

THE IMPLICATIONS OF THE DECISION OF COLLINS J IN THE LIVINGSTONE CASE

Following the High Court decision in the Livingstone case a more restrictive view needs to be taken of when the Code of Conduct can apply to the actions of a member.

There are two provisions of the code that apply not just when a member is acting "*in his official capacity*" but also "*in any other circumstances*." These are paragraphs 4 (bringing your office or authority into disrepute) and 5(a) (improperly using your position to secure or confer an advantage or disadvantage).

However, the interpretation of the words "*or in any other circumstances*" already limited by the Adjudication Panel for England in earlier cases has now been replaced by a much stricter interpretation arising from the decision of Collins J.

He found that "*any other circumstances*" is limited to situations where the member is "performing his functions." He added that the words "*performing his functions*" extend to actions beyond those carried out in a member's "official capacity."

Collins J went on to state that if Parliament wished to regulate the activities of members in their private life it needed to do so explicitly. He expressed the view that unlawful conduct was not necessarily covered and that a councillor convicted of shoplifting or drunken driving was not caught by the code if the offending had nothing to do with their position as a councillor.

He also found that as a consequence of the Human Rights Act the code could not interfere with members who express themselves forcibly using language that is inappropriate, intemperate or offensive so long as it is in their private life.

In relation to establishing disrepute Collins J stated that there was a "*real distinction between the man and the office*" and expressed the view that private capacity conduct will rarely be capable of bringing a member's office or authority into disrepute even if considered inappropriate, outrageous or unlawful. He found that while Ken Livingstone's comments may have tarnished his own reputation they did not tarnish the reputation of his office or authority. Collins J also cited conviction for theft and sexual misconduct as examples where the reputation of the office was not necessarily brought into disrepute.

Since the judgment the Board has been working with Government, the Adjudication Panel for England and ACSeS to clarify the scope of the Code, how cases should be handled at the present time, and whether the position should be rectified by future legislation.

In the light of the judgment, the Government has included proposals in the current Local Government and Public Involvement in Health Bill to make clear that the Code of Conduct is not limited to actions taken only in an official capacity and to delete the words "*in performing his functions*" from section 52. However, until that legislation, if enacted, comes into force we need to apply the law as declared by Mr Justice Collins.

The Standards Board for England is therefore issuing this guidance to set out the position, as the Board currently understands it. However readers should be mindful that while some aspects of the decision are very clear others are not. Therefore each case is likely to turn on its own facts.

The following principles emerge from the decision about cases where a member is not acting in an official capacity: -

1. For the code to apply, it will need to be established that, if the member was not acting in an official capacity, he or she had nonetheless used or sought to use his or her "status" as a member of the council. An example may be where a councillor, in dispute with a neighbour about their planning application, threatens to speak to colleagues on the planning committee. This relates to the wording in section 52 of the Local Government Act 2000, i.e. the "performing his functions" test (commonly known as the "using one's position" test).
2. The second principle is that the use of the status must be of a type that is capable of amounting to a failure to comply with the code. An example would be where a councillor attended a private pre-meeting to discuss a report, which included a proposal to purchase some land for the council to redevelop new council offices, and then, immediately after the meeting, the member contacted the owner and anonymously agreed to buy the property for the price quoted to the council.
3. The third principle relates to establishing disrepute to his or her office or the authority. Under this test a case tribunal or standards committee will need to be persuaded that the misconduct is such as to damage the reputation of the member's "office or authority" as opposed simply to damaging the reputation of the individual concerned.

It should be noted that the parameters of this test are far from clear because Collins J gave no indication of how it could be met in practice. What is clear from the Collins decision and from subsequent discussions with the President of the Adjudication Panel is that the bar will be set quite high. Therefore the test will not be easy to meet.

However the Standards Board believes that some of the considerations that might tip the balance in favour of disrepute to the office of member or to the authority in particular cases are: -

- a. situations where the member has put his or her private interests over and above the public interest, and therefore reduced the standing of his office, that is flouting public interest for private gain, for example by using their position to secure a personal profit
- b. similarly situations where a member defies important and well established rules of the authority for private gain; also
- c. where a member engages in conduct which directly and significantly undermines the authority's reputation as a good employer or responsible service provider

It must be reiterated that these examples are not exhaustive and each case should be treated on its particular facts. In future, therefore, any case involving an allegation that a breach of paragraph 4 of the Code of Conduct has taken place when the member was not acting in an official capacity will need to be carefully scrutinised. In doing so, it will be necessary to establish whether or not the action complained of was carried out as a member or by reference to the capacity of member. Careful thought will also need to go into establishing how the action complained of does more than just bring the individual into disrepute.

Further advice on particular cases may be obtained from the Standards Board's Legal Department. Please ring 020 7378 5091 and your call will be allocated to a lawyer.