

Councillor Conduct Tribunal: Councillor misconduct complaint – Summary of decision and reasons for department’s website

Local Government Act 2009: Sections 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: S150AS(5)(a) and (b).

1. Complaint:

CCT Reference	F20/1990
Subject Councillor	Mr John Denis Connolly (the former Councillor)
Council	Sunshine Coast Council (the Council)

A. Decision (s150AQ):

Date:	19 September 2022
Decision:	<p>The Tribunal determined on the balance of probabilities that:</p> <p>A. The Misconduct allegation and application (the First application) is dismissed pursuant to sections 150AL and 213 (1) of the <i>Local Government Act 2009</i> and the principles of procedural fairness;</p> <p>B. That a decision is not required for the Second application filed 18 May 2022, seeking to withdraw the misconduct application, as the Tribunal by the above decision has dismissed the Misconduct application.</p>
Allegation:	<p>The Allegation provided :</p> <p>“ that on or about 17 May 2019, Councillor Connolly, a councillor for the Sunshine Coast Council, engaged in misconduct as defined in section 150L(1)(c)(ii) of the <i>Local Government Act 2009</i>, in that his conduct in requesting Council Officer/s to make alterations to an officer’s report involved a breach of the local government’s Acceptable Request Guidelines under section 170A of the Act.”</p>

Particulars of the alleged misconduct which could amount to misconduct provided to the Tribunal by the Applicant are as follows:

- a) On 06 December 2018, at Sunshine Coast Council (SCC) Ordinary meeting, Council unanimously voted at Agenda item 8.6.2 to adopt the Council's Acceptable Request Guidelines, which specifies under the 'Guiding Principles', Principle (1): *Councillors must not direct or pressure employees in relation to their work or seek to influence recommendations the employee should make.*
- b) As at 17 May 2019, Councillor Connolly was an elected Councillor of SCC.
- c) On Thursday 16 May 2019, an Agenda Review meeting was held to discuss the Agenda items for the Ordinary Council meeting set for 23 May 2019. Agenda item 8.6 (Commercial Use of Land) considered a report prepared by Council officer Ms Nikki Clements, seeking Council endorsement of the recommendations for 2019-2022 High/-use impact Commercial Land permits, was discussed.
- d) Councillor Connolly attended the Agenda Review meeting and was present during the discussion regarding Agenda item 8.6 .
- e) Ms Nikki Clements is an employee of the local government, within the meaning of section 170A(7) of the Act, holding the position of Coordinator Community Land Permits and Parking Unit.
- f) On 17 May 2019 at approximately 12 noon, Ms Clements was contacted by Councillor Connolly on her mobile phone in relation to Agenda item 8.6 and the report recommendations she had prepared.
- g) During this telephone conversation, Councillor Connolly asked Ms Clements to change the officer's recommendation in her report to recommend the awarding of the permit to the joint applicants for Learn to Surf Lessons at Mooloolaba Beach, rather than the individual applicant who was Ms Clement's recommendation in her officer's report.
- h) Ms Clement's declined to change her recommendation, and consistent with council policy, reported the matter to her supervisor.
- i) Also on 17 May 2019, Councillor Connolly left a voice message on Ms Cheryl Krome's cell phone asking her to call him back. Ms Krome occupies the position of Manager Customer Response – Customer Engagement and Planning Services at SCC and was Ms Clement's supervisor.
- j) On the same day, Ms Krome returned Councillor Connolly's call. Ms Krome states that Councillor Connolly wanted to discuss: the Officers report in relation to Agenda item 8.6; alluded to the fact that he wanted the report recommendations changed; and that he had already spoken with 'Nikki' (Clements).

The Independent Assessor submitted that Councillor Connolly's conduct in contacting Council officers to make alterations to an officers report was in breach of the Council's Acceptable request guidelines, which is misconduct under section 150L(1)(c)(ii) of the Act.

<p>Reasons:</p>	<p>Background</p> <ol style="list-style-type: none"> 1. The former Councillor (the Councillor) was first elected in 2016 and had attended relevant in-service and integrity training. 2. The Council by resolution at an Ordinary meeting on 6 December 2018 adopted unanimously the Acceptable Requests Guidelines under section 170A of the <i>Local Government Act 2009</i> (the Act), that contained the principle that: “(1) <i>councillors must not direct or pressure employees in relation to their work or seek to influence recommendations the employee’s should make...</i>” 3. The Councillor provided a response to the alleged misconduct by email to the Independent Assessor (IA) on 17 September 2019 and disputed the alleged conduct constituted misconduct. It was noted that the Councillor accepted some of the factual details contained in the Statement of Facts prepared by the Independent Assessor (IA). 4. The parties did not reach a final agreement on the statement of facts however on 29 January 2020 the Councillor in his response to the IA accepted that he had discussed with a Council officer, a report and recommendations that she had prepared for the purpose of having the recommendations reviewed: <i>...” I did approach Ms Clements and asked her to <u>review</u> her recommendation...”</i>¹ <p><i>Proposed Tribunal Directions and Hearing – 24 August 2021</i></p> <ol style="list-style-type: none"> 5. The Tribunal assessed the documents and allegation filed by the IA that also included the email responses from the Councillor dated 29 January 2020, 10 and 13 February 2020. 6. On 24 August 2021 the Tribunal issued procedural directions to both parties to the proceedings, the IA and the Councillor. The Directions proposed that the hearing take place on 22 September 2021. <p><i>Delay to the hearing process</i></p> <p><i>Exceptional & altered circumstances of the Councillor</i></p> <ol style="list-style-type: none"> 7. On 30 August 2021 the son of the former Councillor, Mr James Patrick Connolly, notified the Tribunal by email that his father had suffered serious injuries and was receiving treatment in the spinal injuries unit of the hospital. 8. Consequently and in response to the receipt of the above information, the Tribunal vacated the hearing date until a date to be advised in early 2022 and pending the receipt of further information regarding the Councillor’s recovery progress. 9. The Tribunal noted the IA is not empowered to continue an investigation or to compel the production of further documentation, including medical
------------------------	--

¹ Statement of Facts prepared by the IA at [48]

certification of health circumstances, once an application for misconduct has been filed with the Tribunal. Similarly the Tribunal has very limited powers to compel such information.

10. On 3 February 2022 the Tribunal by email requested the Councillor to advise of his capacity to participate in the hearing process. Alternatively he was requested to provide medical certification of ongoing incapacity that could prevent his participation in the proceedings.
11. On 4 February 2022 the son of the former Councillor replied to the Tribunal's email that had been addressed to his father. The son refused the request of the Tribunal to provide medical certification of his father's circumstances. This email did however confirm that Mr. Connolly remains in the Spinal Injuries Unit of the ...Hospital and stated :
"That to avoid doubt, Mr. Connolly will not be participating in the hearing either in the near future or at any time for that matter..."
12. On 18 May 2022 the IA filed a further application (the Second application) seeking to withdraw the misconduct application (the First application) from the Tribunal as a consequence of the exceptional health circumstances of the former councillor. The reasons provided to justify the application included:
 - That further evidence to confirm the injuries and health circumstances of the Councillor and his capacity to participate in the proceedings cannot be obtained as the powers of the IA cease upon referral to the Tribunal
 - "There is no public interest in continuing the proceedings before the Tribunal for the purposes of personal deterrence, general deterrence or guidance to councillors"
 - The misconduct matter does "not involve any unique issue or point that would provide general deterrence or guidance to councillors"
13. On 19 May 2022 the Tribunal notified the former Councillor and the Applicant that both the First and Second applications would be considered at a hearing on the documents. The hearing was scheduled to take place on 27 May 2022 without the need for either party to appear.

Applicable legislation

14. The Applicant by the First application alleges misconduct under section 150L(1)(c)(ii) of the Act. Those provisions in part are:

-The conduct of a Councillor is misconduct if the conduct--

(c) contravenes ...-

(ii) the acceptable requests guidelines of the local government under section 170A of the Act.

Application to former Councillors

By section 150M(1) of the Act the allegation continues to apply to the Councillor even though he was not a serving councillor at the time of the hearing.

Procedural fairness and the hearing process

By section 150AL of the Act the Tribunal “ *must conduct a hearing*” about the misconduct. However by section 213(1)(a) and (b) of the Act the Tribunal must :

(1) (a) ‘*observe natural justice*’ ; but

(b) ‘act ... as quickly and informally as is consistent with ‘*a fair and proper consideration of the issues raised in the hearing*’.

15. The Tribunal in this matter found that compliance with the above provision of the Act was difficult as information needed from one party was not available and the Councillor remained incapacitated for a lengthy and indefinite period.

Considerations & Findings

16. The Tribunal’s considerations in relation to the First and Second applications were premised on procedural fairness principles and the serious and ongoing health circumstances of the Respondent councillor.
17. The nature of the alleged misconduct and the circumstances in which the Respondent’s conduct occurred is relevant to assessing whether misconduct is established.²
18. The former Councillor by the legislation is a party to the hearing along with the IA. By section 213(2)(a) of the Act a party’s failure to participate in the hearing process itself is not a barrier generally to the Tribunal conducting a hearing. However, exceptional circumstances have arisen that include the ongoing and serious incapacity of the former Councillor, the cessation of communications between the IA and the Councillor, and the Councillor’s notable absence from participation in the Tribunal process and disengagement from necessary communications.
19. The Tribunal is not empowered to compel the production of medical certification in these circumstances. However it was noted the Councillor was initially co-operative and engaged in the early investigation process conducted by the IA. During this investigation period the Councillor disputed the allegation and the interpretation placed on some of the material facts.

Public Interest considerations

20. In these exceptional circumstances that include the age, health circumstances and the incapacity of the Councillor to participate in the hearing process the Tribunal found that a procedurally fair misconduct hearing could not be implemented. It was considered that to continue with hearing and determining the application for misconduct would not promote the public interest or provide general deterrence or guidance to other councillors.

² *Deputy Commissioner Stewart v Dark*[2012]QCA[18,33]

	<p>21. It is also accepted by the Tribunal that not every breach of a provision of the Act will lead to a finding of misconduct, having regard to the circumstances and all relevant considerations. The Tribunal found that it was not possible in the circumstances of this matter to be certain that all relevant facts and considerations were available to be assessed when one party, the Councillor, was unable to participate as a consequence of injuries sustained from an accident.</p> <p>22. In these exceptional circumstances and as a consequence of the absence of a designated party to the contested hearing process, the Tribunal considered a finding of fact could not be made when a procedurally fair hearing cannot be implemented.</p> <p><i>Decision:</i> The Tribunal determined for the above reasons that the misconduct application (the First application) is dismissed.</p>
--	--

16. Orders and/or recommendations (s150AR - disciplinary action):

Date of orders:	Not applicable.
Order/s and/or recommendations:	The Misconduct application is dismissed and accordingly orders and sanctions are not applicable.