision for an appeal against a decision of the Upper Tribunal to the Court of Appeal **on a question of law only**. If any party wishes to appeal they must first ask for permission from the Upper Tribunal judge. If the Upper Tribunal judge refuses permission, then the party wishing to appeal can ask for permission from the Court of Appeal itself. If you wish to apply for permission to appeal against the Upper Tribunal decision you must do so in writing with reasons so that your application is received **within one month** from the date of the attached letter.

If any party applies for permission to appeal to the Court of Appeal, the Upper Tribunal judge may review the decision if (1) the judge overlooked a legislative provision or binding authority which could have had a material effect on the decision, or (2) since the decision a higher court has made another decision binding on the Upper Tribunal which, if made before the decision, could have had a material effect on it. If you think that either of those grounds apply you should say so in your application for permission to appeal.

The Upper Tribunal judge may extend either time limit if satisfied that there is a good reason for doing so.