

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 571
3239459

BETWEEN BLAIR KING
 Applicant

AND FAR NORTH DISTRICT
 COUNCIL
 Respondent

Member of Authority: Alex Leulu

Representatives: Penny Swarbrick, counsel for the Applicant
 Charles McGuinness, counsel for the Respondent

Investigation Meeting: 3 to 5 April 2024 in Kerikeri

Submissions and further 25 June and 1 July 2024 from the Applicant
information received: 17 April, 25 June, and 1 July 2024 from the
 Respondent

Determination: 27 September 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Blair King was employed by the Far North District Council (the Council) as its chief executive officer. On 10 February 2023 Mr King resigned from his role at the Council. He claimed he was constructively dismissed by the Council. He also made several other claims including claims against the Council for unjustified disadvantage.

[2] The Council opposed Mr King's claims saying its actions leading up to Mr King's resignation were fair and reasonable. It also lodged a counter claim against Mr King claiming Mr King had breached his obligation of good faith to the Council when Mr King had failed to properly engage with it in an active and constructive way.

The Authority's investigation

[3] For the Authority's investigation written witness statements were lodged from Mr King, Councillor Ann Court, and Dr Richard Neil. For the Council, written statements were lodged by Council Mayor, Moko Tepania, Deputy Mayor, Kelly Stratford, Councillor Steve McNally and Councillor Babe Kapa. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[4] 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

[5] The issues requiring investigation and determination were:

- (a) Was Mr King unjustifiably disadvantaged during his employment with the Council?
- (b) Was Mr King constructively dismissed from his employment with the Council?
- (c) If Mr King was found to be constructively dismissed and/or unjustifiably disadvantaged during his employment with the Council, to also determine whether he is entitled to:
 - (i) Compensation under s 123(1)(c)(i) of the Act; and
 - (ii) Reimbursement for legal costs incurred as a result of the actions of the Council?
- (d) Is Mr King entitled to reimbursement of lost earnings both during and after his employment with the Council?
- (e) Did the Council breach its obligations of good faith to Mr King? If found to be in breach, should a penalty be imposed against the Council?
- (f) Did Mr King breach his obligation of good faith to the Council and if so, should a penalty be imposed against Mr King?

(g) Should one party contribute to the costs of representation of the other?

Context

Mr King's role and responsibilities

[6] On 21 March 2022 Mr King was appointed as the chief executive of the Council and was the Council's sole employee. As the chief executive of a district council, Mr King was the designated employer for all Council employees.¹

[7] A main purpose of Mr King's role was to be the main conduit between the Council employees and the councillors. As part of this purpose, he was tasked to ensure the councillors were supported as they carried out their day-to-day duties.

The 2022 Council elections

[8] In October 2022 the local body elections took place with the Council looking to appoint a new mayor. Although the parties dispute when and why Mr King had contacted Mr Tepania, Mr King spoke to Mr Tepania and congratulated him on being appointed as the new mayor for the Far North district.

[9] On 15 October 2022 the elections results were declared, and a mixture of both new and former councillors were appointed to the Council. Upon confirmation of his appointment, Mr Tepania arranged a meeting with Mr King to discuss the next steps of his appointment.

The 16 October 2022 meeting

[10] Mr Tepania and Mr King met on 16 October 2022 (the 16 October meeting) where they discussed several matters which included preparations for Mr Tepania's induction and swearing in.

[11] During the 16 October meeting, Mr Tepania asked about the possibility of appointing a strategic advisor. Mr Tepania told Mr King about his preferred candidate (the preferred candidate) for the role. Although the parties disagree as to what the next steps would be for this request, the request for a strategic advisor role was declined by Mr King.

¹ Local Government Act 2002, s 42.

[12] Following on from the 16 October meeting, Mr King and Mr Tepania had ongoing direct and indirect contact over various issues which included Mr Tepania's assigned work vehicle and arrangements for Mr Tepania's swearing in as mayor. At this point, the relationship between Mr King and Mr Tepania was strained with the latter feeling like his views and requests relating to his induction were being stifled by Mr King.

The Kaikohe meeting

[13] On 28 October 2022 Mr King received an email from the preferred candidate. In the email she offered to work for the Council as a consultant to help support the Mayor and the Council for three months. Mr King forwarded the email to Mr Tepania and Ms Stratford and expressed his concerns about a consultant operating in what appeared to be a direct advisory role to the mayor.

[14] The parties dispute whether the nature of the preferred candidate's contact with Mr King was in line with Mr Tepania's original suggestion for a strategic advisor or whether the proposed consultant offer was a different position altogether (which was separate from any endorsement from Mr Tepania).

[15] On 3 November 2022 a meeting was held in Kaikohe between Mr King, Mr Tepania and Ms Stratford to discuss the emails between them (the Kaikohe meeting). Mr Tepania said he saw the meeting as an opportunity to address concerns, misunderstandings and to establish a mutually respectful relationship between him and Mr King.

[16] During the meeting, the discussions between Mr King and Mr Tepania became tense and eventually escalated to a point where Mr King had to abruptly leave the meeting. Much of what was discussed during this meeting was disputed between the parties. However, the meeting escalated to the point where Mr King's potential resignation was discussed between them and Mr Tepania responded by gesturing for Mr King to leave the office and saying, "just leave, I accept".

The 4 November 2022 councillors meeting

[17] On the next day, a confidential councillors meeting was called where Mr Tepania had explained to the councillors what had happened during the Kaikohe

meeting (the councillors meeting). At the meeting, Mr Tepania said he told the councillors Mr King had offered his resignation.

[18] During the meeting the councillors agreed they needed to seek legal advice before proceeding with the next steps in addressing the situation with Mr King. Because the Council had only been formed, the Council had not yet established an Executive Review Committee (ERC) to help establish a budget to allow the Council to seek legal advice. The councillors agreed the next step was to set up an ERC and the Council was not to discuss what occurred at the Kaikohe meeting with Mr King until they had received legal advice.

[19] After the councillors meeting, Ms Court and one other councillor contacted Mr King on separate occasions about what was discussed during the councillors meeting. Each councillor had contacted Mr King on their own volition which was separate from the decision made by the Council at the councillors meeting.

[20] After his discussions with the two councillors, Mr King met with his senior leadership team on 7 November 2022. During this meeting, Mr King told his senior leadership team he was asked to resign by Mr Tepania.

[21] Since the Kaikohe meeting and finding out about the councillors meeting, Mr King said he became concerned about several issues. These issues included being excluded from ERC matters which he said, would normally involve him. He said he would usually provide support and advice in setting up the ERC and would also assist the ERC with decisions around council employment matters (such as employee leave entitlements and appointments).

[22] On 14 November 2022 a local reporter emailed Mr Tepania and copied in Mr King. The reporter requested comment on various issues about the “clashing” relationship between Mr King and Mr Tepania and whether Mr King was resigning from his role. The reporter also explained it had derived its information from various sources including sources outside of the Far North district. The parties blamed each other as to the source of the apparent leak to the reporter.

Mr King's first personal grievance

[23] On 25 November 2022 Mr King raised a personal grievance for unjustified disadvantage with the Council by letter from his legal representative (first personal

grievance). As part of his personal grievance, he made allegations against the Council for ill treatment against him arising from when the new Council had been set up. Mr King also requested for the parties to attend mediation to resolve their issues. The Council agreed to go to mediation and steps were to be taken to arrange a suitable mediation date.

[24] Up until January 2023 there appeared to be little communication between Mr King and the Council about Mr King's substantive claims. Up to then, Mr King had also gone on annual leave on 22 December 2022 to 9 January 2023.

[25] On 23 January 2023 the parties agreed to attend mediation to occur on 10 February 2023 in Auckland. The matter was to be mediated by an agreed private mediator.

Cyclone Gabriel

[26] As a result of Cyclone Gabriel, a state of emergency was declared in the Far North on 31 January 2023. During this time, the Council was of the view that the relationship between Mr King and the Council was relatively positive as they both worked together to address the challenges associated with the cyclone and other Council related matters.

[27] On 7 February 2023 the Council contacted Mr King to confirm it was unable to attend the scheduled mediation date. On the same day, the Council also presented Mr King with a letter responding to his claims as set out in his first personal grievance letter. On the following day, Mr King went on sick leave.

Mr King's second personal grievance

[28] On 10 February 2023 Mr King notified the Council of his resignation from his role and confirmed he would be on sick leave for the following month. In a separate letter Mr King raised a second personal grievance for constructive dismissal (second personal grievance). As part of his second personal grievance Mr King also made an information request which included a request for notes and records held by the mayor and the councillors taken during the Kaikohe meeting and the councillors meeting.

[29] From 10 February 2023 to May 2023 there were ongoing exchanges between the Council and Mr King about his information request, his leave entitlements, and a

further mediation date. Mr King’s last day of work for the Council was on 10 May 2023.

Preliminary matters raised by the Council

The Council’s 90-day argument

[30] As part of its closing submissions, the Council said Mr King’s first personal grievance letter of 25 November 2022 did not properly raise a personal grievance under the Act.²

[31] Although the letter said Mr King was raising a personal grievance for disadvantage, the Council said Mr King only provided a general description of alleged events which occurred from 16 October 2022 to 25 November 2022. The Council said, Mr King’s first personal grievance letter failed to specify what Council actions led to his disadvantage.

[32] The Council also said aspects of the letter referred to Mr King’s allegations of actions which it said amounted to hypothetical, or unrealised future concerns. It also said Mr King did not specifically propose any remedies to address the alleged employment relationship problem. Instead it said Mr King had sought an “amicable resolution” and requested for the assistance of a private mediator.

[33] In response Mr King said his first personal grievance letter had sufficiently informed the Council of an employment relationship problem in accordance with the Act. He also said the Council’s actions after he had had raised his first personal grievance showed the Council had acknowledged him raising a personal grievance.

Outcome of the preliminary issue

[34] A personal grievance is raised as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address. This process provides an employer with sufficient notice to be able to appropriately respond to the grievance.³

² Employment Relations Act 2000, s 114.

³ *Creeedy v Commissioner of Police* [2006] ERNZ 517 at [36].

[35] The Council first raised its objection to Mr King's first personal grievance letter as part of its written closing submissions lodged two and a half months after the investigation meeting. As a result, the Authority and the parties were unable to fully question witnesses about their views and understanding in respect of Mr King's first personal grievance letter and whether he had properly raised a personal grievance in accordance with the Act.

[36] Based on the available evidence Mr King's first personal grievance letter provided detailed information about Mr King's recollection of events up to when the letter was sent to the Council. The letter also explained the alleged actions by the Council and the effect these actions had on Mr King. Mr King's request to attend mediation was also a reasonable request for how he wanted his concerns to be addressed.

[37] The Council also understood Mr King's concerns as expressed in his first personal grievance. This was reflected in its own detailed response to Mr King on 7 February 2023. There was also no evidence to show the Council had previously raised any objections about how Mr King had raised his first personal grievance.

[38] For these stated reasons, Mr King had sufficiently raised his first personal grievance under the Act by raising his concerns and sought action from the Council to address his concerns.

Unjustified disadvantage

Mr King's unjustified disadvantage claims

[39] Mr King claimed he was unjustifiably disadvantaged by the Council for several reasons. His reasons included allegations against the Council for its conduct during the Kaikohe meeting and how it responded to him raising his first personal grievance. His unjustified disadvantage claims also included claims about how the Council:

- (a) responded to his information request;
- (b) addressed his request for sick leave after his resignation; and
- (c) approached setting up a suitable mediation date prior to his resignation.

The Kaikohe meeting

[40] Mr King claimed he was disadvantaged because Mr Tepania asked for his resignation during the Kaikohe meeting. He also claimed the first mention about resignation during the meeting came from Mr Tepania and at no point did he resign or offer his resignation during the meeting.

[41] Mr Tepania disagreed and said Mr King was the first to mention resignation during the Kaikohe meeting and eventually gave the Council an option by saying the following incomplete sentence: “*either I resign or*”. This sentence was captured in notes taken by Ms Stratford during the Kaikohe meeting.

[42] In response, Mr King said even if he did say these words, the sentence was not finished, and Mr Tepania and Ms Stratford had incorrectly assumed he had resigned. In support of his argument, Mr King relied on Ms Court’s recollection of the councillors meeting where she said the councillors were informed by Mr Tepania of Mr King’s resignation.

[43] The Council also disputed Ms Court’s evidence and said it never considered Mr King to have resigned at the Kaikohe meeting. It also said it did not solicit or encourage Mr King to resign.

[44] Both parties accept the Kaikohe meeting transcended into a heated discussion. The Council acknowledged an employment relationship problem had arisen between Mr King and the Council and the problem needed to be resolved.

[45] Based on the available evidence, Mr King did not tender his resignation during this meeting. On balance, it was likely he had raised the prospect of resignation as described in Ms Stratford’s notes. This likely prompted Mr Tepania’s response by saying “just leave, I accept”.

[46] The actions of both parties after the Kaikohe meeting show both parties did not believe Mr King had formally resigned. Mr King continued with his work duties while the Council took steps to address the employment relationship problem (as opposed to preparing for Mr King’s departure). It is also important to note, Mr King’s employment agreement required resignation in writing which was not properly tendered by him until 10 February 2023.

[47] Ms Court's evidence of Mr Tepania informing the councillors of Mr King's resignation was contradicted by Mr Tepania, Ms Stratford, and Mr McNally who supported Mr Tepania's recollection.

[48] Due to the intense nature of the interaction between Mr King and Mr Tepania, it was plausible for Mr King to come away from the meeting thinking he was asked to resign. However this does not fully take into account his contribution to what was a heated exchange between him and Mr Tepania. For these reasons, Mr King's unjustified disadvantage claim for being asked to resign during the Kaikohe meeting is unsuccessful.

Allegations of "ghosting"

[49] After the Kaikohe meeting the Council agreed to not to speak to Mr King until they had received legal advice. Mr King described this decision and the Council's actions as being 'ghosted' by the Council which he said caused him distress.

[50] By 7 November 2022 the Council became aware of Mr King informing his senior leadership team about being asked to resign. Mr King submitted the Council should have then realised it needed to clarify whether it did or did not ask Mr King to resign.

[51] The Council said its actions and decisions made after the Kaikohe meeting were reasonable and fair. It said it acted relatively quickly in making decisions and worked towards an appropriate dispute resolution process.

[52] The Council referred also to Mr King's first personal grievance letter which requested for all future communications about Mr King's grievances to be directed to Mr King's lawyer. It said it followed this request and had engaged in ongoing communications with Mr King's lawyer to arrange a suitable mediation date.

[53] Taking into account the views of both parties, it was important to consider the context of the roles and relationship between Mr King and the councillors. Mr King held a significant role as the sole employer of Council employees while at the same was tasked to provide support and advice to the councillors.

[54] What occurred during the Kaikohe meeting severely compromised what was already a strained relationship between Mr King and Mr Tepania. The Council's

decision during the councillors meeting to not engage further with Mr King (about the Kaikohe incident) meant Mr King was left in the dark as to what his position was with both Mr Tepania and the Council. This would likely have caused him further distress. The longer he was left in the dark, the more likely his distress would have escalated. This was especially so as other key processes which ordinarily would involve Mr King (like setting up the ERC) were progressing without him.

[55] Although I accept the Council had difficulties associated with it only being formed, it should have considered the nature of what occurred at the Kaikohe meeting and taken more urgent action to address what had happened. This was especially given how critical Mr King's role was to the Council's operations and the potential effect the Kaikohe meeting had on him. For these reasons, the Council's decision not to engage with him about what occurred during the Kaikohe meeting was not an action of a reasonable employer. As a result, Mr King has established his claim for unjustified disadvantage in this respect.

Information request

[56] Upon making his information request on 10 February 2023, the Council provided Mr King with a complete response on 12 April 2023. The information provided by the Council consisted of six pages of documentation. Mr King said the Council's response was inadequate and as a result, he was unjustifiably disadvantaged.

[57] In describing the Council's approach, Mr King alleged the Council had taken an unnecessarily pedantic approach to his request which he said amounted to deliberate obstruction of his access to the documentation.

[58] The Council said it had properly dealt with the request in accordance with the requirements of the Privacy Act 2020. It also referred to its communications with Mr King's lawyer to clarify the details of Mr King's request and it also provided him with a preliminary view on its proposed disclosure in accordance with the requirements of the Privacy Act 2020.

[59] Although there was a delay by the Council in responding to Mr King's information request, the delay was reasonable given the Council's attempt to properly meet its obligations under the Privacy Act 2020. Given Mr King had already resigned from the Council, it was also difficult to assess how the delay affected his

circumstances. Accordingly, Mr King's unjustified disadvantage claim in respect of his information request was not sufficiently made out.

Sick leave request

[60] As a result of the Council's response to his personal grievance, Mr King said he suffered stress and as a result took sick leave on 10 February 2023. He also obtained confirmation not to attend work for six weeks from his doctor, Mr Neil. Upon taking sick leave there was ongoing communication between Mr King and the Council as to the type of leave he was taking and whether he was to be paid for it.

[61] Mr King was a volunteer for the New Zealand Urban Search and Rescue taskforce (USAR). While on sick leave, he was asked to participate with USAR work carried out as part of the Cyclone Gabriel response. The Council was not aware of Mr King carrying out this work until a media article was released showing Mr King's involvement in the USAR response. The Council then questioned Mr King about this involvement.

[62] Mr King claimed he was disadvantaged when the Council had questioned the validity of his sick leave and declined his request for additional sick leave. He said due to his sick leave being associated with stress while at work, he said it was reasonable for him to be able to carry out his volunteer work. Although the Council did not take any further action against him, Mr King said the Council did not resile from its position or apologise for querying the validity of his sick leave.

[63] Because he only had a limited amount of sick leave entitlements, Mr King had also requested for additional sick leave. This was declined by the Council. Mr King claimed the Council should have properly considered his request for additional paid sick leave. He claimed the Council had a deep-seated feeling of aversion towards him and as a result, he said the Council had unreasonably declined his request for additional leave.

[64] As a result of seeing the media article and not knowing he was carrying out USAR work, the Council said its queries to Mr King about his sick leave were reasonable. It also said its decision to decline Mr King's additional leave request was also reasonable because it had to ensure proper tikanga had to be preserved in ensuring rate payers money was properly spent.

[65] The Council's actions towards Mr King regarding his sick leave were reasonable. Firstly, Mr King provided a medical certificate to the Council before taking sick leave. The medical certificate provided limited information as to Mr King's medical situation at the time. Because the Council was not aware of the full circumstances behind Mr King's sick leave and him initiating his USAR work while on sick leave, it was reasonable for it to seek clarification from Mr King.

[66] Secondly, the Council was also within its right to decide not to grant Mr King additional sick leave. It was a discretionary decision about leave which fell outside Mr King's contractual entitlements. Its reasons for declining additional sick leave were sound and within reason. For these stated reasons Mr King's unjustified disadvantage claims in respect of his sick leave were unsuccessful.

Mr King's constructive dismissal claim

Mr King's position

[67] Mr King claimed he was constructively dismissed by the Council because it engaged in calculated conduct which caused serious damage to the relationship of trust and confidence between him and the Council. He also described the Council's actions as deliberate and with the purpose of coercing him to resign.

[68] In support of his claims, Mr King relied on the Council's alleged actions which fell within two periods during his employment. Firstly, he referred to the Council's conduct before, during and after the Kaikohe meeting. Much of the allegations during this period have already been discussed and addressed earlier in this determination.

[69] The second period was from when Mr King raised his first personal grievance up until the Council decided to postpone mediation on 7 February 2023 (leading to his second personal grievance).

[70] Mr King was critical of the Council's delay in responding to his first personal grievance which he said came two and a half months after he had first raised his personal grievance. Once Council responded to his first personal grievance, he also said he was further distressed from hearing the Council's disputed recollection of the Kaikohe meeting.

[71] Mr King said he was also distressed because of the Council's failure to progress towards a suitable mediation date. Mr King said the Council should have been in a better position to plan and make arrangements for the mediation. He also said the Council had failed to properly appreciate his personal circumstances and the stress he was facing.

[72] Mr King referred specifically to an email communication from his representative to the Council on 12 January 2023. In the email, Mr King's representative said the following:

It is increasingly urgent that we come to some resolution of this matter. I am instructed that the workplace situation remains extremely stressful and is becoming intolerable. It is also apparent to Blair that at least one of the elected councillors has been breaching confidentiality about his situation. At a practical level, and putting to one side the breach aspect, this only serves to add to the stress.

Blair continues to do his best to discharge his duties, including to his staff, but the situation is extremely difficult. It is now some 6 weeks since Blair raised his issues.

[73] As the Council's sole employee, Mr King hoped the Council would address his issues as expressed in his first personal grievance within a reasonable time. He said the Council's response to his personal grievance and its decision to postpone mediation became the last straw and this led to his decision to resign from his role.

The Council's position

[74] The Council objected to Mr King's reasons for resigning saying his reliance on his stress, the postponement of mediation, its response to his first personal grievance and issues arising from the Kaikohe meeting were all insufficient reasons to argue the Council had repudiated its employment relationship with him.

[75] Similar to Mr King's views, the Council relied on its own recollection of the Kaikohe meeting and its actions afterwards to support its arguments against Mr King's constructive dismissal claims.

[76] The Council also disputed whether Mr King's stress was the true reason why he wanted urgent mediation. The Council alleged the real reason Mr King had sought urgency was to ensure his live dispute with the Council would not have an adverse impact on a job application he had with another district council.

[77] The Council also disputed the level of Mr King’s claimed distress due to first hearing about the Council’s recollection of the Kaikohe meeting. It said Mr King should have already been aware of the Council’s position because of his discussions with the two councillors (after the councillors meeting). It said the councillors (including Ms Court who gave evidence in support of his claims) would have explained to him Ms Tepania and Ms Stratford’s recollection of the Kaikohe meeting.

[78] In deciding to postpone mediation, the Council said its decision was reasonable for several reasons including:

- (a) Travelling from the Far North to the Auckland mediation venue was impractical due to the extreme weather events occurring at the time;
- (b) Around January and February 2023, the Council said it was engaged in a relatively busy period preparing and participating in several different council events including preparations for Waitangi Day;
- (c) The Council also said its members were also experiencing personal issues around this period with Ms Strafford experiencing the death of a close relative around this time; and
- (d) The Council also thought its relationship with Mr King was improving during this time and was not aware of Mr King’s stress when it decided to postpone mediation.

[79] In support of its position, the Council relied on Mr Tepania’s evidence about how he wanted to attend mediation in a way which was “pono” meaning being “true, valid, honest, genuine and sincere”. Mr Tepania also said in deciding to postpone mediation he was not in an appropriately physical, mental, spiritual, or cultural state to participate in mediation in a way that was pono.

The outcome of Mr King’s claim

[80] A resignation may be deemed to be a constructive dismissal if an employer could reasonably foresee an employee resigning rather than put up with the ongoing breaches.⁴

⁴ *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 at 374-375.

[81] As already explained in this determination, the Council needed to act with more urgency to address what had occurred during the Kaikohe meeting. December 2022 to February 2023 was a busy time of year for the Council as an organisation and it is accepted the Council would have been preoccupied with events which occurred during this time. However, given the importance of Mr King's role in facilitating the operation of the Council, this likely would have intensified the awkwardness and distress he was exposed to during this time. This was likely a main reason why he instructed his representative to send the email to the Council on 12 January 2023.

[82] There was insufficient evidence to show the Council had properly and fully considered the impact on Mr King of the delay in his claims being addressed by the Council. In postponing mediation, there appeared to be little consideration or inquiry by the Council as to the distress he had expressed in January 2023. In response he had received a detailed reply to his grievance claims which would have had added some degree of distress to him.

[83] Although the Council's reasons for postponing the mediation were valid, it had sufficient resources available to it to properly plan for the mediation or at the very least, propose an alternative to alleviate the impact of the postponement on Mr King.

[84] Given the seriousness of the allegations of what had occurred during the Kaikohe meeting and the focus of the meeting being about Mr King's resignation, Mr King's resignation should have been reasonably foreseeable. For these reasons, Mr King was constructively dismissed by the Council.

Remedies

[85] Mr King established a personal grievance for both unjustified disadvantage and unjustified dismissal. He is entitled to an assessment of remedies to address his grievance.

[86] The parties have agreed for the Authority to defer its decision regarding remedies subject to ongoing discussions between them in respect of the Authority's findings into Mr King's substantive claims. Accordingly, the Authority reserves its decision on remedies until further notification from the parties.

Mr King's breach of good faith claims

[87] Mr King claimed the Council had breached its obligation of good faith to him when it failed to be communicative with him after the Kaikohe meeting. It said the Council's actions were deliberate and sustained. Mr King also said the Council had breached its obligations in respect of each of the matters which were claimed as part of his unjustified disadvantage claim.

[88] Because Mr King's breach claims included matters covered as part of his grievance claims, the Council's response to Mr King's allegations of a breach of good faith were essentially the same.

[89] Much of the proven unjustified actions by the Council in relation to the Kaikohe meeting have been addressed earlier in this determination. Over and above the Council's "ghosting" allegations, there was insufficient evidence to show the Council's actions were a deliberate attempt to breach its obligations of good faith to Mr King.

[90] The Council's decision not to engage with Mr King at the Councillors meeting was a decision made by a newly formed Council looking to do the right thing. This was not a deliberate attempt to undermine Mr King. For this reason, Mr King's allegations of a breach (and a claim for a penalty under the Act) are dismissed.

The Council's counterclaim

[91] The Council also claimed Mr King had breached his obligation of good faith to the Council because he failed to be active and constructive in establishing and maintaining a productive employment relationship between them.

[92] In support of its allegations the Council said Mr King:

- (a) adopted a confrontational and unreasonably negative attitude to Mr Tepania and those who supported him;
- (b) breached his contractual obligations of good faith by disclosing to his senior leadership team his recollection of the Kaikohe meeting; and
- (c) failed to communicate his decision to take part in USAR volunteer work while on sick leave.

[93] During the investigation meeting, it was confirmed Mr King had a medical condition prior to commencing his employment with the Council. In line with the disclosure requirements of his employment agreement, the Council argued Mr King should have disclosed this prior to the start of his employment.

[94] In summary, the Council said these alleged breaches of good faith were numerous and occurred in various ways. As a result, it said Mr King's actions demonstrated the extent Mr King was prepared to avoid his obligations, and the different ways he used to justify his own position.

[95] Mr King opposed the Council's claims and said the claims were spurious and retaliatory to his personal grievance claims. He said none of the issues raised by the Council were ever raised with him during his employment. It should be noted also, the allegations around Mr King's confrontational approach and his non-disclosure of his medical condition were not referenced as part of the Council's statement in reply.

[96] Mr King's actions had to be viewed in the context of an employment relationship problem between Mr King and the Council during the early stages of the Council's formation. As already determined, there were also failures by the Council during this period.

[97] Mr King's actions reflected what was a tense relationship between him and the Council which continued up until the end of his employment. No finding of breach is made in respect of any breach of good faith by Mr King and therefore the Council's counterclaim is dismissed.

Costs

[98] Given the Authority's determination on remedies for this matter is reserved, a determination on costs is also reserved. The parties are to notify the Authority on the outcome of their discussions in respect of the issues for both costs and remedies. If the parties are unable to come to an agreement, the Authority will notify the parties of the next steps for further determination of this matter.

[99] It should also be noted the parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily tariff rate unless circumstances or factors required an upward or downward adjustment of the applicable tariff rate.⁵

Alex Leulu
Member of the Employment Relations Authority

⁵ See www.era.govt.nz/determinations/awarding-costs-remedies.