

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY
I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

No. CIV-2020-412-20

UNDER

**Judicial Review Procedure
Act 2016**

IN THE MATTER OF

**an application for judicial
review of the decision of the
First Respondent**

BETWEEN

L VANDERVIS

Applicant

AND

**THE DUNEDIN CITY
COUNCIL**

First Respondent

AND

D BENHAM

Second Respondent

SUBMISSIONS ON BEHALF OF APPLICANT

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I INTRODUCTION

- 1.1 The Applicant is a Councillor on the Dunedin City Council (“DCC”).
- 1.2 At a meeting of the DCC held on 10 September 2019 a resolution was passed that the behaviour of the Applicant breached the Code of Conduct and he was to be provided with a written censure.
- 1.3 The basis of the judicial review is that the DCC purported to follow a Code of Conduct procedure but failed to comply with the requirements.
- 1.4 The issue is not the determination of Councillors in the DCC decision on 10 September 2019 but the unlawful procedure that was followed by the DCC which resulted in the DCC not having jurisdiction to debate and vote on the matter. The reasonableness of the decision itself is a political issue and is not properly a matter for determination in judicial review proceedings¹.

II BACKGROUND

- 2.1 On 13 September 2019 the Applicant was unhappy about the signage on a parking meter and the consequent issue of a ticket despite having paid for 1 hours parking and parked for less than an hour as the sign limiting parking to 30 minutes was not visible from the footpath.
- 2.2 He complained to a DCC staff member about the signage on the meter and the staff member refused to take his complaint.
- 2.3 He lodged a complaint against the staff member with the Chief Executive on 17 September 2019².
- 2.4 He received an email on 23 September 2019 from the Chief Executive³ which did not provide details of the complaint and he learnt these from a newspaper report on 24 September 2019 which publicised the complaint against him⁴. This was damaging at a crucial time in the elections as the Applicant was standing for Mayor and had not been reluctant to publicly criticise staff or the Chief Executive when he considered it appropriate.⁵ Irrespective of whether the complaint was politically motivated, it is difficult to see what other basis there could be for release of the details of the complaint to the press before the details were proved to the Applicant.

¹ *Goulden v Wellington City Council* [2006] 3 NZLR 245 at [59]

² Bundle 2 page 77

³ Bundle 2 page 86

⁴ Bundle 2 page 87

⁵ Lee Vandervis affidavit paragraph 1.3 Bundle 1 page 16.

- 2.5 The Applicant later learnt that while he thought the enquiry was about his expressed unhappiness at the staff member's refusal to comply with his legitimate request about the signage on the parking meter, Mr Benham was investigating a complaint that he had tried to have the ticket waived.
- 2.6 The "preliminary investigation" carried out by Mr Benham made the following adverse finding without any contact with the Applicant:

It is clear from both the complainant and the witness, that the behaviour of the Councillor towards the complainant was aggressive, loud and intimidating. The complainant was very distressed and upset after the incident⁶.

- 2.7 Mr Benham made three adverse findings in his final report and the most damning of the findings was the finding that he breached section 10 of the Code of Conduct by trying to avoid paying a parking ticket with the ethical obligation being "not influence, or attempt to influence, any council employee, officer or member in order to benefit their own, or families personal or business interests⁷". This finding is particularly objectionable and unfair because it is plain from the documentation that that allegation was not ever put to the Applicant.

III RELIEF SOUGHT

- 3.1 First Declaration:

A declaration that the Chief Executive of the First Respondent acted unlawfully in purporting to forward the complaint against the Applicant to the Second Respondent for investigation under the Dunedin City Council Code of Conduct.

The basis for this declaration is that the Code of Conduct did not permit a complaint by a staff member to form the basis of a Code of Conduct complaint: the complaint had to be either by the Chief Executive or a Councillor.

- 3.2 Second Declaration:

A declaration that the Second Respondent had no jurisdiction to receive any complaint under the Dunedin City Council Code of Conduct as he had not been appointed as an investigator under the provisions of the Dunedin City Council Code of Conduct.

⁶ Bundle 2 page 94

⁷ Bundle 2 page 99

The basis for this declaration is that Mr Benham had not been appointed as an investigator under the provisions of the Code of Conduct.

3.3 Third Declaration:

A declaration that the Second Respondent acted contrary to the principles of natural justice in the investigation he carried out pursuant to the Dunedin City Council Code of Conduct.

The basis for this declaration is that if Mr Benham was properly appointed as an investigator, he had a duty to comply with the principles of fairness and natural justice and he failed to do so.

3.4 Order Sought:

An order setting aside the following decisions of the Dunedin City Council on 11 December 2019:

(a) **That the Applicant breached the Dunedin City Council Code of Conduct; and**

(b) **The issue of a written censure to the Applicant.**

The basis for this order is that whilst the decision itself was a political decision, there was no proper basis for it being made because the Code of Conduct requirements were not followed by DCC..

3.5 The first declaration in the second cause of action is no longer sought as the Applicant accepts that the DCC did have jurisdiction to consider the alleged breaches of the Code of Conduct by the Applicant that occurred in the previous triennium⁸.

IV DUNEDIN CITY COUNCIL CODE OF CONDUCT

4.1 The DCC Code of Conduct was adopted by the Council on 25 October 2016⁹ and it is this document that the Council purported to follow.

4.2 The Code of Conduct required the following:

(a) The appointment of a panel of investigators;

(b) The Chief Executive to:

⁸ *Goulden v Wellington City Council* [2006] 3 NZLR 245 at [43]

⁹ Bundle 2 page 34

- (i) Refer the complaint to an investigator selected from the panel;
 - (ii) Inform the complainant;
 - (iii) Inform the Respondent.
 - (c) The investigator makes a preliminary assessment including determining whether the complaint is material and a full investigation required;
 - (d) Where a full investigation is required, the investigator prepares a report for the Council on the seriousness of the breach;
 - (e) The Council meets to consider the findings and determine whether or not a penalty or some other form of action will be imposed.
- 4.3 It should be noted that the Chief Executive told the Councillors at the meeting that it was not to have a hearing on the issue because “that’s the job of the investigator”¹⁰.
- 4.4 The failures to comply with the Code of Conduct relied upon by the Applicant are:
- (a) The Code of Conduct requires a panel of investigators to be appointed by the Council at the start of each triennium and no panel has been legitimately appointed;
 - (b) As a result of no panel having been appointed, Mr Benham was not authorised by the Code of Conduct to carry out an investigation;
 - (c) The complaint against the Applicant did not satisfy the requirements under the Code of Conduct as the complaint was not made by the Chief Executive;
 - (d) In purporting to carry out investigation under the Code of Conduct Mr Benham’s failed to comply with the principles of natural justice and fairness in each of the following respects:
 - (i) He failed to give a copy of the complaint to the Applicant;

¹⁰ Bundle 2 page 150

- (ii) He failed to divulge the terms of the complaint to the Applicant in sufficient detail to enable the Applicant to understand what he was required to respond to;
- (iii) He failed to tell the Applicant of the witnesses he had interviewed or the statements made by witnesses;
- (iv) He failed to give the Applicant a proper opportunity to respond to allegations made against him in the course of the investigation.

V APPOINTMENT OF PANEL OF INVESTIGATORS

5.1 Step 1 of Appendix B of the Code of Conduct provides¹¹:

On receipt of a complaint under this code the chief executive will refer the complaint to an investigator selected from the panel agreed from the start of the triennium.

5.2 There are two requirements in an investigation:

- (a) The investigator is part of a panel; and
- (b) That the panel is “agreed” at the start of the triennium.

5.3 The reference to “agreed” necessarily requires more than one person to decide and confirms DCC must approve the panel as there is no delegation of that function.

5.4 The panel of investigators used by the DCC was not appointed by the Council and the claimed justification is the footnote to clause 12.2 of the Code of Conduct. The footnote reads¹²:

On behalf of the Council the Chief Executive will, shortly after the start of the triennium, prepare, in consultation with the mayor or chairperson, a list of investigators for this purpose of undertaking a preliminary assessment. The Chief Executive may prepare a list specifically for his or her Council, prepare a list jointly with neighbouring Councils or contract with an agency capable of providing appropriate investigators, such as EquiP.

¹¹ Bundle 2 page 48

¹² Bundle 2 page 42

5.5 There is power in the Local Government Act 2002, Schedule 7 for the DCC to delegate this function to the Chief Executive. However, it cannot be said that the Code of Conduct constitutes a delegation because of the footnote because of the requirement in Step 1 of Appendix B that the panel be “agreed” and the footnote can properly be seen as an administrative step prior to the agreement of the panel being made by DCC:

- (a) The preparation of the list by the Chief Executive in accordance with the footnote does not satisfy the requirement of “a panel agreed at the start of the triennium” as:
 - (i) The footnote does not require the Chief Executive to agree with anyone as to the formulation of the list that is initially prepared; and
 - (ii) The reference to “agreed” makes it clear that the power to form the panel has not been delegated to the Chief Executive by the adoption of the Code of Conduct;
- (b) In so far as the footnote is authorises the Chief Executive to prepare a list of investigators, it limits the list to one solely for the purposes of a “preliminary assessment” and not for the investigation of the complaint.

5.6 If the DCC is claiming that the Otago Chief Executives Group agreement constitutes compliance with Appendix B¹³ then there is no basis to assert such a delegation was made by DCC as it is not expressed in the Code of Conduct.

5.7 As no panel has been “agreed” by DCC, there is no basis for Mr Benham carrying out the investigation into the Applicant’s conduct.

VI NO VALID COMPLAINT

6.1 The requirements of a complaint against a Councillor are set out in clause 12.2 of the Code of Conduct¹⁴ and the three requirements are:

- (a) It must be in writing;
- (b) It must be forwarded to the Chief Executive;
- (c) It can only be made a Councillor or the Chief Executive.

¹³ Paragraphs 12 and 13 affidavit Sandra Graham Bundle 1 page 27

¹⁴ Bundle 2 page 42

- 6.2 It should be noted that the Chief Executive's power to make a complaint is quite separate to the Chief Executive's obligation to forward the complaint (whoever it is made by) to an investigator.
- 6.3 While there is no limitation on the matters that the Chief Executive can lodge a complaint about and the Chief Executive is entitled to lodge a complaint alleging conduct towards a staff member, the Chief Executive has an obligation to do more than simply act as an agent of a staff member.
- 6.4 In this case, the complaint was not made by the Chief Executive and consequently there was no jurisdiction to consider it:
- (a) The Chief Executive (Sue Bidrose) has not given evidence but it is apparent from the documentation that the complaint clearly comes from a staff member who "asked that this event be dealt with as a formal complaint and we are now following the CC process"¹⁵ and the Chief Executive acknowledged at the Council meeting that "in that sense you might argue I did it on her behalf..."¹⁶;
 - (b) The email of 18 September sent from an unnamed staff member to the Chief Executive stated that "[the complainant] could lodge a complaint under the Code of Conduct(CoC)" and the response from the staff member identified in an email is "she would like to make a CoC complaint"¹⁷;
 - (c) The email sent on behalf of the Chief Executive to the Applicant on 23 September 2019 makes it clear it is not a complaint laid by the Chief Executive as it says "I have received a Code of Conduct complaint made against you"¹⁸;
 - (d) The complaint that Vivienne Harvey sent to Mr Benham on 24 September 2019¹⁹ is the complaint of the staff member and the email confirms this:

Here is the complaint as filed in our Health and Safety system²⁰.

¹⁵ Bundle 2 page 85

¹⁶ Bundle 2 page 151

¹⁷ Bundle page 91

¹⁸ Bundle 2 page 86

¹⁹ Bundle 2 page 84

²⁰ Bundle 2 page 90

- (e) The preliminary investigation dated 24 September 2019²¹ by Mr Benham states:

A Code of Conduct complaint has been made by a staff member to the Chief Executive of the Dunedin City Council about behaviour of a Councillor.

The DCC Code of Conduct sets out the process that must be followed. And I have spoken to the staff member who has made the complaint. I have read her written statement of complaint. ...

It is clear from both the complainant

The complainant was very distressed

The witnesses view was the complainant responded

- (f) The report of the investigation from Mr Benham dated 4 October 2019 specifies quite clearly in paragraph 1 that “A Code of Conduct complaint has been made by a staff member to the Chief Executive of the DCC (DCC) about the behaviour of a Councillor”²²;
- (g) The staff member is referred throughout the report as the “complainant”²³.

VII MR BENHAM FAILED TO COMPLY WITH NATURAL JUSTICE AND FAIRNESS

- 7.1 Clause 12.1 of the Code of Conduct²⁴ made clear that the process to be followed was fair including”

That the concepts of natural justice and fairness will apply in the determination of any complaints made under this code. This requires, conditional on the nature of an alleged breach, that the affected parties:

- **Have a right to know an investigation process is underway;**

²¹ Bundle 2 page 93

²² Bundle 2 page 97

²³ Bundle 2 page 97

²⁴ Bundle 2 page 42

- Are given due notice and provided with an opportunity to be heard;
- Have a right to seek appropriate advice and be represented; and
- Have their privacy respected.

7.2 There are four failures relied on, each of which is a fundamental breach of the requirements of natural justice and fairness.

7.3 First Failure: Did not provide the complaint to the Applicant

7.3.1 It is fundamental principal of natural justice that a person who is the subject to a complaint must have the opportunity to properly respond to the complaint.

7.3.2 This is illustrated in the Employment Court case of *Meaden v Chief Executive of the New Zealand Fire Service Commission*²⁵ where reinstatement of a dismissed fire officer was ordered and Palmer J said:

Most unfortunately neither the Plaintiff nor his counsel were provided with a copy of Mr Estall's written complaint where the chairperson's reasons for expressly signalling out Mr Meaden as a participant in the protest demonstration are unmistakably plain. The disciplinary hearing was rendered arguably most unsatisfactorily and unfair and my provisional view of it upon the presently untested evidence. Given that a fundamental precept of natural justice is the right to be heard, that is to say knowing sufficiently what is being actually complained of, I conclude there is a strongly arguable case that the plaintiff's summary dismissal was unjustifiable. Had he been given sufficiently informed insights of what he was accused of, and appropriately responded fully to those allegations, Commander Turek may not have dismissed him. What may have occurred if a fair hearing process had been followed cannot now be recreated after the event. Furthermore, in this particular setting the procedural deficiencies in the process followed by Commander Turek plainly overlap into the substantive justifiability area concerning this particular dismissal.

²⁵ Employment Court, Christchurch CC 26/98 30 July 1998 Palmer J

- 7.3.3 The Applicant's position is that he did not know the details of the complaint until he received the Chief Executive's letter of 21 November 2019 (paragraph 3.13 of the Applicant's affidavit²⁶) and none of the issues identified in paragraph 3.13 of the Applicant's affidavit were specifically discussed with him by Mr Benham.
- 7.3.4 The Applicant's evidence is disputed by Mr Benham who claims the Applicant had received a copy of the staff member's email before speaking to him²⁷ despite there being no evidence of that having occurred and the email from Dr Bidrose of 2 December 2019 effectively confirmed that she had not forwarded the complaint to the Applicant²⁸.
- 7.3.5 Disclosure of the complaint would have enabled the Applicant to refute the allegation made in the complaint that "he wrote [the employee's name] on the ticket and stormed off saying he would see me in court" as the CCTV confirms that the Applicant did not storm off but paid for a different parking fine before leaving.
- 7.4 Second Failure: Did not give sufficient details of complaint to enable Applicant to respond**
- 7.4.1 The Applicant was put in an impossible position as a result of the failure to disclose the complaint which was not mitigated by the failure to even provide details of the allegations against him.
- 7.4.2 He believed that the issue was over the refusal of the staff member to take his complaint about the signwriting on the parking meter. It was the failure of the staff member to record the fault and action it that resulted in his complaint²⁹.
- 7.4.3 The most serious aspect of the complaint that was being investigated by Mr Benham was "that the Councillor was trying to get a parking fine waived" and this was not discussed with him at all.

²⁶ Bundle page 18

²⁷ Paragraph 14 Bundle 1 page 32

²⁸ Bundle 2 page 125 inserting the answer to question 1 of the email of 21 November 2019

²⁹ Lee Vandervis' affidavit paragraphs 3.4 and 3.5 Bundle 1 pages 17 and 18

7.5 Third Failure: Failed to disclose witness statements

- 7.5.1 There was no disclosure of the contents of the witness statements and the Applicant had no opportunity to respond in breach of the general obligation to disclose material prejudicial to a party.
- 7.5.2 In *Ngati Apa Ki Te Waipounamu Trust v Attorney General*³⁰ Keith J held that “entitlement” to a fair hearing “includes reasonable opportunity to present their own cases through evidence and submissions and to challenge the cases put up against them”.
- 7.5.3 Fairness entitles the person to be able to answer the allegations. In *Secretary for Justice v Simes*³¹ the Court of Appeal said at [80]:

Natural justice requires the disclosure of material and decision maker intends to take into account so that the party or parties affected have the opportunity for rebutting material that may be considered adverse and taking advantage of matters that may be considered favourable to that party.

- 7.5.4 In this type of enquiry, copies of the witness statements and, if not the name of the witnesses, at least sufficient details to provide an understanding of whether they were an employee or member of the public would be necessary to enable the Applicant to respond to the allegation. He was not given these documents.

7.6 Fourth Failure: No proper opportunity to respond to allegations

- 7.6.1 There was no communication by Mr Benham to the Applicant before he reached the conclusion that the Applicant had acted in an aggressive, loud and intimidating manner towards the staff member³².
- 7.6.2 Mr Benham did not divulge when he first spoke to the Applicant that he had already decided that the Applicant’s behaviour was “aggressive, loud and intimidating”³³.

³⁰ [2014] 1 NZLR 42 (CA) at [18]

³¹ [2012] NZCA 459, [2012] NZAR 1044

³² Bundle 2 page 93

³³ Bundle 2 page 93

7.6.3 Mr Benham gave a false impression of the complaint by saying that the “complaint was the way he had spoken to the complainant” and not even disclosing the most serious allegation that the Applicant was trying to use his position to avoid a parking fine³⁴.

Dated 9 October 2020

A handwritten signature in blue ink, appearing to read 'L A Andersen QC', with a horizontal dotted line underneath.

.....
L A Andersen QC
Counsel for Applicant

KLI001/JR/D9

³⁴ Bundle 2 page 96 (“I reiterated that the complaint was the way he spoken to the complainant”)