

COUNCILLOR CONDUCT PANEL

**In the matter of an Application by Councillor Heather Wellington concerning
Councillor David Bell of Surf Coast Shire Council**

HEARING PURSUANT TO DIVISION 1B OF PART 4 OF *LOCAL GOVERNMENT ACT (1989)*

Applicant: Cr Heather Wellington

Respondent: Cr David Bell, represented by Ms Corrina Dowling of Barry Nilsson
Lawyers

Council: Surf Coast Shire Council

Date of Hearing: 11 June 2019

Date of Decision: 4 July 2019

Panel Members: Hon Shane Marshall (Chairperson)
Mr Matt Evans

DETERMINATION

Pursuant to s 81J(1)(e) of the *Local Government Act 1989* the Panel dismisses the Application.

Shane Marshall
Chairperson

Matt Evans
Panel Member

STATEMENT OF REASONS FOR DECISION

1. On 11 December 2018, the applicant, Cr Heather Wellington applied under s 81B of the *Local Government Act 1989* (the Act) for a Councillor Conduct Panel to make findings of misconduct and serious misconduct against a fellow councillor, Cr David Bell, the respondent.
2. Subsequent to the filing of the application the Principal Councillor Conduct Registrar (“the Registrar”) decided to form a Panel to hear the matter: see s 81C(1) and s 81V of the Act.
3. The Panel hearing was held on 11 June 2019 in Torquay.

BACKGROUND

4. The applicant and the respondent are both councillors on the Surf Coast Shire Council (“the Council”). The applicant was elected to the Council in 2012 and was re-elected in 2016. The respondent was elected to the Council in 2012, re-elected in 2016 and served as Mayor from November 2017 to November 2018.
5. During 2017 and 2018 there was a deterioration in internal relationships between councillors. This included a divisive debate about whether the rainbow flag should be flown above Council premises. The applicant and the respondent took opposing positions in that debate.
6. In the early part of 2018, Council appointed an arbiter to conduct an arbitration of four complaints brought by the applicant against the respondent alleging breach of the Council’s Councillor Code of Conduct, dated 24 January 2017 (“the Code”).
7. The first complaint involved a claim that the respondent breached the Code by forwarding to others an email sent to him by the applicant which she had asked specifically not to be forwarded by him. The arbiter found that the forwarding of the email was careless and disrespectful. She found that the Code was thereby breached in three respects. She found that the respondent had failed:
 - to support good working relations between councillors by working with colleagues in an atmosphere of mutual respect;
 - to demonstrate respect and due regard to the applicant’s opinions, beliefs, rights and responsibilities, and
 - to treat the applicant with respect, even when disagreeing with her views.

8. The second complaint concerned an email sent on 8 February 2018 by the respondent to other councillors in which he used the word “disingenuous” and asked her to provide “justification” for a statement she made at a public meeting. The arbiter did not find the complaint made out and found the offending parts of the email were part of the robust discussion commenced by the applicant on the point in issue.
9. The third complaint concerned the applicant’s allegations that the respondent would not meet with her and did not intend to have direct communication with her outside of briefing sessions and Council meetings. The arbiter found that the respondent did not intend to have direct communication with the applicant outside briefing sessions and Council meetings. The arbiter found that the Code had been breached by the respondent. The arbiter found that the respondent had not been open and honest with the applicant and had shown her a lack of respect.
10. The fourth complaint concerned a post on the respondent’s Facebook page. The comment was posted by another person on the respondent’s Facebook page. The comment was insulting to the applicant. The applicant complained about the respondent’s failure to remove it immediately. The arbiter found that the Code was breached because the respondent knew about the post and failed to remove it until the applicant raised an issue about it.
11. The arbiter recommended that the respondent provide an apology to the applicant with respect to his conduct which was found to be in breach of the Code. Other ancillary recommendations were made concerning support to the respondent in his role as Mayor, review of social media usage and measures to support working relations between the applicant and the respondent.
12. The respondent did not take part in the arbitration. The reasons for that will be discussed below in dealing with Allegation 1.

THE ALLEGATIONS

13. The applicant alleged that by failing to comply with Council’s internal resolution procedure the respondent had engaged in misconduct. Council’s internal resolution procedure commits councillors to providing reasonable assistance to an independent arbiter. The applicant alleged that by not engaging in the process before the independent arbiter the respondent breached that procedure (Allegation 1).

14. The applicant alleged that the respondent engaged in misconduct by alleging at a Council meeting that she had harassed staff. In combination with the breaches of the Code referred to in the arbiter's report this was said to be a repeated breach of the Code (Allegation 2).
15. The applicant alleged that the respondent's repeated breach of the Code and Councillor conduct principles amounts to bullying which constitutes serious misconduct under the Act (Allegation 3).

ALLEGATION 1

16. Counsel for the respondent conceded that a failure to comply with Council's internal resolution procedure constitutes misconduct under the Act but contended that the respondent did not fail to comply with that procedure.
17. Council appointed the arbiter to hear the applicant's complaints on 22 March 2018. At the time, the respondent was in receipt of a medical certificate stating that he was unfit for work. He was in receipt of a further medical certificate stating that he was unfit to participate in meetings involving the applicant, including by telephone.
18. The respondent gave evidence before us that, at the relevant time, he needed psychological help. He said his mental state was such that he could not participate in the arbitration. His understanding was that the arbitration would proceed in his absence. He was willing to accept whatever came out of the arbitration. He believed he did not need to attend but would abide by the decision of the arbiter. The applicant told us that she made "no comment" about the respondent's ill-health certificate.
19. In submissions filed by the respondent, it is alleged that he contacted the Council's Principal Conduct Officer, Ms Anne Howard, on or about 10 April 2018 and told her he was committed to progressing the arbitration but was concerned that interactions with the applicant would impact his health. The submissions refer to a deterioration in the respondent's health and advice given by him to the Council's Chief Executive Officer (CEO), Mr Keith Baillie that he was unable participate in any aspect of the arbitration. It is alleged that Mr Baillie told the respondent that the process could continue in his absence. No further medical certificate, going beyond 20 April 2018, was requested. The respondent contended that he was not aware that Council or the arbiter required an update on his medical condition. The submissions also referred to the respondent's medical condition being further compromised by details of it being leaked to the press.

20. We find that Allegation 1 is not made out. We find that at the time of the process before the arbiter, the respondent was too unwell to engage in that process. There is no obligation on a councillor to comply strictly with Council's internal resolution procedure when the ill-health of that councillor makes it impossible to comply. The respondent at no stage, attempted to frustrate the process before the arbiter. He was not well enough to engage in the process initially and his health deteriorated during the process. Providing reasonable assistance to an arbiter does not include being compelled to provide assistance when a person is suffering from adverse mental health issues. To read the internal resolution procedure as requiring the provision of assistance despite ill-health would be to compromise the human rights of the respondent.

ALLEGATION 2

21. The applicant relies on the conduct of the respondent found in the arbitration which led to him apologising to her in combination with his alleged conduct on 11 September 2018 at a councillor only time meeting. For reasons which we develop below we do not consider what the respondent said at the meeting constituted misconduct. The conduct the subject of the arbitration has been dealt with by the arbiter. We do not consider that the applicant is relying on that conduct in isolation but rather in combination with what took place on 11 September 2018. As we consider that the comments of the respondent on 11 September 2018 do not amount to misconduct there is no reason for us to revisit the findings of the arbiter to determine whether her findings above could lead us to find that the respondent has engaged in misconduct.
22. The applicant alleged that the respondent said at the 11 September 2018 meeting (the meeting) that the applicant had harassed staff. The meeting was constituted by seven councillors. Five of those councillors present gave evidence before the Panel.
23. The background to the meeting was that the applicant had been pursuing in Council an issue concerned with whether certain documents should be released pursuant to a freedom of information request. It is not relevant for present purposes to go into the merits of that issue. It is sufficient to note that the issue had led the applicant to send several emails to the CEO and another senior staff member dealing with the issue. The issue had previously been raised at two briefing sessions and at Council's audit and risk committee.
24. The respondent gave evidence that the CEO came to him and said he was receiving a lot of email traffic on the "FOI issue" and that there was some need to find resolution. The respondent said he called the meeting because staff had told him

they were feeling harassed on the issue. At the meeting, the respondent said that staff were feeling harassed. He made no direct allegation of his own that staff were in fact being harassed by the applicant. However, as the applicant was the one in email contact with staff, she felt that the comments were directed at her. She would have preferred that they be relayed to her privately and not in a meeting with other councillors. The applicant gave evidence that the respondent accused her of harassing staff. The applicant made her allegation in her evidence and submissions. The respondent was adamant that he only said that staff were feeling harassed. We accept that evidence. It is supported by the evidence of Cr Margot Smith who was present at the meeting. Cr Smith referred to notes she had made on the evening of the meeting. These notes included a reference to the respondent saying that staff had felt they had been harassed around the release of documents. Cr Rose Hodge was present at the meeting. She provided a witness statement to the Panel. It said that she did not recall the respondent mentioning anyone by name with respect to the emails. She considered that as new Mayor it was reasonable to raise the FOI issue in a councillor only time forum. She believed that the respondent as Mayor at the time had a right to raise an issue concerning staff.

25. In support of her claim that the respondent said she had harassed staff, the applicant relied on the evidence of Cr Martin Duke. Cr Duke gave evidence with his handwritten notes of the meeting. He said he had written that the respondent had accused the applicant of harassing officers. He had also written that the applicant has called out the respondent for being “a coward of the CEO”. No one else who was present at the meeting and gave evidence supported Cr Duke on his “coward” recollection. The applicant and the respondent each specifically denied it. We consider Cr Duke’s notes to be a reflection of what he thought was being conveyed at the meeting rather than what was actually said.
26. It is difficult for a Mayor when confronted with concerning allegations by staff at Council to decide how to deal with the allegations. There is often robust debate in Council meetings concerning different views held by councillors on various issues. The “FOI issue” was one such issue. It had been discussed previously by Council on three occasions as outlined above. It may have been preferable for the respondent to speak privately about the concerns of Council officers to the applicant but it was a matter of legitimate interest to all councillors. By saying at the meeting that staff were feeling harassed we consider that the respondent did not engage in misconduct. “Misconduct” is defined in the Act to mean, relevantly, a “repeated contravention of any of the Councillor conduct principles”. We do not consider that the statement of the respondent was in breach of a Councillor conduct principle, let alone a repeated breach.

ALLEGATION 3

27. Allegation 3 is a “rolled up” allegation which alleges that the conduct in Allegations 1 and 2 when taken together amounts to bullying which in turn amounts to serious misconduct under the Act. In the material filed with the application in support of Allegation 3, a large amount of detail is included concerning Council’s failure to deal with the applicant’s complaint against the respondent. That material is not relevant to our deliberations.
28. As we have found that neither Allegation 1 or Allegation 2 have been made out, it follows that we dismiss Allegation 3 also. We see no evidence of “bullying”. “Bullying” is defined as when a “Councillor repeatedly behaves unreasonably towards another Councillor ... and that behaviour creates a risk to the health and safety of that other Councillor”. Serious misconduct is defined to include bullying.
29. We note the findings of the arbiter. We note that the respondent accepts them. On the evidence before us, we are unable to come to the view that based on the conduct after the arbitration the respondent has behaved unreasonably towards the applicant.

DISPOSITION

30. As none of the allegations raised against the respondent by the applicant have been made out we dismiss the application under s 81J(1)(e) of the Act.
31. The dismissal of the application does not mean that the decision of the Registrar to form a Panel under s 81V of the Act was not appropriate. On the face of the application it was open to the Registrar to form the view that the application was not lacking in substance and that there was sufficient evidence to support the allegations made and that Council had taken steps to resolve the matter; see s 81C(1) of the Act. Ultimately, the Panel had the benefit of the allegations being tested by competing evidence and did not find them made out on the totality of all the evidence before the Panel.