

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2025] NZEmpC 44
EMPC 321/2023**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

BETWEEN SIMON MUTONHORI
Plaintiff

AND WAIROA DISTRICT COUNCIL
Defendant

Hearing: 23 – 25 September 2024
(Heard at Napier)

Appearances: S Mutohori, plaintiff in person
C McGuinness, counsel for the defendant

Judgment: 14 March 2025

JUDGMENT OF JUDGE J C HOLDEN

[1] Simon Mutohori has challenged two determinations of the Employment Relations Authority.¹ The challenges are on a de novo basis.

[2] Mr Mutohori claims:

(a) he was unjustifiably disadvantaged by the Wairoa District Council:

(i) removing of some of his duties; and then

¹ *Mutohori v Wairoa District Council* [2023] NZERA 468 (Member Loftus); and *Mutohori v Wairoa District Council* [2023] NZERA 469 (Member English)

(ii) suspending him.

(b) he was unjustifiably dismissed by the Council.

[3] For the reasons set out in this judgment, Mr Mutohori's challenges are unsuccessful.

Issues arose in respect of Mr Mutohori's employment

[4] Mr Mutohori was first employed by the Chief Executive of the Council in January 2020 in the role of Customer Manager, Regulatory. He was promoted to the role of Group Manager, Planning and Regulatory Services, in November 2020.

[5] In 2022, several issues arose with respect to Mr Mutohori's employment.

Issues regarding FBT return

[6] As part of Mr Mutohori's employment, he had access to a Council pool car. In April 2022, the Council's Senior Financial Accountant emailed Mr Mutohori with respect to his use of the pool car. In her email, she advised Mr Mutohori that the pool car appeared to have been used for trips that may have a private benefit. She asked Mr Mutohori to confirm whether any of several trips identified by her were for business purposes and if so, to provide the details. She asked Mr Mutohori to advise if they were for personal use and if so, to confirm whether permission had been given by the Chief Executive in advance of any private trips so that she could complete the Council's Fringe Benefit Tax return correctly.

[7] Mr Mutohori did not supply the information requested. At the hearing, he continued to maintain that he had not been required to fill in an FBT form before and there was nothing in his employment agreement that required him to do so.

[8] After he had not answered the Senior Financial Accountant's email, the matter was pursued by the Chief Financial Officer at the Council. When still nothing was received from Mr Mutohori, the matter was escalated to Mr Tipuna, the Chief Executive, who discussed the matter with Mr Mutohori and then, by email,

confirmed that Mr Mutohori was directed to complete an FBT form as advised by the Finance team. Mr Tipuna confirmed that he deemed that to be a reasonable instruction and direction and that he expected the FBT form to be completed by the end of the week and submitted to the Finance department for processing. Still nothing was received.

[9] It is worth noting that other employees also were asked for explanations and to complete FBT forms, and that all others cooperated.

[10] The Chief Financial Officer gave evidence that the lack of a response from Mr Mutohori placed the Council at some risk and created \$1,400 of unnecessary cost in tax compliance.

[11] The Chief Financial Officer also raised concerns with Mr Tipuna about Mr Mutohori's reportedly inappropriate behaviour towards the Senior Financial Accountant, including comments along the lines of "I do not have to listen to you."

IANZ accreditation

[12] As Group Manager, Planning and Regulatory Services, Mr Mutohori was responsible for a portfolio that included planning, environmental health, compliance, liquor licencing, dog control, freedom camping, and bylaws. It was one of the largest portfolios in the Council. One of Mr Mutohori's responsibilities was with respect to the Council's Small Building Control Authority (BCA) that undergoes an IANZ accreditation assessment each year. In 2022 the assessment was held onsite over the week of 4 to 8 April 2022.

[13] In 2022, the Council received an unusually high number of recommendations for general non-compliances (GNCs) and the report identified not only the GNCs but also issues regarding what was said to be an "unwillingness on behalf of the BCA management to understand and engage in the scheme."

[14] Some of the GNCs were easy to fix and the BCA team was working on that and preparing an action plan.

[15] However, Mr Tipuna learned that Mr Mutohori was quite dismissive of a number of the GNCs, regarding them as trivial and not worth worrying about. On 19 April 2022, Mr Tipuna received an email from Alan Clark, based at the Ministry of Business, Innovation, and Employment, raising concerns about the BCA's IANZ audit. Mr Clark said that the reason for MBIE's contact was "the unusual circumstances which presented in the assessment." This included the high number of GNCs, including some that IANZ had understood were to have been rectified following a previous assessment. Mr Clark also said:

At a management level, your BCA seems to have been unwilling to engage in the assessment process, and openly questioned the need for the BCA to adhere to the regulations at all. I must say, while I find this attitude disappointing, I was not surprised, as I have had previous correspondence with the building control manager in which the value of assessments was questioned, along with criticism of IANZ 'one-size-fits-all' approach and IANZ's focus on 'trivial process issues.'

[16] As a result of receiving this email, Mr Tipuna spoke to Mr Mutohori, who essentially maintained his position, as set out in Mr Clark's email. Mr Tipuna asked Mr Mutohori to consider adjusting his communication style, including his use of words such as "trivial". Mr Tipuna wrote back to Mr Clark confirming that the Council sought to adhere to the relevant regulations and that the action plan to address the GNCs was well-advanced and would be ready by IANZ's deadline.

[17] On 6 May 2022, Mr Tipuna went to check in on the BCA team and to farewell one of the senior members of that who was leaving the Council. When Mr Tipuna asked that person how things were going with IANZ, the response was along the lines of "not good". Mr Tipuna was concerned by this response and spoke to the Team Manager. From his discussion with the Team Manager, Mr Tipuna understood that the team was in crisis.

[18] Mr Tipuna urgently met with the BCA team. Mr Mutohori was not at the meeting; he was away from the office at the time that it occurred.

[19] The other team members explained that Mr Mutohori continued to maintain that the BCA team should not be wasting time submitting responses to matters that he thought were "trivial". The team said they were concerned about the Council losing

its IANZ accreditation, and that they had lost confidence in Mr Mutohori and did not know what to do.

[20] At that stage, Mr Tipuna felt he had to act urgently and directed that the Team Manager step in to take responsibility for the work but, as the Team Manager did not wish to work with Mr Mutohori, he would report directly to Mr Tipuna on the accreditation.

[21] Mr Tipuna advised Mr Mutohori of this by email dated 6 May 2022.

[22] On that day, Mr Tipuna also prepared a letter to Mr Mutohori raising issues of potential serious misconduct. That letter raised five issues:

- (a) Failure to follow reasonable instructions (the FBT return issue);
- (b) A formal complaint from the Group Manager of Finance and Corporate Support (covering the failure to comply with the requirement for an FBT return, and also Mr Mutohori's alleged behaviour towards the Senior Financial Accountant);
- (c) Placing the Council's IANZ accreditation at risk;
- (d) Loss of confidence from the Mayor and elected members; and
- (e) Feedback from staff regarding Mr Mutohori's conduct.

[23] Mr Tipuna had hoped to meet with Mr Mutohori on that day, but did not manage to do so until 13 May 2022, which was when he gave the letter to him.

[24] After giving Mr Mutohori the letter, Mr Tipuna emailed him to set up a meeting to hear Mr Mutohori's responses to the matters of concern. That email set out a proposed timetable of a meeting on 18 May 2022, to receive Mr Mutohori's responses, and then an outcomes meeting on 25 May 2022. Mr Tipuna advised that possible outcomes included putting Mr Mutohori on a performance improvement plan, a warning being issued for serious misconduct, or possible dismissal. The email

also said that, while Mr Tipuna had chosen not to suspend Mr Mutohori at that stage, he would “continue to monitor the situation and will have this option if required.”

Events followed the raising of concerns

[25] After Mr Mutohori received the letter on 13 May 2022, he forwarded it to all regulatory staff (not just the four BCA staff), with highlighting.² The parts Mr Mutohori highlighted said:

- “I sought feedback about the IANZ accreditation audit and process from Council staff; I have since received feedback from Council staff that the views expressed by you throughout the audit process are still held by you.”
- “I have also received feedback from BCA staff that they have lost confidence in your abilities and, as such, this places Council’s IANZ accreditation at serious risk.”
- “Verbal feedback from staff regarding your conduct” (a heading)

[26] The covering email from Mr Mutohori to the regulatory staff advised, “In accordance with our team values and in the interests of transparency, I have decided to share with you the attached letter so that you are informed.”

[27] The team manager of the BCA team was very concerned about Mr Mutohori sharing the letter, especially with the highlighting, and forwarded the email and letter to the Council’s human resources team. When Mr Tipuna learned of the matter, he shared the team manager’s concern as he considered that sending the email broadly, to people not involved with the issues, seemed intended to disrupt the disciplinary process and the workplace.

[28] Another incident occurred the following Monday, 16 May 2022, when Mr Tipuna was alerted to a concern that Mr Mutohori might have accessed the personal remuneration information of another staff member, and shown that to

² There were approximately 12 regulatory staff.

somebody else. The same day, Mr Tipuna became aware that Mr Mutohori had spoken to the Council's Māori Relationships Manager in a way that the Māori Relationships Manager thought undermined Mr Tipuna and that he considered was "unbecoming of a group manager."

[29] At that stage, Mr Tipuna felt he had an avalanche of issues involving Mr Mutohori. The email and highlighted letter he had sent regulatory staff on the Friday afternoon was of particular immediate concern given its effect on other staff. Mr Tipuna met with Mr Mutohori on the afternoon of 16 May 2022, at which time he advised Mr Tipuna he was proposing to suspend him. Mr Mutohori was asked for his response to that proposal, but said nothing. After the meeting, Mr Mutohori was suspended by email with effect from 5pm that day, with the suspension to last until the outcomes meeting scheduled for 25 May 2022. The suspension was on pay.

[30] Almost immediately, Mr Mutohori replied to Mr Tipuna, copying in senior staff and officers of the Council, including the Mayor and elected members. In his email he alleged that the process being followed was flawed and a sham, and that it included vexatious, frivolous and baseless allegations of misconduct against him. The email accused Mr Tipuna of blackmailing and bullying him and made other allegations about him, including that he had predetermined the outcome of the process. Mr Mutohori advised that he would be raising and pursuing a personal grievance against the Chief Executive in due course.

[31] Mr Tipuna considered that sending that email as widely as Mr Mutohori did, including to the Mayor and elected members, was completely inappropriate.

[32] On 16 May 2022, Mr Mutohori also applied for three weeks' study leave, to attend what Mr Mutohori described as "a professional development study tour to Texas". This was part of an overseas manager exchange programme that had been agreed to in December 2020.

[33] There followed some correspondence between Mr Tipuna and Mr Mutohori's then legal representatives.

[34] The solicitor acting for the Council advised Mr Mutohori's solicitor on 24 May 2022 that the Council did not support Mr Mutohori attending the study programme as a representative of the Council at that time, but that, depending on the outcome of the disciplinary process, the Council might support Mr Mutohori attending the study programme at some other time. On 31 May 2022, Mr Tipuna also wrote to Mr Mutohori making it clear that study leave was not approved and that, if Mr Mutohori nevertheless took the trip, it would not be regarded as a Council trip. Notwithstanding this advice, Mr Mutohori undertook the study tour to Texas. The meeting proposed for 25 May 2022 did not take place.

[35] There were further delays, and ultimately a meeting took place on 5 July 2022. Mr Mutohori asked that the Council record the meeting on Zoom. Mr Tipuna declined that request but invited Mr Mutohori to record the meeting himself, and to take notes. In the event, Mr Mutohori chose not to respond to the various allegations.

[36] Mr Tipuna provided Mr Mutohori with his findings and tentative determinations regarding the allegations against him by letter dated 14 July 2022.

[37] Mr Tipuna recorded that he had found that Mr Mutohori had not followed the lawful and reasonable instruction to complete the FBT form and, on that issue, Mr Tipuna tentatively considered that a final written warning for serious misconduct was the appropriate outcome.

[38] In respect of the allegation of inappropriate behaviour towards a Finance team member, Mr Tipuna recorded his decision that there was a breach of the Code of Conduct, and that his tentative view was that a written warning for misconduct to stay on Mr Mutohori's record for 12 months would be the appropriate outcome.

[39] Mr Tipuna found Mr Mutohori had placed the Council's IANZ accreditation at risk, and tentatively was of the view that this too was serious misconduct, warranting a final written warning.

[40] Mr Tipuna considered that sending the email to regulatory staff caused him to lose trust and confidence in Mr Mutohori, and that his tentative decision on that issue was that termination of employment on notice was the appropriate outcome.

[41] Mr Tipuna reached a similar tentative decision in respect of Mr Mutohori's email to the Mayor, elected members, and other staff on 16 May 2022. That is, that it was serious misconduct and that termination of employment on notice was appropriate.

[42] Overall, however, Mr Tipuna found that Mr Mutohori's behaviour towards him was extreme and confrontational and that he found it intimidating and wholly unreasonable. On that basis, his tentative view was that it was not possible for him to have trust and confidence in Mr Mutohori going forward as a senior manager at the Council, with the result that the outcome could be summary termination of his employment.

[43] Mr Mutohori was invited to respond to Mr Tipuna's tentative decisions, either at a meeting on 28 July 2022 or in writing to be received by midday on that date.

[44] Despite being advised that the employment-related process was a confidential one between Mr Mutohori and Mr Tipuna, as his employer, Mr Mutohori reacted by texting the Mayor. On learning of this, by letter dated 14 July 2022, Mr Tipuna advised Mr Mutohori that he would also take the text into account when weighing up matters relating to trust and confidence. He invited Mr Mutohori's response.

[45] Mr Mutohori did not attend a meeting on 28 July, nor did he respond in writing by that date, despite the Council's solicitor emailing him on 25 July, reminding him of his ability to respond.

Mr Mutohori was dismissed

[46] On 3 August 2022, Mr Tipuna made his final decisions, which confirmed his tentative decisions as contained in his letter of 14 July.

[47] He wrote to Mr Mutonhori that day confirming his decisions, which ultimately meant Mr Mutonhori's employment was terminated, summarily.

[48] Mr Mutonhori was advised that any of his personal property at the Council offices would be itemised and boxed up and returned to Mr Mutonhori and that, if he had any queries, he could contact the People and Capability Manager at the Council.

[49] Mr Mutonhori says that his electronic data and personal property was destroyed after his employment ended. This, he said, included some personal papers, clothing, jewellery, and wall hangings.

The approach to be taken is identified in the Employment Relations Act

[50] Where an employee raises a personal grievance, the question for the Court is whether the dismissal or action complained of was justifiable, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.³

[51] In applying the test in circumstances where the employer is considering taking action with respect to matters where the employee may be at fault, the Court must consider the matters in s 103A(3) of the Employment Relations Act 2000:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee;
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee;
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

³ Employment Relations Act 2000, s 103A(1) and (2).

- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee, before dismissing or taking action against the employee.

[52] It does not follow that strict adherence to s 103A(3) of the Act will render an action by an employer justifiable.⁴ The Court is not precluded from considering other factors that it thinks appropriate.⁵

[53] Section 103A(3) also does not mean that the employer's conduct is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed.⁶ Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.⁷ The Act also explicitly constrains the Court from determining a dismissal or an action to be unjustifiable solely because of defects in the process followed by the employer if the defects were:⁸

- (a) minor; and
- (b) did not result in the employee being treated unfairly.

[54] If the Court upholds an employee's personal grievance, it may provide for remedies. Relevant to these proceedings are the remedies of payment of:⁹

- (a) the whole or any part of wages or other moneys lost by the employee as a result of the grievance,

⁴ *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [26].

⁵ Employment Relations Act 2000, s 103A(4).

⁶ *Angus v Ports of Auckland*, above n 4, at [26].

⁷ *New Zealand (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd* (1990) ERNZ Sel Cas 582 at 595.

⁸ Section 103A(5).

⁹ Section 123.

- (b) compensation for humiliation, loss of dignity, and injury to the feelings of the employee, and
- (c) compensation for loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

[55] Under s 123 of the Act, the Court has an overarching discretion with respect to the nature and the extent of the remedies to be provided, including whether remedies should be provided at all.¹⁰

[56] Under s 124 of the Act, where the Court is considering remedies for a personal grievance, it must, in deciding both the nature and the extent of the remedies to be provided, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[57] Previous decisions of the Court have confirmed that a reduction of fifty per cent would be rare, but ultimately a higher percentage may be applied.¹¹ In *Xtreme Dining Ltd v Dewar* the full Court noted, however, that where there is a finding that the conduct of the employee is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Court should not use s 124 of the Act, but should use its discretion to decline remedies under s 123.¹² That approach is consistent with the Court's jurisdiction under s 189(1) of the Act to act in equity and good conscience as it thinks fit.¹³

¹⁰ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [216].

¹¹ *Donaldson & Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920 at 929.

¹² *Xtreme Dining Ltd v Dewar*; above n 10, at [216]; and *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165 at [320].

¹³ *Salt v Governor of Pitcairn and Associated Islands* [2008] NZCA 128, [2008] 3 NZLR 193 at [83].

Mr Mutohori makes a number of complaints

[58] Mr Mutohori says there was no reason or rationale behind the directive for him to complete an FBT form and that he was not contractually obliged to do so. He says he did not enjoy any fringe benefits from the Council.

[59] He says the allegation regarding the IANZ audit was frivolous and without merit and was made as a direct reaction to Mr Mutohori's notice of his intention to undertake his study leave.

[60] Mr Mutohori says that on 6 May 2022, the Council unilaterally and unjustifiably changed his employment agreement by removing some of his duties without consultation. In particular, he says, the responsibility to supervise the BCA team on the IANZ audit was taken away with immediate effect and he was advised of that by way of an email.

[61] In that regard, he says there was a breach of natural justice as Mr Tipuna was acting as the complainant, investigating witness, and final decision-maker, with an obvious conflict of interest. He says this continued throughout the disciplinary process in which there was a blurring of disciplinary and performance issues.

[62] Mr Mutohori claims that all the allegations of misconduct that formed the basis for the Council's actions are unsubstantiated and baseless; they are, he says, based on speculative personal opinion over predetermined and unfounded claims. Mr Mutohori denies that there was any misconduct or serious misconduct.

[63] He says that the process run by the Council was defective and biased and that there was a conflict of interest that undermined natural justice. He says the outcome was pre-determined. He says that Mr Tipuna ran a sham disciplinary process with his lawyer without the involvement of any other neutral person.

[64] He also says there was no proper investigation of the allegations, and that the final decision took into account new allegations that had not been included in the original letter, which I take to mean the letter dated 5 May 2022. Mr Mutohori says that relevant information about allegations were not disclosed when requested.

[65] He says there was no consideration of alternative options for disciplinary action, or of his clean employment record or job performance.

[66] He says that the decision to suspend him was made without him having an opportunity to respond to that proposal and that it was an evasive action showing vindictiveness calculated to frustrate his study trip to Texas.

[67] In summary, Mr Mutonhori says that the removal of his duties, his suspension and the termination of his employment were procedurally and substantively unjustifiable. He says the Council did not follow due process in the disciplinary process and that the procedural unfairness was so significant that the outcome could not be fair and justifiable.

[68] He seeks various sums covering earnings related compensation, compensation for humiliation, loss of dignity and injury to his feelings, and compensation to reimburse him for various benefits and expenses, and for the loss of his personal property. He also seeks a penalty against the Council.

[69] He says too that the actions of the Council unjustifiably disrupted his professional development, including with respect to his trip to Texas, which had previously been approved and caused him to be dropped from a diploma course that he was undertaking when he was only a couple of months away from completing his diploma. He says too that the Council failed to renew his membership of Taituara (Society of Local Government Managers).

[70] As noted, Mr Mutonhori says that the Council destroyed his property after he was dismissed.

[71] Mr Mutonhori also makes allegations of breach of good faith, including in respect of a lack of a performance review.

[72] I turn now to the three core claims.

The removal of responsibility was justifiable in the circumstances

[73] The situation faced by Mr Tipuna regarding the IANZ audit was urgent.

[74] Although Mr Mutohori was not present at the BCA team meeting, and the removal of responsibility of the audit was not discussed with him before it took effect, Mr Tipuna had already discussed the issues raised by Mr Clark with Mr Mutohori and the views Mr Mutohori expressed corresponded with those reported by the BCA team.

[75] In the circumstances at the time, it was reasonable for Mr Tipuna to assume responsibility for that aspect of Mr Mutohori's work.

[76] Further, even if he ought to have spoken to Mr Mutohori before taking over that responsibility, that would have been a minor defect in the process that did not result in Mr Mutohori being treated unfairly.¹⁴ Maintaining the IANZ accreditation was of particular importance to the Council and that had been made clear to Mr Mutohori who was repeatedly defiant towards the work required.

[77] Finally on this issue, if I had found the removal of responsibility for the IANZ audit was an unjustifiable disadvantage, the modest compensation of the Act that otherwise would have been payable under s 123(1)(c)(i) would have been reduced significantly, due to Mr Mutohori's contribution to the situation that gave rise to his personal grievance.¹⁵

Mr Mutohori's suspension was justifiable

[78] The forwarding by Mr Mutohori of the letter of 13 May 2022 was inappropriate, the more so because of the highlighting, which was upsetting to the BCA team.

[79] The suspension that followed no doubt disadvantaged Mr Mutohori; the question is whether that was justifiable.

¹⁴ Employment Relations Act 2000, s 103A(5).

¹⁵ Section 124.

[80] An employer is required to be fair to an employee when considering suspension. But that issue must be looked at in a sensible, flexible, and reasonable way to ascertain what the requirements of fairness are on the particular occasion and in the particular surrounding circumstances.¹⁶ By its nature, suspension often needs to be considered and implemented quickly, and the Court may need to take this into account in assessing the requirements of natural justice in any particular case.¹⁷

[81] A suspension is not justifiable on the basis of suspicions of misconduct but may be justifiable where the employer has good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.¹⁸ This would include, for instance, creating adverse impacts on other employees, which should be handled promptly.¹⁹

[82] Mr Tipuna was already concerned about the impact of Mr Mutohori's behaviour on the BCA team. Following the forwarding of the email with highlighting, the BCA team manager reported that the team felt negatively affected and targeted, exacerbating Mr Tipuna's concerns. I consider there was a justifiable basis for Mr Tipuna's decision to suspend Mr Mutohori from the workplace on pay.

[83] He had foreshadowed that possibility in his letter dated 6 May 2022, given to Mr Mutohori on 13 May 2022, and he met with Mr Mutohori on 16 May and advised him that he was proposing to suspend him so that Mr Mutohori could respond to that proposal prior to the decision being made.

[84] I also do not accept that there is any evidence to suggest Mr Tipuna was motivated at all by Mr Mutohori's application for study leave.

[85] Accordingly, I find that the decision to suspend Mr Mutohori was justifiable.

[86] Again, even if the suspension had been unjustifiable, the compensation payable to Mr Mutohori under s 123(1)(c)(i) would have been significantly reduced to take

¹⁶ *Tawhiwhirangi v Attorney-General, in respect of the Chief Executive, Department of Justice* [1993] 2 ERNZ 546 at 559.

¹⁷ *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587 at [104].

¹⁸ *Singh v Sherildee Holdings Ltd* EmpC AC53/05, 26 October 2005 at [91].

¹⁹ *Graham v Airways Corporation*, above n 17, at [104].

into account Mr Mutonhori's contribution to the situation that gave rise to Mr Tipuna suspending him, namely behaviour which could have a foreseeably negative impact on his colleagues.

The dismissal was justifiable

[87] The disciplinary process in respect of Mr Mutonhori was an extended one, in part because of the correspondence between the parties and also because of Mr Mutonhori's trip to Texas.

[88] Although the initial letter dated 6 May 2022 did not include all the issues that were considered, in particular those that arose after that letter was sent, the letters of 26 May and 14 July 2022 added those further concerns and Mr Mutonhori was invited to address Mr Tipuna on those.

[89] The allegations against him were therefore clear, and Mr Mutonhori had the opportunity to respond to them. I am also satisfied that Mr Mutonhori had the information necessary for him to respond.

[90] Although Mr Mutonhori has raised concerns regarding bias and suggested that an independent investigation was required, I am not satisfied that the Council, or Mr Tipuna, was at fault in either regard. Mr Tipuna was Mr Mutonhori's employer, and he was entitled to consider the matter himself.²⁰ Due to the personal nature of employment relationships it is accepted that employers are usually not in a position of complete neutrality.²¹ What is required to establish bias in the decision-making process of an employer is evidence that the fairness of the employer's actions and/or decisions was compromised.²² Mr Mutonhori has not provided such evidence.

[91] Likewise, I do not accept there was predetermination. I acknowledge that after his employment ended, Taituara emailed Mr Mutonhori to advise that, in July 2022, the Council had advised Taituara that it would not be renewing Mr Mutonhori's

²⁰ See *New Zealand Tramways IUOW v Auckland Regional Council* [1992] 2 ERNZ 883 at 891 where the Court stressed that the employer is entitled to assess whether there are grounds for dismissal and that bias does not arise by virtue of their capacity as employer.

²¹ *Yan v Commissioner of Inland Revenue* [2015] EmpC 36 at [48].

²² At [48].

membership at that stage. While that might tentatively support that the decision to dismiss had already been reached, taking that step was understandable given the position reached in the disciplinary process by that time, and considering the other disciplinary outcomes that may have been reached had Mr Mutonhori not been dismissed. That advice to Taituara, which was not put to the Council witnesses, on its own is not sufficient to prove there was predetermination.

[92] I accept that Mr Tipuna was facing numerous issues with respect to Mr Mutonhori. His letter of 14 July 2022 went through the principal issues and considered them separately. After Mr Mutonhori failed to respond to that letter, Mr Tipuna made his final decisions, again going through each of the issues separately and reaching decisions with respect to them. Ultimately, Mr Tipuna's decision that Mr Mutonhori's defiant and inappropriate behaviour culminated in a loss of trust and confidence in him, and that summary dismissal was the appropriate outcome, was a decision that was open to Mr Tipuna as something that a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[93] Accordingly, I find that the dismissal of Mr Mutonhori on 3 August 2022 was justifiable.

Other matters that were raised

[94] Mr Mutonhori raised other matters that do not come within the claims before the Court. Nevertheless, the following comments are made.

[95] There was very little evidence provided with respect to Mr Mutonhori's allegation of a breach of good faith, including in respect of a lack of a performance review. was not a matter that was before the Authority. There is no finding with respect to that allegation.

[96] Mr Mutonhori made various complaints with respect to the Council's conduct while he was in Texas. The short point is that, as advised to Mr Mutonhori, that trip was not approved by the Council, and he was not there as a representative of the Council. Mr Mutonhori's complaints are not made out.

[97] The complaints claims with respect to Mr Mutohori's personal belongings also are not made out. He was offered the opportunity to contact the Council regarding his personal property in the letter of 3 August 2022 and did not endeavour to do so. In any event, there is insufficient evidence to support Mr Mutohori's claim that property was destroyed.

[98] The matters regarding Mr Mutohori's building surveyor diploma course and membership of Taituara would have been relevant to remedies if Mr Mutohori had succeeded with his claim of unjustifiable dismissal. However, even had they been raised as separate grievances, they would not have succeeded as they flowed from Mr Mutohori's dismissal, which was justifiable.

The Council is entitled to costs

[99] The Wairoa District Council has been successful in its defence of Mr Mutohori's challenges and is entitled to costs. In the event the parties are unable to agree on costs, the Council will have 28 days from the date of this judgment within which to file and serve any memorandum in support of its claim for costs. Mr Mutohori is to respond by filing and serving a memorandum within a further 21 days. Any reply from the Council then should be filed and served within a further seven days.

J C Holden
Judge

Judgment signed at 10.30 am on 14 March 2025