

**ARBITRATION PURSUANT TO DIVISION 5 OF PART 6 OF THE
LOCAL GOVERNMENT ACT 2020**

**Internal Arbitration Process – Golden Plains Shire Council
(IAP 2023-4)**

Applicant: Councillor Brett Cunningham

Respondent: Councillor Les Rowe

Arbiter: Yehudi Blacher

DECISION AND STATEMENT OF REASONS

Background

1. The applicant in this matter is Cr. Brett Cunningham, Mayor of the Golden Plains Shire Council.
2. The respondent is Cr Les Rowe.
3. On 20 March 2023 Cr Cunningham made an application under s 143 of the Local Government Act 2020 for an internal arbitration process to make a finding of misconduct against Cr Rowe in relation to comments apparently made by Cr Rowe regarding the Council's road-grading program which were reported in the Golden Plains Times newspaper on 20 January 2023.
4. Councillor Cunningham alleged that the article was "based on an interview/comments supplied to the reporter by Cr Rowe."
5. Councillor Cunningham further alleged that Cr Rowe's comments were critical of the standard of work of the Council grader drivers/outdoor staff causing a number of staff to be visibly upset.

6. Councillor Cunningham further alleged that a number of Cr Rowe's comments were incorrect and misleading and that this was subsequently pointed out to Cr Rowe in comments attached to the article by the Council's Director of Infrastructure and Environment, Mr Phil Josipovic.
7. Councillor Cunningham stated that, at no time prior to making his comments, did Cr Rowe make contact with the Mayor or the Council's Communications Department as required by the Council's Media Policy and Code of Conduct. He also apparently failed to raise any concerns he may have had with the quality of the work either with the Council's Chief Executive Officer or the relevant senior executive officer.
8. Councillor Cunningham stated that following the publication of the article he met with Cr Rowe to inform him of the feedback from staff and reminded him of his obligations to comply with the Council's Media Policy.
9. Councillor Cunningham stated that he requested that Cr Rowe consider making an apology to the Council staff affected by the comments attributed to him. Cr Cunningham alleged that Cr Rowe refused to do so.
10. On the basis of the above, Cr Cunningham alleged that Cr Rowe's comments breached the standards of conduct set out in schedule 1 of the Local Government (Governance and Integrity) Regulations 2020 (the Standards of Conduct) and therefore constituted misconduct under the *Local Government Act 2020*.

Directions Hearing

11. A Directions Hearing on this matter was held on 19 June 2023. In attendance were Cr Cunningham and Rowe and the Council's Governance officer Ms Lynnere Gray.
12. At the Hearing the Arbiter explained the arbitration process to parties. He advised the respondent, Cr Rowe, that he would consider any submission made by him relevant to the complaint lodged by Cr Cunningham. He requested that Cr Rowe, specifically, address the

reasons why he did not think his comments breached the Council's Code of Conduct or the Council's Media Policy. He also advised Cr Cunningham that he would consider any further submission by the applicant that was directly relevant to the complaint. He requested Cr Cunningham to provide evidence that Council staff were upset by the comments made by Cr Rowe. This could be done either in written form or as a witness statement during the substantive hearing. The Arbiter requested that any submissions be provided to Ms Gray and be received by him no later than 28 June 2023.

Submission from Cr Rowe

13. In his submission Cr Rowe stated that he did not contravene the Council's Media Policy. Cr Row stated that this was because there was no requirement in the policy to consult with the Council's Communications Department and other councillors had made public comments on issues without being sanctioned by the Mayor.
14. In relation to the substance of his comments to the media, Cr Rowe stated that it was not his intention to criticise the work of the staff but merely to state the facts as he saw them. To the extent that his comments could be seen as critical, he maintained they were critical of the Council and not the staff doing the work.
15. He further stated that when rung by the Golden Plains Times reporter he was somewhat distracted because he took the call when working on his tractor. He also stated that he was not given a chance by the newspaper to "proof" what he had said prior to the publication of the article.
16. Councillor Rowe's submission also provided copies of SMS exchanges between he and Cr Cunningham inviting Cr Rowe to attend a "toolbox" meeting of relevant staff to explain his comments. Cr Rowe agreed to attend such a meeting. However, the invitation was subsequently withdrawn by Cr Cunningham on the advice of the Chief Executive Officer and the senior executive responsible for the staff.
17. In his submission Cr Rowe referred to a phone conversation between he and Cr Cunningham where he alleged that Cr Cunningham was

abusive towards him. He also alleged that Cr Cunningham had been abusive to another Councillor during phone conversations. At the Hearing Cr Cunningham denied being abusive towards Cr Rowe but acknowledged that he had been abusive towards another councillor on a previous occasion. The Arbiter counselled Cr Cunningham that in future he should be careful with his choice of words in conversations with other councillors.

Submission from Cr Cunningham and staff statutory declarations

18. Councillor Cunningham provided a short submission in which he referred, inter alia, to a recent finding of an Arbitration process involving Cr Rowe and Cr Gamble (Arbitration Process- IAP 2022-32).
19. I also received statutory declarations from a number of staff stating, amongst other things that they were upset, insulted and felt let down by Cr Rowe's comments in the article.

Arbitration Hearing

20. The Hearing was held on 6 July 2023. In attendance were Crs. Cunningham and Rowe and a Council Governance Officer, Ms Rosie Wright. A support person for Cr Rowe was also in attendance.
21. The Hearing commenced with the Arbiter outlining the process to be followed; in particular, each person to be heard in silence and for any exchange between the councillors to be done in a respectful manner. Both councillors complied with the process.

Did Cr Rowe fail to follow the procedure set out under the Council's Media Policy?

22. Councillor Cunningham contended that Cr Rowe had failed to follow the procedure set out under the Council's Media Policy when he made his statements to the Golden Plains Times. The relevant section of the Council's media policy states that "Media comments and statements should be co-ordinated through the Senior Communications and

Marketing Officer in all instances”. Councillor Cunningham did not articulate how this amounted to a breach of the Standards of Conduct, however for the reasons set out below, this is not something that needs to be determined in this matter.

23. In an email sent from Cr Cunningham to Cr Rowe on 25 January 2023 Cr Cunningham stated that “media comments/statements must be coordinated through the Communications Team...” The email further noted that this was agreed to and signed off by all Councillors as a group on 23 February 2021.
24. There is a material difference between the meanings of the words *should* and *must*. In common usage *should* means something which is proper, reasonable or the best thing to do whilst *must* means obliged to do something.
25. The Council’s formal media policy states that it was due for revision in August 2022.
26. Based on the material before the Arbiter the revision apparently agreed between Councillors on 23 February 2021 does not seem to have been formally incorporated into the Council’s media policy.
27. As indicated in paragraph 13 above, in his submission Cr Rowe stated that other councillors made public comments without being sanctioned by the Mayor. At the Hearing Cr Cunningham acknowledged that this occasionally happened.
28. In view of the failure by the Council to formally amend its media policy to change the word *should* to *must* and because it is apparent that other councillors have made public comments without sanction, I am satisfied that Cr Rowe did not fail to follow the procedure under the Council’s Media Policy as it currently stands.

Did Cr Rowe contravene the Local Government (Governance and Integrity) Regulations 2020?

29. Schedule 1 of the Local Government (Governance and Integrity) Regulations 2020 describes the behaviours expected of councillors in fulfilling their duties. For the purposes of this Arbitration Clause 1 of the Schedule states the “a Councillor must, in performing the role of a

Councillor, treat other Councillors, members of Council staff, the municipal community and members of the public with dignity, fairness, objectivity, courtesy and respect ...” These words are replicated in the Council’s Councillor Code of Conduct.

30. The key issue to be determined is whether Cr Rowe’s comments to the media contravened the standards of conduct set out in the Regulations.
Specifically, whether a reasonable person reading his comments would take them as being critical of the performance of the relevant staff.
31. Cr. Rowe’s submission and comments at the Hearing comprise three arguments in his defence:
 - a) that his observations were matters of fact.
 - b) that it was not his intention to criticise the performance of Council staff.
 - c) that he has received many complaints from the community concerning the state of the roads in the municipality.
32. In relation to the first argument the Arbiter asked Cr Rowe whether he had civil engineering or like qualifications to enable him to assess the state of the roads and the process for repairing them. Cr Rowe responded that his statement was not based his technical qualifications but on his extensive experience as a farmer using the roads and that he had relatives who were engineers.
33. In relation to the second argument Cr Rowe seems to think that because he did not intend to criticise the staff it was not his fault that they were offended by his remarks. This is a curious argument. Words have meanings and those meanings are not solely dependent on the intention of the person who said them but also on how they are understood by those to whom the words are directed.
34. It is clear from the statutory declarations I received that there were staff who took his comments as criticisms of their work.
35. When asked by Cr Cunningham whether he would apologise to the staff Cr Rowe said he would not. In his submission Cr Rowe stated “I cannot apologise for any unintended negative impact it may have had on the staff.” Cr Rowe maintains this position despite having received

an email from the Council's Chief Executive Officer describing the impact of his comments on the relevant staff.

36. In relation to the third issue the Arbiter asked Cr Rowe whether he passed the concerns from members of the community on to Council officers. Cr Rowe responded that he did not do so in this instance. Given that this was an operational matter which, under the Local Government Act, is the responsibility of Council staff it is disappointing that he failed to do so but instead responded to questions from the Golden Plains Times. Cr Rowe has been on Council for over six years and should not have been unaware that his comments would be controversial.

Arbitration Decision

37. In relation Cr. Rowe's obligations to comply with the standards of conduct under the Local Government (Governance and Integrity) Regulations 2020 it is apparent that any reasonable person would consider that his comments were critical of relevant council staff. I therefore find that Cr Rowe has engaged in misconduct by failing to comply with Clause 1 of the standards of conduct.

Sanctions

38. This is the second Arbitration process Cr Rowe which has been subject to over the past seven months. In the previous Arbitration Cr Rowe was asked to apologise for comments he made to the Chief Executive Officer. In his apology Cr Rowe went beyond what he was directed to do and sought to express the view that in his opinion the matter should never have gone to an Arbitration process. In doing so he clearly went beyond the apology requested of him; an apology he no doubt could have made before the matter went to Arbitration in the first place.
39. In view of Cr Rowe's continual refusal to apologise to staff for his media comments I have determined that an apology alone is not sufficient.

40. I direct Cr Rowe to make a written apology to Council staff at the next Council meeting following this decision, which must be limited to the following and is to be recorded in the minutes of the Council meeting:
- a) acknowledging that relevant Council staff were upset, insulted and felt let down by Cr Rowe's statements to the Golden Plains Times.
 - b) undertaking that in future any operational matters raised with him will be passed on to the Chief Executive Officer or relevant senior staff for any necessary action.
41. Further, I suspend Cr Rowe from the office of Councillor for the period of one month commencing the day after this decision is tabled at the next Council meeting as required under s147(4) of the *Local Government Act 2020*.

Yehudi Blacher
Local Government Arbiter
20 July 2023