

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

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

[2023] NZERA 469  
3196899

BETWEEN	SIMON MUTONHORI Applicant
AND	WAIROA DISTRICT COUNCIL Respondent

Member of Authority:	Claire English
Representatives:	Simon Mutohori in person Charles McGuinness, counsel for the Applicant
Investigation Meeting:	13 and 14 June 2023 at Napier and via AVL
Submissions received:	13 June, 20 June, and 24 July 2023 from Applicant 21 June, 20 July, and 26 July 2023 from Respondent
Determination:	23 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Mutohori was employed as the Group Manager – Planning and Regulatory Services for the Wairoa District Council (Council) reporting to its Chief Executive Officer, Mr Kitea Tipuna. In April 2022, the Council underwent an audit of its functions as a building regulator. Mr Mutohori and his team participated. Mr Tipuna had concerns about how Mr Mutohori handled this and other matters, and a disciplinary process followed. In the end, Mr Mutohori was dismissed for serious misconduct.

[2] Mr Mutonhori now raises a claim of unjustified dismissal. He also claims that the Council has acted in breach of its duties of good faith. Mr Mutonhori seeks remedies of reinstatement, lost wages, and compensation for hurt and humiliation.

[3] The Council resists these claims. It takes the position that its dismissal of Mr Mutonhori was both substantively and procedurally justified. In addition, the Council resists any suggestion that Mr Mutonhori's reinstatement would be appropriate or even possible given the current structure of the Council. In particular, the Council says in response to Mr Mutonhori's claims for hurt and humiliation arising from his dismissal, that Mr Mutonhori himself actively publicised details of the disciplinary proceedings as part of his campaign for mayor at the time, which fatally undermines any claim for compensation.

### **The Authority's investigation**

[4] For the Authority's investigation written witness statements were lodged from Mr Mutonhori himself. On behalf of the Council, witness statements were provided by Mr Tipuna, the Building Control Authority Manager, the Senior Building Compliance Officer, and the Chief Financial Officer<sup>1</sup>. All witnesses answered questions under affirmation from me and the parties' representatives. I also received closing submissions.

[5] 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.

### **The issues**

- [6] The issues requiring investigation and determination were:
- (a) Was Mr Mutonhori unjustifiably dismissed?
  - (b) If the Council's actions were not justified (in respect of dismissal), what remedies should be awarded, considering:
    - Reinstatement;

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<sup>1</sup> I have used the relevant titles of these witnesses, in accordance with an earlier determination of the Authority which prevents publication of their names, excluding the name of the Chief Executive Officer. See *Wairoa District Council v Mutonhori*, [2022] NZERA 434.

- Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - Compensation under s123(1)(c)(i) of the Act
- (c) Did the Council act in breach of its duties of good faith?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Mutonhori that contributed to the situation giving rise to his grievance?
- (e) Should either party contribute to the costs of representation of the other party.

## **Background**

[7] Mr Mutonhori was originally employed by the Council from 10 February 2020. He was promoted to the position of Group Manager – Planning and Regulatory Services. That was a position that reported directly to the Chief Executive, Mr Tipuna, and made Mr Mutonhori part of the Council’s senior leadership team.

[8] One of Mr Mutonhori’s key responsibilities was to oversee and manage the Council’s statutory responsibilities as a Building Control Authority, including ensuring that the Council operated within the relevant statutory requirements of a Building Control Authority.

[9] In April 2022, the Council underwent an audit of its statutory functions as a Building Control Authority, carried out by IANZ (International Accreditation New Zealand) with the assistance of the Ministry of Business, Innovation and Employment as the relevant regulatory agency. This audit was carried out every two years. I am advised the assessment was detailed and rigorous, involving daily meetings with the assessors. An insufficient result would have put the Council at risk of losing its ability to act as a Building Control Authority.

[10] The Senior Building Compliance Officer and the Building Control Authority Manager, who reported to Mr Mutonhori at that time, gave evidence that Mr Mutonhori did not take the assessment process seriously, and that he was both dismissive and confrontational. I am advised that Mr Mutonhori expressed the views that “laws were only guidelines”, and that IANZ assessments were not important, and were really too costly for small councils to participate in.

[11] While these views might seem to be extraordinary views to be expressed by a senior leader with regulatory responsibilities during a statutory compliance audit, Mr Mutohori confirmed these were his views during the investigation meeting. He further told me that he made “his own calls outside the law” and that he used his “common sense a lot, and don’t use the letter of the law”.

[12] In the end, the Council was provided with a number of areas of general non-compliance, 25 to be exact, and asked to remedy them. In addition, the audit team would return for another visit in November that year, to monitor progress. I am advised that this was a significantly larger number of areas of non-compliance than had been expected, or which had been experienced before, and that the return of the audit team for a second visit was likewise equally concerning.

[13] Mr Tipuna had concerns about this. He also had concerns about other regulatory matters, namely, an on-going matter where Mr Mutohori had refused to fill in a fringe benefit tax (FBT) form accounting for what appeared to be personal use of a pool car, incorrect advice on a public consultation document under the Local Government Act, and verbal feedback from staff reporting to Mr Mutohori. There was discussion as to the FBT form at the investigation meeting. Mr Mutohori had still not filled it out, and I received evidence from the Chief Financial Officer, that Mr Mutohori’s inexplicable refusal to spend a few minutes filling out this form had resulted in a tax bill for the Council of some \$1,400. In addition, Mr Mutohori made derogatory comments about the member of the finance team who had originally sent the form to him on the basis of her gender and (in Mr Mutohori’s view) lack of status within the Council.

[14] Mr Tipuna prepared a formal letter dated 6 May 2022, setting out his concerns, and attempted to meet with Mr Mutohori in person to discuss. Despite Mr Mutohori being in the office, the meeting did not occur until 13 May 2022, when Mr Tipuna provided Mr Mutohori with the letter dated 6 May and asked for his comment. Potential outcomes were advised to range from the implementation of a performance improvement plan, to a warning for serious misconduct, up to possible dismissal.

[15] Mr Mutohori then took the letter, highlighted with a yellow/orange highlighter 4 places where that letter referred to his staff, and emailed the highlighted copy of the letter to all regulatory staff at the Council. Mr Mutohori says that he did this for “transparency”, although he was unable to explain what that meant.

[16] The staff members who gave evidence said that they perceived this as a threat or an underhand comment on their own work, particularly as Mr Mutonhori could have emailed the letter only to those staff on his own team, but chose instead to send it to all regulatory staff which was a considerably wider group.

[17] Mr Mutonhori then left work, and in the end, did not return.

[18] On 16 May 2022, Mr Mutonhori emailed Mr Tipuna, copied to members of the Council's senior leadership team, and Councillors. In that email he made several allegations against Mr Tipuna, including that "you are trying to blackmail and bully me into submission using all levers within the powers of your office", "you are threatening and manipulating the process to your advantage", referring to the investigation of Mr Tipuna's concerns as "blackmail", "a sham process", and "a window dressing exercise to formalise predetermined conclusions".

[19] Mr Mutonhori was not willing to meet with Mr Tipuna to progress matters. On 26 May 2022, Mr Tipuna wrote again, outlining the original allegations, plus three more issues, being the sending of the email to Council staff on 13 May, the sending of the email to elected Councillors and senior leadership team on 16 May, and a resulting concern that he had lost trust and confidence in Mr Mutonhori.

[20] Mr Mutonhori in the end met with Mr Tipuna on 5 July 2022, for the purposes of discussing and responding to the disciplinary allegations against him. Mr Mutonhori attended on his own, despite having been represented by counsel in the interim. Mr Mutonhori told Mr Tipuna he wanted the meeting recorded using "Zoom". Mr Tipuna declined to do this. Mr Tipuna said that Mr Mutonhori was welcome to take notes, and confirmed that the Council would be taking notes, however, Mr Mutonhori was not happy with this, and wanted Zoom to be used instead. He was unable to explain at the investigation meeting why he needed Zoom when he and Mr Tipuna were meeting in person, or why he did not take his own notes. He simply referred to a "proper process" without more.

[21] Mr Mutonhori did not have a copy of the letter of 26 May, so he was provided one by Mr Tipuna, and Mr Tipuna read it out for him.

[22] Mr Mutonhori then refused to speak to Mr Tipuna, or to make any comment at all on the allegations and concerns in the letter. At the investigation meeting, he confirmed that he had remained silent.

[23] Mr Tipuna made it clear to Mr Mutonhori that, despite his lack of participation, Mr Tipuna would proceed to make “draft decisions” regarding the allegations, and provide them to Mr Mutonhori for any response, before the final decisions were made.

[24] Mr Tipuna did so. He put forward his preliminary views in a letter dated 14 July 2022. It is convenient to summarise the conclusions he reached as follows:

- a. Failure to follow a reasonable instruction to fill in a FBT form: this was made out, and should result in a final written warning for serious misconduct, plus the form still needed to be filled out;
- b. A formal complaint from the Chief Financial Officer about Mr Mutonhori’s failure to comply with relevant legislation, and behaviour shown towards a finance team staff member: the failure to comply with legislation was the failure to fill in the FBT form, so no additional action was proposed here, however, Mr Mutonhori’s rude and dismissive responses to a member of the finance team were made out, and should result in a written warning for misconduct;
- c. Placing Council’s IANZ accreditation at risk: this was made out, and should result in a final written warning for serious misconduct;
- d. Sending an email to regulatory staff (the 13 May email): that this amounted to an undermining of the disciplinary process, and damaged the trust and confidence Mr Tipuna had in Mr Mutonhori, and should result in termination of employment on notice;
- e. Sending an email to Councillors and the senior leadership team (the 16 May email): that this was an attempt to intimidate Mr Tipuna and undermine the disciplinary process. The seriousness of the statements made by Mr Mutonhori about Mr Tipuna in a public way was sufficient to cause Mr Tipuna to lose trust and confidence in Mr Mutonhori as an

employee, and should result in the summary termination of his employment.

[25] However, matters were not yet decided. Also on 14 July 2022, Mr Tipuna had new cause to write again to Mr Mutohori with another allegation, namely that it had come to Mr Tipuna's attention that Mr Mutohori had texted the Mayor about his disciplinary matter, after being expressly told to keep these matters confidential. At the investigation meeting, Mr Mutohori confirmed that he had texted the Mayor, and said he had done so because in his view, the Mayor was Mr Tipuna's boss, and Mr Mutohori had wanted the Mayor to direct Mr Tipuna to cease the disciplinary process and/or preserve Mr Mutohori's employment. Mr Mutohori expressed to me his view that if you didn't like what your boss was doing, it was only sensible to go "over his head" to try and secure the outcome you want. He explained to me that the mayor and councillors were the "only ones who could call [Mr Tipuna] to order."

[26] Mr Mutohori did not respond to either of the letters dated 14 July 2022. Mr Tipuna attempted to meet with him again to discuss, but Mr Mutohori declined or did not attend any meetings.

[27] On 3 August 2022, Mr Tipuna wrote again, terminating Mr Mutohori's employment. The letter confirmed the preliminary decisions already set out above, and stated "Cumulatively your actions and inactions as my employee have destroyed the trust and confidence I can have in you."

[28] At the investigation meeting, I questioned Mr Tipuna about why he had determined that some of the allegations, which appeared to be potentially serious in light of Mr Mutohori's regulatory responsibilities, had only resulted in written warning status. Mr Tipuna stood by the conclusions he had reached in his letter of 3 August 2022. He explained to me that in his view, matters around how Mr Mutohori performed his job, eg the issues around the FBT form, IANZ review, and interactions with staff, were matters of performance and behaviour that could have been modified, particularly by a senior person such as Mr Mutohori, and that he would have been willing to give Mr Mutohori a chance to improve and put these things right.

[29] However, what could not be put right was the lost trust and confidence between himself and Mr Mutohori, shown by Mr Mutohori's emails and text, where Mr Mutohori had tried to find ways to go around, or put pressure on, Mr Tipuna to get the

outcome Mr Mutonhori wanted. Mr Mutonhori's role was one where he not only reported directly to Mr Tipuna, but one where a key part of his duties was carrying out statutory functions which Mr Tipuna as Chief Executive had delegated to him especially. This relationship could not continue without utmost trust and confidence, which no longer existed. This meant that termination was realistically the only option.

[30] At this time, Mr Mutonhori put himself forward as a candidate in the Wairoa mayoral race, where he was open about the allegations against him, and gave multiple statements to the local newspaper about both the disciplinary process, and in the end, the termination of his employment.

[31] Mr Mutonhori now says as part of his claim, that he suffered embarrassment as a result of his dismissal, and that this has made it hard for him as Wairoa is a small community. He also says that the people of Wairoa had a "right to know" what was happening to him, and this was why he shared details of the disciplinary matters and his eventual termination in the paper. He makes no attempt to reconcile the contradiction in these statements.

[32] As this matter progressed, it became clear that Mr Mutonhori was seeking reinstatement to his position, as well as monetary remedies. He explained that he had not, as at the time of the investigation meeting, been able to secure other employment, and he relied upon general statements from himself that other staff would welcome him back. Immediately prior to the investigation meeting, it also became apparent that Mr Mutonhori had permanently moved to Australia, and he advised me that he had no plans to return at any time in the future.

[33] The council's position was that first, in Mr Mutonhori's absence and following the second audit from IANZ, the council had decided that the building regulatory functions which made up a significant portion of Mr Mutonhori's duties, should revert back to the Chief Executive Officer, as they were too important to be delegated. This had been done, resulting in a permanent restructure, so the role Mr Mutonhori held was no longer available in a practical sense. Secondly, there was evidence from council witnesses that Mr Mutonhori would not be welcomed back to the extent he had assumed, and that many of the people who had worked with him had found his approaches to be disruptive and disrespectful, which was borne out by the questioning Mr Mutonhori had for those staff members as part of the investigation meeting.

## **Analysis**

[34] The first question to consider is whether Mr Mutohori was unjustifiably dismissed. There is no doubt that Mr Mutohori was dismissed – this is set out in writing in the letter of 3 August 2022, and Mr Mutohori has raised a claim of unjustifiable dismissal. I start by stating this as the starting point, as during the investigation meeting, Mr Mutohori repeatedly stated that he was still employed by the council, which is not supportable on any of the facts before me.

[35] When considering whether Mr Mutohori's dismissal was justified, I must consider whether the Council's actions were what a fair and reasonable employer could have done in all the circumstances at the time<sup>2</sup>, including whether:

- a. The Council sufficiently investigated the allegations against Mr Mutohori;
- b. The Council raised the concerns that it had before dismissal;
- c. The Council gave Mr Mutohori a reasonable opportunity to respond before dismissal occurred;
- d. The Council genuinely considered Mr Mutohori's explanations before dismissing him; and
- e. Any other factors I think relevant.

[36] The Council took steps to investigate the allegations against Mr Mutohori, and repeatedly raised the concerns it had with Mr Mutohori at various points during the process.

[37] Mr Mutohori was represented during the disciplinary process. With the assistance of his lawyer at the time, he responded fulsomely and substantively to the Council. This included (but not exhaustively) by way of an initial email from Mr Mutohori himself dated 18 May 2022 that was some 2 pages long in response to the letter and meeting on 13 May 2022, a second email from Mr Mutohori's then representative on 18 May 2022, emails on 23 May, 24 May, and 25 May from Mr Mutohori's representative, and a letter of 1 June 2022 that was some 5 pages long, and an email of 23 June 2022. There were also other correspondences between the parties as to meeting times.

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<sup>2</sup> This is the test of justification set out at section 103A of the Employment Relations Act 2000.

[38] In addition, Mr Mutonhori filed other claims in the Authority (separate from these proceedings) relating to his suspension from work, and attempting to require the Council to grant him paid leave to attend an international forum representing the Council. These matters are not the subject of this determination<sup>3</sup>.

[39] Mr Mutonhori then went overseas in the month of June 2022. The Council and Mr Tipuna sought to meet with him on his return at the end of June, and this resulted in a face to face meeting between Mr Mutonhori and Mr Tipuna on 5 July 2022. This was the meeting where Mr Mutonhori requested that the meeting be recorded using Zoom, declined to record the meeting himself, and then chose to sit silently while Mr Tipuna attempted to discuss the Council's concerns.

[40] I am satisfied that the Council genuinely and substantively raised its concerns with Mr Mutonhori before making a determination on the impact on Mr Mutonhori's employment. The documents demonstrate that the parties were engaged in a relatively detailed "back and forth" about the various concerns raised by the Council. Mr Mutonhori also raises some concerns that the Council's allegations changed, and some allegations were added and then removed, and that I should consider this shows that the Council's position was somehow improper.

[41] Mr Mutonhori is correct, in that the original allegations were those set out in the Council's letter of 6 May, handed to Mr Mutonhori at an in-person meeting on 13 May. After this, the Council raised 3 further concerns, the first being concerns around Mr Mutonhori's email to all regulatory staff on 13 May, the second being concerns around Mr Mutonhori's email to elected councillors and the Council's senior leadership team on 16 May, and the third being Mr Mutonhori's text to the Mayor around or immediately before 14 July.

[42] These were additional concerns to those set out in the original letter dated 6 May. However, I do not accept the raising of these other concerns subsequent to 6 May was improper. All of these concerns related to actions that occurred subsequent to the 6 May letter, and were raised with Mr Mutonhori promptly as they came to Mr Tipuna's attention. I do not accept Mr Mutonhori's submissions that this amounted to a "change" of the allegations against him. These were additional allegations, stemming from

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<sup>3</sup> I note that Mr Mutonhori did not raise any claim of unjustified dismissal in the Authority until after his other claims had already been heard by another Member.

further specific actions taken by Mr Mutohori on identified dates. It was not improper for Council to continue to raise its concerns with him, and to ask him for his responses.

[43] The Council did this, and Mr Mutohori actively engaged with Council, both himself and with the assistance of his lawyer, throughout this process.

[44] The next question is whether Council gave Mr Mutohori a reasonable opportunity to respond, and whether it genuinely considered his responses before making a final decision about his on-going employment.

[45] In considering this, I note the following. Mr Mutohori did meet with Mr Tipuna in person to discuss the allegations on 5 July. Mr Mutohori was willing and confident to raise areas of disagreement with the Council, for example, how the meeting should be recorded, but he chose not to take the opportunity to put forward his substantive views. Instead, he has chosen to rely on his previous written correspondence with the Council.

[46] By this stage, it is realistic to acknowledge that Mr Mutohori's relationship with the Council and Mr Tipuna in particular had begun breaking down. At the investigation meeting, he suggested that he chose not to speak with Mr Tipuna at either meeting as he had formed the view that Mr Tipuna had already made up his mind. This suggests that Mr Mutohori had formed this view very early in the process. He also treated Mr Tipuna with open disrespect from an early stage, by accusing him of blackmail and other misconduct in public (via emails sent to elected councillors and the senior leadership team), and by attempting to use the Mayor to put pressure on Mr Tipuna to achieve an outcome favourable to Mr Mutohori. Finally, Mr Mutohori attended a disciplinary meeting where he refused to speak with Mr Tipuna. All of this suggests that Mr Mutohori was no longer invested in the preservation of the employment relationship.

[47] Despite this, Mr Tipuna gave evidence that he did consider the responses Mr Mutohori provided. The letters Mr Tipuna wrote to Mr Mutohori support this. This is best summarised by Mr Tipuna's evidence at the investigation meeting, when he explained that on reflection, he reached the final conclusion that the concerns about Mr Mutohori's conduct in relation to the FBT form, conduct in relation to other staff, and conduct in relation to the IANZ audit, were matters deserving of a written warning, as they were all matters that in Mr Tipuna's view could be worked on and improved

(essentially, were capable of being rectified). However, what concerned him at a fundamental level was that he had a direct report, who was responsible for ensuring the Council's statutory compliance, who would not speak to him and who was emailing councillors and the mayor in an attempt to put pressure on him (Mr Tipuna) to influence how Mr Tipuna dealt with staffing matters.

[48] I further note that throughout the investigation meeting, I asked both Mr Mutohori and Mr Tipuna to describe to me Mr Mutohori's substantive responses to the allegations against him. Both Mr Mutohori and Mr Tipuna were able to express Mr Mutohori's stance, and they said the same thing. Mr Tipuna understood Mr Mutohori's substantive position, and Mr Mutohori has not changed or resiled from his substantive position since.

[49] I am confident that Mr Mutohori was able to convey his position to Mr Tipuna at the time, and I am confident that Mr Tipuna understood Mr Mutohori's position, and took it into account when making the final decision to dismiss.

[50] The decision to end Mr Mutohori's employment was a decision that was open to a fair and reasonable employer in all the circumstances at the time. Mr Tipuna reached the conclusion that there was a fundamental lack of trust and confidence subsisting between himself and Mr Mutohori, and on Mr Mutohori's own evidence, this was a decision that Mr Tipuna was entitled to make. I add that at the investigation meeting, Mr Mutohori maintained his views that he was entitled to ignore or seek to avoid requests and decisions by Mr Tipuna that Mr Mutohori did not personally agree with, and this exemplifies the breakdown in the employment relationship.

[51] For all the above reasons, I find that Mr Mutohori's claim of unjustified dismissal is not made out. No orders are made.

**Did the Council act in breach of good faith?**

[52] In addition to his claim of unjustified dismissal, Mr Mutohori claims that the Council has acted in breach of good faith in its dealings with him.

[53] This was a claim that arose out of comments made by Mr Mutohori at the case management conference in this matter, and he was given the opportunity to file an

amended statement of problem setting out what acts by the Council he considered to be in breach of good faith.

[54] By his filing on 6 December 2022, Mr Mutonhori raised a list of some 16 issues which he claims amount to a breach or breaches of good faith. I will summarise the position in relation to each, as not all of these issues can properly be considered as part of these proceedings, for various reasons:

- a. Failure to carry out an annual performance review – this is a matter that has not been raised previously, and has been raised significantly later than the 90 days allowed for the raising of a personal grievance claim. The Council does not consent to the raising of a personal grievance claim out of time. Accordingly, this matter can not be properly considered.
- b. Denial of one day’s leave for a “Recreational Day” - this is a matter that has not been raised previously, and has been raised significantly later than the 90 days allowed for the raising of a personal grievance claim. The Council does not consent to the raising of a personal grievance claim out of time. Accordingly, this matter can not be properly considered.
- c. Relieving from duties – this claim relates to matters surrounding Mr Mutonhori’s suspension. This is not a matter for these proceedings.
- d. Suspension from my duties – this claim relates to matters surrounding Mr Mutonhori’s suspension. This is not a matter for these proceedings.
- e. A period of unpaid suspension - this claim relates to a period of three weeks when Mr Mutonhori was suspended on an unpaid basis in June 2022. Mr Mutonhori says he should have been paid during this time, whereas the Council says that it had the contractual right to place him on unpaid suspension. This matter can properly be considered here, as it occurred after 16 May 2022, and is therefore not the subject of Mr Mutonhori’s previous hearing. I will comment further below.
- f. Failing to give Mr Mutonhori a chance to inform staff and clients of his absence - this claim relates to matters surrounding Mr Mutonhori’s suspension. This is not a matter for these proceedings, but in any case,

I note that Mr Mutohori's evidence is that he did inform people of his absence, and the disciplinary process including termination. He did so by emails to staff, councillors, and the Mayor as previously discussed, and he further did so by way of public comment in the news media, for which he was censured<sup>4</sup>. Mr Mutohori's own evidence undermines this claim, and insofar as I need to determine it, it is not made out.

- g. Lost personal effects – I heard evidence about this claim at the investigation meeting, and will comment further below.
- h. Refusal to renew Mr Mutohori's professional membership with Taitura<sup>5</sup> – the Council denies this claim. It also says this is a matter that has not been raised previously, and has been raised significantly later than the 90 days allowed for the raising of a personal grievance claim. The Council does not consent to the raising of a personal grievance claim out of time. Accordingly, this matter can not be properly considered.
- i. Denying Mr Mutohori the chance to accept an award from Taitura given to the Council - this is a matter that has not been raised previously, and has been raised significantly later than the 90 days allowed for the raising of a personal grievance claim. The Council does not consent to the raising of a personal grievance claim out of time. Accordingly, this matter can not be properly considered, although I note that even by Mr Mutohori's own pleadings, he describes this as an award given to the Council, and not to him personally, suggesting no breach.
- j. Clandestine tracking of a pool vehicle - this is a matter that has not been raised previously, and has been raised significantly later than the 90 days allowed for the raising of a personal grievance claim. The Council does not consent to the raising of a personal grievance claim out of time. Accordingly, this matter can not be properly considered. In addition, Mr Mutohori's evidence at the investigation meeting was that he was well aware that all Council pool vehicles had GPS tracking on them, and he relied on this tracking as one of the reasons for his refusal to fill out

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<sup>4</sup> See *Wairoa District Council v Mutohori*, [2022] NZERA 434.

<sup>5</sup> Taitura – Local Government Professionals Aotearoa is a national membership organisation for local government professionals.

the FBT form. Mr Mutohori's own evidence undermines this claim, and insofar as I need to determine it, it is not made out.

- k. Undermining Mr Mutohori's authority – Mr Mutohori refers here to certain decisions taken by Mr Tipuna at various times during the course of Mr Mutohori's employment. These are matters that have not been raised previously, and have been raised significantly later than the 90 days allowed for the raising of a personal grievance claim. The Council does not consent to the raising of a personal grievance claim out of time. Accordingly, these matters can not be properly considered.
- l. The Council bribing its own staff - at the investigation meeting, Mr Mutohori accused all the witnesses for the Council of having received bribes to give evidence to the Authority. All witnesses deny this allegation, in the strongest possible terms. I record that there is no evidence to support such an allegation, and I have every reason to accept the evidence before me that this never occurred. This allegation is not made out.
- m. Council holding a secret meeting with staff - this claim relates to matters surrounding Mr Mutohori's suspension. This is not a matter for these proceedings.
- n. Council calling for an unfair disciplinary meeting – Mr Mutohori refers here to the meeting with Mr Tipuna on 5 July 2022, and says that his request to record this meeting was denied, and it was a “secret” meeting. I have already found that Mr Mutohori was given the opportunity to record this meeting but chose not to do so. In addition, it was not a “secret” meeting, but a formal disciplinary meeting, with a written outcome, namely the letter of 14 July 2022 discussed above. These claims are undermined by Mr Mutohori's own evidence, and are not made out.
- o. Cutting Mr Mutohori off from completing a diploma in building survey – Mr Mutohori says that as he was no longer able to access Council email, he lost contact with his tutors and was dropped from the course. These are matters that have not been raised previously, and have

been raised significantly later than the 90 days allowed for the raising of a personal grievance claim. The Council does not consent to the raising of a personal grievance claim out of time. Accordingly, these matters can not be properly considered. In addition, the evidence is that Mr Mutonhori was undertaking this study in his own time, and at his own initiative, which would make contact with his tutor a matter for him, not Council, to manage.

- p. Soliciting for complaints from the Group Manager of Finance – this is in reference to an allegation by Mr Mutonhori that the Council’s Chief Financial Officer, was “solicited” by Mr Tipuna to make a complaint to Mr Tipuna about Mr Mutonhori’s refusal to fill in the FBT form, and how Mr Mutonhori did this. The Council denies this claim, and takes the view that it is out of time. The Chief Financial Officer gave evidence at the investigation meeting, and resists the suggestion, saying that he approached Mr Tipuna with his concerns, not the other way around. Any suggestion otherwise appears to be taken from a request by Mr Tipuna for him to reduce to writing concerns he had already raised. The evidence does not support this complaint, and insofar as I need to determine it, it is not made out.

[55] As will be apparent, the majority of the matters that Mr Mutonhori claims are breaches of good faith, either cannot be properly raised, or are not made out on the evidence before me. I will now consider the outstanding claims of missing property, and the period of three week’s unpaid suspension.

### **Missing Property**

[56] At the investigation meeting, Mr Mutonhori raised concerns about three items of personal property, which he said went missing and/or had not been returned to him by the Council. These items are: a hi-vis vest, a pair of black dress shoes, and personal documents and family photos which Mr Mutonhori had stored on the Council servers. He says that these items should have been returned to him but were not, although he is unable to quantify the monetary loss he claims as a result.

[57] Council advises that, on the termination of Mr Mutonhori’s employment, a council staff member checked his office for personal belongings, and neither the hi-vis

vest nor a pair of black dress shoes were found. Accordingly, the Council takes the position that these items were not present, and accepts no liability for this. In terms of Mr Mutonhori's personal documents, Council says that they were (as identified by IT) placed on a USB stick and left for Mr Mutonhori to pick up, which it believes he did, again, leading to no liability. In addition, the Council has provided a three-page itemised list, setting out all the personal items that it did return to Mr Mutonhori. Finally, legal submissions for Council point out that the non-return occurred after the ending of employment, so in any case cannot be a breach of good faith obligations, as these do not continue after the employment relationship has ended.

[58] In considering this matter, I prefer the evidence of the Council, which was detailed and to-the-point. More fundamentally, this claim was not properly raised. If it were a personal grievance claim, it has been raised well outside the 90 days provided for in the Act; if it is a claim of breach of good faith, such a claim cannot succeed in relation to actions that occurred after the ending of the employment relationship. For all these reasons, this claim is not made out.

### **Unpaid Suspension**

[59] I can properly consider whether the period of three weeks at the end of June 2022, when Mr Mutonhori was on unpaid suspension, should instead have been a period of paid suspension. Other matters around the suspension itself will not be considered, as they are the subject of a different proceedings.

[60] Both Mr Mutonhori and the Council refer to the provisions of the employment agreement between the parties in support of their respective positions. The employment agreement provides for suspension at clause 42, and the relevant portions are as follows:

42.4 The Employee is entitled to be paid normal salary while suspended.

42.5 If the matters being investigated by the Employer are unduly delayed due to the Employee not participating promptly or constructively, the availability of the Employee's representative, or because of other reasons beyond the Employer's control, the Employer may decide, acting reasonably, that the remainder of the suspension become unpaid.

[61] Mr Mutonhori's suspension commenced on a paid basis. This is consistent with clause 42.4 of the employment agreement. Part way through the disciplinary process, in the month of June, Mr Mutonhori left New Zealand to go on a trip to the United States. Mr Mutonhori states that the Council was aware that he was planning to

take this trip. Mr Tipuna states that Mr Mutohori never applied for leave (annual leave or otherwise) in respect of this trip.

[62] When Mr Mutohori returned to the country, he re-engaged with the Council, and the Council recommenced paying him. The period of non-payment was three weeks. Council states that clause 42.5 allows it to place Mr Mutohori on unpaid suspension, as its disciplinary investigation was unduly delayed due to Mr Mutohori not participating promptly or constructively.

[63] I find as a matter of fact that Mr Mutohori's absence delayed the disciplinary process, as he was not ready, willing, and able to meet with Mr Tipuna to discuss matters as a result. This is supported by in-person evidence given by both Mr Tipuna and Mr Mutohori at the hearing, and by the contemporaneous correspondence. The question then becomes, is a delay of three weeks an "undue" delay, such that the employer may decide, "acting reasonably" that the suspension should become unpaid?

[64] My view is that Mr Mutohori should have remained on pay during this three week period. The delay is not of such a length that it can truly be called undue, especially in light of the Council's obligation to act reasonably when making such a serious decision.

[65] Mr Mutohori claims the sum of \$8,005.38 as three weeks wages, plus an additional 3% to account for Kiwisaver contributions, which amounts to a further \$240.16 gross. As I have found that he should have been paid during this time, orders are made for payment to him accordingly.

[66] I am not minded to award any penalties in respect of this breach. First, a single breach, relating to an action the Council believed it was entitled to take in accordance with its employment agreement, does not reach the high threshold required for a penalty award by section 4A of the Act. The court has found that even though an employer may have been wrong to conduct itself in the way that it did, this is not enough for a penalty award, as the failure must be deliberate and this is not so in circumstances where the employer's conduct was based on an incorrect belief as to the justification for its actions<sup>6</sup>.

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<sup>6</sup> *Fleming v Attorney-General* [2021] NZEmpC 77.

[67] Second, I have awarded reimbursement of losses in respect of this failure. It is not appropriate to also award penalties in respect of the same conduct. I note that the court has found that this type of “doubling up” may be wrong in principle, and that where a remedy has been sought and granted, it will be unusual for a penalty to be imposed in respect of that same conduct<sup>7</sup>. I find that this is so in the present case, including because the Council’s actions were not part of continuing course of conduct – rather, the Council believed that it was entitled to act as it did, even though I have found that this was mistaken. Accordingly, no penalties will be awarded.

### **Conclusions and Orders**

[68] Mr Mutohori’s claim of unjustifiable dismissal is not made out. No orders are made.

[69] Mr Mutohori’s claims of breach of good faith, are either not made out on the evidence before me, or have not been properly raised. No orders are made.

[70] Mr Mutohori’s claim for three weeks wages plus Kiwisaver contribution is made out. Wairoa District Council is ordered to pay to Mr Simon Mutohori within 28 days of the date of this determination, the sum of \$8,245.54 gross.

### **Costs**

[71] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[72] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[73] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>8</sup>

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<sup>7</sup> See the discussion at paragraph [124] of *Salt v Fell*, [2006] NZEmpC 49.

<sup>8</sup> Please note the Authority’s Practice Note on costs, effective from 2 May, available at <https://www.era.govt.nz/assets/Uploads/practice-note-2>

Claire English  
Member of the Employment Relations Authority