

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 84
EMPC 275/2023**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN E TŪ INCORPORATED
Plaintiff

AND SHER SINGH
Defendant

EMPC 286/2023

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN SHER SINGH
Plaintiff

AND E TŪ INCORPORATED
Defendant

Hearing: 20-22 February 2024

Appearances: S R Mitchell KC and A Drumm, counsel for E tū Incorporated
D Fleming, counsel for Sher Singh

Judgment: 21 May 2024

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Mr Singh was employed as a union organiser with E tū in July 2017. E tū is focused on supporting worker rights. Mr Singh was seen as a good fit for the organisation, in part because of links he had to the Migrant Workers' Association

(MWA). He continued his association with the MWA after commencing employment with E tū, something E tū was aware of and which it encouraged. Another employee of E tū, Mr Sehgal, was also involved with the MWA.

[2] In August 2018 Mr Singh received a Facebook friend request from an employer who said she had an interest in migrant worker rights. I refer to her by the same random letters (HVF) used by the Employment Relations Authority. Mr Singh and HVF continued to exchange messages and arranged to meet in Hamilton for coffee. At some point in the chronology HVF disclosed to Mr Singh that she was having employment difficulties and wanted his advice. It transpired that the employment difficulties involved one of her employees, who was supported by the MWA. The issue related to the alleged non-payment of wages and a premium for employment.

[3] Arrangements were put in place to convene a meeting between HVF and the employee. The arrangements were made by the President of the MWA (Ms Kaloti) and Mr Sehgal. The meeting was scheduled to take place at E tū's offices after hours. The purpose of the meeting was to see if matters between HVF and her employee could be resolved. The employee attended the meeting with Ms Kaloti and the employee's husband (a member of E tū). Mr Sehgal, HVF and Mr Singh were also in attendance at the meeting. During the course of the meeting Mr Singh was asked to make a recommendation as to how matters could be resolved, which he did. HVF and the employee signed an agreement recording a number of terms, which included the payment of an agreed amount. HVF did not make the agreed payment.

[4] About two years later HVF contacted E tū complaining that she had been harassed by two members of its staff. Mr Singh was one of the staff members she complained about; Mr Sehgal was the other. HVF threatened to go to the media if E tū did not address her concerns. E tū commenced an investigation, which led to Mr Singh's dismissal some three weeks later.

[5] Mr Singh filed a personal grievance, claiming unjustified dismissal and disadvantage. Mr Singh sought reinstatement to his role, a primary remedy under the Employment Relations Act 2000 (the Act). Two preliminary issues arose: Mr Singh applied for interim non-publication orders (granted) and interim reinstatement

(declined).¹ The Authority subsequently investigated the grievance. The parties were later advised that the Authority member who had undertaken the investigation had left the Authority and another Authority member was taking on responsibility for the proceedings. In the event the investigation was undertaken afresh, on the papers. The Authority upheld Mr Singh's claims of unjustified dismissal and disadvantage, but reduced the amounts ordered in his favour for contribution. The Authority declined to order reinstatement.²

[6] The Act provides a right of challenge against determinations of the Authority. A party may pursue a challenge on a de novo basis (with the Court hearing the entire matter afresh) or by way of non-de novo hearing, focussing on particular alleged errors of fact and/or law made by the Authority. In this case E tū elected to file a de novo challenge against the Authority's determination, putting the entire matter in issue. Mr Singh then filed a challenge against the findings which were adverse to him, contending that the Authority had erred in fact and law in respect of contribution and reinstatement. He later abandoned his claim to reinstatement – events had, he said, moved on in the three year intervening period since his dismissal.

[7] Mr Singh also challenges the Authority's costs determination, which I return to later.

[8] Before considering issues of justification it is necessary to understand the facts, and the context in which events unfolded.

The facts

[9] On initial appointment Mr Singh worked in E tū's contact centre, dealing with telephone enquiries. In March the following year he moved to an organiser role out in the field. He worked within an allocated area, which included Auckland and Hamilton, and focused on organising representation and advocacy for union members. The role involved some travel and face-to-face meetings with various people, use of a work vehicle and a cell phone.

¹ *DPR v WVK* [2021] NZERA 170 (Member Campbell).

² *Singh v E Tū Inc* [2023] NZERA 384 (Member van Keulen).

[10] Mr Singh is a practising Sikh and actively involved in his church community. At the time of his appointment he was also engaged with issues to do with migrant workers. He had an online presence in his personal capacity and was a member of the Migrant Lives Matter Facebook group. In 2018 Mr Singh received a Facebook friend request from a person who claimed to have a shared interest in migrant exploitation. That person was HVF.

[11] Mr Singh and HVF shared numerous messages, which became increasingly personal. On 18 September 2018 Mr Singh texted HVF. He said that he was feeling down and wanted to meet someone. She suggested that he travel to Hamilton. He responded by saying that he could not justify the petrol and “the company” would ask what he was doing in Hamilton without a meeting. Sometime later (the precise timing is unclear, was not clarified in evidence and is not evident on the text message exchange before the Court), Mr Singh advised HVF that he was “on [his] way”. Reference was made to wanting a hug. They met in Hamilton at a coffee shop.

[12] At some stage during the course of their discussions, HVF told Mr Singh that she was having issues with one of her employees. The employee was represented by the President of the MWA, Ms Kaloti. Ms Kaloti and Mr Sehgal (who was a union organiser with E tū at the time) organised a meeting between the employee and HVF, after hours at E tū’s offices. The precise sequence of events leading up to Mr Singh’s involvement at the meeting was in dispute. What is clear from the documentation is that Mr Singh got in touch with HVF on 22 September 2018 asking her to confirm her attendance at the proposed meeting, noting that “otherwise its gonna be hard supporting you.”

[13] The meeting proceeded on the evening of 2 October 2018.

[14] Evidence was given, which I accept, that the meeting progressed in a way which is common in Sikh communities. Resolution was reached, with HVF agreeing to pay the sum of \$6,200 (by way of unpaid wages) to the employee by 2 November 2018. It was also agreed that Mr Singh would decide whether the sum of \$10,000 should also be paid (this figure related to an alleged premium paid for employment). Mr Singh was to advise his decision by 9 October 2018; his decision was to be final

and could not be challenged. All of this was recorded in a settlement agreement signed by HVF and the employee.

[15] Sometime after the meeting HVF disputed that she had ever required or received a premium from the employee and told Mr Singh she had proof of this. She provided him with an audio recording of a meeting which was said to be between herself and the employee. Mr Singh listened to the recording and messaged HVF saying:

After listening to the audio several times. There has been a mention of giving and receiving money. The amount which I have no clue for. So my recommendation is rather than dragging this further and wasting everyones time. Lets settle this dispute with 7k rather than 10k.

[16] HVF was not happy with Mr Singh's response. She told him that she had more proof. Mr Singh replied that any proof should have been given to him on the day of the meeting and if she did not want him to settle for \$7,000 then he should back out of the process and let matters be resolved elsewhere.

[17] As it happened, not only did HVF decide against making payment of \$7,000 as Mr Singh had proposed, she also refused to make payment of the agreed amount of \$6,200. The MWA contacted Mr Singh and he was asked to follow up with HVF, which he did. Mr Singh says that HVF did not take kindly to his inquiries. Mr Singh and HVF had no further contact.

[18] The next step in the chronology occurred about two years later, at a time when HVF was subject to further complaints of worker exploitation. HVF contacted the Assistant National Secretary of E tū, Ms Mackintosh, in early July 2020 and made a number of serious complaints of harassment against E tū staff, one of whom was Mr Singh. Ms Mackintosh asked HVF to put her complaints in writing, which she did. The email set out a lengthy list of allegations, including defamation, breach of privacy, mental and physical harassment, promoting wrong information and hate speech against HVF's business, provoking staff against her and causing loss of her business. Various communications were attached, which were said to be copies of messages received from Mr Singh some two years previously. It is apparent that Ms Mackintosh

also met with HVF – she says that the meeting was brief. No notes were taken of what transpired at the meeting.

[19] Ms Mackintosh reviewed the written material and sent an email to Mr Singh on 14 July, entitled “Potential serious concern over your employment.” She invited Mr Singh’s initial response, advising that once she had received his response she would “likely” start a formal investigation. Ms Mackintosh advised that she particularly wanted his initial response on four matters of concern, which were said to be (1) his apparent use of E tū offices for non E tū business; (2) acting in support of an employer (HVF); (3) his apparent travel to Hamilton during work hours to meet HVF and (4) his use of an E tū telephone and email for non E tū business, including a text message referring to a hotel room.

[20] Ms Mackintosh forwarded Mr Singh some of the communications HVF had provided her with, notably the messages that HVF asserted were exchanged between herself and Mr Singh. She did not disclose to Mr Singh other emails from HVF. Ms Mackintosh said in cross-examination that was because she was focused on the matters of concern to E tū.

[21] Mr Singh gave evidence that he provided an initial response on 17 July. In summary he said that HVF had made contact with him and he had met with her in respect of a threat she said she was under; that he had met with her in Hamilton following a (work-related) meeting with a named organisation; that HVF had subsequently contacted him to advise that he was to be a mediator for her at a meeting; and that he had contacted the MWA to find out what was going on. He said he had only been “invited” to the meeting. He went on to acknowledge that he should not have used the E tū work phone and sincerely apologised for that, and noted that he was confused about the reference in one of the messages to a hotel room. He said that he believed the WhatsApp messages HVF had provided Ms Mackintosh with had been fabricated, and he would be happy to discuss matters further. Mr Singh concluded by noting that he had been receiving threatening calls from a group of employers for the past few months. The group, he said, had been established to “bully and threaten everyone that is working against exploitation”.

[22] Ms Mackintosh confirmed that she (and another staff member) would be carrying out an investigation and deciding whether serious misconduct had occurred. If that conclusion was reached the matter would be passed to other (unspecified) members (plural) of the senior leadership team to make a decision about disciplinary outcome. The email set out in detail the concerns Ms Mackintosh had.

[23] The concerns Ms Mackintosh articulated over a four-page email centred on HVF; no issues of concern were raised in relation to the employee. This is notable because during the course of the hearing E tū witnesses explained that, in terms of the disciplinary process and outcome, the central concern they had was the vulnerability of the employee at the meeting and the fact that Mr Singh was supporting an employer not an employee, together with Mr Singh's alleged failure to understand why E tū would have a concern about that. I return to this issue later.

[24] On 22 July Ms Mackintosh wrote to Mr Singh requesting a meeting at 4pm the next day. Mr Singh requested a deferral to the following week in order to arrange representation, which Ms Mackintosh agreed to.

[25] Later in the day (22 July) Ms Mackintosh was contacted by HVF who advised that she had interviews pending with the media about her story. By this time Mr Singh had also drawn to Ms Mackintosh's attention enquiries from the Indian News media outlet. Ms Mackintosh immediately emailed Mr Singh (at 2.04pm) advising that the matter was about to be made public and the issue was:

... of such seriousness and risk to both you and E tū that I believe it is not tenable for you to continue representing E tū while our investigation continues. Therefore, I am proposing to suspend you immediately. Please respond to this proposal by 5.00pm today.

Furthermore, it is no longer tenable to wait until next week to meet. I require you to find representation and attend at 4.00pm tomorrow as originally proposed.

[26] Mr Singh did not respond to the proposal within the allotted three-hour timeframe and his suspension was confirmed. He said in evidence, and I accept, that he was thrown into a panic by being required to attend the meeting the next day and his attention was focused on the need to find representation for that, rather than trying to deal with the suspension issue by 5pm.

[27] In the event Mr Singh arranged for Mr Sehgal to assist him at the meeting in the absence of his chosen representative. It will be recalled that Mr Sehgal was also a union organiser with E tū, that he and the MWA had organised the meeting that Ms Mackintosh had concerns about, and had also been involved in the resolution process with HVF. Unknown to Mr Singh at the time, E tū harboured concerns about Mr Sehgal's role in the process. Those concerns were drawn to Mr Sehgal's attention later and led to a separate investigation which E tū never concluded.

[28] The meeting with Mr Singh occurred on 23 July. Mr Singh took issue with the authenticity of many of the messages annexed to HVF's correspondence to Ms Mackintosh, and demonstrated how it was possible to digitally manipulate them, which is what he believed had occurred. Mr Singh explained his relationship with HVF, and why he had travelled to Hamilton to meet with her, and talked about the settlement discussions and his involvement with them. Mr Singh offered to make a public statement about his conduct having nothing to do with E tū, seeking to address the reputational concerns Ms Mackintosh had identified.

[29] Ms Mackintosh considered what Mr Singh had to say and wrote to him on 27 July setting out her preliminary conclusion that he had committed serious misconduct. In summary, she said that:

- (a) Mr Singh had not raised anything new in terms of his explanation for the allegations.
- (b) Mr Singh had compromised himself and E tū by acting in three roles simultaneously with HVF in the meeting on 2 October 2018 – support person, mediator and adjudicator. This was unethical.
- (c) Mr Singh did not appreciate the damage he had potentially caused to E tū. An offer made by Mr Singh to make a public statement about his conduct having nothing to do with E tū would, she said, make no difference to the public perception.

- (d) E tū's credibility as a legitimate trade union was severely compromised by Mr Singh's actions, particularly if he continued to be employed.
- (e) Her preliminary conclusion was that Mr Singh's actions amounted to serious misconduct.

[30] At this point it is convenient to note the extent of the investigation into whether or not Mr Singh had committed serious misconduct. The investigation into serious misconduct involved:

- (a) Considering HVF's communications and attachments (E tū advising that it was putting aside the contested communications and the allegation of sexual harassment).
- (b) Considering Mr Singh's emailed response and what he had said at the meeting.

[31] The investigation into whether Mr Singh had committed serious misconduct did not involve further inquiries, such as:

- (a) Checking whether Mr Singh had, as he said in his response, visited a workplace, which he had identified, on his trip to Hamilton.
- (b) Inquiring into the authenticity of the messages HVF had forwarded, which may have informed concerns about her credibility/motivations.
- (c) Inquiring into Mr Singh's concerns about being subjected to a campaign of harassment by employer groups, which may have informed concerns about HVF's credibility/motivations.
- (d) Considering E tū's vehicle usage and resources policies.
- (e) Interviewing others involved in the meeting to understand the role Mr Singh played.

[32] The limited scope of E tū's inquiries at the time assumes some significance, as I will come to, in terms of what can be inferred in terms of the reasonableness or otherwise of its actions against Mr Singh. The speed with which the organisation moved is also relevant; the central theme of Mr Singh's case is that the dismissal was driven by concerns about reputational risk to E tū, and a desire to be seen as responding promptly to claims of sexual harassment by HVF, noting that there had been recent criticism of a political party for allegedly failing to act fast enough in the face of a similar complaint.

[33] Having advised Mr Singh that the preliminary view was that his conduct amounted to serious misconduct at 2.58pm, Ms Mackintosh proceeded to require any response by 5.30pm the same day, advising that once she had made a "final" decision on his conduct the matter would pass to another Assistant National Secretary, Ms Newman, for a decision on disciplinary outcome.

[34] A final decision meeting was arranged for 30 July, which both Ms Mackintosh and Ms Newman attended. Mr Singh was represented by Mr McCarten of One Union.

[35] Mr McCarten wrote to Ms Mackintosh before the scheduled meeting advising that he had just been brought in and had had a "quick look" at the documentation. He drew to her attention concerns he had about HVF's credibility. He also referred to a "string of cases of exploitation" HVF was said to be involved in and suggested that Mr Singh had been drawn into a targeted campaign.

[36] The meeting occurred on 30 July. As I have said, Ms Newman had been identified as the decision-maker. As the decision-maker it was her opportunity to hear from Mr Singh and to clarify any matters, and it was Mr Singh's opportunity to talk to the person who would be making a decision about his employment.³

[37] At the meeting Ms Newman took extensive notes of what other attendees were saying. The notes reflect that Ms Mackintosh drove the discussion, asking various questions of Mr Singh and confirming that the sexual harassment complaint was not

³ *Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424 (EmpC) at 442; *Ioane v Waitakere City Council* [2003] 1 ERNZ 104 (EmpC) at [25].

being pursued by E tū. The focus, Ms Mackintosh said, was on Mr Singh's involvement in the 2 October 2018 meeting. While confirming that the sexual harassment complaint was not being pursued by E tū, it is apparent from the notes of the meeting that numerous questions were focused on the nature of the relationship between HVF and Mr Singh.⁴ Further, no mention was made of concerns that the 2 October meeting had taken place in E tū's offices, or concerns that Mr Singh had used a work vehicle to travel to Hamilton to meet HVF.

[38] Just prior to an adjournment in the meeting, Ms Mackintosh advised Mr Singh that dismissal was proposed. The meeting was then adjourned. During the adjournment Ms Mackintosh and Ms Newman rang the National Secretary of E tū, Mr Newson. Shortly afterwards they returned to the room and Mr Singh was advised that his employment was terminated. The notes do not record any discussion about appropriate disciplinary outcome, or attempts to seek Mr Singh's views on the point.

[39] The termination was confirmed in a letter dated 30 July. It set out two reasons for the dismissal, as follows:

You seriously compromised yourself and E tū by purporting to play three simultaneous roles with an employer, [HVF]. You were at once her support person, a mediator and some kind of adjudicator in an employment case. Your [sic] then moved into an enforcement role. This was unethical.

Your communications with [HVF] were inappropriate.

E tū's credibility as a legitimate trade union is severely compromised by your actions, and the trust and confidence necessary in an employment relationship has been destroyed by your actions. This is serious misconduct.

[40] I return to various aspects of the chronology in further detail below, when discussing the parties' competing submissions about the justification for E tū's actions.

Analysis

[41] Employers and employees owe obligations to one another. Employees are not to be dismissed or disadvantaged in their employment unless such a step is justified. It is up to the employer to demonstrate to the satisfaction of the Employment Relations

⁴ Including why he had asked for a picture and been reluctant to take her calls while at home.

Authority or the Court on a de novo challenge that what they did, and how they did it, was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred: s 103A(2).

[42] In assessing whether what was done, and how it was done, was what a fair and reasonable employer could have done, the Authority/Court *must* have regard to four factors set out in s 103A(3). As s 103A(4) makes clear, the Authority/Court may have regard to additional factors as considered appropriate. The four mandatory factors are:

103A Test of justification

...

- (3) In applying the test in subsection (2), the Authority or the court must consider—
- (a) whether, having regard to *the resources available to the employer*, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
 - (b) *whether the employer raised the concerns* that the employer had *with the employee* before dismissing or taking action against the employee; and
 - (c) whether the employer gave the employee a *reasonable opportunity to respond to the employer's concerns* before dismissing or taking action against the employee; and
 - (d) whether the employer *genuinely considered the employee's explanation* (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

...

(Emphasis added)

[43] The Act is clear that the Authority/Court must not find that a dismissal or action is unjustifiable solely on the grounds that there were minor defects in the process which did not result in the employee being treated unfairly.

Is there a divide between procedural and substantive justification?

[44] Mr Mitchell KC, counsel for E tū, submitted that it was wrong to interpret s 103A as differentiating between procedural and substantive justification, as the Authority had done, and that the Court should not approach the analysis on that basis; rather the required assessment involves consideration of justification per se.

[45] While there is some immediate attraction to the submission, the difficulty I perceive is the wording of s 103(2), which draws a clear distinction between the “what” (the dismissal or disadvantage) and the “how” (the way in which the employer arrived at the what). Section 103A(5) reinforces the bi-furcation point, making it clear that a minor defect in the process followed by an employer which did not result in the employee being treated unfairly will not support a lack of justification finding.

[46] It should not be surprising that the section both differentiates between process and substantive outcome (how and what), and amalgamates the two (minor errors in how, not affecting the what, do not give rise to lack of justification). It has long been recognised that good processes tend to support sound outcomes. The approach to judicial review of administrative action is an obvious example. The process administrative decision-makers follow to arrive at their decision, and the factors they have taken into account, will be scrutinised to see whether what they did and how they did it was open to them.

[47] All of this reflects an acknowledgment that, while a decision-maker has some latitude in reaching a decision (here an employer), it is more likely to be a justifiable one if a process (appropriate to the circumstances) has been followed. In other words, it reflects a balance between the managerial rights of an employer to operate their business as they think fit with the rights of that employer’s employees to be treated fairly and reasonably, rather than arbitrarily.

[48] The Court of Appeal, in relation to the Employment Contracts Act 1991, has accepted that no sharp dichotomy exists but that it is “often convenient” to draw a distinction between substantive and procedural justification,⁵ and has reiterated the importance of procedural justification as distinct from substantive justification since then.⁶

[49] A further balance is reflected in s 103A in the requirement that the Authority/Court must (not may) have regard to the employer’s resources in assessing the justification for what they did and how they did it. A well-resourced employer can

⁵ *Nelson Air Ltd v New Zealand Airline Pilots Assoc* [1994] 2 ERNZ 665 (CA) at 668.

⁶ *Hardie v Round* [2009] NZCA 421 at [22].

be expected to do more; an owner/operator of a small business not so much. Resources may impact at each stage of the process – the nature and extent of the steps reasonably required of employer X as opposed to employer Y; and the scope of the options that may reasonably be available to employer X as opposed to Y in terms of (for example) disciplinary outcome. This is a key consideration which is often overlooked. As the Act makes clear, a one-size-fits-all approach is not the applicable framework for assessing justification.

[50] The available resource point has relevance in this case because, as Ms Mackintosh accepted, E tū is well resourced, most particularly in respect of its knowledge and understanding of employment requirements, including around disciplinary processes.

The suspension

[51] I start with the suspension. E tū has not satisfied me that its decision to suspend Mr Singh and how it went about reaching that decision were what a fair and reasonable employer could have done in the circumstances at the time.

[52] The collective agreement contains a provision relating to the circumstances in which an employee may be suspended and the process to be followed. Clause 37 materially provides that:

37. SUSPENSION / BREACH

The parties recognise the serious effect of suspension in that it removes employees from the workplace. As such, *the employer will take all practicable steps to avoid suspending employees.*

37.1 Where an employee faces an allegation of misconduct (including, but not limited to, serious misconduct, repeated or recurring poor performance,

misconduct of a less serious nature, prolonged or repeated absenteeism which the employer considers is impeding the fulfilment by the employee of his/her duties), *the procedures set out in this clause shall be followed.*

...

37.3 The employer shall have the right to suspend an employee from any or all of their duties or to suspend any of the employer's obligations under this agreement for misconduct, breach or neglect of any of the terms and conditions of this agreement or of any lawful directions given by the employer

or in order to conduct an investigation into allegations of misconduct, breach or neglect of any of the term and conditions of this agreement.

A suspension will be paid or but subject to such conditions (i.e. removal of motor vehicle) as the employer, in its sole discretion, considers appropriate.

...

(Emphasis added)

[53] As will be apparent, the collective agreement required E tū to follow the procedures set out in cl 37 when considering whether to suspend Mr Singh. When asked, Ms Mackintosh was unable to identify what practical steps she had taken to avoid suspending Mr Singh. She acknowledged that she had not considered alternatives to suspension; that suspension had had a serious impact on Mr Singh because of the publicity attendant on E tū's advice to the media that the employee concerned had been suspended and why; and she accepted that the suspension was not related to a need to conduct the investigation into the alleged breaches. Rather, the suspension was about E tū's reputation and seeking to minimise damage to it.

[54] It is well established that an employer is generally required to give notice of a proposal to suspend and seek the employee's view.⁷ Whether an adequate opportunity has been provided to respond to a proposal to suspend will depend on the circumstances. I have no difficulty accepting that E tū was feeling under pressure at the time; there was a looming threat of publicity which it was entitled to be concerned about. It is also true, as Mr Mitchell pointed out, that Mr Singh did not go on the front foot and argue against suspension. The context is, however, relevant.

[55] The context was that E tū had just sent to Mr Singh a four-page email setting out various concerns it had about events that had occurred two years previously; it was at a time when Mr Singh's chosen representative was unavailable (which E tū knew) and E tū was pushing to make an urgent decision. While an employee's lack of objection may be relevant as signalling agreement to a proposed course, that will not always be a reasonable inference to draw. Although employees owe obligations to their employer to be responsive and communicative, it does not follow that a lack of

⁷ *Graham vs Airways Corp of New Zealand* [2005] ERNZ 587 (EmpC); *Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd (No 3)* [2007] ERNZ 686 (EmpC).

active engagement (which may be prompted by a number of things) justifies an employer's actions. It should not be forgotten that it is an employer's obligation to conduct a fair process – the Act is very clear about that.

[56] While I accept that E tū was concerned about the potential impact on its reputation if HVF's allegations became public, I do not accept that its concerns extended to a desire to protect Mr Singh. It remained unexplained how suspending him, and removing him from work, would protect *his* interests. Nor do I accept that suspension was justified in order to ward off reputational damage. I agree with the Authority member's observation⁸ that a statement in response to the allegations would likely have sufficed, and it is notable that Mr Singh had himself offered to make a public statement (which was declined).

[57] Mr Singh was unjustifiably disadvantaged by E tū's actions in suspending him.

Unjustified dismissal

[58] I have already explained why disciplinary processes are important and why I consider that E tū can reasonably be held to a higher standard.⁹ It fell short.

[59] The collective agreement deals with the process to be followed in investigating and determining allegations of serious misconduct. It provides that where an allegation of serious misconduct arises the procedures set out in cl 37 *shall* apply:

...

37.2 The employer shall put the employee on notice that it is investigating the alleged misconduct and *shall specify, in writing, the nature of the misconduct alleged* along with any relevant details such as relevant dates and times known to the employer at the time notice is given.

...

37.4 The employer shall arrange to meet the employee within *a reasonable time after having given notice of the allegation* to hear any account or

⁸ *Singh*, above n 2, at [71].

⁹ In *Beesley v New Zealand Clerical Workers Union* [1991] 2 ERNZ 616 (LC) at 629 the Labour Court described it as an "exemplary" standard: "It goes without saying that unions should not only be good employers but exemplary employers." The reference to an "exemplary" standard was obiter. I prefer "higher".

explanation the employee wishes to give. *The employee is entitled to have a representative/advisor/support person of their choice* (including any other non-management employee of the employer) at the meeting. Depending on the nature and course of the investigation, the employer may require further meetings with the employee and the same rights of representation shall continue.

37.5 Within a reasonable time prior to the meeting with the employee the employer will ensure it has disclosed all relevant and material information to the employee.

37.6 Following completion of its investigation into the alleged misconduct, including giving due consideration to the employee's explanations, the employer will make its decision on any action to be taken against the employee and shall as soon as practicable notify the employee of that decision.

...

(Emphasis added)

[60] E tū says that it put Mr Singh on sufficient notice of its concerns in its original email of 14 July. The concerns were said to be five-fold:

- (a) The use of E tū offices for non-E tū business.
- (b) Acting in support of an employer (HVF).
- (c) Travel to Hamilton during work hours to meet the employer.
- (d) The use of E tū phone and email for non-E tū business.
- (e) A text exchange mentioning a hotel room.

Use of E tū office

[61] Mr Singh's initial response to E Tū's concern that the meeting had been held in its offices, was that he had only been "invited" to the meeting, and had been advised by HVF and the MWA to attend. Despite this response E tū did not make inquiries of the people who were said to have been involved in setting up the meeting, and who might have been able to cast light on Mr Singh's attendance at the office on non-office business. Witnesses who gave evidence at the hearing were clear that it was the MWA and Mr Sehgal who had organised the meeting and made arrangements for it to be held

in E tū's offices. Mr Singh, they said, had nothing to do with it. This was a consistent response throughout.

Acting in support of an employer, HVF

[62] Mr Singh's response to the concern that he had acted in support of an employer, HVF, at the meeting was that she was known to him and he had helped her with a personal issue around August 2018; that she had contacted him in 2020 and told him that he was going to be a mediator for her case (which he was unaware of) and that he had contacted the MWA to get more information. The meeting then followed.

[63] There was a failure to talk to people who may have been able to shed valuable light on Mr Singh's role at the meeting, and the extent to which Mr Singh had acted "in support" of HVF at it. It was submitted that there was no need to make further inquiries because the documentation was clear; particular emphasis was placed on the wording of Mr Singh's message to HVF in the lead-up to the meeting saying that if she did not respond it would be difficult supporting her. I do not accept the submission.

[64] Mr Singh had described himself as being confused about what he was being asked to do at the meeting, clarifying matters with the MWA and concluding that he was being asked to be "a helping person". At the disciplinary meeting of 30 July, Ms Mackintosh again queried Mr Singh on his role. He responded by saying that he: "didn't even know what a mediator was, I was trying to be a facilitator, sit people down and both parties would tell their story and both parties agree and that's it." This was consistent with dispute resolution processes Mr Singh was familiar with in his church, and consistent with the dispute resolution processes familiar to other attendees at the meeting. It is notable too that Mr Singh had no prior experience with mediation processes under the Employment Relations Act.

[65] Nor is it clear from the documentation that Mr Singh had acted in a representative capacity at the meeting. The position is equivocal. There was, for example, reference in the documents to HVF obtaining legal advice; inferentially from someone other than Mr Singh.

[66] It is, of course, open to a fair and reasonable employer to disbelieve what an employee is telling them but a decision to dismiss must be made on reasonable grounds. In this case no attempt was made to speak to members of the MWA who were present at the meeting and who had supported Mr Singh's involvement. Those who gave evidence in Court explained the role they perceived him undertaking, as an impartial person assisting the parties to reach resolution in accordance with the sort of processes which are familiar within the Sikh community. They were clear that Mr Singh was not purporting to act in his capacity as a union official in the course of the meeting, and that the employee's rights were protected. At the very least, a broader understanding of how the meeting came to be held at the office, Mr Singh's involvement in arrangements, and the purpose of the meeting and his participation in it, would have been relevant to an assessment of culpability.

[67] Also relevant to the issue of whether serious misconduct had occurred was the extent to which Mr Singh was acting in a private capacity, rather than in an official E tū capacity – a point that the attendees at the meeting appear to have fully appreciated but which was not adequately considered by E tū.

[68] During the course of the hearing E tū's witnesses emphasised that they were very concerned that the way in which the meeting was conducted was inconsistent with mediations conducted by a mediator approved by the Chief Executive of the Ministry of Business Innovation and Employment under the Act. As Ms Kaloti explained, the way in which discussions unfolded was consistent with Sikh dispute resolution practices, which she considered appropriate in the circumstances and in light of her client's reluctance to engage in formal processes under the Act. Because Ms Kaloti was not spoken to, her perspective was never taken into account in deciding whether the characterisation of Mr Singh's actions at the meeting as "unethical" was warranted or whether dismissal was an appropriate response.

[69] It is apparent that the way in which E tū expressed the nature of its concerns about Mr Singh's role at the meeting developed over time. From an early stage E tū's concerns were expressed to be about HVF's position and vulnerability; the inference being that Mr Singh had exploited his position as a union official for personal reasons. This is hardly surprising given the nature of HVF's complaints. But E tū then advised

it was not going to proceed with the sexual harassment complaint and was putting aside a number of the purported communications between HVF and Mr Singh, because the veracity of many of the messages was in dispute. At that stage, the key concern (at least as expressed in the letter advising that Ms Mackintosh had concluded that serious misconduct had occurred) was expressed as Mr Singh acting as “representative, mediator and some sort of adjudicator” at the meeting (the letter of dismissal also made reference to Mr Singh acting in an “enforcement role”).

[70] However, during the course of the hearing before the Court it became apparent that E tū’s central concern had been that HVF was *an employer*, not *an employee*, and that Mr Singh’s conduct was totally incompatible with its core values. What is notable is that at the time this was never expressly explained to Mr Singh.¹⁰ So, while Ms Newman expressed concern at the hearing that Mr Singh had lacked insight, and that this went to justification for the dismissal, her observation needs to be viewed with a grain of salt, particularly given that she is not recorded as having explained the point to him at the disciplinary meeting and given him an opportunity to respond to what appears to have been her most significant concern as decision-maker.

Use of car and phone, and work time, for personal matters

[71] Mr Singh’s initial response to the letter setting out E tū’s concerns insofar as they related to apparent travel to Hamilton during work hours to meet HVF, made reference to a meeting at a named organisation that afternoon. No attempt was made by E tū to make inquiries of that organisation, or to otherwise investigate the veracity of what Mr Singh had to say.

[72] I agree with E tū that a question mark arose for it having regard to the text message exchange between Mr Singh and HVF, and that it was entirely proper for it to raise a concern. But it was neither fair nor reasonable to conclude that Mr Singh had in fact used work related resources for personal purposes without making additional inquiries, in light of his response and the absence of detail as to when the messages were sent and received. In addition, the terms and conditions of Mr Singh’s

¹⁰ The initial email of 14 July simply referred to one of the concerns as “acting in support of an employer (HVF)”.

employment and the policies under which he carried out his work were relevant. As the policies make clear, there is flexibility of approach as to hours worked and private use of E tū vehicles is permitted in some circumstances, as Ms Mackintosh accepted in cross-examination. The policies were not considered during the disciplinary process.

[73] On the use of an E tū phone and email for non-E tū business, Mr Singh's initial response was to acknowledge that he had used his work phone and should not have; he said he was new and offered his apologies.

[74] There is an additional point which I deal with in further detail below but touch on at this juncture. The letter confirming the reasons for Mr Singh's dismissal said nothing about the use of work time or resources for private purposes. Nor did it refer to the fact that the meeting had occurred at E tū's offices. That is problematic in terms of the submission that these matters, and Mr Singh's responses, fed into the decision-making process.

HVF's concerns and correspondence

[75] As to the reference to a hotel room in E tū's concerns, Mr Singh's response was that he was confused. He said that he believed some of the messages had been fabricated, and that he would be happy to discuss that further. Mr McCarten's first response to E tū after having been instructed was to advise that HVF had a history of manipulation. A review of the tenor of HVF's correspondence, taken with Mr Singh's concerns (which were repeated throughout the process) should have prompted more in-depth inquiries before a finding of serious misconduct was made and before the decision to dismiss. I agree with the Authority's conclusion that there was a failure to adequately consider (or consider at all) the concern raised on Mr Singh's behalf that HVF was undertaking a campaign against those who were seeking to work against the interests of exploitative migrant employers.

[76] As the Authority member pointed out, there are difficulties with E tū saying that it was putting the disputed material to one side and not investigating the allegation of sexual harassment. I have already noted that E tū could have investigated and

resolved the validity of the allegations, which would reasonably have informed any disciplinary process that followed. I infer from the evidence that further inquiries of this sort were not undertaken because they would have resulted in delays; E tū wished to move to resolve matters as soon as possible in order to deal with a publicity issue it perceived to be problematic. That is relevant context but does not excuse the breaches of the obligations E tū owed to one of its employees. It led to a failure to make proper inquiries and compromised the fairness of the process and decision to dismiss.

Time lapse

[77] There was also a failure to have due regard to the fact that the events complained of had occurred two years previously, when Mr Singh had transitioned out of the office and into the field, was relatively inexperienced and had been working for E tū within the two-year intervening period without any issue arising. And, as Mr Singh pointed out, the delay impacted on his ability to clearly recollect the detail and sequence of events which had occurred two years prior.

Who was the decision-maker?

[78] Mr Singh, Mr Sehgal and Mr McCarten attended the disciplinary meeting and each gave evidence that they understood that the National Secretary, Mr Newson, was the decision-maker. They said that they were advised of this during the meeting. Ms Newman and Ms Mackintosh were adamant that no such advice had been given. Nothing is recorded in the meeting notes about the identity of the decision-maker or the role that attendees were playing. Mr McCarten accepted in cross-examination that there may have been a misunderstanding. Mr Singh and Mr Sehgal were firm that they had been advised that Mr Newson was the decision-maker.

[79] The notes of the earlier meeting on 23 July record Ms Mackintosh advising Mr Singh that if there was a disciplinary decision to be made she would “step out” of the process and Ms Newman “will do that part of the process”. Ms Mackintosh’s email of 27 July, setting out her preliminary conclusion that serious misconduct had occurred and inviting a response to that, also advised that Ms Newman would be the decision-maker. However, I consider it is more likely than not that there was a significant

degree of confusion about who the decision-maker actually was. I say this for three reasons.

[80] First, it remained unclear why, if Mr Newson was not a decision-maker, Ms Newman and Ms Mackintosh considered it necessary to ring him during the adjournment and before the decision to dismiss was made. If, as was said, Ms Mackintosh and Ms Newman were simply advising him of where things had got to, it might be expected that the conversation would take place after the meeting had concluded and once Mr Singh had been advised of the disciplinary outcome. There is no evidence that he was called after the meeting, for example, to update him on decisions that had been made. And a letter from Ms Mackintosh later that day (30 July) stated that she and Ms Newman had “represented the union” at the meeting and that “[a]fter consideration of your views, we met with the National Secretary [Mr Newson] *and have now finalised the decision to dismiss you*”. The wording of the letter suggests that Mr Newson was an integral part of the decision to dismiss; Mr Newson was not called to give evidence. It is notable too that on the return to the meeting Mr Singh was not asked for his response to the advice given just prior to the adjournment that dismissal was proposed.

[81] Second, Ms Newman gave evidence that she made the decision to dismiss herself, after hearing from Mr Singh during the course of the meeting. Mr McCarten and Mr Singh both gave evidence that they thought that Ms Newman was attending the meeting as a note-taker. On balance that is not surprising. In contrast to the meeting notes of 23 July, there is no record of what Ms Newman’s role was or who the decision-maker would be.

[82] It is clear that Ms Newman took extensive notes at the meeting, recording who had asked particular questions and the response given. The meeting notes run to just over nine pages. The notes record that it was Ms Mackintosh not Ms Newman who asked questions (despite Mr Singh being advised at the meeting one week earlier that Ms Mackintosh would be stepping out of the process). Ms Newman records herself as only making one comment, and that came after the adjournment (and the discussion

with Mr Newson) and after Mr Singh had been told that he was being dismissed. The notes record:

[Mr McCarten]: Shocked, what's next.

[Ms Newman]: car, laptop, phone.

[83] I do not discount the possibility that Ms Newman did make additional comments during the meeting and I accept that the notes were not verbatim. But it remained unclear why, if she was asking questions and seeking clarification on various points as decision-maker, the responses at least were not recorded. And given the comment she made that she did record in the notes (which was, I infer, directed at requiring Mr Singh to return his work vehicle, laptop and phone), it seems more likely than not that anything more significant would have made its way into her notes.

[84] Third, the notes record that it was Ms Mackintosh who advised Mr Singh of the proposal to dismiss him. There is nothing in the notes to suggest that she spoke to Ms Newman before doing so, and the adjournment followed immediately after her statement. Further, it was Ms Mackintosh who wrote to Mr Singh following the meeting formally advising him of his dismissal and the reasons underlying the decision.

[85] At best there was a lack of clarity as to who was the decision-maker. An employee is entitled to know who is making decisions impacting on them, and to have a full opportunity to engage with them. This did not occur.

Shifting concerns

[86] I have already referred to the developing grounds of concern. This is reflected in the matters set out in the letter advising of the reasons for the dismissal, which was provided shortly after the meeting. As I have said, the letter stated two grounds:

- (a) The multiple roles Mr Singh was said to have played at the meeting (acting as HVF's support person, mediator, "some kind of adjudicator" and an "enforcement" role), which was said to be "unethical".

(b) The “inappropriate” communications with HVF.

[87] It will be immediately apparent that no reference was made to the use of a car or cell phone and no reference was made to the use of the E tū premises for the meeting; the focus was on the role Mr Singh had played. The point is of particular relevance because the stated grounds for dismissal are at odds with the concerns which emerged during the course of the hearing, namely that Mr Singh was attending the meeting for an employer, not an employee and this was wholly incompatible with E tū’s values, and concerns about the vulnerable position of the employee at the meeting and her interests. When cross-examined on the point Ms Newman suggested that the union’s concerns had simply been “abbreviated” in the letter. And Mr Mitchell submitted that the letter did not need to set out the precise basis for the decision to dismiss – other reasons could, he said, have been at play.

[88] It can be expected that when an employer formally records a decision to dismiss they will set out the reasons clearly and accurately. As the Act makes clear, in requiring employers to provide written reasons on request,¹¹ the underlying objective is to give the employee a sufficient basis for deciding whether or not to pursue a grievance. It goes without saying that if an employer purports to set out the reasons for the adverse action it took, but fails to accurately do so, it compromises the employee’s position.

[89] The fact that E tū now says that other factors were in play that were not reflected in the letter of reasons for Mr Singh’s dismissal is problematic, and reinforces the lack of justification for the dismissal at the time that action was taken. Reasons cannot be retrofitted to a decision to justify it.

[90] The reference to “inappropriate” communications with HVF being a ground for dismissal is also problematic. If the messages suggestive of sexual harassment and improper pressure (favourable treatment as a union official for sexual favours) had indeed been put to one side (as E tū said it had done), it is difficult to see how the remaining messages justified termination. They essentially amounted to flirtatious

¹¹ Employment Relations Act 2000, s 120.

messages from Mr Singh in an apparently personal capacity to another person. The inference, as counsel for Mr Singh (Mr Fleming) submitted, is that the messages that E tū had assured Mr Singh would be put to one side did in fact play a part in the decision-making process. Indeed one of the disputed messages was cited by a witness for the union during cross-examination.

Alternatives to dismissal should have been considered

[91] A disciplinary outcome must be what a fair and reasonable employer could impose.¹² A disproportionate response is likely to be neither fair nor reasonable; in other words landing outside the target range of acceptable actions and decisions for the purposes of s 103A. But the size of the target may broaden or narrow depending on the circumstances; whether or not the fair and reasonable target has been hit will be a matter of fact and degree.

[92] The issue that E tū appeared to be most concerned about (as expressed by witnesses at the hearing) was a lack of insight as to the role of a union organiser and the appropriateness of attending a mediated meeting with an employer. Mr Singh was not attending the meeting in his official capacity; he was attending it in his personal capacity. If E tū had made proper inquiries it would have ascertained that he was more likely than not acting as a neutral party at the meeting, addressing a significant plank in their concerns. As I have said, these inquiries appear not to have been made because of external time pressures relating to impending publicity.

[93] Alternatives to dismissal must be considered. There is no evidence that E tū considered whether its concerns might otherwise be met, for example by coaching or training. There are three factors of particular relevance. First, there had been a two year lapse since the incident and during that time no other concerns or issues were raised about Mr Singh's judgment; second, when the concerns arose he had just started his on-the-road job; and third, he made an early offer to make a public statement that E tū had not been involved.

¹² Employment Relations Act 2000, s 103A(2).

[94] E tū has failed to satisfy the Court that the decision to dismiss Mr Singh was justified.

Remedies

[95] Having concluded that Mr Singh was unjustifiably suspended and unjustifiably dismissed I turn to consider remedies.

Compensation under s 123(1)(c)(i)

[96] The Authority ordered \$22,000 in Mr Singh's favour by way of compensation for hurt, humiliation and loss of dignity. That quantum is open to the Court to revisit on E tū's de novo challenge. Having decided against reinstatement Mr Singh now seeks a global compensatory award of \$50,000 in respect of both grievances. I accept that in the circumstances a global award is appropriate given that the suspension and dismissal were inextricably linked, especially because of the tight timeframes involved.¹³ E tū contends that the fact that reinstatement is or is not sought is irrelevant to the appropriate quantum of compensation.

[97] I do not consider it necessary to decide the extent of any interrelationship between remedies in this case. That is because the hearing was de novo and it is accordingly up to the Court to decide what figure is appropriate in the circumstances. That involves assessing the amount of damage suffered by Mr Singh as a result of his employer's breaches.

[98] The suspension was, as I have said, rushed and Mr Singh did not have an adequate time to engage on the issue. He was entitled to expect that suspension would be a last resort and that his employer would have properly considered alternatives. He was obliged to engage with a process without his first chosen representative present, under pressing timeframes, in respect of events which had occurred some two years previously. The rushed process, and failure to adequately engage, caused unnecessary

¹³ See *Pyne v Invacare New Zealand Ltd* [2023] NZEmpC 179, (2023) 20 NZELR 59 at [46]; *Smith v Life to the Max Horowhenua Trust* [2010] NZEmpC 152, (2010) 8 NZELR 440 at [24]; and *Robinson v Pacific Seals New Zealand Ltd* [2014] NZEmpC 99, [2014] ERNZ 813 at [50].

stress and anxiety to Mr Singh. The same point can be made in relation to the process leading up to the dismissal.

[99] Mr Singh gave evidence that he felt as though his reputation had been destroyed, in part because of adverse publicity which linked him (although not expressly named) to a claim of sexual harassment and misuse of power. It was around this time that Mr Singh started getting tagged into media articles, including by members of his community, and was the subject of intense speculation. He says that E tū could have done more to minimise the damage to him, including by putting out a media statement, and that its failure to do so exacerbated his distress.

[100] While media coverage did not expressly name Mr Singh, it was of course clear to him who was being referred to, and the nature and extent of E tū's reported comments to the media exacerbated matters. This is most graphically seen in a statement attributed to Mr Newson in an Indian News article:

E tū suspends staffer for allegedly demanding sexual favours from a female business owner, in return for settling her worker exploitation case; says investigations are on

The biggest private sector union in New Zealand, E tū, has suspended a staff member and unionist, after a female business owner has come forward with allegations that the E tū representative had demanded sexual favours from her, in return for settling her worker exploitation case in which he [the E tū representative] was involved as a mediator.

Confirming this was Bill Newson, E tū National Secretary, who said, "I can confirm that I have received a complaint making serious allegations against one of my staff."

"I am treating the complaint very seriously. I started an investigation immediately upon receiving the formal complaint. The staff member has been suspended from work while we undertake the investigation," Newson added.

...

[101] While Ms Mackintosh sought to characterise it as a "neutral" statement the point is, as Mr Fleming observed, that E tū took no steps to clarify in the media that it had (by the date of the article) advised Mr Singh that it had put the sexual harassment allegation to one side and that Mr Singh's suspension arose out of other (less salacious) concerns.

[102] On 30 July 202 an article appeared in the Herald, under the tag-line: “Union staff member sacked for allegedly asking for sex to help with employment matter.” The article quoted the “union’s boss” as confirming that the union had received an allegation of a very serious nature against one of its employees, had investigated the complaint “thoroughly” and “... as a result of the investigation the staff member’s employment has been terminated.”

[103] If E tū had taken steps to clarify the position in respect of its engagement with the media it may have lessened the impact on Mr Singh. Mr Singh was entitled to feel that he had been hung out to dry by his employer.

[104] It is clear that the dismissal had a significant impact on Mr Singh. He was dismissed from a role that he felt strongly about and he was unable to find alternative work in the field. He was obliged to tell family and friends about the dismissal and confront uncomfortable issues about the media attention that ensued. He was unable to sleep, shut himself off from his partner and family, felt unable to adequately provide for his children, suffered financial hardship (and was in receipt of a benefit) and was distracted and upset for many months. His evidence was corroborated by the evidence of his partner.

[105] There is, however, a need to focus on the impact of the E tū’s breaches; that is because there must be a causal connection between the breach and the loss. In this regard it is appropriate to put to one side the humiliation and loss of dignity which I have no doubt Mr Singh suffered as a result of family and friends finding out about the nature of HVF’s concerns, and the flirtatious messages between them. It is also appropriate to put to one side the emotional impact Mr Singh was experiencing at the time due to his separation from his wife and being a full-time father to his three children, as his current partner explained in evidence.

[106] After having had the advantage of hearing from Mr Singh and other witnesses explaining the impact of the breaches on him, and separating out as best I can other factors impacting on Mr Singh at the time which were not causally connected to his employer’s breaches, I would place this case in the middle of band 2. Compensation

in the sum of \$25,000 is appropriate, subject to a reduction for contribution which I discuss below.

Reimbursement

[107] Where the Court determines that an employee has a personal grievance and that they have lost remuneration as a result of that grievance, it must order reimbursement to the employee.¹⁴ Mr Singh did not lose any wages as a result of his unjustified suspension; he did from his unjustified dismissal. That is the focus for his lost wages claim.

[108] Section 128(2) provides that the order for lost wages is to be the lesser of a sum equal to the remuneration lost or to 3 months' ordinary time remuneration. That is subject to the proviso in s 128(3) which provides that the Court may, in its discretion, order an employer to pay to an employee by way of compensation a sum greater than that to which an order under subs (2) may relate. Actual loss represents the outer limit of reimbursement for lost remuneration.

[109] It took Mr Singh two years to find alternative work. E tū says that he failed to mitigate his losses and that an award of reimbursement for lost wages should be limited to three months.

[110] Mr Fleming submitted that an employee who has been unjustifiably dismissed is not under a duty to mitigate their losses. While the Act does not impose a duty to mitigate loss, previous cases have held that an employee has some obligation to do so.¹⁵ As explained in *Maddigan v Director-General of Conservation*, any such obligation must be viewed in context; the question is whether the steps the employee took to mitigate their loss, if any, were reasonable in the circumstances.¹⁶

[111] Mr Singh says that his efforts to find alternative work were hampered by a number of factors. First, he was significantly impacted by his dismissal and his

¹⁴ Employment Relations Act 2000, s 128.

¹⁵ *Carter Holt Harvey Ltd v Yukich* [2005] ERNZ 300 (CA) at [38].

¹⁶ *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550 at [56]-[65].

confidence had been undermined. Second, he was seeking reinstatement and wished to focus his energies on this, rather than employment elsewhere. Third, he wished to remain working in a field that he felt passionate about and the market for union organisers was constrained at the time. Fourth, he did make some inquiries in the aviation industry, an area he had previously worked in, but COVID-19 was having a negative impact across the aviation sector. He was ultimately able to secure a baggage handling job in the industry, a position he continues to hold.

[112] I accept that Mr Singh's immediate focus was on reinstatement to the position he felt strongly about. And it was not unreasonable for him to believe that his claim, filed in March 2021, would be resolved much sooner than it was. I have already found that he was significantly impacted by E tū's unjustified actions, and I accept that this goes some way to explaining why his search for work was directed at the two areas he was familiar with.

[113] An award of lost remuneration from the date of dismissal to 25 July 2022 is sought. There is no doubt that the union is at least partly to blame for the difficulty Mr Singh had in finding alternative employment, in particular because of the way it responded to media inquiries. In this regard, Mr Newson was quoted in media coverage as confirming that a complaint of a serious nature had been made against one of their staff members, which the union had investigated thoroughly and which resulted in the staff member's termination, giving rise to the inference that Mr Singh was guilty of the misconduct he had been accused of. However, while it is open to an employee to wait for the perfect role to come up following an unjustified dismissal, it is not generally appropriate to place the burden of such a decision on the employer. And the union, as I have discussed, is not entirely to blame for the negative media attention on Mr Singh. Standing back, my assessment is that an award of twelve months' lost remuneration is just.

Contribution

[114] The Authority reduced the remedies ordered in Mr Singh's favour by 15 per cent. Mr Singh says that no reduction should be made; E tū says that a larger reduction would be appropriate in the circumstances.

[115] Section 124 provides the starting point for analysis. It provides that:

124 Remedy reduced if contributing behaviour by employee

Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[116] As s 124 makes plain, the Court is required to consider whether there ought to be a reduction for employee contribution whenever it is satisfied that a personal grievance has been established. Two steps must be taken:¹⁷

- (a) First, the Court must be satisfied that the actions of the employee contributed to the situation that gave rise to the personal grievance.
- (b) Second, an assessment of whether the employee’s actions “require” a reduction in the remedies that would otherwise have been awarded.

[117] The primary considerations when determining whether a particular action should result in a reduction for contribution are causation and proportionality.¹⁸

[118] The leading authority on s 124 is the Court of Appeal’s judgment in *Salt v Fell*.¹⁹ Under the heading “What s 124 means” the Court observed that:

[79] ...It is clear that s 124 is intended to operate like a “contributory negligence” provision: if the employee, by his or her own behaviour, is partly the cause of the employer’s hasty or ill-judged action (here, in dismissing the employee), then the employee should have the remedies to which he or she would otherwise have been entitled reduced.

[119] I agree with Mr Fleming that there is a need to pin-point the proven wrongdoing before concluding that a reduction for contribution is a proportionate response.

¹⁷ *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 (EmpC); *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 at [179].

¹⁸ *Macadam v Port Nelson (No 2)* [1993] 1 ERNZ 300 (EmpC) at 304-306.

¹⁹ *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155.

Mr Singh formed an on-line relationship which involved a degree of flirtation. This occurred before the process which E tū was concerned about took place. It is clear that Mr Singh travelled to Hamilton and met with HVF. I have already held that there was an insufficient basis for E tū to conclude that he travelled to Hamilton for that express purpose. Nor, in any event, was this issue relied on by E tū in its letter of dismissal.

[120] I have also held that there was an insufficient basis for E tū to conclude that Mr Singh was responsible (in whole or in part) for organising the meeting, or that the role he played at the meeting was “unethical” as it asserted. If the complaint about sexual harassment had been made out, contribution would be engaged, but E tū decided against continuing with its investigation into these allegations and decided against making inquiries into Mr Singh’s concerns that aspects of the complaint against him had been motivated as part of a campaign by some employers of migrant workers.

[121] Standing back, I do not consider that any of Mr Singh’s actions could be described as blameworthy in the required sense and I do not order any reduction for contribution under s 124.

Costs challenges

[122] There are issues in respect of the Authority’s approach to costs. In order to deal with this aspect of the challenge it is necessary to set out more of the background.

[123] It appears that Mr Singh’s grievance was filed in the Authority on 2 March 2021. Two interlocutory issues arose: applications by Mr Singh for interim non-publication orders and for interim reinstatement. The first was granted; the second declined. The first scheduled investigation meeting was adjourned at short notice because Auckland was placed under COVID-19 restrictions and E tū was unwilling to proceed via remote participation. When the matter came back before the Authority an investigation meeting occurred, on 10-11 May 2022, taking two full days.

[124] On March 2023 (so around 10 months later) the parties were notified that the Authority member's warrant had expired and no determination would be issued by him.

[125] In May 2023 (so around two years after Mr Singh had filed his grievance) the matter was reheard by another Authority member. The rehearing took place on the papers already filed, additional affidavit evidence and updated legal submissions. The intervening period had also necessitated further legal cost, through communications with the Authority in respect of the delays which had occurred and the procedure for the rehearing (which included attendances at additional case management conferences).

[126] Just prior to the (first) investigation, Mr Singh was granted legal aid. The grant was not, however, retrospective, and he remains liable for all costs to that point, which amounted to \$14,685.57. He is also required to repay his legal grant from the proceeds of his case. Costs paid from Mr Singh's grant of legal aid totalled \$7,142.49 ($\$14,685.57 + \$7,142.49 = \$21,828.06$).

[127] The Authority generally applies a daily tariff approach to costs, with a starting point of \$4,500 for the first day and \$3,500 for each subsequent day, adjusting upwards or downwards according to the particular circumstances.²⁰

[128] The first investigation meeting occupied two days; an application of the daily tariff would result in a notional costs award of \$8,000. The second investigation was conducted on the papers. There is no stated tariff for on-the-papers investigations, communications with the Authority or attendances at case management conferences.

[129] It is, however, apparent that the Authority has on occasion awarded costs based on deemed equivalence to an in-person investigation meeting, and awarded increased costs to reflect work done outside of an investigation meeting. The approach adopted in *Ferris v Proprietors of Nuhiti Q*, another matter involving a rehearing in similar circumstances, provides an example.²¹

²⁰ Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi (February 2024) at 5.

²¹ *Ferris v Proprietors of Nuhiti Q* [2023] NZERA 583 at [12].

[130] In the present case the Authority declined to award costs in respect of the rehearing. That was because the rehearing had not been the fault of either party. Costs were awarded on the original investigation, and in Mr Singh's favour (although no determination, and accordingly no finding, had been made in that particular context). The daily tariff was applied (\$8,000) but reduced by \$3,000 to reflect the unsuccessful application for interim reinstatement. No weighting was applied to reflect Mr Singh's successful application for interim non-publication which had involved the preparation, filing and service of affidavit evidence in support and legal argument.

[131] What is the correct approach in the circumstances? I agree with Mr Fleming that the fact that neither party is at fault in respect of a particular aspect of litigation is not the determining factor; nor is it evidently built in to the daily tariff approach which the Authority favours. In addition, there is no barrier to consideration being given to costs necessarily incurred outside of the investigation meeting itself, a point made by the full Court in *Da Cruz*.²²

[132] Mr Fleming submits that an award of \$11,500 would be appropriate; equivalent to tariff costs for a three day investigation (two days for the first investigation; deemed one day for the second). This, as he points out, would represent around 50 per cent of Mr Singh's actual costs in the Authority.

[133] I agree the sum of \$11,500 represents a fair contribution to the costs Mr Singh reasonably incurred in pursuing his grievance, and is just in the particular circumstances.

Conclusion

[134] In summary, the following orders are made:

- (a) Mr Singh was unjustifiably dismissed and disadvantaged.
- (b) E tū is ordered to pay Mr Singh the sum of \$25,000 by way of compensation under s 123(1)(c)(i) of the Act.

²² *PBO Ltd (formerly Rush Security Ltd) v Da Cruz* [2005] ERNZ 808 (EmpC) at [46].

- (c) E tū is ordered to reimburse Mr Singh a sum equivalent to 12 months' lost remuneration.
- (d) E tū is ordered to pay a contribution to Mr Singh's costs in the Authority in the sum of \$11,500.

[135] The parties are encouraged to agree costs in these proceedings. If costs cannot be agreed I will receive memoranda, with Mr Singh filing and serving within 20 working days of the date of this judgment; E tū filing and serving within a further 15 working days and any submissions in reply filed and served within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 2.00 pm on 21 May 2024