

WINCHESTER CITY COUNCIL
STANDARDS (DETERMINATION) SUB COMMITTEE
RE CLLR GOTTLIEB'S REQUEST TO RE-OPEN THE HEARING

DECISION

PROCEDURE SINCE THE HEARING ON 26 JULY 2018

1. On 6 August 2018 the Sub-Committee issued its Decision dated 5 August 2018, which found that one of the five incidents set out in paragraph 27 of the Monitoring Officer's report amounted to a breach of the Code, namely the one which concerned the statement made in the Southern Daily Echo on 11 February 2015.
2. The Chairman's covering email enclosing the Decision proposed that, subject to submissions, the question of sanction and confidentiality be determined by the Sub-Committee following submissions in writing and set out a proposed timetable. Submissions were to be made by the end of Friday 10 August 2018.
3. By an email early Friday afternoon, the Monitoring Officer Lisa Hall responded seeking a modification of the timetable. By an email late Friday afternoon, Bindmans on behalf of Councillor Gottlieb responded with a letter requesting that the findings in respect the 11 February 2015 statement be withdrawn in the interests of procedural fairness and that the hearing should be re-opened for further submissions on this matter. A response was sought within 14 days.
4. On Monday morning 13 August 2018, the Chairman responded by email on behalf of the Sub-Committee stating that a response within 14 days was not possible in light of people being away and that in the meantime a) the proposed timetable was suspended; and b) if the Monitoring Officer wished to make any representations on the matters raised by Bindmans in their letter, she should do so by 5 pm on 23 August 2018.
5. By a letter dated 23 August and sent by email at 12.11, the Monitoring Officer did so.

6. The Sub-Committee convened to consider the matter by telephone conference on 24 August 2018. Mr Bailey, the Independent Person, and Ms Broadfoot QC, the Legal Advisor, were also present on that conference call.
7. On Wednesday 29 August 2018, Mr Potter on behalf of Cllr Gottlieb emailed a further letter containing representations in response.
8. The Sub-Committee convened once again by telephone conference on 30 August to give further consideration to Cllr Gottlieb's request in light of the further arguments raised in the 29 August letter. Mr Bailey and Ms Broadfoot were present on the call.

DECISION AND REASONS

9. There are two heads of complaint: delay and findings of bad faith and lack of evidence.

Delay

10. On behalf Cllr Gottlieb it is argued that the case against Cllr Gottlieb was put forward as a 'course of conduct' and that, the Panel having found a breach only in respect of one incident and that being an incident which was raised by the complainant over a year after it had occurred, the hearing should be re-opened in order to enable submissions to be made as to whether the only remaining aspect of the complaint should be excluded as a result of the delay. On behalf of Cllr Gottlieb it is stated that submissions were not made on this issue because "it was understood that the complaints effectively concerned a course of conduct".
11. We do not accept that this accurately characterises the Monitoring Officer's presentation of the complaints against Cllr Gottlieb. The Monitoring Officer presented the case on the basis that each of the five instances identified in the Monitoring Officer's report at paragraphs 27(a)-(b) and (d)-(f) amounted to separate breaches of the Code. Detailed submissions were made in respect of each of those items in response on behalf of Cllr Gottlieb. It was not suggested by either party that Cllr Gottlieb could only be found to have breached the Code only if all five instances were proven or, for example, that an earlier incident could

only amount to a breach if a later incident was also found to amount to a breach. On the contrary, both sides set out their analysis on an incident by incident basis as to why it was said that each one amounted or did not amount to a breach of the Code. The fact that the 11 February 2015 statement was raised in a complaint that post-dated the complaint by over a year, was not raised as a basis for not upholding that particular complaint. We agree with the Monitoring Officer's submissions that if Cllr Gottlieb had wished to argue that any particular statements or events should be excluded from the Sub-Committee's consideration of the complaint on the basis of delay, that argument should have been made at the hearing on 27 July 2018.

12. But in any event we do not accept that either the Guidance Notes or the time lapse since the 11 February 2015 statement meant that either that statement should have been excluded from our consideration or that we should have declined to find a breach of the Code because of the delay. We accept the Monitoring Officer's submission as to the effect of the Guidance Notes as set out on page 2 of her letter. Further, we do not think that the consideration of the 11 February 2015 statement was unfair: Cllr Gottlieb was on notice of it, the issues of delay and fairness were raised in the Monitoring Officer's report at paragraph 3.3 and the nature of the complaint was not one where the evidence was adversely affected by the length of time between the incident complained about and our determination. It was a complaint where both sides accepted there was no need to call or question witnesses at all; and where there was no relevant dispute of fact.

13. The additional representations dated 29 August 2018 on behalf of Cllr Gottlieb which we have also carefully considered do not take this issue any further.

14. Accordingly, and on the assumption that we have a discretion to re-open the matter, we decline to do so on the grounds of the delay arguments.

Findings of bad faith and lack of evidence

15. Cllr Gottlieb takes issue with the Sub-Committee's findings at paragraph 91 of the Decision on the grounds, in essence, that this was not how the case was put and further there was no evidence for the Sub-Committee's conclusions.

16. We reject that. As is set out in the Decision at paragraphs 88-89 there was an argument (raised for the first time at the July hearing) as to the meaning of 'conduct' in Rule 38 and whether the words used in the statement fell within the scope of Rule 38 at all. For the reasons set out in paragraph 91 of the Decision, we concluded that the vehemence of Cllr Gottlieb's criticisms of senior Council Officers by the combination of words used implied that their conduct was in some way improper and fell within the scope of Rule 38 even on the narrow definition of 'conduct'.
17. This view arises from the words of the statement themselves in their context and how a reasonable person reading the statement would interpret them. That was a matter for submissions which we heard. We do not see how evidence as to what other people thought the statement meant is relevant. It is an objective test.
18. We note that the 29 August representations on behalf of Cllr Gottlieb focus on the phrase 'bad faith' which we used in paragraph 91 of the Decision. Our phrase was in fact "bad faith or behaviour" and was used as a way of expressing our view that statement contained (and would be read as containing) criticisms over and above questions of capability and implied a significant and serious element of culpability on behalf of the officers which meant that they should no longer remain employed at the council. Bad faith is an example of the type of misconduct which might justify a person's position becoming "clearly untenable".
19. This is consistent with our approach in relation to item 27(f) (the press release of 12 April 2016) as set out in paragraph 138.
20. We further do not accept the assertion made on behalf of Cllr Gottlieb in the 10 August representations that it would be "a common part of Government at all levels" for officials to be called upon immediately to resign, simply on the basis that the public body by whom they are employed has been found to have acted unlawfully in some respect.
21. As to the complaint regarding our finding that Cllr Gottlieb should have made proper attempts to exhaust the internal complaints procedure in Rule 38 by making his complaint to the Leader (Cllr Humby at the time), we do not see a basis for re-opening this now. We addressed the arguments that were made at

the hearing and the Decision deals with this issue in paragraphs 93 and 103, which should also be seen with paragraphs 42-45 and 87-88. We do not accept that there was any unfairness. The need to use the internal procedures is a key theme running through the Monitoring Officer's report and the availability of those procedures was a key issue at the oral hearing. Separately, we also see force in the Monitoring Officer's 'bootstrap' argument made in her letter of 23 August.

22. Paragraph 88 makes it clear that we were aware that the February 2015 statement called for the resignation of the Leader and Deputy Leader as well as the named officers.

23. Accordingly, and again on the assumption that we have a discretion to re-open the hearing in respect of these issues, we decline to do so.

24. In the circumstances the application to re-open the hearing in respect of the 11 February 2015 statement is refused.

NEXT STEPS

25. The question of sanction and confidentiality thus remain outstanding for determination. We note that the Monitoring Officer has no objection to submissions being made in writing on these matters. Cllr Gottlieb's position is less clear on this as the representations of 10 and 29 August seek an oral hearing principally for the purposes of re-opening the matters set out above and do not specifically address the position were those matters not to be re-opened.

26. However, the Sub-Committee is aiming to meet in person with the Independent Person and the Legal Advisor in order to deliberate on the outstanding issues and accordingly an oral hearing could be accommodated on the morning of that day, if either party seeks it. We are advised and consider that 2.5 hours is a sufficient and proportionate time estimate for the hearing. We note that in the 10 August letter Cllr Gottlieb wished also to make submissions on "(i) the inadequacies of the investigation process... (ii) the amendments that should be made to the Code and the investigation process; and (iii) responsibility for his legal costs in successfully defending his conduct". If these points are to be pursued aside from their potential relevance to the question of whether any

sanction be imposed, we would need to be shown the basis upon which we were able to make recommendations or any decision about costs as any submissions need to be relevant to the powers that we have. Our preliminary view is that, subject to any representations, this Sub-Committee has no authority to amend the Code or the investigation process or to make any decision that one side pay the costs of the other side.

27. The available dates for the Sub-Committee's deliberations are: 26 September 2018, 1 October 2018 and 8 October 2018.

28. We would be grateful if the parties would notify the Sub-Committee within the next 3 working days, whether an oral hearing is sought and if so on which day. We would further be grateful if Lisa Hall were able to make the necessary arrangements for a hearing room in Winchester.

If there is to be an oral hearing

29. In order to ensure that both the parties and the Sub-Committee are aware of the nature of the arguments to be made as well as to ensure the efficient use of time at the hearing, the parties should set out an outline of their submissions in writing in advance of the hearing as follows:

- a) Any submissions on the question of confidentiality and sanction on behalf of the Monitoring Officer should be made by 4 pm on 10 September 2018.
- b) Any submissions on the question of confidentiality, sanction and any other matters on behalf of Cllr Gottlieb should be made by 4 pm 18 September 2018.
- c) Any reply from the Monitoring Officer on any matters raised should be made by 4 pm on 24 September 2018.

30. This timetable is slightly asymmetric in order to accommodate Cllr Gottlieb's solicitor being away for the first two weeks in September, whilst allowing the hearing to be effective if it is to occur on 26 September.

31. As set out in the Chairman's email of 6 August, the Sub-Committee would be particularly assisted by submissions as to whether it is possible to publish the decision and reasons or any part of it in public and what the effect would be on the underlying documents contained in the evidence pack.

If no oral hearing is sought by either party

32. If there is not to be an oral hearing, then the same timetable applies for written submissions save that Cllr Gottlieb will also have a final right of reply in writing, to be made by noon on Friday 28 September and the Sub-Committee will meet to decide the outstanding matters on Monday 1 October 2018. A decision in writing will follow shortly thereafter.

Councillor Fiona Mather (chair)

Councillor Margot Power

Councillor Patrick Cunningham

30 August 2018