

Appeals Tribunal Decision

Case Ref:	APE 0400
Date of Appeal Tribunal Hearing:	16 May 2008
Relevant Standards Committee:	Birmingham City Council
Date of Standards Committee Decision:	20 March 2008
Name of member concerned: <i>(Appellant & his authority)</i>	Councillor Mullaney of Birmingham City Council
Ethical Standards Officer (ESO):	Mr Steve Kingston
Monitoring Officer:	Mr Mirza Ahmad
<u>Appeals Tribunal Members:</u>	
Chairman:	Mr Steve Wells
Member:	Mr Chris Perrett
Member:	Mr Darryl Stephenson

1. The Appeals Tribunal has considered an appeal from the Appellant about the above decision.
2. The Appeals Tribunal has considered written submissions from the Appellant, Councillor Mullaney, the Standards Committee and the Ethical Standards Officer and determined that it can consider the appeal on the written representations presented to it.
3. The Appellant, Councillor Mullaney has appealed against the Standards Committee's finding that the Appellant had failed to follow paragraph 2(b) of the Code of Conduct by trespassing on private land and recording a video, which was subsequently posted on the internet, the content of which was inaccurate and biased against the landowner and therefore failed to treat him with respect.
4. Paragraph 2(b) of the Code provides:

"A member must treat others with respect."
5. Councillor Mullaney has appealed against the action, which the Standards Committee decided to take in the light of the failure to follow the provisions of the Code of Conduct. That action was to suspend him for a period of one month, unless he gave a written apology to the complainant within 14 days of the Standards Committee decision. The suspension has been 'put on hold' pending the outcome of this appeal.
6. The Appeals Tribunal has determined that the Appellant did fail to follow the provisions of the Code. The reasons are as follows:

- 6.1 In order to establish whether or not paragraph 2(b) of the Code of Conduct is engaged, the question of whether Councillor Mullaney was acting in his official capacity falls to be determined by the Appeals Tribunal. The Standards Committee determined, on the balance of probabilities, that the Councillor was acting in his official capacity.
- 6.2 Councillor Mullaney contends that he was in fact acting as a campaigner or politician outside his official capacity by virtue of campaigning publicly in respect of a listed building. The ESO contends that whilst there is no direct High Court authority on the point, the case of *Livingstone –v- Adjudication Panel for England [2006] EWHC 2533* did indicate, albeit obiter dicta, that 'official capacity included anything done in dealing with staff, when representing the council, in dealing with constituents problems and so on' and that in this case Councillor Mullaney was dealing with a constituent's problems.
- 6.3 It should also be noted that a councillor is required to comply with the Code of Conduct when performing his functions (Section 52 Local Government Act 2000). Even accepting the Councillor's point that 'official capacity' should be construed narrowly, the Appeals Tribunal concludes that the Standards Committee was right in determining that Councillor Mullaney was acting in his official capacity.
- 6.4 This is supported by the following facts:
- Councillor Mullaney was elected to the Moseley and Kings Heath Ward of Birmingham City Council on 10 June 2004. He was contacted by Mr Marsden, a constituent, in 2004 at a time when Mr Marsden was facing problems with the council funding of his skateboard park. It is an undisputed fact that Councillor Mullaney was impressed with what Mr Marsden was trying to achieve as he felt that he was preserving a historic building (the former Tram Shed) and providing an activity for young people which could help reduce re-offending – all matters which were within the compass of a councillor's official capacity.
 - Councillor Mullaney raised a number of 'Councillor Enquiries' with Birmingham City Council Officers concerning the property owned by Mr Zaman which was adjacent to Mr Marsden's property.
 - On 7 February 2005 he raised a 'Councillor Enquiry' relating to the fact that Mr Zaman was carrying out works without having reached an appropriate agreement with Mr Marsden about parking. Whilst there is no direct evidence on the point the Appeals Tribunal considers that it is reasonable to conclude that this request was generated following a conversation between Councillor Mullaney and his constituent, Mr Marsden.
 - On 5 April 2005 Councillor Mullaney raised a 'Councillor Enquiry' concerning advertising hoardings on Mr Zaman's property. The response in June 2005 was that the advertising hoardings did have permission to be in place until March 2008. In an email to Keith Marsden and others dated March 4 2007, Councillor Mullaney communicates this fact.
 - On 11 June 2005 another 'Councillor Enquiry' from Councillor Mullaney requested that a Stop Notice be implemented in respect of Mr Zaman's building. In late July 2005, Mr Marsden contacted Councillor Mullaney to raise concerns that Mr Zaman was using pile drivers in the building. Councillor Mullaney was also concerned about access to Mr Marsden's property by fire engines but did accept that this was a matter for Mr

Marsden to sort out. Councillor Mullaney was also aware of the skateboard park and Mr Zaman's building by virtue of his membership of the Planning Committee and aware that Mr Zaman also had a councillor advocating his position in Committee.

- The evidence shows that Councillor Mullaney took a keen interest in the planning issues surrounding Mr Zaman's building. In the summer of 2006 Councillor Mullaney was again contacted by Mr Marsden concerning actions of Mr Zaman. Whilst Councillor Mullaney indicated that the issue was for Mr Marsden to sort out and that it was nothing to do with him, it is instructive in determining the question of official capacity that Mr Marsden approached the Councillor with a request to act. This suggests to the Appeals Tribunal that Mr Marsden believed that Councillor Mullaney was acting in his official capacity in relation to the two buildings.
- The YouTube video is also instructive in determining the official capacity issue. Councillor Mullaney identifies himself as a councillor at the outset, when asked for his name by Mr Zaman he says 'I'm Councillor Martin Mullaney' and confirms that he is a councillor when asked again by Mr Zaman. During the course of the filming Mr Marsden complains that Mr Zaman's building is 'dangerous.. full of rats and pigeons and sewerage and all sorts of horrible stuff. It stinks all summer long' and 'It really does need sorting out' and later following Councillor Mullaney's comment that the state of the building was a disgrace, Mr Marsden addressing him says 'We need the city council to do something about it'.
- The video was subsequently posted on Councillor Mullaney's website, the home page of which is headed 'Martin Mullaney, Councillor for Moseley & Kings Heath, Birmingham'. The video was accessed by a link to YouTube.
- In the opinion of the Appeals Tribunal the creation of the video was an integral and ongoing part of supporting a constituent in order to promote action by the council to progress the issue to a satisfactory conclusion. Also, the Councillor's membership of the Planning Committee, in the view of the Appeals Tribunal, inextricably links him to acting in his official capacity on this issue. This visit to video the premises was a continuation of Councillor Mullaney's interest in Mr Zaman's building, which the Appeals Tribunal considers was entirely legitimate in his official capacity as a Councillor.

6.5 Having determined that Councillor Mullaney was acting in his official capacity, the Appeals Tribunal has to determine whether or not the decision of the Standards Committee that paragraph 2(b) was breached is sustainable. Paragraph 2(b) is one of the general obligations of the Code and requires a Councillor to treat others with respect. The allegations made by Mr Zaman were that Councillor Mullaney did not treat him with respect in several ways:

- By virtue of trespassing on his land and a building he owned, filmed him and the building and made the film available on the internet.
- That the film made a number of negative statements regarding the ownership of the property including that Mr Zaman carried out work on the property without planning and building control consent; that he had made the building structurally unsafe and made defamatory remarks about him which caused him and his family distress.

- 6.6 Much is made by Councillor Mullaney that the definition of treating others with respect in APE 0374 Shaddock is uncertain and therefore unlawful. The Appeals Tribunal disagrees; as indicated in *Sanders –v- Kingston (no.1) [2005] EWHC 1145 (Admin)* the concept of respect is perfectly capable of being applied by a reasonable person. The definition of respect in APE 0374 is straightforwardly stated as ‘failure to treat others with respect will occur when unfair, unreasonable or demeaning behaviour is directed by one person against another’. The circumstances are also relevant and can include the place where the behaviour occurred, who observed the behaviour, the character and relationship of the people involved and the behaviour of anyone who prompted the alleged act of disrespect.
- 6.7 In determining that Councillor Mullaney failed to treat Mr Zaman with respect the Standards Committee relied on a number of points in support.

Trespass onto Mr Zaman’s land

- 6.7.1 Firstly it concluded that Councillor Mullaney had trespassed on Mr Zaman’s land. There is a dispute as to the correct position of the hoarding. Mr Marsden maintains that it is in the wrong place and restricts his right of way. The positioning of the right of way was resolved following discussions between the parties and a definitive plan was drawn up by Messrs Bigwoods. This evidence was not available to the Standards Committee at the time of its adjudication but it is clear from the video that Mr Marsden believed, correctly as it later proved, that he was on the right of way when requested to leave by Mr Zaman.
- 6.7.2 The ESO argues that as Councillor Mullaney could not traverse from Mr Zaman’s land to Mr Marsden’s land on the right of way and therefore could not exercise his right of way as he well knew and had so stated in the video and that consequently he was trespassing for the whole period that he was within the hoardings.
- 6.7.3 The Appeals Tribunal notes that Councillor Mullaney did not respond to requests from Mr Zaman to leave the land until a time of his own choosing. Indeed, in the opinion of the Appeals Tribunal, the video shows Councillor Mullaney and Mr Marsden studiously ignoring the requests being made by Mr Zaman.
- 6.7.4 Regardless of the proper interpretation of the law concerning rights of way there is no dispute that Councillor Mullaney did trespass onto Mr Zaman’s land to video the inside of the building and continued to trespass after being told he was trespassing by Mr Zaman. Later Mr Zaman repeated to Councillor Mullaney and Mr Marsden that they were trespassing and asked them to leave. By implication, it is suggested by the Appellant that a 34 second trespass was reasonable in order to gather evidence to show the alleged unsafe and dangerous state of the building.
- 6.7.5 The Appeals Tribunal considers that the actual trespass, which was witnessed by Mr Zaman and which he identified as a trespass by Councillor Mullaney was disrespectful to Mr Zaman. In the opinion of the Appeals Tribunal, Councillor Mullaney should have raised access to the building with Mr Zaman before entering or requested council officials to gain access through their right of entry powers. It considers that the Councillor’s actions were foolhardy and potentially dangerous to himself, and possibly actionable in the civil courts. In the opinion of the Appeals

Tribunal Councillor Mullaney was there as a councillor undertaking his duties rather than acting as an investigative reporter.

- 6.7.6 For these reasons the Appeals Tribunal considers that Councillor Mullaney was disrespectful to Mr Zaman at the time of the visit to Mr Zaman's building because it was an unreasonable interference with Mr Zaman's property rights having neither sought permission to enter or informed him that he was going to visit the building. Consequently, the Appeals Tribunal upholds this aspect of the decision of the Standards Committee.

Tenor and content of the video

- 6.7.7 Secondly, the Standards Committee concluded that the tenor and content of the video was biased against Mr Zaman. The Appeals Tribunal is in no doubt that the Standards Committee was correct in concluding that the video was biased against Mr Zaman. Despite protestations by Councillor Mullaney that the purpose of the video was simply to show the state of the building The Appeals Tribunal concludes based on its tone and content that the video's purpose was to show Mr Zaman in a poor light.
- 6.7.8 Councillor Mullaney identifies that the buildings are owned by Mr Zaman and includes Mr Zaman's home address in his opening remarks. Following this, most of the comments are made by Mr Marsden. Councillor Mullaney does not at any stage disassociate himself from the comments or seek to temper the comments made. The Appeals Tribunal considers that this acquiescence establishes that Councillor Mullaney was content to adopt the commentary of Mr Marsden. He clearly says in the video that the state of the building 'is an absolute disgrace'.
- 6.7.9 The video, in both its unedited and edited versions, was posted on YouTube by Councillor Mullaney through a link on his website and with his full knowledge of its content. It is clear from this that he was happy to associate himself with the opinions expressed in the video. Whilst some of the comments were purely factual, others amounted to speculation (the unsafe and dangerous state of the building) and another was simply incorrect (the reference to Mr Zaman having done or not done something in breach of planning and building consents).
- 6.7.10 In applying the definition of what constitutes respect, the Appeals Tribunal concludes that Councillor Mullaney was unfair and unreasonable within the context of the Code to Mr Zaman in publishing, through the means of a video posted on the internet, an unsubstantiated account of Mr Zaman's activities and therefore upholds that aspect of the Standards Committee decision.

Editing the video in light of additional information

- 6.7.11 Thirdly, the Standards Committee concluded that paragraph 2(b) of the Code was breached by virtue of not editing or qualifying the content of the video once additional information had come to light. Both the Standards Committee and the ESO maintain that additional editing of the video should have taken place once information came to light. Councillor Mullaney contends in his representations that he is under no legal obligation to edit a video once new information has come to light and

that it was as a consequence of the video (and by implication his efforts) that Mr Zaman was required to complete the underpinning and keep the cellar dry.

- 6.7.12 It is clear from the evidence that in June 2005 the Planning Enforcement Officer was concerned that the advertising hoardings did not have permission but that they might enjoy deemed consent. An update was supplied to Councillor Mullaney on 20 June 2005 indicating that Mr Zaman had deemed consent to erect the advertising hoardings.
- 6.7.13 The first unedited version of the video was placed on YouTube on 3 March 2007 and seen by Mr Zaman on that date and the following day as detailed in the uncontested facts established by the ESO. Councillor Mullaney was prompted by the solicitor's letter and advice he received from a councillor to edit the video which he then posted on YouTube shortly thereafter. The acceptance of editing in respect of the advertising hoardings and other comments created a precedent for Councillor Mullaney.
- 6.7.14 Having accepted that editing was appropriate when information was incorrect, in order to be consistent he should, in the opinion of the Appeals Tribunal, have maintained this principle and further edited or posted corrections once new information came to light. To not do so, is, in the opinion of the Appeals Tribunal inconsistent and unfair to Mr Zaman and consequently a breach of paragraph 2(b) of the Code of Conduct.
- 6.7.15 The Appeals Tribunal notes that at no stage was the 'Blog' which accompanied the video revised to take account of the video editing and was therefore, in its opinion, also inaccurate and disrespectful to Mr Zaman. Councillor Mullaney also sent the video to 'The Stirrer', a local news website, which published it. The video prompted comments from members of the public. In the undisputed facts Mr Zaman states that the appearance of the video on the website and some of the comments caused him and his family considerable distress and caused harm to his professional standing and his standing in the community.
- 6.7.16 The Appeals Tribunal considers the action of sending the video to the 'Stirrer' to be a clear breach of paragraph 2(b) by Councillor Mullaney.

Failure to agree not to publish or destroy the video

- 6.7.17 Fourthly, the Standards Committee concluded that paragraph 2(b) of the Code was breached by Councillor Mullaney failing to agree not to publish or destroy the video as requested by Mr Zaman through his solicitors by letter dated 2 March 2007.
- 6.7.18 The ESO considered that Councillor Mullaney should have removed the video after he had the results of the building inspection. The suggestion was that the continuing publication of the video caused Mr Zaman and his family distress and that not to remove it after receiving the results of the building inspection constituted a breach of paragraph 2(b).
- 6.7.19 It was clear that by April 2007, Councillor Mullaney had achieved his stated aim, namely to as he put it 'shame the Planning Department into action' although the Appeals Tribunal has no evidence that they were not taking appropriate action.

6.7.20 In the opinion of the Appeals Tribunal, to continue to publish the video was unnecessary and its continued publication was unfair and unreasonable towards Mr Zaman in that it was causing distress to him and his family and consequently was a breach of paragraph 2(b) of the Code of Conduct.

7. In reaching the above conclusions the Appeals Tribunal has taken account of the written representations of the parties. The suggestion from Councillor Mullaney that Mr Zaman misled the Investigating Officer has been taken into account in reaching the conclusions. As the Appeals Tribunal has the benefit of the videos it is able to reach its own conclusions about the conduct of the parties on the day in question.
8. No proceedings for assault were brought by either Mr Zaman or Councillor Mullaney and the Appeals Tribunal has discounted assertions in respect of this in reaching its conclusions. The Appeals Tribunal also notes that the facts detailed in the ESO's report were not disputed.
9. The Appeals Tribunal is invited by Councillor Mullaney to declare that the proceedings were not Article 6 ECHR compliant. It is asserted that a fair trial was not possible because the Committee relied on two matters not contained in the ESO's report, namely that the tenor and content of the video was biased against Mr Zaman and not publishing or destroying the video despite the request of Mr Zaman's solicitors.
10. The latter point was detailed in the ESO's report and in the view of the Appeals Tribunal it was entirely reasonable for the Committee to view the video and reach its own conclusions having read the conclusions of the ESO in his report.
11. The Appeals Tribunal considers that the fair trial argument is unsustainable. Councillor Mullaney had prior sight of the documentation in the case and confirmed at the commencement of the hearing that he had no dispute with the facts contained within the ESO's report and Mr John Hemmings MP, was given opportunities to make submissions on behalf of Councillor Mullaney where he could have challenged the ESO's conclusions. It disagrees that the mischief being complained of was vague. The ESO's report is clear and lucid as to what, in his view, constituted a breach of the Code.

Sanction

12. The Standards Committee, in its written representations in respect of the appeal states that in determining the sanction to be imposed it referred to the Standards Board guidance [July 2003] and duly considered the advice therein and considered the decision to suspend Councillor Mullaney for a period of one month to be proportionate and reasonable, particularly as the option of an apology to Mr Zaman was offered instead of activation of the suspension.
13. Councillor Mullaney contends that the sanction was excessive and appropriate for more serious cases as defined in the Standards Board guidance and that his case was not a serious one in that context. The Appeals Tribunal considers that the sanction imposed by the Standards Committee was reasonable. The Standards Board guidance on suspension does not provide an exhaustive list of what behaviour justifies suspension.
14. The Appeals Tribunal considers that the course of conduct of Councillor Mullaney as outlined in the findings represents a serious breach of the Code meriting a short period of suspension. The Appeals Tribunal confirms the one month suspension imposed by the Standards Committee be varied to no longer offer the option of an

apology to avoid suspension. It should be noted that the Appeals Tribunal still considers that an apology is appropriate.

15. The Appeals Tribunal has upheld the findings of the Standards Committee.
16. The decision of the Appeals Tribunal was unanimous.
17. A copy of this determination is being sent to the Appellant, the Ethical Standards Officer, the Standards Committee and any person who made the allegation that gave rise to the investigation.
18. The Standards Committee is required to impose the penalty specified at paragraph 14 above.
19. This determination will be published in a newspaper circulating in the area of the local authority and will also be published on the Adjudication Panel's website at www.adjudicationpanel.co.uk.

Steve Wells

Chairman of the Appeals Tribunal

16 May 2008