

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE**

**CIV-2020-412-000020
[2020] NZHC 3436**

BETWEEN

LEE VANDERVIS
Applicant

AND

DUNEDIN CITY COUNCIL
First Respondent

DAVID BENHAM
Second Respondent

Hearing: 19 November 2020

Appearances: L A Andersen QC for Applicant
M R Garbett and S M Chadwick for First and Second Respondent

Judgment: 18 December 2020

JUDGMENT OF GENDALL J

This judgment was delivered by me on 18 December 2020 at 3:30 p.m.
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] Lee Vandervis has been an elected Dunedin City Councillor for many years.¹ On 13 September 2019, having parked his car in Dunedin City, Mr Vandervis received (wrongly he contends) a parking ticket.

[2] That relatively innocuous event was the catalyst for what followed. Mr Vandervis was unhappy about the signage on the parking meter in question and the consequent issue of the parking ticket. He says the ticket was issued, despite the fact he had paid for one hour's parking and parked for less than an hour, as the sign limiting parking in this area to a maximum of 30 minutes was not visible from the footpath.

[3] Subsequently Mr Vandervis complained to a staff member of the Dunedin City Council (the Council) about the signage on the meter. He contends that the staff member was "very unpleasant" and refused to take his complaint. He then lodged a formal complaint against that person with the Chief Executive of the Council (the Council CE). An additional complaint was made by the staff member against Mr Vandervis. Following a code of conduct process relating to the staff member's complaint instigated by the Council, Mr Vandervis was formally censured by the Council.

[4] These events culminated in this proceeding. It was issued by Mr Vandervis with the filing of his statement of claim on 13 March 2020, some six months after the initial event. The proceeding was then the subject of a full day hearing in this Court on 19 November 2020.

[5] In this proceeding, Mr Vandervis seeks judicial review of the Council's code of conduct investigation into his conduct towards the Council staff member and its decision to censure him.

[6] The basis of this judicial review is that, according to Mr Vandervis, the Council, in purporting to follow its code of conduct procedure, erred significantly in

¹ I understand Mr Vandervis has been a Dunedin City Councillor since 2004 up to the present time except for the period of 2007 – 2010.

that it failed to comply with both the settled requirements for the process and the principles of natural justice.

[7] Mr Vandervis emphasises at the outset that the issue before the Court is not the determination of the Dunedin City councillors in the Council decision and the resolution they reached, but the unlawful procedure that he says was followed by the Council. This, he maintains, resulted in it not having jurisdiction to debate and vote on the matter. The reasonableness of the Council decision itself is a political issue. Mr Vandervis accepts it is not properly a matter for determination in these judicial review proceedings.²

Review grounds

[8] The focus of the present judicial review is whether:

- (a) in exercising the Council's own process under its Code of Conduct, including establishing the list of investigators, and appointing the second respondent (Mr Benham) to investigate, the Council properly followed the process set out in its Code of Conduct; and/or
- (b) Mr Benham's investigation complied with the principles of natural justice and was fair; and/or
- (c) any alleged unfairness in the investigation was remedied by processes followed at the Council hearing.

Background

A. The parking ticket

[9] On 13 September 2019 Mr Vandervis was issued with a parking ticket for exceeding the time limit in a 30 minute parking zone in Dunedin City.

² *Goulden v Wellington City Council* [2006] 3 NZLR 244 (HC) at [59].

[10] As I have mentioned, Mr Vandervis protested the signage on the parking meter in this area and the consequent issue of the overtime parking ticket. He says the ticket was issued despite him having paid \$4.20 for one hour's parking and this having been accepted by the meter. He then contends he parked for less than the one-hour period. Finally, he says that the sign limiting parking in the area to 30 minutes was not visible from the footpath.

[11] As a result, Mr Vandervis complained first to the parking officer on the road and then he went to the Council's customer services office (the CSO) and complained to a staff member about the signage on the meter. He says, however, as I have already noted, that the staff member was "very unpleasant" and refused to take his complaint.

B. The 13 September 2019 CSO events

[12] From the 17 September 2019 formal complaint Mr Vandervis made to the Council CE regarding the staff member at the CSO, Mr Vandervis outlined his particular concerns relating to these events. This included the following:

I then went to the Octagon DCC Customer Services desk where an unpleasant female services officer refused to listen to my parking complaint saying that I had to make complaints in writing. I insisted that the DCC parking officer that I had already complained to had told me that I had to go to the DCC to complain which I was doing, but the services person was adamant and became more unpleasant as I tried to show her the phone-photo [attached] which the first Parking Officer had told me to take of the machine and complain with.

...

It is disappointing that I now am spending so much more of my valuable time making this DCC-caused parking complaint for a third time, now to you as CEO.

(square brackets original)

[13] In addition, in this complaint, Mr Vandervis concluded by requesting the Council CE to:

Please advise that the inappropriate parking ticket has been canceled [sic] by return of email, and that you will promptly address [the other issues he raises earlier in his complaint].

Those earlier issues Mr Vandervis outlined in a request to the Council CE in his

complaint as follows:

Please sort the following issues:

- 1 – misleading advertising on parking machine clearly saying \$4 per hour.
- 2 – contradictory P30 signage on machine invisible from normal footpath approach for paying machine.
- 3 – faulty machine accepting \$4.20 payment but only allowing 30 minute time restriction.
- 4 – Scooter Parking Officer not recognising issues above, not cancelling ticket, and apparently falsely claiming that I had to go to the DCC if I wanted to complain.
- 5 – Very unpleasant Customer Services female [they were all female] who refused to consider my complaint, or to acknowledge the photo evidence I showed, or to acknowledge the Parking Officer's wrong advice that I had to go to the DCC to complain.

(square brackets original)

[14] By way of contrast, the views expressed by the Council CSO staff member and the other witnesses to the incident, as found by Mr Benham in his 4 October 2019 final report to the Council, were to this effect:

Complainant

6. The complainant was deeply upset by what was regarded as an uncalled for verbal attack [by Mr Vandervis]. The tone of the verbal exchange in the complainants [sic] view was loud, aggressive and intimidating. The complainant maintained that ... [Councillor Vandervis] was trying to get a parking fine waived. The complainant continued to insist that this could not be done and the Councillor needed to fill in an appropriate written form. According to the complainant the Councillor got increasingly angry and refused to do that. In the complainants [sic] view the incident ended with comment from the Councillor "see you in court". The complainant felt very shaken and upset when the incident ended.

Witnesses

7. All the people I interviewed that witnessed the incident, including the member of the public, were all consistently of the same view as expressed above by the complainant.
8. There were a number of recurring themes the witnesses independently told me relating to what the Councillor said. They were:³

³ From Mr Benham's 4 October 2019 report it is clear that he acknowledged Mr Vandervis had quite a different view of the tenor of the discussion and this was outlined at some length.

- *The comments became increasingly loud, aggressive and intimidating.*
- *The comments were inappropriate.*
- *The behaviour “was not ok”.*
- *He refused to follow procedure to seek parking fine waiver.*
- *His final comment was “see you in court”.*
- *The customer services officer remained calm and polite throughout the strong verbal attack.*
- *A number of the women said they would have been in tears had it been them.*

(emphasis original)

[15] Also, in his 4 October 2019 final report Mr Benham explained his communications with Mr Vandervis in this way:

Councillor Vandervis

9. I spoke at length with Councillor Vandervis.

He had quite a different view of the tenor of the discussion. He said he was there to get action related to problems with parking meter signage not to get a waiver of the fine. He believed that complainant would not listen to or act on what his complaint was about. He believed that complainant was not acting how a customer services officer should act. He refuted that he spoke in an loud, aggressive and intimidating tone. His recollection was such that he couldn't believe other people could have heard what was going on. He believed complainant was politically motivated and that this was a continuation of negative information leaked about him from staff to discredit him. He believed this was because of his ongoing attempt to improve performance of the Council.

He said he did not say “I will see you in court”. He says he said “if you want to take this to court, I'm happy to argue”.

He wanted me to widen what he regarded as the narrow terms of reference of the investigation. I said I could not do that as my role was to investigate the specific complaint.

He was highly critical of the culture of the organisation and and [sic] its approach resembled “group think”. He felt people were fearful of asking questions.

I told him, without exception, the people I had spoken to (including a member of the public who was present) had the strong view his manner and voice was loud, aggressive and intimidating. I also told

him again, without exception, that all believed his behaviour was inappropriate.

[16] The incident in the CSO on 13 September 2019 was captured on CCTV footage, although this was without sound. Mr Benham in his 4 October 2019 final report described the incident from the CCTV coverage, which he said lasted just under four minutes as follows: “Clearly there was gesticulating and finger pointing but without sound its [sic] difficult to note anything other than that.”

C. The CSO staff member’s complaint

[17] On 18 September 2019 the Council CSO staff member concerned advised the Council CE that she wished to lodge a Code of Conduct complaint against Mr Vandervis. The Council’s “Full Incident Report” completed for this complaint described details of the event in question in this way:

What happened:

Lee Vandervis came in to reception regarding a parking infringement he was not happy about receiving. He showed me a photo on his phone of the meter that had the maximum time stay on the opposite side from the payment screen, and said he was not aware of the maximum time stay. I told him he can submit an explanation in writing. He said I’m doing my explanation now, to which I explained explanations need to come to us in writing and we are unable to accept the explanation verbally. I tried to give him options but he said he had wasted enough time and that he was giving his explanation. I tried to explain again it would need to be in writing but he was not happy with this and asked for my name, which he wrote on the ticket and stormed off saying he would see me in court.

His manner during this exchange was aggressive, and his voice was raised the whole time. He was leaning over the counter trying to intimidate me and waving his finger at me. I tried to remain calm and explain there are processes in place, but this seemed to get him more riled up.

We had a customer at the time, who was made to feel very uncomfortable.

Everyone in the plaza (in planning and building) at the time heard the whole thing, which indicates that he was speaking in a raised voice.

D. The newspaper article

[18] Mr Vandervis also complains in this application regarding an article which appeared in the Dunedin daily newspaper, the Otago Daily Times, on 24 September 2019 which publicised the complaint against him. This was only a matter of a few weeks before forthcoming local authority elections. Mr Vandervis contends this was

damaging to him at a crucial time in the election process as, in addition to standing as a councillor for the Dunedin City Council, he was also standing for Mayor. He says too that, in his view, the provision of material for the newspaper article was politically motivated, given especially that in the past he had not been reluctant to publicly criticise Council staff or the Council CE when he considered this was appropriate.⁴

[19] These suggestions from Mr Vandervis, however, are strongly denied by the Council and by those who have provided evidence on behalf of the Council here. No evidence is before me as to who may have provided this material to the Otago Daily Times. Nor was there any direct evidence before me to support the contention that either the complaint against Mr Vandervis or the newspaper article was politically motivated, or that the timing of these events was in any respect significant. I, therefore, leave these allegations from Mr Vandervis to one side.

The requirement for a council to have a code of conduct

[20] Under the Local Government Act 2002 (the LGA) a council is required to always have a code of conduct in place. All councillors are required by the LGA to comply with their own council's code of conduct. The code is required to set out the understandings and expectations about how councillors and members will conduct themselves towards staff, toward each other and toward the public.

[21] A code of conduct must also set out councillors' obligations when receiving information in their capacity as an elected member and the requirements of other legislation which applies to council business and creates obligations on councillors.

[22] Even though a code of conduct is required by statute, the LGA leaves it to the members of each council to agree what their behaviour expectations are, how breaches of the code might be determined and any potential sanctions for a breach.

⁴ At para 1.3 of his 13 March 2020 affidavit, Mr Vandervis states:

I have been outspoken as to the issues that I believe are of concern to Dunedin citizens and have not been frightened to criticise council operations (or staff) where I consider the public has been let down. This has not endeared me either to the Chief Executive of the Dunedin city Council, Sue Bidrose, or the elected representatives (particularly the mayors) and this is reflected in the fact that despite being one of the most experienced councillors and the highest polling councillor in both the 2016 and 2019 elections, I was not allocated any special area of responsibility such as chairman of a committee for the last six years.

[23] In *Goulden v Wellington City Council* the High Court considered that:⁵

The Code is in the nature of an internal regulatory manual so that whether there has been a transgression of its guidelines is very much a matter for the Council to assess.

The Council's code of conduct

[24] On 25 October 2016 the Dunedin City Council adopted its Code of Conduct (the Code) which requires:

- (a) The appointment of a panel of investigators.
- (b) Following receipt of a complaint the Council CE to:
 - (i) Refer the complaint to an investigator selected from the panel.
 - (ii) Inform the complainant.
 - (iii) Inform the respondent.
- (c) The investigator is then to make a preliminary assessment, including to determine whether the complaint is material and, if so, a full investigation would be required.
- (d) Where a full investigation is required, the investigator is to prepare a report for the Council on the seriousness of the breach.
- (e) The Council is then to meet to consider the findings and determine whether or not the breach is established and, if so, what penalty or some other form of action may be imposed.

[25] Breaches of the Code are addressed in section 12. That section 12 states specifically:

⁵ *Goulden*, above n 2, at [59].

12 BREACHES OF THE CODE

Members must comply with the provisions of this Code (LGA 2002, Schedule 7, s. 15(4)). Any member, or the chief executive, who believes that the Code has been breached by the behaviour of a member, may make a complaint to that effect. All complaints will be considered in a manner that is consistent with the following principles.

12.1 Principles

The following principles will guide any processes for investigating and determining whether or not a breach under this Code has occurred:

- that the approach for investigating and assessing a complaint will be proportionate to the apparent seriousness of the breach complained about;
- that the roles of complaint, investigation, advice and decision-making will be kept separate as appropriate to the nature and complexity of the alleged breach; and
- that the concepts of natural justice and fairness will apply in the determination of any complaints made under this Code. This requires, conditional on the nature of an alleged breach, that affected parties:
 - have a right to know that an investigation process is underway;
 - are given due notice and are provided with an opportunity to be heard;
 - have a right to seek appropriate advice and be represented; and
 - have their privacy respected.

12.2 Complaints

All complaints made under this Code must be made in writing and forwarded to the chief executive. On receipt of a complaint the chief executive must forward that complaint to an independent investigator for a preliminary assessment to determine whether the issue is sufficiently serious to warrant a full investigation.²

Only members and the chief executive may make a complaint under this Code.

(footnote original)

² On behalf of the Council the Chief Executive will, shortly after the start of a triennium, prepare, in consultation with the Mayor or Chairperson, a list of investigators for this purpose of undertaking a preliminary assessment. The Chief Executive may prepare a list specifically for his or her council, prepare a list jointly with neighbouring councils or contract with an agency capable of providing appropriate investigators, such as Equip.

12.3 Investigation, advice and decision

The process, following receipt of a complaint, will follow the steps outlined in Appendix B.

12.4 Materiality

An alleged breach under this Code is material if, in the opinion of the independent investigator, it would, if proven, bring a member or the council into disrepute or, if not addressed, reflect adversely on another member of the council.

[26] This section 12 is supplemented by the more specific requirements for any investigation into a potential breach set out in Appendix B to the Code which guides the process and provides:

APPENDIX B: PROCESS FOR THE DETERMINATION AND INVESTIGATION OF COMPLAINTS

Step 1: Chief executive receives complaint

On receipt of a complaint under this Code the chief executive will refer the complaint to an investigator selected from a panel agreed at the start of the triennium. The chief executive will also:

- inform the complainant that the complaint has been referred to the independent investigator and the name of the investigator, and refer them to the process for dealing with complaints as set out in the Code; and
- inform the respondent that a complaint has been made against them, the name of the investigator and refer them to the process for dealing with complaints as set out in the Code:

Step 2: Investigator makes preliminary assessment

On receipt of a complaint the investigator will assess whether:

- 1 the complaint is frivolous or without substance and should be dismissed;
- 2 the complaint is outside the scope of the Code and should be redirected to another agency or process;
- 3 the complaint is non-material; and
- 4 the complaint is material and a full investigation is required.

In making the assessment the investigator may make whatever initial inquiry is necessary to determine the appropriate course of action. The investigator has full discretion to dismiss any complaint which, in their view, fails to meet the test of materiality.

On receiving the investigator's preliminary assessment the chief executive will:

- 1 where an investigator determines that a complaint is frivolous or without substance, inform the complainant and respondent directly and inform other members (if there are no grounds for confidentiality) of the investigator's decision;
- 2 in cases where the investigator finds that the complaint involves a potential legislative breach and outside the scope of the Code, forward the complaint to the relevant agency and inform both the complainant and respondent of the action.

Step 3: Actions where a breach is found to be non-material

If the subject of a complaint is found to be non-material the investigator will inform the chief executive and, if they choose, recommend a course of action appropriate to the breach, such as;

- that the respondent seek guidance from the Chairperson or Mayor;
- that the respondent attend appropriate courses or programmes to increase their knowledge and understanding of the matters leading to the complaint.

The chief executive will advise both the complainant and the respondent of the investigator's decision and any recommendations, neither of which are open to challenge. Any recommendations made in response to a non-material breach are non-binding on the respondent and the council.

Step 4: Actions where a breach is found to be material

If the subject of a complaint is found to be material the investigator will inform the chief executive, who will inform the complainant and respondent. The investigator will then prepare a report for the Council on the seriousness of the breach.

In preparing that report the investigator may:

- consult with the complainant, respondent and any affected parties;
- undertake a hearing with relevant parties; and/or
- refer to any relevant documents or information.

On receipt of the investigator's report the chief executive will prepare a report for the council or committee with delegated authority, which will meet to consider the findings and determine whether or not a penalty, or some other form of action, will be imposed. The chief executive's report will include the full report prepared by the investigator.

Step 5: Process for considering the investigator's report

Depending on the nature of the complaint and alleged breach the investigator's report may be considered by the full council, excluding the complainant,

respondent and any other 'interested' members, or a committee established for that purpose.

In order to avoid any suggestion of bias, a Code of Conduct Committee may often be the best mechanism for considering and ruling on complaints. Committees should be established at the start of a triennium with a majority of members selected from the community through either an application process or by invitation.

The council or committee will consider the chief executive's report in open meeting, except where the alleged breach concerns matters that justify the exclusion of the public, such as the misuse of confidential information or a matter that would otherwise be exempt from public disclosure under s. 48 of the [Local Government Official Information and Meetings Act 1987 (LGOIMA)], in which case it will be a closed meeting.

Before making any decision in respect of the investigator's report the Council or committee will give the member against whom the complaint has been made an opportunity to appear and speak in their own defence. Members with an interest in the proceedings, including the complainant and the respondent, may not take part in these proceedings.

The form of penalty that might be applied will depend on the nature of the breach and may include actions set out in section 13.1 of this Code.

In accordance with this Code councils will agree to implement the recommendations of a Code of Conduct Committee without debate.

[27] Section 13 of the Code then sets out potential penalties or actions. These are available where a material breach of the Code has been determined by the Council.

[28] Importantly, the investigation process under the Code is to be commenced by a complaint from an elected member (a councillor) or from the Council CE and forwarded to the Council CE.⁶

Judicial review principles

[29] In addressing the broad nature and purpose of judicial review applications, the Privy Council in 1994 in *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* said:⁷

Judicial Review [is] a judicial invention to secure that decisions are made by the executive or a public body according to law even if a decision does not otherwise involve an actionable wrong.

⁶ Sections 12 and 12.2 of the Code.

⁷ *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 388.

[30] The focus in judicial review is ostensibly on process, not outcome.⁸ In *Aorangi School Board of Trustees v Minister of Education* French J said:⁹

Contrary to popular belief, judicial review is not an appeal. It is not about the Court considering information afresh in coming to its own views. Judicial review is primarily linked to an examination of the process, and if successful usually results in the decision maker being required to start afresh, as opposed to quashing the decision for all time.

[31] The overriding consideration on this judicial review is whether there has been some particular impropriety or fundamental irregularity in the decision-making process culminating in the decision such that this decision cannot stand.¹⁰

[32] Questions relating to the intensity of review required have occupied our courts from time to time.¹¹

[33] The context of the case before me concerns a consideration of the Council's internal regulatory matters and discipline. Broadly, I am satisfied, therefore, that no unduly heightened scrutiny of the actions involved in this case is required. Although, having said that, I do acknowledge and accept the recent comments of Cooke J in *Patterson v District Court, Hutt Valley* where he stated:¹²

[16] Whilst some commentators, and some decisions refer to the intensity of judicial review, or variable standard review, these can also be misleading concepts. In every judicial review case the Court's role is to review whether a decision is made in accordance with law. In all cases it does so in the same dispassionate way. The intensity with which it performs that task does not change. But the extent to which powers are substantively or procedurally controlled by legal limits varies considerably. It is the nature and extent of the legal controls that vary between cases, not the intensity with which the Court assesses compliance with them.

⁸ See *Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery* [2014] NZHC 2810 at [1].

⁹ *Aorangi School Board of Trustees v Minister of Education* [2010] NZAR 132 (HC) at [8].

¹⁰ *N R v District Court at Auckland* [2014] NZHC 1919 at [7].

¹¹ See *A v Chief Executive of the Department of Labour* HC Auckland CIV-2004-404-6314, 19 October 2005; *Kim v Minister of Justice of New Zealand* [2019] NZCA 209, [2019] 3 NZLR 173; and *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228.

¹² *Patterson v District Court at Hutt Valley* [2020] NZHC 259 (footnote omitted).

The grounds for review

[34] The grounds for review advanced by Mr Vandervis allege failures on the part of the Council to comply with its Code of Conduct in the following ways:

- (a) The Code of Conduct requires a panel of investigators to be appointed by the Council at the start of each triennium and no panel has been legitimately appointed here.
- (b) As a result of no panel having been appointed, Mr Benham was not authorised by the Code to carry out an investigation.
- (c) The complaint against Mr Vandervis did not satisfy the requirements under the Code as the complaint was not made by the Council CE.
- (d) In purporting to carry investigation under the Code, Mr Benham failed to comply with the principles of natural justice and fairness in each of the following respects:
 - (i) He failed to give a copy of the complaint to Mr Vandervis.
 - (ii) He failed to divulge the terms of the complaint to Mr Vandervis in sufficient detail to enable him to understand what he was required to respond to.
 - (iii) He failed to tell Mr Vandervis of the witnesses he had interviewed or the statements made by witnesses.
 - (iv) He failed to give Mr Vandervis a proper opportunity to respond to allegations made against him in the course of the investigation.

[35] I now consider each of these alleged failures in turn.

Process – no proper appointment of the panel of independent investigators?

[36] Under section 12 of the code the Council adopted a procedure whereby complaints about a breach of the Code were to be considered by an independent investigator selected from a list of investigators compiled by the Council's CE. Mr Andersen QC, counsel for Mr Vandervis, contended that the process of compiling this list of investigators was not properly carried out here. I disagree. Mr Benham was an independent investigator selected from the panel and the list of investigators on this panel was properly compiled on behalf of the Council.

[37] Here, the panel list was prepared jointly with neighbouring councils by the Council CE. I am satisfied this was done with appropriate delegation authority pursuant to Sch 7 of the Local Government Act. It was a panel Sandra Graham, the acting Chief Executive of the Council, put in place during September/October 2018, around one year before the events in question here. It was a delegated and administrative function undertaken, as I see it, properly by the Council CE in consultation with the Mayor.

[38] So far as the reference in the Code to appointment of an investigator from a panel "agreed" at the start of the triennium is concerned, the panel list here, as I have noted, was prepared jointly with neighbouring councils and the list was accordingly agreed between them.

[39] It is interesting to note also that Mr Vandervis himself on 3 October 2018, in response to his earlier request, received from the Council by email a membership list of investigators for code of conduct matters with Mr Benham's name included at the top of the list. No objection it seems was taken by Mr Vandervis to the panel list or its compilation process at that time.

[40] For these reasons I reject this argument advanced on behalf of Mr Vandervis.

Mr Benham was not authorised to investigate because no panel had been properly appointed?

[41] As to this second argument advanced on behalf of Mr Vandervis, it can be addressed briefly. Given my finding above that the panel of investigators advised to Mr Vandervis on 3 October 2018 were indeed properly appointed, there can be no question that Mr Benham had authority under the Code to carry out the investigation. He was a previous Chief Executive of the Greater Wellington Regional Council, experienced in local body matters and there is no suggestion that his qualifications and experience to carry out the investigation role here were inadequate.

[42] This complaint is also rejected.

Method of making complaint under the Code?

[43] The third failure alleged by Mr Vandervis is his contention that the complaint did not satisfy the Code requirements as it was not one “made” by the Council CE.

[44] The requirements of a complaint against a councillor like Mr Vandervis here are set out in section 12.2 of the Code of Conduct. They comprise three requirements:

- (a) The complaint must be in writing.
- (b) It must be forwarded to the Council CE.
- (c) It can only be made by a councillor or the Council CE.

[45] Here there is no argument that the first two requirements noted above (that the complaint is in writing and must be forwarded to the Council CE) were satisfied. The only issue is whether the complaint was one “made by a councillor or the Council CE”.

[46] The Council CE, as part of her role, is effectively the employer of approximately 1200 Council staff on behalf of the territorial authority. As part of her employer role, the Council CE on 18 September 2019 received the complaint against Mr Vandervis from the CSO staff member. The Council CE was not present at the

events in question and obviously did not witness the alleged behaviour or dealings on the part of Mr Vandervis with the staff member in question.

[47] Having received what was regarded as a sensitive internal complaint from a staff member, the Council CE was required to determine whether it might trigger a Code of Conduct investigation or be dealt with in some other way. A decision was then taken by the Council CE to engage the independent investigator in terms of the processes specified in sections 12.2 – 12.3 and Appendix B of the code of conduct. The Council CE initiated this code of conduct process by first phoning Mr Benham and instructing him to investigate. A subsequent email on 20 September 2019 to Mr Benham confirmed these instructions and provided details of the process in the Code and other administrative matters.

[48] Mr Vandervis contends here that the complaint was not one made by the Council CE and consequently there was no jurisdiction for it to be considered. He says the complaint came from a staff member and it was not a complaint laid by the Council CE as the Code required.

[49] I disagree. Details of the alleged events in question were plainly provided by the staff member by way of an initial complaint which found its way to the Council CE as effective employer. Those details were then considered and clearly, in my view, the Council CE then chose personally to bring the complaint in her role as employer of the staff member as she was required to do in carrying out that role.

[50] Any language used or comments made which referred to the complaint as one having been made by the staff member, in my view, related to the initial and necessary transmission of the event details to the Council CE. This in no way alters the position, as I see it, that the complaint was one made formally by the Council CE. I reject this narrow and technical challenge to the complaint process advanced by Mr Vandervis. I find the complaint was, in process terms, one properly made by the Council CE.

Natural justice and fairness of the investigation process?

[51] Section 12.1 of the Code, as I note at [25] above, states in part:

- that the concepts of natural justice and fairness will apply in the determination of any complaints made under this Code. This requires, conditional on the nature of an alleged breach, that the affected parties:
 - have a right to know an investigation process is underway;
 - are given due notice and provided with an opportunity to be heard;
 - have a right to seek appropriate advice and be represented; and
 - have their privacy respected.

[52] On this aspect, Mr Andersen for Mr Vandervis contended that he relies on four failures here, each of which he says is a fundamental breach of the requirements of natural justice and fairness. Shortly I will address each of these alleged failures. But first I need to comment briefly on what I see is a general and preliminary matter. This is Mr Vandervis' complaint over Mr Benham's actions at the start of his investigation process in making his preliminary assessment of the complaint.

[53] That preliminary assessment advised and concluded, amongst other things:

I have undertaken a preliminary investigation into the complaint. As part of that I have spoken (by phone) to the staff member who has made the complaint. I have read her written statement of complaint. I have also spoken (by phone) to another staff member (from another department) who witnessed the latter part of the incident. I have also viewed the CCTV recording of the incident. I do note there is no sound associated with the CCTV footage.

It is clear from both the complainant and the witness, that the behaviour of the Councillor towards the complainant was aggressive, loud and intimidating. The complainant was very distressed and upset after the incident.

The witnesses' view was the complainant responded remarkably calmly in what was a totally uncalled for verbal attack.

I have determined that the complaint is material and of sufficient substance that a full investigation is justified.

[54] Mr Benham, as he acknowledged, made his preliminary assessment without first speaking with Mr Vandervis. Ideally, he might have called on Mr Vandervis for his comments on the complaint, but he did not do so here. But, in my view, this is not fatal to his preliminary investigation decision and to what followed. It was a decision made simply, as he noted, to confirm that the complaint was material and of sufficient substance that a full investigation was justified. And, in any event, as I see it, any

deficiencies here were in large measure cured by Mr Benham's full investigation later and the Council decision which followed.

(a) First failure – Mr Vandervis was not provided with the complaint

[55] Quite properly, Mr Andersen noted that it is a fundamental principle of natural justice that a person who is subject to a complaint must have the opportunity to properly respond to it.¹³

[56] Here, Mr Vandervis complains in that he says he did not know the full details of the complaint against him until after he had received details of the Council resolution and decision upholding the complaint. In particular, it is Mr Vandervis' position that disclosure of the details of the complaint would have enabled him, amongst other things, to refute the allegation made that "he wrote [the employee's name] on the ticket and stormed off saying he would see me in court."

Mr Vandervis says the CCTV footage confirms that he did not storm off but in fact paid for a different parking fine before leaving the Council offices at the time.

[57] Turning now to the process followed by the investigator Mr Benham, here, he summarises this in his 4 October 2019 report. He confirms this included speaking in person to the CSO staff member, seven witnesses, one member of the public, Mr Vandervis and also viewing the CCTV video of the incident.

[58] Mr Benham in his report summarised his meeting with Mr Vandervis. He confirmed that key allegations about Mr Vandervis' behaviour were put to him and he took the opportunity to provide a lengthy response in his interview.

[59] In the report Mr Benham records that he directly put to Mr Vandervis that:

... Without exception, the people I had spoken to [who had witnessed the incident] (including a member of the public who was present) had the strong view his manner and voice was loud, aggressive and intimidating. I told him again, without exception, that all believed his behaviour was inappropriate.

¹³ *Meaden v Chief Executive of the New Zealand Fire Service Commission* EmpC Christchurch CC26/98, 30 July 1998.

[60] It was this behaviour, which plainly involved significant power differential issues between Mr Vandervis and the staff member, that Mr Benham was investigating. From all the material before the Court it seems to me unquestionable that these aspects were understood by Mr Vandervis and, indeed, he addressed Mr Benham on it. And the communications Mr Benham records he had with Mr Vandervis, as I outline at [15] above, set out these aspects. In my view, they also support the position that Mr Vandervis was well aware in his lengthy discussion with Mr Benham what the nature of the complaint against him was.

[61] I am satisfied too, as will appear later, that Mr Benham generally took appropriate steps and carried out his full investigation process on a reasonable and objectively fair basis.

[62] And, I conclude also, as I amplify below, that Mr Vandervis had ample opportunity to refute the claims against him, in particular in his lengthy interview with Mr Benham and then later in his appearance and the statements he made before the full Council meeting.

[63] I reject this ground advanced by Mr Vandervis.

(b) Second failure – Mr Vandervis was not given sufficient details of the complaint to enable him to properly respond?

[64] This complaint amplifies matters noted above under the first failure contention. The comments I make there apply also to this second matter.

[65] And, whilst Mr Vandervis states that he believed the issue he faced was only over the refusal of the staff member to take his complaint about the incorrect signage on the parking meter and the acceptance of payment in excess of the permitted time, in reality, as I see it, the true position is somewhat different. The evidence before me here, considered at each aspect of this process, as I have noted above, plainly indicates, in my view, that reversal of the parking fine incurred by Mr Vandervis was an integral part of all this. For this and the other reasons I amplify above, I reject any suggestion that Mr Vandervis was not given sufficient details of the complaint against him to enable him to respond.

(c) Third failure – there was a failure to disclose witness statements to Mr Vandervis

[66] As to this, Mr Andersen contends that Mr Vandervis has been prejudiced here because there was no disclosure to him of the contents of witness statements and he had no opportunity to respond. This was in breach of a general obligation to disclose all material which was prejudicial to any party.

[67] On this aspect, I am satisfied that the key allegations concerning Mr Vandervis' behaviour were understood by him throughout this process and, indeed, he took the opportunity to provide what were lengthy responses in his initial interview with Mr Benham and then at his later appearance before the Council. These matters had been put to Mr Vandervis in particular by Mr Benham, including the relevant details of what various witnesses had said. I am satisfied no disclosure failures of particular significance occurred here.

(d) Fourth failure – Mr Vandervis had no proper opportunity to respond to the allegations

[68] Mr Andersen's final point on these natural justice and fairness requirements contended that there was no communication by Mr Benham to Mr Vandervis before a conclusion was reached that Mr Vandervis had acted in an aggressive, loud and intimidating manner toward the staff member. Further, Mr Vandervis complains that Mr Benham did not divulge when he first spoke to him that he had already made the decision that the applicant's behaviour was "aggressive, loud and intimidating" as he had concluded in his preparatory report findings. These breaches of the requirements of natural justice and fairness, Mr Andersen submitted, were very important from Mr Vandervis' reputational point of view especially given that as a Councillor he was effectively in public office. Mr Vandervis contends also that Mr Benham left him with a false impression of the complaint by suggesting that the complaint was the way he had spoken to the complainant and by not fully disclosing the most serious allegation, that Mr Vandervis was trying to use his position to avoid a parking fine. On these aspects, as I have noted already however, Mr Vandervis, both in his lengthy discussions with Mr Benham and also in speaking at the full Council meeting, plainly addressed both matters including the allegation that he was using his position to avoid the parking fine. I am satisfied these were all matters of which he was fully aware at

the time. The suggestion that he had no proper opportunity to respond to the allegations here, in my view, lacks substance. In fact, as I have outlined above, Mr Vandervis had at least two opportunities to do so – the first, when he had the chance to address Mr Benham in his interview with him, and the second, to convince the Council at its full Council meeting.

[69] Finally, I turn briefly to the Council hearing process in this case. This was an aspect not addressed in any great detail by Mr Andersen before me.

[70] Mr Vandervis was told of his right to address the full Council both before and at this meeting. The Council at the outset resolved to suspend a standing order in order to provide Mr Vandervis with more than the five-minute maximum requirement to speak on the investigation at the meeting. This was to ensure he had ample opportunity to address the members as decision makers here.

[71] After hearing from Mr Vandervis the Council members present, on the basis of Mr Benham's findings and the witnesses' evidence, unanimously resolved to issue a written censure to Mr Vandervis in respect of his behaviour which they found breached the Code of Conduct. As I see it, from all the evidence before the Court, all the procedural steps taken by the Council ensured the principles of natural justice and fairness were met here.

[72] The transcript material of the Council meeting before me, in my view, makes clear that Mr Vandervis had the full opportunity at the meeting to make all the submissions he wished and to address all disputed matters relating to the complaints against him. Plainly he fully availed himself of this, as the transcript makes clear.¹⁴ The Council, in my view, then properly considered matters and reached their decision that there had been a breach of the Council's Code.

[73] Overall, I find that no significant reviewable errors of process or natural justice concerns occurred here. Even if there may have been minor procedural errors that occurred, I am satisfied they were not sufficient to be reviewable and in any event, in

¹⁴ In the transcript, perhaps not insignificantly, Mr Vandervis notes as his first point of the five points he outlines: "The claim here that I have tried to avoid a twelve dollar parking ticket is ridiculous".

all the circumstances, it would be highly unlikely that any different decision to that made by the Council would be made on review.

[74] Finally, even in situations where judicial review has merit, and I have found that not to be the case here, ultimately relief is always discretionary. In the present case, because this incident involves a disciplinary context for a member of what is inherently a political body, in any event, relief, in my view, would likely not be appropriate.

Result

[75] For all the reasons I have outlined, Mr Vandervis' application for judicial review is dismissed.

Costs

[76] No submissions on costs were made to me at the hearing of this matter. Costs are therefore reserved. In the event that counsel are unable to resolve the issue of costs between themselves, then they may file sequentially memoranda on costs (with a six-page maximum) which are to be referred to me and, in the absence of either party indicating they wish to be heard on the matter, I will decide the question of costs based on the material then before the Court.

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Gendall J

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