

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA56/2021  
[2022] NZCA 219**

BETWEEN                      LEE VANDERVIS  
   Appellant

AND                                DUNEDIN CITY COUNCIL  
   First Respondent

   DAVID BENHAM  
   Second Respondent

Hearing:                      23 March 2022

Court:                            Collins, Lang and Mallon JJ

Counsel:                      L A Andersen QC and S Gaskell for Appellant  
   M R Garbett and S M Chadwick for Respondents

Judgment:                      2 June 2022 at 9.30 am

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**JUDGMENT OF THE COURT**

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- A     The appeal is dismissed.**
- B     The appellant must pay the respondents costs for a standard appeal on a band A basis with provision for one counsel and with usual disbursements.**
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**REASONS OF THE COURT**

(Given by Mallon J)

**Introduction**

[1]     Lee Vandervis, a Dunedin City councillor, was censured by the Dunedin City Council after a confrontation with a staff member about the circumstances in which

he had been issued a \$12 parking ticket. He challenged his censure in a judicial review proceeding. The High Court dismissed this challenge.<sup>1</sup> He now appeals to this Court.

[2] He appeals on two grounds:<sup>2</sup>

- (a) The complaint that led to him being censured was invalid because it was not made by an authorised person under the Council's Code of Conduct.
- (b) The investigation that led to him being censured was in breach of natural justice because he was not adequately informed of the complaint and the evidence relied upon or given an adequate chance to respond before it was determined that he had breached the Code of Conduct.

[3] We dismiss the appeal for the reasons that follow.

### **Factual background**

[4] Mr Vandervis has been an elected councillor for many years. In each of the 2016 and 2019 elections he was the highest polling councillor. He was also the highest unsuccessful candidate in the mayoralty.

[5] On 13 September 2019, he parked his car in a parking space near the Dunedin Dental School. From the footpath side he could see a sign on the meter stating that the rate was \$2 per 30 minutes. He did not notice that on the street side the meter had a P30 sign indicating that the parking space had a 30 minute limit. He paid \$4.20 into the meter thinking that he had parking for over one hour. He came back within the hour to find his car being ticketed. He had a discussion with the parking officer who pointed out the P30 limit. The parking officer told Mr Vandervis that he would have to take up his issue with the Council.

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<sup>1</sup> *Vandervis v Dunedin City Council* [2020] NZHC 3436 [High Court judgment].

<sup>2</sup> In the High Court, Mr Vandervis also contended that no panel of investigators had been appointed at the start of the triennium as required and this meant that Mr Benham (the investigator) had not been properly appointed and the decision to censure him was invalid. This ground of review was rejected in the High Court and is not pursued on this appeal.

[6] Mr Vandervis' evidence is that he immediately went to the Council Customer Services desk. He told the person at the desk that he wanted the meter noted as faulty because the P30 sign was not visible when using the meter and it had accepted \$4.20 when the limit was \$2 for the maximum 30 minute period. According to Mr Vandervis, the person at the desk refused to listen to his complaint and told him he had to make the complaint in writing. Mr Vandervis said he made it clear that his complaint was about the faulty machine and she should note the machine number.

[7] On 17 September 2019 at 5.42 am he sent an email to the Council's Chief Executive, Dr Sue Bidrose. The email outlined the above and said the "unpleasant female services officer" refused to listen to his complaint and "became more unpleasant as [he] tried to show her the phone-photo" of the meter. The email continued:

Please sort the following issues:

- 1- misleading advertising on parking machine clearly saying \$4 per hour.<sup>3</sup>
- 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 acknowledge the Parking Officer's wrong advice that I had to go to the DCC to complain.

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

Please address the numerous complaints above, ...

Please advise that the inappropriate parking ticket has been cancelled by return email, and that you will promptly address the issues 1-5 above..

(square brackets in original)

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<sup>3</sup> We note that the photograph of the sign relied on by Mr Vandervis does not state "\$4 per hour". Rather it states "\$2.00 per 30 min".

[8] On 18 September 2019 at 2 pm the staff member involved in the incident with Mr Vandervis emailed Dr Bidrose to advise that she wished to make a Code of Conduct complaint. Her email advised that this had followed a discussion with her general manager about her options. Her email also advised that there were many witnesses to the incident who would be willing to make statements.

[9] Dr Bidrose also received an email that day, at 5.31 pm, from the staff member's general manager about their meeting earlier in the day. The email advised Dr Bidrose that the staff member "was quite shaken" at the time of the incident and, having been advised of her options, had decided she would like to make a Code of Conduct complaint about the incident.<sup>4</sup>

[10] On 19 September 2019, Dr Bidrose contacted David Benham by telephone appointing him as the independent investigator on the complaint. Mr Benham had considerable relevant experience, having held roles in local government for over 30 years, including nine years as the Chief Executive of the Wellington Regional Council. The next day, at 10.38 am, Dr Bidrose's PA, Vivienne Harvey, emailed Mr Benham about administrative arrangements for the appointment and advised him that interviews with the complainant and the witnesses were scheduled for 26 September 2019.

[11] On 23 September 2019 at 9.18 am Dr Bidrose emailed Mr Vandervis advising him that: she had received a Code of Conduct complaint; Mr Benham had been appointed investigator; and Mr Benham would investigate the complaint in accordance with Appendix B of the Code of Conduct.

[12] On 24 September 2019 a "Full Incident Report" was completed by the staff member. It was provided to Mr Benham by email on the same day at 4.36 pm. The staff member described the incident as follows:

Lee Vandervis came [into] 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

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<sup>4</sup> The options were taking no further action, speaking with Mr Vandervis directly, or making a Code of Conduct complaint.

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 I 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 he was speaking in a raised voice.

[13] At 5.56 pm that day, Mr Benham emailed Dr Bidrose advising that “the complaint [was] material and a full investigation [was] required”. He attached his preliminary assessment of the complaint. This advised that he had read the staff member’s complaint and spoken to her by telephone. He had also spoken to another staff member from another department who had witnessed the latter part of the incident. He had also viewed the CCTV recording of the incident and noted that it had no sound. His assessment went on to state:

It is clear from both the complaint 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 witness['] 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.

[14] At 6.48 pm that day, Dr Bidrose emailed Mr Vandervis advising him that she had received the investigator’s preliminary assessment and he had determined that “the complaint [was] material and a full investigation [was] required”. Mr Vandervis was also advised that the investigation would begin that week.

[15] Over the next two days, 25 and 26 September 2019, Mr Benham conducted interviews of the staff member involved, seven other employees and a member of the public. He also interviewed Mr Vandervis and made the CCTV footage available to him. Mr Benham made notes of his investigation setting out:

- (a) The staff member's account: This was in similar terms to that set out above. She described feeling intimidated, "churned up and upset" from the incident.
- (b) The accounts given by other employees and the member of the public: Their accounts corroborated the staff member's account. They described Mr Vandervis as "yelling", getting "progressively louder and more aggressive" or similar and that the staff member had remained calm throughout.
- (c) His discussion with Mr Vandervis: Mr Vandervis gave a different account of the incident. He said he was not there to get a waiver of his fine, but rather to get action on the parking meter signage. He believed the staff member was not acting appropriately and the complaint was politically motivated (in the context of the upcoming Mayoral and Council elections in early October) and a continuation of negative information leaked about him by staff to discredit him. He disputed that he spoke loudly, aggressively and in an intimidating tone. He said he did not say "I will see you in court" but did say "if you want to take this to court, I'm happy to argue". Mr Benham informed Mr Vandervis that, without exception, witnesses considered that his manner and voice were loud, aggressive and intimidating and that his behaviour was very inappropriate.
- (d) Mr Benham's comments on the CCTV footage: He noted that it showed gesticulating and finger pointing but was without sound so of limited assistance. He also noted that he had made the footage available to Mr Vandervis who had then released it on social media and Mr Benham considered this was unfortunate and inappropriate.

[16] By letter dated 4 October 2019, Mr Benham provided his "full investigation" report to Dr Bidrose. He referred to his preliminary investigation in which he had concluded "that potentially a material and substantive breach" of the Code of Conduct had occurred. He summarised the information he obtained from his investigation, as

outlined above. He also referred to Mr Vandervis having released to social media on 23 September 2019 his own complaint which described the staff member as “a very unpleasant” officer. He said this contrasted with all the witness statements who said that the staff member had remained calm and polite. He commented that the public release of Mr Vandervis’ complaint had added to her distress. He concluded:

13. On the basis of what I have heard I conclude that ... Councillor Vandervis has materially breached the Code of Conduct on three grounds.

a) Section 5.2 Relationships with Staff. Under bullet 4 “*treat all employees with courtesy and respect and avoid publicly criticising any employee*”

b) Section 5.2 bullet 6 “*avoid doing anything that might compromise, or could be seen as compromising, the impartiality of an employee*”

c) Section 10 Ethical Behaviour. Under bullet 2 “*not influence, or attempt to influence, any council employee, officer or member in order to benefit their own, or families personal or business interests*”

14. I do not accept Councillor Vandervis’ contention that the complainant and other staff were politically motivated. As stated there was a member of the public present who presented the same view as the staff.

15. In terms of penalties and actions a number are set out in Code of Conduct Section 13. Based on what I have outlined I will leave it to the Council to decide what actions it decides to take but at the very least I believe an apology should be made to the complainant.

[17] On 30 October 2019, counsel for Mr Vandervis wrote to Dr Bidrose setting out concerns about the process. Following an interim reply on 4 November 2019, Dr Bidrose replied on 21 November 2019. Amongst other things, this included a copy of the complaint (set out at [12] above). There were further communications between counsel for Mr Vandervis and Dr Bidrose about Mr Vandervis’ concerns with the process.

[18] A Code of Conduct report from the Council Executive Leadership Team was an agenda item for a Council meeting on 10 December 2019. This report set out the background and made recommendations as follows:

## RECOMMENDATIONS

That the Council:

- a) **Considers** the findings of the investigation of David Benham in his Full Investigation into Dunedin City Council Code of Conduct complaint made by the Chief Executive following a complaint by a Customer Service Centre staff member.
- b) **Provides** Councillor Vandervis the opportunity to address Council if he wishes to.
- c) **Suspends** standing order 20.2(c) to enable Councillor Vandervis more than usual five minutes to address Council.
- d) **Decides** whether a breach of the Code of Conduct has occurred, and if so, which, if any, of the sanctions outlined in the Code of Conduct that it wishes to impose.

[19] In discussing the options and the next steps, the report said:

10. The Council must now decide what it wishes to do about the complaint. Councillors must read the report, attached, and must also give Councillor Vandervis an opportunity to appear and speak in his own defence. If the Council accepts the findings in the investigator's report, and wishes to apply for sanctions, the Council can decide, based on the investigation, to impose sanctions ...

...

13. The next steps are for the Council to discuss the investigation, hear the Councillor, and decide whether the findings of the independent investigation are accepted and, if so, how to respond.

[20] The minutes of the Council meeting refer to the report, note that the matter was investigated in accordance with the Code of Conduct process, and that Councillor Vandervis considered there had been no breach and provided reasons for that view. The minutes further record that "Councillors spoke to the perceived breach and agreed to accept the findings of the investigation and issue Cr Vandervis with a written censure", and the motion to accept the findings of Mr Benham's investigation and to censure Councillor Vandervis was unanimously carried.

[21] A transcript of the Council meeting provides more detail. Mr Vandervis made the following points:

- (a) He did not engage in the conduct alleged by the complainant. He is a tall man with a beard and has a loud clear voice, which some people

may find intimidating. The claim that he was trying to avoid a \$12 parking ticket was ridiculous. He paid a \$40 parking ticket that was owing before he left.

- (b) He was not provided with natural justice because he was not able to see the complaint or any of the witness statements and did not know until after receiving the investigator's report that a staff member had falsely claimed that he was trying to have a parking ticket set aside. His purpose was to report a malfunctioning and mislabelled parking meter and he has made similar complaints about this before this incident.
- (c) It was only after his complaint about the staff member that the Code of Conduct complaint was made about him.
- (d) Staff members other than the Chief Executive did not have the right to make a Code of Conduct complaint and this breach of procedure meant that his privacy had been breached at a critical time in the election campaign.
- (e) Councillor Benson-Pope should not participate because of apparent bias arising out of his comments in an *Otago Daily Times* article.<sup>5</sup>
- (f) The CCTV supports his account because it did not show any inappropriate behaviour nor any obvious concern by the staff member and other people in the vicinity. His "finger wagging" was about the parking machine.

[22] In the ensuing discussion, one councillor spoke in favour of Mr Vandervis, making the points that: it was unlikely Mr Vandervis was trying to get out of paying a \$12 ticket because he was paying a \$40 ticket at the same time; the video did not appear to show shouting or that Mr Vandervis had stormed off; a big issue was being made out about a small thing; and it was no wonder that Mr Vandervis was concerned about election interference. However, other councillors spoke in favour of accepting the investigator's report. They made the point that it did not matter whether

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<sup>5</sup> The article was published on 24 September 2019, describing the incident and noting that a Code of Conduct complaint had been filed.

Mr Vandervis was trying to get out of a \$12 ticket or was complaining about the meter. Rather, it was about the conduct being an inappropriate way to treat staff. The point was also made that the investigator interviewed nine witnesses and there was no reason to believe they were all politically motivated. A councillor made the point that it was unlikely that a staff member would have said “I am going to take you to court”. Another councillor raised whether the process was appropriate in light of Mr Vandervis’ concerns about the process that had been followed. The lawyer who had provided advice to the Chief Executive about the process advised that he was satisfied the principles of natural justice and fairness had been followed.

[23] On 11 December 2019 a letter from the Mayor was forwarded to Mr Vandervis recording the Council’s decision to accept the investigator’s report and to censure him.

### **Code of Conduct**

[24] The Code of Conduct sets out the standards of behaviour expected from elected members in the exercise of their duties.<sup>6</sup> It is designed to deal with the behaviour of members towards: each other; the Chief Executive and staff; the media; and the general public.<sup>7</sup> Members are to “treat all employees with courtesy and respect and avoid publicly criticising any employee” and a failure to do so is a breach of the Code of Conduct.<sup>8</sup>

[25] On making complaints, the Code of Conduct provides:<sup>9</sup>

## **12 BREACHES OF THE CODE**

Members must comply with the provisions of this Code ... 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:

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<sup>6</sup> Dunedin City Council *Code of Conduct* (25 October 2016) [Code of Conduct], cl 1.

<sup>7</sup> Clause 2.

<sup>8</sup> Clause 5.2.

<sup>9</sup> Footnotes omitted.

...

- 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;

...

## 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.

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

## 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.

(footnotes omitted)

[26] If “a complaint is determined to be material and referred to the council the nature of any penalty or action will depend on the seriousness of the breach”.<sup>10</sup> If the breach is material, the Council has a range of actions it can take. They include sending a letter of censure to the member.<sup>11</sup>

[27] Appendix B sets out the process for determining and investigating complaints. As relevant it provides:

### **Step 1: Chief executive receives complaint**

On receipt of a complaint under this Code the chief executive will refer the complaint to an investigator ... The chief executive will also:

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<sup>10</sup> Clause 13.

<sup>11</sup> Clause 13.1.

...

- 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 ... ;
- 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.

...

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

...

### **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 ... which will meet to consider the findings and determine whether or not 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**

...

The council ... will consider the chief executive's report in open meeting, except where the alleged breach concerns matters that justify the exclusion of the public [...].

Before making any decision in respect of the investigator's report the council ... will give the member against whom the complaint has been made an opportunity to appear and speak in their own defence. [...]

### **First appeal ground: whether the complaint was made by the Chief Executive**

[28] This ground of appeal concerns the requirement under cl 12 of the Code of Conduct that “[o]nly members and the chief executive may make a complaint”.<sup>12</sup> Mr Vandervis contends that the complaint did not comply with this because it was made by a staff member. He contends that the power to make a complaint is separate from the obligation on the Chief Executive to forward a complaint to an investigator. He contends that the Chief Executive has an obligation to do more than simply pass on a complaint by a staff member as occurred here. She must decide to make a complaint about the matter and the complaint is then from her and not the staff member.

[29] The High Court rejected this argument. It found that the Chief Executive considered the complaint and chose to bring the complaint as the employer of the staff member.<sup>13</sup> Mr Vandervis submits the High Court was wrong about this because:

- (a) Dr Bidrose had not seen the complaint before she instructed Mr Benham on 19 September 2019 because it was not put in writing until 24 September 2019.
- (b) The staff member was told that it was entirely her decision whether to make a complaint under the Code of Conduct.
- (c) The documents refer to the complaint being made by a staff member and describe her as the complainant.

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<sup>12</sup> Code of Conduct, above n 6, cl 12.2.

<sup>13</sup> High Court judgment, above n 1, at [49]–[50].

- (d) There is no evidence or document showing that Dr Bidrose gave independent consideration to whether a complaint should be made about the incident.

[30] As set out earlier, the Code of Conduct encompasses the behaviour of a councillor towards a staff member.<sup>14</sup> However, it is only a Member or the Chief Executive that can make a complaint under the Code of Conduct.<sup>15</sup> This means that when an incident involving a staff member and a councillor arises, the Chief Executive is the person who must initiate the Appendix B process.

[31] We accept that, when the Chief Executive learns of an incident about a possible breach of the Code of Conduct by a councillor that involves a staff member, the Chief Executive must determine whether to initiate the Appendix B process. However, this is a narrow (gatekeeping) inquiry of a kind that does not require a formal decision. Relevant to that inquiry are whether the staff member alleges a councillor has behaved inappropriately towards them, whether the incident appears to be within the Code of Conduct, and whether the staff member wishes to have the incident investigated under the Code of Conduct.

[32] We say this because, once a written complaint under the Code of Conduct has been made to the Chief Executive, she “must” forward that to an independent investigator.<sup>16</sup> It is the investigator, not the Chief Executive, who then determines whether the complaint is frivolous, without substance, outside the scope of the Code of Conduct, non-material, or material and requiring full investigation.<sup>17</sup> It is therefore not the Chief Executive’s role to consider the merits of the complaint.

[33] This was the way the complaint proceeded here. Dr Bidrose was aware of the incident from Mr Vandervis’ letter of complaint on 17 September 2019. It is evident she was also aware that the staff member was meeting with her general manager on 18 September 2019 to discuss the incident and potential options she could pursue. By the early evening of that day she was aware that the staff member was “quite shaken”

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<sup>14</sup> See [24] above.

<sup>15</sup> A member encompasses councillors.

<sup>16</sup> Code of Conduct, above n 6, cl 12.2 and Appendix B, step 1.

<sup>17</sup> Clause 12.3 and Appendix B, step 2.

by the incident and wished for the matter to proceed as a Code of Conduct complaint. The next day she instructed the investigator. She subsequently advised Mr Vandervis of the investigation and that it would be investigated pursuant to the Appendix B process.

[34] At the time she instructed Mr Benham, she had received written confirmation that the staff member wished to make a complaint under the Code of Conduct. She had not received written details of the complaint. However, those details were received by 24 September 2019 and forwarded to the investigator before he completed his preliminary investigation. We see no issue with this under the Appendix B process. The narrow compass of the incident meant that both the Chief Executive's gatekeeping role and the preliminary investigation could be completed in short order as it was.

[35] We also see no issue with the fact that the complaint was described in some of the documentation as the staff member's complaint and that she was described as the complainant. The staff member had complained about Mr Vandervis' conduct and wished to have the matter investigated under the Code of Conduct. As Dr Bidrose accurately put it at the Council meeting on 10 December 2019:

... although the staff member used the term that they wanted to make a code of conduct complaint it is actually me that raised the complaint with the investigator and hired the investigator ... [the] staff member or member of the public can't do that so that has to go through so in that sense you might argue that I did it on her behalf if you like because the behaviour wasn't about me but it was me that raised the complaint with the investigator ...

[36] The complainant is the person who makes the complaint to the relevant authority (here the Chief Executive) for the relevant authority to initiate the relevant process (here an investigation by an independent investigator). It was not inaccurate to describe the staff member as the complainant and as having made a complaint even though it was the Chief Executive who formally made the complaint that initiated the Appendix B process.

[37] We therefore dismiss this ground of appeal.

## **Second appeal ground: whether the investigation breached natural justice**

### *Law*

[38] Natural justice is the duty to act fairly. Its requirements vary according to the power that is exercised and the circumstances of its use. As it was put in a case from 1949:<sup>18</sup>

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

[39] The duty to act fairly includes the requirement to “hear the other side”. What that will require depends on the circumstances, but a party must know the case against them and have an adequate opportunity to prepare a response.<sup>19</sup> The duty to act fairly also means that decisionmakers must not predetermine the matter, that is they must not have closed their minds or committed themselves to an intractable position before hearing the other side.<sup>20</sup>

### *Alleged breaches*

[40] Mr Vandervis contends that the Appendix B process involves the following stages: at Step 1 the Chief Executive decides whether to make a complaint under the Code of Conduct; at Step 2 the investigator determines whether a material breach has occurred; if a material breach is found to have occurred, then at Step 4 the investigator determines how serious the breach is; and at Step 5 the Council decides what penalty to impose.

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<sup>18</sup> *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA) at 118; and PA Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 1099–1011.

<sup>19</sup> Joseph, above n 18, at 1110–1111.

<sup>20</sup> At 1159.

[41] He contends the investigation was conducted in breach of natural justice because:

- (a) He was not given a chance to respond at all until after the preliminary assessment was done, by which time it was already determined that there had been a material breach of the Code of Conduct.
- (b) He could not adequately respond during the full investigation because he was not given the original complaint or adequate details of it, nor was he given the witness' statements nor the preliminary assessment until after the full investigation was done.
- (c) The defects in the investigation were not cured by the Council's decision because the Council's sole role relates to penalty.

*High Court*

[42] The High Court rejected Mr Vandervis' arguments for the following reasons:<sup>21</sup>

- (a) The preliminary assessment was only to assess whether the complaint was material and required a full investigation, so there was no need to give Mr Vandervis a chance to respond during the preliminary assessment.
- (b) The full investigation gave Mr Vandervis a chance to respond. It was also clear from what was said to Mr Vandervis, and what Mr Vandervis said in response, that he knew the key details of the complaint during the full investigation.
- (c) The Council meeting gave Mr Vandervis another chance to respond.

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<sup>21</sup> High Court judgment, above n 1, at [52]–[74].

- (d) If there were any errors in the process, they were cured by later steps in the process, they were too insignificant to be reviewable, and they would not have changed the Council's decision.

*Preliminary investigation*

[43] As set out earlier, under the Appendix B process, the purpose of the preliminary investigation is to determine whether the complaint is frivolous or without substance, outside the scope of the Code, is non-material or material.<sup>22</sup> Materiality means conduct that would bring the Council member into disrepute.<sup>23</sup>

[44] This is intended to be a low-level inquiry. This is because the Appendix B process permits the investigator to make whatever initial inquiry is necessary to determine the appropriate course of action. The appropriate course can only be dismissing the complaint (if it is frivolous or without substance or non-material), referring it elsewhere if appropriate (if the complaint is outside the Code of Conduct), or referring it for a "full" investigation.

[45] It is also because the Appendix B process provides that at the full investigation stage the investigator may consult with the complainant, respondent and affected persons, undertake a hearing, and refer to any relevant documents or information.<sup>24</sup> The process therefore envisages that this is where the main part of the investigator's investigation takes place.

[46] We acknowledge that the headings at Steps 3 and 4 in the Appendix B process are framed as "where a breach is found to be non-material" and "where a breach is found to be material". Those headings suggest that whether there has been a breach of the Code of Conduct will take place at the preliminary stage and the full investigation determines the seriousness of the breach that has already been found to have occurred.

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<sup>22</sup> See [27] above.

<sup>23</sup> Code of Conduct, above n 6, cl 12.4.

<sup>24</sup> Appendix B, step 4.

[47] However, those headings must be read with the content of each step set out under those headings. Under Step 2, the investigator is to assess whether “the complaint” is frivolous, outside the scope of the Code of Conduct, non-material or material. It does not state that the investigator is to determine whether a breach of the Code of Conduct has occurred. This language continues under Step 3 where it is stated “[i]f the subject of a complaint is found to be non-material ...” and Step 4 where it is stated “[i]f the subject of a complaint is found to be material ...”. Even if the investigator decides at Step 4 that a serious breach of the Code of Conduct has occurred, when the Council consider the complaint under Step 5, it is described as an “alleged breach” with the respondent entitled to “speak in their own defence”.

[48] This language confirms that the process at the preliminary stage is focussed on the nature of the complaint rather than what the respondent has to say about it. The investigator’s role is to make a preliminary assessment on whether the alleged conduct in the complaint would constitute a “material” breach of the Code if the investigator considers that a breach is established after hearing from the respondent at the full investigation. In other words, the preliminary investigation considers whether there appears to be a case to answer such that a full investigation is appropriate. It remains entirely open to an investigator, following a full investigation, to recommend that no action be taken by the Council.

[49] This is how the investigation proceeded here. At the preliminary investigation stage, the investigator reviewed the written complaint, discussed it with the staff member, spoke to another staff member and viewed the CCTV footage. The investigator reported to Dr Bidrose that he had determined that “the complaint” was material and of sufficient substance to justify a full investigation. There was no point initiating a full investigation, and calling upon Mr Vandervis to respond to it, if the complaint was frivolous or non-material.

[50] At the full investigation stage, a wider investigation took place. In addition to the telephone inquiries made at the preliminary stage, interviews were conducted with the staff member and other witnesses. Mr Vandervis was also interviewed for his account. It was only after this process was completed that the investigator reported to the Council. His report described his preliminary investigation as having concluded

“that potentially a material and substantive breach” had occurred. It is clear from this description that the investigator’s views were preliminary only. He set out the information he had obtained from the full investigation and said he had concluded a material breach had occurred on the basis of that investigation.

[51] We therefore reject the submission that whether Mr Vandervis had breached the Code of Conduct was predetermined at the preliminary investigation stage. It was a preliminary assessment that “the complaint” was material. We also reject the submission that Mr Vandervis should have had the opportunity to respond at the preliminary investigation stage. He did not need to respond unless it was decided that a full investigation was warranted.

#### *Full investigation*

[52] We agree with the High Court that the full investigation gave Mr Vandervis an opportunity to respond and that it was also clear from what was said to Mr Vandervis, and what Mr Vandervis said in response, that he knew the key details of the complaint during the full investigation.

[53] Specifically, Mr Vandervis’ response, as recorded by Mr Benham at the time, showed that he knew the staff member alleged that he was trying to get a waiver of his parking ticket as he said that was not his purpose and his concern was the parking meter signage. Mr Vandervis’ position that he did not know this allegation also contrasts with his own letter of complaint, which sought to have his parking ticket cancelled.<sup>25</sup> Mr Vandervis also knew, again as recorded by Mr Benham at the time, that his manner and tone was also at issue as he disputed that he had spoken loudly, aggressively and in an intimidating tone and was told that all the witnesses had a different view than him about this.

[54] Mr Benham’s affidavit for the High Court judicial review initially said:

When I spoke to him, Councillor Vandervis knew what the staff member said she experienced because he had been provided with a copy of her email.

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<sup>25</sup> We were advised at the Court of Appeal hearing that he had not paid the parking fee. It seems that it may have been paid by someone, however: see Hamish McNeilly “The mystery of who paid a \$12 parking ticket at the centre of a court case” *Stuff* (online ed, Wellington, 7 April 2022) <[www.stuff.co.nz](http://www.stuff.co.nz)>.

Notwithstanding, I continued to remind him of the specifics of the complaint about his behaviour as he raised a number of other issues with me during the interview. In response I reminded him it was not my role to take a view on other issues he raised.

[55] He corrected the first sentence of this at the High Court hearing (he had been called for cross-examination). He said he had understood that the staff member's complaint (that is, the "Full Incident Report" at [12] above) had been provided to Mr Vandervis but he now knew this to be incorrect. However, he stood by his evidence that the specifics of the complaint were put to Mr Vandervis despite repeated cross-examination on the matter. Mr Benham also said he gave Mr Vandervis the tenor of the evidence from the witnesses.

[56] Mr Benham's evidence is consistent with his contemporaneous records as investigator. We agree with the High Court on the basis of that evidence and the contemporaneous records that Mr Vandervis had knowledge of the substance of the complaint and what the witnesses had said about it.

[57] Mr Vandervis' principal concern seems to be that he did not know it was being said that he was trying to get out of a parking ticket when his complaint was about the parking meter. However, that was Mr Benham's conclusion about his conduct rather than what the complainant actually said. The staff member's account was that he was unhappy about the parking infringement he had received because of the signage on the meter. That accorded with his own account of his actions on that day and his written complaint on 17 September 2019. Whether he actually said to the staff member that he wanted his ticket waived (which she does not say) is somewhat splitting hairs.

[58] Because Mr Vandervis was not provided with the complaint and the written accounts of what the witnesses said, it is possible that he did not know in precise terms how his behaviour had been described. For example, he may not have known that the staff member had claimed that he had "stormed off". Investigators under this process might find it useful in the future to provide the written complaint to a person being investigated (with any necessary redactions) to avoid any later allegation that the person being investigated did not know the details of the complaint.

[59] Here, however, there is no doubt that Mr Vandervis knew the gist of the complaint. Specifically, he had come into the Customer Service office to complain about the misleading signage of a parking meter which meant that he had received a parking ticket and he was not happy about it (all of which he had himself referred to in his own complaint). There is also no doubt that he knew that he was said to have spoken loudly and inappropriately to the staff member. We consider this was sufficient to fairly provide him with the opportunity to respond.

#### *Council hearing*

[60] Mr Vandervis contends that the process errors and breach of natural justice in the investigation were not cured by the Council hearing because that hearing was confined to penalty. We have found that the complaint was made by the Chief Executive and there was no breach of natural justice. However, we also consider that the Council hearing gave Mr Vandervis a further and full opportunity to respond to the investigator's conclusion that breaches of the Code of Conduct had occurred.

[61] The report to the Council from the Executive Leadership Team informed the Council that it was for them to decide "whether a breach of the Code of Conduct [had] occurred, and if so, which, if any, of the sanctions" should be imposed. As the discussion at the meeting and the minutes show, this was a decision about whether to accept the report rather than a reinvestigation of the matter. The councillors discussed whether they accepted the investigator's conclusions having heard what Mr Vandervis had to say about them. One councillor made the point that Mr Vandervis must have been motivated by the poor signage rather than the \$12 ticket. The ensuing discussion was focussed on Mr Vandervis' treatment of the staff member. The discussion is consistent with the Council deciding to accept the investigator's report because of that treatment. They considered this conduct warranted a censure.

[62] We therefore consider that the Council hearing provided Mr Vandervis with another opportunity to be heard. At this time, he had received all of the information relied on by the investigator. It would have been open to the Council to decide to impose no penalty on Mr Vandervis having heard from him if they accepted what he

had to say. However, they were also entitled to accept the investigator's report and decide that he should be censured.

## **Result**

[63] The appeal is dismissed.

[64] The appellant must pay the respondents costs for a standard appeal on a band A basis with provision for one counsel and with the usual disbursements.

Solicitors:  
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