

## **DECISION REPORT**

**TRIBUNAL REFERENCE NUMBER:** APW/001/2019-020/CT

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

**RESPONDENT:** Councillor Aaron Shotton

**RELEVANT AUTHORITY:** Flintshire County 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 Llandudno Magistrates Court on 27, 28 and 29 January 2020. The majority of the hearing was open to the public and only a limited amount of evidence in relation to the precise extent of any relationship was heard in private.

1.3 Councillor Shotton attended and was represented by Ms Joanne Clement, Counsel and the Public Services Ombudsman for Wales (“the Ombudsman”) was represented by Mr Gwydion Hughes, Counsel. The Monitoring Officer or Deputy Monitoring Officers of Flintshire County Council were also present throughout the proceedings.

1.4 *References in square brackets within this Decision Report are to pages within the bundle of Tribunal Case Papers unless otherwise stated.*

## **2. PRELIMINARY DOCUMENTS**

### **2.1 Reference from the Public Services Ombudsman for Wales**

In a letter dated 10 June 2019 [B1], the Adjudication Panel for Wales received a referral from the Ombudsman in relation to allegations made against the Respondent. The allegations were that the Respondent had breached the Code of Conduct of the Relevant Authority by failing to comply with Paragraphs 6(1)(a), 7(a) and 7(b) of the Code of Conduct in relation to certain events connected to interactions with his Personal Assistant (“PA”) in 2012 and also in 2016 and 2017.

### **2.2 The alleged breaches of the Code of Conduct**

The three alleged failures under consideration were as follows:-

### 2.2.1 Allegation 1

Whether the Respondent, in his official capacity or otherwise, used or attempted to use his position improperly to confer on or secure for himself or his PA, an advantage or create or avoid for himself or his PA a disadvantage by providing an opportunity to view questions before her interview for the permanent role of PA and also whether he thereby conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute.

### 2.2.2 Allegation 2

Whether the Respondent used, or authorised his PA to use the resources of the authority (hire of vehicles):-

- (i) imprudently;
- (ii) in breach of the authority's requirements;
- (iii) unlawfully;
- (iv) other than in a manner which is calculated to facilitate, or to be conducive to, the discharge of the functions of the authority or of the office to which he had been elected or appointed;
- (v) improperly for political purposes; or
- (vi) improperly for private purposes.

and also whether he thereby conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute.

### 2.2.3 Allegation 3

Whether the Respondent conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute by sending and/or encouraging his PA to send inappropriate messages, to include messages of a sexual nature, during office hours.

## 2.3 Summary of circumstances leading to alleged breach.

2.3.1 The three allegations arose as a result of the discovery by the PA's husband of a series of "WhatsApp" messages and a subsequent complaint to the Chief Executive of the Relevant Authority and an investigation leading to disciplinary proceedings involving the PA.

2.3.2 The circumstances surrounding **Allegation 1** were that the PA had been seconded to the role of PA to the Leader in May 2012 and had previously supported Councillor Woolley who had been Leader and was succeeded by the Respondent as Leader in May 2012. An interview took place for the permanent PA role on 29 November 2012. The PA was the only remaining candidate by that time, another candidate having withdrawn her application the week before.

2.3.3 **Allegation 2** arose during the course of the disciplinary investigation when e-mails recovered from the Council's computer systems revealed private hotel bookings made by the Respondent using his Council e-mail address which, in three cases, coincided with hire-car bookings made by the PA using the Council's booking system and paid for by the Council. In each case the cost of hire was £11 per day.

2.3.4 **Allegation 3** arose from the discovery of WhatsApp messages which were forwarded to the Chief Executive and Monitoring Officer of the Relevant Authority, some of the messages apparently having been sent during working hours.

## 2.4 The Councillor's Response to the Investigation and Reference

2.4.1 The Respondent e-mailed the Ombudsman's investigating officer on 2 July 2018 [B533] following notification of the complaint and said that he and his family had been extremely distressed by the complaint, level of press coverage and social media comments it attracted.

2.4.2 Two officers from the Ombudsman's office conducted a lengthy interview with the Respondent on 12 November 2018 in which he denied **Allegations 1 and 2**. The Respondent agreed that a certain WhatsApp exchange between himself and his PA was not appropriate however in relation to **Allegation 3** [B286].

2.4.3 The Respondent's solicitor, Ms Randle of Steel and Shamash, (later Edwards Duthie Shamash), wrote a detailed response to the Ombudsman's draft Report on 31 May 2019 [B533] stating; "We note that you have provided a very clear and concise report into the allegations made against Councillor Shotton in spite of the huge amount of material which you had to take into account, evidenced by the 497 pages of appendices with the draft report. As a consequence of your efforts to distil some of this evidence into a comprehensive narrative, we are concerned to note, however, that some important details have been omitted. On a few occasions, we are concerned that this gives an impression, albeit unintentionally, of our client's conduct or the context which he found himself, which is not entirely accurate." The solicitor then urged the Ombudsman to accept a number of points to expand certain paragraphs of the Report.

2.4.4 Ms Randle completed a formal Reply to the Notice of Reference from the Ombudsman on 5 July 2019 [C1]-[C23] and provided a detailed response to the material facts set out in the Ombudsman's Report.

## 2.5 The Ombudsman's Written Representations

2.5.1 The Ombudsman responded to Ms Randle's letter of 31 May 2019 on 10 June 2019 [B543] and stated that the investigating officer had carefully considered the comments in the letter and had made some minor amendments to her analysis as a result, however stated that the overall conclusions were unchanged. It was also stated that consideration is generally given at pre-hearing stage of any requirement to conduct a hearing in private based on the assessment of the public interest.

2.5.2 The Ombudsman provided a concise formal response to the Reply to the Notice of Reference on 18 July 2019 [D1]-[D7].

### **3. PRE-HEARING REVIEW AND DIRECTIONS**

3.1 General Directions were issued on 10 October 2019 [A1]-[A5] which included the listing of the matter for pre-hearing review on 10 December 2019. The Case Tribunal convened the Pre-Hearing Review of its own motion for the efficient discharge of the proceedings.

3.2 Listing Directions were issued following the pre-hearing review on 18 December 2019 [A6]-[A15] to identify the list of relevant disputed and undisputed facts, to confirm the allegations, to direct that certain limited evidence on the precise extent of any relationship would be heard in private at the final hearing, to make directions accordingly with regard to the Tribunal Bundle and to agree the list of witnesses to be called.

3.3 General Directions were also issued on the 22 January 2020 [A16]-[A17] in relation to the Tribunal Bundle.

### **4. PRELIMINARY MATTERS AND APPLICATIONS MADE DURING THE HEARING**

At the outset of the hearing and during the course of proceedings the following applications were made and the following issues arose:-

4.1 A small number of documents had been omitted from the Bundle and these were numbered B395(a) to (n). The quality was not particularly good and clearer copies were agreed by the parties and the Case Tribunal directed that these be included in the Bundle.

4.2 The Directions Section (A) of the Bundle had been expanded and numbered to include the General Directions dated 10 October 2019 [A1] to [A5], Listing Directions dated 18 December 2019 [A6] to [A15] and further General Directions dated 22 January 2020 [A16] to [A17].

4.3 Ms Clement made an application to file a witness statement on behalf of the Respondent and the Case Tribunal directed that the statement be admitted into the Bundle.

4.4 At the pre-hearing review the parties had indicated that they would wish the first witness to provide evidence as to character as well as evidence as to fact at the first stage of the proceedings. Mr Hughes did not object on behalf of the Ombudsman and the Case Tribunal duly directed this course of action.

4.5 Ms Clement raised a preliminary point during the proceedings with regard to the particular points that could be raised during the public and private sessions of the hearing and wished to receive precise legal directions as she considered there to be

one or two grey areas. In particular Ms Clement did not consider that cross-examination of the issues as to the hire-car allegation, **Allegation 2**, could be easily separated into issues which could be examined in public and those which could be examined in private. The Case Tribunal did not agree and directed that the administrative and practical matters relating to the hire-cars be heard in public as it related to financial probity and that it could be separated from cross-examination regarding the motivation for and relationship background given that an inappropriate relationship was an undisputed fact. The Case Tribunal directed that questions to Mr Everett regarding the precise extent of the relationship would be heard in private and evidence regarding the PA's interview for a permanent post, **Allegation 1**, would be heard in public. **Allegation 3**, with regard to the inappropriate messages during office hours, would be heard in private only to the extent that it would go to the precise nature of any relationship.

4.6 Ms Clement also requested clarity with regard to **Allegation 3** at Paragraph 4.3.3 [A7] and whether this allegation extended to messages outside office hours. The Case Tribunal confirmed that the wording should read; "Whether Councillor Shotton conducted himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute by sending and/or encouraging his PA to send inappropriate messages, to include messages of a sexual nature, during office hours" (the comma having previously been omitted).

4.7 During the course of the hearing, the PA said that she wished to correct one of her witness statements. As a result, the Respondent's representative applied for disclosure of the transcript and recording of the interview together with all correspondence between the Ombudsman's investigator and the PA relating to the drafting and finalisation of the PA's witness statement. In the interests of proportionality, the interests of justice and expeditious disposal of the case, the Case Tribunal did not order disclosure of the transcript and recording. It did however order the disclosure of draft statements and all related written correspondence [H1] to [H38] in the interests of natural justice and these were supplied during the course of the hearing.

4.8 In connection with this matter, Ms Clement also invited the Case Tribunal to issue a warning to the PA with regard to giving evidence on oath and the Tribunal Chairperson duly proceeded with this course of action.

4.9 During the adjournment to arrange for disclosure as per 4.7 above, the Monitoring Officer also provided the parties with additional documentation with regard to **Allegation 1** and it was agreed by the parties and directed by the Case Tribunal that this be included in the Bundle [G1] to [G5].

4.10 An agreed position statement was read out to the Tribunal and then submitted in written format with regard to the question of whether there had been a second candidate for the post of PA. (There had been a second candidate who withdrew her application a week before the interview).

4.11 Finally, Ms Clement applied for the witnesses as to character who were due to provide oral evidence, to give their evidence before submissions on the Disputed Facts were made by Counsel for each of the parties. There being no objection from

Mr Hughes, the Case Tribunal agreed to this course of action in order to release the witnesses.

## **5. THE HEARING**

The Case Tribunal considered the contents of the Bundle including the witness statements of the witnesses who provided oral evidence as well as the complainant's witness statement and heard submissions and oral evidence as follows. The Monitoring Officer and Deputy Monitoring Officer were provided with opportunities throughout the proceedings to comment on the evidence and to clarify policy and governance issues in relation to the Relevant Authority.

### **5.1 The Ombudsman's presentation of the investigation report**

Mr Hughes briefly introduced the Ombudsman's investigation report.

### **5.2 Witnesses as to Fact**

#### 5.2.1 Mr Everett, Chief Executive at the Relevant Authority

Mr Everett gave evidence as to the layout of the open plan Executive office where the PA worked and as to the dates of the 2017 local government and general elections. He was however unable to assist the Case Tribunal as to the precise details of the Council's flexible work/home-working scheme. With regard to the Respondent's working hours as Leader, these were not fixed or standard working hours although the Leader should make his availability known generally. Mr Everett was aware of the arrangement for hiring vehicles for official purposes but unaware of any policy or the specific procedures for booking such vehicles, although a PA would normally make travel arrangements for senior Members and he was not sure of any approval processes either at the relevant time or currently. Mr Everett said there was no ban on the use of private mobile phones and that such a ban would be unrealistic.

Between 2016 and 2017 Mr Everett had some temporary line management responsibilities for the PA in view of the absence of the line manager due to ill-health. Before 2017, he had no concerns about the nature of the relationship between the Respondent and the PA and he would have expected to have known if there were any concerns as the Executive team was close-knit and as the offices were highly visible.

It was confirmed that the press coverage surrounding this case had impacted negatively after Mr Everett had worked hard with the Respondent to improve the Council and to build a good reputation. In response to questions from Ms Clement regarding salacious reports in certain newspapers which focused on sexual claims which did not form the basis of the allegations, Mr Everett made it clear that he did not read the same.

Mr Everett then gave limited evidence in private session.

### 5.2.2 Ms Sharron Jones, former Executive Office Manager

Ms Jones stated that the PA had given a good interview. Ms Jones did not recall having said that the PA must have received the questions in advance. She might have said it in jest but did not think so as that would not have been very professional. If she had, it would have been a compliment and never a suggestion that the PA had the questions in advance. She did not recall any joke in the office on the subject either and nothing was said in her presence as manager.

Ms Jones had not had any concerns about the Leader and the PA and thought that the relationship was professional.

With regard to interview questions, these would have been written by the HR officer and Ms Jones explained the type of questions that would have been asked. Different questions would have been asked at the interview for the permanent role as compared with the initial secondment which would not have been formal. No-one else had expressed interest in that secondment opportunity.

### 5.2.3 Ms Hayley Selvester, former PA

The former PA was asked by Mr Hughes to confirm the contents of her witness statements and her signature, one dated 9 August 2018 [190]-[B194] and the other 1 May 2019 [B204]-[206]. She stated that not all of her first statement was true and that paragraphs 12, 14 and 15 of that statement were incorrect. It was correct that the Respondent was meant to be interviewing her and that he told her that the questions were on his desk, however it was incorrect to say that he was joking by saying that the questions were on his desk or that it was a joke that she had seen the questions. He did allow her to see the questions and she did look at them. She said that there had been another internal applicant for the post of PA.

The PA continued to give her evidence on the second day of the hearing and, following Ms Clement's invitation to issue the same, the Tribunal Chairperson warned the PA of the consequences of providing a false statement, informed of the duty to tell the truth to the Tribunal and of the right to refuse to answer questions which could leave her or her spouse open to criminal proceedings.

The parties' representatives had agreed a statement overnight to the effect that the second applicant for the role of PA had withdrawn her application and the PA was the only remaining candidate interviewed on 11 December, had scored highly in interview and was appointed to the role.

The PA confirmed that she had not been in a personal relationship with the Respondent at the time of the interview in 2012.

### **Allegation 1**

The PA confirmed her application for the role of PA [G1]. She would like to think that she placed the interview in the Respondent's diary, however confirmed that the

Respondent in fact attended a School Budget Forum meeting instead and not a Scrutiny meeting as she had previously stated [B345].

The PA could not remember Ms Jones giving the Respondent an interview pack, however he must have been given a pack. She could not remember the words as this was back in 2012, however he made it clear that if she wanted to, she could have a look and that they were on his desk and that the text messages in 2017 make that clear. The PA said that this admission in the hearing was just as damaging for her as it was for the Respondent.

She could not remember the exact detail but said that the pack contained her application, questions and a sheet for the interviewer's own notes. She said she did not take the questions home or copy them. Following interview, she couldn't recall being told that she had done well and did not recall being teased by anyone.

Ms Clement then cross-examined the PA on the contents of a WhatsApp exchange with the Respondent dated 26 March 2017 [B53] where she expressed an interest in working with an AM. The exchange progressed and referred to flirting one's way into a job, progressing to; "Can you not remember leaving me the questions for the interview!" The response was "Did I" and culminating in three messages from the PA within the same minute 12:12 as follows: "Nope...you were meant to interview me with shaz and hr", "You gave me the questions the night before", "Then you didn't turn up for interview...still in committee so told shaz to go ahead without you!" then a 'shocked face emoji'. The Respondent wrote 12:13; "Oh...yea I forgot about that". The PA believed that he was referring to the interview questions.

Ms Clement referred to the Investigatory Interview of the PA on 29 June 2018 [B451], where the importance of being open and honest had been stressed, however she accepted that she had tried to hide the truth in certain respects. She agreed that she had also referenced joking about the questions being on his desk and agreed that at the time she had said; "no I would never [look at questions left on the desk]". She said that she had lied as she was under extreme pressure in her personal and family life at the time, so she panicked and lied.

The PA was also taken to her witness statement [B190] and to the Ombudsman's correspondence with regard to signature of statements [H1-H38] and opportunities to add or better explain her position and to the disciplinary hearing outcome [B477] where it was recorded that the PA had strongly refuted that she had looked at the interview questions and that she had no motivation for lying when she had come clean about the other allegations. The PA said she was now being truthful as she was under oath although she had lied to a number of previous investigators. She said it would have been easier to have said the same to this Tribunal, however the Respondent did leave the questions for her.

The PA was referred to newspaper articles and she responded that it was absolutely ridiculous to suggest that she was the source of any leak. She had not been angry about losing her job, she did not seek revenge against the Respondent and did not want to see him 'go down'.

When asked to compare her interview answers to the model answers which had accompanied the questions in the interview pack, she agreed that they were very similar and she recognised interview question/model answers sheet [G2-G3].

## **Allegation 2**

The PA agreed that she booked hire cars through the Council system for private journeys in question. She was referred to her second statement [B204] and she explained the standard system for booking cars at the relevant time, including an “authorisation summary” [B395]. Normally a Member would not authorise such a booking and would simply request the arrangement of travel. She agreed that in her statement she had referred to booking hire cars for three separate occasions “at his request and/or with his knowledge”.

The PA described each of the three occasions 27-29 February 2016, 11-13 April 2016 and 20-23 May 2016 when she had booked hire cars for private purposes [B395-B399]. She said that she had discussed arrangements with the Respondent as to how to arrange meetings. She said that she would see if they could hire a car as they were at good rates however she was aware that they couldn't be booked in this way for personal use. She said that the Respondent did not offer to pay personally for the bookings and she did not say that she would do so. The Respondent paid for the petrol.

The PA agreed that the Respondent would not be copied in to the booking and he would not have seen the details. The cost of hire at that time was £11 per day however Ms Clement asked the PA whether she was asking the Tribunal to believe that the Respondent would indeed risk it all to save a few pounds, she answered “yes”.

It was put to the PA that when made aware of this allegation, she realised that she would get into yet more trouble and that she had been looking for someone else to take the blame. The PA denied this and said that there was equal blame. She explained her reluctance to sign her second witness statement and to engage with the process at that time.

On the third day of the hearing, the PA gave a limited amount of her evidence in private in accordance with the Listing Directions dated 18 December 2019 in relation to **Allegation 3**.

### 5.2.4 Councillor Shotton, the Respondent

The Respondent's evidence in chief was comprised firstly of the witness statement forwarded to the Tribunal on the evening of 24 January 2020 and the Respondent confirmed the contents of this statement and his signature. Ms Clement asked further questions in chief.

## **Allegation 1**

The Respondent explained that his experience of staff interviews was in relation to senior officers where questions may have been considered in advance then taken back and only handed to Members just prior to interview to make sure that nothing untoward happened. In relation to the PA's interview, he could not recall an interview pack and did not know what happened to any pack that may have been prepared for him. He said he hadn't seen the interview questions [G2] before and he would have recalled seeing them. When asked whether he might have been allocated questions to ask, he said that he had no idea. He said he was struggling with the question as to whether or not he was intended to be part of the interview process. He attended the Schools Forum at the same time set for the interview, it may have been the first of the administration as it did not meet regularly and as Finance Cabinet Member and Leader, he would not have missed them.

His initial stance was that no interview had taken place [B117]. He agreed that it was fair to say that he had been expected to take part in the interview in view of the evidence contained in two e-mails from Ms Jones, one preparing for interview, the other on the day of interview referring to the Respondent putting the interview back to 10.30 [B518]-[B519]. He did not know how he responded however and could not recall whether he was hoping to do both, however he could not "for the life of him" understand why he would attend the interview and thought it would have been irregular for him to have been observing, let alone to have been participating in the interview. He accepted however that there had been a lot of water under the bridge since 2012 and that the interview would have been utterly routine and that it would not have required much preparation.

He agreed that the questions were quite generic and easy to answer if you had experience of the role; for instance, the Authority's priorities were well known as there was focus in the new administration on injecting pace and political direction. There was a detailed manifesto which was translated into documents such as the Council's improvement plan. Boards were set up across a range of Directorates to consider sub-priorities.

The Respondent agreed that the PA had scored highly at interview [G4] and did not recall the PA's good performance in interview as being a big issue and he would have expected her to have performed well as she had already been doing the job for some time. He said he would not have made it clear that the PA could look at the questions.

It was accepted by the Respondent that there would be no reason to be lying in the WhatsApp messages between himself and the PA as these were unguarded messages and neither expected them to be shared with anyone else. He agreed that by the reference to flirting her way into a separate employment role, the PA was making the link with her own position. As to which previous message "Oh yes I forgot about that" was referring to, the Respondent said that it was difficult to recall, however he said that there was a WhatsApp etiquette around answering each question in turn and he felt confident that he was answering the first in the sequence. If the PA had read the questions in advance, the Respondent said that it would be inappropriate to speculate as to how else she could have received them.

## **Allegation 2**

The Respondent had not seen any policy on the use of hire cars for private purposes and never saw documents in relation to car-hire bookings.

On 27 February 2016, he filled the hire car up with petrol with the corporate credit card in connection with the official council business [B395a]. He would always fill the car up with petrol before taking it back. In connection with what he thought was a separate and private hire event on 28 February, he would have filled up the car again and would have paid this out of his own pocket. He had never been accused of misusing funds before and had never done so.

The Respondent said that he wanted to be confident about how he and the PA would reach their meetings and did not want to travel in either of their private cars and he did also look into booking a hire car privately. In his witness statement, he stated that the PA had said that staff could hire cars at the rates within the Council contract. He contended that she had assured him that she would arrange the car hire and pay for it as he was paying other expenses associated with their meetings. He further stated that he asked the PA on a number of occasions as to whether he could pay for the car hire and he was given the clear response that as he was paying for the hotels, she was adamant that she would “sort” or “cover” the hire car.

With regards the February booking, he was surprised that the hire car had been booked later than he had believed as he had committed and paid for a hotel meeting on the 5<sup>th</sup> February on a non-refundable basis. It was later that the Cardiff business trip was mentioned. He accepted what the PA said and had no reason to question her so he did not check the arrangements.

It was put to the Respondent that as he usually paid for his own mileage and did not claim legitimate expenses, he might regard the small occasional cost for private use of hire cars as a case of “swings and roundabouts”. The Respondent denied this and said it was not a political stance but it was not in his character. Members would have known his stance and he would not have needed to do what was suggested. On other occasions, he would refuse to go to meetings and use video conferencing instead to save money for the Council.

If the PA had told her that she was not paying, he would not have put himself at risk for this amount. She did not tell him however.

The Respondent then gave a limited amount of his evidence in private in accordance with the Listing Directions dated 18 December 2019 in relation to **Allegation 3**.

### 5.3 Witnesses as to Character

The Respondent called evidence as to character as follows:-

#### Mr Everett

Mr Everett had known the Respondent in his Council roles for 13 years and for 2 to 3 years previously in a WLGA context. He referred to the special relationship between CE and Leader. They co-lead and co-run the Council, dealing with many sensitive issues along the way. Trust is an absolute requisite. Mr Everett considered that the Respondent had been an excellent Leader who had demonstrated vision, determination and wished to make a positive difference. They held similar values in terms of public ethos and had worked hard in the context of housing and an anti-poverty strategy. He also referred to high profile work on the Regional Ambition Board in North Wales and within the WLGA where the Respondent had been highly regarded and respected. He had no concerns regarding the Respondent although he referred to one unrelated private matter. There had been no suggestions previously of any misuse of public funds and there was scrutiny and publication of expenses. In any event, the Respondent did not claim the mileage which he was entitled to claim. Mr Everett had continued to work with the Respondent following the allegations and their professional relationship remained as strong through tense and turbulent times. He had felt mixed emotions regarding the Leader's resignation.

Evidence as to character was also given by the following:-

#### Councillor Roberts

#### Councillor Thomas

#### Councillor Bithell

The three Councillors provided oral evidence regarding the Respondent's good character, integrity, public commitment, leadership qualities through difficult economic times and his WLGA and North Wales Economic Ambition Board roles. He had steered a smooth ship, showed vision and taken his Finance portfolio role seriously. He had been respected and his resignation was seen as a serious loss by many colleagues

The Respondent also relied upon a number of written character references which the Case Tribunal read and considered;

#### Councillor Jones

#### Councillor Butler

#### Councillor Mullin

#### Councillor Wilcox, Baroness Wilcox of Newport

#### Councillor Siencyn, Leader of Gwynedd Council

## **5.4 The Monitoring Officer**

The Monitoring Officer clarified certain points which had been raised in Mr Everett's evidence. Firstly with regard to the Member/Officer protocol, this had been reviewed in 2014/15 and approved by the Council. The Officer Code had also been reviewed in 2015 and again in 2019. With regard to the Council's flexible working scheme, there were no "core hours" but there were "band-widths" which varied depending on the needs of the service. With regard to the relevant IT policy, it does allow use of official e-mail for private use which must not be excessive. Certain specified uses such as shopping and social media accounts were prohibited however.

## **5.5 The Ombudsman's Submissions**

Mr Hughes said that for the large part, the determination of Disputed Facts 2.1 and 2.2 depended on whether the Case Tribunal preferred the evidence of the Respondent or the PA. Disputed Facts 2.3 and 2.4 coalesced to a degree and there had been agreement for the most part regarding the messages and the factual position.

Much of what had been said regarding an inappropriate relationship involved dishonesty as both parties will have lied to their respective spouses and the motive will have been the product of fear of discovery and the consequences of discovery for political and/or employment prospects. Both lied to Mr Everett as to the nature of the relationship.

The Tribunal may feel that the path to the current evidence of the PA may be relevant. Her evidence had moved from a position of limited or no culpability to an admission of everything which was the conventional path. What the Respondent was saying was that the path had been from honest denial to dishonest culpability. This would be an odd progression and improbable.

Mr Hughes submitted that one reason for there being more evidence of the PA's less than honest answers than for the Respondent was that her disciplinary process had progressed and was now over.

He also submitted that there was independent evidence to assist. If there was confusion over who to believe, it was possible to look at the text messages themselves and also the close correlation between model answers and answers given by the PA at interview [G2] and [G4] which spoke for themselves. The texts contained unguarded and honest comments, albeit including lightweight comments, jokes and fantasy and no-one expected this lengthy review at that time. The exchanges were relatively independent and with regard to the interview questions, indicated that the Respondent allowed the PA to have sight of the questions and that was the most straightforward meaning. The Respondent's interpretation was strained.

## 5.6 The Respondent's Submissions

Ms Clement said that only Disputed Facts 2.1 and 2.2 remained and that there was common ground on Disputed Fact 2.3 and it was in the context of acceptance that there were only a small number of inappropriate messages and that these were sent on the 7 April 2017. The question of office hours was complex in view of the nature of the flexible working scheme and that there were minimum break times. The Respondent accepted that it was probable that some were sent during office hours however.

The PA confirmed that they frequently sent work-related messages and that the inappropriate messages were limited and she had thought she was on lunch break. With regard to Disputed Fact 2.4, no-one had previously probed what had been meant by the language used by the PA in describing the relationship in her second draft statement [H11] and due to the now common view, cross-examination had been unnecessary.

Ms Clement addressed the Tribunal as to the respective credibility of the Respondent and the PA, she asserted that the former was a high-flying deeply committed public servant who had never had a previous complaint against him and who had co-operated with the investigation and the other being a self-acknowledged liar when it suited her own interests and who "took delight" in changing her formal witness statement in court. She also referred to the view expressed in the disciplinary hearing outcome letter [B480]. There was a motive to lie in order to destroy the Respondent's career as he was still in a job and she was not. Ms Clement submitted that the current event met the description of the anonymous source in a newspaper article, "predicting fireworks".

Ms Clement submitted that retrieved electronic information previously deleted by the PA regarding the hire-cars showed that the PA was in trouble and all she could do was confer "equal blame" and shift as much of the responsibility as possible.

With regard to the Respondent, it was submitted that he had made early admissions where appropriate and had not sought to hide from the truth. He deeply regretted his error of judgment in entering an inappropriate relationship and was paying for it to this day.

He did not lie to the Chief Executive however wished that he had been more frank. Ms Clement also sought to differentiate between lying to a spouse and lying during formal investigations.

Regarding the WhatsApp exchange referring to the interview, it was submitted that the last response referred to the first point (that the Respondent was supposed to attend the interview) and that it was unclear whether the Respondent ever had the interview pack or if he was intended to be at the interview in the light of the timing of the Schools Forum. The PA could not remember any details of what was said and she had previously been equally adamant that she had not had prior sight of the interview questions. As to the similarity between the model answers and the actual answers, the PA did not get a perfect score and was simply good at her job. It was submitted that the evidence therefore fell far short on the balance of probabilities test.

As for the Respondent, he had been too honourable to speculate as to what occurred and whether he was the only person who may have had access to the interview questions.

Ms Clement referred to the Ombudsman's own Report [B29] as he had not been persuaded that there had been improper use of the Respondent's position in relation to the interview process.

With regard to the car hire, it was the PA who booked the hire-cars, received the invoices and without a shadow of a doubt knew that the Council had paid for private use. The Respondent did not and never saw any of the documents. It made no sense that he would have filled the car up twice with petrol in relation to the February 2017 booking, one on the corporate card and one personally if he was then allowing the Council to pay for the private element of the hire.

Finally Ms Clement submitted that the only thing the PA could do was to attribute equal blame to the Respondent and to try to shift as much of the responsibility as possible and that the Respondent did not know and had no reason to suspect that the Council was paying for car-hire for private purposes, particularly as Cabinet Member of Finance who had denied himself expense claims.

## **6. FINDINGS OF FACT**

6.1 The Case Tribunal found the following **undisputed** material facts

- 6.1.1. The Respondent is a Councillor and the former Leader at Flintshire County Council ("the Council"). He was first elected to the Council in 1999 and was Leader of the Council from 2012 until his resignation in April 2019.
- 6.1.2 The personal assistant ("PA") was seconded to the role of PA to the Leader and Deputy Leader on 28 May 2012. The PA was interviewed for the permanent role of PA on 29 November 2012 and was duly appointed to the role. The Respondent was due to take part in the interview however did not attend in the end.
- 6.1.3 The Respondent received training on the Council's Code of Conduct for Members in 2013 and signed an undertaking to observe the Code.
- 6.1.4 The Respondent conducted an inappropriate close personal relationship with the PA which involved hotel meetings and 'sexting' between January 2016 and May 2017.
- 6.1.5 The Respondent used hire cars paid for by the County Council on 27 and 28 February 2016, 11 to 13 April 2016 and 21 and 22 May 2016 which included personal purposes in relation to the hotel meetings.

6.2 The Case Tribunal found the following in respect of the **disputed** material facts:

- 6.2.1 The Respondent did use his position improperly to confer an advantage on the PA by providing an opportunity to view questions before her interview.
- 6.2.2 The Respondent was not aware nor could he have been expected to be aware that he was using hire vehicles for private purposes at the Council's cost.
- 6.2.3 The Respondent sent and encouraged the PA to send inappropriate messages, to include messages of a sexual nature, during office hours.
- 6.2.4 Insofar as there was any difference in accounts, Disputed Fact 2.4 in relation to the precise extent of any relationship required no formal finding and therefore did not impact on the assessment of credibility of either the Respondent or the PA.

### **6.3 Credibility of the Witnesses**

- 6.3.1 The Case Tribunal found Mr Everett and Ms Jones to have been honest witnesses in relation to the background and contextual issues, although certain policy issues and issues regarding the PA's interview needed to be corrected, clarified or expanded by the Monitoring Officer during the course of the hearing.
- 6.3.2 The Case Tribunal noted that the PA had been evasive in interview with the Chief Executive, had been adamant as to her innocence in relation to the interview questions during her disciplinary interview and had signed a witness statement during the Ombudsman's investigation to this effect, a position from which she now resiled. The Tribunal considered this to be a serious matter, however it found her evidence on oath to be compelling in relation to the interview questions, in particular as that evidence was not only detrimental to the Respondent but also detrimental to herself. The interview was a life-event of great significance to a PA on a temporary secondment and a permanent role would have meant employment security and a considerable degree of prestige. The events running up to interview would have been memorable for her.
- 6.3.3 With regard to the hire-car bookings, the PA's evidence was that the cars had been booked at the Respondent's "request and/or with his knowledge." She believed that the Respondent would have been aware that the Council would be paying for the car on each occasion "as they were usually booked on the back of council or political events". When her attention was drawn to the relevant documentation however, the PA conceded this was the case in only one instance and she was not able to recall the detail of any discussions with the Respondent about the arrangements for using

hire cars. The Case Tribunal found her evidence on this matter to be vague to the point that it lacked credibility.

- 6.3.4 In relation to the third allegation, her recollection broadly matched that of the Respondent.
- 6.3.5 The Case Tribunal found the Respondent to be a credible and honest witness with regard to **Allegations 2 and 3**. In relation to the interview questions, the Respondent could barely recall the event and indeed in his initial communication with the Ombudsman [B117], doubted that the PA had any job interview during his time as Council Leader. During his interview with the Ombudsman's investigator he could not recall anything about the interview process. In giving evidence at this hearing, he said that he struggled to accept that it had been intended that he should participate in the interview process, despite the written evidence in the bundle to the contrary [B518] and [B519]. The Case Tribunal did not find this surprising as this would not have been a memorable or high-level event in the early days of being a Leader of a new administration with far more pressing duties and where there was only one candidate for a job which the PA had already been doing for quite some time.
- 6.3.6 With regard to the hire-cars, the Respondent was clear that he understood that the car-hire for meetings with the PA was a private arrangement made independently of the Council contract. He was consistent in his assertion that the PA had said that she was paying for the car and that when he had offered to pay for the private bookings, she said that she had "sorted" or "covered" this element of cost as her contribution. In this respect, the Tribunal found the Respondent to be far more reliable in his recollection than the PA. His wish to pay was consistent with his strong ethos in terms of financial probity and his unwillingness to claim expenses to which he was entitled.

#### **6.4 The bases for the above findings are as follows:-**

##### **Allegation 1**

- 6.4.1 Having considered the credibility of each witness and in particular that of the PA and the Respondent, on the balance of probabilities, the Case Tribunal found the PA's evidence on oath to be consistent with the unguarded and unstructured remarks made in the WhatsApp exchange of 26 March 2017 in the context of an unconnected job role [B54] and [B55]. The exchange contained the clear statement; "You gave me the questions the night before". The inappropriate exchange of 7 April 2017 showed that the Respondent and the PA had not concluded their WhatsApp relationship and there was therefore evidence of a trusting relationship at that time with no reason to be joking about this statement.
- 6.4.2 The Respondent had no recollection of the interview or the surrounding circumstances. This is not in the least surprising in the first year of a new administration when there would have been a huge number of events,

meetings and responsibilities to attend to. The interview of a PA who was the only remaining candidate and who had already been carrying out the role for a lengthy period of time meant that she was almost certain to gain the role of PA. The sharing of interview questions with a candidate was wholly inappropriate as the Leader was in a position of power and would have been expected to lead by example, however this would not necessarily have been a memorable event or one that was given any proper thought and consideration.

- 6.4.3 The Tribunal also agreed that for the PA to move from a position of honest denial to a position of dishonest culpability would be unusual. It did not accept that the comment “Oh...yea i forgot about that” naturally referred to the initial comment only in the series of three comments and agreed that this would be a strained construction. It was more likely to refer to all three, including the comment; “You gave me the questions the night before”.
- 6.4.4 In her answers during disciplinary interview [B465], the PA clarified that the Respondent had hinted that the questions were on his desk rather than him having physically given them to her. Although the PA could not recall the exact wording, it was apparent to the Tribunal that the PA had seen model answers to the interview questions, the similarity in answers to the model answers was too great to be a mere coincidence. More directly, in her evidence on oath she confirmed that she recognised the questions and those model answers and that she had seen them the day before interview. The most obvious explanation was that the Respondent had allowed the PA to view the questions. No other explanation was advanced to explain how the PA could have accessed those questions and answers. As the Respondent conceded, any other explanation would have been speculation. In conclusion, the Case Tribunal accepted the PA’s evidence on **Allegation 1** and preferred it to the Respondent’s evidence. The Case Tribunal’s conclusions included consideration of the character evidence called on the Respondent’s behalf.

## **Allegation 2**

- 6.4.5 Conversely, having considered the credibility of each witness, the Tribunal accepted the Respondent’s evidence on **Allegation 2**. As Cabinet Member for Finance who led by example in terms of Members expenses, having not claimed significant sums to which he was entitled and which the Independent Remuneration Panel for Wales expected Members to claim, it would be extremely unlikely for the Respondent to knowingly or recklessly allow or encourage the PA to book travel for private purposes at the cost of the Council and to risk financial criticism for relatively small sums.
- 6.4.6 The Respondent’s evidence with regard to filling the car with petrol using the Council’s corporate card to pay for the official purposes and then filling the car at his own expense for private purposes supported his account that, at the time, he believed there to be two entirely separate bookings, one for business use and one for private use. In the view of the Case

Tribunal, this corroborated the evidence of lack of intention to travel for private purposes at the Council's expense.

- 6.4.7 The PA had been responsible for booking the hire-cars, for the paperwork and for liaising with the hire company. She was the expert in that respect and at the relevant time, there were no additional checks and balances with regard to authorisation and as such, she was in a position of knowledge and power.
- 6.4.8 The Tribunal preferred the evidence of the Respondent that he had been led to believe that the PA had "sorted" and was "taking care" of the cost of the hire cars for private purposes and that he had offered to pay for this on each occasion. It came as a shock to him that the hire cars were paid for by the Council. In his statement he said that it had "floored" him and that he would not have travelled in the cars if he had "thought for one second" that the Council was paying for them. [B303].
- 6.4.9 As to whether the Respondent used the resources of the Council "imprudently", the Case Tribunal considered that this required an element of knowledge on the part of the Respondent, which the Tribunal found to be absent. The phraseology "improperly for private purposes" likewise implied knowledge and a dishonest intent which the Tribunal found to be absent. As to "in breach of the authority's requirements", there was no formal policy in place, nor formal requirements (although it would have been patently obvious that the Council would not pay for private use).

### **Allegation 3**

- 6.4.10 The Respondent and the PA had by the last day of the Tribunal hearing reached an agreed position that the Respondent had sent and/or encouraged his PA to send inappropriate messages, to include messages of a sexual nature, during office hours on the 7 April 2017.
- 6.4.11 In the circumstances, the Tribunal noted that this was no longer a Disputed Fact or allegation.

## **7. FINDINGS OF WHETHER DECIDED FACTS/ALLEGATIONS AMOUNT TO A FAILURE TO COMPLY WITH THE CODE OF CONDUCT**

### **7.1 The Ombudsman's Submissions**

7.1.1 With regard to **Allegation 1**, Mr Hughes stated that the finding led to the inevitable finding of a breach of Paragraph 7(a) of the Code of Conduct and was also capable of bringing the office and authority into disrepute.

7.1.2 It was stated that with regard to **Allegation 3**, this was more complex in the context of Paragraph 6(1)(a) of the Code of Conduct. He referred to the need for a fine balancing exercise between the Code and Article 8 of the ECHR in relation

to the text messages during working hours and the need to differentiate between the man and the office. He urged caution in relation to the Livingstone judgment which referred to an earlier version of the statutory regime with reference to Section 52 of the Local Government Act 2000.

7.1.3 Mr Hughes referred to numerous paragraphs of the judgment, however he contended that each case was fact sensitive. He said that Section 52 was framed in such a way that interference in private issues was more limited than in a councillor's public role.

7.1.4 In the context of Article 8 ECHR, consideration would need to be given as to what extent the state should interfere in relation to private texts exchanged in work time.

## 7.2 The Respondent's Submissions

7.2.1 With regard to **Allegation 1**, Ms Clement acknowledged the cross-over between Disputed Fact 2.1 and Paragraph 7(a) of the Code of Conduct and the factual finding would determine that there was a breach, however she resisted an additional finding of breach of Paragraph 6(1)(a), particularly as the factual circumstances were not so serious in the light of the surrounding circumstances, being that there was only one candidate, that the PA was well qualified and would have got the job in any event.

7.2.2 Ms Clement contended with regard to **Allegation 3** that the following were the reasons as to why the finding did not lead to breach of the Code. With regard to Livingstone, there were two distinct aspects. One argument was around the Respondent being 'off-duty', which she conceded was not an argument open to her in this Case. The alternative argument however was binding and that related to the distinction between the man and the office [paragraph 40].

7.2.3 Ms Clement also produced a report regarding a Code of Conduct investigation concerning a Member of Parliament which she acknowledged was not binding on the Case Tribunal but potentially persuasive in illustrating actions that should be taken in cases of this nature. She referred to various paragraphs of the relevant report and drew parallels with the Respondent's case. She submitted that the Respondent had not brought his office into disrepute because he had damaged his own reputation rather than that of the role.

7.2.4 Ms Clement's second line of argument built on the first and she contended that these were entirely private messages in relation to private actions using private phones. The allegation came about not through the Respondent's actions but through the unlawful actions of a third party who showed private messages to members of the public and a third party who had leaked highly personal data to the Press. She therefore submitted that any damage to reputation occurred not so much because of the actions of the Respondent but because of the actions of another. The messages upon which much of this case was based should never have been made public.

7.2.5 Ms Clements' third line of argument was to look at what had caused the damage to reputation. She submitted that it was based on an untrue version of the nature of the Respondent's personal relationship with his PA and not based upon the facts which had been found by this Case Tribunal. She contended that the Respondent did not cause the disrepute because any disrepute was due to false press reporting. In fact, there were a small number of inappropriate messages sent from private phones over a very short period, over one working day and this was not capable of amounting to disrepute.

7.2.6 The final line of argument on behalf of the Respondent was in relation to Article 8 of the ECHR. Finding that there had been a breach of the Code of Conduct based on the limited messages would amount to a disproportionate interference with the Respondent's right to a private life in Ms Clement's submission. She contended that there were two ways in which it could apply. Firstly, the facts said to constitute a breach fell squarely within the scope of the Respondent's right to a private life, and therefore "right at the heart" of that which is protected by Article 8. If one interprets the Code of Conduct properly so as to avoid a breach of Article 8, the conclusion should be that these private matters cannot truly amount to "disrepute". Secondly, even if it is necessary in a democratic society to find a breach when one considers the protection of the "rights and freedoms of others", the pursuit of any such legitimate aim has to take account of the weight of the Respondent's right to a private life. The importance of the Respondent's right to a private life outweighs any legitimacy in punishing the Respondent's behaviour by characterising it as "disrepute" and so the Case Tribunal should refrain from doing so. In effect, Ms Clement contended that any legitimate aim in this case was not sufficiently weighty to trump Article 8.

### **7.3 Relevant Paragraphs of the Code and Article 8 ECHR**

The relevant Paragraphs of the Code which were considered by the Case Tribunal were as follows:-

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

7.3.2 Paragraph 7(a) of the Code states that; " You must not in your official capacity or otherwise, use or attempt to use your position improperly to confer on or to secure for yourself, or any other person, an advantage or create or avoid for yourself, or any other person, a disadvantage;

7.3.3 Paragraph 7(b) of the Code states that; "You must not use, or authorised others to use, the resources of your authority-

- (i) imprudently;
- (ii) in breach of the authority's requirements;
- (iii) unlawfully;

- (iv) other than in a manner which is calculated to facilitate, or to be conducive to, the discharge of the functions of the authority or of the office to which he had been elected or appointed;
- (v) improperly for political purposes; or
- (vi) improperly for private purposes.

Article 8 of the ECHR states as follows:-

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

#### **7.4 The Case Tribunal’s Decision**

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 Relevant Authority’s code of conduct as follows:-

7.4.1 The Case Tribunal found **Allegation 1** proved and found that the Respondent had breached Paragraphs 6(1)(a) and 7(a) of the Code of Conduct for Members of Flintshire County Council.

7.4.2 The Tribunal agreed with Counsel for the Respondent that there was a cross-over between the finding of Disputed Fact 2.1 and the wording of Paragraph 7(a) and by necessity, this amounted to a breach of the Code.

7.4.3 The Case Tribunal was also satisfied that the facts amounted to a breach of Paragraph 6(1)(a). The type of behaviour complained of was the type of behaviour which dented the reputation of local authorities. The Leader was in a position of power and influence and whereas he showed commendable passion for leading and acting with financial prudence and integrity, employment practice was another area of local authority work which naturally attracted the attention and scrutiny of the public who would expect complete integrity and transparency in the employment of staff to roles within the Council. The internal workforce also deserved to know that appointments would be made entirely on merit and with no suggestion of interference or manipulation of process. The Leader would be expected to lead by example in this respect.

7.4.4 The PA role was a key role which demanded integrity and a close and trusting professional relationship with the Leader and his Deputy and the process for the appointment to such a role equally demanded trust, integrity and professionalism. The Case Tribunal was therefore satisfied that allowing a candidate, albeit a lone

candidate who was almost certain to succeed in interview, to view the questions in advance of their interview could reasonably be regarded as an action which could bring the office of Leader and the Authority into disrepute.

7.4.5 The Case Tribunal also found **Allegation 3** proved and that the Respondent had breached Paragraph 6(1)(a) of the Code of Conduct.

7.4.6 The Case Tribunal agreed that the wording of Section 52 of the Local Government Act 2000 had since changed and also agreed with Ms Clements that, whilst binding on the Tribunal in certain respects, *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 (Admin) (“the Livingstone case”) could not be directly translated into the legal position in Wales where the legislation and the mandatory provisions of the Code set out in the relevant Welsh Regulations had, by clear wording, spelt out that Paragraph 6(1)(a) extended to a Member’s conduct “at all times and in any capacity” as per Paragraph 2(1)(d) of the Code.

7.4.7 The Respondent and the PA had used their personal mobile phones interchangeably for work and private purposes and it was the Respondent’s evidence that he preferred to use this method of communication for work purposes over his Council-provided “BlackBerry” device. The PA’s evidence was that inappropriate messages were not usually exchanged during working hours, however the Case Tribunal considered that this blurred proper boundaries of communication. The evidence was clear however that the Respondent was well aware that on 7 April 2017 he was sending and encouraging his PA to send inappropriate message during working hours.

7.4.8 The Case Tribunal considered that the close professional working relationship between Leader and PA had likewise become blurred at the relevant time with an inappropriate close personal relationship. Members have a duty of trust and confidence towards staff and vice versa and the Case Tribunal considered that the exchange of inappropriate messages during working hours inevitably conflicted with work itself as well as that fundamental duty. Time spent engaging in such activities would have been at the cost of the Council and ultimately the public purse. Such inappropriate exchanges during work hours would adversely affect the working environment, leave Members and officers open to criticism, pressure, mistrust, resentment and ultimately could lead to lies and at worst, blackmail. In a situation where there is a power differential such as that between Leader of the Council and a relatively junior member of staff who works directly for the Leader and Deputy Leader, the risks are even greater.

7.4.9 The Case Tribunal was clear that the mere fact of any personal relationship between a Member and Officer did not amount to a breach of the Code of Conduct although it could clearly lead to difficulties, hence the wording of paragraph 9.1 of the Protocol on Office/Member relations of the Relevant Council; “Members and Officers will not allow a working relationship to become so close or appear to be so close as to bring into question the Officer’s ability to deal impartially with other members, political groups and other Officers.” [B97]. **Allegation 3** related purely to sending and/or encouraging the PA to send inappropriate messages during office hours however.

7.4.10 In conclusion, the Case Tribunal considered that the Respondent could not divorce himself from his role as the PA's quasi-employer and that when sending or encouraging his PA to send inappropriate messages during working hours, unlike the Livingstone case, the Respondent was acting in his official capacity when engaging in message exchanges during his PA's working hours on 7 April 2017.

7.4.11 Even if it could be argued that the Respondent was acting in an entirely private capacity rather in connection with his role as Leader and Member when exchanging messages from the Labour Conference, the Case Tribunal considered that the Respondent's conduct would nevertheless have breached Paragraph 6(1)(a) of the Code as the Welsh Code was clear and specific in stating that a Member may bring the office and/or authority into disrepute by his actions in a private capacity and also as the behaviour was so serious and so integrally linked to his role as Leader and therefore to his role as quasi-employer.

7.4.12 With regard to the Respondent's second line of argument, the Case Tribunal disagreed that the messages were entirely private, relating to private actions, using private phones. The Respondent's phone was used interchangeably for official and private purposes with the PA and the series of e-mails of 7 April 2017 started with a commentary relating to party political issues and then went on to discuss what was happening in the office, that is, that one member of staff was finishing early and that there was no-one else down at the bottom end of the office, about an office communication system called "Same Time" as referred to in the Respondent's interview [B280] and about office furniture. Exchanging inappropriate messages did bring the office and the authority into disrepute in this instance due to a third party copying private texts which referred to the office context and then leaking them to the Press. More fundamentally however, the conduct itself "could reasonably be regarded as bringing the office or authority into disrepute" in any event.

7.4.13 Thirdly, and linked to the above, the Case Tribunal did not agree that the damage to reputation was caused by newspaper reporting which was based on inaccurate information rather than the facts which have been found in this case. The basis for the damage to reputation was the inappropriate close personal relationship involving inappropriate messages during office hours. Nevertheless, reports referred to messages regarding the office and from the contents of the reports it is highly probable that these included the WhatsApp exchange of 7 April 2017 [e.g. B508], albeit that the newspapers provided exaggerated interpretations of the messages.

7.4.14 Finally, with regard to Article 8(1) of the ECHR, everyone has the right to respect for his private life and his correspondence. Article 8(2) states that there shall be no interference with the exercise of this right except as is in accordance with the law and is necessary in a democratic society...for the protection of health and morals, or for the protection of the rights and freedoms of others. The Code of Conduct is a Code of ethics and it governs the behaviour of Members to ensure, for example, that the public can expect public resources to be used and staff to provide public services and so that employees can expect a dignified working environment where each staff member is treated fairly and equally with no special privileges such as lax, unprofessional and inappropriate working arrangements or allowing inappropriate message exchanges [B142]. This is exemplified by the disciplinary

interview where the PA stated “As we are more than work colleagues, the relationship is less formal” [B473]

7.4.15 The Respondent had accepted that he had sent inappropriate messages to his PA during office hours and albeit that the messages may have been intended to be private and not sent by the Respondent whilst exclusively engaged in his Leader and Member function, they nevertheless could not be divorced from the fact that he was writing to a member of staff during working hours and talking about working arrangements amongst other more personal matters. There could not be the same expectation of privacy in the circumstances. This was taken fully into account in the careful balancing of Article 8(1) rights with Code duties. The public would expect behaviour of this nature to be regulated by the Code and the Respondent could not hide behind the shield of privacy when the behaviour was so inappropriate and so serious and breached the relationship of trust and confidence between employer and employee. It is for good reason that the Protocol on Member/Officer Relations paragraph 9.1 of the Relevant Authority [B97] stated that; “Members and Officers will not allow a working relationship to become so close or appear to be so close as to bring into question the Officer’s ability to deal impartially with other Officers”. Any penalty or sanction implied in characterising such inappropriate behaviour as “disrepute” is a legitimate and proportionate interference with the Respondent’s Article 8 rights that is “necessary in a democratic society in the interests of...the protection of the rights and freedoms of others.”

7.4.16 Finally, the Case Tribunal considered that the Decision of the Parliamentary Commissioner in relation to the alleged breach of the House of Commons, Code of Conduct for Members, whilst helpful so far as it explored a separate standards regime, had limited value in relation to the case under consideration. The facts were significantly different, there being no employment connection between the parties in that case.

## **8. SUBMISSIONS ON ACTION TO BE TAKEN**

### **8.1 Evidence of previous conduct**

The Clerk to the Tribunal reported that there had been no previously reported instances of breach of the Code of Conduct with regard to the Respondent.

### **8.2 The Ombudsman’s submissions**

8.2.1 Mr Hughes said that it was not the practice of the Ombudsman to suggest a particular penalty to the Case Tribunal.

8.2.2 With regard to mitigating factors, he said that there was evidence of good public service by the Respondent over a long period of time and that the behaviour which had been established was relatively confined.

8.2.3 Regarding aggravating factors, the length of service and extent of responsibilities was relevant. In relation to the interview questions, it was also deliberate conduct resulting in advantage for another, albeit not someone who was

particularly close to him at that stage and the Respondent was therefore exploiting his position of trust. In one sense there was lack of acceptance of the behaviour in question in that the Respondent had continued to deny the allegations.

### 8.3 The Respondent's Submissions

8.3.1 In mitigation, Ms Clement also referred to the Respondent's previous record of dedicated and long service. She said that, in her experience, it was unprecedented for the numbers of character witnesses to come forward in such numbers and in the way in which they spoke of the Respondent. She said that the incidents were one-off incidents within a long timeframe.

8.3.2 The Respondent had expressed deep regret for his behaviour and had acknowledged that none of this should have happened. He had apologised to all affected by his behaviour, although not in relation to the interview questions which he said he did not provide. He had co-operated with the Ombudsman's investigation and there had been no suggestion of any breach of the Code since the adjudication.

8.3.3 With regard to his previous long service, Ms Clement noted that this could be an aggravating as well as a mitigating feature. She contended that this was not a case of deliberate exploitation for gain however and this was not a case of numerous breaches of the Code. She argued that the aggravating factor in relation to disrepute did not apply and that there had been no previous adverse determinations against the Respondent. She reminded the Case Tribunal that the Respondent had resigned from his role as Leader and she stated that neither incident will ever be repeated.

8.3.4 Ms Clements contended that the appropriate sanction would be no sanction at all in relation to **Allegation 1** in the factual context. There had been limited consequential harm and the Respondent stepped down as Leader voluntarily. Ms Clements contended that if the Case Tribunal did not agree that a "no action" finding was appropriate, a warning or partial suspension from the role of Leader could be appropriate.

### 8.4 Case Tribunal's Decision

8.4.1 The Case Tribunal considered all the facts of the case and considered in particular the mitigating and aggravating factors referred to in the APW Sanctions Guidance.

8.4.2 The Case Tribunal concluded by unanimous decision that the Respondent should be suspended from acting as a member of Flintshire County Council for a period of three months or, if shorter, the remainder of his term of office.

8.4.3 It considered that both proven **Allegations 1** and **3** were serious, **Allegation 3** being particularly egregious, both comprising of the type of behaviour that would normally attract lengthy suspension or disqualification, particularly in the light of a Leader's vital role in improving a Council's culture and building its good reputation.

8.4.4 As well as the factual context of each proven Allegation, the Case Tribunal carefully considered its published Sanctions Guidance. It took account of the aggravating factors which also included long experience, seniority and position of responsibility, deliberate conduct and abuse and exploitation of a position of trust. It also consisted of deliberate or reckless conduct with little or no concern for the Code.

8.4.5 In terms of mitigating factors however, the Case Tribunal accepted that the Respondent had a previous record of good service over a long period of time and was a deeply committed politician who worked hard for his community and his Authority. With regard to **Allegation 3**, the Respondent had recognised his failure to abide by the Code, he had also shown deep remorse for the misconduct and its consequences, he was contrite and had apologised early in the investigation and throughout to all those affected, he had co-operated throughout the investigation and co-operated with the Adjudication Panel for Wales and finally, he had voluntarily resigned his position as Leader together with the relevant senior responsibility allowance. The Case Tribunal also accepted that the Respondent, as well as others, had already suffered a form of punishment through public humiliation and adverse publicity over a considerable period of time and the Case Tribunal was satisfied that the behaviour would never be repeated.

8.4.6 In all of the above circumstances and taking full regard of Article 8 of the ECHR, the Case Tribunal considered that a relatively short suspension of three months properly reflected all of the relevant mitigating and aggravating factors and the facts of the case. It considered that a period of three months' suspension was proportionate in all the circumstances and was the minimum sanction necessary to uphold the Code of Conduct. It noted that even if the Case Tribunal had considered that the Respondent had been acting in his private capacity in relation to sending and encouraging his PA to send inappropriate messages during office hours, it would nevertheless have considered that a short suspension of this nature would have been appropriate and proportionate having regard to Article 8 of the ECHR.

8.3.7 Flintshire County Council and its Standards Committee are notified accordingly.

8.2.8 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 February 2020

Tribunal Judge Jones  
Chairperson of the Case Tribunal

Ms Susan Hurds  
Panel Member

Mr Tom Mitchell  
Panel Member