

IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
SITTING AS THE MUNICIPAL ELECTORAL TRIBUNAL

G13115571

VICTORIAN ELECTORAL COMMISSIONER

Applicant

V

CITY OF MELBOURNE

Respondent

MAGISTRATE: Magistrate M. Smith
WHERE HELD: Melbourne
DATE OF HEARING: 5/12/16
DATE OF DECISION:
CASE MAY BE CITED AS:

REASONS FOR DECISION

Catchwords:

APPEARANCES:

Counsel

Solicitors

For the Applicant

For the Respondent

HIS HONOUR:

1 This application is made pursuant to s.45(1)(c) of the *Local Government Act*
1989 (as amended) ("the Act").

2 The basis for the Commissioner's application was stated shortly as follows.

3 (1) A candidate was declared elected to the Melbourne City Council
and this candidate was not qualified to nominate as a candidate as she
did not hold a valid entitlement to be included on the voters' roll for the
Melbourne City Council.

4 The summary of basic facts is as follows:

5 On 22 October 2016, a General Election for the Melbourne City Council
as held (by postal voting concluding at 6.00 pm on 21 October 2016).

6 On 26 August 2016, Ms Brooke Wandin, submitted an Enrolment
application by Property Occupier with the Registrar for the Melbourne
City Council voters' roll.

7 On 20 September 2016, Ms Wandin completed and signed a
Nomination Form, nominating as a candidate for the election.

8 At that time the deputy returning officer, Ms Jill Esplan, appointed by
me on 25 August 2016 for the period of the Election, confirmed that
Ms Wandin was enrolled on the Melbourne City Council voters' roll and
accepted her nomination as a candidate for the Election.

9 Ms Wandin ran as a candidate in the Election.

10 On 31 October 2016, Ms Wandin was declared as the sixth elected
councillor for the Melbourne City Council.

11 Ms Wandin did not take the oath of office and on 8 November 2016
submitted her resignation for the Acting Chief Executive Officer of

Melbourne City Council.

12 On 10 November 2016, I received confirmation that Ms Wandin did not hold a valid entitlement to be enrolled on the Melbourne City Council's voters' roll at the time of the entitlement date at 4.00 pm on 26 August 2016.

13 Ms Wandin was therefore not qualified to nominate as a candidate in the Election.

14 It should be noted that the Melbourne City Council consists of one unsubdivided ward. There was therefore a single ballot-paper to elect nine councillors. There were 44 candidates for office. The election was by way of preferential voting in order to determine election by quota.

15 All candidates at this election including those persons elected were put on notice of this proceeding. Neither they, (including Ms Wandin), nor any representative of the City of Melbourne appeared, that being so, and the facts set out above being indisputable, it was appropriate to proceed to a determination of the application.

16 The first order sought from the tribunal by the applicant was a declaration that Ms Wandin, having been declared elected, was not duly elected, pursuant to s.46(1)(a) of the Act. This declaration is made.

17 The next order sought by the applicant was that a successful candidate effectively to replace Ms Wandin be determined by some form of recalculation or recount of the vote.

18 The legislative provisions relied upon by the applicant and otherwise relevant to the determination as to what form any recount or recalculation should take are in the first instance, clause 8 of Schedule 2 to the Act, and clause 9A of Schedule 2 to the Act.

- 19 "8 Retirement of a candidate.
- 20 (1) A candidate may retire before a declaration of an election is made
or, if an election is to be held, before the day of the election, only in
accordance with this clause.
- 21 (2) A candidate may retire before the day of an election if the
retirement will result in an uncontested election.
- 22 (3) If clause 9A(5) applies to a candidate, the retirement of the
candidate takes effect on and from the date the returning officer sends
the candidate advice under clause 9A(4)(b).
- 23 (4) To retire in any other circumstance, one of the following must
apply to the candidate -
- 24 (a) the candidate is not qualified to be a candidate as
required by section 28(1)
- 25 (b) the candidate is disqualified by section 29(1) or (2).
- 26 (5) If subclause (4)(a) or (b) applies to a candidate, the candidate may
retire by giving the returning officer -
- 27 (a) a written statement specifying that the candidate is not
qualified to be a candidate as required under section
28(1) or is disqualified by section 29(1) or (2) (as
appropriate) and include or attach evidence in support of
that statement; and
- 28 (b) a notice of retirement signed by the candidate.
- 29 (6) Retirement in accordance with subclause (2) or (5) takes effect on
the returning officer receiving -
- 30 (a) the notice of retirement; and

31 (b) if subclause (4) applies, the written statement specified in
subclause (5).

32 (7) If practicable, the returning officer must give public notice of a
retirement before the day of the election.

33 (8) The following provisions apply if the candidate has retired in
accordance with subclause (5) or is taken to have retired under clause
9A)5) -

34 (a) if the retirement of the candidate is effective after the ballot-
papers have been printed the returning officer must take all
practicable steps to remove the name of the retiring candidate
from the ballot-papers;

35 (b) if the returning officer receives a completed ballot-paper on
which the name of the retiring candidate has not been removed,
the name of the retiring candidate and any figure next to the
name are to be treated as removed and the ballot-paper is to be
given effect in the voter's order of preference in respect of the
remaining candidates;

36 (c) if a candidate retires, or is taken to have retired, after 4 pm on
the Monday before the day of the election, the returning officer
may permit the remaining candidates to remove the name of the
retiring candidate from their how-to-vote cards in a manner
approved by the returning officer.

37 9A Returning officer may query qualifications of candidate

38 (1) The returning officer must send written notice to a candidate for
election if the returning officer believes that the candidate -

39 (a) is not qualified to be a candidate for the office of

Councillor under section 28(1); or

40 (b) may be disqualified from nominating as a candidate under
section 29(1) or (2).

41 (2) A notice under subclause (1) -

42 (a) must be -

43 (i) personally served, or

44 (ii) sent by post or email to the postal or email address
specified to the candidate's nomination form; and

45 (b) must specify that the returning officer believes that the
candidate -

46 (i) may not be qualified to be a candidate for the
office of Councillor under section 28(1); or

47 (ii) is disqualified from nominating as a candidate
under section 29(1) or (2); and

48 (c) must specify the reason for that belief; and

49 (d) must invite the candidate to submit written reasons
explaining why the candidate should not be prevented
from being a candidate for election; and

50 (e) must specify the date by which the candidate must submit
written reasons (being a date not less than 1 day after the
date of the returning officer's written notice).

51 (3) The returning officer must take action in accordance with
subsection (4) of the returning officer -

52 (a) receives reasons from the candidate explaining why the

candidate should not be prevented from being a candidate for election but the returning officer is satisfied that the candidate is not qualified as specified in subsection (1)(a) or is disqualified as specified in subsection (1)(b); or

53 (b) does not receive any written submission from the candidate.

54 (4) The returning officer must -

55 (a) if nominations for the election have not closed, reject the nomination of the candidate and advise the candidate that the nomination has been rejected and the reasons for that rejection; or

56 (b) if nominations for the election have closed but the declaration of the election has not been made, advise the candidate that they are retired from the election and give reasons for retiring the candidate.

57 (5) For the purposes of subclause (4)(b) -

58 (a) the candidate's nomination is void from the date that advice is sent to the candidate by the returning officer; and

59 (b) the candidate is taken to have retired from the election on and from the date the advice is sent.

60 There are in fact three possible methods to employ in a recount or recalculation of the vote. The first as urged by counsel for the applicant was to adopt the formula set forth in Schedule 2 clause 8(8)(b) as set out above. The difficulty with applying this formula lies in the wording of Schedule 2 clause 8(8)).

61 "The following provisions apply if the candidate has retired in accordance with subclause (5) or is taken to have retired under subclause 9A(5)."

62 Manifestly, Ms Wandin, did not retire prior to the declaration of the poll. It is clear the recount, if it can be so described, is included in Schedule 2 clause 8 as one of the steps that a returning officer is able to take in order to rectify or mitigate the consequence of an actual retirement of a candidate at some stage post nomination and prior to the declaration of the poll. In my opinion it should be seen strictly in this light, and not as a general prescription for governing any recount.

63 It is an assumption, and it can be an assumption only, that a voter faced with the removal of their preferred candidate would have allocated their preferences in the same manner as they would have allocated them if the candidate had in fact remained. In other words that they would merely have promoted their preferences once their first preference did not exist. With great respect to any court which may have decided on the particular facts before it, that such an inference might properly be drawn, I would only say that the drawing of an inference in law requires that there be firstly the clear establishment of facts upon which a further fact or conclusion might properly be deduced. I only ask somewhat rhetorically, upon what concluded facts in the present case or in any secret ballot, could such an inference safely be drawn?

64 The second option canvassed for a recount or a recalculation was a full recount where all votes cast for the disqualified candidate were treated as informal. In effect these votes were informal, as the candidate of the electors' choice could not be elected by the casting of those votes. The effect of treating these votes as informal would be in effect a form of retrospective disenfranchising of all voters who voted for the ineligible candidate. Furthermore, an effect of declaring these votes to be informal would result in a revision of the calculation of the number of votes required to achieve the quota for election. Both upon this scenario, and the first scenario as discussed, there is a more than theoretical possibility that as well as filling the now vacant position on the council, a person or persons duly elected, might find themselves no longer

elected.

65 The third option is to be found in section 46(1)(a) of the Act and section 46(3) of the Act.

66 "If a municipal electoral tribunal has declared that a person declared elected was not duly elected and has not declared another candidate duly elected instead, an extraordinary vacancy is caused by the declaration of a municipal electoral tribunal on the day which applies under section 38(2A)."

67 The process to be followed to fill an extraordinary vacancy of this kind, is by way of a countback of the votes. This process was explained to the tribunal by a representative of the Victorian Electoral Commission.

68 It must be said that none of these three options present as wholly satisfactory. What can be said to be the basic common law of elections is that any election should be held in such manner that affords each voter a free and fair opportunity to vote for the candidate of their choice. There is clearly no completely compelling basis in fact or logic to accept that any recount or recalculation caused by these circumstances has effectively afforded each voter that opportunity. Be that as it may, a choice must be made. In my opinion the choice clearly lies between declaring each vote cast for Ms Wandin as informal, and the procedure set out in section 46(3).

69 The Commissioner's position urged the first option as discussed above primarily on the basis of what he "would have done" had he been able to retire Ms Wandin at any time prior to the declaration of the vote. In other words the tribunal should proceed on the basis "as if" Ms Wandin had retired and therefore apply the procedure in Schedule 2 Clause (8) (8) as set out above.

70 In my opinion, this is simply not tenable. At no time did Ms Wandin retire. Once the poll has been declared the relevant provisions concerning the powers of a

returning officer upon the retirement of a candidate no longer apply. That candidate, eligible or otherwise has been declared elected. The returning officer, or indeed any other person competent to apply under the Act has thereafter 14 days to seek an appropriate declaration from the tribunal overturning that candidate's election. There is moreover a legislative basis in the Act for proceeding in accordance with sections 46(1)(a) and 46(3). Of the alternatives discussed I am clearly of the view that this is the better of them.

71 A fourth alternative was discussed, (or perhaps "aired" would be better), and that is to say a declaration that the whole election was void. This course however is neither necessary nor desirable, especially in view of the legislative provisions I propose to adopt.

72 The orders of the tribunal will be therefore -

73 (1) The applicant have leave to amend his application.

74 (2) Pursuant to section 46(1)(a) of the *Local Government Act 1989* (as amended) declare that Brooke Wandin, a person declared elected as councillor for the Melbourne City Council was not duly elected.

75 (3) Application otherwise dismissed.

76 Subject to any steps that might be taken to review this decision, therefore the procedure governing the filling of an extraordinary vacancy in accordance with s46(3) will be put into effect by the VEC, acting on behalf of the City of Melbourne.
