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**CCL 25/07/2023 - OUTCOME OF NSW CIVIL AND ADMINISTRATIVE TRIBUNAL
HEARING EXECUTIVE DIRECTOR, LOCAL GOVERNMENT
UNDER DELEGATION FROM THE SECRETARY,
DEPARTMENT OF PLANNING AND INDUSTRY V ROBINSON
(NO 2) [2020] NSWCATOD 81**

8.4 Attachment A: NSW Civil and Administrative Tribunal decision dated 13 June 2023

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Civil and Administrative Tribunal New South Wales

Medium Neutral Citation:	Executive Director, Local Government under delegation from the Secretary, Department of Planning and Industry v Robinson (No 2) [2023] NSWCATOD 81
Hearing dates:	14 March 2023
Date of orders:	13 June 2023
Decision date:	13 June 2023
Jurisdiction:	Occupational Division
Before:	R C Titterton OAM, Senior Member
Decision:	<ol style="list-style-type: none">1. Pursuant to s 482A(2)(c1) the respondent is disqualified from holding civic office for a period of two years from the date of this order.2. The applicant is to file and serve any costs submissions within 14 days of the publication of these reasons.3. The respondent may respond within a further 14 days.4. The applicant may reply within a further seven days.
Catchwords:	TRADES AND OCCUPATIONS – misconduct by Councillor - referring to the Mayor as “fatso” and making other disparaging remarks concerning her appearance - repeatedly interrupting a meeting of Council - making disparaging remarks to councillors about their appearances - making disparaging and discriminatory remarks to a councillor because of his homosexuality - making disparaging and discriminatory remarks about a homosexual councillor to journalists - engaging in unwanted conduct to the Mayor during the taking of photographs – protective orders where complaints proven
Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW), s 60 Local Government Act 1992 (NSW), ss 8A, 440F, 482A
Cases Cited:	Acting Chief Executive, Office of Local Government v Passas (No 2) [2017] NSWCATOD 12

Executive Director, Local Government under delegation
 from the Secretary, Department of Planning and Industry v
 Robinson [2023] NSWCATOD 42
 Gayed v Walton [1997] NSWCA 121
 Lee v Health Care Complaints Commission [2012] NSWCA
 80
 Office of Local Government v Neville [2018] NSWCATOD
 31
 NSW Bar Association v Meakes [2006] NSWCA 340:
 Deputy Secretary of the Department of Local Government,
 Planning and Policy v Doueihy (No 2) [2022] NSWCATOD 3

Texts Cited:

Nil Cited

Category:

Principal judgment

Parties:

Applicant: Executive Director, Local Government under
 delegation from the Secretary, Department of Planning and
 Industry
 Respondent: Allan Robinson

Representation:

Counsel:
 M Cobb-Clark, Applicant

Solicitors:
 Office of Local Government
 Respondent, no appearance

File Number(s):

2022/00148260

Publication restriction:

Nil

REASONS FOR DECISION

- 1 In these reasons “Council” means the Newcastle City Council.
- 2 The respondent Mr Robinson is a former Councillor of the Council.

Introduction

- 3 On 18 May 2022, the applicant referred to the Tribunal eight allegations of misconduct as defined in s 440F of the *Local Government Act 1992* (NSW) (**LGA**) concerning the Mr Robinson.
- 4 The conduct of Mr Robinson the subject of the allegations was:
 - (1) on 27 June 2019, sending an email to a Council constituent that contained the following words:

I've spoken to Grahame about this something needs to be done if it was in fleet⁴ st where fatsos parents lived it would have already happened.

- (2) during a meeting of Council held on 23 July 2019:
- (a) repeatedly interrupting speakers who were entitled to speak at that point in time;
 - (b) refusing to withdraw disparaging remarks made towards other councillors; and
 - (c) making remarks bringing the Council into disrepute.

- (3) during a meeting of Council held on 23 July 2019, directing the following words to Clr Duncan:

Tea is nearly ready Mrs Duncan so we'll get going soon."
You need a trough.

- (4) during a meeting of Council held on 23 July 2019, directing the following words to Clr Nelmes:

Some people have got more hide than Jessie the Elephant and look like it.

- (5) during a meeting of Council held on 23 July 2019, directing the following words to Clr Clausen:

I think we had this argument before with custard.

- (6) on about 25 July 2019, sending an email to a journalist from the *Newcastle Herald*, in which Mr Robinson wrote words to the effect of:

I have no problem with poofs. I have one work for me. I'm very good friends with three poofs who I'm proud to say they are my friends.

- (7) on about 26 July 2019, Mr Robinson spoke to a journalist from the *Guardian*. During that conversation, Mr Robinson:

- (a) repeated the contents of the email particularised above;
- (b) made several other homophobic remarks; and
- (c) said words to the effect of :

Why should it be offensive? If you're a fucking poof, you're a poof.

- (8) on about 25 February 2020, while photographs were taken of a group of councillors in Council's chamber, Mr Robinson placed his arm around the shoulder of Clr Nelmes, thereby intimidating her; in her words:

Honestly, there was no consent at all. He just grabbed hold of me... And he did it in front of – it was – it wasn't like – it wasn't soft. He grabbed hold of me. His arm went right around. I have broad shoulders. His arm went right around my whole body and he – his hands pressed into my shoulders and he squeezed me and grabbed hold of me. So my arms were down by my side and I thought "I'll just look straight ahead and he'll eventually let go of me". [...] He grabbed me,

5
like, his hands were pressed in, squeezing me hard – like, you know, as probably as hard as he could [...] But I know what he's like, so I know that he was trying to intimidate me.

- 5 The Tribunal found all eight allegations of misconduct to be proven: Executive Director, Local Government under delegation from the Secretary, Department of Planning and Industry v Robinson [2023] NSWCATOD 42 (Primary Decision).
- 6 The Tribunal is now required to determine what action, if any, should be taken in relation to Mr Robinson pursuant to s 482A of the LGA.
- 7 For the reasons set out below the Applicant submits that it would be appropriate for Mr Robinson to be disqualified from holding civic office for a period of three years pursuant to s 482A(2)(c1) of the LGA.

Ex parte Stage 2 hearing

- 8 There was no appearance by the respondent at the Stage 2 hearing.
- 9 At the conclusion of the Stage 1 hearing, the Tribunal made orders, amended on 19 April 2023, relevantly as follows:
- 7. The applicant is to file and serve any evidence and submissions for the Stage 2 hearing on or before 28 April 2023.
 - 8. The respondent is to file and serve any evidence and submissions in response on or before 26 May 2023.
- REASONS
- The orders are amended at the request of the applicant to provide clarity to the parties and to allow additional time to file evidence and submission for the Stage 2 hearing.
- The Stage 2 hearing remains listed on 1 June 2023.
- 10 At the Stage 2 hearing, the applicant tendered an affidavit of service proving that the Tribunal's orders and the applicant's submissions had been served on Mr Robinson both by email and by registered post.
- 11 I am satisfied from perusing the Tribunal file that notice of the Stage 2 hearing has been provided to Mr Robinson. I am also satisfied that Mr Robinson has not filed any submissions in accordance with my orders.
- 12 Mr Robinson has previously stated that he would accept any action taken by the Tribunal under s 482A of the LGA: Primary Decision at [6]. As a matter of procedural fairness, the Tribunal gave Mr Robinson the opportunity to make submissions on the appropriate action the Tribunal should take, and gave him notice of the hearing.
- 13 Given these matters, I decided that it was appropriate to proceed in the absence of respondent at the Stage 2 hearing.

Relevant legislation and principles

Local Government Act 1992 (NSW)

14 Section 482A of the LGA states:

482A Decision of NCAT – misconduct matters

(1) This section applies where a matter has been referred to the Civil and Administrative Tribunal under section 438HA or 440J.

(2) The Tribunal may, if it finds that the behaviour concerned warrants action under this section—

(a) counsel the councillor, or

(b) reprimand the councillor, or

(c) suspend the councillor from civic office for a period not exceeding 6 months, or

(c1) disqualify the councillor from holding civic office for a period not exceeding 5 years, or

(d) suspend the councillor's right to be paid any fee or other remuneration, to which the councillor would otherwise be entitled as the holder of the civic office, in respect of a period not exceeding 6 months (without suspending the councillor from civic office for that period).

(3) In determining which action, if any, to take against a councillor, the Tribunal may take into account any previous incidents of misconduct by the councillor, any disciplinary action previously taken against the councillor and any other relevant matters.

(4) In this section, councillor includes a former councillor.

15 Mr Robinson is a former councillor and does not currently hold civic office.

Consequently, action pursuant to s 482A(2)(c) or (d) is in applicable.

16 The applicant submits, and the Tribunal accepts that, as Mr Robinson has also failed to take an active role in these proceedings, the Tribunal could therefore infer that Mr Robinson would be unwilling to participate in any counselling pursuant to s 482A(2)(a) of the LGA.

17 Accordingly, the only actions that could have a meaningful effect would be either a reprimand or a disqualification for a period not exceeding five years.

Relevant principles

- 18 The applicant submits, and the Tribunal accepts, that in deciding what action, if any, should be taken, the Tribunal should have regard to the following general principles.
- 19 First, the Tribunal's jurisdiction in taking action under s 482A of the LGA is at least in part protective, both of the public and the maintenance of high standards among local councillors: *Office of Local Government v Neville* [2018] NSWCATOD 31 at [36].
- 20 Secondly, the important indirect effects of a disciplinary order (Here see *NSW Bar Association v Meakes* [2006] NSWCA 340 per Basten JA), namely:
- (1) the order reminds other councillors of the public interest in the maintenance of high standards;
 - (2) the order may give emphasis to the unacceptability of the conduct involved; and
 - (3) by speaking to the public at large, the order seeks to maintain confidence in the standard of conduct of local councillors.
- 21 Thirdly, the Tribunal is also able to have regard to whether Mr Robinson has expressed any remorse, or whether there is evidence of Mr Robinson having acquired insight into his conduct since the misconduct occurred: *Deputy Secretary of the Department of Local Government, Planning and Policy v Doueihy (No 2)* [2022] NSWCATOD 3 at [44].
- 22 Fourthly, given that multiple instances of misconduct have been proven, the Tribunal is required to ensure that Mr Robinson is not subjected to multiple actions under s 482A of the LGA for essentially the same conduct: *Doueihy* at [37]. The Tribunal should also apply the principle of totality to Mr Robinson's conduct, and ensure that the action that is proposed to be taken is not excessive in the circumstances.

The applicant's submissions

- 23 In summary, the applicant makes the following submissions.
- 24 Mr Robinson's misconduct involved grossly homophobic statements a fellow councillor during a Council meeting held on 23 July 2019. Mr Robinson subsequently publicly defended those statements in interviews with newspaper journalists in his capacity as a Council member, and in doing so again used homophobic slurs.
- 25 During the same Council meeting where those homophobic slurs were uttered, Mr Robinson made further remarks based on his perception of another councillor's weight and food consumption, and made remarks about a third Councillor's personal appearance.
- 26 Additionally, on another occasion, Mr Robinson engaged in unwanted physical contact with another Councillor, where he put his arm around her shoulder in a forceful and

intimidating manner while posing for a group photograph.

- 27 Other minor allegations of misconduct, such as referring to a councillor as 'fatso' in an email, and generally engaging in an act of disorder during the Council meeting on 23 July 2019 were also proven. However, these instances of misconduct are of a lesser

magnitude than the other misconduct that was proven, and once the totality principle is properly applied, they should not increase the severity of the action to be taken by the Tribunal. They should not be considered any further in these proceedings

28 Mr Robinson's conduct in making homophobic remarks towards another councillor during a Council meeting is a blatant instance of discriminatory conduct. The fact that those remarks were repeated and endorsed by Mr Robinson during public interviews with journalists shortly after he made them magnifies the severity of the discriminatory conduct that Mr Robinson engaged in.

29 Mr Robinson's comments towards Cllr Nelmes and Cllr Duncan, which were grounded in his perception of their physical appearances, are a clear breach of the requirement imposed by the Code of Conduct to treat other Councillors with respect.

30 Mr Robinson's conduct in engaging in unwanted physical contact in an intimidatory manner with Cllr Nelmes during a photo shoot is a serious instance of harassment. The Councillor provided evidence of the unpleasant and forceful nature of that contact by Mr Robinson.

31 Such conduct is clearly capable of interfering with the proper administration of local government in this state. Councillors, like others in the community, are entitled to work in an environment that is free from harassment or discrimination on grounds including on the basis of sexual orientation or gender. That is what the Code of Conduct seeks to ensure.

32 Statements of the type made by Mr Robinson made in public Council meetings and in public statements to the media clearly have the capacity to dissuade individuals from participating in local government, for fear that they themselves will become subjected to such conduct.

33 Similarly, unwanted and intimidatory physical contact is inimical to a safe working environment, which is necessary in order for councillors to carry out their functions under the LGA.

34 When conduct of the type engaged in by Mr Robinson occurs, then the ability of a council to act fairly, ethically and without bias in the interests of the local community is compromised. Such conduct diminishes public confidence in local government. Such conduct is fundamentally inconsistent with the role and responsibilities of a local Councillor.

35 Therefore, the applicant submits that the Tribunal is required to take strong action in order to protect the public from this kind of conduct by local Councillors. A reprimand would clearly be insufficient.

36 The applicant submits that Mr Robinson has demonstrated a remarkable lack of insight into his misconduct. When he was interviewed by a conduct reviewer concerning the various allegations, he proudly admitted them and made further homophobic and

- derogatory remarks concerning the other Councillors to the conduct reviewer.
- 37 Mr Robinson appears to have made a public apology to Clr Clausen (the councillor to whom he directed the homophobic remarks) as part of the resolution of an Anti-Discrimination Tribunal claim. However, the terms of the apology refer to “a series of incidents over a number of months” and so it is unclear whether the apology is in relation to any of the misconduct that the Tribunal has found that Mr Robinson engaged in. This apology should therefore be given little weight.
- 38 There is an unacceptable risk to the public that if Mr Robinson were to be returned to public office, then other councillors would be subjected to the same sort of personal attacks and discrimination that Mr Robinson has previously engaged in. That would have the detrimental effects on local government that have been outlined above. Therefore, as a protective measure, the Tribunal should take steps to disqualify Mr Robinson from public office.
- 39 Viewing the entirety of Mr Robinson’s misconduct as a whole, the Applicant submits that three years would be an appropriate period of disqualification. The next local council elections are scheduled for September 2024, and therefore a disqualification of three years would prevent Mr Robinson from running for public office in the upcoming elections. That is a proportionate and necessary response to Mr Robinson’s egregious misconduct.

The applicant’s submissions

- 40 As noted above, Mr Robinson made no submissions on these matters and did not attend the hearing.

Consideration

- 41 As the Tribunal stated in *Neville*, the following principles are relevant to the Tribunal’s determination:

36. ... As with professional disciplinary matters, the Tribunal’s jurisdiction is at least in part protective, both of the public and of the maintenance of high standards in the ranks of the particular occupation, here local councillors: *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630 at 637-638.

...

39. Secondly, there are important but indirect effects of a disciplinary order. These were recognised by Basten JA in *NSW Bar Association v Meakes* [2006] NSWCA 340 in relation to barristers. These considerations are relevant (by analogy) to orders made in respect of a local councillor and include:

- (1) The order reminds other councillors of the public interest in the maintenance of high standards;
- (2) The order may give emphasis to the unacceptability of the conduct involved; and
- (3) By speaking to the public at large, the order seeks to maintain confidence in the standard of conduct of local councillors.

40. Thirdly, there is a “public interest in having the respondent’s conduct denounced as unacceptable”, and that orders made by the Tribunal would “make plain that conduct of the kind engaged in is unacceptable”: *Health Care Complaints Commission v Do* [2014] NSWCA 307 at [39].¹¹

41. Fourthly, the availability of a range of statutory disciplinary options implies the necessity to consider whether those short of depriving the constituents of their representative can adequately punish the councillor’s failure to comply with the statutory obligations and vindicate the public interest in maintaining the honesty of municipal administration: *Mehajer v Chief Executive of the Office of Local Government* [2014] NSWSC 1804 at [13].

42. Fifthly, whether the proposed orders will prevent the respondent from exercising any functions as a councillor, and the impact of this on constituents: *Mehajer* at [13], [15] and [21].

43. Sixthly, whether there have been any previous offences: *Mehajer* at [15]; *Phillips v Director-General, Department of Premier and Cabinet* [2014] NSWCATOD 48 at [52].

44. Seventhly, the acknowledgement if any, or apology or remorse for, the conduct by a respondent, and the lack of any insight into the conduct on their part.

45. Eighthly, the longer the experience as councillor the greater should be the councillor’s understanding and knowledge of their duties and obligations. That is not to say that misconduct of an inexperienced councillor should be excused. All councillors must act honestly and exercise a reasonable degree of care and diligence in carrying out his or her functions under the Act (s 439(1)) and comply with the Council’s code of conduct (s 440(5)).

42 I entirely accept the submissions of the applicant as to the seriousness of Mr Robinson’s conduct. The conduct involved:

- (1) making grossly homophobic statements against a fellow Councillor and defending those statements in interviews with newspaper journalists in his capacity as a Council member;
- (2) making remarks relating to another Councillor’s weight and food consumption, and remarks about a third Councillor’s personal appearance;
- (3) engaging in unwanted physical contact with another Councillor, where he put his arm around her shoulder in a forceful and intimidating manner while posing for a group photograph.

43 Mr Robinson’s conduct in making homophobic remarks towards another councillor during a Council meeting was clearly discriminatory conduct. His comments towards Cllr Nelmes and Cllr Duncan were clearly a breach of the requirement imposed by the Code of Conduct to treat other Councillors with respect.

44 Significantly, the acts of Mr Robinson were public ones, made in public Council meetings and in public statements to the media. Those statements have the capacity to dissuade individuals from participating in local government, for fear that they themselves will become subjected to such conduct.

45 I accept the applicant’s submission that such conduct is capable of interfering with the proper administration of local government, and that Councillors are entitled to work in an environment that is free from harassment or discrimination on grounds including on

the basis of sexual orientation or gender.

- 46 I accept that unwanted and intimidatory physical contact prevents there from being a safe working environment, which is necessary for Councillors to carry out their functions under the LGA.
- 47 I accept that when conduct of the type engaged in by Mr Robinson occurs, then the ability of a council to act fairly, ethically and without bias in the interests of the local community is compromised. Such conduct diminishes public confidence in local government, and is fundamentally inconsistent with the role and responsibilities of a local councillor.
- 48 I accept that, given Mr Robinson's lack of insight and remorse, that a reprimand would be insufficient in the circumstances of this case. I agree that a period of disqualification is appropriate, in order to protect the public from this kind of conduct by local councillors.
- 49 I accept the applicant's submissions that there is an unacceptable risk to the public that if Mr Robinson were to be returned to public office, other Councillors may be subjected to the same sort of personal attacks and discrimination that Mr Robinson has previously engaged in. I accept that that would have the detrimental effects on local government that have been outlined above.
- 50 As noted, the Tribunal seeks an order of disqualification for a period of three years.
- 51 In *Neville*, at [57] to [60] the Tribunal discussed similar cases and noted the outcomes in each. However, the Tribunal also noted that it has often been remarked, at least in the health professional disciplinary cases, that each case depends on its own facts and circumstances. The Tribunal referred to *Gayed v Walton* [1997] NSWCA 121-^[1] where Mason P, (with whom Meagher and Stein JJA agreed) stated:

[T]here is always a difficulty in getting help from individual cases because of the problem of drawing comparisons between one case and the next. Each must be looked at according to its own facts.

- 52 In *Neville*, the Tribunal also noted that in *Lee v Health Care Complaints Commission* [2012] NSWCA 80 the Court of Appeal has cautioned against the use of comparative cases in the determination of disciplinary orders.
- 53 Mr Cobb-Clark, counsel for the applicant, indicated that he was aware of only one decision in which an order of disqualification was made, namely *Acting Chief Executive, Office of Local Government v Passas (No 2)* [2017] NSWCATOD 12.
- 54 Mr Cobb-Clark, counsel for the applicant, indicated that he was aware of only one decision in which an order of disqualification was made, namely *Acting Chief Executive, Office of Local Government v Passas (No 2)* [2017] NSWCATOD 12.
- 55 The Tribunal had found that the councillor in question:
- (1) was disruptive or refused to abide by the Mayor's procedural rulings, or refused to accept she needed to leave the Council chamber when lawfully directed after the requisite three warnings on a number of occasions;
 - (2) had an inappropriate and direct interaction with a Council employee;
 - (3) refused to give an apology as formally resolved by the Council; and
 - (4) refused to undertake training on the Code in accordance with the Council resolution (Ground 8).
- 56 In view of that conduct, the Tribunal did disqualify the respondent from holding civic office, but only for a period of three months. It appears the applicant had sought a longer period, continuing after 9 September 2017 (which was when the next elections were to be held) which would have had the effect of precluding the respondent from standing for election until September 2020.
- 57 The function of any protective order is to give specific deterrence to the individual, general deterrence to the profession or occupation of which that individual is a member (here local government councillors) and by speaking to the public at large, maintaining confidence in the standard of conduct of local councillors.
- 58 On the one hand this is the first infraction of Mr Robinson which has come before the Tribunal. On the other hand, his conduct, on any view was serious, and he has not expressed an atom or remorse or insight. I accept entirely that disqualification is appropriate for the reasons set out above, but, on balance, having heard the well-reasoned oral submissions of Mr Cobb-Clark on the matter, I remain of the view that the appropriate period of disqualification for this first infraction of Mr Robinson is a period of two years.

Costs

59 The applicant has indicated that it proposes to make an application for costs pursuant to s 60 of the *Civil and Administrative Tribunal Act 2013* (NSW). The orders will set out a timetable for submissions. I propose to deal with any application for costs on the papers, and without a hearing. The applicant has agreed to that course. If Mr Robinson opposes that course, he should address that issue in his submissions.

Orders

60 The Tribunal orders:

- (1) Pursuant to s 482A(2)(c1) of the Local Government Act 1992 (NSW), the respondent is disqualified from holding civic office for a period of two years from the date of this order.
- (2) The applicant is to file and serve any costs submissions within 14 days of the publication of these reasons.
- (3) The respondent may respond within a further 14 days.
- (4) The applicant may reply within a further seven days.

Endnote

1. At p 7 of the PDF version of the judgment available on NSW Caselaw.

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar

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Decision last updated: 13 June 2023