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# Standards Investigation at West Berkshire Council NDC 02 - 18

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A report for the Monitoring Officer at West  
Berkshire Council

**Elizabeth Howlett, Solicitor**  
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A report investigating a complaint made by Mr Thomas Tunney. The complaint is about an alleged breach of the Code of Conduct of West Berkshire Council by failing to treat members of the public with courtesy and respect and by engaging in bullying or intimidating behaviour (or behaviour which may be regarded as such). The allegations are made against Councillor Dominic Boeck and concern the retweeting of messages on Councillor Boeck's social media account which referred to a generalized opinion of a transgender individual's merits, contribution and ability as well as endorsing the characterisation of transgender people as mentally ill.

## Background

I have been asked by the Monitoring Officer at West Berkshire Council to investigate the following matters:

1. Was Councillor Boeck acting, claiming to act or giving the impression of acting in his capacity as a councillor?
2. Did Councillor Boeck make the comment, retweet the comments, using resources issued to him by the Council?
3. Was the social network activity deemed to be disrespectful, bullying and/or intimidation?
4. Did Councillor Boeck fail to adhere to any regulations pertaining to equality?

On 30<sup>th</sup> April 2018 the Monitoring Officer in consultation with Lindsey Appleton, the Independent Person for West Berkshire Council, considered the assessment of the complaint. The conclusion was that, if the allegations were substantiated, and, if Councillor Boeck was deemed to have been acting in his capacity as a councillor, they may constitute a breach of the Code of Conduct. An investigation was necessary to establish the facts before deciding if the Code of Conduct had been breached.

In order to undertake this investigation, I have interviewed Councillor Boeck and the complainant. I have also considered the social media postings that are the subject of this complaint and have had regard to West Berkshire Council's constitution including the Social Media Protocol for Councillors. I would like to thank both Mr Tunney and Councillor Boeck for their cooperation.

## The Code of Conduct

West Berkshire Council's Code of Conduct provides that:

- Councillors must treat councillors, co-opted members, officers, members of the public and service providers with courtesy and respect.
- Councillors must, when using or authorising the use by others of the resources of the Council, use resources properly and in accordance with the Council's relevant policies.
- Councillors must not engage in bullying or intimidating behaviour or behaviour which could be regarded as bullying or intimidation.
- Councillors must not do anything which may cause the Council to breach any of the equality enactments as defined in the relevant equalities legislation.

The definition in the Code of Conduct of 'bullying and intimidating behaviour' is:

"Bullying and intimidating behaviour" means offensive, intimidating, malicious, insulting or humiliating behaviour which attempts to undermine, hurt or humiliate an individual or group. Such behaviour can have a damaging effect on a victim's

confidence, capability and health. Bullying conduct can involve behaving in an abusive or threatening way, or making allegations about people in public, in the company of their colleagues, through the press or in blogs [but within the scope of the Code of Conduct]. It may happen once, or be part of a pattern of behaviour, although minor isolated incidents are unlikely to be considered bullying. It is also unlikely that a member will be found guilty of bullying when both parties have contributed to a breakdown in relations.”

## **Summary**

Social media poses a specific challenge when determining if a councillor is acting as a councillor. The informality of it makes it less clear cut. If Councillor Boeck had been a backbencher my finding would have been that he was not acting in his capacity as a councillor. He did not claim to be a councillor and the subject matter of the message was not council business. However, Councillor Boeck is not a backbencher. He is a member of the Executive and therefore has a higher profile and a position of very specific responsibility and trust in the community. Although he did not hold himself out as a councillor his comments concerned an area that is a function of the Executive. One of the social media posts was, by his own admission, disrespectful and consequently I do consider that he was in breach of the Code of Conduct in respect of that posting.

## **The complaint**

Mr Tunney submitted this complaint as a representative rather than as an individual member of the public. A private individual had come forward to discuss it with the Executive Team at the Labour party. This person wished to remain anonymous. Mr Tunney provided other examples of inappropriate social media behaviour by Councillor Boeck. His complaint includes the point that those incidents mentioned in the complaint were not ‘one-offs’. Mr Tunney commented that a lot of the problem stems from the people Councillor Boeck follows on twitter rather than original comments made by Councillor Boeck himself. Mr Tunney is particularly concerned by the fact that Councillor Boeck has taken on an important role that involves the oversight of mental health given the comment he retweeted.

Within two hours of the complaint being submitted Councillor Boeck had put a disclaimer on his twitter account saying that ‘retweeting did not imply endorsement’. Without any comment challenging what was being re-tweeted Mr Tunney questioned what else it could be but endorsement?

Whilst Mr Tunney said that he was horrified on a personal level at the retweets he was a very busy man and would not have complained as a private individual. There had been a complaint in writing. There had been a number of complaints on Labour’s Facebook page and Mr Tunney had also heard complaints from within the local

Conservative Party. He acknowledged that Councillor Boeck had been quiet on twitter recently.

## **The Social Media activity**

The complaint cited two threads on twitter. The first concerned the endorsement of a view that Mr Eddie Izzard's capability as a politician is directly related to his chosen gender identity. The complaint is that there is no context so the message is that the 'weakness' of Mr Izzard is connected to his gender identity. In the second post (where Councillor Boeck added "And he's not even funny") the complaint is that this conveys support for the underlying point in that Councillor Boeck is augmenting the post not taking issue with it.

Councillor Boeck countered that the comment on Eddie Izzard was not about gender identity but about different constituencies being influenced in different ways by different individuals. It was a political comment.

The second thread was a news story about an individual in the US asked to leave a lecture hall for claiming there were only two genders. Mr Tunney believed it was offensive to equate transgender with mental illness. On this second post Councillor Boeck acknowledged that he should have taken more care. He had not realised that he was retweeting a comment about the mentally ill. He did not agree with the comment and he did not support it. It had been careless of him and it had been done in haste. The retweets were taken down within a day or two following advice that he had received that they were likely to offend some people.

Councillor Boeck said he had a very small twitter following (124) and generally followed and retweeted others rather than creating tweets himself. He had not appreciated that there was any problem until what he had sent was retweeted by Newbury Labour Party and by the local Green Party and Momentum. He felt all had a political point to make.

Councillor Boeck stands by the apology he made on 9<sup>th</sup> April. He has used twitter very little since and intends to use it only in his capacity as a councillor in the future. He said that he will make clear in his profile that he is a councillor.

## **The legal position**

There are two important legal cases on the issue of the use of twitter.

### **McAlpine v Bercow [2013] EWHC 1342 (QB) (24 May 2013)**

Sally Bercow was sued for defamation because of a tweet asking why Lord McAlpine was trending with an\*innocent face\*. The court stated that Twitter permitted users to express themselves in tweets of no more than 140 characters [at that time]. Tweets were used in a similar way to ordinary conversation. People tweet descriptions of what they are doing, or would like to do, jokes and gossip, and comments on people

or topics at large, and anything else they want to say. They tweet using conversational words and expressions.

The tweet that Sally Bercow sent was not a publication to the world at large, such as a daily newspaper or broadcast. It was a publication on Twitter. The hypothetical reader must be taken to be a reasonable representative of users of Twitter who follow Sally Bercow. A significant number retweeted the tweet to their own followers. The fact that the Defendant's followers used Twitter implied that they liked to be up to date with such matters. The finding of the court was that Sally Bercow had defamed Lord McAlpine by the words she used. This verdict has been treated as an important statement about Twitter. It confirmed that Twitter is a powerful and potentially dangerous weapon. It is more like a broadcast than an email and Twitter is subject to the law of defamation. Sally Bercow herself said: "Today's ruling should be seen as a warning to all social media users".

### **Jack Monroe v Katie Hopkins [2017] EWHC 433 (QB)**

The perils of Twitter, even where tweets are swiftly deleted, were also examined in the High Court when food blogger Jack Monroe sued the columnist Katie Hopkins.

Monroe was awarded £24,000 plus costs in the case. However, Mr Justice Warby also ordered Hopkins to pay an initial £107,000 towards Monroe's legal costs within 28 days. The case confirmed that a tweet can be defamatory even if it is only sent initially to 140 followers and it is deleted within two and a half hours. That is enough time for it to be re-tweeted, viewed on a home page and picked up in mainstream media. The size of the following and the transient nature is irrelevant.

Hopkins had erroneously tweeted that Monroe approved of the vandalism of war memorials, after mistaking her for the journalist, Laurie Penny, who had expressed support for the vandalism. Monroe, who is from a military family, responded with an angry denial. Monroe said she would sue but offered to settle for a £5,000 donation to her chosen charity, Migrant Rescue. Hopkins, who had previously expressed controversial views on migrant issues, did not take up the offer. Hopkins later deleted the first tweet but also tweeted a derogatory statement comparing Penny and Monroe.

Warby J held that the tweets had caused Monroe "real and substantial distress". He said the second tweet, by implication, suggested that Monroe also condoned the vandalism.

He examined the "principles applied to Twitter", including that a tweet that is said to be libellous may need to be read as part of a series of tweets forming part of a "multi-dimensional conversation".

Rather than engaging in an “elaborate analysis” of a 140-character tweet, he held that the courts should adopt an “impressionistic approach” that takes into account “the whole tweet and the context in which the ordinary reasonable reader would read that tweet”.

Warby J also pointed out the difficulties of disclosure in Twitter cases — the first tweet was deleted, which meant the Twitter Analytics were not available, and Monroe’s Twitter records were deleted. This highlighted, in the Twitter context, the importance of retaining and preserving material that may become disclosable.

There is also a case on the issue of when a councillor is acting in the capacity of a councillor:

**McTigue v Middlesbrough Council (2009) APE 0421** (a decision of the former Adjudication Panel for England) concerns blogging. When Councillor McTigue posted on a forum as "Indie" it was considered that ‘everyone knew’ she was a councillor despite the lack of identification as a councillor in her user name.

## Conclusion

To address the specific questions asked by West Berkshire Council:

1. **Was Councillor Boeck acting, claiming to act or giving the impression of acting in his capacity as a councillor?** This is the key question because it determines whether the Code of Conduct applies at all. Mr Tunney said at the interview that his personal view was no. Councillor Boeck was not representing West Berkshire Council. A lot of the tweets were political rather than about council business. Councillor Boeck was a political person.

However, Mr Tunney subsequently emailed to change his mind about his response to this question. He had answered that based on tweet history and thought it could only really be classed as politically motivated but looking deeper into Councillor Boeck’s twitter account Mr Tunney considers there are numerous examples of him talking about council work projects. There are two tweets that highlight Councillor Boeck discussing council business and identifying himself as a councillor. Mr Tunney believes that anyone following his tweets would easily associate Councillor Boeck’s tweets with him being a Councillor at West Berkshire. Councillor Boeck said that he had never claimed on twitter to be a councillor.

Councillor Boeck is not simply a councillor. He is a high-profile councillor. He is a member of the Executive at West Berkshire Council. He holds a position of responsibility. He is the Chair of the Health and Well-being Board. One of the priorities of the Board for this year is mental health. I do not think Councillor Boeck was claiming to act as a councillor but I do think he has a

sufficiently high profile in the community because of his role at West Berkshire Council for him to be followed on twitter purely because he is a councillor. It is likely that he was perceived by followers of his account to be acting in his capacity as a councillor.

I therefore conclude that he gave the impression that he was acting in his capacity as a councillor even though I accept he may not have intended that.

2. **Did Councillor Boeck make the comment, retweet the comments, using resources issued to him by the Council?** Probably not. It is impossible to be absolutely certain about this. From the discussion with Councillor Boeck I am reasonably confident that all the social media activity took place on Councillor Boeck's iPhone which is his own personal property.
3. **Was the social network activity deemed to be disrespectful, bullying and/or intimidation?** I make a clear distinction between the two threads. The first was a political comment. If it was aimed at Eddie Izzard at all it was in his position as a member of Labour's National Executive so it was aimed at the Labour party. Mr Tunney himself believed it was aimed at humiliating the Labour party. The Code of Conduct has always accepted that political debate and political comment is going to be robust and that the Code of Conduct should not stifle this. Eddie Izzard has chosen to enter the political arena. The complainant was not complaining on behalf of Eddie Izzard. I do not therefore believe that the first thread was disrespectful, bullying or intimidating towards an individual.

The second thread is different. It directly characterised transgender people as mentally ill. It was disrespectful. It is particularly unfortunate because of the role Councillor Boeck now holds on the Executive. Mental health is directly within his remit. Councillor Boeck accepts that he was careless with this retweeting and acted in haste.

4. **Did Councillor Boeck fail to adhere to any of the regulations pertaining to equality?** The complainant believes it was offensive to transgender people. Councillor Boeck said that he had clearly offended some people but he had not compromised any rights. I believe the answer is yes because Councillor Boeck failed to treat those with mental illness with respect. It was a mistake and he has acknowledged this and apologised.

Councillor Boeck apologised on 9<sup>th</sup> April 2018. He also added a disclaimer to his account that retweeting does not imply endorsement. Mr Tunney, the complainant, did not accept the apology as being sincere. The two do not know each other. The complainant is making his assumptions based on what he knows of Councillor Boeck from his twitter account. Councillor Boeck has made the point that others, including

Newbury Labour Party, accepted his apology graciously (on 10<sup>th</sup> April it welcomed the change of heart and looked forward to his future contributions to the social media debate).

I do not accept that a disclaimer saying that 'retweeting does not imply endorsement' is convincing if you retweet without any comment. What else are you doing if you retweet without comment other than endorsing the comment you are forwarding? Why would you forward it if you did not agree with it? If you forward it with a comment about how outrageous the comment is that is different but forwarding with no comment cannot imply anything other than endorsement.

I do not think Councillor Boeck had any idea of the reaction that his actions would cause. I believe it came as a complete shock to him. The problem, as Councillor Boeck himself said, is that twitter is a fast-moving platform that allows consumers to consume a wide range of views. There are very offensive views out there. Society as a whole is struggling with the impact of social media. Consequently, the law itself is having to evolve to deal with it. However, the legislation is clear and the case law is clear. Twitter might well be transitory and it can be very informal but the law still applies to it as does the Code of Conduct.

I do consider Councillor Boeck's apology to be genuine and that is to be welcomed as is the clear indication he gave that he now appreciates the impact of what he does on social media.