

FAO: Cllr Elaine Fieldhouse, The Mayor of Ledbury and Cllr Keith Francis, Deputy Mayor of Ledbury
Ledbury Town Council

By Email Only

admin@ledburytowncouncil.gov.uk
efieldhouse@ledburytowncouncil.gov.uk
kfrancis@ledburytowncouncil.gov.uk

Our ref: HEJH(ADL)/46010.0001 **Your ref:** 21 July 2017

Dear Sirs

Proposed claim for judicial review against Ledbury Town Council (the Town Council)
Our Client: Cllr Elizabeth Harvey

We are instructed by Cllr Elizabeth Harvey in relation to the decision taken by the Town Council to extend sanctions against Cllr Harvey and Cllr Andrew Harrison that was taken on 11 May 2017 (the **Decision**). For the avoidance of doubt we are not instructed by Cllr Harrison.

This letter is a formal letter before claim in accordance with the pre-action protocol for judicial review under the Civil Procedure Rules.

1. Background

- (a) Cllr Harvey is a Town Councillor representing Ledbury-North and is also a councillor on Herefordshire Council. Cllr Harrison is a Town Councillor representing Ledbury-South. Prior to the events detailed in this letter, Cllr Harvey and Cllr Harrison were Town Council committee chairs (planning and finance respectively).
- (b) In December 2015, the Clerk of the Town Council and the Deputy Clerk (the **Complainants**) both made complaints against Cllr Harvey and Cllr Harrison (the **Complaints**). In short the Complaints relate to allegations about the behaviour of Cllrs Harvey and Harrison and its effect on employees of the Town Council (including the Complainants).

- (c) The Complaints were initially handled as complaints under the Town Council's adopted Code of Practice for Handling Complaints (adopted 15 March 2012 (**Code of Practice**)). Within the first month, the Town Council's Complaints Procedure and Grievance Procedure (adopted 11 January 2007) were both set aside without reason. Instead the Town Council at a meeting on 19 January 2016 decided to deal with the Complaints locally under an unspecified and - yet to be adopted procedure - comprising a Grievance Panel with authority to recommend sanctions and Appeal Panel formed of Town Councillors. However, the Complaints relate to the conduct of Town Councillors and so the Complaints should have been referred to Herefordshire Council's Monitoring Officer (the **Monitoring Officer**) for investigation and determination in respect of the Complaints.
- (d) On 31 January 2016, our Client self-referred the Complaints (as they related to our Client) to the Monitoring Officer of Herefordshire Council.
- (e) On 21 March 2016, the Grievance Panel met to consider the Complaints and upheld them without giving reasons and without recommending any sanctions (as required by the process the Town Council had adopted). This decision was confirmed to our Client by an email from the Chair of the Grievance Panel, Cllr Francis, on 21 March.
- (f) On 29 March 2016, our Client wrote to Cllrs Francis and Crowe regarding the outcome of the Grievance Panel and requesting an appeal.
- (g) On 19 April 2016 the Appeal Panel convened to consider our Client's appeal. Given that no reasons for the Grievance Panel decision had been released and no sanctions recommended, our Client's appeal related only to the procedure adopted. The Appeal Panel did not allow the appeal and upheld the decision of the Grievance Panel. This "final decision" determining the Complaints was communicated to our Client by an email on 19 April from Cllr Crowe. Cllr Crowe further confirmed that the determination of the Complaints would be reported to the full Town Council for it to consider what (if any) action to take.
- (h) On 4 May 2016 and prior to the Extraordinary Meeting referred to below, the Monitoring Officer wrote to our Client's previous solicitors stating "*I have previously suggested that this town council seek advice on their ability to deal with the matter given the restrictions clearly stated in the Localism Act and I have renewed that request given that I have now seen the agenda calling for a decision if any as a result of the grievance and appeal panel meetings*".
- (i) On 5 May 2016 an Extraordinary Meeting of the Town Council was held to consider the findings made by the Grievance Panel and affirmed by the Appeal Panel and

further to consider what action to take. Our Client maintains that Town Councillors were not given the reasons of either Panel or appropriate access to the substance of the Complaints. The following resolution was passed:

“Following detailed discussion, and mindful of the Town Council’s duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees and that failure to address the issue could result in a fundamental breakdown of trust and confidence between the Town Council as employer and its employees, it was RESOLVED to take the following action, in order to reduce contact between the two officers and the two councillors concerned, and thereby help prevent the on-going bullying, intimidation and harassment of staff:

- 5.1 *Councillors Harvey and Harrison not to serve on any of Ledbury Town Council’s committees, sub-committees, panels or working/steering groups.*
 - 5.2 *Councillors Harvey and Harrison not to be eligible to substitute for a member of any of Ledbury Town Council committees, sub-committees, panels or working/steering groups.*
 - 5.3 *Councillors Harvey and Harrison not to represent Ledbury Town Council on any outside body.*
 - 5.4 *All communication between Councillors Harvey and Harrison and the Clerk and Deputy Clerk to go through the Ledbury Town Council Mayor or Deputy Mayor in his/her absence.*
 - 5.5 *That Herefordshire Council be informed of the above actions taken by Ledbury Town Council.*
 - 5.6 *That all bodies affiliated to Ledbury Town Council be informed of the above actions taken by Ledbury Town Council.*
 - 5.7 *The time period for 5.1 – 5.6 to remain in place, shall be:
From the Annual Meeting of Ledbury Town Council on 12th May 2016 until the Annual Meeting of Ledbury Town Council in May 2017, when the matter may be reviewed.”*
- (j) On 10 May 2016, the Monitoring Officer wrote to Cllr Crowe (as Mayor of Ledbury) concerning the proposed investigation into complaints against a number of Town Councillors. The Monitoring Officer stated:

*“The difficult situation that you are dealing with is not underestimated but the problem you have is that the staff grievances allege bullying by two councillors. Clearly this is behaviour prohibited by the code of conduct. Therefore in my opinion **although the staff have written these allegations within the grievance procedure their allegation is in fact that a member has failed to comply with the authority’s code of conduct. As a result you know that my view is that such an allegation cannot be dealt with otherwise than in accordance with arrangements made under s28(6) of the Localism Act 2011.***

I understand the duty of care to your own staff and why therefore you have followed the grievance procedure and made decisions at the extra ordinary meeting on 5th May.

However this is in conflict with the requirements in the Localism Act and could expose the council to risk which I would want you to avoid. [Emphasis added]

- (k) At its Annual Meeting on 12 May 2016, the Town Council resolved to submit further Code of Conduct complaints against Cllr Harvey and another Town Councillor. These further complaints were submitted to the Monitoring Officer together with numerous other complaints submitted by Town Councillors and members of the public against various Town Councillors.
- (l) In April/May 2016, the Monitoring Officer engaged external investigators for the complaints received in respect of Town Councillors (including the Complaints). Over a period in excess of a year the independent investigation was undertaken.
- (m) On 8 May 2017, the Standing Committee of the Town Council met. It was reported to the meeting that Cllrs Fieldhouse and Baker had interviewed staff to assess the impact of the measures referred to in paragraph 1(g) above. The Committee resolved to recommend to the full Town Council to extend the sanctions made on the 5 May 2016 against both Cllr Harvey (from 11 May 2017 until the 2018 Annual Meeting of the Town Council) and Cllr Harrison (from 11 May 2017 until the November 2017 meeting of the Town Council). The new proposed sanction wording in respect of communication related not just to the Clerk/Deputy Clerk but all office staff.
- (n) The Monitoring Officer wrote to Cllr Harvey on 9 May 2017, confirming that there had been no breach of the Code of Conduct in respect of all complaints made against Cllr Harvey (including the Complaints as they relate to Cllr Harvey). Cllr Harrison was similarly cleared by the Monitoring Officer.
- (o) On 11 May 2017, the Monitoring Officer wrote (via email) to Cllr Crowe (the presiding Mayor of Ledbury at the time the Complaints were locally determined) stating *“My opinion on a town council taking sanctions against a members where there has either not been a code of conduct allegation or where one has been determined, remains. **A town council can only take sanction against a member where the principal authority has recommended them following a breach of the code...** This will be no surprise as it is what I said a year ago, the duties to your staff must be your priority as an employer, but you have to be mindful to ensure that you do not by your actions make any decisions that put the town council at risk of a judicial review challenge”*. [emphasis added]
- (p) The Annual Meeting of the Town Council was held on 11 May 2017, and resolved to extend the sanctions as per the Standing Committee’s recommendation (with one minor typographical change).

(q) Throughout the process set out above the Town Council has been advised by Mrs Lynda Wilcox of the Herefordshire Association of Local Councils (**HALC**) and the National Association of Local Councils (**NALC**). The advice purported to have been received from NALC is referenced in a letter from the Town Council's former solicitors (Masefield Solicitors LLP) dated 23 March 2016. In short the Town Council asserts:

- i. The Town Council was not investigating whether our Client had breached the Code of Conduct;
- ii. NALC advised there was no reason why the grievance procedure should be put on hold whilst the Monitoring Officer investigated any alleged councillor behaviour which would constitute a breach of the Code of Conduct; and
- iii. Any investigation by the Monitoring Officer is a total separate matter to the Town Council's grievance processes.

(r) In addition to the warnings received from the Monitoring Officer, our Client's former solicitors were in frequent correspondence with both the Town Council and its various solicitors concerning the legal issues with the process adopted.

2. The proposed defendant

Ledbury Town Council

Town Council Offices

Church Street

Ledbury

Herefordshire HR8 1DH

3. The claimant

Cllr Elizabeth Pauline Jane Harvey

Glen Helen

Elmsdale Road

Ledbury

Herefordshire HR8 1DH

4. Reference details

The Mayor of Ledbury and the Deputy Mayor of Ledbury.

5. Details of the matter being challenged

- (a) Our Client proposes to challenge the decision of the full Town Council on 11 May 2017 (item reference C.69 – 05.17 EMPLOYMENT MATTER) as follows:

*“Following detailed discussion and mindful of the Town Council’s duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all their employees and in the knowledge that failure to address employment issues could result in a fundamental breakdown of trust and confidence between the Town Council as employer and its employees, it was **RESOLVED** that:*

The Minutes 5.2.1 to 5.2.8 be approved and adopted with the following amendment to 5.2.4: “All communication from Councillors Harvey and Harrison to all office staff to go through the Ledbury Town Council Mayor or Deputy Mayor in his/her absence”

- (b) For clarity the sanctions currently imposed on our Client and Cllr Harrison are as follows:

“5.2.1 Councillors Harvey and Harrison not to serve on any of Ledbury Town Council’s committees, sub-committees, panels or working/steering groups.

5.2.2 Councillors Harvey and Harrison not to be eligible to substitute for a member of any of Ledbury Town Council committees, sub-committees, panels or working/steering groups.

5.2.3 Councillors Harvey and Harrison not to represent Ledbury Town Council on any outside body.

5.2.4 All communication from Councillors Harvey and Harrison to all office staff to go through the Ledbury Town Council Mayor or Deputy Mayor in his/her absence.

5.2.5 That Herefordshire Council be informed of the above actions taken by Ledbury Town Council.

5.2.6 That all bodies affiliated to Ledbury Town Council be informed of the above actions taken by Ledbury Town Council.

5.2.7 The time period for 5.2.1 – 5.2.6 to remain in place for Councillor Harvey will be from the Annual Meeting of Ledbury Town Council on 11th May 2017 until the Annual Meeting of Ledbury Town Council in May 2018, when the matter may be reviewed, subject to any additional measures deemed necessary by full Council during or at the conclusion of this period.

5.2.8 The time period for 5.2.1 – 5.2.8 to remain in place for Councillor Harrison will be from the Annual Meeting of Ledbury Town Council on 11th May 2017 until the November Meeting of Ledbury Town Council in 2017, when the matter may be reviewed, subject to any additional measures deemed necessary by full Council during or at the conclusion of this period.”

6. The issue(s)

- (a) We have set out in paragraph 5 above the decision our Client proposes to challenge. We now set out in this paragraph 6 the reason why the decision is liable to challenge.

Legislative Background

- (b) Section 27, Localism Act 2011 provides:

“(1) A relevant authority [which includes both Herefordshire Council and the Town Council (as a parish council)] must promote and maintain high standards of conduct by members and co-opted members of the authority.

“(2) In discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity”

The Town Council could satisfy this requirement by adopting the Herefordshire Council code of conduct. It is not disputed that at all relevant times a code of conduct (**Code of Conduct**) had been adopted by the Town Council. The current version of the Code of Conduct was adopted by the Town Council on 28 January 2016 – we understand that the version in force prior to that date was not materially different and as with the current Code of Conduct is based on the Herefordshire Council code.

- (c) Section 28, Localism Act 2011 provides:

*“(4) A **failure to comply with a relevant authority’s code of conduct is not to be dealt with otherwise than in accordance with arrangements made under subsection (6)**; in particular, a decision is not invalidated just because something that occurred in the process of the making the decision involved a failure to comply with the code.*

...

*(6) **A relevant authority other than a parish council must have in place-***

*(a) arrangements under which allegations can be **investigated**, and*

*(b) arrangements under which **decisions** on allegations can be made.*

...

*(9) In subsections (6) and (7) **“allegation”**, in relation to a relevant authority, means a written allegation-*

(a) ...

*(b) that a member or co-opted member **of a parish council for which the authority is the principal authority has failed to comply** with the parish council’s code of conduct.*

*(11) If a relevant authority **finds** that a member or co-opted member of the authority has failed to comply with its code of conduct (whether or not the finding is made following an investigation under arrangements put in place under section (6)) **it may have regard to the failure in deciding-***

*(a) **whether to take action** in relation to the member or co-opted member, and*

(b) **what action to take.**” [Emphasis added]

Leading Case Law

- (d) Sections 27 and 28, Localism Act 2011 have been reviewed by the High Court in the case of *Taylor v Honiton Town Council & Anor* [2016] EWHC 3307 (Admin). Mr Justice Edis held:
- i. The effect of Section 28 (6) and (9) is that the principal authority must have in place arrangements for the investigation and determination of code of conduct complaints against parish council members. The principal authority makes the decision on the complaint and not the parish council.
 - ii. [At paragraph 35] “*The whole point of the scheme **is to remove decision making powers and duties from very small authorities which do not have the resources to manage them effectively and who may be so small that any real independence is unattainable**” [emphasis added].*

Commentary

- (e) The Code of Conduct sets out what the Town Council (and by extension its constituents) expects of its Town Councillors – this is reflected in the Town Council’s Code of Practice for Handling Complaints (adopted 15 March 2012) (**Code of Practice**) which states “*Town Councillors sign up to a Code of Conduct on taking office*”.
- (f) The Code of Conduct sets out specific Rules of Conduct that would be relevant to the behaviour alleged by the Complainants, namely:
- i. Rule 11(a) – “**Do** treat others with respect and courtesy”.
 - ii. Rule 11(c) – “**Do not** bully any person”.
- (g) Town Councillors are not employees of the Town Council. Their conduct and behaviour towards others, including employees of the Town Council, is governed by and can only be measured against the Code of Conduct and not any other policy (not forming part of the Code of Conduct) that the Town Council purports to adopt to deal with the behaviour and actions of members. This is reflected by the Town Council’s Standing Orders in place at the time the Complaints were made (those adopted on 11 April 2013) – see Standing Orders 30a, 30b and 30c (the latter of which specifically deals with notification of complaints made by employees. In the current Standing Orders the Town Council acknowledges that only Herefordshire Council can

determine whether there has been a breach of the Code of Conduct (see Standing Order 14d) and that employee complaints should also be dealt with by Herefordshire Council (see Standing Orders 14a and 14b). We also note that the NALC guidance that we have seen supports our Client's arguments on how the Complaints should have been handled.

- (h) The Council acknowledges that it has no power to investigate a complaint about the behaviour of a Town Councillor (see the Code of Practice). The fact that the Complainants are employees of the Town Council making a complaint, through the employee grievance process, about behaviour experienced during the course of employment does not change the Town Council's powers in respect of Town Councillors and their behaviour.
- (i) Even where a complaint arises through the grievance process for employees, if the resolution of the grievance requires an investigation of a Town Councillor's behaviour towards the employee then that can only be done by the Monitoring Officer and Herefordshire Council by reference to the Code of Conduct. In such a scenario we suggest that any such grievance process should be adjourned to allow Herefordshire Council to investigate and determine if there is a breach of the Code of Conduct – as was specifically requested by the Monitoring Officer in writing to the Mayor, Councillor Crowe. We note that paragraph 3.3 of the Town Council's adopted Grievance Procedure states "*A grievance meeting may be adjourned to allow matters raised during the course of the meeting to be investigated, or to afford (the employees manager/the clerk) time to consider the decision*". This could clearly have been adopted in this case.
- (j) If a finding has not been made that there is a breach of the Code of Conduct then there is no jurisdiction for any sanction to be determined and in any event we submit that a proper reading of Section 28(11) means that only Herefordshire Council can determine sanctions. Even if this was not the case, without a valid finding that there is a breach of the Code of Conduct the power to determine sanctions does not arise.
- (k) We consider the Decision to be unlawful and challenge the Decision on the following grounds (**Grounds**) (this paragraph 6(k) is without limitation to our Client's right to amend or add to these Grounds in any application for judicial review):

Ground 1 – The Decision was ultra vires and unlawful

- i. The Decision was ultra vires in that a Town Councillor's behaviour including towards an employee of the Town Council can only be assessed against the adopted Code of Conduct. Sections 28(4) and (6), Localism Act 2011 provide

only one mechanism to investigate and determine whether there is a breach of the Code of Conduct and this is through Herefordshire Council. The Town Council has no power to impose any other process.

- ii. The power to determine sanctions is found in Section 28(11) and applies to the relevant authority that *“finds that a member...of the authority has failed to comply with its code of conduct”*. As only Herefordshire Council has the authority to make such a finding, it follows that only Herefordshire Council can determine sanctions. The Town Council therefore had and has no power to make the Decision.
- iii. Even if it was the case that the Town Council could determine sanctions then it can only do so where there has been a finding of a failure to comply. As detailed above only Herefordshire Council can make such a finding and in the case of the Complaints it has cleared both Cllr Harvey and Cllr Harrison. Therefore even if the Town Council has the power to determine sanctions, the statutory condition precedent that Herefordshire Council has found a breach is not met.

Ground 2 – Procedural Unfairness

- iv. At all times the procedure adopted leading up to the Decision has been unfair to our Client and Cllr Harrison in that they have been given an inadequate opportunity to understand the nature of the procedure, the legal basis of the procedure and to participate effectively in the procedure and make effective or any representations about the impact of the Decision on them.

Ground 3 – Irrationality (Legislative Scheme)

- v. The Decision is so unreasonable in light of the clear legislative scheme for Town Councillor conduct and that there has been no finding of a breach of the Code of Conduct that that no reasonable parish council could have reached the Decision that the Town Council did.

Ground 4 – Irrationality (Failure to Take Account of Material Considerations)

- vi. The Town Council relied solely upon considerations relating to employee relations (as detailed in the resolutions above) and failed to have regard to the impact upon Cllrs Harvey and Harrison in their ability to do their jobs as Town Councillors and represent the interests of their constituents.

Ground 5 – Proportionality

- vii. The Decision was disproportionate in that it does not represent a proportionate means of achieving the legitimate aim of maintaining relations between Town Councillors and Town Council employees because it breaches the rights of our Client and Cllr Harrison under Article 10 (freedom of expression), Human Rights Act 1998 by significantly curtailing their ability to participate in Town Council business and effectively represent the views of their constituents.
- (l) Our Client has clear grounds to challenge the Decision and we are confident that any challenge would be successful. In any challenge our Client will seek:
- i. A quashing order to render the Decision ineffective;
 - ii. A declaration that a parish council cannot investigate and/or determine any complaint and/or determine sanctions in respect of any complaint concerning the behaviour of a member of the parish council, howsoever arising, and that all such matters are the responsibility of the relevant principal council.

7. Actions that the defendant is expected to take

- (a) Our Client requires the Town Council to reverse the Decision. The Town Council must provide a written undertaking **by no later than 4pm on 28 July 2017** that it will convene a meeting of the full Town Council such meeting **to be held by no later than 4 August 2017** and shall put before that meeting the following resolutions (or ones in substantially the same form) for consideration and vote at that meeting:

IT IS RESOLVED THAT:

- i. Ledbury Town Council notes that it has no power to investigate and/or decide any complaint relating to the behaviour of a Town Councillor and that these complaints, howsoever arising, must be sent to Herefordshire Council's Monitoring Officer.
- ii. Ledbury Town Council acknowledges and accepts that in respect of complaints from the Clerk and Deputy Clerk relating to the behaviour of Councillors Harvey and Harrison made in December 2015 that the Monitoring Officer of Herefordshire Council has investigated these complaints and determined that there is no breach of Ledbury Town Council's Code of Conduct.
- iii. The decision of Ledbury Town Council of 11 May 2017 (reference C.69 – 05.17 EMPLOYMENT MATTER) was unlawful and shall be treated by Ledbury

Town Council and all those dealing with Ledbury Town Council as having never been made.

- iv. Councillors Harvey and Harrison shall be permitted forthwith to participate fully in the business of Ledbury Town Council and to communicate with all officers of Ledbury Town Council.
 - v. Herefordshire Council and all bodies affiliated to Ledbury Town Council shall be informed that the decision of 11 May 2017 has no effect.
- (b) If the Town Council does not provide such an undertaking and/or does not reverse the Decision on the terms set out above then our Client will issue an application for judicial review without further notice.
- (c) As set out above our Client has clear grounds to challenge the Decision. It is our view that the Town Council has no defence to such a challenge and that our Client would be successful. Our Client would also seek her costs in pursuing such a challenge from the Town Council – this would be something that she would do with some regret given the impact upon the people of Ledbury but feels she would have been left no other course of action by the Town Council. Our costs currently stand in the region of £5,000 plus VAT. From our extensive experience of conducting judicial review matters, we consider that if proceedings are issued our Client's legal costs could be in excess of £60,000 plus VAT if the matter goes to a final hearing.

8. Details of the legal advisers, if any, dealing with the claim

Anthony Collins Solicitors LLP

134 Edmund Street

Birmingham B3 2ES

DX 13055 Birmingham 1

Reference: Hilary Harrison (HEJH(ADL)/46010.0001)

9. Details of any interested parties

- (a) Herefordshire Council

Plough Lane

Hereford HR4 0LE

Reference: Claire Ward – Solicitor to the Council and Monitoring Officer

(b) Cllr Andrew Harrison - aharrison@ledburytowncouncil.gov.uk

(c) A copy of this letter before claim has been sent to each of the interested parties.

10. Information sought

As detailed in paragraph 11 below.

11. Documentation sought

All materials relied upon for the Decision including all meeting agendas, minutes, records and background papers. This documentation is relevant to the Grounds set out above.

12. The address for reply and service of court documents

The address detailed at paragraph 8 above.

13. Proposed reply date

We require the Town Council's written undertaking as detailed at paragraph 7 above by **no later than 4pm on Friday 28 July 2017.**

We look forward to hearing from you.

Yours faithfully



Anthony Collins Solicitors LLP

Direct Line: 0121 214 3557
Departmental Fax: 0121 212 7439
Email Address: hilary.harrison@anthonycollins.com

CC:

Claire Ward, Solicitor to the Council and Monitoring Officer – Herefordshire Council
Claire.ward@herefordshire.gov.uk

Cllr Andrew Harrison - aharrison@ledburytowncouncil.gov.uk

All Town Councillors of Ledbury Town Council (by email)

NALC:

Chairman: Cllr Sue Baxter sue.baxter@nalc.gov.uk
Chief Executive: Jonathan Owen jonathan.owen@nalc.gov.uk