
Decision Maker: GENERAL PURPOSES AND LICENSING COMMITTEE

Date: Tuesday 6 February 2024

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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Chief Officer: Tasnim Shawkat, Director of Corporate Services and Governance

Ward: All

1. Reason for decision/report and options

- 1.1 At its meeting on 27th November 2023 the Executive, Resources and Contracts PDS Committee considered the attached report on the Council's measures on freedom of speech for employees and contractor staff. Officers reviewed the legal background to freedom of speech in Article 10 of the Human Rights Act and other legislation and showed how this was reflected in a range of relevant Council policies and procedures, including the Raising Concerns whistleblowing policy, Staff Surgeries, Departmental Representatives and Trade Unions, the Grievance Procedure and Bromley's values. This Committee is responsible for non-executive HR matters, so the report is referred here for consideration.

2. **RECOMMENDATIONS**

The Committee is requested to

- (1) Consider and note the attached report, including the additional text and recommendations made by Executive, Resources and Contracts PDS Committee.
- (2) Note that the Standards Committee will consider how the recommendations should be reflected when reviewing the Council's Member Code of Conduct.
- (3) Agree that officers carry out further work on relevant sections of the Constitution, such as the Member/Officer Protocol and the Officer Employment Rules, and report to Members where additional changes are required.

Impact on Vulnerable Adults and Children

1. Summary of Impact: Not Applicable
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Transformation Policy

1. Policy Status: Existing Policy:
 2. Making Bromley Even Better Priority:
(5) To manage our resources well, providing value for money, and efficient and effective services for Bromley's residents.
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Financial

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

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

1. Legal Requirement: Statutory Requirement: See attached report
 2. Call-in: Not Applicable: Non-executive reports are not subject to call-in.
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Procurement

1. Summary of Procurement Implications: Not Applicable
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Property

1. Summary of Property Implications: Not Applicable
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Carbon Reduction and Social Value

1. Summary of Carbon Reduction/Sustainability Implications: Not Applicable
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Impact on the Local Economy

1. Summary of Local Economy Implications: Not Applicable
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Impact on Health and Wellbeing

1. Summary of Health and Wellbeing Implications: Not Applicable
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Customer Impact

1. Estimated number of users or customers (*current and projected*): Not Applicable
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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 At the request of its chairman, the Executive, Resources and Contracts PDS Committee considered the attached report (Appendix A) reviewing the Council's measures on freedom of speech for employees at the meeting on 27th November 2027. The report acknowledges that, as a part of good governance, it is important that employees feel free to speak out about issues of concern or poor practice, and this is already recognised in existing Council policies and culture, including the Raising Concerns whistleblowing policy, Staff Surgeries, Departmental Representatives and Trade Unions, the Grievance Procedure and Bromley's values. The report noted that there is also wider legal framework to protect freedom of speech/expression for individuals balanced against the rights of an organisation to protect confidentiality and the rights of others.
- 3.2 Before the PDS Committee's meeting, the Chairman proposed a number of changes to the officers' report, as follows (additions in *italic*)–

Paragraph 2.1 (recommendation): 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* **Error! Reference source not found.** *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.*

Paragraph 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.

Paragraph 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.*

Paragraph 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.*

3.3 The Executive, Resources and Contracts PDS Committee decided to support the additions and its decision was -

RESOLVED: That

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 be noted;
2. The potential liabilities faced by the council if it fails to protect that right, either in relation to Councillors or Council employees be noted;
3. Officers are asked to take the following actions in support of the resolutions (1) and (2) above:
 - (a) 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
 - (b) to report to the Executive and Constitutional Working Party on progress with the review recommended at paragraph 3 (a) above.
4. GP&L and the Constitutional Improvement Working Party be 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.
5. Note the additional text added to the body of the report.

(Minutes attached as Appendix B)

3.4 The report was also considered at the Constitution Working Group on 22nd January 2024, which decided that the report and the amendments should be referred to this Committee.

Non-Applicable Headings:	Impact on Vulnerable Adults and Children, Policy, Finance, Personnel. Legal, Procurement, Property, Carbon Reduction, Local Economy, Health and Wellbeing, Customer, Ward Councillors
Background Documents: (Access via Contact Officer)	Raising Concerns – Whistleblowing Policy