

Section 28ZK (7) of the *Local Government Act 1993* requires that any person who receives a determination report must keep the determination report confidential until the report is included within an item on the agenda for a meeting of the relevant council. Failure to do so may result in a fine of up to 50 penalty units.

Local Government Act 1993
CODE OF CONDUCT PANEL DETERMINATION REPORT
DEVONPORT CITY COUNCIL
Complaint brought by Mr Christopher Mills against Cr Alison Jarman

Code of Conduct Panel:

- Lynn Mason (Chairperson)
- Liz Gillam (community member with experience in local government)
- Anthony Mihal (legal member)

Date of Determination: 30 July 2021

Content Manager Reference : C22018

Summary of the Complaint

A code of conduct complaint was submitted by Mr Christopher Mills to the General Manager, Devonport City Council on 1 March 2021.

The complaint alleged that Cr Jarman used her office as a councillor to influence Mr Mills against bringing a complaint against a council employee, in return for assisting Mr Mills to resolve a long-standing issue he had with the General Manager of the council. The complaint also alleged that Cr Jarman had been 'agitated and disrespectful' in dealing with Mr Mills, and that she had bullied Mr Mills in her phone call to him on 1 March 2021. Finally, the complaint alleged that Cr Jarman failed to represent council in accordance with clauses 1 – 7 inclusive of Part 8 of the Code.

The Code in force at the time of the alleged breaches was adopted by Council in January 2019.

The sections of the Code which Mr Mills alleged Cr Jarman breached are:

Part 3 – USE OF OFFICE

1. *The actions of a councillor must not bring the Council or the office of councillor into disrepute.*
2. *A councillor 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.*
3. *In his or her personal dealings with the Council (for example as a ratepayer, recipient of a Council service or planning applicant), a councillor must not expect nor request, expressly or implicitly, preferential treatment for himself or herself or any other person or body.*

Part 7 – RELATIONSHIPS WITH COMMUNITY, ELECTED MEMBERS AND COUNCIL EMPLOYEES

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.*

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Part 8 - REPRESENTATION

1. *When giving information to the community, a councillor must accurately represent the policies and decisions of the Council.*
2. *A councillor must not knowingly misrepresent information that he or she has obtained in the course of his or her duties.*
3. *A councillor must not speak on behalf of the Council unless specifically authorised or delegated by the Mayor or Lord Mayor.*
4. *A councillor must clearly indicate when he or she is putting forward his or her personal views.*
5. *A councillor's personal views must not be expressed publicly in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
6. *A councillor must show respect when expressing personal views publicly.*
7. *The personal conduct of a councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

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 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 as Mr Mills had invited Cr Jarman to contact him if she thought the complaint was unfair;
- the complaint substantially related to a contravention of the Devonport City Council's Code of Conduct, namely Part 3 1-3, Part 7.1 (a), (b) and (c), and Part 8 1-7;
- the complaint should not be dismissed on the grounds that it was frivolous, vexatious or trivial. The reasons for this conclusion were that if proven the allegations would amount to a significant breach of the Council's code of conduct;
- she was satisfied that 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 outcome of the initial assessment by letter dated 15 April 2021.

The Complaint

At the centre of this complaint is an issue between Mr Mills and a council employee. Mr Mills considered that a Council officer, the Parks and Reserves Co-ordinator (PRC), had behaved corruptly in managing the removal of some trees from a Council Reserve in Caroline Street East Devonport, adjacent to Mr Mills' home. Mr Mills had been pursuing a complaint against the PRC since the removal of the trees.

In early February 2021, after Mr Mills had asked a question regarding the PRC's employment status during Public Question Time at the ordinary council meeting of 25 January 2021, Cr Jarman phoned Mr Mills. Mr Mills alleged that Cr Jarman suggested that if he desisted from pursuing his complaint

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.

against the PRC, she would see *what she could do* to resolve the matter of Mr Mills' request for an assessment of the landslip zone next to his house. Cr Jarman stated in her Statutory Declaration of 6 May 2021 that her intention in that phone call was to ask Mr Mills not to mention publicly the name of the council employee in pursuing his complaint, as they were very unwell and on sick leave from the Council. Cr Jarman denied that she had asked Mr Mills to stop pursuing his complaint.

Mr Mills gave Cr Jarman his word that he would not pursue the complaint at that time.

On 26 February 2021, Mr Mills received a letter from the Council's General Manager, telling him that the person in question was still employed by the Council. Mr Mills interpreted this as notice that the PRC was *fit and well enough to be employed*. As a result of this, Mr Mills wrote to the General Manager on 1 March 2021, stating that he intended to proceed with his complaint against the PRC as he was *now capable of returning to work*. This letter was copied to Cr Jarman.

Later that day (1 March 2021), Cr Jarman phoned Mr Mills to reiterate that the PRC was still on sick leave. It is this phone call which is the subject of the complaint. The complaint alleged that Cr Jarman was *agitated and disrespectful*, and that her behaviour was *unbecoming of a Deputy Mayor and Councillor*. Mr Mills alleged that he was abused and bullied by Cr Jarman. Mr Mills believed that Cr Jarman was expressing her views (in the phone call) with the support of the General Manager.

Procedure

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

The Panel met on 23 April 2021. On 26 April 2021 the Panel wrote to the General Manager, requesting a copy of a letter from Mr Mills to Council on 18 December 2020, and a copy of a letter from the General Manager to Mr Mills on 26 February 2021. The General Manager, Mr Atkins, was also asked to provide information regarding the phone call from Cr Jarman to Mr Mills on 1 March 2021, during part of which Cr Jarman was in his presence. These letters and a Statutory Declaration were received from Mr Atkins on 6 May 2021.

On 26 April 2021 the Panel wrote to Mr Mills, asking him to provide further information regarding the exact nature of the words or phrases used by Cr Jarman in the phone call on 1 March. This information was provided by Mr Mills on 29 April 2021.

On 26 April 2021 Cr Jarman was informed that the Panel had met, and was invited to request an extension of time to make her response to the complaint. Her response to the complaint was received on 6 May 2021.

The Panel met on 26 May 2021, and on 28 May the parties were informed that a hearing was to be conducted on 30 June 2021, with the General Manager to appear as a witness. Neither Mr Mills nor Cr Jarman asked to call witnesses, and neither party asked for an advocate or a support person.

The hearing was held in Ulverstone on 30 June 2021.

Material considered by the Panel

The Panel considered the following documents in its investigation:

- The Devonport City Council Model Code of Conduct Policy, January 2019;
- the complaint from Mr Mills, attached to a Statutory Declaration dated 10 March 2021;
- Statutory Declaration from Mr Mills, dated 29 April 2021
- Statutory Declaration from the General Manager, dated 5 May 2021 accompanied by:
 - letter dated 9 April 2020 from the Council to Mr Mills;
 - letter dated 18 December 2020 from Mr Mills to Council; and
 - letter dated 26 February 2021 from the Council to Mr Mills.

- response to the complaint from Cr Jarman, attached to a Statutory Declaration dated 6 May 2021;
- Statutory Declaration from Mr Mills, dated 26 May 2021, covering five emails from Mr Mills to the Executive Officer between 18 May 2021 and 22 May 2021;
- Statutory Declaration dated 3 June 2021 from Mr Mills, and attachments A, B, C and D; and
- Statutory Declaration dated 24 June 2021 from Mr Mills, with excerpt from Council's minutes of the meeting of 25 January 2021.

Oral Evidence at the Hearing

The Complainant's oral evidence was that on 1 March 2021, during the telephone call, Cr Jarman was *very loud and aggressive*. She attempted to dissuade Mr Mills from going ahead with the complaint against the PRC. He reminded her of her offer to seek resolution of the 'landslip issue' (caused by the PRC's removal of trees). He was told that the General Manager was with her during the phone call. The Complainant expected Mr Atkins to come to the phone and *to take the lead* but Cr Jarman kept talking and became more agitated, and accused him of misunderstanding council's RTI response. The Complainant said Cr Jarman said he was breaking his word, he was cold hearted, and *how would I feel if I was not in good health*. She ended the phone call by saying she would not help him anymore. Mr Mills maintains his belief that the PRC was guilty of 'corruption' in relation to the removal of the trees.

Mr Atkins, the general manager of the Devonport City Council, gave evidence. He said that on 1 March 2021, he was in his office at the paranaple centre in Devonport when he heard Cr Jarman speaking on the telephone in the nearby councillors' lounge, to a person he gathered was Mr Mills. He could not hear what was being said until Cr Jarman came into his office for less than a minute during the course of the telephone call. She then left before the end of the call. He said the conversation was not animated but Cr Jarman habitually spoke loudly, and did so on this occasion. That was not unusual. He said there was no offensive language or abuse. The duration of the phone call was ten or fifteen minutes. The call ended 'quickly' but he could not recall the words used.

Mr Atkins' evidence did not support the Complainant's allegations that Cr Jarman was agitated and disrespectful during the telephone call.

Cr Jarman said that the purpose of her phone call to the Complainant was to assist him to direct his complaint about the removal of trees towards the Council rather than towards the individual council employee who was involved. She said in effect that Mr Mills misdirected that complaint towards a council employee who was on indefinite leave because of serious health issues, and was not likely to ever return to work. She wanted to know how she could help to resolve his complaint, not to 'end it'. Her intention was not to obtain a benefit for the unwell employee but to assist the complainant to properly direct his complaint so it could be resolved. She did not recall calling the Complainant 'cold hearted' during the telephone call. She said she ended the phone call by saying *I don't think I can help you anymore* because the complainant was not listening to her. She does not believe her manner was bullying or aggressive.

Determination

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

Reasons for the Determination

Part 3 – USE OF OFFICE

1. *The actions of a councillor must not bring the Council or the office of councillor into disrepute.*

2. *A councillor 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.*
3. *In his or her personal dealings with the Council (for example as a ratepayer, recipient of a Council service or planning applicant), a councillor must not expect nor request, expressly or implicitly, preferential treatment for himself or herself or any other person or body.*

The effect of Mr Mills' evidence was that he believed that a person on extended sick leave or personal leave is not employed by the Council. Mr Mills therefore considered (during the phone call on 1 March 2021) that the Council had not been honest with him when he was told in the letter from the Executive Co-ordinator of the Council on 26 February 2021 that the PRC *is a current employee of the Devonport Council*. Mr Mills was confused by the apparent discrepancy between the information in the letter of 26 February 2021, and the information being provided by Cr Jarman in the phone call, regarding the PRC's status as a Council employee.

During the phone call on 1 March 2021, Cr Jarman may have been frustrated by her failure to be able to explain to Mr Mills that the PRC was still an employee of the Council, despite his having been on sick leave for several months. While Cr Jarman may have spoken loudly, the Panel saw no evidence that Cr Jarman's phone call of 1 March 2021 brought the Council into disrepute, either because of what was said or because of the tone of the conversation.

Whilst Cr Jarman was seeking to ensure that Mr Mills was aware of the PRC's circumstances, the Panel determines that Cr Jarman was not seeking preferential treatment for him, nor was she seeking undue, improper, unauthorised or unfair benefit for herself or the PRC. The Panel accepts Cr Jarman's evidence that she believed that Mr Mills had misdirected his complaint about the removal of trees towards the unwell council employee, and she wanted to assist Mr Mills to direct his complaint towards the Council rather than the individual, in order to achieve a resolution.

Part 7 – RELATIONSHIPS WITH COMMUNITY, ELECTED MEMBERS AND COUNCIL EMPLOYEES

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.*

The Panel determines that Cr Jarman did not treat Mr Mills unfairly. On the evidence provided, Cr Jarman was attempting to assist Mr Mills to resolve his issue regarding landslip risk caused by the removal of trees, and giving him information about the PRC's ongoing health problems to help him to understand why the pursuit of his 'corruption' complaint might not be appropriate while the PRC was still unwell. Mr Mills stated in hearing that he was unaware that the PRC was still unable to return to work, as the Council had not given him this information.

The Panel prefers Cr Jarman's evidence about the nature of the telephone call on 1 March 2021, her tone and its content, to the extent that it differed from Mr Mills' account. Mr Mills did not understand that an employee/employer relationship continues when an employee is on leave due to ill health, and appeared to misunderstand Cr Jarman's purpose in making the telephone call. It is likely he was also mistaken about Cr Jarman being aggressive and agitated, which was unsupported by the only witness to part of the conversation, Mr Atkins. In either account of the words used in the phone call, and taking into account that the call did not take place in a public area, the Panel is unable to find a basis for a reasonable person to be offended or embarrassed, nor anything that could amount to bullying or harassment.

Part 8 – REPRESENTATION

1. *When giving information to the community, a councillor must accurately represent the policies and decisions of the Council.*

2. *A councillor must not knowingly misrepresent information that he or she has obtained in the course of his or her duties.*
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4. *A councillor must clearly indicate when he or she is putting forward his or her personal views.*
5. *A councillor's personal views must not be expressed publicly in such a way as to undermine the decisions of the Council or bring the Council into disrepute.*
6. *A councillor must show respect when expressing personal views publicly.*
7. *The personal conduct of a councillor must not reflect, or have the potential to reflect, adversely on the reputation of the Council.*

The Panel determines that during the phone call, Cr Jarman was not talking about policies and decisions of the Council. She did not misrepresent information she had obtained as a councillor, but rather, conveyed information which was known in the community about an unwell council employee. She spoke as an individual councillor, not on behalf of the Council. The exchange was not a public exchange. The Panel cannot determine that anything about what Cr Jarman said or the way she said it during the phone call was disrespectful, nor could it reflect adversely on the reputation of the Council.

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 other commitments by members preventing preparation of the final report.

Right to Review

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



Lynn Mason
(Chairperson)



Anthony Mihal
(Legal Member)



Liz Gillam
(Community Member with
experience in local government)