

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TAMAKI MĀKAURAU**

**CIV-2023-004-002095
[2023] NZDC 25093**

UNDER THE ELECTORAL ACT 1993
AND
IN THE MATTER OF AN APPLICATION BY **MELISSA
LEE** FOR A RECOUNT OF
ELECTORATE VOTES IN THE MT
ALBERT DISTRICT

Date of Decision: 15 November 2023

**DECISION OF JUDGE C M TREADWELL ON
OUTCOME OF JUDICIAL RECOUNT OF
MT ALBERT DISTRICT CANDIDATE VOTES**

Introduction

[1] Melissa Lee stood as the National Party candidate in the electorate of Mt Albert in the General Election held on 14 October 2023.

[2] Following an application by Ms Lee for a recount, on 8 November 2023 I directed a recount to be undertaken of the electorate votes for the electorate of Mt Albert pursuant to s 180(5)(a) of the Electoral Act 1993 (“the Act”).

[3] The recount took place at the Returning Officer’s Headquarters at 608A Rosedale Road, Avondale, Auckland on 13 and 14 November 2023 in accordance with my direction.

Process

[4] The recount was undertaken in my presence in the manner provided for in the case of the original count. The only persons present at the recount other than me were:

- (a) the Returning Officer, Electorate Manager Christine Glover, and her assistants and headquarters staff;
- (b) Peter Fermor, Electoral Commission Regional Manager – Auckland & North Region, and staff from the National Office of the Electoral Commission;
- (c) Kristina Temel, Electoral Commission Manager, Legal and Policy;
- (d) Three scrutineers appointed by the National party and four appointed by the Labour party (the fourth to stand in for another of the Labour party scrutineers who had to be absent for a period on the Tuesday morning), so that each of the two major parties had three scrutineers present at any one time (no scrutineers were nominated by any other party);
- (e) counting staff based at five tables of six counters each, plus a table leader at the head of each table.

[5] A security guard was present in the building's foyer 24 hours a day, monitoring all entry and exit, which was by electronic card only. Such cards were held by Electoral Commission staff only. All boxes of votes were sealed and kept locked in rooms to which only approved Electoral Commission staff had access. I am satisfied that the security procedures in place were well thought-through and sound.

[6] The recount commenced with the ballots being removed from the sealed envelopes in which they were contained. Each envelope contained the votes for a polling station in the electorate (some from shared polling booths in neighbouring

electorates). The ballots were manually recounted and checked, with the results being recorded in worksheets with any necessary adjustments being made by reference to the worksheets from the official count. These results were then captured electronically and a results sheet produced. The worksheets were then reconciled and checked for accuracy.

[7] There were some minor differences in numbers between the official count and the recount but all bar one of these were able to be reconciled on further inquiry. The one vote discrepancy in the totals is, I am satisfied, simply the result of human error. Having overseen the recount process, I am satisfied that the totals for each candidate from each polling station, the overall totals for each candidate across the electorate and the total number of votes received for the electorate, are accurate.

[8] One instance which called for further investigation (beyond a further count of several voting boxes, to double-check the accuracy of the recount) was a discrepancy of 11 votes in one box. The 11 votes had, at the time of the official count a few days after election day, been credited to Ricardo Menendez March (Green Party). On the recount, 10 of those votes were, in fact, for Helen White (Labour Party) and one was for Melissa Lee (National Party). The documents at hand established that the count on election-night had produced the same results as the recount now did, but the intervening official count, shortly after election day, had the 11 votes incorrectly credited to Mr Menendez March. I asked for the data entry documents created at the time of conveyance of the election night results to the Electoral Commission and the subsequent data entry records and these were produced. On inspection, it was clear to me that the correct figures had been conveyed to the Electoral Commission by telephone on election night because they had been recorded correctly in a worksheet by the officer at the Electoral Commission taking the call. The Electoral Commission's data entry which followed was also correct. The first time that the incorrect entries emerged was in the results of the official count which followed.

[9] After discussion with Ms Glover and her officers, and hearing from Mr Kiely (National) and Mr Mitchell (Labour) for the scrutineers, I was satisfied that human error had caused the wrong entries to be made during the official count. The error was not picked up by reference back to the election night results because, as was

explained by the staff, the process for the official count requires only that the total votes from a box be cross-checked against “Form G”, an Electoral Commission record which records the total votes for that polling station but not the votes received for each candidate. Of course, the 11 votes (albeit wrongly credited) were not missing from the total and so it had tallied with Form G at the time of the official count.

[10] There is some cause for concern in the official count process described to me because the error here would never have been picked up, had it not been for the recount. I do not profess expertise in the procedures for the official count but it may be that the tally would be better cross-checked against the full results entered on election night, not simply the total entered on Form G.

[11] In the event, the recount process has enabled the correction of the error in this instance.

[12] The results sheets for each lot of ballots recounted was duly signed off as correct by the Returning Officer and by me in the presence of at least one scrutineer from each of the two major parties. Each lot of ballots was then again sealed in an envelope and the boxes were returned to secure storage.

[13] It will be seen later that the votes cast for the two leading candidates have ended up being remarkably close to the official count. In fact, throughout the recount process, there were minor corrections usually of one or two votes, which caused ‘swings and roundabouts’ as the recount progressed. The closeness of the final numbers obscures how often an adjustment was made.

Informal votes

[14] The Electoral Commission’s Official Count Instructions provide examples for the counters, of the most likely kinds of errors that might occur which would render a vote informal and unable to be counted. There was no uncertainty about informal votes which reflected these instructions.

[15] The majority of informal candidate votes were ones in which no tick (or other mark) had been placed in the circle next to any candidate's name, or anywhere else which might have indicated an intention to vote for a candidate. Occasionally, such absence of a vote for a particular candidate would be emphasised by the crossing-out of all candidate's names, sometimes accompanied by a comment as to the voter's lack of confidence in all candidates. Such votes were found by me to be informal.

[16] Where confirmation was required as to whether or not a vote was informal, these were brought to me for determination in front of scrutineers, at least one from each of the two major parties. There was often agreement about these votes by the scrutineers but, inevitably, there were occasions when they disagreed. I thank the scrutineers for the professional and courteous way in which they approached this aspect of the process. In all cases, I welcomed their views, which I found valuable, before making a decision as to whether the intention of the voter was clearly indicated, as required by s 178(5)(a) of the Act.

[17] As to trends in the type of errors which rendered votes informal, I comment:

- (a) The informal votes included numerous instances in which the voter had placed ticks against two candidate's names. Sometimes, this was replicated by two ticks also being placed in the column for the Party Vote. The scrutineers shared my concern that this 'double voting' may be the result of a misunderstanding of the large heading at the top of the form "YOU HAVE 2 VOTES". I consider that there is real potential for people to be confused by this and I note the observation of Judge Adams in *Waitakere (No 2)* (20 December 2011), at [49], to similar effect, though he appears not to have encountered as many of these errors as I did. The prescribed voting form is Form 11 of the Act, apparently last amended in 1995.
- (b) The tick was sometimes placed on a candidate's party logo, rather than in the relevant circle. Notwithstanding the irregularity, I was satisfied that the intention of the voter was clearly indicated in such cases.

- (c) A mark (but not a tick) would be placed in the circle next to a candidate. Sometimes, these were tiny, possibly caused by the hesitancy of the voter in trying to wield the broad-tipped marker pens provided at booths. Again, I was satisfied that the intention of the voter was clearly indicated in such cases.

[18] Aotearoa New Zealand is an increasingly multi-cultural society. English is a second language for many. It appears to me to be timely that the language used on voting forms be reviewed for plain English and ease of understanding. 12 years has elapsed between Judge Adams' comments in *Waitakere (No 2)* and my own observations, but the language on the voting form remains the same.

Post Writ Transfers and Special Votes

[19] The scrutineers and I received a presentation from Michelle Machin, Team Leader Processing – Enrolment & Community Engagement, as to the rules for eligibility in such cases and the processes followed, for which I was grateful.

[20] In brief, an otherwise eligible voter who has moved into an electorate after Writ Day may sign a declaration to that effect and be entitled to vote. Other voters may have good reason for not being able to get to a polling station during the available period. They may sign a 'Takeaway' declaration to enable them to vote by returning their declaration, with their vote in a special sealed envelope. There are other grounds for a Special Vote as well.

[21] In order to satisfy myself as to the process of declaration which had been followed in such cases, I asked for two random boxes of the declarations to be opened and looked through by a table of counters, with the scrutineers and me able to inspect them as they were looked through. Helpful explanation was given by the Electoral Commission staff as to the process and as to the requirements for such declarations. It is worth recording that any declaration which gave cause for concern as to its validity had been seen by either the Electorate Manager or the Registrar of Electors in the context of the official count and a ruling made at that time.

[22] I was satisfied that a robust process had been in place and I note the care which had been taken to allow the vote where an irregularity had been caused by, or contributed to, by an official.

[23] I inspected, with the scrutineers, the box of votes/declarations which had been found to be disqualified. They included, for example, declarations accompanied by the requisite envelope, but no voting form inside the envelope. I was satisfied that the decisions made in such cases were correct.

Dual votes

[24] There were some dual votes but, after hearing from Electoral Commission staff on the process which had been followed, the scrutineers were satisfied that a robust investigative process had taken place, with which I agreed.

Acknowledgements

[25] In concluding, I wish to record my thanks to those involved.

[26] I am particularly grateful to Peter Fermor, Regional Manager (Auckland & North Region), Kristina Temel, EC Legal and Christine Glover, Electorate Manager, who did everything in their power to accommodate me, and the scrutineers, with professionalism and courtesy. I found the Electoral Commission staff and the counters to be professional and diligent in undertaking the important process of the recount. The New Zealand public should have confidence in the integrity of the process of counting votes and the electoral process generally.

[27] I record my thanks to the two teams of scrutineers, particularly Peter Kiely (National) and Simon Mitchell (Labour), for their contribution. The time given by them, and the professional approach they brought to their work, adds significantly to the integrity and transparency of the electoral process. I found the approval of teams of three from each party worked well, with two from each party able to observe the counting process while the third was available to confer with me over informal votes and other individual issues.

Result

[28] The recount has resulted in minor variations to the official declaration of results made on 6 November 2020. Accordingly, pursuant to s 180(10) of the Act, I order the Electoral Commission to give an amended declaration of the result of the poll.

[29] The overall outcome is as follows:

Candidates	Party	Official Count Result	Recount Result
LEE, Melissa	National Party	13218	13220
MENENDEZ MARCH, Ricardo	Green Party	9302	9296
MURPHY, Ollie	ACT New Zealand	1483	1485
NAUFAHU, Tesi	Independent	155	155
SWORDS, Ciara	The Opportunities Party (TOP)	1319	1318
VAN DEN HEUVEL, Anthony Joseph J	Human Rights Party	103	104
WHITE, Helen	Labour Party	13238	13238
Candidate Informals		429	430
TOTAL		39247	39246

[30] I am satisfied that the difference in total votes is due to human error by way of simple counting errors when the original number of votes were counted and that, subject to the one vote difference in the totals, all votes have been accounted for when processing the results.

Orders

[31] Pursuant to s 180(10) of the Act, I order the Electoral Commission to give an amended declaration of the result of the poll, as set out in [29] above.

[32] No order has been sought as to costs. Ms Lee's application was justified inasmuch as differences were identified, notwithstanding that no change has resulted in terms of the successful candidate for the Mt Albert electorate. I bear in mind that the recount has resulted in a narrowing of the gap between the two leading

candidates. Pursuant to s 180(11), I order that the deposit of \$1,000 which the applicant was required to file, be returned to her.

C M Treadwell
District Court Judge