

Councillor Conduct Tribunal: Decision and Reasons Misconduct Application

Local Government Act 2009: Sections 150AQ and 150AS

Application details:

Reference No.	F22/3044
Date of Application/s from the IA	19 May 2022
Applicant:	Independent Assessor
Respondent:	Councillor Adam Hain (the Councillor)
Council:	Moreton Bay Regional Council (the Council)
Complainant¹:	The Tribunal is not permitted to publish the name or identifying details of the Complainant in the Summary of this decision to be published on the Tribunal's webpage (section 150AS(5)(b)(ii)).
Public Interest Disclosure:	No
Allegation:	<p>It is alleged that on 25 September 2020, Councillor Adam Hain (Councillor Hain), a Councillor of Moreton Bay Regional Council, engaged in misconduct as defined in section 150L(1)(b)(i) of the Local Government Act 2009 (the Act), in that the conduct constituted a breach of trust placed in him as a councillor, either knowingly or recklessly, in that his conduct was inconsistent with local government principle 4(2)(e) of the Act being 'ethical and legal behaviour of councillors and local government employees'.</p> <p>Particulars of the alleged conduct which could amount to misconduct are as follows:</p> <ol style="list-style-type: none"> a. Councillor Hain was at all material times the councillor for Division 3 of the Moreton Bay Regional Council ('Council'). b. At the time of the alleged conduct, Council had in force the policy: 'Moreton Bay Regional Council Corporate Identity (Logo) Version 2', Policy No 12-2150-047, dated 3 May 2012 (the Logo Policy).

¹ Section 150AS(5)(a): The conduct tribunal must not give another entity any information that is part of a public interest disclosure under the *Public Interest Disclosure Act 2010*, unless giving the information is required or permitted by another Act.

	<p>c. Under the heading <i>“Policy Statement”</i> in the Logo Policy, the following is prescribed:</p> <p>...</p> <p><i>“2. The two elements of the logo; the graphic icon and the text, may not be separated or used on their own, unless authorised by the Chief Executive Officer (CEO)...”</i></p> <p>.....</p> <p><i>“authorisation of its use by external parties may be given where a sponsorship, partnership, joint venture or other similar relationship exists. Such authorisation is to be discussed with the Communication Section and then approved by the CEO under the terms of a specific agreement.”</i></p> <p>...</p> <p>d. ...</p> <p>e. On 25 September 2020 at 2.54pm, Councillor Hain sent an email to a council employee with the subject line <i>“Council logo”</i>, which included the following relevant lines:</p> <p>i. <i>“Please send our logo for one of their boxer shirts.”; and</i></p> <p>ii. <i>“Please don’t ask anyone for permission [hushing emoji] We gave [sic] given them grants so they want to display our brand”.</i></p> <p>f. The person referred to in the email is associated with a club, which was the recipient of grants from Council in recent years.</p> <p>g. The email sent to the council employee with the request to provide the Council logo, contravened the Logo Policy.</p> <p>h. Given the power imbalance between the councillor and the council employee and the content of the email namely the request to <i>“not ask anyone permission [hushing emoji]”</i>, is conduct that could amount to misconduct on the basis that it did not comply with local government principles in section 4(2)(e) of the Act being <i>“ethical and legal behaviour of councillors and local government employees”</i>.</p>
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Decision (section 150AQ):

Date:	7 May 2024
Decision:	The Tribunal has determined, on the balance of probabilities, that the allegation that on 25 September 2020, Councillor Adam Hain , a councillor of Moreton Bay Regional Council, engaged in misconduct as defined in section 150(1)(b)(i) of the <i>Local Government Act 2009</i> (the Act), in that his conduct constituted a breach of trust placed in him as a councillor, either knowingly or recklessly, in that his conduct was inconsistent with local government principle 4(2)(e) of the Act being ‘ethical and legal behaviour of councillors and local government employees’ has been sustained.

Orders (section 150AR - disciplinary action):

Date of orders:	7 May 2024
Order	Pursuant to Section 150AR(1)(b)(ii) of the Act, the Tribunal orders that Councillor Adam Hain be reprimanded.

Tribunal:

Chairperson:	Russell Faulkner
Member:	Carolyn Ashcroft
Member:	Kylie Goodwin

Conflict of interest disclaimer/declaration (section 150DT)

1. Having reviewed the material provided, all Tribunal members confirmed that they did not have a real or perceived conflict of interest in proceeding to decide the complaint.

Hearing (section 150AP & Chapter 7, Part 1):

Time and Date:	4pm, 12 March 2024
Heard at:	By telephone conference with all members in attendance
Appearances: (where applicable)	<p>This matter was heard and determined on the documents pursuant to section 150AP(2) of <i>the Local Government Act 2009</i> with no parties appearing.</p> <p>The Tribunal considered the provisions of section 298 of the Regulation and determined that it was appropriate in the circumstances of this matter to conduct the hearing in private. Accordingly, the Tribunal directed that the hearing be held in private².</p>

Reasons for decision:

Abbreviations

The following abbreviations have been used in this determination:

the Act the *Local Government Act 2009* (Qld)

the HRA the *Human Rights Act 2019* (Qld)

² Section 298 of the *Local Government Regulation 2012* requires that a hearing must be held in public unless the decision-maker directs the hearing is to be held in private.

the Department	the Department of State Development, Infrastructure, Local Government and Planning
the Regulation	the <i>Local Government Regulation 2012</i>
the CEO	the Chief Executive Officer of the Council
the complainant	the person who lodged the complaint
the Council	Moreton Bay Regional Council
the Logo Policy	Moreton Bay Regional Council Corporate Identity (Logo) Version 2', Policy No 12-2150-047, dated 3 May 2012
the Councillor	Adam Hain (the Respondent)
the IA	The Independent Assessor (the Applicant)
the SOF	the Statement of Facts
the Tribunal	the Councillor Conduct Tribunal constituted to hear and determine the allegations made by the IA concerning the Councillor's conduct.

Background

2. From the material received by the Tribunal, the Tribunal noted that:
 - a. The Councillor was first elected to the Council in 2016 and was re-elected in 2020.
 - b. On 10 March 2022, the IA served the Councillor with a section 150AA Notice and Opportunity to respond to the alleged misconduct the subject to this report.
 - c. The IA was advised in the section 150AA response³, that the Councillor maintains his position in relation to the allegation, that his conduct does not constitute misconduct as detailed in his previous submission to the IA dated 15 June 2021.⁴ The Section 150AA response also stated that the Councillor does not dispute the SOF generally, to the extent and in relation to matters that he is able to dispute or not dispute, with the exception of paragraph 40.⁵ This exception is further discussed at paragraph 30 of this the decision.
 - d. On 19 May 2022 the Applicant filed an application with the Tribunal pursuant to sections 150W(1)(c) and 150AJ of the Act.
 - e. Directions were issued by the Tribunal on 29 January 2024.

Conduct of hearing

3. The hearing was conducted on the documents.

³ Respondent's submission on his behalf dated 23 March 2022.

⁴ Respondent's Submission on his behalf dated 15 June 2021, (Brief of Evidence p 17).

⁵ Respondent's Submission on his behalf dated 23 March 2022.

Considerations pursuant to the *Human Rights Act 2019 (Qld)*

4. In the circumstances of this matter, the Tribunal considers it has discharged its obligation to observe and protect the Councillor's human rights by conducting a procedurally fair hearing pursuant to the provisions of the *Local Government Act*. Furthermore, the Tribunal considered these human rights in the context of sections 21 (freedom of expression), 23 (taking part in public life) and 25 (privacy and reputation) of the Human Rights Act to be potentially engaged.

The Tribunal was satisfied during the hearing process that in dealing with the matter before it that any limitation of rights protected and applicable by the provisions are reasonable and lawful in the context of the empowering statute which prescribes the Tribunal's powers and role.

5. The Tribunal also has a statutory duty, imposed by section 58 of the HRA, to act compatibly and make decisions compatibly with human rights. In making a decision as a "*decision maker*" under the Act, the Tribunal is also bound to give "*proper consideration to a human right relevant to the decision*".
6. Section 31 of the HRA is engaged because the Tribunal conducted a hearing in relation to the Applicant's application of 19 May 2022. Although the Tribunal is not a criminal or civil proceeding in the strict sense, the Respondent has the right to "*have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing*".
7. The Hearing of this application was not in public; however, section 31(2) of the HRA permits a court or tribunal to "*exclude...the general public from all or part of a hearing in the public interest or the interests of justice*". The Tribunal is empowered by section 150AP(2)(a) of the Act and section 298 of the *Local Government Regulations 2012 (Qld)* to hold private hearings if "*the conduct tribunal considers it appropriate in all the circumstances*", which was the case in the present matter.
8. Further, the decision of this proceeding will be made publicly available in accordance with the provisions of the Act and consistent with section 31(3) of the Act.
9. The Respondent equally has a right to be treated as a person before the law under section 15(1) of the HRA and has been treated as such throughout this hearing. The Tribunal is satisfied, on the basis of the above procedural history, that it has offered the Respondent sufficient opportunity to be heard and take part in the hearing that may result in a decision adverse to his interests.
10. The Tribunal noted various items of procedural compliance required prior to conducting a hearing.⁶

Standard of Proof

11. The standard of proof in the hearing is the balance of probabilities (section 150AP(4) of the Act). In making its decision the Tribunal considered *Briginshaw v Briginshaw (1938)* 60 CLR 336 at 361-362 where it was said by Dixon J as he then was:

"Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a mind that is attained or established independently of the nature and consequence of the fact or facts to be proved.

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are

⁶ See paragraph 2 (b),(c),(d), and (e) of this report.

considerations which must affect the answer to the question whether the issue has been proven to the reasonable satisfaction of the tribunal".

12. In *Qantas Airways Limited v Gama (2008) FCAFC 69*, Branson J commented on the above statements and said:

"His Honour made plain that before accepting the truth of evidence of a particular allegation, the tribunal should give consideration to the nature of the allegation and the likely consequences which will follow should it be accepted".

Evidence and material considered

13. The Tribunal has considered the evidence provided to it although it has not found it necessary to refer to, or comment on, each item of that evidence. In considering any allegation of complaint, the Tribunal is obliged to decide, in terms of sections 150AL & 150AP of the Act, whether or not Councillor Hain engaged in misconduct as defined in section 150(L)(1)(b)(i) of the Act.

A. Documentary Evidence

Initial documentation provided to the Tribunal including:

- Relevant Documents
 - Annexure A – Statement of Facts
 - Annexure B – 150AA Notice and Opportunity to Respond
 - Annexure C – Response to 150AA Notice
 - Annexure D – Brief of Evidence;
- Witness Statements
 - Affidavit affirmed on 22 September 2021.
 - Exhibits 1 to 3.
 - Affidavit affirmed on 18 May 2022.
 - Exhibits 1 to 18.
- Relevant training undertaken by the Councillor;
- Disciplinary history of the Councillor;
- Submissions by the Applicant dated 13 February 2024.
- Submissions on behalf of the Respondent dated 15 June 2021, 23 March 2022 and submission attached to email dated 27 February 2024.

Discussion and findings

14. The particulars of the alleged conduct are contained on pages 1-2 of this report and the SOF. Those particulars⁷ are not disputed by the Respondent, other than disputing that his actions constituted misconduct.

⁷ Submissions on behalf of the Respondent dated 15 June 2021, 23 March 2022 and attachment to email dated 27 February 2024.

15. The particulars are also supported by the evidence provided by the Applicant, and the Tribunal therefore accepts that the Respondent engaged in the conduct the subject of the allegation, with the Respondent challenging that his conduct constituted misconduct.

Definition of Misconduct

16. The applicable definition of misconduct is contained in section 150L(1)(b)(i) of the Act, which relevantly provides:

150L What is misconduct

(1) The conduct of a councillor is **misconduct** if the conduct—

...

(b) is or involves—

(i) a breach of the trust placed in the councillor, either knowingly or recklessly; ...⁸

A Councillor's Responsibilities

17. The responsibilities of councillors are set out in section 12 of the Act, which relevantly provides:

12 Responsibilities of councillors

(1) A councillor must represent the current and future interests of the residents of the local government area

...

(3) All councillors have the following responsibilities—

(a) ensuring the local government—

(i) discharges its responsibilities under this Act; and

(ii) achieves its corporate plan; and

(iii) complies with all laws that apply to local governments;

(b) providing high quality leadership to the local government and the community;

(c) participating in council meetings, policy development, and decision making, for the benefit of the local government area;

(d) being accountable to the community for the local government's performance.

...

(6) When performing a responsibility, a councillor must serve the overall public interest of the whole local government area.

The Local Government Principles

18. The Local Government Principles are set out in section 4 of the Act and relevantly provide:

⁸ The remainder of section 150L(1)(b)(i) of the Act is not relevant to this matter and has been omitted.

4 Local government principles underpin this Act

(1) To ensure the system of local government is accountable, effective, efficient and sustainable, Parliament requires—

(a) anyone who is performing a responsibility under this Act to do so in accordance with the local government principles; and

(b) any action that is taken under this Act to be taken in a way that—

(i) is consistent with the local government principles; and

(ii) provides results that are consistent with the local government principles, in as far as the results are within the control of the person who is taking the action.

(2) The local government principles are—

(a) transparent and effective principles, and decision-making in the public interest; and

(e) ethical and legal behaviour of councillors....

19. The Tribunal has also considered the Code of Conduct, being the *Code of Conduct for Councillors in Queensland* of 4 August 2020. This Code of Conduct is a requirement under section 150D of the Act, and must set standards of behaviour for Councillors in the performance of their responsibilities as Councillors.

20. Before assuming public office, Councillors must:

a. Understand and commit to complying with the local government principles and obligations of Councillors in accordance with section 169 of the Act, as well as the standards of behaviour set out in this Code of Conduct;

b. Make a declaration of office, during which Councillors must declare that they will abide by this Code of Conduct.

21. The relevant sections of the Code of Conduct to these allegations are:

...

1.2 Respect and comply with all policies, procedures and resolutions of Council.

Allegation - Applicant's submission

22. The Applicant submits that the Respondent breached the trust placed in him as a councillor, either knowingly or recklessly, by engaging in conduct that was inconsistent with local government principle 4(2)(e) of the Act, being 'ethical and legal behaviour of councillors and local government employees', when he sent the email dated 25 September 2020, the subject of the allegation, to the council employee.

23. The Applicant⁹ acknowledged that the council employee did carry out their own enquiries in relation to the Respondent's request and as a result, did not send the Council logo externally as requested to do.

⁹ Applicant's submission dated 13 February 2024 at paragraph 28.

Respondent's submissions

24. The Respondent in the submission¹⁰ on his behalf, stated:
 - (a) that his request to the council employee in the email did not amount to an order or a command, management or control, or an authoritative direction,
 - (b) that his request to the council employee, amounted to nothing more than a request for administrative assistance, and
 - (c) that he was not aware at the relevant time, of the Logo Policy, which required all requests to be approved by the Council's Chief Executive Officer (CEO) or sent to the Council marketing department.
25. The Respondent stated further that he maintains that the request was not a deliberate or calculated attempt to avoid complying with Council policy requirements and it was certainly not an attempt to get the council employee, to do anything wrong or improper.
26. The Respondent acknowledged that the council employee diligently investigated the procedure applicable to the request he made and advised the Respondent of the appropriate procedure accordingly. Ultimately, the correct procedure was investigated, confirmed and followed.
27. The Respondent referred to the Applicant's submission¹¹ that stated whilst there may have been a power imbalance between the Respondent and the council employee, that power imbalance did not have the effect of causing the council employee not to comply with Council policy or procedure.

Applicant's submissions in reply

28. The Applicant did not file submissions in reply.

Tribunal's decision

29. The evidence provided to the Tribunal demonstrated that the Respondent sent the email dated 25 September 2020, the subject of the allegation¹², to the council employee.
30. The relevant sections of the Code of Conduct require a Councillor to respect and comply with all policies, procedures and resolutions of Council. Councillors make a declaration of office, during which Councillors declare that they will abide by this Code of Conduct.
31. The Council policy relevant to the use of the Council Logo was dated 3 May 2012.
32. The Respondent serving in his second term of office as a Councillor should have been aware or could have made enquiries in the first instance, as to what was the Council policy relevant to the use of the Council Logo. Instead, he sent the email the subject of the allegation. The Tribunal makes no comment about specific training relative to the policy but does not accept the Respondent's excuse¹³ that he was unaware such policy existed. Rather, that the very nature of the email and emoji was designed to circumvent normal process.

¹⁰ Respondent's submission on his behalf as attachment to email dated 27 February 2024 at paragraph 6.

¹¹ Applicant's submission dated 13 February 2024 at paragraph 5(h).

¹² Applicant's submission dated 13 February 2024 at paragraph 5(e).

¹³ Respondent's Submission on his behalf dated 23 March 2022.

33. The Tribunal was therefore satisfied on the evidence that there was a clear link between the Councillor's action in relation to the allegation and his role as a Councillor.
34. Local government principle 4(2)(e) requires Councillors to engage in ethical and legal behaviour.
35. The Tribunal finds that the Respondent's conduct in sending the email the subject of the allegation, was inconsistent with local government principle 4(2)(e), it was unethical behaviour by a councillor, and constituted a breach of trust placed in him as a councillor.
36. Considering all of the evidence received, the Tribunal has determined that on the balance of probabilities, the allegation has been sustained.

Discussion on orders to be made:

Applicant's submission on penalty

37. The Applicant referred the Tribunal to the Respondent's previous finding of misconduct¹⁴ on 6 September 2019 as aggravating.
38. The Applicant submitted that the Tribunal should consider a Reprimand and consideration to an order that the Respondent pay to the local government a monetary fine in the range of \$250-\$500.

Respondent's submission on penalty

39. The Respondent in submissions on his behalf¹⁵ stated that in all of the circumstances, the nature of the Respondent's conduct was different, and of a less serious nature compared to conduct the subject of the other finding of misconduct.
40. The Respondent further submitted¹⁶ that a finding of misconduct alone, should the Tribunal make such a finding, coupled with the public exposure of publication of the Tribunal's decision in accordance with the requirements of the Act, would achieve the appropriate protective purpose of the disciplinary proceedings.

Tribunal decision

41. Having sustained the allegation of misconduct against Cr Adam Hain, in that his conduct involved a breach of the trust placed in him as a councillor, either knowingly or recklessly, in that his conduct was inconsistent with the local government principle in section 4(2)(e), requiring the 'ethical and legal behaviour of councillor's, the Tribunal then considered the appropriate order and/or recommendation to be made under section 150AR of the Act.
42. In determining the appropriate order or recommendation, the Tribunal must consider what order, or combination of orders, would best serve the objects of the disciplinary regime for councillors having regard to the range of orders and recommendations available. It is uncontroversial that the purpose of disciplinary proceedings and orders are protective rather than punitive.
43. The Tribunal considered that a reprimand was appropriate in the circumstances.


¹⁴ Applicant's submission dated 13 February 2024 at paragraph 44.

¹⁵ Respondent's submission on his behalf as attachment to email dated 27 February 2024 at paragraphs 29 to 31.

¹⁶ Ibid at paragraph 31.

Notices

44. Following the finalisation of this Decision and Reasons, the Tribunal will arrange for notices to be sent to relevant parties as required by sections 150AS(3) and (4) of the Act.

Russell Faulkner¹⁷	Carolyn Ashcroft	Kylie Goodwin
Chairperson	Tribunal Member	Tribunal Member
Signed: 		
Date: 7 May 2024		

¹⁷ Authorised to sign this determination on behalf of the Tribunal by email from Carolyn Ashcroft dated 7 May 2024 and Kylie Goodwin dated 10 May 2024.