

IN THE MATTER OF AN APPLICATION FOR AN INTERNAL ARBITRATION PROCESS

HOBSONS BAY CITY COUNCIL

IAP 2023-14

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

Applicant: Councillor Antoinette Briffa
Respondent: Councillor Daria Kellander
Date of hearing: Thursday, 30 November 2023
Place of hearing: Civic Centre, 115 Civic Parade, Altona
Arbiter: Simon Heath

DETERMINATION:

Councillor Antoinette Briffa seeks a finding of misconduct against that Councillor Daria Kellander relating to allegations, the details of which are summarized below.

The Arbiter acknowledges Councillor Briffa's withdrawal of allegations of alleged misconduct against Councillor Kellander occurring after submitting the Application, and those relating to alleged misconduct occurring more than three months beforehand.

The Arbiter also acknowledges Councillor Briffa's withdrawal of an allegation that Councillor Kellander had misused her position as a Councillor.

The Arbiter determines that Councillor Kellander has failed to comply with the standards of conduct in her Facebook post on 15 June 2023 headed "Should Council meeting recordings be edited?" and, as such, makes a finding of misconduct against her.

The Arbiter directs that Councillor Kellander make a written apology to the Chief Executive Officer of the Hobsons Bay City Council in relation to that post, a copy of which is to be posted on her Council Facebook page.

In relation to the remaining allegations, the Arbiter determines that Councillor Kellander has not breached the Standards.

STATEMENT OF REASONS

The Application

1. The 'Application for an Internal Arbitration Process' is dated 4 July 2023 (**Application**).
2. The Applicant seeks a finding of misconduct against the Respondent in relation to alleged breaches of the standards of conduct

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".
6. The Arbiter does not have jurisdiction to hear allegations of misconduct occurring after the Application had been submitted to the Principal Councillor Conduct Registrar (**Registrar**).
7. This is by reason of section 144(1) of the Act which requires that the Registrar *must* examine an application made under section 143 of the Act to determine whether an Arbiter should be appointed to hear the matters.
8. The vetting of applications by the Registrar is a critical part of the internal arbitration process, as it prevents an applicant from introducing new or further allegations to circumvent the process.
9. This Application, therefore, is confined to allegations of alleged misconduct occurring between 4 April 2023 and 4 July 2023.
10. Pursuant to section 147 of the Act, an Arbiter may determine whether or not a Councillor has engaged in misconduct.
11. Importantly, "misconduct" is defined in Section 3 of the Act as follows:
"any breach by a Councillor of the standards of conduct".
12. That section specifies that "standards of conduct" (**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.
13. 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 Hobsons Bay City Council and are contained in its Code.

14. Pursuant to section 141 of the Act, the internal arbitration process applies only to breaches of the Standards.
15. An Arbiter also does not have jurisdiction to consider allegations of “serious misconduct”, which is defined in section 3 of the Act to include a breach of section 123 of the Act.
16. It is a matter for the Applicant whether to bring another application in relation to allegations of misconduct occurring after 4 July 2023.

Hearings

17. The internal arbitration process comprised directions hearings on 17 August 2023 and 9 November 2023, and a hearing on 30 November 2023.

Applicant’s evidence

18. The Applicant’s evidence comprised the Application and detailed ‘Further and Better Particulars’ dated 8 September 2023 (**Particulars**), as well as the Applicant’s oral evidence at the hearing.
19. In summary, the Applicant’s evidence was that the Respondent had breached the Standards in a range of social media posts and newspaper articles, a copy of which were annexed to the Particulars.

Respondent’s evidence

20. The Respondent’s evidence comprised detailed written submissions dated 23 November 2023 (**Submissions**), and the Respondent’s oral evidence at the hearing.
21. The Respondent denied the Applicant’s allegations.
22. In addition to objecting to having to deal with fresh allegations, the Respondent primarily relied on clause 5 of the Standards, namely that nothing in the Standards is intended to:

“...limit, restrict or detract from robust public debate in a democracy”.

Preliminary matters

23. The Submissions raised the following six “preliminary” matters:
 - (a) The Respondent sought to be legally represented.

Pursuant to section 141(2)(c) of the Act, the Arbiter did not consider that representation was necessary to ensure that the process was conducted fairly.
 - (b) The Respondent requested a hearing “on the papers”.

Pursuant to section 141(2)(b) of the Act, and regulation 11(3)(a) of the Regulations, the Arbiter determined that the parties should be given the opportunity to be heard in person.

- (c) The Respondent sought dismissal of the Application on the basis that the Arbiter originally appointed had to withdraw before hearing the matter.

The Arbiter considered that this submission was misguided because an Arbiter can be replaced. Replacing an Arbiter who has health issues or who discovers a conflict of interest are examples.

In the Arbiter's view, the decision of *Lew v Harvey & Anor [2023] VSC 477*, cited by the Respondent, supports the contrary view that the Application survives an Arbiter's withdrawal and must continue to be heard until the matter has been determined.

- (d) The Respondent submitted that she was not acting in the role of a Councillor when making social media posts and media statements.

The Arbiter rejected this submission relying on the decision in *Lew v Blacher [2023] VSC 604* where Justice Gray held that:

"in performing the role of a Councillor" is capable of applying to behaviour of a Councillor in communicating with members of the public about matters for decision before the Council."

- (e) The Respondent submitted that the alleged breaches of Council policies and clauses of the Code other than the Standards must be disregarded.

The Arbiter accepts this submission.

- (f) The Respondent submitted that the Application should be dismissed because it lacked substance.

The Arbiter did not consider that the Application was *"vexatious, misconceived, frivolous, or lacking in substance"* and was therefore not prepared to discontinue the hearing pursuant Regulation 11(3)(c)(i) of the Regulations.

Arbiter's findings

24. The Arbiter determines that the Respondent breached the Clauses 1 and 4 of the Standards by reason of her Facebook post on 15 June 2023 and makes a finding of misconduct against her.

25. The Arbiter does not find that the Respondent otherwise breached the Standards.

Arbiter's Reasons

26. The Application lacks detail. Instead, the Applicant chose to provide “numerous” social media posts and newspaper articles subsequently. As mentioned, a copy of the posts and articles were provided with the Particulars, but several related to matters occurring after the Application.
27. It is unclear from the Application what misconduct is alleged to have occurred on some of the dates listed by the Applicant. Paragraph 2 contains seven dates and paragraph 4 contains three more. When asked at the hearing, the Applicant was unable to clarify the relevance of two of the dates.
28. The Applicant appropriately withdrew allegations of misconduct occurring before 4 April 2023 and the fresh allegations in the Particulars for conduct after 4 July 2023.
29. The Applicant also withdrew the allegations that the Respondent had breached section 123 of the Act and the Code.

Recording of Council Meeting

30. The Applicant alleges that the Respondent breached the Standards by reason of her “abusive and disrespectful behaviour” towards the CEO in a Facebook post on 15 June 2023 (**recording post**). The Applicant asserts that the Respondent had “publicly and falsely targeted the CEO as a ‘liar’.”
31. The recording post, prominently titled “Should Council meeting recordings be edited?” and accompanied by images of a muted speaker and lips sealed with red tape, was as follows:

“The livestream recording from the last Council meeting dated 9 May 2023 contains various moments where the auditory is muted entirely. I asked the CEO why the recording sound was edited by muting it. He responded that the ‘Livestream has not been edited in any way’. It seems muted to me. Why the need? You be the judge.”
32. The Council’s Livestream provider, Interstream, has confirmed in writing that the recording had not been edited or muted. Interstream also provided the Council with photographs as evidence.
33. The Respondent was not prepared to accept the CEO’s assurance that the recording had not been edited or muted.
34. In her Submissions, the Respondent indicates that:

“I’m not sure what enquiries if any he made which form the basis of his opinion, The opinion received from the CEO did not allay my concerns”.
35. Instead of asking the CEO what enquiries he had made to “form the basis of his opinion”, the Respondent chose to question the CEO’s veracity in a public post.

36. While the Respondent did not call the CEO a “liar”, the question ‘*Why the need?*’ indicates to readers of the recording post that the stream had been edited, and that therefore the CEO’s response was false.
37. The recording post relates to a Council meeting. The Arbiter determines that the Respondent was “performing the role of a Councillor” when making it.
38. In making the recording post, the Arbiter finds that the Respondent breached Clause 1 of the Standards by failing to treat the CEO with “fairness”, “objectivity” and “respect”.
39. Further, the Arbiter finds that the Respondent also breached Clause 4(1) of the Standards as the recording post brought “discredit upon the council”. This is evidenced in the 97 comments on the recording post, which are highly critical of the Council. Such criticism was unwarranted because it was based on an incorrect assertion that the recording had been muted.
40. If the recording post has not been removed, it should be.
41. Pursuant to section 147(2)(a) of the Act, the Arbiter directs that the Respondent is to provide a written apology to the CEO for the recording post and that the apology is to be posted to the Respondent’s Council Facebook page.

Council Security Measures

42. The Applicant alleges that the Respondent breached Clause 1 of the Standards in posts on 21 June 2023 and on 7 July 2023 relating to the Council’s introduction of increased security measures for meetings (**security posts**). The security posts included articles from the Herald Sun.
43. There is nothing improper in the Respondent expressing her view in the security posts that all residents should be able to attend Council meetings. The Respondent acknowledges that Councillors, members of Council staff and members of the public should feel safe when attending meetings and is only critical of the extent of the measures taken.
44. In the security posts, the Respondent has not treated others in an undignified, unfair, discourteous, or disrespectful manner. Nor do the security posts contain anything “abusive, obscene or threatening”.
45. The Arbiter accepts the Respondent’s evidence that protestors at a Council meeting, the date of which was not provided, were not “associated” with her as alleged by the Applicant.

46. The Arbiter notes that an inappropriate “misgendering” of the Applicant was contained in a comment by a member of the public. Fortunately, it appears that the comment may not still be available but, in any event, the Respondent did not support the comment. The Arbiter accepts the Respondent’s indication that she has and will continue to abide by the Applicant’s chosen pronouns.
47. The Applicant refers to an unacceptable GIF posted by the Respondent containing a moving baseball bat as a guillotine blade. While the date of that posting has not been provided, the Arbiter notes that the Respondent removed it after a complaint.
48. The Arbiter therefore makes no finding of misconduct in relation to the security posts.

Performing the role of Councillor

49. The Applicant alleges that the Respondent has breached Clause 2 of the Standards by failing to perform the role of a Councillor “effectively and responsibly” (**role allegations**). The role allegations are that the Respondent:
 - (a) failed to respond to repeated written and verbal requests to meet with the Applicant and other Councillors to discuss issues; and,
 - (b) failed to attend briefings and meetings.
50. While the Applicant is to be applauded for her attempts to meet with the Respondent to discuss issues with the Respondent, and the Respondent’s failure to accept the Applicant’s requests is not ideal, the Respondent’s absence from a number of Council meetings, and briefings, do not themselves establish a breach of Clause 2 of the Standards.
51. The Respondent provided reasons why she was not prepared to meet with the Applicant as well as indicating that attendance at briefings was not mandated.
52. The Arbiter therefore makes no finding of misconduct in relation to the role allegations.

Compliance with good governance

53. The Applicant alleges that the Respondent breached Clause 3 of the Standards by failing to comply to comply with good governance measures.
54. It is important to note that those ‘measures’ are restricted to complying with policies for managing interactions between Council staff and Councillors, the Council’s expenses policy, Governance Rules, and any Ministerial directions.
55. The Applicant withdrew her allegation that the Respondent breached section 123 of the Act by misusing her position as a Councillor to cause detriment to the Council, the Mayor, the CEO, or other Councillors.

56. The Applicant provided no evidence that the Respondent had discriminated against or victimized staff.
57. "Robust public debate in a democracy" does not restrict the Respondent being critical of the Council where it is done in an appropriate manner.
58. The Applicant alleges that the Respondent's failure take responsibility for the Council budget in a post on 23 June 2023, constituted a breach of Clause 3 of the Standards (**budget post**). The budget post was as follows:

"Cheers to 3 consecutive years of voting against ongoing increases in rates, fees and charges."

59. The Arbiter does not find anything improper with the budget posting which simply records how the Respondent, as an elected representative, had voted in relation to the Council's budget confirming the Respondent's views expressed at a Council meeting on 20 June 2023.

Councillor must not discredit or mislead Council or public

60. In addition to the recording post, the security posts and the budget post, the Applicant further alleged that the Respondent had breached Clause 4 of the Standards in other posts (**other posts**). The Applicant alleged that these posts:

"portrayed the council negatively, brought discredit upon the council and misled the community".

61. The other posts were in relation to the following issues:

- (a) 'Public toilets' dated 3 February 2023;
- (b) 'Rubbish bin's dated 24 February 2023;
- (c) 'Harriet Shing comments' dated 29 March 2023;
- (d) 'Mayor's trip to Japan' dated 13 April 2023;
- (e) 'Playground see-saw' dated 17 May 2023;
- (f) 'Community Engagement Policy' on 17 June 2023;
- (g) 'Techno Park Drive' dated 17 July 2023;
- (h) 'Outdoor trading/dining' dated 8 September 2023;
- (i) 'Tree removal' dated 8 September 2023;
- (j) 'Paid parking', no date or details were provided.

62. The Applicant withdrew her allegations with respect to the posts in (a), (b) and (c) above, as they relate to conduct more than three months before the Application, as well as the other posts in (f), (g) and (h), which relate to conduct after the Application had been submitted to the Registrar.

63. The other post in (j) was mentioned in the Application, however no details were provided by the Applicant and therefore the Arbiter was unable to consider the allegation.

64. With respect to the post in (d), the Applicant's issue is with the Respondent's use of "junket" in reference to her trip to Anjo, Japan. The Arbiter notes that the Respondent's post adopted the media's usage of that term and, in any event, the Applicant had previously used that term in relation to a similar Japanese trip by a previous Mayor and Councillors.
65. The Arbiter does not find anything improper with the Respondent indicating that:
"Rates are for community, not for junkets".
66. With respect to the post in (e), the Arbiter does not find anything improper with the Respondent posting a photograph of a broken and fenced off see-saw, with a comment that the Council was unable to provide a "timeframe" for repairs.
67. In relation to the post in (f), the Applicant alleges in the Application that the Respondent "heavily criticised" the Council's "Community Engagement Policy" (**policy**) in a public meeting. The Applicant however has not provided the date or any details of that meeting.
68. The Arbiter notes from a transcript of a Council meeting on 20 June 2023 that the Respondent said that she was:
"a little concerned about this policy to be quite honest";
and that that the policy:
"allows for less genuine consultation and less community input into decision making".
69. The Arbiter does not find that the Respondent's criticism of the policy constitutes a breach of the Standards and, therefore, makes no finding of misconduct in relation to the other posts.

Simon Heath

Arbiter

Dated: 11 December 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.