

IN THE MATTER OF AN APPLICATION FOR AN INTERNAL ARBITRATION PROCESS

NILLUMBIK SHIRE COUNCIL

IAP 2023-12

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

Applicant: Mayor Ben Ramcharan

Respondent: Councillor Natalie Duffy

Date of hearing: Tuesday, 17 October 2023

Place of hearing: Macey Training Room at Edendale Farm, Edendale-Gastons Road, Eltham

Arbiter: Simon Heath

DETERMINATION:

Mayor Ben Ramcharan seeks a finding of misconduct against that Councillor Natalie Duffy relating to eight allegations, the details of which are summarised below.

The Arbiter acknowledges Mayor Ramcharan's withdrawal of the First, Second, and Fourth allegations in the Application and the withdrawal of the Seventh and Eighth allegations which were raised subsequently. The withdrawal of those allegations is appropriate given that the Arbiter does not have jurisdiction to consider them.

The Arbiter does not make a finding of misconduct in relation to the Third and Sixth allegations.

In relation to the Fifth allegation, the Arbiter determines that Councillor Duffy has failed to comply with the standards of conduct and, as such, makes a finding of misconduct against her.

The Arbiter directs that Councillor Duffy make a written apology for that misconduct,

STATEMENT OF REASONS

The Application

1. The 'Application for an Internal Arbitration Process' is dated 24 June 2023 and seeks a finding of misconduct against the Respondent in relation to six alleged breaches of the standards of conduct (**Application**).
2. When providing further material in support of the Application on 31 August 2023, the Applicant sought to raise two further allegations that the Respondent had breached the standards of conduct (**further allegations**).

Arbiter's jurisdiction

3. The Arbiter was appointed pursuant to sections 144 and 149 of the *Local Government Act 2020* (**Act**).

4. Section 143 of the Act provides that an Arbiter may hear an application that alleges misconduct by a Councillor.
5. Section 143(3) of the Act provides that an Application “must be made within 3 months of the alleged misconduct occurring”. Accordingly, any alleged misconduct must have occurred on or after 24 March 2023.
6. Pursuant to section 147 of the Act, an Arbiter may determine whether or not a Councillor has engaged in misconduct.
7. Importantly, “misconduct” is defined in Section 3 of the Act as follows:
“...any breach by a Councillor of the standards of conduct”
8. That section specifies that “standards of conduct” as those referred to in section 139(3)(a) of the Act which, in turn, specifies those set out in Schedule I to the *Local Government (Governance and Integrity) Regulations 2020 (Standards)*. A copy thereof is attached as Annexure A.
9. Pursuant to section 139 of the Act, the Standards are to be included in a Councillor Code of Conduct (**Code**). The Standards have been adopted by the Nillumbik Shire Council and are contained in paragraph 4 of its Code.
10. Pursuant to section 141 of the Act, the internal arbitration process applies only to breaches of the Standards.
11. The Arbiter does not have jurisdiction to determine alleged breaches of section 123 or section 124 of the Act. Breaches of those sections, as defined in section 3 of the Act, constitute “serious misconduct”.
12. Further, the Arbiter does not have jurisdiction to hear the further allegations.
13. Section 144 of the Act provides that the Principal Councillor Conduct Registrar *must* examine an application made under section 143 of the Act to determine whether an Arbiter should be appointed to hear the matters.
14. The vetting of applications by the Registrar is a critical part of the internal arbitration process, and the addition of the further allegations circumvents the process.
15. It is a matter for the Applicant whether to bring another application in relation to the further allegations.

Hearings

16. The internal arbitration process comprised directions hearings on 3 August 2023, 18 September 2023, and 17 October 2023, directions made ‘on the papers’ on 31 July 2023, 15 September 2023, and 12 October 2023, and the hearing on 17 October 2023.

Applicant's evidence

17. The Applicant's evidence comprised the Application and 'supporting materials', which contained submissions and an indexed bundle of documents, as well as the Applicant's oral evidence at the hearing.
20. In summary, the Applicant's evidence was that the Respondent:
- (a) Misused her position as a Councillor, contrary to section 123 of the Act, by providing personal information without consent in or about May/June 2023 (**First allegation**).
 - (b) Misused her position as a Councillor, contrary to section 123 Act of the Act, and clause 3 of the Standards ("Compliance with good governance measures"), by providing personal information without consent and by inappropriate approaches to Youth Council members said to have occurred on or about 28 May 2023 (**Second allegation**).
 - (c) Breached clauses 1 and 3 of the Standards ("Treatment of others" and "Compliance with good governance measures"), by causing an officer discomfort during an allegedly inappropriate approach at a Nillumbik Reconciliation Group event on 1 June 2023 (**Third allegation**).
 - (d) Directed a member of Council staff, contrary to section 124 of the Act, and clause 1 of the Standards ("Treatment of others"), to provide a 'firmer' briefing report on 1 June 2023 (**Fourth allegation**).
 - (e) Breached clause 1 and 3 of the Standards ("Treatment of others" and "Compliance with good governance measures"), by approaching an officer she had agreed not to speak to in relation to complaint previously lodged by that officer on 1 June 2023 (**Fifth allegation**).
 - (f) Breached clauses 1 and 2 of the Standards ("Treatment of others" and "Performing the role of Councillor"), by reasons of inappropriate interactions with Youth Council members on or about 7 June 2023 (**Sixth allegation**).
21. As mentioned, the Applicant subsequently raised the further allegations, namely that the Respondent:
- (g) Breached clause 3 of the Standards ("Compliance with good governance measures"), by reason of the Respondent causing delay at an Awards event on 17 August 2023 (**event**) by adding material in relation to an allegedly agreed speech (**Seventh allegation**); and,
 - (h) Breached clauses 3 and 4 of the Standards ("Compliance with good governance measures" and "Councillor must not discredit Council or public"), by serving ice cream to an attendee during an interval at the event (**Eighth allegation**).

Respondent's evidence

22. The Respondent's evidence comprised detailed written submissions and supporting documents, and the Respondent's oral evidence at the hearing. In this regard, the Respondent relied on a several pre-prepared statements which she read.

23. The Respondent denied the Applicant's allegations and the further allegations.

Arbiter's findings

24. The Arbiter notes the Applicant's appropriate withdrawal of the First, Second and Fourth allegations in the Application because the Arbiter does not have jurisdiction to consider them.

25. The Arbiter finds that he does not have jurisdiction to consider the Seventh and Eighth allegations as they have not been examined by the Principal Councillor Conduct Registrar as required by section 144 of the Act.

26. In relation to the Third and Sixth allegations, the Arbiter does not find that the Respondent breached the Standards.

27. In relation to the Fifth allegation, however, the Arbiter finds that the Respondent has failed to comply with the Standards and, as such, a finding of misconduct is made against her.

Arbiter's Reasons

First, Second and Fourth allegations

28. At the outset of the hearing, the Arbiter advised the Applicant that the First, Second and Fourth allegations in the Application, involving alleged breaches of sections 123 and 124 of the Act, were beyond the Arbiter's jurisdiction because they were allegations of "serious misconduct" as defined in the Act.

29. The Applicant acknowledged the jurisdictional issues and withdrew the First, Second and Fourth allegations

Seventh and Eighth allegations

30. Similarly, the Arbiter advised the Applicant of an inability to consider the further allegations, being the Seventh and Eighth allegations, as those allegations had not been submitted to the Principal Councillor Conduct Registrar pursuant to section 143 of the Act, for the Registrar's examination pursuant to section 144 of the Act.

31. The Applicant also acknowledged the Arbiter's lack of jurisdiction and appropriately withdrew the Seventh and Eighth allegations.

32. The Arbiter noted that the further allegations are said to have occurred on 17 August 2023, which would not prevent the Applicant from making a further application.

Third allegation

33. The basis of the Third allegation, was that the officer approached by the Respondent 'felt uncomfortable' because the Respondent discussed matters unrelated to the officer's role.

34. The Arbiter does not find that the Respondent failed to treat the officer in a way contrary to clause 1 of the Standards. There is nothing to suggest that during the engagement the Respondent treated the officer without courtesy and respect.

35. The Arbiter also does not find that the Respondent breached clause 4 of the Standards. No evidence was provided to indicate that the Respondent's approach was contrary to any developed and implemented 'policy, practice or protocol' of the Council.

36. The Arbiter notes the Respondent's indication that she will now refrain from speaking to the officer on matters outside the officer's role.
37. No finding of misconduct is made against the Respondent in relation to the Third allegation.

Fifth allegation

38. In relation to the Fifth allegation, namely that the Respondent inappropriately approached an officer to offer an apology, the Arbiter makes a finding of misconduct against the Respondent.
39. By reason of an earlier complaint by the officer against the Respondent, the Respondent had agreed not to approach the officer in the absence of one or both of the officer's managers. The Respondent had also agreed to provide the officer with a written apology in relation to that complaint. The Respondent was aware that the officer was not prepared to accept an oral apology.
40. While the Respondent's evidence was that the approach was 'accidental', and that she did not say much, that is not the issue.
41. No matter how well intentioned the Respondent may have been, approaching the officer was unnecessary and inappropriate. Neither manager was with the officer at the time. The terms of the written apology were still being discussed between the Applicant and the Respondent. Despite this, the Respondent chose to approach the officer. The Respondent could simply have acknowledged the officer and kept moving. Indeed, the Respondent accepted that she had upset the officer.
42. The Arbiter finds that the approach was a breach of clause 1 of the Standards. The Respondent showed a lack of objectivity, and disrespected the officer's specific request that she was not prepared to accept a verbal apology.
43. Pursuant to section 147(2)(a) of the Act, the Arbiter directs that the Respondent makes a written apology to the officer for the approach on 1 June 2023.
44. The Arbiter further directs that the apology be added to the written apology in relation to the officer's previous complaint against the Respondent. As noted, the form of that apology is presently being agreed between the Applicant and the Respondent. Although the apology was put 'on hold' by reason of this internal arbitration process, the Arbiter urges that an agreed written apology be provided to the officer as a matter of absolute priority.

Sixth allegation

45. The Sixth allegation, that the Respondent stepped outside her role as a Councillor, related to the Respondent's interaction with Youth Councillors, namely that she 'pushed' her 'agenda and ideas' at meetings, offered to collect one from school, shared photographs of some on social media without consent, and disclosed personal information about another without consent.
46. Other than a meeting held on 8 June 2022, which was more than three months before the Application, and therefore a matter that the Arbiter could not consider, no details were provided in relation to alleged misconduct by the Respondent at any other Youth Councillor meetings. As such, the Arbiter is unable to determine whether either clause 1 or clause 4 of the Standards have been breached as alleged.
47. The Arbiter accepts the Respondent's evidence that she had permission to drive the Youth Councillor to meetings.

48. Details of the photographs alleged to have been posted by the Respondent without consent of Youth Councillors and/or their guardians were not provided to the Arbiter. Nor was any evidence provided that these posts were contrary to any Council policy. In any event, the Respondent's evidence that she had obtained the necessary consent prior to posting the photographs was not challenged.
49. The Arbiter also accepts the Respondent's evidence that she did not disclose personal information about the Youth Councillor.
50. No finding of misconduct is therefore made against the Respondent in relation to the Sixth allegation.

Simon Heath

Arbiter

Dated: 24 October 2023

Appendix A

Schedule 1—Standards of conduct

1 Treatment of others

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, including by ensuring that the Councillor—

- (a) takes positive action to eliminate discrimination, sexual harassment and victimisation in accordance with the **Equal Opportunity Act 2010**; and
- (b) supports the Council in fulfilling its obligation to achieve and promote gender equality; and
- (c) does not engage in abusive, obscene or threatening behaviour in their dealings with members of the public, Council staff and Councillors; and
- (d) in considering the diversity of interests and needs of the municipal community, treats all persons with respect and has due regard for their opinions, beliefs, rights and responsibilities.

2 Performing the role of Councillor

A Councillor must, in performing the role of a Councillor, do everything reasonably necessary to ensure that the Councillor performs the role of a Councillor effectively and responsibly, including by ensuring that the Councillor—

- (a) undertakes any training or professional development activities the Council decides it is necessary for all Councillors to undertake in order to effectively perform the role of a Councillor; and
- (b) diligently uses Council processes to become informed about matters which are subject to Council decisions; and
- (c) is fit to conscientiously perform the role of a Councillor when acting in that capacity or purporting to act in that capacity; and
- (d) represents the interests of the municipal community in performing the role of a Councillor by considering and being responsive to the diversity of interests and needs of the municipal community.

3 Compliance with good governance measures

A Councillor, in performing the role of a Councillor, to ensure the good governance of the Council, must diligently and properly comply with the following—

- (a) any policy, practice or protocol developed and implemented by the Chief Executive Officer in accordance with section 46 of the Act for managing interactions between members of Council staff and Councillors;
- (b) the Council expenses policy adopted and maintained by the Council under section 41 of the Act;
- (c) the Governance Rules developed, adopted and kept in force by the Council under section 60 of the Act;
- (d) any directions of the Minister issued under section 175 of the Act.

4 Councillor must not discredit or mislead Council or public

- (1) In performing the role of a Councillor, a Councillor must ensure that their behaviour does not bring discredit upon the Council.
- (2) In performing the role of a Councillor, a Councillor must not deliberately mislead the Council or the public about any matter related to the performance of their public duties.

5 Standards do not limit robust political debate

Nothing in these standards is intended to limit, restrict or detract from robust public debate in a democracy.