

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 468  
3173582

BETWEEN                      SIMON MUTONHORI  
Applicant  
  
AND                                WAIROA DISTRICT COUNCIL  
Respondent

Member of Authority:        Michael Loftus  
  
Representatives:              Applicant in person  
Charles McGuinness, council for the Respondent  
  
Investigation Meeting:        15 September and 23 September 2022 at Napier  
  
Submissions Received:        At the investigation meeting with additional written  
submissions on 28 September 2022  
  
Date of Determination:        22 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Mr Mutohori claims his employment with the Wairoa District Council (Council) has been affected to his disadvantage in a multiplicity of unjustified ways.

[2]     In particular he claims:

- (a)     The Council unilaterally removed various duties on 6 May 2022 without due process and an opportunity for Mr Mutohori to provide input;
- (b)     That unmeritorious allegations of misconduct were levelled on 6 May 2022;
- (c)     That Mr Mutohori was unjustifiably suspended on 16 May 2022;

- (d) That Mr Mutohori was unjustifiably locked out of his office and Council systems including e-mail; and
- (e) Mr Mutohori has been subjected to an improper and poorly conducted disciplinary process.

[3] Council denies Mr Mutohori has been treated improperly and claims anything which might be considered disadvantageous such as a conceded removal of duties and suspension can be justified.

### **This Determination**

[4] This is one in a series of matters involving these parties which, as far as the Authority is concerned, first came to its notice on 26 May 2022. That was the day Mr Mutohori lodged a statement of problem seeking interim orders. His primary interest was his ability to travel to the United States on a study tour which was effectively resolved by his simply choosing to go.

[5] That said the application also raised a series of unjustified disadvantage claims and it is those this determination addresses.

[6] Subsequent to this application and upon Mr Mutohori's return from the United States the parties attended mediation conducted by the Mediation Service of the Ministry of Business, Innovation and Employment. This occurred on 2 August 2022. It was unsuccessful and Mr Mutohori was dismissed the following day, 3 August.

[7] During the telephone conference at which this investigation was scheduled Mr Mutohori was encouraged to consider amending his application to include the dismissal and other events which followed this application. He refused and was adamant this application proceed, and that he is neither pleading, nor expecting I address any issues that arose after 16 May 2022. This assertion/approach was reiterated in oral evidence with the reason for proceeding being that he sought vindication prior to the local authority election in which he was standing for mayor of Wairoa. This was despite it being pointed out he could not expect a result in time.

[8] The events which occurred after 16 May will now be considered by another member who was allocated Mr Mutohori's subsequently lodged claim of unjustified dismissal. Also considered elsewhere were claims by the Council concerning a possible breach of mediation

confidentiality and other confidentiality requirements by Mr Mutohori in pre-election publicity.<sup>1</sup> Finally, and also to be considered elsewhere, is a later claim by the council regarding further alleged breaches of confidentiality.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[10] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

## **Background**

[11] Mr Mutohori was initially engaged by the Council on 10 February 2020 with terms and conditions specified in an individual employment agreement (IEA). As of 10 December 2020 he was promoted to Group-Manager – Planning and Regulatory Services and remained in that role until his dismissal. In the later role his duties included the management of statutory and regulatory functions, one of which was the oversight of the Council’s responsibilities as a Building Control Authority (BCA). He reported to the Chief Executive Officer, Kitea Tipuna, led some 25 staff (including contractors and consultants) and managed an annual budget of around \$5,000,000.

[12] Between 4 and 8 April 2022 the Council underwent an IANZ (International Assessment New Zealand) assessment. According to IANZ’s website it “... protects the health and wealth of New Zealand by ensuring that the companies who test or inspect the products and services you buy, consume, use or are surrounded by every day, are safe, accurate, and aren't doing us harm” “by ensuring ... building consent authorities ... meet international standards and can demonstrate that they are competent.” IANZ accreditation is a compulsory process about which the Council has no choice.

[13] Entering into the process the Council expected some 12 to 18 GNC’s (general non-compliances) though in Mr Tipuna’s view remediation is normally relatively straight forward,

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<sup>1</sup> *Wairoa District Council v Mutohori* [2022] NZERA 434

albeit time consuming. In 2022 the results were, however, disappointing with more than double the number of expected GNC's and on 14 April IANZ's lead assessor emailed Messrs Tipuna and Mutohori seeking an action plan to address the deficiencies no later than 16 May.

[14] On 19 April Mr Tipuna received an email from an MBIE (Ministry of Business, Innovation and Employment) official, Alan Clark. It raised the high number of GNC's before expressing concern that "... a number related to improvements the BCA assured IANZ had been put in place following the previous assessment, but which had not been implemented." The email then went on to state it was abnormal for MBIE to get involved at this stage but issues arose:

"... because of the unusual circumstances which presented in the assessment. 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's 'one size fits all' approach and IANZ's focus on 'trivial process issues'.

[15] The email then on to say that while others also expressed the view the IANZ process was both expensive and challenging the law remained the law before commenting further on the response from Wairoa and the fact the BCA function could be transferred to another council if necessary.

[16] The manager in question was Mr Mutohori and his evidence leaves little doubt he still holds the views attributed to him in the email and is not averse to airing them. Indeed, he made it very clear that while he might manage regulatory enforcement functions he considered the regulatory parameters within which he worked guidelines which should be disregarded if he thought that appropriate. He stated he did not mince his words with Mr Clark when discussing 'stupid laws' and that to be kind to officials to get accreditation was 'simply corrupt'.

[17] Mr Tipuna says he then met with Mr Mutohori who advised the rectification plan was well advanced but who took the opportunity to again air negative views about the process before stating some of the deficiencies were trivial and did not warrant any effort. Mr Mutohori also expressed concerns about the cost of the IANZ process.

[18] The response concerned Mr Tipuna given the fact any deficiency, trivial or not, had to be addressed as the audit process was mandatory. He was also of the view that this was not the

time nor place to enter into discussions with IANZ about the merits of their assessment process and that should wait till after rectification. The same applied to cost, which he accepts is an issue especially for a small Council like Wairoa but, again, this was neither the time nor place to enter into such discussions. He says he advised Mr Mutohori accordingly and then assured Mr Clark the issues would be addressed.

[19] Around the same time there were, or had recently been, other issues involving Mr Mutohori. In the recent category was one involving his non-adherence to consultation requirements when considering the adoption or amendment of by-laws.

[20] More significantly, and then current, was an issue concerning his adherence to reporting requirements for fringe benefit tax (FBT) assessment purposes. On 11 April Mr Mutohori was questioned about specific examples of his use of a council vehicle and whether or not they had been for private or business purposes. It was stated, quite correctly, that this information was needed for the preparation of the Council's FBT return.

[21] Mr Mutohori's reply was that the request was "... unwarranted, offensive and demeaning of my person and the office I hold. ...[and this] has got to stop forthwith". A continuing lack of response from Mr Mutohori led to further emails and an escalation of the matter to Mr Tipuna by the finance team. In the escalation email it is observed "... Simon believes he is above and outside the scope for NZ Tax legislation and also exempt from providing essential information to colleagues".

[22] Answers Mr Mutohori gave during the investigation only confirm that remains the case and he still fails to understand the import or necessity for the request. His answers also strongly indicate he was offended the request had come from a female who occupied what Mr Mutohori considered a position of lesser seniority in the Council structure.

[23] On 6 May Mr Tipuna visited the BCA team to both the check on the development of the remediation plan for IANZ given the looming deadline and to say farewell a team member who was leaving the Council's employ that day. Indeed, the employee leaving was considered to be the subject matter expert and important to the responses' completion.

[24] That visit led to a meeting at which BCA team members expressed the view the Council's BCA accreditation was at risk as Mr Mutohori had neither the skills nor, more importantly, a willingness to address the deficiencies and get the IANZ assessment successfully

completed. The evidence, from more than one of those present, was that they asked Mr Mutohori be relieved of responsibility and Mr Tipuna take direct charge.

[25] It would appear from the evidence the staff's concerns were fuelled by a meeting they had had with Mr Mutohori the previous day at which it is said he "went on a rant", advised he was going to tell IANZ to go away and "seemed fixated on resisting the IANZ assessors". Mr Mutohori denies he acted this way on 5 May though a number of other answers he gave indicate his views are consistent with such an approach.

[26] This, it is fair to say, concerned Mr Tipuna as Council was not only losing the subject matter expert but another employee as well. The situation was exacerbated by the fact the employee most likely to step up and complete the IANZ tasks was reticent to do so on the grounds he had lost all confidence in Mr Mutohori. The evidence is he would only agree to do so if Mr Tipuna took charge.

[27] The result was that Mr Tipuna decided to personally manage the council's response to the IANZ audit himself and in doing so relies upon a contractual clause, 2.4, that provides Mr Mutohori's "... duties and responsibilities may be changed, modified and updated as required to meet the needs of the Council". Mr Mutohori was advised of this by email at 2.30 that afternoon, 6 May.

[28] As events turned out Council had to seek an extension for its response to the IANZ assessment and this was eventually completed on 26 August 2022.

[29] After further thought Mr Tipuna then concluded events to date gave rise to potential disciplinary issues. To that end he sent Mr Mutohori a further email around 5.00pm asking that he attend a "notification meeting" at which he would initiate a process whereby they could discuss Mr Tipuna's concerns about Mr Mutohori's performance and behaviour. The email ended with a request Mr Mutohori advise his availability.

[30] The concerns were outlined in a further letter Mr Tipuna prepared that day and included:

- (a) A failure to follow reasonable instructions which referred to an instruction he complete the FBT return;
- (b) A complaint from the GM finance which again refers to the FBT issue;
- (c) Placing the council's IANZ accreditation at risk;

- (d) A loss of confidence with respect to both the Mayor and other elected members of council which stemmed from the by-law issue and advice Mr Mutohori had given; and
- (e) Verbal feedback from staff suggesting conduct that was not in the best interests of the employer and the employment relationship.

[31] There was a further meeting between Mr Mutohori and his staff on 9 May where it is said Mr Mutohori remonstrated about an “MBIE dictatorship” and alleged Mr Tipuna had an agenda and was using the BCA team as pawns to achieve his ends. Two of the team reported the meeting to Mr Tipuna and advised they had told Mr Mutohori to “pull his head in”.

[32] On 10 May, and having had no response to his 6 May email, Mr Tipuna sent a follow up to Mr Mutohori. A further email was sent late afternoon the following day, 11 May in which it was noted Mr Mutohori had failed to respond before advising that in the absence of a response a meeting would be scheduled for 3.00pm on 13 May. Yet another reminder was sent on 12 May though no response was forthcoming. Notwithstanding that the two did meet on the 13<sup>th</sup> and Mr Tipuna presented and spoke to the letter he had prepared on the 6<sup>th</sup>.

[33] Of the meeting Mr Mutohori simply says he was called to Mr Tipuna’s office where Mr Tipuna read the letter before handing it over. Mr Mutohori says he simply took it and walked away though added when asked another question that Mr Tipuna also outlined the next steps in the process. Mr Tipuna’s evidence is consistent.

[34] Mr Tipuna followed the meeting with an email to Mr Mutohori asking he consider the issues. It also noted suspension had been a possibility and while Mr Tipuna had not adopted that path he would “continue to monitor the situation and will have this option if required”. The email then outlined the next steps and sought a further meeting on 18 May.

[35] On 13 May two further events occurred. The first was that Mr Mutohori copied Mr Tipuna’s letter of 6 May to all regulatory staff having highlighted some parts which referred to Mr Tipuna’s meeting with BCA staff on 6 May. The accompanying email advised this was “In accordance with our team values and in the interests of transparency”. Mr Mutohori states the highlighting was to show staff “who was being brought into the dispute”. The evidence is BCA staff saw this as threatening and divisive vis-à-vis BCA staff and other members of Mr Mutohori’s team.

[36] The second event was that Mr Mutohori called another staff member to his office and showed him the remuneration records for two colleagues and to which he should not have had access. The employee in question alleged Mr Mutohori stated “something like; “do whatever you want with this...”, or “get what you want””. The employee states this made him grumpy as the others were being paid somewhat more than he though the Council’s evidence is that was because they were receiving higher duties allowances at the time.

[37] Mr Tipuna became aware of both events on 16 May which was the day of another event. Mr Tipuna was at a meeting in Waipukurau where he was approached by one of his senior employees who advised he had been contacted by Mr Mutohori who was actively undermining Mr Tipuna and otherwise behaving inappropriately.

[38] Mr Tipuna considered things were getting out of hand with increasing disruption and disunity affecting the Council’s operation. He decided it could well be better to have Mr Mutohori out of the workplace while he investigated his earlier concerns. On his return to Wairoa later than afternoon he sought a meeting with Mr Mutohori.

[39] It is Mr Mutohori’s evidence a meeting, as such, never occurred. He says Mr Tipuna “tried” to call him to a meeting by coming to his, Mr Mutohori’s, office and asking for a meeting. Mr Mutohori says he refused on the grounds he had other things to do. It is Mr Tipuna’s evidence he raised the possibility of suspension before Mr Mutohori refused to discuss matters with him and, as a result, he decided to confirm the suspension.

[40] Mr Tipuna returned to his office and prepared a notice of suspension which also outlined the next steps in the disciplinary process. It was sent at 4.35pm.

[41] In the interim and at 4.28pm, Mr Mutohori sent an email to Mr Tipuna copied to the mayor, elected councillors and level two managers of the Council. It is Mr Mutohori’s evidence it had been prepared the preceding weekend. It takes issue with the timelines and what he considered inadequate time to respond to the concerns Mr Tipuna had raised before raising Mr Tipuna’s earlier mention of possible suspension which he characterises as an attempt to blackmail and bully Mr Mutohori into submission. It then gives a brief response to the five allegations by asking why FBT forms need to be completed then suggesting the rest of the allegations are as yet inadequately explained or evidenced. The email closes by advising a personal grievance would follow.

[42] There then followed a series of correspondence with lawyers becoming involved. As already said the initial focus was on Mr Mutonhori's ability to partake in the study tour to the United States though things escalated with an ever increasing list of concerns the Council wished to discuss with him and which, in totality, would lead to his dismissal in early August. That said those events are to be considered by another member with Mr Mutonhori remaining adamant this investigation was limited to the issues raised in his first application (albeit subsequently amended on 26 July), the last of which was the suspension of 16 May.

### **Analysis**

[43] Mr Mutonhori claims to have been unjustifiably disadvantaged by virtue of:

- (a) The removal of responsibility for the BCA on 6 May 2022;
- (b) The levelling of allegations on 6 May 2022; and
- (c) The suspension of 16 May 2022.

[44] Mr Mutonhori also made claims regarding the loss of access to his office and the Council's email system but this is, in my view, inseparable from the claim regarding the suspension. These outcomes were a result of the suspension so if it is unjustified so will they be. Conversely if the suspension is justified then these results will also be justified though I note the suspension did not become operative until the end of business on the 16<sup>th</sup> which means Mr Mutonhori's demand I consider events only until that day means the disadvantage, if there was one, did not become operative till the next day and is therefore beyond my consideration.

[45] Mr Mutonhori also claimed he had been the subject of an improper and poorly conducted disciplinary process but once again all that had occurred by 16 May was that it had been initiated. The actual process about which he now complains occurred later and will fall to my colleague to consider as part of Mr Mutonhori's challenge against his dismissal

### ***Removal of duties.***

[46] Mr Mutonhori claims he was unjustifiably deprived of responsibility for the BCA on 6 May 2022. That responsibility for this function was removed from Mr Mutonhori on that day is not disputed.

[47] As submitted by Mr McGuiness the issue here is whether or not the removal was fair, reasonable and within Mr Tipuna's powers.

[48] The first point to be noted is that the evidence shows the removal was, at least when it happened, intended to be temporary and last no longer than needed to address the GNC's.

[49] That it was within Mr Tipuna's powers is confirmed by the content of Mr Mutohori's employment agreement. As already said clause 2.4 provided Mr Mutohori's "... duties and responsibilities may be changed, modified and updated as required to meet the needs of the Council". Mr Tipuna, as the employer,<sup>2</sup> had the ability to apply that clause especially as he was Mr Mutohori's direct manager.

[50] Was the decision reasonable and fair? Again the answer is yes. The Council was facing a serious issue with the possible loss of one of its statutory functions. It had to be addressed and the evidence makes it clear Mr Mutohori was not going to ensure this occurred. In reaching this last conclusion I note three things.

[51] First are the findings of IANZ and here I note a comment in the report which states:

*The assessment team identified that the BCA's management demonstrated a lack of understanding of the Regulations and the accreditation scheme. An unwillingness on behalf of the BCA management to understand and engage in the scheme was also observed.*

[52] Second is the evidence of various staff who worked for Mr Mutohori. Their evidence was that he consistently expressed a view IANZ accreditation was a waste of time and should be disregarded and his actions were consistent with that. There was also evidence they had no knowledge of Mr Mutohori's plan to address the issues and the work that had been done was performed by others when it was in fact Mr Mutohori's responsibility. To that must also be added the evidence BCA staff had lost all confidence in Mr Mutohori which would further impede progress.

[53] Thirdly, and perhaps most importantly, was Mr Mutohori's own evidence which was again highly critical of IANZ and consistent with a conclusion he was not motivated to address the issues.

[54] As already said the Council faced a dilemma which had to be addressed and Mr Mutohori was an impediment to doing so. It was, I conclude, fair to remove the impediment and, given the contractual right to do so, a reasonable response.

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<sup>2</sup> Section 42(2)(g) of the Local Government Act 2002

[55] The only possible infringement arises from the fact the decision was not discussed with Mr Mutohori prior to implementation. This is, I conclude, forgivable if for no other reason the move was not intended to be permanent and in any event was contractually permissible. Add to that the fact time was an imperative with the subject matter expert leaving that day and the only viable replacement unwilling to take over in the then present circumstances and the evidence is Mr Mutohori was not in fact present at that time to have a discussion with.

[56] I conclude the Council's actions in this respect justifiable.

### ***The levelling of the accusations of 6 May***

[57] There is little that need be said about this claim other than it faces no prospect of success.

[58] At the time, and as of 16 May when my consideration ends, Mr Tipuna had done nothing more than raise his concerns and put Mr Mutohori on notice of them. That does not constitute a disadvantage absent any outcome.

[59] An employer who has concerns about an employee's performance has an absolute right to raise those concerns. Indeed it is arguable it has a duty to do so.

[60] As at this time, and as already said, that is all that had occurred as of 16 May with Mr Mutohori then retaining the ability to address those concerns. To argue as he now is, that this was unjustified as the outcome was preordained and Mr Tipuna was going through the motions to achieve an as yet undisclosed secret outcome defies the evidence. Mr Mutohori can offer nothing to support such conjecture.

### ***The suspension of 16 May***

[61] The first point to be made is that Mr Mutohori's employment agreement has a clause that allows the employer to suspend in order to investigate any alleged misconduct.<sup>3</sup> The caveat placed upon that is one that reflects the requirements of both s103A of the Act and caselaw in that the clause also requires the employer discuss the proposed suspension and consider the employees views before making a decision.<sup>4</sup>

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<sup>3</sup> Clause 42.1 of Mr Mutohori's Individual Employment Agreement

<sup>4</sup> Clauses 42.2 and 42.3 of Mr Mutohori's Individual Employment Agreement

[62] Here the evidence suggests no such conversation occurred but in the circumstances I do not hold that against Council. While Mr Tipuna's evidence suggests he initially decided to suspend he also evidenced the fact he then had second thoughts and sought advice. His evidence is clear that the advice reiterated the contractual obligation to discuss a possible suspension and this was firmly in his mind when he approached Mr Mutohori. It was Mr Mutohori, as his evidence confirms, who then refused to enter into the discussion. It is difficult to see an unjustified disadvantage in such circumstances, especially as I accept Mr Tipuna's evidence that Mr Mutohori's email of 4.28pm that same day would undoubtedly have given further grounds for suspension.

[63] Finally an issue arises in that while Mr Mutohori was initially paid while suspended Council ceased this when he went to the United States in June. While that is contrary to the contractual provision and might therefore bring the suspension into question this did not occur on or before 16 May and falls outside the bonds of this consideration. The claim fails.

### **Conclusion and Orders**

[64] For the above reasons I conclude Mr Mutohori has failed to establish that he has been disadvantaged as claimed on 16 May 2022 (and amended on 26 July 2022) by events which occurred on or before 16 May 2022.

[65] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed the Council may, as the successful party, lodge a memorandum on costs within 21 days of the date of issue of this determination. From that date Mr Mutohori will have 21 days to lodge any reply memorandum.<sup>5</sup>

**Michael Loftus**  
**Member of the Employment Relations Authority**

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<sup>5</sup> [www.era.govt.nz/assets/Uploads/practice-note-2.pdf](http://www.era.govt.nz/assets/Uploads/practice-note-2.pdf)