

IN THE MATTER OF TWO APPLICATIONS FOR AN INTERNAL ARBITRATION PROCESS

HOBSONS BAY CITY COUNCIL

IAP 2024-28 and IAP 2024-31

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

Applicant: Councillor Antoinette Briffa
Respondent: Councillor Peter Hemphill
Date of hearing: Thursday, 15 August 2024
Place of hearing: Civic Centre, 115 Civic Parade, Altona
Arbiter: Simon Heath

DETERMINATION:

Councillor Antoinette Briffa has made two Applications seeking findings of misconduct against Councillor Peter Hemphill relating to allegations, which are summarized below.

The Arbiter determines that in both Applications, Councillor Hemphill has failed to comply with the standards of conduct and, as such, makes findings of misconduct against him.

The Arbiter directs that Councillor Hemphill make written apologies to Councillor Briffa and Ms. Diane Eyckens for that misconduct.

The Arbiter also directs that Councillor Hemphill be suspended from the office of Councillor for a period of one month.

STATEMENT OF REASONS

The Applications

1. The Applicant submitted two 'Applications for an Internal Arbitration Process' seeking findings of misconduct against the Respondent in relation to alleged breaches of the standards of conduct (**Standards**).
2. The First Application is dated 17 May 2024 (**First Application**) and alleges that the Respondent breached the following Standards: clause 1 'Treatment of others' and clause 4 'Councillor must not discredit or mislead Council or public'.
3. The Second Application is dated 12 June 2024 (**Second Application**) and alleges that the Respondent breached the following Standards: clause 1 'Treatment of others', clause 3 'Compliance with good governance measures', and clause 4 'Councillor must not discredit or mislead Council or public'.

Arbiter's jurisdiction

4. The Arbiter was appointed pursuant to sections 144 and 149 of the *Local Government Act 2020 (Act)*.
5. Section 143 of the Act provides that an Arbiter may hear an application that alleges misconduct by a Councillor.
6. Section 143(3) of the Act provides that an Application 'must be made within 3 months of the alleged misconduct occurring'.
7. Pursuant to section 147 of the Act, an Arbiter may determine whether a Councillor has engaged in misconduct.
8. 'Misconduct' is defined in Section 3 of the Act as follows:

'any breach by a Councillor of the standards of conduct'.
9. That section specifies that the Standards as those referred to in section 139(3)(a) of the Act which, in turn, specifies that they are set out in Schedule I to the *Local Government (Governance and Integrity) Regulations 2020 (Regulations)*. A copy of the Standards is attached as Annexure A.
10. Pursuant to section 139 of the Act, the Standards are included in a 'Councillor Code of Conduct' **(Code)**.

Hearings

11. The internal arbitration process comprised a directions hearing on 9 July 2024, a brief hearing on 30 July 2024, which was adjourned to and completed on 15 August 2024.

Applicant's evidence

12. The Applicant's evidence in the First Application comprised the Application, which attached an email from the Respondent dated 29 February 2024, a statement dated 9 July 2024, and the Applicant's oral evidence at the hearings.
13. In the Second Application, the Applicant's evidence comprised the Application, a statement dated 9 July 2024, video and transcript of a Council meeting on 11 June 2024, Council policies (relating to complaint handling, Councillor and staff interaction, managing unreasonable conduct by complainants, media and privacy), an email from Council's Director of Corporate Services dated 19 April 2022, a letter from the Respondent to Council Watch dated 26 July 2023, and an email from Council, as well as the Applicant's oral evidence at the hearings.

Respondent's evidence

14. The Respondent did not provide any written or oral evidence for either the First Application or the Second Application.

Preliminary matter

15. Pursuant to written directions made on 24 June 2024 by the Arbiter, a directions hearing via the Council's video-conferencing platform was scheduled for 9 July 2024 (**directions**). The directions were emailed to the Applicant and the Respondent by the Councillor Conduct Officer (**CCO**).
16. The Respondent did not attend the directions hearing on 9 July 2024. Attempts by the CCO to contact the Respondent by telephone and email were unsuccessful.
17. The Arbiter made further written directions on 9 July 2024, which included a direction that any material on which the Respondent intended to rely be lodged with the CCO by 26 July 2024 and that an in-person hearing would take place on 30 July 2024 (**further directions**). The CCO emailed the further directions to the parties.
18. The Respondent did not lodge any material with the CCO by 26 July 2024.
19. The Respondent also did not attend the hearing on 30 July 2024. Attempts by the CCO to contact the Respondent prior to the hearing were unsuccessful.
20. As is required by section 141(2)(b) of the Act, the Arbiter was satisfied that the Respondent had been given the opportunity to be heard and that the hearing could proceed in the Respondent's absence.
21. Shortly after the hearing started, the Arbiter learnt that the Applicant's statements dated 9 July 2024 had not been forwarded to the Respondent. The Arbiter therefore made additional written directions that the statements be immediately emailed to the Respondent, that any response material be lodged with the CCO by 14 August 2024 and that the hearing was adjourned to 15 August 2024. 2024 (**additional directions**). The additional directions were emailed to the parties by the CCO.
22. The Respondent did not lodge any material with the CCO by 14 August 2024.
23. The Respondent also did not attend the adjourned hearing on 15 August 2024. Again, attempts by the CCO to contact the Respondent were unsuccessful.
24. The Arbiter remained of the view that the Respondent had been given ample opportunity to be heard and, in the absence of any explanation as to why the Respondent had not complied with the directions, further directions and additional directions, the hearing proceeded.

Arbiter's findings

25. In relation to the First Application, the Arbiter determines that the Respondent breached clauses 1 and 4 of the Standards.
26. In relation to the Second Application, the Arbiter also determines that the Respondent breached clauses 1, 3 and 4 of the Standards.

Arbiter's Reasons – First Application

27. Attached to the First Application is an email sent by the Respondent on 29 February 2024, to Council's Executive Leadership Team, all Councillors, and Diane Eyckens (**email**).
28. The Executive Leadership Team (**ELT**) comprises the Chief Executive Officer, Director of Corporate Services, Director of Sustainable Communities and Director of Infrastructure and City Services. Diane Eyckens is the Manager Corporate Integrity (Legal Counsel) (**Ms. Eyckens**).
29. The Respondent says he was sending the email following a review of a transcript of a Council meeting held on 13 February 2024 (**February meeting**).
30. The Applicant's statement dated 9 July 2024 alleges that the Respondent made comments at the February meeting which breached the Standards but provides no details. Section 143(3) of the Act requires that allegations of misconduct must be made within three months of an application being made. Because the February meeting was more than three months before the First Application, the Arbiter did not consider this alleged breach.
31. In the email, the Respondent raises complaints made about the Applicant's conduct in 2011, 2013 and 2023.
32. The first matter raised by the Respondent was a complaint by a resident in 2011 after the Applicant questioned the resident's potential links to the operator of a refinery (**first complaint**). The Respondent states that the Applicant was unable to attend the hearing of the first complaint, inferring that this was somehow improper. The Arbiter however accepts the Applicant's evidence that the non-attendance was for valid personal reasons.
33. The Arbiter notes that the first complaint was resolved 13 years ago. The Applicant accepted the outcome and issued a public apology to the resident.
34. The second matter raised in the email was a complaint by the Respondent in 2013 relating to the Applicant's apology to the resident (**second complaint**). The Arbiter does not accept the Respondent's contention that it was improper for the Applicant to have engaged lawyers or that it was improper for the Applicant to have referred the second complaint to VCAT.
35. The Arbiter notes that the second complaint was resolved more than a decade ago with the Applicant accepting the outcome and issuing a public apology.
36. The third matter raised in the email is an unsubstantiated allegation that in 2014 the Applicant 'accosted' and used abusive language towards a former Mayor. The Arbiter accepts the Applicant's evidence that in addition to not being notified of any complaint by the former Mayor, the conduct alleged by the Respondent did not occur.
37. In the email, the Respondent implies that the Applicant's resignation from Council in February 2014 was to avoid accountability for a complaint made by the former Mayor. As mentioned, the Arbiter accepts the evidence that no such complaint was brought to the Applicant's attention. Further, the Arbiter accepts the evidence that the Applicant's resignation was solely for personal reasons. The Respondent's implication is therefore misleading.

38. The email refers to an internal arbitration process in 2023 involving the Applicant. The Arbiter notes that the Applicant accepted the outcome.
39. While the three complaints raised by the Respondent in the email may have involved women, the Arbiter finds it misleading and unfair to assert that Applicant was involved in “attacks *on* women”.
40. The Respondent has failed to treat the Applicant with “dignity, fairness, objectivity, courtesy and respect” by sending the email to fellow Councillors and senior Council staff raising historical issues that had been appropriately dealt with, as well as making allegations which, on the evidence, were incorrect and misleading.
41. The Arbiter therefore determines that the Respondent has failed to comply with clause 1 and clause 4 of the Standards. As such, pursuant to section 147(1) of the Act, the Arbiter makes a finding of misconduct against the Respondent.
42. Pursuant to section 147(2) of the Act, the Arbiter directs that the Respondent make an apology to the Applicant at the next Council meeting acknowledging that the email was inaccurate, and that the Respondent failed to treat the Applicant with ‘dignity, fairness, objectivity, courtesy and respect’.

Arbiter’s reasons – Second Application

43. The Second Application alleges misconduct on the part of the Respondent during Council’s meeting held on 11 June 2024 (**June meeting**). A transcript of questions asked by the Respondent during the meeting was attached.
44. The allegations of misconduct at the June meeting are that the Respondent:
 - (a) failed to comply with ‘good governance measures’ by not following policies, practice and protocols developed by the Chief Executive Officer pursuant to section 46 of the Act (**governance issues**);
 - (b) improperly publicly disclosed a confidential complaint made by ‘Ratepayers Victoria’ against the Applicant (**confidential complaint**); and,
 - (c) brought discredit upon the Council by publicly criticising Ms. Eyckens, as well as being critical of Council governance and processes (**discredit issues**).
45. In relation to the governance issues, the Respondent stated that Council’s ‘Councillor Complaint Handling Policy’ (**policy**) was ‘devised’ by Ms. Eyckens but had ‘never ever’ been ratified by Council.
46. The Respondent, however, erroneously assumed that the policy required ratification. The policy had been prepared in compliance with section 46 of the Act, adopted by the ELT and distributed to Councillors on 19 April 2022.

47. In referring to Council policies, the Respondent indicated that it was 'hard to know which ones we have in place'. In performing the role of a Councillor, as required by clause 3 of the Standards, the Respondent 'must diligently and properly comply' with 'any policy, practice or protocol developed and implemented by the Chief Executive Officer in accordance with section 46 of the Act'.
48. The confidential complaint was made by Ratepayers Victoria on an unknown date and was referred to the Respondent as the immediate past Mayor. After making enquiries and obtaining legal advice from the Information Commissioner, the Respondent wrote to the complainant on 26 July 2023 advising that the complaint could not be dealt with as it was based on hearsay. The Respondent's letter records that the Applicant refuted the allegations made.
49. Despite the confidential complaint being dismissed, the Respondent not only revealed its existence in a question in the June meeting but also misleadingly indicated that the Council's complaint handling policy was unratified and therefore flawed.
50. In revealing the confidential complaint, the Respondent has failed to treat the Applicant with "dignity, fairness, objectivity, courtesy and respect". The Arbiter therefore determines that the Respondent has failed to comply with clause 1 of the Standards and makes a finding of misconduct against the Respondent pursuant to section 147(1) of the Act.
51. The Respondent indicated in the June meeting that he would be contacting Ratepayers Victoria to advise that he had been "hoodwinked", which means "deceived" or "tricked".
52. Attached to the Applicant's statement dated 9 July 2024 was copy of an undated letter from Respondent to Ratepayers Victoria which appears to have been posted on the 'Hobsons Bay Council Watch' Facebook page on 20 June 2024 (**letter**). The letter is consistent with the alleged criticism of Ms. Eyckens. However, as the letter was posted after the date of the Second Application, it does not form part of the Arbiter's findings.
53. In asserting that Ms. Eyckens 'devised' and used an unratified policy in dealing with the confidential complaint, the Respondent was referring to Ms. Eyckens being responsible for providing 'poor advice in the past few months' to Council resulting in the Respondent's claim that he had been deceived. The Arbiter finds that there was no basis for the Respondent to criticise or discredit Ms. Eyckens.
54. The Respondent has therefore failed to treat Ms. Eyckens with "dignity, fairness, objectivity, courtesy and respect". The Arbiter determines that the Respondent has failed to comply with clause 1 of the Standards and, accordingly, makes a finding of misconduct against the Respondent.
55. Further, the Arbiter determines that in publicly questioning the Council's governance, in disclosing the confidential complaint, and in criticising Ms. Eyckens, the Respondent breached clause 4 of the Standards by failing to ensure his behaviour did not bring discredit upon the Council.

56. Pursuant to section 147(2)(a) of the Act, the Arbiter directs that the Respondent make an apology to Ms. Eyckens which acknowledges a failure to treat her with “dignity, fairness, objectivity, courtesy and respect’.
57. Pursuant to section 147(2)(b) of the Act, the Arbiter also directs that the Respondent be suspended from the office of Council for a period of one month to take effect the day after the Arbiter’s determination is tabled at the next Council meeting, [presently scheduled for 10 September 2024], or from 11 September 2024, whichever is sooner.

Simon Heath

Arbiter

Dated: 27 August 2024