

was a reasonable decision and one which was open to the Council taking into account both the relevant contractual provisions and all the circumstances occurring at the time.

The Authority's investigation

[3] For the Authority's investigation written submissions were lodged from the Council.

[4] Mr Mutonhori did not file formal submissions in respect of this matter, despite ample time being allowed for him to do so. Mr Mutonhori did however engage with the Authority, to say that:

This is not right, entertaining a frivolous application like this. I strongly object to this baseless application which has no realistic chance of succeeding.

and

...this application to reopen is frivolous and vexatious and should be dismissed forthwith.

[5] Accordingly, I have proceeded to determine the matter on the basis of the information before me.

[6] 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

[7] The issues requiring investigation and determination are: in respect of a three-week period when Mr Mutonhori was suspended but was not paid, should he have received payment or was the Council able to decide that his suspension should become unpaid?

Background

[8] The employment agreement between the parties provides for suspension on a paid basis. This may change, as set out in the relevant clause as follows:

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.

[9] In the present case, Mr Mutonhori was suspended on full pay. Instead of engaging with the Council and participating in its disciplinary process, Mr Mutonhori then went overseas for a period of some three weeks. The Council, in reliance on the clause in the employment agreement quoted above, placed him on unpaid leave for that three-week period. When the Council became aware that Mr Mutonhori had returned, it recommenced paying him until his eventual dismissal.

[10] The Council's position is that this clause empowers it to decide that a paid suspension may become unpaid in certain circumstances, after a period of paid suspension has occurred. The clause gives the Council discretion, as indicated by the use of the word "may" to change a period of paid suspension to unpaid suspension.

[11] When exercising that discretion, the Council must act reasonably, and this means that the decision it made must be one that was reasonably open to it on the particular facts. In other words, the decision made by the Council must be one that it "could" make, on the facts of the matter.

[12] In this case, the Council says that its decision that Mr Mutonhori's actions had unduly delayed its investigation and that a period of paid suspension should become unpaid, was a decision that was reasonably open to it both under the terms of the relevant clause and the specific facts.

[13] The facts may be summarised as follows:

- a. On 6 May 2022, the Council presented Mr Mutonhori with written disciplinary allegations and invited him to meet to discuss.
- b. On 16 May 2022, Mr Mutonhori was suspended on pay.
- c. On 26 May 2022, Mr Mutonhori was presented with further disciplinary allegations and the Council sought to meet with him to discuss on 1 June 2022;
- d. On 31 May 2022, the Council wrote to Mr Mutonhori, advising him that it had become aware he intended to travel despite disciplinary proceedings being on foot and the Chief Executive's attempts to meet with him. The Council stated that no leave had been approved (in fact I

understand from the evidence of the parties that no leave had even been applied for), and that if Mr Mutonhori proceeded to leave the country, he should be aware that the Council would treat this as leave without pay.

- e. On approximately 1 June 2022 instead of meeting with the Council as requested, Mr Mutonhori left the county to visit the United States. He had not been granted leave by the Council, even though he remained employed.
- f. He was away for approximately 3 weeks (Mr Mutonhori did not provide specific dates in his evidence).
- g. On 21 July 2022, the Council learned Mr Mutonhori had returned and wrote again to him to progress the disciplinary process.
- h. Despite Mr Mutonhori not formally advising the Council of his absence or return, once the Council learned Mr Mutonhori had returned, it recommenced paying him.
- i. On 5 July 2022, a disciplinary meeting occurred.
- j. Further correspondence occurred, with time for Mr Mutonhori to respond.
- k. On 3 August 2022, the Council dismissed Mr Mutonhori.

[14] The Council submits that, once it was able to re-engage with Mr Mutonhori, the disciplinary process took approximately a month to resolve, from 5 July 2022 to 3 August 2022. By comparison, the three weeks Mr Mutonhori spent overseas was in fact an “undue” delay.

[15] In addition, the Council points out that not only was Mr Mutonhori’s absence from the country an unauthorised absence from work, but he left after being put on notice that his actions were delaying the disciplinary process and that the Council would not pay for his unauthorised leave.

Analysis

[16] I now return to the question of whether the delay caused by Mr Mutohori's unauthorised overseas travel was "undue" and whether the Council acted reasonably in determining that his suspension should become unpaid, which was a power open to it in accordance with the terms of the employment agreement between the parties.

[17] The disciplinary process took some three months, from the issuing of the disciplinary allegations by letter on 6 May 2022 to Mr Mutohori's dismissal on 3 August 2022. The Council sought to meet with Mr Mutohori on 1 June, however due to him going overseas, this meeting was not able to occur until 5 July. This is clearly a delay, which resulted in the disciplinary process extending over three months rather than two. This absence effectively almost doubled the time spent in the disciplinary phase of the investigation.

[18] My initial view was that this was simply not enough to have become an "undue" delay. However, the Council have pointed out the surrounding circumstances, which are not matters in dispute and which Mr Mutohori had no explanation for, namely that his leave was unauthorised, he had been placed on notice that absenting himself from the country without leave would result in this time being treated as leave without pay, and his lack of response to the Council's attempts to meet with him to discuss the unresolved disciplinary matters.

[19] Mr Mutohori's position at the investigation meeting was simply that he should have been paid as he was still employed. His comments now are that the position taken by the Council is "frivolous" and "baseless". As I have already noted, there is no dispute on the facts, and at no point has Mr Mutohori provided a direct response to the careful submissions by the Council as to why, in all the circumstances, it was reasonable for it to have acted as it did. Mr Mutohori's failure to explain or justify his actions does not support his position that the Council's claims should be dismissed.

[20] On balance, and in the circumstances at the time, I find that it was open to the Council to have placed Mr Mutohori on unpaid leave for a period of three weeks while he was out of the country without leave of his employer.

Orders

[21] Accordingly, the orders set out at paragraph [70] of my determination of 23 August 2023 are replaced with the order that Mr Mutohori's claim for three weeks wages plus Kiwisaver contribution is not made out. No orders for payment are made.

[22] If there are issues as to costs, the parties may revert to the Authority as needed.²

Claire English
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1