This determination includes an order prohibiting publication of certain information.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 344
5436826

	BETWEEN	JANET WALTERS-GLEESON Applicant
	AND	WHANGAREI DISTRICT COUNCIL Respondent

Member of Authority:	Robin Arthur
Representatives:	Anthony Russell, Counsel for the Applicant Samantha Turner and Simon Clark, Counsel for the Respondent
Investigation Meeting:	8, 21, 22 and 23 July 2014
Determination:	25 August 2014

DETERMINATION No 2 OF THE AUTHORITY

A. **The decision by Whangarei District Council chief executive Mark Simpson to dismiss Janet Walters-Gleeson (Ms Walters) for serious misconduct, and how he went about making that decision, was not what a fair and reasonable employer could have done in all the circumstances at the time of those actions.**

B. **Reinstatement of Ms Walters' employment with the Council is not practicable and reasonable.**

C. **The Council must settle Ms Walters' personal grievance by paying her the following sums:**

(i) $31,684.28 in reimbursement of lost wages and compensation for loss of future earnings as a result of her grievance; and

(ii) $6000 as compensation for humiliation, loss of dignity, and injury to her feelings (being an amount reduced by one quarter due to actions by her contributing to the situation giving rise to her grievance).

D. Costs are reserved.

Employment relationship problem

[1] On 12 September 2013 Mark Simpson, the chief executive of Whangarei District Council (the Council) dismissed Janet Walters-Gleeson (Ms Walters) from her role as Personal Assistant (PA) to the Mayor and Chief Executive.

[2] In reasons for her dismissal, given in letters to her on 12 and 24 September, Mr Simpson said Ms Walters had seriously breached the Council's Code of Conduct (the Code) and its Election Protocols for Employees (the Protocols) by signing a nomination form for mayoral candidate Stan Semenoff on 15 August 2013. He said her conduct had the potential to damage the Council's reputation and ability to operate as an impartial administrator. As a result he concluded she had committed serious misconduct and her dismissal was appropriate. He said this was because Ms Walters' role at the Council gave her access to highly sensitive confidential information and she must "*be beyond reproach*".

[3] Mr Simpson said Ms Walters' decision to nominate Mr Semenoff and her "*explanations surrounding that decision*" had seriously damaged his trust and confidence in her ability to exercise good judgement and to conduct her duties in line with the Code, the Protocols and Council expectations.

[4] Ms Walters applied to the Authority for a determination that her dismissal was unjustified and that she should be awarded remedies of reinstatement, lost wages and compensation for her resulting distress. The Council replied that her dismissal was justified and had followed a full and fair investigation of its concerns about her

conduct. It opposed the remedies Ms Walters sought, particularly that of reinstatement.

Order prohibiting publication

[5] Among documents lodged as evidence for the Authority investigation was a copy of a three-page letter, dated 21 April 2014, that Ms Walters wrote and sent to the home address of Trudi Crocombe. Ms Crocombe had worked with Ms Walters at the Council and is Mr Simpson's present PA. During the investigation meeting I made an order prohibiting publication (in relation to this matter before the Authority) of the names of a Council manager and the personal partner of that manager, who were both referred to on page two of that letter. The order, made under clause 10(1) of the Schedule 2 of the Employment Relations Act 2000 (the Act), remains in place. I thought the order fit as neither person referred to was involved in any key events in this matter or as a witness in the Authority's investigation and neither had the opportunity to respond to negative comments about them in Ms Walters' letter.[1]

The investigation

[6] The Authority's investigation of Ms Walters' application received written and oral evidence from the following witnesses:

(i) Ms Walters; and

(ii) Stan Semenoff, who had asked Ms Walters on 15 August to sign his mayoral nomination form and who, on 16 August, lodged his completed form at the Council's offices at 8.13am; and

(iii) Kathryn Candy, the Council's in-house legal counsel who was involved in a review of the Protocols earlier in 2013, had assisted with administration of electoral matters during the 2013 Council election period, and who was told by Ms Walters (at around 9.03am on 16 August) that she had signed Mr Semenoff's nomination form; and

(iv) Dominic Kula, the Council's governance manager who was also involved in the review of the Protocols before they were distributed to Council staff in May 2013; and

[1] *H v A Limited* [2014] NZEmpC 92 at [79]-[80].

(v) Alan Adcock, the Council's support services group manager who was a member of the Council's leadership team that approved the Protocols, was told by Ms Candy on the morning of 16 August that Ms Walters had signed Mr Semenoff's nomination, and who then discussed the matter with Mr Simpson; and

(vi) Mr Simpson; and

(vii) Jenny Antunovich, the Council's Human Resources Manager who assisted Mr Simpson in carrying out his investigation and disciplinary process; and

(viii) Ford Watson, who had worked as an advisor to Mr Simpson during 2013 and who Mr Simpson agreed on 24 May 2013 could help with campaign material for Warwick Syers, another mayoral candidate (and, at the time, a sitting councillor); and

(ix) Peter Gleeson, who is Ms Walters' husband, also works for the Council, and who accompanied Ms Walters as her support person and representative in investigation and disciplinary meetings with Mr Simpson.

[7] Along with that evidence I also reviewed more than 300 pages of related documents lodged by the parties and detailed written and oral submissions on the facts and law that the parties' counsel delivered at the investigation meeting. As permitted by s174 of the Act I have not set out all the evidence and submissions received but have stated relevant findings on factual and legal issues and expressed conclusions on those issues.

The test of justification

[8] To be justified under s103A of the Act Mr Simpson's decision to dismiss Ms Walters, and his conduct in reaching that decision (on behalf of the Council), must have been within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time. From my investigation I concluded, on the basis of what was more likely than not, that Mr Simpson's actions and decision fell below that objective standard. His findings that Ms Walters had committed serious misconduct and should be dismissed were unjustified for the following reasons:

(i) Mr Simpson held Ms Walters to a standard he had not met himself in respect of requirements to maintain political neutrality and to avoid the risk of appearing biased; and

(ii) He failed to genuinely consider her explanation of having made an error; and

(iii) His conduct breached the statutory obligation of dealing with Ms Walters in good faith, in part by doing some things in his investigation that were misleading and deceptive and, in part, by not being as active and constructive in his dealings with Ms Walters as he should fairly have been after he found out she had signed Mr Semenoff's form.

[9] The reasons for those conclusions have been set in the remainder of this determination.

(i) The double standard

[10] After considering the following matters I concluded Mr Simpson had imposed an unjustified double standard in making his decision:

(a) The legitimacy and requirements of the Protocols; and

(b) The nature of Ms Walters' conduct in signing Mr Semenoff's form; and

(c) The conduct of Mr Watson in working on part of Mr Syers' campaign and of Mr Simpson in approving that activity under the Protocols; and

(d) The effect of Mr Simpson's own conduct under the Protocols.

(a) The legitimacy and requirements of the Protocols

[11] Ms Walters' submissions attacked the Protocols as improperly limiting her right under the Local Electoral Act 2001 (LEA) to nominate a candidate. As a citizen and resident on the electoral roll Ms Walters was qualified to nominate a candidate in the Council's 2013 mayoral elections.[2] The LEA also required the Council to "*take into account so far as [was] practicable in the circumstances*" the principle that she had "*a reasonable and equal opportunity*" to nominate a candidate.[3]

[2] Section 26 of the Local Electoral Act 2001 (LEA).
[3] Section 4(2) and 4(1)(b)(ii) of the LEA.

[12] In Ms Walters' submission the Council's common law right to impose requirements on her conduct as its employee could not override her statutory rights as a citizen. For the following reasons I have not accepted that proposition.

[13] Firstly, the Protocols, properly and fairly applied, did not prohibit an employee exercising her or his right to nominate a candidate but rather, if that were done, set a framework for managing potential risks or conflicts of interest that might result from that action. In that sense its terms were within the bounds of practicability and reasonableness referred to in the LEA provisions.

[14] Secondly, if the Protocols did fetter a Council employee's statutory right to some extent, the matrix of relevant rights and obligations (including those in the LEA and the Local Government Act 2000) could reasonably be interpreted as allowing for such a restriction. The exercise was not solely one of weighing the respective rights of the employees and the Council but also those of other citizens who have an interest in their local authorities not becoming a closed circle of power and influence for incumbent politicians and officers. It would be a surprising outcome if there were not some reasonable and legitimate requirements made of local government employees to minimise the risk of appearing biased or unduly influencing the elections of councillors and mayors.[4] Those requirements could be expected to be similar to standards of political neutrality required of state servants.[5]

[15] The Employment Court has recognised a council can have rules limiting employees' activities but has emphasised that the scope and extent of such limits should be articulated with "*great clarity so that council officers will be in no doubt about their obligations*".[6] And it was on that basis that I have accepted Ms Walters' submission correctly identified that some terms of the Protocols (that Mr Simpson and his team of managers approved for the 2013 Election) were "*fraught with contradictions and uncertainties*".

[16] The key parts of the Protocols were:

---

[4] *Walters-Gleeson v Whangarei District Council* [2014] NZERA Auckland 139 at [20].
[5] See, for example, *Guidance for the 2014 Election Period: State Servants, Political Parties, and Elections* at www.ssc.govt.nz.
[6] *Lowe v Tararua District Council* [1994] I1 ERNZ 887 at 901.

Introduction

…
It is important that all Whangarei District Council employees remain politically neutral at times in their dealings with both elected members and the public in general. This becomes even more crucial as we approach the elections.

It is not appropriate and not acceptable conduct for employees to align themselves or support in any way candidates, whether they are incumbent or aspiring. Such action will leave employees open to allegations of bias which could cause serious problems both for themselves and for Council as an organisation.

These protocols have been put together to assist employees, who are all required to adhere to the protocols.
…

Council employees

- *It is important for all Whangarei District Council employees to remain politically neutral at all times in their dealings with elected members and the public in general.*

- *It is not appropriate and is not acceptable conduct for employees to obviously align themselves or support candidates, whether an incumbent or aspiring member.*

- *Any action that leaves employees open to [sic] allegation of bias could potentially cause serious problems for both themselves personally and for Council as an organisation.*

Council employees may not take part in political campaigns without CEO approval

Taking part in a candidate's election campaign significantly increases the potential for conflicts of interest and extreme care must be taken if employees wish to take an active role in a campaign. Approval from the Chief Executive Officer is required if employees wish to have any direct involvement in a candidate's campaign:

Unless prior approval has been granted, employees should not:
- *attend private campaign strategy meetings, [or]*
- *be involved in running public meetings (unless they are facilitating meetings where competing candidates present themselves for scrutiny), or*
- *take part in any activity that could be seen to be a campaign activity.*

Extra care should be taken to ensure when organising events or issuing statements that they do not link to any candidate's campaign.

When considering a request to take part in a campaign, the Chief Executive Officer will consider the employee's position in the organisation and their potential access to information that could give unfair advantage to a candidate as part of their role. It will then be up to the employee to manage their involvement in accordance with the wider provisions of these protocols.

Employees standing for political office

<u>WDC Candidacy</u>

Nothing in the legislation prevents a council employee from pursuing a direct political involvement at local, regional or national levels. However due to the high possibility of a conflict of interest, an employee who desires to become a candidate for the election to the Whangarei District Council shall be placed on leave of absence for the purposes of his or her candidature.

…

Other Candidacy – Local Authority or District Health Board

If the employee desires to become a candidate for another local authority … there may be a possibility that a conflict of interest could develop, either during a campaign or afterwards if elected. Therefore employees must register any such interest through their manager before lodging their nomination.
The CEO reserves the right to consider each situation on its merits. One of three determinations will be made:

1. *No serious conflict of interest exists.*
2. *A conflict of interest exists and ongoing employment with the Whangarei District Council is incompatible with campaigning and/or holding political office. In such a situation the employee must decide which they wish to pursue.*
3. *A conflict exists but can be satisfactorily managed by a change in work duties. The feasibility of such a change being made shall be dependent on organisational requirements and at the CEO's discretion.*

In making such a determination the CEO will consult with the employee concerned, act reasonably and the decision will not be unreasonably delayed.

Application of protocol

…
Above all it is a matter of common sense. If any employee is unsure whether particular requests or activities are in breach of the protocols set out above, please contact Alan Adcock, Group Manager Support Services.

Breaches of protocol

Any breach of this protocol may result in disciplinary action being taken in accordance with WDC policies.
…

[17] At the heart of the present matter was whether the provision allowing the CEO to approve employees' involvement in the election campaigns of candidates could be reasonably reconciled with the Protocols' statement that it was not appropriate or acceptable conduct for employees to align themselves with, or support, candidates "*in any way*". The inherently contradictory nature of the terms in the Protocols was also apparent to a special review committee of Council (comprising an external lawyer and three councillors) who made this observation in its report on 25 September 2013:

… [I]t is perhaps surprising that the CEO should be given the discretion to make an exception in the case of one or more employees. The obvious concern being that if the reason for imposing a bar in the first place is a good one (and on the face of it, it is), and that therefore the involvement of employees in election campaigns is inappropriate, then the CEO sanctioning that involvement, does

> *not alter the fact that the conduct of the employee in those circumstances remains inappropriate.*

[18] The Protocols appeared to be at odds with the approach taken by other Councils – at least based on two examples and a national model among the documents lodged by the Council for the Authority investigation. Model Protocols circulated by the Society of Local Government Managers (SOLGM) in its code of good practice for the 2013 local authority elections had the same strong wording about officers not aligning themselves with candidates but included no mechanism for a CEO approving participation in campaign activity. Instead the SOLGM model recommended an officer intending to engage in such activity should inform their manager who "*may advise*" the activity was "*inappropriate*". Advice about an intended activity is plainly different from approval of it. Approval suggests an endorsement or authorisation of the activity.

[19] Viewed objectively the Protocols contained some reasonable instructions about conduct by Council employees but the requirements of the CEO approval mechanism were so inherently contradictory that they were irrational. That mechanism (if approval for an activity was given) could not operate without then violating the central rationale of the Protocols – that any support for candidates was unacceptable conduct due to the risk of allegations of bias which could cause "*serious problems*" for both the employees and the Council as an organisation. Identifying the irrational nature of that part of the Protocols was important to the subsequent assessment of whether some decisions Mr Simpson made were what a fair and reasonable employer could have done in all the circumstances. Such an employer could not reasonably have or fairly apply such an irrational provision or policy.

(b) The nature of Ms Walters' conduct

[20] There were two key aspects to Ms Walters' conduct or behaviour in how she came to sign Mr Semenoff's nomination form on 15 August 2013.

[21] Firstly, she had not read the Protocols, which were accessible through a 'hyperlink' in emails sent to Council employees on 24 May and 19 July 2013. Electronic records showed she opened the first of those emails. Her oral evidence

confirmed she had probably printed out the document but, although she knew she needed to, she had not got around to reading it.

[22] Secondly Ms Walters' decision to sign Mr Semenoff's form on 15 August was done 'on the spur of the moment' and without forethought. Ms Walters later gave some explanations to Mr Simpson – and even later in the Authority investigation – that sought to rationalise what she did that day (such as her claim that she had a right to do what she did). However, I considered that it was more likely than not, and consistent with her own evidence and the evidence of others, that those explanations were *post facto* justifications. They did not accurately reflect her state of mind at the time. She had really agreed to do it without much thought at all.

[23] On 15 August 2013 Mr Semenoff picked up a mayoral nomination form while visiting the Council offices on a business matter. He spoke with Ms Walters by mobile telephone as she was walking back to the offices with her husband, Mr Gleeson, after taking their lunch break in town. The three met and talked briefly outside the Council offices before Mr Gleeson left to return to work. Mr Semenoff then asked Ms Walters to sign his form. She agreed, signing it and filling out the spaces for her name and address. The rest of the form was probably blank at the time but Ms Walters knew she was nominating Mr Semenoff for the office of Mayor in Council elections due to be held in October 2013.

[24] When answering questions at the Authority investigation Ms Walters accepted that council officers should (as a general principle) be politically neutral, that her particular PA role required her to be politically astute, that signing a nomination form for public office was an act of support for a candidate, that she would probably have told Mr Semenoff that she was not allowed to sign his form if (before doing so) she had read the Protocols, and that ignorance of that document's contents was not a legitimate excuse for what she did.

[25] I did consider whether Mr Semenoff pressured Ms Walters into signing his form, in the sense that he asked her in a way, at a time and in a place where she felt she could not refuse. She had known him and his family for more than 30 years and was employed by the Council to work in her PA role in February 2008, shortly after Mr Semenoff was elected Mayor in 2007. At the time he asked her to sign his nomination form on 15 August there must have been at least some possibility Mr

Semenoff might win the election and so could again be her 'boss' – and that could have made refusing him awkward. In answer to questions during Mr Simpson's inquiry she had said that she had felt "*a bit pressured*" that day and described Mr Semenoff as having a "*just do it"* character. However her unequivocal evidence at the Authority investigation was that she had meant she only felt pressured for time because she was due back at work and that she was confident she could have refused Mr Semenoff's request if she had thought, at the time, that it was not right to agree.

[26] The Council's disciplinary policy described misconduct as including "*unacceptable or irresponsible actions or omissions*". Her omission in not reading the Protocols and her action of signing Mr Semenoff's form (without really thinking about whether it was appropriate to do so) could been seen as within the scope of the definition, particularly if the Protocols' requirement to remain politically neutral was accepted as a reasonable standard of conduct. The disciplinary policy also referred to expected standards of behaviour set out in the Code. The six pages of 'guidance' given by the Code referred to "*a convention of neutrality*" and included a requirement that employees acted in a way that enabled them to ensure their department could establish an "*impartial relationship*" with future Councils. If she had thought about it properly beforehand, Ms Walters would have realised that signing Mr Semenoff's form would create a real risk that another candidate successfully elected as Mayor, and who became aware Ms Walters had nominated Mr Semenoff for that post, might consider she would not be neutral and impartial in serving that other person as Mayor. Also relevant was Ms Walters' implied contractual duty to exercise skill and care in the performance of her duties. Her lack of attention to the Protocols and what signing Mr Semenoff's form might mean was, in that sense, negligent.

[27] However the real issue was not whether Ms Walters' carelessness was misconduct but whether it amounted to serious misconduct – that is behaviour so deeply impairing of the employer's trust and confidence in the employee that the relationship becomes untenable. Generally serious misconduct, even where its consequences for the employer are very serious, does not consist of mere inadvertence, oversight or negligence.[7] The Employment Court has explained the need for a thorough inquiry by the employer in such circumstances:[8]

---

[7] *Makatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 311 at p319 (EC).
[8] *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 at [81] (EC).

> *Where an employer investigates an employee's failure to adhere to a policy or code of conduct, it has to assess whether the employee's failure to comply was because of inadvertence, oversight, or negligence or whether it was done deliberately in the knowledge that it was wrong. If the employee did not have knowledge of the relevant policy or rule, a fair and reasonable employer should find out whether that was the fault of the employee for ignoring or failing to take proper care to be familiar with the policy, or whether there was genuine room for misunderstanding as to what the policy meant. This is not to say that it is necessary for an employer to be satisfied that an employee who breaches policy or a code of conduct has done so deliberately in the sense of having mens rea or criminal intent … but it is bound to investigate fully to establish why it occurred.*

[28] In Ms Walters' case there were shortcomings in how she was expected to become aware of the requirements of the Protocols, relevant to the application of the objective test concerning all the circumstances at the time of the dismissal decision.

[29] Firstly, Mr Simpson had not talked with Ms Walters about the Protocols after the emails referring to them were sent to all staff in May and July. While a manager could not necessarily be expected to discuss the operation of every policy with every employee, in this case Ms Walters reported directly to Mr Simpson as his PA, was in a supposedly sensitive role during the election period, and (because of the CEO approval mechanism in the Protocols) might be approached by an employee to schedule an appointment with Mr Simpson about that issue.

[30] Secondly, Ms Walters was not given an opportunity to attend the meetings held for other Council employees to hear a briefing on what was expected of them during the election period. The group emails to staff in May and July (containing the hyperlinks) said meetings would be arranged to discuss the Protocols. Council's leadership team, including Mr Simpson, had considered the matter sufficiently important to arrange for a briefing about the elections to be a special agenda item at staff group meetings. Mr Simpson could not explain why he had not suggested Ms Walters attend one of those meetings and said it was "*clearly an omission*". While the first such meeting was, in fact, held the day after she had signed Mr Semenoff's form, its importance here was that it indicated Mr Simpson's lack of attention to ensuring Ms Walters knew and understood necessary information.

(c) The conduct of Mr Watson and Mr Simpson

[31] Mr Watson also reported directly to Mr Simpson. His role as an advisor to the CEO included research and communications work, drawing on his skills and

extensive experience as a journalist. Mr Watson took the Minutes at the Council's leadership team meetings where, on 23 May 2013, he read the Protocols adopted that day for circulation to staff. On the following day Mr Watson told Mr Simpson that Warwick Syers had asked Mr Watson to work on his mayoral election campaign.

[32] Mr Simpson and Mr Watson agreed in their evidence that Mr Simpson had made it clear that Mr Watson's activity to help Mr Syers' campaign could not be done in Council-paid time or use any Council equipment or resources. They disagree about how much work Mr Watson in fact did for Mr Syers' campaign. In reaching my conclusions on Mr Simpson's actions, however, I have relied only on his narrower description of what he approved and what he understood Mr Watson did for Mr Syers' campaign. I did so because even Mr Simpson's own account demonstrated the inappropriate outcome created by his use of the CEO approval mechanism.

[33] Mr Simpson said Mr Watson described the work as "*run[ning] his eye over [Mr Syer]'s campaign material*". In his witness statement for the Authority investigation Mr Simpson said his approval of Mr Watson's activity created "*very little risk in terms of any appearance of bias or conflict simply because he proof-checked some material for Warwick*". For the following reasons I was not convinced by Mr Simpson's attempt to minimise or explain away his approval of Mr Watson's activity.

[34] Mr Simpson's witness statement said he "*had a think*" about Mr Watson's request and considered the application of the Protocols. Questioned in the investigation he said he spent "*about ten seconds*" doing so. The important point is that his action was deliberate, considered, and made in light of a full knowledge of the Protocols.

[35] Those Protocols said "*extreme care*" was needed when the CEO was asked to approve an employee taking an active role in a candidate's campaign. Mr Simpson admitted that he had made no inquiry about the scope or extent of what Mr Watson intended to do for Mr Syers, made no record of what he had approved, and told no-one else in his senior leadership team about it.

[36] Mr Simpson described Ms Walters' role as PA to the Mayor and CEO as being "*very high profile*" compared to Mr Watson's role as an advisor to him. I have not

accepted the distinction as valid. Both roles reported directly to the CEO and would be involved in work with whichever candidates were successful in the Council elections. In Mr Watson's case he had access to all Mr Simpson's emails and attended strategic decision-making of the Council's leadership team. While Mr Syers (who was then the councillor chairing the Council's finance committee) would also have had access to some confidential Council information anyway, Mr Watson's role in the CEO's office gave him access to another source of potentially sensitive information.

[37] The effect of what Mr Simpson did was to approve Mr Watson's support for Mr Syers' campaign – when the Protocols stated that support of an aspiring candidate "*in any way*" was "*not acceptable conduct*". The phrase 'in any way' was unequivocal – even a little bit of support was too much. Mr Simpson accepted, in answer to a question, that his approval of Mr Watson's activity on Mr Syers' campaign had left Mr Simpson open to an allegation of bias (in favour of one mayoral candidate over others) – and that was the very situation that the Protocols were intended to help the Council and its employees (including its CEO) to avoid.

(d) The effect of Mr Simpson's own conduct under the Protocols

[38] Ms Walters' submissions sought to establish that her dismissal was unjustified because of the disparity between how Mr Simpson treated her and Mr Watson – both having been involved in activity supporting an aspiring candidate (and in apparent breach of the direction of the Protocols not to do so).

[39] However there were not truly parallel circumstances in what Ms Walters and Mr Watson had done. His activity was approved under the Protocols, however inherently contradictory the terms of that document were. Her argument about disparity of treatment with Mr Watson was misplaced – the more apt comparison was that between the conduct of Ms Walters and Mr Simpson.

[40] Her act, in actively supporting a candidate by signing his nomination form, was one done thoughtlessly and carelessly. She was dismissed for it.

[41] Mr Simpson's act – in approving a skilled professional in his office using those skills to actively support one candidate – was deliberate. It inevitably created

the risk that any objective observer (including such people among the electors of the Whangarei District) could reasonably form the view that Mr Simpson was biased in how he carried out his role as CEO as he agreed with supporting one mayoral candidate over another. In his own witness statement Mr Simpson said "*the mere appearance of bias or a conflict could be just as damaging to the Council as an actual conflict or bias*". The risk for the Council, as an organisation – resulting from what Mr Simpson had done (in respect of Mr Watson and Mr Syers) – was that both the successful and unsuccessful candidates as Mayor and councillors could have reason for real doubt that the CEO would observe the Code requirements to ensure an impartial relationship with future Councils and to observe the convention of neutrality.

[42] In the letter advising Ms Walters of her dismissal Mr Simpson wrote that the PA to the Mayor and CEO, due to her access to sensitive confidential information, must "*be beyond reproach*" and conduct herself in a manner in line with the Code, the Protocols and Council expectations. A fair and reasonable employer, in those circumstances, could not expect a lower standard of its CEO (with similar or higher levels of access to sensitive information) than that required of his PA. However, according to his evidence, Mr Simpson's actions – that that had left him 'open to allegations of bias' and, thereby, not being 'beyond reproach' – did not result in any disciplinary review by Council. Ms Walters, by contrast, was subject to such a disciplinary process organised and decided on by him.

[43] A decision-maker, acting on behalf of a fair and reasonable employer, could not, in those circumstances, have interpreted and applied the Protocols to impose a higher standard for the careless action of a PA and a lower standard for the deliberate action of a CEO. If the Council had dismissed Mr Simpson for his actions, the argument about a double standard or disparity would not hold. It had not and the result for Ms Walters was unjustified.

(ii) Failure to genuinely consider Ms Walters' explanation

[44] One factor the Authority must take into account, under s103A(3)(d) of the Act, when applying the test of justification is whether the employer genuinely considered the employee's explanation given in response to any allegations made. If the employer failed to do so, in a way that was more than minor and that then resulted in

the employee being treated unfairly, the Authority may find the employer's subsequent dismissal decision was unjustified.[9]

[45] From the evidence of Mr Simpson and Ms Antunovich I concluded Mr Simpson had failed to genuinely consider Ms Walters' repeated explanation and acceptance that she had made a mistake in signing Mr Semenoff's form.

[46] Mr Simpson's witness statement gave apparently contradictory statements about Ms Walters acknowledging, during his meetings with her, that signing Mr Semenoff's form was the wrong thing to do and a mistake. He said it "*seemed [Ms Walters] thought she had not done anything wrong*" but he also said she was "*quite antagonistic and aggressive in saying on the one hand yes, what she did was the "wrong thing" or a "cock up" then despite this, denying any responsibility, saying instead someone should have effectively caught her and stopped her*". He said Ms Walters *"was quite strong in maintaining while she was 'wrong' she had not done anything wrong really. Frankly her attitude seemed to be consistently 'I can do what I want'."*

[47] Notes Ms Antunovich made in the meetings held with Ms Walters recorded a number of acknowledgements by Ms Walters that what she did on 15 August was wrong. She (or her representative) described it variously as "*an innocent error*", "*a genuine mistake*", "*a genuine slip up*" (22 August); a "*slip*", "*done unwittingly*", "*on reflection was wrong thing*", and a "*cock up*" (28 August).

[48] Ms Antunovich's witness statement gave an insight into Mr Simpson's thinking, as expressed in private discussions with her at the time he made his preliminary decision to dismiss Ms Walters and, on 12 September 2013, his final decision to do so.

[49] Ms Antunovich recalled Mr Simpson talking on the earlier occasion about "*the fact he was very concerned there did not seem to be <u>any</u> recognition by [Ms Walters] that she had done <u>anything</u> wrong"* (emphasis added). And, describing their 12 September discussion, she said Mr Simpson's concern was "*that by signing the nomination and not recognising the implications of this, and, <u>continuing</u> to not accept*

[9] Section 103A(5) of the Act.

there was anything wrong with this, [Ms Walters] had irreparably damaged his trust and confidence in her" (emphasis added).

[50] Mr Simpson's description (at the time of making his decisions) of Ms Walters' explanation did not accurately reflect what she had said to him. Accordingly he had not genuinely considered her recognition or acceptance, at some points, that she had done something wrong. His failure was not minor, as it was central to his decision to dismiss her, and it resulted in a decision about her future employment being made unfairly.

(iii) Failure to deal with Ms Walters in good faith

[51] The statutory duty of good faith required Mr Simpson and Ms Walters not to do anything likely to mislead the other person and also to be responsive, communicative, active and constructive in seeking to maintain a productive employment relationship.[10]

[52] Mr Simpson failed to meet that obligation in the following respects:

(a) Making misleading statements – in a letter and in his first investigation meeting with Ms Walters – about how the matter came to his attention; and

(b) Holding a formal interview with Mr Adcock on 27 August to ask one question about which Mr Simpson already knew the answer but which he had not disclosed to Ms Walters when she raised the question in their 22 August meeting; and

(c) Failing to speak with Ms Walters directly on 16 August (to acknowledge her disclosure or to discuss what she might do to remedy or reduce any risks caused by her nomination of Mr Semenoff).

(a) Misleading statements in the 20 August letter and 22 August meeting

[53] Mr Simpson formally began his inquiry into Ms Walters' nomination of Mr Semenoff by sending her a letter dated 20 August 2013. The letter was drafted by Ms Antunovich but, after making some amendments, was approved and signed by Mr Simpson. It began with a statement that Ms Walters' activity had come to his

[10] Section 4(1) and (1A)(b) of the Act.

attention "*while reviewing Local Government nomination forms*". That statement was not true.

[54] Ms Walters' nomination of Mr Semenoff came to Mr Simpson's attention because Ms Walters disclosed that fact to Ms Candy on the morning of 16 August. Ms Walters did so because her husband Mr Gleeson had spoken to her soon after attending a staff meeting earlier that morning. The meeting included a briefing delivered by Mr Kula about the responsibilities of staff during the 2013 election period. From what Mr Kula said in that briefing Mr Gleeson realised he should disclose to his manager that he had nominated a colleague as a candidate for a Northland Regional Council position and that Ms Walters should also disclose that she had nominated Mr Semenoff as a Whangarei mayoral candidate. Mr Gleeson told his wife she should do so.

[55] Around 9.03am on 16 August Ms Walters told Ms Candy what she had done. Ms Candy then spoke to Mr Adcock who said he would speak to Mr Simpson about it. About 10am Mr Adcock went to Mr Simpson's office where he and Mr Simpson spent at least half an hour discussing issues arising from that information. Ms Candy joined them for some of that conversation. Mr Simpson accepted in his oral evidence to the Authority that he was told during that conversation that the information came from Ms Walters directly. Mr Adcock's evidence was that he recalled Ms Candy mentioning that fact while she was with them in Mr Simpson's office that morning.

[56] During his first investigation meeting with Ms Walters, on 22 August, Mr Simpson was asked why the 20 August letter said the information about her nominating Mr Semenoff had come from a review of the forms. He replied that "*it was news to [him]*" that Ms Walters had spoken to Ms Candy. However Mr Simpson admitted at the Authority investigation meeting that he had known the source of the information – both when he signed the 20 August letter and when he answered the question raised at the 22 August meeting with Ms Walters. On both occasions his actions were likely to mislead or deceive Ms Walters in a context where accurate information was important to a decision about the continuation of her employment. It was a clear breach of his duty to deal with her in good faith. Its significance was that from the outset of his investigation, Mr Simpson's incorrect description 'set the tone'

for how he viewed Ms Walters' behaviour – as something she was 'caught' doing rather than something she disclosed as soon as she realised it might cause a problem.

(b) Misleading questions to Mr Adcock

[57] In their discussion on 16 August Mr Simpson and Mr Adcock concluded Mr Semenoff's nomination form was valid. They knew the deadline for nominations expired at 12 noon. However they decided not to try to talk before then to Mr Semenoff or Ms Walters about their concerns over her nomination of Mr Semenoff. Instead they agreed Mr Adcock would seek some advice from the Council's external legal advisors that day – although the nature or scope of that inquiry was not clear from the evidence of either man. Nevertheless the evidence of both confirmed that they had decided not to approach either Mr Semenoff or Ms Walters about withdrawing Mr Semenoff's form and replacing it with a new one without Ms Walters as a nominator.

[58] In that light it was unclear why (as part of his investigation) Mr Simpson had, on 27 August, called Mr Adcock to a second interview to ask why Mr Adcock had not talked to Ms Walters before 12 noon on 16 August. When asked that question on 27 August Mr Adcock answered that he did not do so because it was up to Mr Simpson to address any issues with her.

[59] In the Authority investigation Mr Simpson's explanation for making that inquiry of Mr Adcock was that Ms Walters had asked about that point in his first interview with her on 22 August and it was appropriate to then go back to Mr Adcock. Ms Antunovich supported that view. She said it was an important question in the investigation as Ms Walters had challenged why no one came to speak to her on 16 August and it was necessary to check that point with Mr Adcock as part of a thorough, sound investigation.

[60] It was not clear to me that Mr Simpson told Ms Antunovich that it was not necessary to ask Mr Adcock that question since Mr Simpson already knew the answer – that Mr Adcock did not talk to Ms Walters on 16 August because he and Mr Simpson had decided not to do so. At the Authority investigation Mr Simpson could give no satisfactory explanation as to why he had not disclosed that fact to Ms Walters when she had asked about it in their meeting on 22 August.

[61] Holding a second interview of Mr Adcock was, in that sense, a sham carried out for the purpose of making the investigation look thorough. Mr Simpson already knew the answer but he went through the motions of asking him. He also knew Mr Adcock's answer on 27 August was not the whole answer or reason. The effect was misleading and a breach of Mr Simpson's duty to deal with Ms Walters in good faith.

(c) Failure to be active, constructive and communicative on 16 August

[62] When Ms Walters spoke to Ms Candy on 16 August about the nomination – which Ms Candy described as 'fessing up' – Ms Candy told her to have no further contact with Mr Semenoff. Ms Candy also sent Ms Walters an email at 9.58am saying that she had spoken to Mr Adcock and "*imagine[d] that [Mr Simpson] and/or [Mr Adcock] will come and have a chat soon*".

[63] However neither Mr Adcock nor Mr Simpson spoke with Ms Walters that day. Although they were not aware that Ms Candy had suggested to Ms Walters that they might talk to her "*soon*", it was nevertheless a failure to be active and communicative with her and also proved to be misleading.

[64] In his investigation meeting on 28 August Mr Simpson asked Ms Walters repeatedly why she had not contacted Mr Semenoff once she realised, on the morning of 16 August, about the problem with her act of nomination. Mr Simpson suggested she could have asked Mr Semenoff to come back to the Council offices. However Ms Walters considered she was under a direction from Ms Candy – whom she understood was the 'go to' person on election issues – not to contact Mr Semenoff.

[65] If Mr Simpson had spoken to Ms Walters himself on the morning of 16 August he might have found that out and have been able, with or without her help, to get Mr Semenoff to call by the Council offices before 12 noon and provide a replacement form (with a nominator other than Ms Walters). I was satisfied from the evidence of Mr Semenoff, Mr Adcock and Mr Simpson that there was at least an hour before 12 noon on 16 August during which such an arrangement could have been attempted. It would not – accepting a point Mr Simpson made in his oral evidence – have resolved the problem of Ms Walters not having read and understood the Protocols' requirement on political neutrality but it could have reduced what he described on 28 August as "*reputational damage*" for the Council. The result could

have been that the Council was seen, if it ever became a public issue, to have acted promptly where an employee had breached the expectation of neutrality. In that context Ms Walters' comments that Mr Simpson, Mr Adcock and others could have done more to 'protect' her was a reasonable criticism of their failure to be active and constructive that day.

[66] I have not accepted the suggestion from Mr Simpson and Mr Adcock that doing any more that day would have interfered with the electoral process and risked Mr Semenoff not having a valid nomination form in on time. His nomination form was already in and valid. A replacement form – with a different nominator – could have been lodged before 12 noon and to the same effect.

[67] A fair and reasonable employer could also have been expected to be communicative by at least letting Ms Walters know what would or would not be done that day. Mr Simpson's office was a few metres away from her office. He could simply have stepped along the corridor or called her into his office. A brief discussion could have easily resolved some misconceptions that were not identified until later – including why Ms Walters had not spoken to Mr Simpson herself, rather than waiting for him to speak to her. Firstly, he might have learnt that she and Mr Gleeson had come to talk to him that morning but found his door closed (because he was conferring with Mr Adcock on the issue) and, secondly, that Ms Walters believed from what Ms Candy had told her that it was in Mr Simpson's hands and to wait to hear from him. Although she could, arguably, have done more herself to communicate with Mr Simpson directly that morning, she had not failed to make some reasonable effort to meet her own obligations to be active and communicative. However the result of Mr Simpson's failure to communicate in a good faith manner with Ms Walters was that she thought nothing more needed to be done that day about what she had disclosed. Consequently, both she and the Council missed the opportunity to reduce the potential risk by at least trying to get a different nomination form in by the deadline.

Remedies

Reinstatement

[68] Ms Walters sought reinstatement in the event that she was determined to have a personal grievance. Reinstatement may be granted under s125(2) of the Act where "*it is practicable and reasonable to do so*".

[69] This statutory test for the reinstatement requires:[11]

> *"... a balancing of interests of the parties and the justices of their case with regard not only to the past but more particularly the future ... Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence."*

[70] The Employment Court has described the necessary assessment of reasonableness in this way:

> *[65] ... the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.*
>
> *[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.*
>
> *[67] Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.*
>
> *[68] As in other aspects of employment law, it is not a matter of laying down rules about onuses and burdens of proof but, rather, on a case by case basis, of the Court or the Authority weighing the evidence and assessing therefrom the practicability and reasonableness of making an order for reinstatement. The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer ...*"

[11] *Lewis v Howick College Board of Trustees* [2010] NZCA 320 at [6].

[71] I concluded a productive working relationship could not practicably and reasonably be re-established by ordering the reinstatement of Ms Walters to her former position, or a similarly advantageous one. The reasons for that conclusion were largely drawn from Ms Walters' own words and deeds rather than the views of Mr Simpson, Mr Adcock and Ms Antunovich on whether reinstatement could work.

[72] Ms Walters' April 2014 letter to Ms Crocombe provided a candid insight into her views that differed markedly from her witness statement prepared for the Authority investigation. Her witness statement (lodged in June 2014) said, if reinstated, she was professional and mature enough to work with anyone.

[73] I considered the letter was sufficiently recent to require significant weight be given to the quite different perspective it revealed. Although Ms Walters described the letter as being meant to be entirely private and an exercise in moving through recognised stages of grief, it was written and sent more than six months after the dismissal and well after her claim was lodged in the Authority.

[74] If Ms Walters was reinstated to a PA role to the Mayor, the CEO or some other senior manager at Council – as she submitted she should be – her work would have likely required frequent contact with Mr Simpson, Mr Adcock, another manager referred to in the April 2014 letter (whose name is prohibited from publication), and the CEO's present PA, Ms Crocombe. Her submissions also referred to possible alternative roles elsewhere in Council administration or event management but there was no real evidence that such roles existed or could reasonably be established.

[75] In her letter – in which she referred to her "*present maturity and positive state of mind*" – Ms Walters described Mr Simpson as "*very nasty*", "*very evil*", "*quite sick*" and as someone she was "*well over working with*". She also wrote that "*the man didn't like me and I am unable (then and clearly now) to rate the man with any professionalism or ability to be a leader or a manager*".

[76] During meetings with Mr Simpson prior to her dismissal Ms Walters had made a number of negative references to Mr Adcock as being responsible for her predicament. And in the letter she described the other manager referred to above as "*shallow*" and recounted what she called a "*very funny*" post-dismissal encounter which had left that person "*sobbing*".

[77] She was also clearly angry that Ms Crocombe had disclosed the April 2014 letter to her employer. In her reply witness statement (lodged in July) she wrote that Ms Crocombe would "*have to live with herself*" for doing so. It was a written comment, not an off-the-cuff remark. It indicated an ongoing antagonism that would likely interfere in any necessary working relationship.

[78] Two points on which Ms Walters demonstrated poor judgement were also indicators on the likelihood of restoring a productive working relationship, and hence the practicability of her reinstatement.

[79] Firstly, Ms Crocombe was placed in a difficult and highly-compromised situation by Ms Walters' letter. As an employee of Council and Mr Simpson's present PA, Ms Crocombe could be said to have properly disclosed something she had only received because of her previous working relationship with Ms Walters (even if Ms Walters also saw her as a personal friend). Ms Walters, in sending the letter, demonstrated ongoing poor judgement about the distinction between personal and work matters, which had also caused her the initial difficulty in agreeing to Mr Semenoff's form.

[80] Secondly, Ms Walters said during her oral evidence to the Authority investigation that signing the nomination form was no different than witnessing a passport form for someone she knew. In the light of the issues canvassed over many pages of evidence and days of investigation, that comment revealed both poor judgement and an ongoing poor understanding about the obligations around political neutrality that would again bind her if she was reinstated. It counted against the reasonableness of doing so.

Lost wages

[81] Ms Walters sought an order for reimbursement of lost wages from her dismissal up to 31 July 2014, calculated at $24,942.30. The amount of her loss was reduced by earnings she made from an administrative job she initially got on a casual basis in late October 2013 and had continued on a more regular basis in 2014.

[82] In the event that she was not reinstated to her job with the Council Ms Walters also sought an order for loss of future earnings for the period from 31 July 2014 to 31 January 2015, calculated at $12,158.64.

[83] The Council submitted Ms Walters had not made sufficient endeavours to mitigate her loss of earnings because she travelled to Dubai to visit a grandchild shortly after her dismissal, and, according to her letter to Ms Crocombe, had spent other time with her aging parents, gone tramping and kayaking and played tennis. It also said her evidence about five positions she had applied for was inadequate and included some applications for jobs for which she lacked necessary skills or expertise.

[84] I have accepted Ms Walters' loss should be assessed for the period up to 31 January 2015, as she sought. I have not identified any contingencies (such as redundancy or ill-health) that might, realistically, have resulted in the end of her employment before then, but for her unjustified dismissal.[12] There was no evidence suggesting she might otherwise have become too ill to work, for example, and, although the PA role she had worked in was 'rejigged' in a restructuring exercise after her dismissal, it was likely (if she had still been employed at that time) that she would have continued to work in one of the restructured roles or something similar.

[85] However the evidence on her job search in the weeks immediately following her dismissal was too limited to grant lost wages for that period, which included going overseas on a family visit. Accordingly I have deducted the value of one month's wages (that is $5416.66) from the amount sought in reimbursement of lost wages

[86] Otherwise, while not extensive, I considered there was adequate evidence of her endeavours subsequently to mitigate her loss by working as an administrator from late October 2013 onwards and applying for alternative positions. Assessed realistically there were likely to be few jobs in the Northland labour market requiring her PA-type skills and she could not be fairly criticised for applying for a wider range of jobs outside her immediate area of experience.

[87] With the adjustment referred to, the amount for the order for reimbursement of wages lost up to 31 July 2014 and for loss of future earnings to 31 January 2015 totalled $31,684.28.

---

[12] *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315 at [74] (CA).

Compensation under s123(1)(c)(i) of the Act

[88] Ms Walters sought an award of compensation for humiliation, loss of dignity and injury to feelings "*at the high end of the range*". Her evidence was that she felt her reputation was tarnished by her dismissal, she was distressed to see her husband and elderly parents upset by what had happened, and she suffered gastroenteritis and a viral infection that she attributed to the stress and anxiety she felt as a result of the dismissal.

[89] There was no medical evidence to support Ms Walters' attribution of her ill-health to the distress she felt following her dismissal.

[90] She also referred to a "*bombardment of media, phone calls and public embarrassment*" following her dismissal. However, as the Council submitted, Ms Walters, her legal representative at the time, and Mr Semenoff each appeared to have willingly participated in media interviews that made the event more widely known. Having courted that publicity, Ms Walters cannot entirely blame the Council for the sense of humiliation she may have consequently felt about the public attention on her dismissal.

[91] There was, however, an inevitable sense of humiliation and loss of dignity in being removed from a position that she clearly enjoyed, the manner in which Mr Simpson did it, and the effect of the resulting embarrassment on her confidence and sense of self-esteem. As this was caused by the unjustified actions of the Council, including breaches of good faith by Mr Simpson in how he dealt with the matter, I concluded an award of $8000 under s123(1)(c)(i) was warranted.

Reduction of remedies for contributing behaviour by Ms Walters

[92] Under s124 of the Act the Authority must consider whether an employee's actions contributed to the situation that gave rise to the personal grievance and, if those actions are sufficiently blameworthy, reduce the remedies that would otherwise have been awarded.

[93] Ms Walters' failure to read the Protocols contributed to the situation giving rise to her grievance because, as she accepted in her oral evidence, had she done so

before talking with Mr Semenoff on 15 August, she probably would not have signed his form. The failure was blameworthy conduct because a fair and reasonable employer could have expected someone in her role would have read that document, and, having done so, been more careful about not compromising the convention of political neutrality that day. However she did not contribute to the two subsequent, substantive elements that gave rise to her personal grievance – Mr Simpson's breaches of good faith in conducting his investigation and the double standard he applied to her behaviour. They were his fault, not hers.

[94] I concluded the blameworthy element of how Ms Walters contributed to the situation should be marked by a 25 per cent reduction of the award of compensation to her under s123(1)(c)(i) – that is a reduction to $6000. In applying the discretion to award remedies for her unjustified dismissal I considered the substantial merits of the case did not require any reduction to the wages award made to Ms Walters, partly because the reinstatement remedy was effectively also reduced by 100 per cent.

Costs

[95] Costs are reserved. The parties are encouraged to resolve any issue of costs themselves. If they are not able to do so and an Authority determination of costs is necessary, Ms Walters has 28 days from the date of this determination to lodge and serve a memorandum on costs. The Council would then have 14 days to lodge a reply memorandum. The parties could expect costs to be determined using the Authority's usual daily tariff, subject to what their memoranda might say about whether any factors in the particular case and application of the principles stated in *PBO v Da Cruz* required that tariff to be adjusted up or down.[13] The components of the investigation to which the tariff would apply comprised determination of a preliminary matter (that I would treat as a half-day), a telephone conference interview of Mr Adcock (that I would treat as a half-day), and then an investigation meeting over three days in Whangarei.

Robin Arthur
Member of the Employment Relations Authority

[13] [2005] 1 ERNZ 808 (EC).