
JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : LOCAL GOVERNMENT ACT 1995 (WA)

CITATION : BLANCO and LOCAL GOVERNMENT
STANDARDS PANEL [2019] WASAT 42

MEMBER : MS C WALLACE, SENIOR MEMBER

HEARD : 14 MAY 2019

DELIVERED : 24 JUNE 2019

FILE NO/S : CC 2385 of 2018

BETWEEN : CAMILO BLANCO
Applicant

AND

LOCAL GOVERNMENT STANDARDS PANEL
Respondent

ATTORNEY-GENERAL FOR WESTERN
AUSTRALIA
Intervenor

Catchwords:

Local government - Rules of Conduct - Minor breach - Conflicting witness evidence

Legislation:

Local Government (Rules of Conduct) Regulations 2007 (WA), reg 7(1), reg 7(1)(b)

Local Government Act 1995 (WA), s 5.104, s 5.105(1), s 5.106, s 5.107, s 5.108, s 5.109, s 5.110, s 5.110(6), s 5.110(6)(b)(ii), s 5.125(1)

State Administrative Tribunal Act 2004 (WA), s 27(1), s 27(2), s 29(1), s 29(3)

Result:

Application for review allowed

Category: B

Representation:

Counsel:

Applicant : In Person
Respondent : N/A
Intervenor : Mr Stockton

Solicitors:

Applicant : N/A
Respondent : N/A
Intervenor : State Solicitor's Office

Case(s) referred to in decision(s):

Treby and Local Government Standards Panel [2010] WASAT 81; (2010) 73
SR (WA) 66

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 The applicant, Mr Camilo Blanco, is the Mayor of the Town of Port Hedland (Town). On 1 July 2018 the Local Government Standards Panel (respondent) found that the applicant had breached reg 7(1)(b) of the *Local Government (Rules of Conduct) Regulations 2007* (WA) (Regulations) and had therefore committed a 'minor breach' pursuant to s 5.104 and s 5.105(1) of the *Local Government Act 1995* (WA) (LG Act).

2 On 25 September 2018 the respondent ordered, pursuant to s 5.110(6)(b)(ii) of the LG Act, that the applicant apologise publicly for the minor breach.

3 The applicant seeks a review of both the decision finding that a minor breach had occurred and the decision requiring the applicant to publicly apologise. The Attorney-General of Western Australia intervened in the proceeding.

Background

4 On 19 January 2018 the respondent received a complaint from the complaints officer of the Town made by Mr George Daccache, a councillor with the Town, alleging that the applicant had breached reg 7(1)(b) of the Regulations by engaging in verbal threats, bullying and harassment of Mr Daccache during a meeting which occurred on 28 November 2017.

5 The specific allegations made by Mr Daccache which were before the respondent for its consideration are as follows:

- a) that the applicant said 'Are we going to have a good discussion or are you going to walk out like a girl?';
- b) that the applicant said 'I'm going to fucking get rid of you, you fucking won't last, you're gone';
- c) that the applicant moved his chair and himself closer to Mr Daccache in a threatening, bullying, confronting and aggressive manner; and

- d) after moving his chair towards Mr Daccache, the applicant stated 'I'm going to fucking get rid of you and you can't stop me'.

(Exhibit A pages 3 - 4)

6 The applicant's response to the complaint to the respondent was effectively as follows:

- a) to deny that he made the alleged statements;
- b) to assert that there was no evidence to support the allegations and in particular the CCTV footage taken from outside of the applicant's office at the time of the meeting evidenced that Mr Daccache was sitting in a laid-back manner which is inconsistent with his allegation of being threatened; and
- c) Mr Daccache was upset when leaving the applicant's office because he raised issues with Mr Daccache regarding his behaviour including excessive alcohol consumption on Town property, sexual harassment of female staff and financial conflict between the Town and Mr Daccache.

7 The respondent was satisfied that each of the essential elements of a contravention of reg 7(1)(b) of the Regulations had been established. In particular in relation to whether the applicant had made improper use of his office as a councillor the respondent found as follows:

- a) The respondent accepted that the statements set out in [5a)], [5b)] and [5d)] above were made by the applicant and were offensive and likely to cause Mr Daccache embarrassment, in breach of clause 7.2(d) of the *Town of Port Hedland Code of Conduct* (Code of Conduct);
- b) The statements made by the applicant were not in keeping with the standards of conduct expected of Councillors pursuant to clause 3.1 and 7.1(b) and (g) of the Code of Conduct or clause 3 of the Code of Conduct because the applicant did not act with integrity, professionalism, respectfulness and courtesy;

- c) A reasonable person with a knowledge of the nature and content of the discussion which took place between the applicant and Mr Daccache with the knowledge of the relevant provisions of the Code of Conduct and understanding that a Mayor has a special onus, as leader of the Council, to set an example of appropriate conduct, would consider that the applicant had breached the standards of conduct expected of him and councillors generally; and
- d) The applicant made improper use of his office during the discussion when making the statements referred to in [5] above and by moving towards Mr Daccache in a threatening and bullying manner.

(Exhibit A page 10)

8 The respondent also found that the applicant intended to cause detriment to Mr Daccache by engaging in the relevant conduct. In this regard, the respondent found that there was no evidence that what was said or done occurred in the heat of the moment and thus the actions of the applicant were deliberate and made with the intent to offend, humiliate and threaten Mr Daccache and thereby to cause his detriment (Exhibit A page 11).

Relevant statutory provisions

9 Section 5.104 of the LG Act enables regulations to be made prescribing rules of conduct for council members.

10 Relevantly to the current proceeding, reg 7(1) of the Regulations made pursuant to s 5.104 of the LG Act provides as follows:

- (1) A person who is a council member must not make improper use of the person's office as a council member -
 - (a) to gain directly or indirectly an advantage for the person or any other person; or
 - (b) to cause detriment to the local government or any other person.

11 It is reg 7(1)(b) of the Regulations which is in issue in this proceeding.

12 Section 5.105(1) of the LG Act provides:

(1) A council member commits a minor breach if he or she contravenes -

- (a) a rule of conduct under section 5.104(1); or
- (b) a local law under this Act, contravention of which the regulations specify to be a minor breach.

13 The standard of proof in relation to findings of a breach is that it was more likely that the breach occurred than it did not occur: s 5.106 of the LG Act. Sections 5.107 to s 5.110 of the LG Act set out the procedure for dealing with alleged minor breaches by council members including the process to be undertaken by the respondent in determining whether a minor breach has occurred.

14 Section 5.110(6) of the LG Act provides that the respondent may deal with a minor breach by:

The breach is to be dealt with by -

- (a) dismissing the complaint; or
 - (b) ordering that -
 - (i) the person against whom the complaint was made be publicly censured as specified in the order; or
 - (ii) the person against whom the complaint was made apologise publicly as specified in the order; or
 - (iii) the person against whom the complaint was made undertake training as specified in the order;
- or
- (c) ordering 2 or more of the sanctions described in paragraph (b).

Code of Conduct of the Town

15 The Town's Code of Conduct sets out the following (Exhibit A page 40):

3.1 Working ethically with Each Other

All Council Members, Committee Members, Employees, Consultants and Contractors are expected to treat each other and members of the public in a respectful, professional, fair and courteous manner at all times in the workplaces as outlined in 6.0 Professional Conduct.

16 In respect of the behaviour of councillors, the Code of Conduct (Exhibit A pages 44 - 45) provides as follows:

7.1 Behavioural Principles

For the purposes of the Code, the following principles, as set out in the *Local Government (Rules of Conduct) Regulations 2007*, are to guide the behaviours of Council Members, Committee Members, Employees, Consultants and Contractors while performing their role at the Town:

- a) act with reasonable care and diligence;
- b) act with honesty and integrity;
- c) act lawfully;
- d) avoid damage to the reputation of the Town;
- e) be open and accountable to the public;
- f) base decisions on relevant and factually correct information;
- g) treat others with respect and fairness; and
- h) not be impaired by mind altering substances.

7.2 Personal Behaviour

Council Members, Committee Members, Employees, Contractors and Consultants will:

- a) act, and be seen to act, properly and in accordance with the requirements of the law and the Code;
- ...
- d) make no allegations which are improper or derogatory (unless true and in the public interest) and refrain from any form of conduct, in the performance of their official or professional duties, which may cause any person unwarranted offence or embarrassment[.]

History of the proceeding at the Tribunal

17 The applicant lodged his application pursuant to s 5.125(1) of the LG Act with the Tribunal on 29 October 2018. The proceeding was set down for directions hearings on 19 November 2018 and 25 February 2019 and was listed for final hearing on 14 May 2019.

18 The Tribunal received into evidence at the hearing the following documents:

- Exhibit A respondent's s 24 bundle of documents
- Exhibit B witness statement of Camilo Blanco dated 15 February 2018
- Exhibit C witness statement of David Pentz dated 15 February 2019
- Exhibit D witness statement of George Joseph Daccache dated 21 January 2019
- Exhibit E witness statement of Karl Daybell dated 8 January 2019
- Exhibit F Housing Joint Venture Agreement dated 22 December 1999
- Exhibit G Port Headland Retirement Village Incorporated Constitution
- Exhibit H complaint of serious breach lodged by the applicant in respect of Mr Daccache dated 30 December 2018
- Exhibit I letter to the applicant from the Town dated 30 January 2018.

19 At the hearing the Tribunal also had the benefit of receiving oral evidence from the applicant, Mr Daccache and Mr Pentz. At the conclusion of the hearing the decision was reserved.

Issues to be determined by the Tribunal

20 The review proceeding is a hearing de novo (s 27(1) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act)) with the purpose of the review being to produce the correct and preferable decision at the time that the original decision was made (s 27(2) of the SAT Act). In dealing with this matter the Tribunal has the same functions and discretions exercisable by the original decision-maker (s 29(1) of the SAT Act). The Tribunal may either affirm the decision being reviewed; or vary the decision being reviewed; or set aside the decision being reviewed and substitute its own decision or refer the

matter back to the original decision-maker for reconsideration (s 29(3) of the SAT Act).

21 The Tribunal therefore undertakes the same considerations as the respondent with the benefit of any new and/or additional information and the crucial issue remains as it was when the complaint was originally considered by the respondent.

22 It was not in contention between the parties that the applicant was a council member at the time of the alleged conduct and that the meeting which took place between the applicant and Mr Daccache involved a use by the applicant of his office as mayor. The Tribunal accepts that these facts are established and that the matters which are in dispute between the parties and therefore which are issues which require determination by this Tribunal are as follows:

- 1) Whether the behaviour alleged by Mr Daccache as set out at [5] above took place;
- 2) If the behaviour as alleged did take place, whether it constitutes an 'improper use' of the applicant's office as a council member;
- 3) If the conduct as alleged took place, whether the applicant engaged in the conduct with the intent or belief that it would cause 'detriment' to Mr Daccache; and
- 4) If the Tribunal finds that the conduct occurred and constitutes an improper use of the applicant's office as a council member and that the applicant engaged in the conduct with the intent or belief that it would cause detriment to Mr Daccache, what is the appropriate penalty to be imposed?

Meaning of 'improper use' in reg 7(1)(b) of the Regulations

23 In *Treby and Local Government Standards Panel* [2010] WASAT 81; (2010) 73 SR (WA) 66 (*Treby*), Pritchard DCJ (as her Honour then was) gave consideration to the meaning of 'improper' in the context of reg 7(1) of the Regulations at [26] - [33]. Her Honour referenced the Shorter Oxford English Dictionary meaning of 'improper' noting that it includes 'unsuitable' and 'inappropriate'. Her

Honour then went on to summarise, at [29] - [33], what the case law suggested as to the meaning of 'improper' in this particular context:

First, impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the [councillor] by reasonable persons with knowledge of the duties, powers and authority of his position as a councillor and the circumstances of the case.

Secondly, impropriety does not depend on a councillor's consciousness of impropriety. It is to be judged objectively and does not involve an element of intent.

Thirdly, impropriety may arise in a number of ways. It may consist of an abuse of power, that is, if a councillor uses his or her position in a way that is inconsistent with the discharge of the duties arising from that office or employment. Alternatively, impropriety will arise from the doing of an act which a councillor knows or ought to know that he has no authority to do.

Fourthly, in the case of impropriety arising from an abuse of power, a councillor's alleged knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power will be important factors in determining whether the power has been abused.

Fifthly, a councillor's use of his or her office can be improper even though it is for the purpose or with the intention of benefiting the Council.

24 In *Treby*, it was emphasised that what will be improper in any particular case will be context-driven, requiring consideration not only of the statutory and formal context of a local government councillor's duties and responsibilities, but also requiring a full consideration of the unique factual matrix specific to each relevant case.

Meaning of 'detriment' in reg 7(1)(b) of the Regulations

25 In *Treby* at [94] - [96] the Tribunal discussed the meaning of the word 'detriment'. The Tribunal found that the word 'detriment' is loss or damage done or caused to, or sustained by, any person or thing. The Tribunal went on to refer to the *Shorter Oxford English Dictionary* meaning of 'loss' as the 'diminution of one's possessions or advantages; detriment or disadvantage involved in being deprived of something, or resulting from a change of conditions', while 'damage' means 'loss or detriment to one's property, reputation etc' and 'harm done to a thing or person'. The Tribunal also noted that a contravention of reg 7(1)(b) does not depend on actual detriment being suffered by a person but it

must be established that the councillor intended or believed that their conduct would cause detriment.

Relevant findings of fact

26 The applicant was elected a councillor of the Town in October 2015. On 5 November 2016 he was elected as Mayor of the Town and has continued in that role.

27 In or about mid-November 2017 Mr David Pentz, the Chief Executive Officer for the Town, had a discussion with the applicant at which time he raised with him concerns of sexual harassment of a council staff member by Mr Daccache when he was under the influence of alcohol (paras 9 - 11 of Exhibit C). Mr Pentz asked the applicant, on an urgent basis, to raise the issue with Mr Daccache. The applicant advised Mr Pentz that he would raise the matter and had some other issues that he would also like to ventilate with Mr Daccache when he met with him (para 12 of Exhibit C).

28 The meeting between the applicant and Mr Daccache took place on 28 November 2017 and was fairly impromptu in that a meeting had not been pre-arranged and Mr Daccache entered the applicant's office simply in order to collect his mail. The applicant took the opportunity to ask Mr Daccache if he could stay for a few minutes for a discussion. Mr Daccache agreed and a discussion took place.

29 The evidence provided to the Tribunal from the applicant and Mr Daccache are entirely inconsistent from this point onwards in relation to what was said and what took place during the impromptu meeting.

30 The applicant gave evidence to the Tribunal that the intention of the meeting was to raise serious issues with Mr Daccache in respect of his conduct and that was the sole purpose of the meeting. On that basis the applicant gave evidence that those matters were indeed raised with Mr Daccache and included concerns regarding a conflict of interest, complaints made in respect of excessive alcohol consumption by Mr Daccache and a complaint of sexual harassment by a female staff member (paras 7 - 11 of Exhibit B).

31 Mr Daccache's evidence to the Tribunal was that no issues were raised with him during the course of the meeting with the applicant. Indeed, he gave evidence to the Tribunal that until attending the hearing he was completely unaware of the issues which the applicant gave

evidence were the sole reason for requiring a meeting with Mr Daccache (ts 30 - 31, 14 May 2019).

32 Contrary to the evidence of Mr Daccache, the Tribunal finds that the issues identified in [30] above were indeed raised by the applicant with Mr Daccache during their meeting on 28 November 2017. The Tribunal makes this finding on the following bases:

- a) There was no reason for the meeting to take place other than to allow the applicant to raise the matters identified in [30] above;
- b) Mr Pentz gave credible evidence to the Tribunal that days prior to the meeting he had requested the applicant to raise two of the issues with Mr Daccache, being the allegations of excessive alcohol consumption and sexual harassment of a female staff member and gave evidence that following the meeting the applicant confirmed with Mr Pentz that he had indeed raised those matters with Mr Daccache (ts 22, 14 May 2019);
- c) Exhibits H and I before the Tribunal evidence that the issue in respect of an alleged conflict of interest now formally comprises a complaint of a serious breach against Mr Daccache in respect of which Exhibit I evidences that he has been informed, despite his oral evidence to the Tribunal to the contrary (ts 60, 14 May 2019); and
- d) The Tribunal did not find Mr Daccache's evidence credible in this regard. In particular, although denying that any issues in respect of his conduct were raised with him, Mr Daccache gave evidence to the Tribunal that he was 'mad' at the applicant for 'accusing' him (ts 34, 14 May 2019). Mr Daccache was asked in evidence to identify what the applicant had accused him of, at which point he attempted to unconvincingly retract his earlier statement.

33 In light of the above, the Tribunal finds that the applicant did raise various serious matters with Mr Daccache during the meeting on 28 November 2017. It is nonsensical to the Tribunal that the applicant would require Mr Daccache to remain in his office so that they could discuss a matter or matters and then simply not raise those matters at all

as contended by Mr Daccache. It is an implausible contention and one that conflicts with the surrounding credible evidence as to the purpose of the meeting.

34 The applicant and Mr Daccache also gave entirely inconsistent evidence as to the applicant's physical conduct of himself during the course of the meeting. Mr Daccache gave evidence to the Tribunal that the applicant was acting in a threatening and bullying manner and that he was confronted by the applicant's aggressive behaviour (para 11 of Exhibit D). Mr Daccache alleged that the applicant during the course of the meeting pushed his chair back, leaned over the desk and was pointing his finger at him. It is then alleged that he walked around the desk towards Mr Daccache and was so close that he could smell his breath (paras 11 - 14 of Exhibit D). The applicant denies that alleged conduct and gave evidence that he did not physically move from behind his desk (ts 12, 14 May 2019).

35 In relation to this particular conflict in the evidence, the Tribunal finds that the conduct alleged by Mr Daccache did not occur. The Tribunal makes this finding for the following reasons:

- a) The Tribunal had before it the CCTV footage taken from outside of the applicant's office on 28 November 2017 when the meeting took place.
- b) The footage shows the applicant's office door which contains a square glass panel through which part of the applicant's office can be viewed. The footage showed Mr Daccache sitting in a chair on the other side of the applicant's desk and leaning forward and presenting in a fairly calm manner. There is no vision of the applicant anywhere near Mr Daccache in the CCTV footage. If the applicant was so close to Mr Daccache that he could 'smell his breath' in the Tribunal's view the CCTV footage would have shown the applicant in close proximity to Mr Daccache. However, it did not. In addition, if the applicant had aggressively, physically approached Mr Daccache as he stated in his evidence, it is unlikely, in the Tribunal's view, that Mr Daccache would have presented calmly in the CCTV footage. Indeed he was leaning towards the direction of the applicant rather than attempting to distance himself.

- c) Contrary to the assertion by Mr Daccache that he was feeling intimidated, confronted and bullied by the applicant, he gave evidence to the Tribunal that he was 'pretty relaxed' during the meeting (ts 50, 14 May 2019).
- d) Mr Daccache's actions as he left the room are inconsistent with his evidence that he was confronted, intimidated and bullied by the applicant. In this regard the CCTV footage showed Mr Daccache leaving the office then pausing and opening the door of the office to say something to the applicant and raised his middle finger at the applicant. The fact that Mr Daccache raised his middle finger at the applicant was not a matter on which he gave evidence in his witness statement. In the Tribunal's view this action is inconsistent with Mr Daccache's evidence that he left the applicant's office in order to diffuse the situation and because he felt threatened.
- e) The respondent found that Mr Daccache in leaving the applicant's office abruptly and in an agitated manner supported his contention that he had been verbally abused by the applicant (Exhibit A page 7). However, in the Tribunal's view, the behaviour of Mr Daccache is entirely consistent with him being upset and agitated by the serious issues and allegations of inappropriate conduct made against him.

36 On the basis of the above, therefore, in the Tribunal's view the alleged physical conduct of the applicant that he moved towards Mr Daccache in a threatening, aggressive and confronting manner is not supported by the totality of the evidence before the Tribunal. The Tribunal's finding is therefore that it is more likely than not that the alleged physical conduct did not occur and in this regard prefers to evidence of the applicant.

37 Lastly, the Tribunal comes to the specific alleged statements that Mr Daccache asserts that the applicant made during the course of the meeting and which are set out at [5] above. Again the applicant and Mr Daccache have given entirely inconsistent evidence in this regard. Mr Daccache emphatically and repeatedly gave evidence that the

statements were made by the applicant. The applicant also emphatically and consistently denied making the statements.

38 The conclusion in this regard that the Tribunal has reached is that the statements were not made. The Tribunal makes this finding on the following bases:

- a) The Tribunal has already made findings of lack of credibility in respect of Mr Daccache and finds him not to be a truthful witness. In this regard the Tribunal has already found his evidence to be untrue in material respects (see [32] and [35] above);
- b) It became very clear to the Tribunal during the course of Mr Daccache's evidence that he dislikes the applicant and has done so for a very long period of time, including prior to the applicant becoming a councillor (ts 38 - 40, 14 May 2019). There is also a history of the applicant lodging complaints with the respondent in respect of Mr Daccache, a number of which have resulted in the issuing of minor breaches to Mr Daccache. Mr Daccache responded in kind by making a complaint against the applicant with the respondent in respect to an alleged matter which occurred some 11 years earlier (ts 39 - 40, 14 May 2019).
- c) In the context of what appears to be an intense dislike of the applicant by Mr Daccache together with complaints being raised by each councillor against the other, there exists a foundation on which there would be motivation by Mr Daccache to bring an unfounded complaint against the applicant, particularly in circumstances of the nature of the issues which the Tribunal has found were raised with Mr Daccache during the course of the meeting. It is entirely feasible that Mr Daccache, fearful of complaints of serious breach being made against him, would seek to discredit the applicant prior to any such complaints being made. It was put to Mr Daccache at the hearing that he had falsified the complaint against the applicant which he denied (ts 45 - 46, 14 May 2019). The Tribunal did not

find Mr Daccache's evidence in this regard to be credible.

- c) Included in the alleged statements by Mr Daccache was the allegation that the applicant intended to 'get rid of him'. The applicant gave evidence that he was well aware at the time of the meeting that it was impossible to remove one councillor and on that basis he never would have said the words attributed to him (ts 14 - 15, 14 May 2019). The Tribunal found that evidence to be persuasive and a sound basis on which to find that the alleged statements were never made by the applicant. It is improbable that the applicant would make a statement knowing that he was unable to do the very thing that he was threatening to do.

39 On the basis of the above considerations, in the Tribunal's view it is more likely than not that the alleged statements were not made by the applicant. In the Tribunal's view, Mr Daccache had strong motivation to fabricate a complaint against the applicant for a number of reasons: he had a strong long-standing dislike of the applicant; the applicant had pursued Mr Daccache through the making of numerous complaints against him with the respondent; and most significantly, the applicant had just raised allegations of the most serious kind with Mr Daccache which were likely to result in complaints of serious breach against him.

40 Despite Mr Daccache denying fabricating the complaint against the applicant, the Tribunal finds that he did so for those reasons. He was also found to lack credibility in a number of material aspects which, in the Tribunal's view, renders him an uncredible witness in respect of this particular evidence. Thus the alleged statements are simply unsustainable by the only witness relied upon, being Mr Daccache.

Conclusion

41 On the basis of the findings of fact made by the Tribunal there is no basis on which the Tribunal could find an improper use of the applicant's office as a council member. Clearly therefore no sanction should result.

42 The application for review should therefore be allowed.

Orders

For the reasons set out above the Tribunal's orders will be:

1. The application for review is allowed.
2. The decisions of the Local Government Standards Panel are set aside and in substitution thereof there will be a decision dismissing the complaint.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MS C WALLACE, SENIOR MEMBER

24 JUNE 2019