

Presentation Notes for First Tier Tribunal Hearing — 3rd November 2010

Sir, thank you for hearing my appeal.

My appeal has three main assertions:

1. Assuming that the Code of Conduct (the Code) applied to my actions, I was not in contravention of it;
2. That the Code did not apply to my actions in any event; and
3. The sanctions imposed upon me were disproportionate.

Briefly, I think it is helpful to explain exactly what I did, the facts of which are not in dispute. I accessed the Council's public webcast website using my own computer and Internet connection to view webcast footage. I then used video capture software, again on my computer, to save excerpts of some of the public footage and then posted these excerpts, with full attribution as to what they were of, onto YouTube for use in illustrating posts on my personal blog.

These actions resulted in a complaint which was considered for breaching the Code in a number of ways which I will now rebut.

I did not treat other members with disrespect

Acting in a personal capacity I put unmodified excerpts of an already public webcast video, taken from a public council meeting, onto YouTube so that I could more easily reference specific time points in the videos. The video I placed on YouTube was already in the public domain. The simple act of making public video more accessible does not meet the fairly high bar of a member treating another member with disrespect.

In this context, it is notable that the investigating officer found no disrespect.

I did not fail to follow the authority's reasonable requirements

There were no policies or protocols in place to restrict my actions in terms of putting clips on YouTube. The Council's webcasting protocol did however encourage openness. Additionally, if there were requirements to not use videos in the way I did, they would have be unreasonable.

Furthermore there are no copyright notices or terms of use on the webcasting website, though I have since learnt that some clips sometimes show in their captions a copyright notice for Public-i Ltd.

I did not use the authority's resources improperly for political or party political purposes

Paragraph 6 of the Council's code of conduct is copied from paragraph 6 of The Local Authorities (Model Code of Conduct) Order 2007. It seems plain that the purpose of the paragraph is that a councillor does not misuse resources that they have peculiar access to by virtue of their position as an elected member.

Yet I had no privileged access to the webcast as an elected councillor. I merely captured segments of interest whilst viewing webcasts as a member of the public. As any member of the public could do what I did, and so it follows that paragraph 6 is not applicable.

Paragraph 6 is there to prevent councillors, for example, using their town hall offices to host a business meeting to promote their own financial interests or a political party fundraiser. This would give unfair advantage to the councillor

when compared to those not elected. Yet if a councillor was to host such meetings as a picnic on the grass of a local park this paragraph of the Code could not be applied, for any member of the public would be able to do exactly the same thing. I had no special access, anyone with an Internet connection can and has done what I did.

The Council argued:

“Webcasts are Council resources in the same way as telephone, computer and other IT facilities have been characterised as council resources (Standards Board Case Review 2007)”

This statement perfectly highlights how the Standards Committee have misunderstood the case. Webcasts absolutely are nothing like the examples cited. Telephones, computers and other IT facilities are resources for internal Council officer use, to successfully and efficiently conduct their work. The webcast is a public broadcast expressly for public use to enhance public involvement with the Council.

The best parallel metaphor I can think of is that telephones and IT are like the vehicles and tools used to maintain the city's parks. These resources are not for public use and if they were used (somehow) for party political or financial

benefit then that would be a breach of the Code. However the parks are expressly for public use, their use is encouraged as is the use of the webcasts.

However beyond this point both my example and that cited by the Council's response fails. Because video clips are a digital good, not a physical object. Digital goods are what economists call 'non-rival', that is we can both use them with neither of us being any worse off. So the videos are digital, there was no loss to the Council nor additional use of Council IT resources in my publishing excerpts on YouTube. Hence Council resources were not used and the investigating officer accepted that "there was no material loss" to the Council.

Furthermore, under section 30 part 2 of the Copyright Designs and Patents Act 1988 'fair dealing' allows excerpts of copyright material to be used without permission or licence for various purposes including reporting. It is my view that the clips I placed on YouTube meet this 'fair dealing' requirement so cannot be seen as having deprived the Council of it's intellectual property. There is also, as I will detail later, a public interest exception to copyright protections which I argue also applies. It has been argued that the intellectual property was also a resource of the Council, but I have shown that I

legitimately and legally made excerpts, without depriving the Council of its alleged intellectual property.

I was not acting in my official capacity as a councillor when putting the videos online and therefore was not bound by the code of conduct as this falls outside of the scope of the Code.

My YouTube channel and blog are personal sites that I operate in a personal capacity as an individual. My blog is titled 'Jason Kitcat' and my YouTube channel appears as 'Jason Kitcat — jpkitcat's channel'. My blog was created 10 years before I became a councillor, and my YouTube channel 18 months before my winning in an unexpected by-election. When uploading the videos I was not conducting the business of the authority nor was I giving the impression that I was acting in an official capacity.

Thus, as in *Livingston v Adjudication Panel for England* [2006] EWHC 2533 (Admin) (paragraph 41) there is no case to answer under the Code, as it does not apply when I am not acting in an official capacity as a councillor.

This point was entirely ignored by the Standards Committee. There is nothing to suggest that it considered the possible non-applicability of the Code before coming to its decision.

Putting videos on YouTube and on my blog is protected by Article 10 of the Human Rights Act which provides for freedom of expression

In *Sanders v Kingston* ([2005] EWHC 1145 (Admin)) the High Court decided that Article 10 would be engaged in a case such as the present. Wilkie J went on to cite comprehensively, at paragraph 69 of his judgment, from cases that establish the particular importance of freedom of political expression.

This freedom of expression is not limited to just factual data, but also opinions and value judgements, as made clear by the European Court of Human Rights in *Oberschlick v. Austria* (1991).

The present case is in fact much stronger than that of *Sanders*. There, the High Court found that there was, in the circumstances, no political expression. Here, I was highlighting matters of interest to all city centre wards, including communal bins, and the councillor responsible for their implementation, Cllr Geoffrey Theobald — the clips were showing the very

business of politics. The decision to punish me for the publication of legitimate political views, using material that was already in the public domain, amounted to an unjustified interference with my Article 10 rights.

In *Ashdown v Telegraph* [2001] EWCA Civ 1142 (paragraph 45) the Supreme Court judgement found that “..*circumstances can arise where the right of freedom of expression will come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found in the Act. In these circumstances, we consider that the court is bound, insofar as it is able, to apply the Act in a manner that accommodates the right of freedom of expression.*” The judgement goes on to conclude that a public interest exception does exist to copyright protections. I argue that my actions were in the public interest and were protected political expression.

The Standards Committee required me to apologise and submit to retraining or face suspension. This was, in all the circumstances, unclear in their detail, excessive and disproportionate.

I co-operated fully with every stage of the complaint process. I provided all responses and evidence on time and as requested. There is no evidence or suggestion of any previous breaches of the code. I stopped putting webcast

video on YouTube as soon as I learnt that the Standards Committee had decided to forward Cllr Kemble's complaint for a full investigation.

Standards Board for England guidance states

Suspension may be appropriate for more serious cases, such as those involving:

- *bullying officers;*
- *trying to gain an advantage or disadvantage for themselves or others; or*
- *dishonesty or breaches of trust.*

(page 13 July 2003 "Standards Committee determinations Guidance for monitoring officers and Standards Committees")

It is my view that this case does not fall into any of the above categories. I have a "legitimate expectation" that this guidance will be adhered to and it was not.

Cllr Jason Kitcat

[ENDS]