

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 632
3200499

BETWEEN

WAIROA DISTRICT
COUNCIL
Applicant

AND

SIMON MUTONHORI
Respondent

Member of Authority: Natasha Szeto

Representatives: Charles McGuinness, counsel for the Applicant
Respondent in person

Investigation Meeting: 18 July 2023 by audio-visual link

Evidence and Submissions Received: 31 July 2023 from the Applicant and 6 August 2023
from the Respondent

Date of Determination: 26 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Mutohori was employed by the Wairoa District Council (the Council) as the Customer Services Manager Regulatory on 10 February 2020 on an individual employment agreement. He was later promoted to the role of Group-Manager – Planning and Regulatory Services.

[2] Mr Mutohori was summarily dismissed by the Council on 3 August 2022. During his employment and following his dismissal, Mr Mutohori lodged Statements of Problem with the Authority commencing two separate proceedings relating to alleged personal grievances.

[3] This determination relates to information Mr Mutohori produced during the Authority's investigations into alleged unjustifiable disadvantages and unjustifiable dismissal. The Council says Mr Mutohori should not have had the information. It is concerned about what other information Mr Mutohori may have. The Council seeks orders requiring Mr Mutohori to delete or destroy Council information he has in his possession. The Council also asks the Authority to make a finding that Mr Mutohori breached express terms of his individual employment agreement and implied obligations of confidence, fidelity and good faith by emailing the Council's information to himself and keeping it after his employment had ended.

Procedural history

[4] An investigation meeting (IM) was held by audio-visual link on 18 July 2023. The Chief Executive of the Council, Mr Tipuna, gave evidence for the Applicant and Mr Mutohori gave evidence in response. I received evidence and submissions from both parties. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination does not record all evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result. All material provided by the parties has been considered.

Issues

[5] The Council says Mr Mutohori was in possession of Council information because he wrongly emailed the Council's information (whether confidential or not) to his personal email address and retained the Council's information after his dismissal. The Council says these actions are a breach of express terms of Mr Mutohori's individual employment agreement and a breach of Mr Mutohori's implied obligations of confidence, fidelity and good faith.

[6] The Council seeks:

- (a) Permanent injunctions and/or orders requiring the Respondent to permanently delete or destroy all the Applicant's digital documentation, printouts, manuals, reports, letters, memos, plans, diagrams and all copies of that material, which are in the Employee's possession or under their control except for those already (as at the date of the orders) filed

in evidence in any proceeding before the Employment Relations Authority or Employment Court.

(b) A finding the Respondent breached express terms of his individual employment agreement and/or implied obligations of confidence and/or fidelity and/or good faith, by emailing to himself the Applicant's information (whether confidential or not) or taking the Applicant's confidential information while employed and keeping it post-employment.

(c) Costs.

[7] The Council says the injunctions and/or compliance should commence on the date the Orders are imposed.

Relevant Background

[8] The Wairoa District Council is a Territorial Authority as designed by Part 3 of Schedule 2 of the Local Government Act 2002.

[9] Mr Mutonhori was employed by the Respondent on 10 February 2020 on an individual employment agreement. Clause 29.1 of Mr Mutonhori's employment agreement is headed "Confidential Information" and states:

The Employee shall not, whether during their employment or at any time after the termination use, disclose or distribute to any person or entity any confidential information such as but not limited to company turnover, products and/or services, messages, data, trade secrets, client lists, client details, information relating to client deals or personal information about the management and staff acquired by the Employee during their employment, except as necessary for the proper performance of their duties and responsibilities under this agreement or as required by law.

[10] Clause 45.1 of Mr Mutonhori's employment agreement is headed "Return of Company Property" and states:

Upon termination of this agreement for whatever reason, or at any other time if so requested by the Employer, the Employee shall immediately return to the Employer all information, material or property (including but not limited to personal protective equipment, uniforms, electronic data, storage devices, digital documentation, printouts, manuals, reports, letters, memos, plans, diagrams, security cards, keys, mobile phone and laptop computers) either belonging to all the responsibility of the Employer and all copies of that material, which are in the employee's possession or under their control.

[11] On 3 August 2022 Mr Mutonhori was summarily dismissed from his employment with the Council. That day, the Council wrote Mr Mutonhori a letter stating (amongst other things):

Please ensure that any Council property in your possession is returned to the Council within 24 hours. You should contact [People and Capability Manager] to arrange return of any Council property...

Your Ongoing Confidentiality and Privacy Obligations

Simon, as an ex-Council employee have ongoing confidentiality obligations, both implied and in terms of clause 29 of your IEA. Specifically, you must not “at any time use, disclose or distribute to any person or entity any confidential information such as but not limited to...information relating to the management and staff acquired by [you] during [your] employment”. Please ensure that you comply with these obligations.

[12] On 23 September 2022 on the second day of an Investigation Meeting regarding Mr Mutonhori’s disadvantage claim against the Council,¹ Mr Mutonhori produced an email entitled “Feedback from Kitea” which contained a number of attachments. Mr Mutonhori received this email – which had been sent from a slingshot address to his personal email address - while employed by the Council (the Feedback from Kitea email).

[13] During a further Investigation Meeting on 13 to 14 June 2023, Mr Mutonhori lodged a brief of evidence for his unjustifiable dismissal claim² against the Council which included two emails relating to an accreditation audit undertaken by the Council. Mr Mutonhori had sent these emails from his work email address to his personal email address while employed by the Council (Supplementary documents A and B).

[14] The Council was concerned about the production of these two sets of documents because:

- (a) The Feedback from Kitea email and attachments contains communications regarding Council operations and personal information about Council employees (individuals’ names, email addresses, health / wellbeing status, personal events).
- (b) Supplementary documents A and B contain commercially sensitive information.

¹ *Simon Mutonhori v Wairoa District Council* [2023] NZERA 468.

² *Simon Mutonhori v Wairoa District Council* [2023] NZERA 469.

[15] To determine whether it is appropriate for me to make the orders sought by the Council, I have to decide whether Mr Mutohori has Council information in his possession, and (if so) whether Mr Mutohori breached express or implied terms of his employment agreement by retaining the information after his dismissal.

Does Mr Mutohori have Council information in his possession?

[16] The Council says Mr Mutohori has Council documents in his possession that he was required to return to the Council on termination of his employment. The Council gives the examples of the two documents Feedback from Kitea email and attachments, and Supplementary documents A and B to demonstrate this.

[17] The context for the Feedback from Kitea email and attachments was that a (then current) staff member had conducted a survey to engage with Council staff about retention issues in an informal and confidential way. The results of the survey were provided to certain staff at the Council and shared with the Chief Executive, Mr Tipuna. Mr Tipuna told the Authority that when he received the survey, he was not happy that staff members had been individually identified by name and he received an apology from the survey-taker. The Council says the feedback attached to the Feedback from Kitea email was obtained with express undertakings of confidentiality from survey participants.

[18] Mr Mutohori says that the Feedback from Kitea email and attachments were not property of the Council because the survey originated as a staff initiative.

[19] I have reviewed the documents and I prefer the Council's view that the Feedback from Kitea email and attachments were Council documents. The original email in the chain was sent from a Council employee's work email address to the Chief Executive of the Council at his work email address. The email was later forwarded to a number of Council staff members (again, all at Council work email addresses) with the salutation on the email being: "Kia ora Council whānau". The email was sent to Mr Mutohori at his hotmail email address on 18 May 2022, while he was still employed by the Council. Irrespective of whether the information arose as a staff initiative, it was clearly generated in a work context, and intended to identify workplace issues to the Chief Executive. I conclude that the Feedback from Kitea email and attachments are Council information.

[20] Supplementary documents A and B relate to an IANZ accreditation process. The Council submits these documents are commercially sensitive. Mr Mutohori had access to these emails because at the time he was employed by the Council and managing the IANZ process.

[21] Mr Mutohori says Supplementary documents A and B are publicly available information because the audit of Council affairs is public. While the Council concedes the IANZ reports are themselves public, it says Supplementary documents A and B contain correspondence about what was needed for the purposes of the IANZ investigation and were not the finalised reports. This information was not public and not published.

[22] I have reviewed Supplementary documents A and B and I prefer the Council's view that these were Council documents and not in the public domain. For the sake of completeness, I record that even if that information had been published it would still be the Council's information.

[23] The originating email in the Supplementary document A email chain was sent on 19 April 2022 while Mr Mutohori was still employed by the Council. It was sent from an MBIE employee's work email address to the Chief Executive of the Council at his work email address, and copied in two IANZ staff members, an MBIE staff member and Mr Mutohori at his work email address. Mr Mutohori forwarded this email chain to himself on 14 May 2022. The originating email in the Supplementary document B email chain was sent to Mr Tipuna and Mr Mutohori on 14 April 2022 (copying in a number of others) while Mr Mutohori was still employed by the Council. Mr Mutohori forwarded this email chain to himself on 11 May 2022. Having read both emails in full, I agree with the Council's synopsis that the email chain contains communications relating to an accreditation audit of the Council as a Building Control Authority. I conclude that Supplementary documents A and B are Council information.

[24] It is axiomatic that Mr Mutohori had the Feedback from Kitea email and attachments, and Supplementary documents A and B in his possession because he provided them to the Authority. In concluding that, I rely on the uncontested evidence of the Council that Mr Mutohori provided this information to the Authority on 23 September 2022 and 13 to 14 June 2023. I therefore conclude Mr Mutohori has Council information in his possession.

Did Mr Mutohori breach express terms of his employment agreement?

[25] The Council says Mr Mutohori has breached clause 29.1 of his employment agreement because he has used or disclosed confidential information including personal information about the management and staff of the Council which he acquired during his employment, and he was not required to use or disclose the information by law. Further, the Council says Mr Mutohori has breached clause 45.1 of his employment agreement because he was required to return the Council's information following his termination and he did not do so.

[26] Mr Mutohori's position at the investigation meeting was that he was not in breach of his employment agreement or any express or implied terms of his employment because he is still employed by the Council and that would remain the case until the final decision of the Authority on his unjustifiable dismissal claim.

[27] Mr Mutohori says the information he used or disclosed to the Authority was not confidential or personal. He says that because the Council is subject to the Local Government Official Information and Meetings Act 1987 (LGOIMA) and under an obligation to consider a request for information held by it under that Act, that its documents are public property. Mr Mutohori told the Authority that challenges to the Government should not be confidential because these processes are paid for by ratepayers.

[28] Mr Mutohori also relies on the "required by law" exception in his employment agreement and says he was required to use confidential or personal information in the Authority's proceedings.

[29] Firstly, I do not accept Mr Mutohori's submission that he cannot be in breach of his individual employment agreement because he is still employed by the Council. That position is not correct in law and not supportable on the evidence. Mr Mutohori's previously expressed view is now also superseded by the Authority's determination in respect of Mr Mutohori's unjustifiable dismissal claim, where the claim was found not to be made out.³ Mr Mutohori was dismissed on 3 August 2022 and as at the time of the Authority's investigation meetings was not employed by the Council.

³ *Simon Mutohori v Wairoa District Council* [2023] NZERA 469.

[30] Council documents can be confidential, can contain private information, and can contain commercially prejudicial information. I am not persuaded by Mr Mutonhori's submission that all Council documents are public property. The LGOIMA provides a framework to provide proper access to official information including consideration of whether there are good reasons or conclusive reasons for withholding requested information. I accept the Council's submission that it is the Council's prerogative to determine whether and how to release information in response to a LGOIMA request. The information provided to the Authority by Mr Mutonhori was not obtained in response to a LGOIMA request.

[31] I accept the submission of the Council that the Feedback from Kitea email and attachments contained confidential information, being personal information about identified individual members of management and staff including their names, email addresses, health or wellbeing status and personal events. This information was acquired by Mr Mutonhori during his employment, remained in his possession after his employment ended and was used by him during the investigation meeting. There is no evidence to support Mr Mutonhori's submission that he was required to produce this information for the Authority's investigation. I conclude the production of the Feedback from Kitea email and attachments is a breach of clause 29.1 of Mr Mutonhori's individual employment agreement.

[32] I accept the submission of the Council that Supplementary documents A and B were confidential, containing commercially sensitive information relating to the Council's internal operations. This information was acquired by Mr Mutonhori during his employment, remained in his possession after his employment ended, and was used by him during the investigation meeting. There is no evidence to support Mr Mutonhori's submission that he was required to produce this information for the Authority's investigation. I conclude the production of Supplementary documents A and B is a breach of clause 29.1 of Mr Mutonhori's individual employment agreement.

[33] Under clause 45 of Mr Mutonhori's individual employment agreement, he was required to return all information belonging to or being the responsibility of the Council, which was in his possession or under his control at the end of his employment. The Council's letter of 3 August 2022 reiterated this requirement. By not returning the Feedback from Kitea email and attachments and Supplementary documents A and B,

being copies of the digital information in his possession, Mr Mutonhori has breached clause 45.1 of his individual employment agreement.

Was there a breach of implied terms of confidence, fidelity and good faith?

[34] The Council has asked the Authority to find that Mr Mutonhori has breached implied terms of confidence, fidelity and good faith⁴ by emailing to himself the Council's information (whether confidential or not) or taking the Council's confidential information while employed and keeping it post-employment.

[35] The Council says Mr Mutonhori had no acceptable basis to email these documents or email trails to a personal email address. He was obligated to not do anything against the interests of the Council but sent this information to himself for his own purposes. At the end of his employment, he was obligated to return or delete any emails, data or information belonging to the Council that he still had, and he did not do so.

[36] However, the Council also confirmed in evidence before the Authority that it did not impose or enforce an absolute prohibition on Council employees sending emails to their personal email addresses while employed by the Council. The Council's evidence was that its process to return or destroy electronic information at the end of employment was not a formal one. Mr Tipuna told me that in good faith former employees are "supposed to do what they're supposed to do".

[37] The Feedback from Kitea email and attachments, and Supplementary documents A and B, were sent to Mr Mutonhori's personal email address prior to his employment ending on 3 August 2022. Despite the Council's clear mistrust of Mr Mutonhori's motives for doing so, there was no evidence before the Authority that Mr Mutonhori has used these documents other than during the Authority's investigation. The Council confirmed this in its evidence, and Mr Mutonhori told the Authority he had sent the emails to himself to use in litigation.

[38] I am not persuaded there has been a breach of the implied terms of confidence, fidelity and good faith in relation to these documents. But in any event, a separate finding on this issue does not add to the Council's remedies because I have already found Mr Mutonhori breached the express terms of his employment agreement by

⁴ Employment Relations Act 2000, s 161(1)(f).

failing to return the information and then using the information after his employment had ended. The appropriate remedy to address the Council's concerns about further use or disclosure is by imposing the Orders it seeks.

What remedies are appropriate?

[39] The Authority can order compliance where a person has not observed or complied with any provision of an employment agreement.⁵

[40] The Council says it has reasonably strong cause to believe that Mr Mutohori is retaining information other than the information he produced for the Authority. The Council is not seeking return or destruction of any information that has already been lodged with the Authority as it appropriately acknowledges the formal discovery and disclosure obligations governing legal processes. It also says it is not seeking to remove Mr Mutohori's natural justice rights. The Council's focus has been on the "unknown information".

[41] Mr Mutohori says the Council is paranoid. The tenor of his evidence to the Authority was that he sent emails to himself that he knew were going to be required and there was nothing else he needed. In evidence, Mr Mutohori said all the information he needed for the Authority's proceedings has been submitted to the Authority. Mr Mutohori says that if the Authority was to grant the orders sought by the Council, this would have no effect on him because he has "already given everything to the ERA", and consequently "it is a hypothetical academic exercise with inconsequential outcome".

[42] Mr Mutohori's substantive claims before the Authority are now concluded. Having found Mr Mutohori did not comply with clauses 29.1 and 45.1 of his employment agreement, it is appropriate for me to grant the Council the orders it seeks to prevent any further non-compliance. In doing so, I note Mr Mutohori's submission that such an order is immaterial to him as he does not have any other Council information.

⁵ Employment Relations Act 2000, s 137.

Orders

[43] Under s 137 (2) of the Employment Relations Act 2000 I make an order:

- (a) Requiring Mr Mutohori to permanently delete or destroy all of the Wairoa District Council's digital documentation, printouts, manuals, reports, letters, memos, plans, diagrams and all copies of that material, which are in Mr Mutohori's possession or under his control except for those documents already filed in evidence in any proceeding before the Employment Relations Authority or Employment Court as at the date of this determination.
- (b) Under s 137 (3) of the Employment Relations Act 2000, this Order is to be complied with on the date of this determination.

Costs

[44] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination of costs is needed, any party seeking costs 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 other party will 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.

[45] The parties could expect the Authority to determine costs and ask to do so on its usual notional daily rate, unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Natasha Szeto
Member of the Employment Relations Authority

⁶ Practice Direction of the Authority Te Ratonga Ahumana Taimahi at: <https://www.era.govt.nz/assets/Uploads/practice-direction-of-era.pdf>