

# Councillor Conduct Tribunal: Summary of Decision and Reasons for Department's website

*Local Government Act 2009: Section 150AS(2)(c)*

Note that the Tribunal is prohibited from giving another entity information that is part of a Public Interest Disclosure unless required or permitted under another Act; or including in this summary the name of the person who made the complaint or information that could reasonably be expected to result in identification of the person: section 150AS(5)(a) and (b).

## 1. Application details:

<b>Reference No:</b>	F21/4742
<b>Subject Councillor:</b>	Councillor Jack Dempsey, the Mayor of the Council (the Councillor / the Respondent)
<b>Council:</b>	Bundaberg Regional Council (the Council)

## 2. Decision (section 150AQ):

<b>Date:</b>	19 October 2023
<b>Decision:</b>	<p><b>Allegation One</b></p> <p>The Tribunal has determined, on the balance of probabilities, that the allegation that on or around 2 May 2018, Mayor Jack Dempsey of Bundaberg Regional Council engaged in misconduct pursuant to section 176(3)(b)(ii) of the <i>Local Government Act 2009</i> (Qld), in that he breached the trust placed in him as a councillor, in that he failed to uphold the local government principles contained in sections 4(2)(a) and 4(2)(d) of the Act, being transparent and effective processes, and decision-making in the public interest, and good governance, in that he approved a salary increase to the Chief Executive Officer of Bundaberg Regional Council, Stephen Johnston, without being given the authority to do so by the local government <b>has not been sustained</b>.</p> <p><b>Particulars</b></p> <p>Particulars of the alleged misconduct are as follows:</p> <ol style="list-style-type: none"><li>a. Mayor Dempsey was Mayor of Bundaberg Regional Council at the time of the alleged misconduct.</li><li>b. On 13 December 2016 at an Ordinary meeting, the local government resolved as follows:</li></ol>

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	<p>i. <i>"That Mr Stephen Johnston be appointed to the position of Chief Executive Officer on a negotiated contract basis, to commence on a date to be determined."</i></p> <p>c. On 20 March 2017, Mayor Dempsey executed an employment contract (the Contract) on behalf of the local government appointing Stephen Johnston (Mr Johnston) to the position of Chief Executive Officer (CEO) for the period of 5 April 2017 to 4 April 2021.</p> <p>d. The Contract contained terms relating to Mr Johnston's remuneration as CEO, relevantly:</p> <p>i. Clause 8.1 and Schedule B(1): that the annual salary was to be \$285,000 gross, which would be reviewed annually with an increase of 1% per annum or Brisbane CPI whichever is the greater, subject to satisfactory performance; and</p> <p>ii. Clause 8.2: that Mr Johnston may request in writing at any time a variation to the remuneration package and Council was not to unreasonably refuse the request, and that any variation that increased the remuneration package or involved further cost to Council must be agreed to by Council in writing.</p> <p>e. By way of a memo dated 2 May 2018 (the Memo), Mr Johnston requested approval from Mayor Dempsey for his annual remuneration to be increased by \$20,000, from \$285,000 to \$305,000, effective from the Contract anniversary date of 5 April 2018 (the salary increase).</p> <p>f. Mayor Dempsey signed the Memo approving the requested salary increase.</p> <p>g. Mayor Dempsey's approval of Mr Johnston's salary increase was inconsistent with transparent and effective processes, and decision-making in the public interest, and good governance, as:</p> <p>i. The salary increase of \$20,000 was greater than both of 1% and Brisbane CPI, which was inconsistent with Clause 8.1 and Schedule B(1) of the Contract;</p> <p>ii. The salary increase had not been agreed to by the local government in writing, which was inconsistent with Clause 8.2 of the Contract; and</p>
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- iii. The local government had not otherwise resolved to approve the salary increase or to delegate authority to Mayor Dempsey to approve the salary increase.

#### **Allegation Two**

The Tribunal has determined, on the balance of probabilities, that the allegation that on or around 23 November 2017, Mayor Jack Dempsey of Bundaberg Regional Council engaged in misconduct pursuant to section 176(3)(b)(ii) of the *Local Government Act 2009* (Qld), in that he breached the trust placed in him as a councillor, in that he failed to uphold the local government principles contained in sections 4(2)(a) and 4(2)(d) of the Act, being transparent and effective processes, and decision-making in the public interest, and good governance, in that he approved a vehicle allowance increase to the Chief Executive Officer of Bundaberg Regional Council, Stephen Johnston, without being given the authority to do so by the local government **has not been sustained**.

#### **Particulars**

Particulars of the alleged misconduct are as follows:

- a. Mayor Jack Dempsey was Mayor of Bundaberg Regional Council at the time of the alleged misconduct.
- b. On 13 December 2016 at an Ordinary meeting the local government resolved as follows:
  - i. *"That Mr Stephen Johnston be appointed to the position of Chief Executive Officer on a negotiated contract basis, to commence on a date to be determined."*
- c. On 20 March 2017, Mayor Dempsey executed an employment contract (the Contract) on behalf of the local government appointing Stephen Johnston (Mr Johnston) for the position of Chief Executive Officer (CEO) for the period of 5 April 2017 to 4 April 2021.
- d. The Contract contained terms relating to Mr Johnston's remuneration as CEO, relevantly:
  - i. Clause 8.1 and Schedule B(6): a vehicle allowance to a maximum of \$23,000; and
  - ii. Clause 8.2: that Mr Johnston may request in writing at any time a variation to the remuneration package and Council was not to unreasonably refuse the request, and any variation that increased the remuneration package or involved further cost to Council must be agreed to by Council in writing.
- e. By way of a Memo dated 23 November 2017 (the Memo), Mr Johnston requested approval from Mayor Dempsey to have his

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	<p>vehicle allowance increased from \$23,000 to \$27,000 per annum, effective from 16 November 2017.</p> <p>f. Mayor Dempsey signed the Memo approving the requested vehicle allowance increase (vehicle allowance increase).</p> <p>g. Mayor Dempsey's approval of Mr Johnston's vehicle allowance increase was inconsistent with transparent and effective processes, and decision-making in the public interest, and good governance, as:</p> <ul style="list-style-type: none"> <li>i. The vehicle allowance increase from \$23,000 to \$27,000 per annum resulted in an increase to Mr Johnston's remuneration package provided for in Clause 8.1 and Schedule B(6) of the Contract;</li> <li>ii. The vehicle allowance increase had not been agreed to by the local government in writing, which was inconsistent with Clause 8.2 of the Contract; and</li> <li>iii. The local government had not otherwise resolved to approve the vehicle allowance increase or to delegate authority to Mayor Dempsey to approve the vehicle allowance increase.</li> </ul>
<p><b>Reasons:</b></p>	<p><b><u>Introduction</u></b></p> <ol style="list-style-type: none"> <li>1. The matter concerned the Respondent approving an increase to the CEO's salary (<b>Allegation One</b>) and motor vehicle allowance (<b>Allegation Two</b>) on the CEO's request but without the express approval of the full Council. Due to the factual similarity of both allegations, the Tribunal dealt with both allegations simultaneously.</li> <li>2. The Tribunal considered there were two key issues in the matter: whether the Respondent's conduct was inconsistent with the local government principles of 'transparent and effective processes, and decision-making in the public interest' and 'good governance of, and by, local government' and if it was, whether the conduct amounted to a breach of the trust placed in the Respondent.</li> <li>3. The Independent Assessor's / the Applicant's case was basically that the Respondent did not have the express authority of the full Council or legislative authority to negotiate the terms of the CEO's contract or approve any amendments to it and that the Respondent's conduct was inconsistent with the terms of the contract.</li> <li>4. The Respondent's case was basically that the authority to negotiate the CEO's contract and approve amendments to it was granted to him by the Act, by the Council in a Council</li> </ol>

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resolution, by Council 'custom and practice' and that the use of 'Mayor' and 'Council' in the terms of the contract was interchangeable.

**Was the Respondent's conduct inconsistent with the local government principles of 'transparent and effective processes, and decision-making in the public interest' and 'good governance of, and by, local government'?**

5. Regarding this issue, the Tribunal examined three major points of contention between the parties, being:
- a. Appointment of the new CEO on a 'negotiated contract basis';
  - b. The Mayor's power to 'manage' the CEO; and
  - c. Terms of the CEO's contract.

**Appointment of the new CEO on a 'negotiated contract basis'**

6. Regarding this point, the Tribunal looked at:
- a. Section 194 of the *Local Government Act 2009* (Qld) ('the Act') (**Appointing a chief executive officer**) which specified that the CEO 'must enter into a written contract of employment with the local government'; and
  - b. The Council's resolution from 13 December 2016 resolving '**That Mr Stephen Johnston be appointed to the position of Chief Executive Officer on a negotiated contract basis, to commence on a date to be determined.**'
7. The Tribunal noted that the 13 December 2016 Council resolution did not specify who was supposed to negotiate the contract basis.
8. The Tribunal also noted section 236 of the Act (**Who is authorised to sign local government documents**), which stated that the 'head of the local government' 'may sign a document on behalf of a local government' and relevantly the '**head of the local government is**' [...] the mayor [...].
9. The Tribunal formed the view that the wording 'negotiated contract basis' in the 13 December 2016 Council resolution was sufficiently broad to allow the Respondent as the Mayor to negotiate, set and amend the terms of the contract with the CEO. Adding in the power of a Mayor to sign documents on behalf of a local government in section 236 of the Act added further credence to this view. The 13 December 2016 Council resolution and section 236 of the Act allowed for the Respondent as the Mayor to be the figurehead for the contract negotiations with the CEO and to become for all intents and purposes a party to the contract in all but name. Otherwise, the contract negotiations would have involved either Mr Johnston sitting before the full Council negotiating the contract terms or back and forth

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	<p>correspondence over an extended period of time, which the Tribunal accepted would be impractical and inefficient.</p> <p>10. The parties took differing views on why a previous and a subsequent Council resolution granted/delegated to the Mayor express authority to conduct contract negotiations with the CEO. Having looked at the evidence holistically and from a practical perspective, the Tribunal formed the view that the exclusion of an express power for the Mayor to negotiate the terms of the CEO's contract from the 13 December 2016 Council resolution seems to have been an oversight.</p> <p><u><i>The Mayor's power to 'manage' the CEO</i></u></p> <p>11. Regarding this point, the Tribunal looked at the '<b>Responsibilities of councillors</b>' in section 12 of the Act, namely section 12(4) which outlined the Mayor's 'extra responsibilities' and specifically section 12(4)(c) which provided the Mayor has the extra responsibility of 'leading, managing, and providing strategic direction to, the chief executive officer in order to achieve the high quality administration of local government'.</p> <p>12. The Tribunal took the view that in the absence of a definition of 'managing' in the Act or in the <i>Acts Interpretation Act 1954</i> (Qld), the ordinary meaning of the word from a dictionary can be used. For example, the online <i>Cambridge Dictionary</i> defines 'managing' as 'to be responsible for controlling or organizing someone or something, especially a business or employees' or 'to be in charge of and control a company, department, project, team, etc.' The Tribunal's interpretation was that such definitions are broad enough to encompass the Respondent as Mayor negotiating, setting and amending the terms of the CEO's contract, including the remuneration and allowances of the CEO. In the Tribunal's view, such an interpretation was also consistent with the Tribunal's interpretation of section 236 of the Act and the 13 December 2016 Council resolution appointing the CEO on a 'negotiated contract basis'.</p> <p><u><i>Terms of the CEO's contract</i></u></p> <p>13. Regarding this point, the Tribunal looked at whether there was a clear distinction between 'Mayor' and 'Council' in the terms of the contract. The contract was between the Council and the CEO but was signed by the Respondent as the Mayor on behalf of Council.</p> <p>14. The Tribunal formed the view that 'Mayor' and 'Council' were used interchangeably in the contract and this interchange was particularly clear in clause 7 of the contract. Further, from a practical perspective, it was difficult for the Tribunal to see how anything in clause 7.4 of the contract (e.g. 7.4(a) 'Council shall give the employee at least 7 days' notice in writing that a performance review is to be conducted') could have been done by someone other than the Respondent as the Mayor.</p>
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	<p>15. There was also an argument raised that the increase to the CEO's salary was above 1% per annum/Brisbane CPI being inconsistent with clause 1(ii) of <b>Schedule B Remuneration &amp; Benefits</b> of the contract. However, in the Tribunal's view, there was nothing in the contract stopping Mr Johnston from seeking a greater increase to his salary in writing. Clause 8.2 of the contract stated the employee could request a variation of the structure of the remuneration package '<b>at any time</b>' [emphasis added], that such a request could not be unreasonably refused but '[u]nder no circumstances will any such restructure involve any increase in the remuneration package or involve any further cost to Council <b>unless Council agrees in writing as set out in Schedule B</b>' [emphasis added]. The Tribunal ultimately found that the Respondent complied with the terms of the contract.</p> <p>16. The Tribunal noted that it was Mr Johnston and not the Respondent who requested the increases. Had the Respondent increased Mr Johnston's salary or motor vehicle allowance on his own accord, the Tribunal may have come to a different view about the Respondent's conduct.</p> <p><i><u>Tribunal's findings regarding the relevant local government principles</u></i></p> <p>17. In the Tribunal's view, there was nothing on the evidence in this matter that suggested the Respondent failed to uphold the local government principle of 'good governance of, and by, local government' because the Tribunal saw no evidence of wrongdoing by the Respondent or any breaches of the 13 December 2016 Council resolution, the Act or the contract.</p> <p>18. Regarding the local government principle of transparent and effective processes, and decision-making in the public interest, the Tribunal had some comments.</p> <p>19. The Tribunal acknowledged that the 'gold standard' transparent and effective process in this matter would have been for the Respondent to prepare a report to the full Council about the increases requested by the CEO. However, in light of the powers and responsibilities given to the Respondent by the Act, as well as the Tribunal's interpretation of the 13 December 2016 Council resolution and the contract, the Tribunal found that the process the Respondent adopted was sufficiently transparent and effective so as to avoid a breach of this local government principle. This is because everything was done in writing, Mr Johnston's memos provided reasonable justifications for why he was seeking the increases and once the Respondent signed the memos, they were forwarded on to the relevant Council personnel for action. The Tribunal also accepted that the salary range of \$300,000-\$400,000 for one executive at the Council was the salary range of the CEO and this information was made publicly available in the Council's annual reports for 2017/18 and 2018/19.</p>
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	<p>20. The Tribunal repeats that while there could have been a more transparent and effective process surrounding the disclosure of the total remuneration of the CEO, what was done by the Respondent was a sufficiently transparent and effective process and ultimately, the Tribunal found that the Respondent's conduct was not inconsistent with the relevant local government principles.</p> <p><b><u>If the Respondent's conduct was inconsistent with the local government principles, did the conduct amount to a breach of the trust placed in the Respondent and result in misconduct?</u></b></p> <p>21. Having reached the view that the Respondent's conduct was not inconsistent with the relevant local government principles, it was unnecessary to consider whether the Respondent breached the trust placed in him as a Councillor. However, in case the Tribunal was wrong about its findings regarding the local government principles, the Tribunal briefly addressed 'breach of the trust'.</p> <p>22. The phrase 'breach of the trust' was not defined in the Act. Therefore, the Tribunal looked at the phrase's ordinary meaning, the phrase's interpretation in previous Tribunal decisions and in the case of <i>Flori v Winter &amp; Ors</i> [2019] QCA 281. Both parties submitted that not every breach of the Act will be considered serious enough to amount to misconduct. Drawing on particularly <i>Flori v Winter &amp; Ors</i> [2019] QCA 281 at paragraph 59, in the Tribunal's view, whether there was a breach of the trust in the Councillor depended on whether public confidence in the integrity of the Councillor can be maintained.</p> <p>23. In the event that the Tribunal was wrong about its findings regarding the relevant local government principles, the Tribunal found that there was no breach of the trust placed in the Councillor because public confidence in the integrity of the Councillor can be maintained. Further, the Tribunal found that the evidence of the Councillor's conduct in this matter would not satisfy Dixon J's 'reasonable satisfaction' threshold test in <i>Briginshaw v Briginshaw</i> (1938) 60 CLR 336 at 361-362. Therefore, the Tribunal found that the Respondent did not breach the trust placed in him as Councillor and did not engage in misconduct.</p>
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### 3. Orders and/or recommendations (section 150AR - disciplinary action):

<b>Date of orders:</b>	19 October 2023
<b>Orders and/or recommendations:</b>	As the Tribunal has decided the Councillor has not engaged in misconduct, no orders or recommendations are necessary.

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