

## **FINAL Report – 13/01/17**

### **Report in relation to an investigation conducted under Chapter 7 of the Localism Act 2011 into a complaint about Councillor Robbie Robertson, a member of Lewes District Council**

#### Introduction

I am the designated Monitoring Officer for Lewes District Council. I have received a complaint from Cllr Sarah Osborne of Lewes District Council against Cllr Robbie Robertson of the same Council.

#### Allegation

Cllr Robertson fell into arrears with his Council tax payments, a matter that became known to the local press. It is alleged that when questioned about the matter Cllr Robertson made certain comments to the press which were flippant, attempted to trivialise the matter, undermined the Council's position as the Council tax collection authority and brought both his own office as a councillor and the reputation of the district council into disrepute.

#### Finding

I find that Councillor Robertson did make comments to the press which were substantively consistent with those comments attributed to him in the Argus on 27 October 2016. Is such conduct capable of constituting a breach of the Code of Conduct? The law here is not clear, as is explained in the report, but it is at least arguable that the Code of Conduct is engaged in these circumstances, in which case Cllr Robertson's conduct is capable of constituting a breach of it. Having considered relevant legislation and case law I conclude that on the facts of this particular case the Code is engaged and that Cllr Robertson is in breach.

#### Councillor Robertson's official details

Councillor Robertson was first elected to office as a councillor of Lewes District Council on 3 May 2007 and has served continuously since. Councillor Robertson was most recently re-elected in May 2015 for four years.

Councillor Robertson has given a written undertaking to observe the Code of Conduct adopted by Lewes District Council.

#### The relevant Legislation and protocols

On 19 July 2012, in accordance with Chapter 7 of the Localism Act 2011, Lewes District Council (the Council) adopted a Code of Conduct (the Code) in which the following paragraphs are included:

“(1) The Code applies to you as a member of the authority, when acting in that capacity.

## Scope

- (1) ..... you must comply with this Code whenever you –
  - (a) conduct the business of your authority (which in this Code, includes the business of the office to which you are elected or appointed); or
  - (b) act, claim to act or give the impression you are acting as a representative of your authority and references to your official capacity are construed accordingly
- (2) This code does not have effect in relation to your conduct other than where it is in your official capacity.

## General Obligations

- (2) You must not:
  - (d) do anything which compromises or is likely to compromise the impartiality of those who work for, or on behalf of, your authority.
- (5) You must not conduct yourself in a manner which could reasonably be regarded as bringing your office or authority into disrepute.”
  - (b) You –
    - (a) must not use or attempt to use your position as a member improperly to confer on or secure for yourself or any other person, an advantage or disadvantage”

The code of Conduct adopted by Lewes District Council includes a note at the end of it which directs members’ attention to the provisions set out in Section 106 of the Local Government Finance Act 1992 as it affects members who might be in arrears with their Council tax payments.

This reads:

**“Note from Monitoring Officer:** Councillors are reminded that quite apart from the Code of Conduct, Section 106 of the Local Government Finance Act 1992 restricts the rights of Councillors who are two months or more in arrears with their Council tax payments. Any such member must disclose the fact and must not vote at any meeting on decisions being taken which might affect the level of the council tax or the arrangements for administering it. Failure to comply is a criminal offence.”

A copy of the Code of Conduct is attached at Appendix A. A copy of Section 106 of the Local Government Finance Act 1992, as amended, is attached at Appendix B.

## Summary of Events

On 27 October 2016 the Argus published a story which was headed as follows:

“Authorities urged to name those who have received summonses

16 councillors pursued over council tax bills”

A copy of the press article is attached (Appendix C)

The press article said that Cllr Robertson had been taken to court by the district council for failure to pay his council tax.

It is a fact that on 2<sup>nd</sup> November 2016 after issuing a number of reminders, the district council issued a summons against Councillor Robertson, for non-payment of council tax.

The press article records that on being questioned about his failure to pay council tax, Councillor Robertson gave his reasons for his failure as follows:

“I didn’t pay it one month because council tax was the last priority to pay.

I paid my rent and I paid my water but there wasn’t anything left for council tax.

If people can’t afford it, they can’t afford it”

The press article further records Councillor Robertson as saying:

“I went down the court route and then I did pay it. I wanted to see how the system worked and it works extremely well”.

On 27 October 2016 a complaint was received from Councillor Sarah Osborne as follows:

“By making the comments that were quoted in an article in The Argus today (link provided above) Councillor Robbie Robertson has conducted himself in a manner which could reasonably be regarded as bringing his office and the authority into disrepute”.

In a phone call to the Monitoring Officer the same date, Councillor Osborne emphasised that her complaint did not relate to the fact of non-payment because she recognised that councillors, like residents, might struggle financially to pay council tax due. Her complaint related to the comments alleged to have been made by Councillor Robertson. To her mind the comments made, particularly the reference to council tax payment being considered a “last priority” and the suggestion that Councillor Robertson “wanted to see how the system worked” showed a lack of regard for his obligations as a councillor and brought both himself and the district council, into disrepute.

The Monitoring Officer interviewed Councillor Robertson on 10 November 2016.

Councillor Robertson admitted that he had made comments which broadly reflected the comments attributed to him by the press article.

He said that the press quotes were not entirely accurate. He would not have said that he had “paid my rent” because he has a mortgage and does not pay rent.

Councillor Robertson confirmed that the comment about wanting to see how the system worked was accurate, although he believed he may have made a fuller comment than that recorded in the press article.

Councillor Robertson stated that he was not aware that his comments were to be published. The phone call from the reporter had been unexpected and he felt that the reporter was trying to provoke him.

Councillor Robertson acknowledged that a press article headed “16 councillors pursued over council tax bills” and which focussed on him as a councillor being taken to court by his own council, might be an embarrassment to the council and he was sorry for that.

He maintained however that the council tax collection system was wrong and that a better system would be for the district council to deduct an amount equivalent to his council tax liability before paying him his councillor’s allowance.

The Monitoring Officer asked whether Councillor Robertson considered there was anything wrong in participating in a decision to set council tax for residents across the district and then failing to pay it himself. Councillor Robertson maintained that the system was wrong.

In response to a suggestion from the Monitoring Officer that a failure to pay a tax which he was responsible for setting might be viewed as undermining the Council tax collection system Councillor Robertson said that his Group Leader had indicated that he was not alone in that other councillors had not paid council tax due either.

The Monitoring Officer asked Councillor Robertson to explain his comment – “I wanted to see how the system worked and it words extremely well”.

Councillor Robertson said that he had wanted to “test” the council’s council tax collection system. He wanted to put himself in the same position as any other resident; he wanted to assure himself that the council would treat him exactly as they would treat anybody else in its dealings with him. He said:

“I was impressed with the Council for treating me like everyone else and not making an exception to the rule” (ie because I was a councillor).

The Monitoring Officer asked whether he had considered how having to serve one of their own councillors with a court summons might have made officers feel.

Councillor Robertson said he was pleased they had not given him any special treatment. The Monitoring Officer suggested he might have put officers in an embarrassing position and made them uncomfortable. Councillor Robertson had not considered this point but acknowledge that this might be the case.

The Monitoring Officer suggested that a reasonable interpretation of Councillor Robertson's comments, especially the comment "I wanted to see how the system worked and it works extremely well" – might be that he was being flippant and showing a lack of regard for his office as a councillor and for the reputation of his council. His comment might reasonably be regarded as an attempt to trivialise what was a matter of some gravity.

Councillor Robertson said that this was not his intention. Rather, he had meant that he as a councillor had been scrutinised and made to pay; as a consequence everyone else would know that the collection system worked well and that they too would have to pay.

Councillor Robertson said that some residents had sympathised with his position. One had said to him, having seen the press article, "well done. I've been in the same position. Now I know you're not made of money".

When asked what effect the press article might have had on the reputation of the district council and councillors generally, Councillor Robertson said that although he could see how it might be interpreted as damaging, his intention had been to show that he was just like everyone else and had been treated accordingly.

At the same time he repeated that the system did not work and that the Council could assist by withholding his allowance and using it to fund his council tax liability.

In response to the Monitoring Officer asking what action Councillor Robertson might be willing to take to mitigate the situation, Councillor Robertson said that he would be willing to make an apology to all councillors, either by way of a statement at full Council or by way of personal letter to all Councillors.

### Reasoning as to whether there have been failures to comply with the Code of Conduct

#### Official Capacity

It is necessary to consider whether the Code applied to Councillor Robertson in the circumstances of the case.

The Code states that it does not have effect in relation to a member's conduct other than where that conduct is carried out in an official capacity.

Was Councillor Robertson conducting the business of his authority, or acting, claiming to act or giving the impression he was acting as a representative of his authority at the time he made his comments to the press? Or was he in fact acting in a private capacity i.e. was he in the same position as any other resident who might be in council tax arrears and responding in a private capacity?

Previous decisions taken by the Adjudication Panel for England and case law in the High Court suggest that the notion of acting in an official capacity/carrying out the business of the office of councillor, is to be narrowly construed.

The Court case of *Livingstone v Adjudication Panel for England* [2006] EWHC 2533 is relevant here. In that case Mr Justice Collins considered the scope of the Code and the extent, if any, to which it might be applied to the conduct of a member acting in a private capacity.

Mr Justice Collins stated:

“It seems to me that unlawful conduct is not necessarily covered. Thus a councillor who shoplifts or is guilty of drunken driving will not if my construction be followed be caught by the Code if the offending had nothing to do with his position as a councillor. Section 80 of the Local Government Act 1972 provides for disqualification for election to a local authority of those who have within 5 years before the date of election been convicted of any offence which has resulted in a sentence of 3 months imprisonment (whether or not suspended) or more. Parliament could for example have provided that conviction of any offence carrying imprisonment whatever the sentence should lead to consideration of some punitive action by the Standards Board. It seems to me that if it is thought appropriate to subject a member of a local authority to a code which extends to conduct in his private life, Parliament should spell out what is to be covered”.

Mr Justice Collins made clear that a distinction is to be drawn between the individual as a councillor and the individual as an individual; a councillor is not a councillor twenty-four hours a day. A member is subject to the provisions of the Code when he/she conducts the business of the authority or when a member acts, claims to act, or gives the impression that s/he is acting as a representative of his/her authority.

The paying of one's Council tax is clearly something which a Councillor does in his/her private capacity.

The *Livingstone* case made clear that the Code does not seek to control what members may do in their purely private and personal lives.

The *Livingstone* case was considered in a later case – *Bartlett and Milton Keynes Council* [2008] APE 0401. The Tribunal in that case determined that the *Livingstone* case established that a Councillor might be said to be acting in an official capacity only in the following circumstances:

- (a) the Councillor should be engaged in business directly related to the Council or constituents,
- (b) the link between the Councillor's office and the conduct should have a degree of formality.

If this line of case law is followed then since the conduct by Councillor Robertson which gave rise to the complaint arose out of something (ie not paying his council

tax) which affected him in a private, as opposed to an official, capacity, the Code cannot be engaged.

If the non-payment of council tax is insufficient to engage the Code, then Councillor Robertson's subsequent comments to the press about his failure to pay, similarly, cannot engage the Code.

There is an alternative construction however and this is based on the very special responsibility which councillors have for the setting of council tax for residents in their district.

It is notable that Parliament has seen fit to make specific legislation (Section 106 Local Government Finance Act 1992) which denies councillors their councillor rights to participate in debate and voting on any matter relating to the setting or administration of council tax.

There is no similar statutory provision relating to any other function carried out by a councillor and the absence of such seems to me to demonstrate that council tax setting and administration is at the heart of councillors' responsibilities, to such an extent that non-payment of such tax by a councillor goes beyond a purely personal and private matter.

If a councillor responsible for setting and administering council tax for all those residents in his/her ward and district then fails to pay that tax himself/herself, this can be considered to be conduct which undermines the council tax collection system. If the failure becomes publicly known then this is capable of adversely affecting the reputation of the individual councillor and the reputation of the authority.

I am not aware that there is any standards-related case law on this issue. There is however a persuasive and recent Freedom of Information case which is relevant: *Haslam v (1) Information Commissioner (2) Bolton Council* [2016] UKUT 0139 (AAC).

This case involved a Bolton journalist who made a FOI request for details of councillor council tax payments. The Upper Tribunal overturned 2 previous decisions and ruled that such information was disclosable. The judgement suggests that this was because of the very strong links between the essential role of a councillor in setting and ensuring the proper administration of council tax, and the payment of such tax by councillors including the special legislative provision in section 106, relating to the 2 month arrears rule.

In this case, the upper Tribunal (Judge Markins QC) concluded as follows:

"39. There was much debate before me as to the extent to which non-payment of council tax by a councillor was a public or a private matter. The position of the Council was in essence that a councillor's failure to pay the council tax was largely a private matter and so the tribunal's silence as to the asserted public nature of the issue was not as significant as contended by Mr Haslam. I accept that there is a private element to non-payment of council tax, even in the case of a councillor. It is a matter of a private debt in respect of which the

individual incurs a private liability. It arises out of a person's occupation of a private property. The liability may arise jointly with other persons with whom the individual forms a household. Persistent non-payment will lead to the individual being summonsed, in a personal capacity, and possibly being subject to a liability order.

40. But, in the case of a councillor, it is not only a private matter. A councillor is a public official with public responsibilities to which non-payment of council tax is directly and significantly relevant. A number of specific features of this were advanced in submissions to the First-tier Tribunal. In particular, section 106 of the Local Government Finance Act 1992 bars a councillor from voting on the Council's budget if he or she has an outstanding council tax debt of over two months. If a councillor is present at any meeting at which relevant matters are discussed, he or she must disclose that section 106 applies and may not vote. Failure to comply is a criminal offence. Thus council tax default strikes at the heart of the performance of a councillor's functions. It is evident that setting the council's budget is one of the most important roles undertaken by councillors. The loss of one vote could make a fundamental difference to the outcome. This adds a significant public dimension to the non-payment of council tax. The very fact that Parliament has legislated in this way reflects the connection between non-payment and the councillor's public functions. Moreover, as the Commissioner observed in his decision notice, recent failure to pay council tax is likely to impact on public perception and confidence in a councillor as a public figure."

If the reasoning in this very recent case is followed then public knowledge of non-payment of council tax, coupled with the consequent adverse public perception and lack of confidence in the councillor means that the non-payment is in itself certainly capable of bringing both the office of councillor and the council itself into disrepute, thus constituting a breach of the code.

If the non-payment of council tax constitutes a breach of the code, then similarly, the consequent comments made by Cllr. Robertson to the press are likewise capable of engaging the Code since they flow from the non-payment.

I repeat here that the complaint received was not in fact about the non-payment of council tax; rather it was about the nature of the comments made by Cllr. Robertson to the press.

I now consider the nature of the comments made.

Cllr. Robertson has explained to me the intention behind his comment—"I went down the court route and then I did pay it. I wanted to see how the system worked and it works extremely well."

Whilst acknowledging Cllr. Robertson's explanation I believe a reasonable reader might construe his comments to the press to be irresponsible. They suggest that Cllr. Robertson deliberately withheld payment until forced into court by his own council, with the attendant embarrassment to council officers which that may have occasioned, which could in itself be a possible breach of paragraph 2 (d) of the

Code (not to do anything which compromises or is likely to compromise the impartiality of those who work for, or on behalf of, your authority).

Cllr. Robertson's suggestion to me was that he wanted to make sure that he was treated 'just like any other resident in arrears' I took this to mean that he wished to ensure that officers did not give him any special treatment in relation to the enforcement of his debt because of his position as a councillor, an understanding which he confirmed to be accurate.

I do not understand or have any explanation as to why Cllr. Robertson thought council officers might treat him differently to other residents. There is no evidence, and no suggestion, from Cllr. Robertson that there may be any evidence, to suggest that officers might deal with him differently.

There is no evidence that Cllr. Robertson was hoping to receive special treatment and I am satisfied from my interview with him that this was not his intention in failing to pay until taken to court. Clearly, if his intention had been otherwise this would have constituted a clear breach of para 5 (b) (a) of the Code (must not use or attempt to use your position as a member improperly to confer on or secure for yourself...an advantage).

I do believe, that the comment "I didn't pay in one month because council tax was the last priority to pay", when made by a councillor who is responsible for setting that same council tax, undermines the council tax collection system and is therefore capable of constituting a breach of the Code as a consequence of bringing the office of councillor and the district council itself into disrepute.

### **Finding and Recommendations**

Based on a review of the complaint, evidence and relevant caselaw I consider that Councillor Robertson's failure to pay council tax due constituted conduct which was not only a private but also a public matter, in accordance with the finding in Haslam v (1) Information Commissioner (2) Bolton Council (2016).

As such both the failure to pay and the subsequent comments made to the press about his failure to pay amounted to conduct which was both capable of constituting and which did actually constitute a breach of the Code in that it brought his office as a councillor and the district council itself into disrepute.

Legislation (s.106) specifically prohibits councillors in participating in setting/administering council tax when they are two months or more in arrears. It should be noted that Councillor Robertson was not two months or more in arrears at the date of the council meeting at which the level of council tax was set (February 2016).

It is recognised that on the basis of my finding that non-payment of council tax constitutes a breach it would be a relatively easy matter for a councillor, through financial difficulty or oversight, to miss a payment and, if the matter becomes publicly known, find themselves to technically be in breach of the Code.

It is suggested therefore that a mere technical breach should attract a lenient sanction, if any. It is worth noting again that it was not the non-payment of council tax due which occasioned the complaint. The complaint was made because of the comments which were subsequently made to the press. It is therefore recommended that in determining whether there is a breach of the Code which warrants further action the panel may wish to concentrate on that aspect, namely the comments made.