

COUNCILLOR CONDUCT PANEL

In the matter of an Application by Hume City Council concerning Councillor Trevor Dance

HEARING PURSUANT TO DIVISION 7 OF PART 6 OF THE *LOCAL GOVERNMENT ACT (2020)*

Applicant:	Hume City Council
Appointed representative:	Councillor Carly Moore
Respondent:	Councillor Trevor Dance
Date of Hearing:	26 November 2021
Date of Decision:	29 April 2022
Panel Members:	Hon Shane Marshall AM (Chairperson) Ms Jan Boynton

DETERMINATION

Pursuant to section 167(1)(a) of the *Local Government Act 2020* (the Act) the Panel makes a finding of serious misconduct against Councillor Trevor Dance.

Pursuant to section 167(3)(a) the Panel reprimands Cr Dance for his serious misconduct in failing to comply with two lawful directions of an arbiter.

Pursuant to section 167(3)(c) the Panel suspends Cr Dance from office (effective from the date of the decision) for a period of three (3) months.

Shane Marshall
Chairperson

Jan Boynton
Panel Member

STATEMENT OF REASONS FOR DECISION

Decision on liability

1. On 29 July 2021, Hume City Council (the Council), through its appointed representative Cr Carly Moore, applied under section 154 of the *Local Government Act 2020* (the Act) for a Councillor Conduct Panel to examine an allegation that Cr Trevor Dance had engaged in serious misconduct as defined in section 3 of the Act.
2. The serious misconduct alleged in the application was the failure of Cr Dance to comply with the Council's internal arbitration process. Cr Dance failed to attend a directions hearing and the substantive hearing regarding an application made by him for an internal arbitration process concerning alleged misconduct by Cr Jack Medcraft. Cr Dance alleged that Cr Medcraft made false and misleading statements concerning the monitoring of a tip site.
3. An arbiter appointed to conduct the internal arbitration process made directions that Cr Dance attend the directions hearing and the hearing of the application in person.
4. In defending Cr Dance's absence at the internal arbitration hearings, Cr Dance's legal representative submitted that Cr Dance was not able to comply with the directions because of a mental health condition. She relied on the 4 July 2019 decision of a Councillor Conduct Panel under the *Local Government Act 1989* in Wellington & Bell. At [20] of that decision, the Panel said:

“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 the 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 that 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.”
5. The above comments were made in relation to an allegation that Cr Bell had failed to comply with that Council's internal resolution procedure and had thereby engaged in misconduct. The internal resolution procedure committed councillors to provide reasonable assistance to an independent arbiter.

6. In Wellington & Bell the submission of Cr Bell was that he conceded a failure to comply with the internal resolution procedure constituted misconduct. However, he said that, in his case, he didn't fail to comply with the procedure. He said that his mental state was such that he needed psychological help and he was unable to participate in the arbitration. He understood the arbitration would proceed in his absence as the party against whom allegations were made but was willing to abide by whatever decision was made by the arbiter and accept the outcome of the arbitration. He did not frustrate its process. In fact, there was evidence that the Chief Executive Officer of the Council told Cr Bell that the process could continue in his absence.
7. The circumstances in Wellington & Bell are in stark contrast to the circumstances in this matter. Cr Dance was the moving party before the arbiter. He was making an allegation against Cr Medcraft. His failure to attend the hearing made it very difficult for him to make out his case against Cr Medcraft. The alleged offending conduct in Wellington & Bell was a failure to comply with procedure by not attending the internal resolution process in circumstances where Cr Bell had made it clear that he was unable to contribute to that process on mental health grounds and was happy to accept any outcome arising out of the matter effectively being unopposed. Here the alleged serious misconduct is specifically failing to comply with directions made by the arbiter including a direction that Cr Dance attend the directions hearing on 17 June 2021 and the hearing on 24 June 2021 in person.
8. Cr Dance contended that his mental health made it impossible for him to comply with those directions. We do not accept that is so. He failed to comply with the directions because he chose not to comply. He said, at the time, that he was too unwell to attend Council premises or be in the same room as Cr Medcraft. Yet on 21 May 2021, at a time a directions hearing was being attempted to be arranged by the arbiter, Cr Dance attended a function at Council premises which was also attended by Cr Medcraft. They observed each other to be in attendance and no issues ensued.
9. Furthermore, the medical certificates supplied to the arbiter at the times at which they were supplied did not satisfy her that the need for Cr Dance not to attend in person was so pressing that it overrode her duty to ensure that the hearing was conducted in private. Cr Dance proposed no alternative way of his attending which would ensure that the process would remain private, nor did he press the arbiter to find a solution to overcome his issue with an in person hearing on Council premises. Effectively, without his presence, his application was doomed to fail. It was not a matter, unlike Wellington & Bell, where the moving party was still present agitating for an outcome. Cr Dance raised the issue of an electronic hearing but didn't address privacy issues. He raised the issue of written submissions but natural justice dictates that a person is entitled to advance oral evidence in his defence and it is highly unlikely that Cr Medcraft would have desired to rely on written submissions.

10. Cr Dance first raised an issue about the directions hearing occurring in person in an email to the Principal Councillor Conduct Registrar (the Registrar) on 8 May 2021. He sought a directions hearing by Zoom. He raised concerns about meeting Cr Medcraft in person on Council premises and asserted that Council premises were not safe for him. He didn't refer to any medical evidence to support that latter claim.
11. In a further email to the Registrar dated 10 May 2021, Cr Dance said he wouldn't meet with Cr Medcraft in person due to concerns about his personal safety. He did not say he was not able to attend otherwise. On 12 May 2021, the Registrar informed Cr Dance by email that no evidence had been produced by him to support allegations about bullying and intimidation by Cr Medcraft. He informed Cr Dance of the arbiter's assurance that the process would be conducted in a safe and respectful manner. Cr Dance responded by saying that he had concerns about his safety and, specifically bullying, but was reluctant to provide details because "this would cause further issues with the pending process." No method of proceeding with the directions hearing which would have safeguarded the privacy of the process was put to the Registrar by Cr Dance.
12. The arbiter had arranged for the presence of security personnel at the directions hearing but Cr Dance raised concerns about their ability to deal with conflict in an email to the Registrar on 19 May 2021. That email stated that Cr Dance had medical evidence of his inability to attend an in-person hearing.
13. The medical evidence referred to was a certificate from a medical practitioner saying that Cr Dance was unable to perform work from 19 to 21 May 2021. It also said that he was unable to attend activities on Council premises due to bullying and intimidation by unnamed Councillors. That certificate was kept by Cr Dance and not supplied or copied to the Registrar or Cr Medcraft. Cr Dance made no suggestion to alleviate any problem such as the hearing being conducted in off-Council office premises such as a meeting room in a hotel or motel with Cr Dance being placed in another meeting room and connected by Zoom or Teams while being supervised by an independent person.
14. Cr Dance noted that the certificate was not requested by the Registrar but he could not have done so if he was unaware of its existence having previously just been referred to "medical evidence". It was not for the Registrar, who is a neutral person in the process, to run the case of Cr Dance for him. The certificate should have been provided to the Registrar to pass on to the arbiter.
15. It is fair to say that at this point in setting the matter down for an in-person directions hearing the objection of Cr Dance amounted to no more than unsubstantiated claims to be at risk in an in-person hearing. In any event the actions of Cr Dance in attending the Council function on 21 May 2021 in the presence of Cr Medcraft made light of the medical letter.

16. Unsurprisingly, on 21 May 2021, the Registrar advised Cr Dance by email that the arbiter had considered his emails about bullying, intimidation and the lack of safety at Council premises and noted that no evidence had been provided to support those allegations. There was information about proposed security being arranged and an assurance that the process would be conducted in a safe manner.
17. Cr Dance responded by return email saying that he “had medical advice on the matter now”. He doesn’t say what the medical advice was nor did he supply the Registrar with a copy of it. It was not for the Registrar to require Cr Dance to produce the medical certificate.
18. On 16 June 2021, Cr Dance emailed the Registrar asking for the directions hearing to be conducted by Zoom. The request was not responded to before the directions hearing. However, the arbiter had made her position clear by reference to security guards and ensuring that the directions hearing was conducted safely. The directions hearing was to be an in-person hearing and no material was before her to make her consider any alternative consistent with holding the directions hearing in private.
19. The directions hearing took place at 6:00 pm on 17 June 2021 at the Hume Global Learning Centre in Sunbury. Cr Dance failed to appear and so was in breach of a direction that he appear in person, conveyed to him in an email on 1 June 2021, which extended the time for a directions hearing which was set for an earlier date on the basis of an in-person hearing and adjourned to 17 June 2021.
20. At 6:26 pm on 17 June 2021 after the in-person directions hearing, Cr Dance sent an email to the Registrar attaching a medical certificate similar to that he obtained about 4 weeks earlier but did not tell the Registrar of its existence. However, this certificate referred to his unfitness for work until 21 August 2021. This last email arrived too late to impact on the directions hearing but if it was before the arbiter at the directions hearing it still would have been an inadequate basis on which to conclude that there were coherent grounds on which Cr Dance could not attend a brief directions hearing with security guards and the arbiter being alert to his concerns. There was no basis for any contention that Cr Dance was psychologically unable to attend an in-person directions hearing with security guards in attendance. The arbiter was entitled on the information before her to form the view that a directions hearing could be safely held in the manner of hearing she had arranged. Cr Dance engaged in serious misconduct in failing to attend the directions hearing. He supplied no satisfactory evidence to support his contention of a lack of safety for him.

21. On the 18 June 2021, the Registrar advised the parties, including Cr Dance, of the directions made at the directions hearing the previous day, including a direction for an in-person hearing on 24 June 2021 with private security arranged. The Registrar, in a separate email of 18 June 2021, advised Cr Dance that all the matters contained in his previous email correspondence had been considered including the revised medical certificate. The certificate added little to information the arbiter had already except for the extension of its currency to 21 August 2021.
22. On 20 June 2021, Cr Dance emailed the arbiter directly. This is a practice which is discouraged. Parties before arbiters do not have the need to contact arbiters directly. The Registrar or the Councillor Conduct Officer is to undertake that function. In this email Cr Dance again referred to the latest medical certificate. He also raised a concern about being able to deal with conflict and a fear of being photographed should he be seen going to or coming from Council premises and being ridiculed online.
23. The email noted the power of the arbiter to hear the matter in writing or by electronic means in regulation 11(3)(a) of the Local Government (Governance and Integrity) Regulations 2020 (the Regulations). This power of the arbiter is discretionary. In a seriously contested matter it is generally better (COVID restrictions allowing) for a hearing to occur in person. In an appropriate case it may be held in writing or by electronic communication. A hearing involving witness evidence is generally better done in-person but electronic means may be used if an in-person hearing is impracticable but the privacy of the process must be respected.
24. On 23 June 2021, Cr Dance emailed the Registrar referring to his “human rights” and to his medical certificate. He hinted at supplying an additional medical certificate but did not do so. On 24 June 2021, the Registrar replied saying that all Cr Dance’s concerns had been addressed. The arbiter had taken steps to alleviate concerns by using security. Cr Dance suggested that the arbiter should have asked for the material. It was not for the arbiter to make the case of Cr Dance for a variation of the directions.
25. As at the date of the directions hearing (17 June 2021) and as at the date of the substantive hearing (24 June 2021), objectively considered, Cr Dance had not demonstrated beyond mere assertion in medical certificates that he was unable to participate in either the directions hearing or the substantive hearing. In particular the certificate from Dr McGrath, dated 21 May, only refers to Cr Dance voicing allegations about concerns and it offers no medical opinion as to the sincerity or reality of those allegations nor does he make any medical diagnosis. In any event that certificate was not material in the possession of the arbiter at the time of its making or at a reasonable time thereafter.

26. The question for determination in this matter is whether Cr Dance engaged in serious misconduct by failing to attend the 17 and 24 June events in person after being directed by the arbiter to do so. We are satisfied that there was no material before the arbiter in making the directions for an in-person hearing for each of these events which demonstrated that Cr Dance was mentally unwell to such an extent that he could not attend such a hearing in which security was arranged. With the benefit of hindsight and the advantage of having considered the later more detailed medical reports in connection with this panel hearing, placing ourselves in the shoes of the arbiter, we may have tried to find other ways to conduct an in-person hearing to assuage Cr Dance which were not considered by the arbiter. In saying this, there is no criticism of the arbiter. We are approaching the matter with the benefit of hindsight and having seen later medical reports not available to her.
27. If a similar situation arose in the future it may be preferable to arrange a meeting room in a hospitality venue where the arbiter and other persons could assemble with a link by Zoom or Teams to an affected person who needs isolation, save that an agreed independent person or that party's legal representative should supervise that party to ensure that the hearing does not become available to anyone other than the parties and that it remains a hearing in private as required by the regulations.
28. The reality for Cr Dance is that he failed to comply with an internal arbitration process by not complying with directions of an arbiter to attend before her in person. The claim that he was mentally unable to do so is rejected, especially having regard to the accommodations that were made for him in the context of the vague medical evidence and also in the context of his attendance at the Council social function on 21 May 2021.
29. It is not to the point to say that the decisions of the arbiter requiring the form of hearing on 17 and 24 June 2021 were not the preferable ones with hindsight informed by subsequent events. If Cr Dance did not want to be in breach of the directions of the arbiter, it was open to him to seek a further directions hearing to pursue an alternative method of hearing which kept him away from Council premises and other Councillors but ensured the process was held in private. We were able to achieve that in this hearing by requiring Cr Dance to attend at the office of his legal representative by Zoom in company with his legal representative. However, Cr Dance was not legally represented before the arbiter but may have chosen to apply to be represented to assist him find an appropriate accommodation but did not do so.
30. Having regard to the definition of serious misconduct in section 3(a) of the Act we find that Cr Dance engaged in serious misconduct by failing to comply with an internal arbitration process by failing to attend a directions hearing on the 17 June 2021 and a substantive hearing on 24 June 2021 as directed by an arbiter in the context of an application made by him for a finding of misconduct against Cr Medcraft.

31. The fact that other alternative ways of securing Cr Dance's attendance may have been considered with the benefit of hindsight is not a matter relevant to a finding of engaging in serious misconduct but may be relevant when the Panel considers what sanctions, if any, to impose on Cr Dance.
32. Cr Dance has referred to an offer made to the arbiter to produce further medical evidence on the basis of confidentiality. Those are not matters of bargaining between a party and an arbiter. The arbiter should be supplied with all material any party wants to advance in furtherance of that person's position procedurally or substantively. Any material produced to the arbiter is confidential under section 145 of the Act. No undertaking of confidentiality was necessary. If Cr Dance wanted to put further medical evidence in his own interests he should have done so but he refused to do so and is left with the consequences of that choice.
33. None of the medical material before the arbiter asserted that it was not possible for Cr Dance to appear in an in-person hearing. It only hinted at accommodations which might be made but was light on as to detail and discussion of Cr Dance's medical condition. One of the certificates resonates with language used by Cr Dance in his evidence before us by reference to "higher authorities" suggesting that Cr Dance may have had a first draft role in composing what that certificate said. On a few occasions in his evidence before us, Cr Dance objected to discussing some matters by reference to "higher authorities".
34. For the above reasons we find that Cr Dance did engage in serious misconduct in failing to attend the 17 June directions hearing and the 24 June hearing.

Decision on sanctions

1. In a decision published to the parties only on 13 December 2021 the Panel made a finding that Cr Dance had engaged in serious misconduct within the definition of the term in section 3(a) of the *Local Government Act 2020* (the Act). This decision must be read together with that decision.
2. The Panel found that Cr Dance engaged in serious misconduct by failing to attend a directions hearing and a substantive hearing as directed by the arbiter. The Panel rejected Cr Dance's submission that he was not able to comply with the directions because of a mental health condition. The Panel found that Cr Dance failed to comply with the directions because he chose not to comply.

3. On the information before the arbiter, and on the basis of security arrangements made by her, the Panel found that there was no basis upon which Cr Dance could not attend the directions hearing in person. The Panel found that there was no material before the arbiter or available to her when she made the directions for in person hearings (both directions and final hearings) that Cr Dance was mentally unwell to such an extent that he could not attend these hearings, especially in the context of security being arranged and his attendance at a social forum at Council premises on 21 May 2021. The medical evidence relied on by him was assessed as vague and it was noted that Cr Dance claimed to have further medical evidence on which he ultimately did not seek to rely in the context of a claim for confidentiality which was unnecessary; see section 145 of the Act.
4. Problems with the nature of the medical evidence that was relied on are addressed at [33] in the liability decision.
5. Councillor Dance's legal representative, in support of a submission that no sanction should be imposed on Cr Dance, contended that the Panel "is unable to make a finding that Cr Dance was not medically unable to attend the hearings." That characterisation of the Panel decision is misplaced. The Panel made no such finding. It did find that on the evidence and material before the arbiter that there was no satisfactory basis put to her that Cr Dance could not attend the hearings due to a medical condition that prevented him from doing so.
6. Cr Dance's legal representative also asserted that Cr Dance repeatedly sought to participate in the process in alternative ways and these requests were denied. That statement is hyperbolic and wrong. Cr Dance made some requests for the hearings to proceed in alternative ways, but failed to do so in a manner that ensured the essential privacy of the process. Critically, at [9] the Panel found that:

"Cr Dance proposed no alternative way of his attending which would ensure that the process would remain private, nor did he press the arbiter to find a solution to overcome his issue with an in person hearing on Council premises ... Cr Dance raised the issue of an electronic hearing but didn't address privacy issues. He raised the issue of written submissions but natural justice dictates that a person is entitled to advance oral evidence in his defence and it is highly unlikely that Cr Medcraft would have desired to rely on written submissions."
7. At [10] the Panel noted that Cr Dance raised an issue about having a directions hearing by Zoom. He claimed Council premises were unsafe for him but produced no medical evidence at the time to support that claim. No method of conducting a directions hearing which would have safeguarded the privacy of the process was put to the Registrar by Cr Dance. Although the Act requires the proceedings before an arbiter are to be in private, Cr Dance showed no respect for that requirement contained in regulation 11(2)(b) of the Local Government (Governance and Integrity) Regulations 2020.

8. In complaining about not wanting to attend a hearing on Council premises Cr Dance referred to “bullying and intimidation” by councillors not named by him, in the content of an email to the Registrar on 19 May 2021. At that point the discussions were about the location for the final hearing. As noted at [13] of the liability decision:

“Cr Dance made no suggestion to alleviate any problem such as the hearing being conducted in off-Council office premises such as a meeting room in a hotel or motel with Cr Dance being placed in another meeting room and connected by Zoom or Teams while being supervised by an independent person.”

9. Cr Dance’s legal representative also asserted that Cr Dance desired to participate in the process in a manner which would protect his health and safety. The evidence is to the contrary. The arbiter arranged security for the directions hearing and the final hearing. Cr Dance asserted that the security would not be adequate. He provided no medical evidence to substantiate that a greater or a different level of security was appropriate. It is incorrect to allege, as his legal representative does, that Cr Dance didn’t understand what was required of him for a request for reasonable accommodations to be considered. He made no coherent request supported by medical evidence which would have allowed compliance with the duty of the arbiter to ensure that the hearing was not open to the public.
10. Cr Dance’s legal representative concluded her characterisation of his actions by saying that Cr Dance did not attend the hearings to protect his health. Whilst Cr Dance may have subsequently subjectively held that view, it is not a rational objectively discernible view on the evidence. He failed at appropriate times to produce medical evidence that it was unsafe for him to attend the hearings. His conduct, at the relevant time, in attending a Council function in the presence of Cr Medcraft demonstrates that his holding of any such subjective fear may be considered highly questionable. Cr Dance, as the Panel found in the liability decision, did not attend the hearings because he chose not to attend in circumstances where no medical evidence to support his non-attendance was provided by him and no consideration was given by him to holding the hearing in private.
11. At [26] the Panel said that it may have approached the matter of trying to assuage the concerns of Cr Dance in a different manner than the approach taken by the arbiter. However at [29] the Panel noted that:

“It is not to the point to say that the decisions of the arbiter requiring the form of hearing ... were not the preferable ones with hindsight informed by subsequent events.”

At [31] the Panel noted that the availability of alternative ways to deal with Cr Dance’s concerns may be relevant to sanctions.

12. The legal representative of the Council submitted that the possibility of other alternative ways of securing Cr Dance's evidence should not affect penalty, especially given the finding that Cr Dance refused to comply with the directions that were given and that action answered the description of "serious misconduct" under the Act. That submission has much force. However, the availability of alternative ways of overcoming the problem caused by Cr Dance's recalcitrance to engage with a process he initiated, is a matter which we believe can impact on the severity of the sanction. It illustrates that this is by no means one of the worst possible types of transgression in the context of "serious misconduct".
13. The options open to the Panel, so far as is relevant, under section 167(3) of the Act are:
- to reprimand Cr Dance; and/or
 - to direct Cr Dance to apologise; and/or
 - to suspend Cr Dance from his office as a Councillor for up to 12 months.
14. In all the circumstances we consider that Cr Dance's serious misconduct in acting in defiance of the directions of an arbiter (which we treat as a single course of conduct) deserve a reprimand and a suspension. We reject the submission by his legal representative that there should be no sanction. To impose no sanction is to disrespect the arbitration process that the arbiter was attempting to engage in and finalise.
15. We see no point in ordering an apology in circumstances where Cr Dance would not be capable of giving an apology with sincerity based on our observations of him and his conduct in the proceeding as well as his submissions on sanction which in several respects cavil with the findings made against him by the Panel.
16. We are unaware of any similar cases to the current one. However, in the matter of Buckley [2018] VCAT 1244, the Victorian Civil and Administrative Tribunal made findings of serious misconduct against a Councillor who had disclosed confidential information to persons not entitled to that disclosure. A term of 4 months suspension from Council was imposed when the maximum period of suspension available was 6 months. Conduct in breach of confidentiality provisions shows a disdain for Council processes. Conduct which disrespects the authority of an arbiter is almost as serious.
17. Specific and general deterrence inform our decision on sanctions. Specific deterrence is relevant because Cr Dance has failed to acknowledge how his conduct has interfered with the proper functioning of the internal arbitration process. General deterrence is important to discourage future similar conduct in others.

18. In all the circumstances we impose the following sanctions:

- (i) Cr Dance is reprimanded by the Panel for his serious misconduct in failing to comply with two lawful directions of an arbiter; and
- (ii) Cr Dance is suspended from his office as a Councillor for a period of 3 months. In setting that period we have taken into account that it is not one of the worst cases of defiance of a lawful order of an arbiter because Cr Dance appeared to genuinely believe he had a valid excuse not to do so. However, such a subjective view was objectively unsound. In saying that we have not taken into account the other instance of serious misconduct engaged in by Cr Dance and referred to in an internal arbitration process in September 2021 because that matter was not a prior transgression for the purposes of this matter.

29 April 2022