

Decision Maker: ERC PDS COMMITTEE

Date: 17 October 2023

Decision Type: Non-Urgent Non-Executive Non-Key

Title: REVIEW OF THE COUNCIL'S MEASURES ON
FREEDOM OF SPEECH FOR EMPLOYEES

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Ward: All

1. REASON FOR REPORT

1.1 The Chairman of ERC PDS committee requested a report to review the Council's process, policy and procedure to protect and defend freedom of speech for Council staff and for those who work for the Council's contactors. This report looks at the process, policy, and procedure to protect and defend freedom of speech for Council staff and considers the measures available to staff who work for the Council's contractors.

2. RECOMMENDATIONS

2.1. Members are asked to note the following:

2.1.1. the fundamental importance of the right to freedom of speech to the Council's activities, and the narrow scope for interfering with political expression; and

2.1.2. the potential liabilities faced by the council if it fails to protect that right, either in relation to Councillors or Council employees.

2.2. Officers are asked to take the following actions in support of the recommendations under paragraph 2.1 above:

2.2.1. to review the Council's policies, procedures and Constitution with a view to ensuring that they reflect the fundamental importance of the right to freedom of speech; and

2.2.2. to report to the Executive and Constitutional Working Party on progress with the review recommended at paragraph 2.2.1 above.

2.3. GP&L and the Constitutional Improvement Working Party is recommended to note this report and update the code of conduct for Officers and Members, and inform members of the Standards Committee to reflect the above recommendations.

2.4. Note the additional text added to the body of the report.

Impact on Vulnerable Adults and Children

1. Summary of Impact: Not applicable

Corporate Policy

1. Policy Status: Existing Policy Further Details
 2. BBB Priority: Managing our Resources well
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Financial

1. Cost of proposal: No Cost:
 2. Ongoing costs: Not Applicable:
 3. Budget head/performance centre:
 4. Total current budget for this head: £
 5. Source of funding:
-

Personnel

1. Number of staff (current and additional): Not applicable
 2. If from existing staff resources, number of staff hours: Not Applicable
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Legal

1. Legal Requirement: Statutory Requirement: Further Details
 2. Call-in: Not Applicable:
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Procurement

1. Summary of Procurement Implications:

Customer Impact

1. Estimated number of users/beneficiaries (current and projected):

Ward Councillor Views

1. Have Ward Councillors been asked for comments? Not Applicable
2. Summary of Ward Councillors comments: Not Applicable

3. COMMENTARY

- 3.1 Members of ERC PDS wish to be informed of the current process, procedures, and policies the Council currently has to enable employees to speak out on issues without fear of being ostracised or disciplined. It is recognised that as a part of good governance of an organisation it is important that employees feel free to speak out about issues of concern or poor practice. There is also wider legal framework to protect freedom of speech/expression for individuals and the rights of an organisation to protect confidentiality and rights of others. This report will set out below the legal framework around protection of free speech followed by the current LBB measures available to staff to raise concerns.

4. LEGAL FRAMEWORK

Article 10 of the Human Rights Act

- 4.1 Under Article 10 everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
- 4.2 This right comes with qualifications, which must be construed narrowly. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
- 4.3 Article 10 affords a particularly high degree of protection to political speech and disclosure of information in the public interest. There is little scope for interfering with such speech.
- 4.4 Under the Human Rights Act 1998 the Council is a public authority and therefore must not act incompatibly with the right to freedom of expression in carrying out its public functions. The Council's relationship with its employees will in most cases be a matter of private law. However Article 10 rights and duties form part of the employment relationship – and present a liability risk to the Council – in two important ways.
- 4.5 First, an Employment Tribunal considering an unfair dismissal claim brought by a Council employee would itself be bound to act compatibly with Article 10. It would therefore apply free speech protections in assessing whether the Council had acted reasonably in dismissing the employee. Tribunals are increasingly disposed to entertain Article 10 arguments, therefore the Council needs to be alive to the risks in dismissing employees even for apparently 'offensive' speech.
- 4.6 Second, recent decisions of the Employment Appeal Tribunal in cases such as *Higgs v Farmor's School* (2023) EAT has highlighted that gender critical belief that an employee may hold is a religious and philosophical belief and therefore a protected characteristic under the Equality Act 2010 . The Employment Appeal

Tribunal (EAT noted that protection for belief is not limited to merely holding the belief without the ability to express those beliefs. The protection also covers the lawful manifestation of the belief. The EAT found that employers cannot decide to discipline or dismiss an employee for manifesting a protected belief on the basis that someone else might be offended. Doing so risks discrimination unless an employer has also considered whether the action is both a necessary and proportionate interference with the right to freedom of expression. Any objective justification of a restriction is always dependent on context and is employment-specific.

The above developments pose particular risks for the Council in dealing with competing rights. The EAT set out some broad principles to help employers take a balanced approach which employers should consider when dealing with complaints of offensive speech against employees:

- the nature of the employment relationship;
- the content and tone of what was said;
- who the likely audience is or was;
- whether the views intrude on others' rights;
- the likely impact on the employer's business;
- whether the employee or worker made it clear the views were personal;
- any wider reputational risk; and
- any power imbalance between the employee or worker and their employer.

4.7 Whilst Article 10 gives protection to freedom of expression in the workplace, the Council legitimately expects staff to respect others and not cause offence to other employees, Members or third parties they deal with. It is important to note that offensive speech *per se* is protected by Article 10 and the English common law. It cannot on its own justify interference with speech rights, in particular where the speech concerns debate of questions of public interest, i.e. politics. However, when offensive speech harms the Council's interests, or makes the employment relationship untenable, it can be a fair ground for dismissal. It is therefore important that the Council's HR policy recognises this distinction, takes into account all relevant circumstances, and does not rely on a blanket prohibition of offensive speech.

4.8 The Council's employment contract and employment policies and procedures set out clear standards of behaviour expected from employees. For example, hate speech or sexual or racial abuse or other forms of discrimination incompatible with the Council's obligations under legislation such as the Equality Act 2010 and the Council's equal opportunities policy and thus is not acceptable to the Council. If an employee expresses him or herself in a way that is defamatory, discriminatory, or harassing then this could lead to disciplinary action against the offending employee. Freedom of speech within the employment context is subject to responsibility and accountability hence staff cannot for example, make disparaging remarks about their employers without consequences.

4.9 The Equality Act 2010 provides protection for individuals in the event of treatment

that is considered unfair. It both protects expression of belief, as set out above, and restricts certain speech relating to 'protected characteristics', although the tribunal has held that it does not protect 'hyper-sensitivity'. There are 9 protected characteristics in the Equality Act 2010 namely age, disability, race, religion and philosophical beliefs, sex, sexuality, marriage and civil partnership, gender reassignment and being pregnant and maternity leave. Freedom of expression and the protection of these individual characteristics have been tested in the employment tribunal due to the potential conflict that arises between competing rights, particularly as damages for discrimination are uncapped.

- 4.10 The Employment Rights Act 1996 set out the rights of employees in situations such as dismissal, unfair dismissal, parental leave, and redundancy. The contract of employment also sets out obligations on both the employer and the employee to regulate the employment relationship. There is an implied obligation on both employer and employee not to act in any way that is calculated to, or likely to, breach trust and confidence. Any unlawful restrictions or prohibitions from expressing a legitimate view can potentially give rise to arguments that there has been a breach of the implied trust and confidence obligation in the employment contract. A breach of this obligation could potentially give rise to unfair/constructive dismissal claims, pursuant to the Employment Rights Act 1996.
- 4.11 Under the Local Government and Housing Act 1989 certain posts are politically restricted to ensure political impartiality of local government staff. Officers in politically restricted posts cannot express political views likely to undermine their impartiality or public confidence in their neutrality.

5. RAISING CONCERNS (WHISTLEBLOWING) POLICY

- 5.1 The Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998) protects whistle-blowers from detrimental treatment by their employer as a result of making a public interest disclosure. To be counted as a public interest disclosure / "whistleblowing" disclosure, information must be disclosed; it is not sufficient to gather information or threaten to make a disclosure. The individual reporting must reasonably believe that the information relates to one of six categories listed in The Employment Rights Act:
- commission of a criminal offence
 - failure to comply with a legal obligation
 - a miscarriage of justice
 - danger to the health and safety of any individual
 - damage to the environment
 - the deliberate concealment of information falling within any of these categories.
- 5.2 A public interest disclosure must, in the reasonable belief of the employee, be made in the public interest. It will not be a public interest disclosure if the person making the disclosure commits an offence by making the disclosure, for example, under the Official Secrets Act. A public interest disclosure must be made to certain people (e.g. the employer) in order to attract statutory protection. An employee complaining about suppression of certain beliefs is also likely to have whistleblower protection under the Employment Rights Act and the Equality Act.
- 5.3 The Employment Rights Act requirements are addressed by the Council in its

Raising Concerns (Whistleblowing) Policy. Employees are often the first to realise that there may be something wrong within an organisation. The Whistleblowing Policy is intended to encourage and enable employees and members to raise serious concerns. This policy applies to all those who work for the Council whether full-time or part-time, employed through an agency, contractors or as a volunteer.

- 5.4 The procedures in the policy are in addition to the Council's complaints procedures and other statutory reporting procedures applying to some departments. Complaint about an employee's employment or how they have been treated fall outside this procedure and are dealt with under the grievance procedure.
- 5.5 The Whistleblowing Policy is primarily for concerns where the interests of others or of the organisation itself are at risk. These include:
- conduct which is an offence or a breach of law
 - disclosures related to miscarriages of justice
 - health and safety risks, including risks to the public as well as other employees
 - the unauthorised use of public funds
 - possible fraud and corruption
 - sexual, physical, verbal, or financial abuse of clients
- 5.6 The policy sets out how concerns can be raised and provides contact information for relevant senior officers and Members. Concerns may be raised verbally or in writing. The Council gives the assurance under the policy that individuals will not be at risk of losing their jobs or suffer any detriment as a result of raising a genuine concern under the policy. The policy encourages staff to raise concerns with Members if they feel unable to raise them with officers. The Employment Rights Act provides legal protection in this regard to those who raise genuine concerns falling within the remit of the Act.
- 5.7 The Policy also signposts those with concerns to Protect which is a charity which provides independent advice. Members should note that the Whistleblowing policy is currently under review and a revised policy will be presented to the Audit and Risk Management committee on 2 November 2022 for approval.
- 5.8 Under the Whistleblowing policy staff employed through agencies or employed by the Council's contractors can raise concerns in the same way that Council staff can.
- 5.9 In addition to the above legal route and safeguards in place there are other options available to raise concerns.

6. STAFF SURGERIES

- 6.1 All staff are able to meet with the Chief Executive at staff surgeries on a one to one basis to discuss issues and concerns. Staff are also able to meet with Service Directors on a one to one basis to raise concerns.

7. DEPARTMENTAL REPRESENTATIVES AND TRADE UNIONS

7.1 The Council has a number of staff who are departmental representatives. The role of departmental representatives are as follows:

- To represent employees within their own departments as part of the council's consultative process
- Who work alongside other departmental representatives and trade unions to ensure that employees interests are represented
- To be consulted on organisational change other work related proposals
- Support employees and suggest options available on an individual or collective basis send meetings with chief officers and trade unions

7.2 Trade Unions are also available to staff individually or collectively. The role, of trade unions include:

- negotiating agreements with employers on pay and conditions
- discussing big changes like large scale redundancy
- discussing members' concerns with employers
- going with members to disciplinary and grievance meetings

7.3 Staff can raise issues of concern with departmental representatives and trade union representatives. Both sets of representatives have informal and formal access to the Chief Executive and the Director of HR, Customer Services and Public Affairs. The Chief Executive encourages the departmental representatives and the trade union representatives to raise issues of concerns with him in a timely and sensitive manner of behalf of staff.

8. GRIEVANCE PROCEDURE

8.1 In the course of the normal employee/manager relationship, employees may raise problems or complaints that are dealt with informally at source. The purpose of the Grievance Procedure is to establish a formal arrangement under which individual employees or groups of employees who feel aggrieved about a matter relating to their employment, which they have tried to resolve informally with their manager without success, can register that grievance. The aim of the procedure is for grievances to be heard and determined promptly and fairly and as close as possible to the point of origin.

9. BROMLEY VALUES

9.1 Bromley Council values of Respect, Empower, Ambition and Learn (REAL) set out the fundamental standards which govern the behaviours of individuals within the Council. Bromley values are embedded into how the Council recruits, manages, and develops staff so that we can achieve the Council's organisational goals. The Council also has a clear set of competency framework to help establish consistent standards across all service areas and to collectively towards achieving organisational goals. The four key behaviours that form the core of the Council's competency framework for managers and employees are:

- accountability and responsibility

- building relationships
- communication
- continuous improvement

9.2 Culturally, staff are empowered and encouraged to raise ideas and opinions. As our greatest assets ‘the voice of staff is key to the transformation journey’ and the delivery of ‘Making Bromley even a better place’. Hence, the Council actively seek their opinions and suggestions through a number formal and informal channels including staff surveys, ‘Ask the Chief Executive sessions, the use of online suggestion box (Ideas’ Aloud) on the Transform website, and so on.

9.3 The Council’s Equal Opportunities Policy also sets out how the Council treats all people with equal respect, concern and consideration and sets out principles the Council will promote in the employment context, service provision, community leadership and so on.

10. LEGAL IMPLICATIONS

Legal implications are set out within the body of the report.

<p>The legal implications are contained within the body of the report. Non-Applicable Sections:</p>	<p>Impact on Vulnerable Adults and Children/Policy/Financial/Personnel/Procurement</p>
<p>Background Documents: (Access via Contact Officer)</p>	<p>Raising Concerns (Whistleblowing) policy</p>