

Local Government Act 1993

CODE OF CONDUCT PANEL DETERMINATION REPORT

MEANDER VALLEY COUNCIL CODE OF CONDUCT

Complaint brought by Ms Sharon Webb against Cr Wayne Johnston

Code of Conduct Panel

- Lynn Mason (Chairperson)
- Katherine Schaefer (Local Government Member)
- Graeme Jones (Legal Member)

Date of Determination: 18 January 2022

Content Manager Reference: C22742

Summary of the complaint

A code of conduct complaint was submitted by Ms Sharon Webb to the General Manager – Meander Valley Council, on 4 August 2021. Ms Webb is the principal journalist at the Meander Valley Gazette (the Gazette) and is a volunteer with Meander Valley Connect Inc. (MVC Inc), the publisher of the Gazette.

The complaint alleged that the Mayor, Cr Johnston, breached the Meander Valley Council (the Council) Code of Conduct (the Code), dated June 2019, primarily by condoning the action of the Council's General Manager in posting a public statement regarding the Gazette on Council's Facebook page and Council's website. The complaint alleged that this action breached the following parts of the Code:

Part 3 – Use of Office

2. *An Elected Member must not take advantage, or seek to take advantage, of their office or status to improperly influence others in order to gain an undue, improper, unauthorised or unfair benefit or detriment for themselves or any other person or body.*

Part 7 - Relationships with community, councillors, and council employees

7.1 A Councillor

- a. *must treat all persons fairly; and*
- b. *must not cause any reasonable person offence or embarrassment; and*
- c. *must not bully or harass any person.*

Initial assessment

Following receipt of the complaint, the Chairperson conducted an initial assessment of the complaint in accordance with the requirements of section 28ZA of the *Local Government Act 1993* (the Act). Having assessed the complaint against the provisions of sections 28ZB and 28ZC of the Act, the Chairperson determined that:

- the complainant had made a reasonable effort to resolve the complaint. The Chairperson arrived at this conclusion because the complainant had requested the Mayor to remove the items from the Meander Valley Council's website and Facebook page, without receiving a response, and without the items being removed;

- the complaint substantially related to a contravention of the Meander Valley Council's Code of Conduct, namely Part 3 (2) and Part 7 (1);
- the complaint should not be dismissed on the grounds that it was frivolous, vexatious or trivial. The reasons for this conclusion were that if upheld on investigation, the Mayor's involvement in the publication of the items on Council's website and Facebook page could have constituted a breach of the Code by having caused offence or embarrassment, and could have constituted unfair detriment to a person or persons, namely Ms Webb and the staff and volunteers of the Gazette, and/or unfair benefit to the Council and the Tasmanian State Government;
- having made enquiries of the Code of Conduct Executive Officer, there was no relevant direction under section 28ZB(2) or 28ZI of the Act that would apply to the complainant and the complaint.¹

On this basis, the Chairperson determined to investigate the complaint.

The complainant, respondent councillor and the General Manager were notified of the outcome of the initial assessment by letter dated 7 September 2021.

The Complaint

On or about 8 February 2021, the General Manager of the Council, Mr John Jordan, published a statement on the Council's website and Facebook page. The statement was published together with four letters from Mr Jordan to Ms Douglass, the managing editor of the Gazette. The complaint alleged that some of the published material was false or defamatory of persons associated with the Meander Valley Gazette and its publisher.

The complaint alleged that the public statement was still on both sites at the time the complaint was lodged on 4 August 2021, despite the Complainant's having requested its removal on 16 February 2021.

The complaint alleged that Cr Johnston condoned the publication of this material and thereby breached the Code of Conduct. The complaint alleged that in so doing, Cr Johnston sought to improperly influence others, i.e., the Gazette's readers and advertisers, in order to gain an improper or unfair benefit for himself and/or the Council, and/or the State Government; and further, that such publication was unfair and caused offence or embarrassment and otherwise amounted to bullying and harassment, contrary to Part 3(2) and Part 7(1) of the Meander Valley Council Code of Conduct.

The complaint also alleged a pattern of bullying behaviour which included criticism of reporting in the Gazette and alleged Council threats to withdraw advertising revenue, and the banning of the Gazette's reporter on Council matters (the complainant) from Council meetings.

Procedure

In accordance with section 28ZE of the Act, the Code of Conduct Panel investigated the complaint.

The Panel met on 26 September 2021 to consider the complaint. Cr Johnston's response was received by the Panel on 30 September 2021, and was sent to Ms Webb on 6 October 2021. Ms Webb requested an extension of time to provide her response to Cr Johnston's submission, and this was granted. Further submission from Ms Webb was received on 20 October 2021.

The Panel met on 26 October 2021 to consider all material before it. It was decided at that time that the investigation could be adequately conducted by examination of the written submissions and documentary evidence provided. Ms Webb and Cr Johnston were subsequently asked whether they would be disadvantaged if a hearing were not held.

The Panel met on 8 November 2021 to consider Ms Webb's submission on hearing, and Cr Johnston's submission on penalty in the event that the Panel upheld any part or all of the complaint. Cr Johnston made no submission on hearing.

¹ Section 28ZB(2) and 28ZI of the Act enable the Chairperson or the Panel (as applicable) to issue a direction to a complainant in prescribed circumstances not to make a further complaint in relation to the same matter unless the complainant provides substantive new information in the further complaint.

Ms Webb made a further submission on hearing on 15 November 2021. In accordance with section 28ZG(1) of the Act, the Panel determined that it would conduct a hearing to allow both parties to provide further evidence and to allow both parties to call witnesses should they wish to do so. On 26 November the parties were asked to provide notice of any witnesses to be called. Ms Webb requested the presence of a support person, as did Cr Johnston. Both persons were approved by the Panel. Cr Johnston provided witness statements from Ms Jacqueline Parker, Manager of Governance and Performance at Meander Valley Council, and Mr John Jordan, the General Manager, and advised that he wished to call both Ms Parker and Mr Jordan as witnesses. Witness statements from both were received on 13 December 2021.

Ms Webb did not receive the witness statements from Ms Parker and Mr Jordan until 16 December 2021. As a result the Panel offered to defer the hearing to give her more time to consider the statements. Ms Webb confirmed in an email of 17 December that she agreed to proceed with the hearing on 17 December, rather than have it deferred.

The hearing was held on 17 December 2021. Ms Webb was supported by Ms Linda Poulton. Cr Johnston was supported by Mr David Downie. At the outset of the hearing, Ms Webb noted that as she had not received the witness statements from Ms Parker and Mr Jordan until 16 December, she be allowed to call Ms Liz Douglass, Editor of the Gazette, as her witness. The Panel acceded to this request. Evidence was given by Ms Webb, Ms Douglass, Cr Johnston, Ms Parker, and Mr Jordan.

Material considered by the Panel

- The complaint submitted under cover of a Statutory Declaration dated 4 August 2021 (3 PDFs, total 14 pages);
- Annexures to the complaint (3 PDFs, total 74 pages);
- Audio recording of the Ordinary Council Meeting of 14 September 2021;
- Cr Johnston's response to the complaint submitted under cover of a Statutory Declaration dated 30 September 2021, plus 8 attachments (1 PDF, total 73 pages);
- Ms Webb's comments on the Councillor's response, submitted under cover of a Statutory Declaration dated 20 October 2021, (2 PDFs, total 9 pages);
- Annexures to Ms Webb's comments (13 PDFs, total 46 pages);
- Response to request re hearing, Ms Webb, 2 November 2021, 1p;
- Response to request re hearing, Cr Johnston, 2 November 2021, 1p;
- Witness statement from Ms J Parker, submitted under cover of a Statutory Declaration, 13 December 2021, 12pp;
- Witness statement from Mr John Jordan, submitted under cover of a Statutory Declaration, 13 December 2021, 4pp;
- Table of alleged breaches of the Code of Conduct, compiled by Ms Webb, undated, received by the Panel 16 December 2021, 4pp;
- Meander Valley Council Code of Conduct dated June 2019, adopted 12 March 2019.

Determination

Pursuant to section 28ZI (1)(b) of the Act, the Code of Conduct Panel the Panel dismisses the complaint against Cr Johnston.

Reasons for determination

Initial findings

The Panel finds that allegations made in the complaint regarding public statements or actions by the General Manager are not relevant to this complaint. In accordance with section 28V(1) of the Act, only the actions of

the respondent councillor can be investigated by the Panel. The Panel therefore investigated mainly those public statements or actions made by the respondent, Cr Johnston. Substantial sections of the complaint referring to the actions taken by the General Manager and others were only considered in this investigation where it could be shown that those actions could have been condoned by Cr Johnston.

The Panel also does not take into account Facebook comments regarding the Gazette made by members of the public on websites other than the Meander Valley Council Facebook page, given that these cannot be seen as Cr Johnston's responsibility. The Panel heard evidence that posts on the Council website are moderated by the Council's Communications Officer, who reports to the General Manager, not to the Mayor. The Panel finds it unlikely that posts would be removed at the behest of an individual elected member (including the Mayor), and such action would only be considered by the General Manager if a majority of Councillors pressed for this to be done.

The Panel considered the meaning of the word 'condone', viz, to approve or forgive an action which is considered to be wrong, or to disregard or overlook something illegal or objectionable. The Panel therefore considered in the first instance whether the actions taken by the General Manager in publishing material relating to the Gazette on the Council's website, in removing Council's advertising from the Gazette, and in requiring Ms Webb to commit to abiding by Council's meeting regulations, could be considered by a reasonable person to be morally wrong, illegal, or objectionable.

Publication of letters on Council's website, 8 February 2021

The Panel considered the material on which the substance of this complaint was based, viz., the item entitled *Council writes to the Meander Valley Gazette seeking corrections to misreports*, posted on Council's website on 8 February 2021, signed by the General Manager. Four letters from the General Manager to the Editor of the Gazette were also published on the website as attachments to the item: letter dated 23 July 2020, letter dated 29 October 2020, letter dated 20 November 2020, and letter dated 4 January 2021. Of these letters, the Gazette published the one dated 23 July 2020: none of the remaining letters was published.

The Panel accepts that the General Manager has the right and duty to correct what he considers to be misinformation in the public arena when he considers it appropriate to do so. The Panel disagrees with the statement in the complaint that *it is not a function of the council to involve itself publicly in criticising media outlets or denigrating the people who work or volunteer for them*. On the contrary, if matters pertaining to council expenditure or council staff are raised publicly in the media, it is normal for the response to such matters to be delegated to the responsible officer, the General Manager. In this case, the General Manager made three attempts to correct what Council considered to be inaccuracies, and none of these was published.

The Panel finds that the Mayor's role in the publication of the statement and letters on 8 February 2021 was appropriately remote from the General Manager's role in caring for his staff and ensuring that the public is aware of any misinformation that has been published about the Council. The Panel determines that the Mayor did not condone (i.e., overlook or ignore) an action by the General Manager which could be seen by a reasonable person as illegal, objectionable, or wrongful; nor did the Mayor seek to gain improper advantage for himself or any other person or body, nor did he seek to impose unfair detriment on any person or body.

The complaint alleged that by 'condoning' this publication, Cr Johnston caused Ms Webb personal and professional embarrassment by inclusion of the words *incorrect facts, bias and misreporting*. The Panel accepts that Ms Webb, and Ms Douglass, may have been offended or embarrassed by the letters. The Panel accepts that the statement and accompanying letters clearly indicated that the General Manager considered Ms Webb to be the author of this reporting. However, no evidence was provided by Ms Webb to show that this statement was incorrect or morally wrong, nor that it was unfair to Ms Webb in the context of newspaper publishing and response. The complaint alleged that Cr Johnston *allowed Mr Jordan to perpetuate untruths about me in the public arena, thus denigrating me professionally and in the community...* The Panel finds no evidence to substantiate this assertion. The Panel determines that the Mayor did not seek to gain improper advantage for himself or any other person or body, nor did he seek to impose unfair detriment on any person or body.

Removal of Council's regular two page advertisement in the Gazette

The complaint alleged that Cr Johnston *colluded with Mr Jordan in a year of harassment and bullying designed to denigrate me in the community, pressure the Gazette to change its reporting and pressure the Gazette to remove me*. Both Ms Webb and Ms Douglass referred to a meeting in February 2020 between the General Manager, Cr Johnston, and a person who at the time was a volunteer with the Gazette and purported to represent the Gazette in discussions with Council. Following this meeting the Gazette volunteer advised the committee of the

Gazette that it should wind back or pause its reportage on the prison issue (the proposed Northern Regional Prison), and advised the Editor that anti-prison advertising should be removed from the forthcoming edition of the Gazette. These recommendations were not accepted by the Gazette and the March 2020 issue was accordingly published. In April 2020 the Council changed its previous practice of taking an advertising/information spread in each edition of the Gazette. Ms Webb alleged that the removal of the Council's advertising from the Gazette was a direct response to the Gazette's refusal to remove anti-prison advertising and commentary, and thereby constituted bullying by Cr Johnston (with the General Manager). The General Manager denied that this was the case, and further stated that the decision on how to provide the community with council news was his decision to make, and, he had made it without reference to the elected Council. In the absence of any direct sworn evidence by the Gazette volunteer, the Panel finds that this allegation of bullying by Cr Johnston cannot be upheld.

Similarly, the Panel determines that the Mayor did not seek to gain improper advantage for himself or any other person or body, nor did he seek to impose unfair detriment on any person or body.

Ban on Ms Webb's attendance at Council meetings

Ms Webb stated in the hearing that she considered that Cr Johnston's failure to ask her to leave the council meeting on 14 September 2021 constituted bullying. Ms Webb entered the meeting chamber approximately two minutes after the meeting commenced. The audio recording of the meeting recorded Cr Johnston's telling Ms Webb that she could not enter the meeting because doing so would be in breach of the meeting rules restricting the number of persons allowed in the public gallery to seven. Cr Johnston then suspended the meeting. One of the seven persons seated in the public gallery then relinquished a seat to Ms Webb, at which point the Mayor resumed the meeting. The Panel finds that the Mayor's refusal to immediately order Ms Webb to leave the meeting cannot be construed as bullying.

The General Manager wrote to Ms Webb on 15 September 2021, notifying her that he considered that she had breached the *Public Health Act 1997*, the *Work Health and Safety Act 2012*, and *Council's COVID Safety Plan*; and that she had twice breached regulation 41 of the *Local Government (Meeting Procedures) Regulations 2015*. The General Manager advised that until Ms Webb undertook in writing not to continue with behaviours which could constitute breaches of the above provisions, she could not attend Council Meetings. Ms Webb alleged that this prohibition amounted to bullying of her by Cr Johnston, in that he 'condoned' the action of the General Manager. The Panel finds that the General Manager acted in accordance with his authority under section 62 of the Act. The Panel determines that this allegation of bullying against Cr Johnston is not supported by the evidence and is dismissed. Similarly, the Panel determines that the Mayor did not seek to gain improper advantage for himself or any other person or body, nor did he seek to impose unfair detriment on any person or body.

Timing of the Determination

In accordance with section 28ZD (1) a Code of Conduct Panel is to make every endeavour to investigate and determine a code of conduct complaint within 90 days of the chairperson's determination that the complaint is to be investigated.

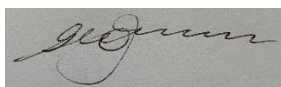
The Panel has been unable to determine the complaint within 90 days, owing to extensions of time granted to enable the parties to respond, delays in setting a time for the hearing, and loss of working time over the Christmas-New Year holiday period.

Right to review

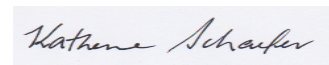
A person aggrieved by the determination of the Code of Conduct Panel, on the ground that the Panel failed to comply with the rules of natural justice, is entitled under section 28ZP of the Act to apply to the Magistrates Court (Administrative Appeals Division) for a review of that determination.



Lynn Mason
Chairperson



Graeme Jones
Legal Member



Katherine Schaefer
Member