

**PANEL DYFARNU CYMRU
ADJUDICATION PANEL FOR WALES**

DECISION REPORT

TRIBUNAL REFERENCE NUMBER: APW/003/2011-012/CT (“Reference 1”)
APW/005/2012-013/CT (“Reference 2”)
APW/007/2012-013/CT (“Reference 3”)

REFERENCE IN RELATION TO AN ALLEGED BREACH OF THE CODE OF CONDUCT

RESPONDENT: Former Councillor Whitby

RELEVANT AUTHORITY(IES): Coedpoeth Community Council

1. INTRODUCTION

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

1.2 In the absence of any proper and meaningful response by former Cllr Whitby, the Case Tribunal determined its adjudication by way of written representations at a meeting on Thursday 28 March 2013 at the New House Country Hotel, Thornhill, Cardiff.

2. PRELIMINARY DOCUMENTS

2.1 Reference from the Public Services Ombudsman for Wales

2.1.1 In letters dated 24 November 2011, 6 September 2012 and 29 October 2012, the Adjudication Panel for Wales received three separate referrals from the Public Services Ombudsman for Wales (“the Ombudsman”) in relation to allegations made against now former Cllr Michael Whitby. The allegations were that former Cllr Whitby had breached the above Community Council’s Code of Conduct by his behaviour and consequent arrest for a breach of the peace during a demonstration in Liverpool on 4 December 2010, failure to show respect and consideration to the Clerk to the Community Council, his behaviour, arrest, subsequent imprisonment and non-cooperation with the relevant authorities arising from a protest at Birkenhead County Court on 7 March 2011; and his lack of co-operation with the Ombudsman’s investigation of these allegations.

2.1.2 Two of the references to the Ombudsman relate to similar incidents between December 2010 and March 2011 when former Councillor Whitby attended demonstrations, one of which in Liverpool was organised by the British National

Party (BNP). On the first occasion he was alleged to have deliberately incited anti-BNP demonstrators using offensive language. On the second occasion he took part in a violent and disorderly invasion of Birkenhead County Court. On both occasions he was arrested and on the second occasion was sentenced to fourteen days of imprisonment, eventually serving seven days in Liverpool Prison. He was actively uncooperative with the police and prison authorities on each occasion. Subsequent media coverage identified him as a serving community councillor. Complaints were lodged by a fellow elected councillor. There was a further complaint arising from a series of e-mails and comments made by former Councillor Whitby between May and October 2011 in which he appeared to criticize the Town Clerk, and to question his professional integrity. Attempts were made by the Town Council to resolve matters but without success. The Town Clerk lodged a formal complaint.

2.2 The Respondent's Written Response to the Reference

2.2.1 Former Councillor Whitby was advised on the 29th November 2011 that the Ombudsman had forwarded his report to the Adjudication Panel. The letter was returned undelivered by the Royal Mail. He was e-mailed by the Adjudication Panel's Registrar on the 5th December and asked to provide an alternative address for delivery. He responded the same day with a two line e-mail –

“As I have stated many times this witch hunt must end now. Otherwise the Common Purpose controllers involved will have to accept the consequences of a criminal action”.

No alternative address was provided and accordingly all papers were sent to him by e-mail on the 20th December, and he was advised that, in the absence of a substantive response, the Case Tribunal would determine the matter on the basis of papers before it. On the 23rd December former Councillor Whitby responded in the same vein as his earlier e-mail indicating that this should be recorded as his submitted evidence. He was sent a copy of the directions notice setting out undisputed and disputed facts and given yet a further opportunity to respond. The letter was again returned unopened.

2.3 The Ombudsman's Written Representations

2.3.1 In the absence of a substantive response from former Cllr Whitby, no further representations were invited from the Ombudsman.

3. FINDINGS OF FACT

3.1 The Case Tribunal found the following **undisputed** material facts in relation to **Reference No. 1**:

3.1.1 Mr Mike Whitby was elected as a councillor to Coedpoeth Community Council in May 2008. He signed an undertaking to observe the code of conduct on 12 May 2008. He is now no longer a community councillor and will therefore be described below as “former councillor”.

3.1.2 On 4 December 2010, the British National Party (BNP) held a demonstration in Liverpool city centre which was attended by former Cllr Mike Whitby. He was arrested by Police Sergeant Rowlands and detained in police custody for 10 hours. The police evidence states and the panel found that former Cllr Whitby had a megaphone and walked up to anti-BNP demonstrators shouting “paedophiles” and “communist paedophiles” in an antagonistic manner. When arrested former Cllr Whitby refused to cooperate and at the police station refused to answer any questions and was totally non-compliant. Former Cllr Whitby was released without charge.

3.1.3 The demonstration and arrest was reported in The Leader newspaper on 8 December 2010. Former Cllr Whitby was clearly identified as a Coedpoeth community councillor. His arrest was confirmed by fellow BNP member John Walker.

3.1.4 Cllr O Arfon Jones (Wrexham County Borough Council) complained to the Ombudsman on 6 December 2010 that former Cllr Whitby had failed to observe the code of conduct. Former Cllr Whitby was advised of the intended investigation on 22 December 2010 and was asked to respond to a series of formal questions. He did not do so.

3.1.5 On 25 May 2011, former Cllr Whitby was provided with evidence gathered during the investigation. He sought details of correspondence between the Ombudsman and the police authority (which was refused) and threatened to personally sue the investigator for libel. Between 9 June and 4 July 2011 there was a further exchange of e-mails in which former Cllr Whitby made clear his disdain for the investigation and indicated that he would not cooperate nor respond to the complaint.

3.2 The Case Tribunal found the following **undisputed** material facts in relation to **Reference No. 2**:

3.2.1 On 15 February 2011, Coedpoeth Community Council held a meeting at which a presentation was given by two officers from Wrexham County Borough Council.

3.2.2 On 24 May 2011, former Cllr Whitby sent a copy of minutes of that meeting he had prepared to the Town Clerk, Mr Bamber. Mr Bamber responded on 31 May 2011 saying that he noted the content and would report former Cllr Whitby's concerns to the council on 21 June 2011.

3.2.3 On 2 June 2011, former Cllr Whitby e-mailed Mr Bamber saying:

“Thank you for your reply and also your comment that you;

...’have noted the contents of [my] email and I will report [my] concerns to Council at its meeting on the 21st June 2011’...

Well that's very 'gracious' of you, I must say. But, I would prefer straight talking, instead of inuendo [sic]. As, if you REALLY mean;

... 'I completely disagree with you and will not change a word of it, instead I will put it to the Council on the 21st June'...

.....

In my view, the Clerk should have FAR less involvement in discussions at council meetings, and be FAR more accurate with the minutes. A more observant and less interactive Clerk MAY be able to record the facts more accurately.

.....

YOUR allegiance may well be with [Wrexham County Borough Council], but you are employed by Coedpoeth Community Council, and this Council represents the residents of Coedpoeth. I would hope that the residents of Coedpoeth can reply upon you to do your job accurately, as THEIR interests must remain paramount.

.....”

3.2.4 The minutes of the community council meeting of 21 June 2011 record Mr Bamber's objection to former Cllr Whitby's e-mail and what he perceived as an attack on his professionalism and character. He asked for a formal written apology from former Cllr Whitby. Former Cllr Whitby refused to apologise.

3.2.5 At the Community Council's meeting on 19 July, former Cllr Whitby sought an agenda item to make a complaint about Mr Bamber. The minutes set out this complaint and conclude with a proposal that the Vice-Chair effect an informal meeting between the two parties to see if the difficulties could be resolved.

3.2.6 On 6 August 2011, former Cllr Whitby sent an e-mail copied to all his fellow councillors expressing concern about the minutes of 19 July, that they had omitted the essence of his complaint about the “excessive power and control “ exerted by the clerk.

3.2.7 On 20 September 2011, Mr Bamber declined the proposed mediation and again asked former Cllr Whitby to apologise for “questioning his professionalism and impartiality”.

3.2.8 On 3 October 2011, former Cllr Whitby wrote to the Council referring to Mr Bamber's statement as a threat.

3.2.9 Former Cllr Whitby was sent a copy of the evidence obtained during the Ombudsman's investigation on 6 February 2012 and was asked to respond to a number of formal questions. Former Cllr Whitby's response indicated that he would not cooperate with what he saw as a witch hunt.

3.2.10 Former Cllr Whitby was sent a copy of the Ombudsman's draft report on 14 August 2012, but it was returned on 30 August as former Cllr Whitby had refused to accept delivery of it.

3.3 The Case Tribunal found the following **undisputed** material facts in relation to **Reference No. 3**:

3.3.1 On 7 March 2011, former Cllr Whitby attended a protest at Birkenhead County Court. In the course of the protest a large number of demonstrators (100) invaded the court. Former Cllr Whitby was one of this number.

3.3.2 Documentation supplied by the Merseyside Police indicates a situation of mayhem and disorder at the time of the protest and describes a "harrowing and violent incident in which numerous officers were obstructed and actively assaulted". The Panel accepted this evidence as a correct statement of events.

3.3.3 Former Cllr Whitby was arrested at the scene by Inspector Barrett. He was charged that he had behaved in a manner whereby a breach of the peace had been committed.

3.3.4 Former Cllr Whitby refused to provide personal details at all stages of the police custody process.

3.3.5 On 8 March 2011, former Cllr Whitby was brought before Wirral Magistrates Court. He was found to have breached the peace and upon his refusal to undertake to keep the peace for 12 months he was sentenced to 14 days imprisonment.

3.3.6 Former Cllr Whitby was committed to HM Prison Liverpool and was released on 14 March 2011.

3.3.7 A report of these events appeared on the BNP website on or about 10 March 2011 in which former Cllr Whitby was described as "popular activist and official Councillor Mike Whitby".

3.3.8 Former Cllr Whitby was advised of the Ombudsman's investigation on 28 November 2011. On 13 December 2011, he wrote to the investigator and accused the Ombudsman's staff of arrogance; suggested that Coedpoeth councillors should not "breathe a word" about the complaint; and threatening a legal challenge which would put their homes at risk. He wrote again to the investigator on 16 December 2012 saying "you and your ilk are a joke" and "don't think, for one second, that this matter is over".

3.3.9 Former Cllr Whitby failed to respond to any further correspondence and in particular the formal questions sent to him on 24 July 2012.

3.4 The Case Tribunal found the following **disputed** material facts in relation to **Reference No. 1**:

3.4.1 Whether, as stated by former Cllr Whitby in an email to the Ombudsman's office on 16 June 2011, the complaint to the Ombudsman was vexatious?

3.4.2 Whether former Cllr Whitby's failure to make a substantive response constituted a failure to cooperate with the Ombudsman's investigation?

3.4.3 Whether the content and tone of former Cllr Whitby's responses to the Ombudsman demonstrated a lack of respect as required by the code of conduct?

3.5 The Case Tribunal found the following **disputed** material facts in relation to **Reference No. 2:**

3.5.1 Whether the complaint lodged by Town Clerk was vexatious and constituted a witch hunt?

3.5.2 Whether former Cllr Whitby's comments made in his e-mail on 2 June 2011 constituted legitimate political comment?

3.5.3 Whether the content and tone of the e-mail and subsequent comments made by former Cllr Whitby constituted an unfair comment on the professionalism, impartiality and character of Mr Bamber?

3.5.4 Whether former Cllr Whitby's failure to make a substantive response to the Ombudsman constituted a failure to cooperate with the investigation?

3.6 The Case Tribunal found the following **disputed** material facts in relation to **Reference No. 3:**

3.6.1 Whether former Cllr Whitby's failure to make a substantive response to the Ombudsman constituted a failure to cooperate with the investigation?

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

Reference No. 1

3.7.1 The complaint to the Ombudsman concerning this incident was not vexatious. There was no evidence to support this assertion by former Councillor Whitby.

3.7.2 Former Councillor Whitby's failure to make a substantive response did constitute a failure to cooperate with the Ombudsman's investigation. All councillors who sign the undertaking to observe the code of conduct have a clear and unambiguous obligation to cooperate with such an investigation which means responding to correspondence and enquiries. The evidence showed that former Councillor Whitby had singularly failed to comply with this duty.

3.7.3 Former Councillor Whitby's content and tone of his responses did demonstrate a lack of respect as required by the code of conduct. Between the 9th June and the 4th July 2011 there was an exchange of e-mail with the Ombudsman

in which former Councillor Whitby variously threatened to sue the investigator, harangued her saying that he was “not the slightest bit interested in your totalitarian attitude” and advised her to stop “hounding me”. Letters were returned marked “addressee gone away”. Finally on the 4th July he sent an e-mail saying that he had “absolutely no intention of proving my innocence to you.”

Reference No. 2

3.7.4 The complaint lodged by the Town Clerk was neither vexatious nor a witch hunt. It is clear from the papers that he had legitimate cause to raise matters initially with the Town Council and latterly with the Ombudsman. There is no evidence that this was part of a campaign or witch hunt.

3.7.5 Former Councillor Whitby’s comments in his e-mail to the Town Clerk on the 2nd June 2011 constituted legitimate political comment. The Case Tribunal had regard to the observations made by the Ombudsman in his report, and considered that councillors have a legitimate right to comment on, and express a view about the business of the council. This includes the accuracy and content of minutes and the manner in which an officer conducts meetings. The papers show that former Councillor Whitby’s concerns were raised and discussed as part of council business on the 21st June, and the 19th July 2011. The Town council sought a way to resolve differences through mediation although the Town Clerk did not consider this to be an acceptable way forward.

3.7.6 The tone and content of the e-mail of the 2nd June 2011 and subsequent comment was not unfair comment on the professionalism, impartiality or character of the Town clerk. In coming to this conclusion the Case Tribunal had particular regard to the Ombudsman’s Guidance which has been revised in the light of the High Court case of Calver decided on the 3rd April 2012. The tone and content of the e-mail was inappropriate and badly worded. The working relationship between elected councillors and officers should be conducted on the basis of mutual respect and courtesy. This correspondence was on the borderline of acceptability but the Case Tribunal took into account a number of factors, namely:

- a) the legitimate right of councillors to comment on council business and
- b) the fact that the concerns were raised within the procedures of the council and
- c) the experience and resilience of the officer concerned and his capacity to challenge the comments in a vigorous manner.

3.7.7 Former Councillor Whitby’s failure to make a substantive response did constitute a failure to cooperate with the Ombudsman’s investigation. (see paragraph 3.7.2)

Reference No. 3

3.7.8 Former Councillor Whitby’s failure to make a substantive response did constitute a failure to cooperate with the Ombudsman’s investigation. (see paragraph 3.7.2)

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

4.1 The Respondent's Submissions

4.1.1 The only response received from former Councillor Whitby is set out at paragraph 2.2.1. No further submissions were received from him.

4.2 The Ombudsman's Report

5.2.1 The Ombudsman concluded that following a detailed investigation and having regard to former Councillor Whitby's attitude to the investigation and his persistent failure to respond to requests for information that there was clear evidence to support all of the complaints in references 1 2 and 3 and that his conduct had breached the relevant parts of the code cited in the three reports, save that in respect of reference 2 and his comments concerning the Town Clerk. The Ombudsman did not consider, on the occasions highlighted in the complaint, that former Councillor Whitby could be said to have gone beyond political comment.

4.3 Case Tribunal's Decision

4.3.1 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 Coedpoeth Community Council code of conduct.

Reference No. 1

4.3.2 Paragraph 4(b) of the Code of Conduct states "*You must show respect and consideration for others.*"

4.3.3 The Case Tribunal found that former Cllr Whitby by virtue of the tone and content of his correspondence with the Ombudsman's office breached paragraph 4(b) by failing to show respect to the Ombudsman's investigator.

Reference Nos. 1 and 3

4.3.4 Paragraph 6(1)(a) of the Code of Conduct states "*You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.*"

4.3.5 The Case Tribunal found that former Cllr Whitby by virtue of his behaviour during the demonstration in Liverpool on 4 December 2010, and by virtue of his behaviour and arrest at Birkenhead on 7 March 2011 coupled with his court appearances and detention, brought the office of member and the Community Council into disrepute.

Reference Nos. 1, 2 and 3

4.3.6 Paragraph 6(2) of the Code of Conduct states *“You must comply with any request of.....the Public Services Ombudsman for Wales, in connection with an investigation conducted in accordance with [his] statutory powers.”*

4.3.7 The Case Tribunal found that former Cllr Whitby failed to provide a proper and substantive response to formal questions and thereby failed to comply with the Ombudsman’s requests in respect of the investigation.

4.3.8 The Case Tribunal found that Cllr Whitby did not fail to comply with the code of conduct in relation to alleged conduct towards the Community Council Clerk.

5. SUBMISSIONS ON ACTION TO BE TAKEN

5.1 The Respondent’s Submissions

5.1.1 No submissions were received from former Councillor Whitby.

5.2 Case Tribunal’s Decision

5.2.1 The Case Tribunal considered all the facts of the case. It had regard to its sanctions guidance in particular the factors which may warrant disqualification as a possible option. In determining the appropriate sanction the Case Tribunal found there were no mitigating factors. By contrast there were a substantial number of aggravating factors:

- a) Repeated breaches – there were three complaints within a 10 month period, two of which were for similar breaches.
- b) Actions which brought the Council into disrepute – on two occasions the incidents complained of were widely reported in the press and former Councillor Whitby was clearly identified with the Community Council. The incidents were of a very serious nature and in respect of one incident former Councillor Whitby was imprisoned.
- c) Seeking unfairly to blame others – former Councillor Whitby has never taken any responsibility for his actions. He has sought to blame others, accusing them of conducting a witch hunt against him. He has threatened colleagues on the council, and the Ombudsman’s own investigator. He has made unsubstantiated allegations of conspiracies.
- d) Challenging the investigation and adjudication to the end – this is the most significant and serious factor. Former Councillor Whitby has shown a blatant disregard for the Ombudsman’s investigation and has effectively chosen to ignore the Adjudication process. He has demonstrated contempt for the responsibility laid upon him as an elected councillor and has consistently failed to reply to proper questions and enquiries from both the Ombudsman and the Adjudication Panel. Correspondence has been returned and letters remain unanswered. In so doing he has demonstrated contemptuous

disregard for the code of conduct itself which he solemnly undertook to uphold, and the principles of public life set down in legislation.

5.2.2 The Case Tribunal therefore concluded by unanimous decision that former Cllr Whitby had, by his actions in breaching the code of conduct and in his unacceptable attitude to the investigation and general disregard of the code, demonstrated that he was unfit to hold public office and was unlikely to become fit over the next five years. Accordingly he should be disqualified for 5 years from being or becoming a member of the Coedpoeth Community Council or of any other relevant authority within the meaning of the Local Government Act 2000.

5.2.3 Coedpoeth Community Council and the Standards Committee of Wrexham County Borough Council are notified accordingly.

5.2.4 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.....
Ms Kate Berry
Chairperson of the Case Tribunal

Date April 2013

Mr Andrew Bellamy
Panel Member

Mr Colin Evans
Panel Member