

APPEALS TRIBUNAL DECISION

Case Ref:	APE 0416
Appeals Tribunal Date:	11 March 2009
Relevant Standards Committee:	West Wiltshire District Council
Date of Standards Committee decision:	24 December 2008
Name of Member concerned: (Appellant and authority)	Mr Russell Hawker Westbury Town Council
Ethical Standards Officer (ESO):	Jennifer Rogers
Monitoring Officer:	Tim Darsley
Investigating Officer:	Maria Memoli
<u>Appeals Tribunal Members</u>	
Chairman	Mr David Laverick
Member:	Mr Neil Pardoe
Member:	Mr Brian McCaughey

1. Councillor Hawker appealed against a finding by the Hearings Sub-committee of the Standards Committee that he had failed to follow the provisions of the Code of Conduct adopted by Westbury Town Council but that no further action need be taken.
2. The decision of the Sub-committee referred to a breach of Paragraph 7(1) of the Code. That sub paragraph defines when a member of the Town Council had a personal interest. It is not of itself a paragraph which can be breached: the breach would come if the member failed to follow the provisions of Paragraph 8 of the Code which requires the member to declare an interest of the kind defined in paragraph 7(1).
3. Paragraph 9 of the Code defines a personal interest as also being a prejudicial interest if a member of the public with knowledge of the relevant facts would reasonably regard the interest as so significant that it is likely to prejudice the member's judgement of the public interest. Paragraph 11 of the council's Code required a member with a prejudicial interest to withdraw from the room and not to seek improperly to influence a decision in the matter.
4. The Notice of Decision issued by the Hearings Sub-committee indicated that the Sub-committee did consider that the matter under discussion at the Town Council (a traffic management scheme for Westbury) could reasonably be regarded as affecting the financial

position of Councillor Hawker's brother to a greater extent than other council tax payers and inhabitants. Assuming that the facts supported such a conclusion there would be a breach of paragraph 8 of the Code as Councillor Hawker had not declared the interest at the relevant meeting. The Notice of Decision did not go on to reflect any consideration of whether the particular interest should also have been regarded as a prejudicial interest which, if in existence, would have meant that Councillor Hawker would not have been able to participate in the relevant meeting.

5. The Investigating Officer whose report was being considered by the Sub-committee had concluded that the interest was not of a kind defined as prejudicial. That view was no doubt one for the Sub-committee to take into account but is not of itself determinant of the matter.
6. Thus the key substantive issues before the Appeals Tribunal in deciding whether to endorse the finding of the Sub-committee are whether the interest was of a kind defined in paragraph 7(1) and whether the interest was also of a kind defined by paragraph 9.
7. Councillor Hawker himself referred the matter to the Standards Board for England saying he had inadvertently forgot to declare a personal interest arising from his brother's part-ownership of a shop business in Westbury High Street.
8. The Appeals Tribunal noted that the exact nature of that interest was not established: the Investigating Officer's report uses both the terms Chantry TV and Chantry TV Ltd apparently interchangeably. No company search appears to have been undertaken. No enquiries were made directly of Councillor Hawker's brother. No attempt seems to have been made to see who was paying business rates on the property. To be fair to the Investigating Officer she could perhaps be surprised to find that Councillor Hawker is now seeking, at least to some extent, to resile from the statement which he himself had made. The need for more and clearer information should perhaps have been picked up by the Sub-committee which, according to its own minutes of the meeting, had experienced difficulty in obtaining confirmation from Councillor Hawker as to whether his original statement was correct.
9. What is clear to the Appeals Tribunal is that Councillor Hawker undoubtedly had made a statement to the effect that his brother had an interest arising from part-ownership of a shop in Westbury High Street. Ownership can reasonably be regarded as encompassing a leasehold as well as a freehold interest.
10. The Investigator stated in her report that she had taken it in the round that Councillor Hawker's brother had a legal interest in Chantry TV Limited which has an interest in a lease and runs a business from the shop. There is no evidence in the papers before the Appeals Tribunal (which include the papers before the Sub-committee) of the lease or the parties to it.
11. However, it is common knowledge that a business with the name of Chantry TV operates from a shop in Westbury High Street. And, however much Councillor Hawker may quibble about a lack of direct evidence in the Investigator's report, he has not sought to dispute that his brother has an interest in that business. That being so it was reasonable for the Sub-committee to conclude that there was a personal interest of the kind identified by paragraph 7(1)(a) of the Code of Conduct. There may also have been interests of the kind described in paragraphs 7(1)(b) and (c) but the evidence is not clear about this. Those further possible reasons for finding there was a personal interest need not be explored.
12. Councillor Hawker has argued that the particular shop would not be affected by his proposals to any greater extent than other nearby shops. That argument is based on a

mistaken understanding of the Code of Conduct. The relevant test was whether the Council's decision on the matter under consideration (a proposal to reverse the traffic flow in High Street) would affect his brother to a greater extent than other council tax payers, ratepayers or other inhabitants of the council's area, i.e. the whole area of Westbury Town Council. It is self-evident that a proposal to reverse the traffic flow in a particular street would have a greater effect on properties within that street, and those living or conducting business in them, than on other properties and residences in the whole town.

13. Any councillor who has a personal interest needs also to go on to consider whether that interest is also of a kind which is prejudicial. So too a body reviewing whether an interest has been properly declared needs also to move on to that further consideration:

13.1. Councillor Hawker has submitted that as his original complaint to the Standards Board was limited to a complaint of a failure to declare a personal interest, there is no scope for the Investigator, the Sub-committee or the Appeals Tribunal to consider whether there was also a failure to act on a prejudicial interest.

13.2. Councillor Hawker's original complaint began by stating that he "took part in a discussion" at a meeting on 19 February 2007. His complaint went on to include a statement that he had inadvertently forgotten to declare a personal interest. In the Appeal Tribunal's view the matter that was referred for investigation was the whole complaint, including Councillor Hawker's presence, declarations (or lack of) and participation in the discussion.

13.3. It would be absurd for a councillor whose conduct is under review himself to determine the extent to which his conduct should be reviewed.

13.4. Councillor Hawker also seeks to argue that the Appeals Tribunal can deal only with the Sub-committee's finding that there was a breach of paragraph 7 of the Code and cannot go on to consider whether there was also a breach of later paragraphs which refer to a prejudicial interest. Councillor Hawker's right of appeal is to be found in Regulation 9 of the Local Authorities (Code of Conduct) (Local Determination) Regulations 2003 as amended. This provides that, with permission, a councillor may appeal against a finding under Regulation 7(1) of those Regulations. Regulation 7(1) sets out three possible findings:

I. That the member has not failed to comply with the Code of Conduct.

II. That the member has failed to comply with the Code of Conduct but that no further action need be taken.

III. That the member has failed to comply with the Code of Conduct and that a sanction should be imposed.

13.5. The decision by the Sub-committee fell within the second category listed above. The Appeals Tribunal is charged with upholding or dismissing the finding under Regulation 7(1). In so doing the Appeals Tribunal is not confined to adopting the same reasoning, or considering only the particular paragraphs of the Code of Conduct quoted by the Sub-committee.

13.6. Councillor Hawker has also argued that both the Sub-committee and the Appeals Tribunal should have dealt with the matter in accordance with the Standards Committee (England) Regulations 2008. Those Regulations came into force on 8

May 2008. Reading the Regulations as a whole it is clear to the Appeals Tribunal that they refer to complaints which were received on or after that date and that therefore complaints which were already in process of consideration and investigation continued to be dealt with under the old Regulations.

14. The minutes of the meeting of the Town Council's Highways, Planning and Development Committee on 19 February 2007 record under the heading of Westbury Town Centre Measures Concept Plan that the Committee should respond to the County Council's Principal Highways Engineer "as per Councillor Hawker's report as follows". There follows a quotation of a document apparently produced by Councillor Hawker. This begins:

"Reversing the traffic flow along the section of High Street between the 60s parade will achieve the quickest, most significant, most easily implemented, most cost-effective, most easily understood improvement to the commercial viability of the town centre shopping system because."

There followed a list of five numbered reasons which included

2. The High Street is currently disconnected from the key Town Centre anchor store to car users. Cars leaving Coopers should be able to reach the High Street directly to encourage follow-on shopping in the High Street. The reverse effect at present puts High Street traders at a disadvantage.
 4. Car-borne shoppers passing along the reversed flow section will see the maximum range of shops on their way to the car park from Edward Street. This increased visibility will improve trade.
 5. The greatest untapped potential for improved trade will come from car-borne shoppers being enticed to shop more in Westbury..."
15. Although it does not appear from its decision that the Sub-committee addressed its mind to the issue of whether Councillor Hawker had a prejudicial as well as a personal interest, it is clear that the Investigating Officer had given the matter some consideration. Her executive summary states her conclusion that:

"Councillor Hawker did have a personal interest but not a prejudicial interest in matters relating to the reversal of traffic flow in a one-way section of the High Street, Westbury. I concluded that neither Councillor Hawker's well-being or his financial position or that of his brother was likely to be affected by the proposal to reverse the traffic flow for the purposes of the Code of Conduct."

The report contains no reasoning to explain her conclusion that the wellbeing or financial position of Councillor Hawker's brother would not be affected by the changes which Councillor Hawker was proposing. She quite properly set out the test as to whether a member of the public with knowledge of the relevant facts would reasonably regard Councillor Hawker's personal interest as being as so significant as likely to prejudice his judgement of the public interest. But her statement that there was no such prejudice is coloured by her own prior conclusion that the wellbeing or financial position of Councillor Hawker's brother was not affected because it was through the brother that Councillor Hawker's interest arose. The Appeals Tribunal finds that prior conclusion difficult to reconcile with Councillor Hawker's own assessment of the advantage of his proposals for shops in the High Street. Although not referred to in her reasoning, her report did contain a statement from the County Council's Principal Highways Engineer that although he did not know what the effect of the reversal of the traffic flow would be on Chantry TV, in his

opinion any impact would be negligible. If the Engineer did not know what the effect would be, the Appeals Tribunal is puzzled as to how he could express a view about its impact.

16. The Appeals Tribunal is of the view that had Councillor Hawker's brother still been a councillor (as he had formerly been) the brother would have had a prejudicial interest and thus would have been precluded from participating in the discussion. Although possibly of no great impact on the brother's overall business interests, the evidence from Councillor Hawker's own statements is that his proposal was likely to be to the financial advantage of shops, including that in which the brother had an interest. Nevertheless, it does not automatically follow that Councillor Hawker who, as far as the Appeals Tribunal knows, had no direct financial interest, should have been precluded from such participation.
17. The key question is whether a member of the public with knowledge of the relevant facts would reasonably regard Councillor Hawker's interest (arising from his brother's involvement with Chantry TV and thus with a shop on the affected street) as likely to prejudice his own judgement of the public interest. In addressing that question the Investigating Officer stated:

"There is no indication that the response (to Wiltshire County Council) in relation to the reversal of traffic flow was likely to prejudice Councillor Hawker's judgement of the matter, despite the brother having a legal interest in the shop on the High Street."
18. That seems to be dealing with the question the wrong way round. The Committee discussion was about formulating the response (to Wiltshire County Council) so the question is whether the brother's interest could be seen as prejudicing Councillor Hawker in participating in the decision as to how to frame such a response.
19. There is some evidence (in the form of a statement attributed to the Appellant) that in the past the Appellant has supported proposals (about the proposed Westbury by-pass) which were opposed by his brother. Thus, assuming the facts referred to in that statement are accurate, there would be some basis for a member of the public to recognise that Councillor Hawker was capable in putting to one side any effect on his brother when considering what was in the public interest.
20. Bearing that in mind, and (in the absence of hard factual evidence) the Appeals Tribunal's impression that the proposal, however meritorious, was not likely to have a major impact on the fortunes of Chantry TV, the Appeals Tribunal has concluded that while a cynical member of the public might have suspicions, on a reasonable view Councillor Hawker should not be regarded as having a prejudicial interest.
21. As the only part of the Code which has not been followed is that involving the failure to declare a personal interest, the Appeals Tribunal concurs with the view that no further action needs to be taken.
22. The Appeals Tribunal has received a substantial number of submissions from Councillor Hawker about essentially procedural matters. Many of those are not strictly relevant to the Appeals Tribunal's task of deciding whether to uphold or dismiss the finding and are thus not matters on which the Tribunal is commenting. Any procedural defects in the process before or at the Sub-committee's hearing are effectively overreached by the Appeals Tribunal's own consideration.
23. Councillor Hawker has suggested that account should not be taken of statements made to the Investigating Officer. It is not entirely clear whether the sentence he quotes from a judgement of Wilkie J in *Sanders v Kingston*, to the effect that a statement taken from an

appellant pursuant to a power which had compulsion as a backdrop could amount to unfairness in the trial, is a reflection of the Judge's own view or is the Judge's summary of a submission being made to him. But in any event the statements on which the Appeals Tribunal have relied are those set out in documents which have not been produced under any compulsion. The Appeals Tribunal has however taken account of a statement in the Appellant's favour made in the course of the Investigating Officer's enquiries.

David Laverick
Chairman of the Tribunal

11 March 2009