

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 206
3014372**

BETWEEN ADMIRAL MANGANDA
Applicant

AND WAIKATO ETHNIC FAMILY
SERVICES TRUST
Respondent

Member of Authority: Eleanor Robinson

Representatives: Hamish Burdon, Advocate for Applicant
Nick Wilkinson, Counsel for Respondent

Investigation Meeting: 29 & 30 May 2018 at Hamilton

Submissions received: 30 May 2018 from Applicant
30 May and 11 June from Respondent

Determination: 29 June 2018

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Admiral Manganda, claims that on 13 March 2017 he was unjustifiably dismissed for serious misconduct by the Respondent, Waikato Ethnic Family Services Trust (WEFST).

[2] Mr Manganda claims that he was unjustifiably disadvantaged by WEFST suspending him on 21 February 2017.

[3] Mr Manganda also claims that WEFST breached the duty of good faith it owed him.

[4] WEFST Trust denies that Mr Manganda was unjustifiably dismissed or unjustifiably disadvantaged and claims that he was justifiably dismissed.

Issues

[5] The issues for determination are whether or not:

- Mr Manganda was unjustifiably dismissed by WEFST?
- Mr Manganda was unjustifiably disadvantaged by WEFST by reason of suspension?
- WEFST breached the duty of good faith it owed to Mr Manganda?

Note

[6] During the course of the two day hearing, the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties’ representatives. The parties have also submitted closing submissions on the facts and law.

[7] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on each of the issues necessary to dispose of the matter and specified orders made as a result.

Background Facts

[8] WEFST is a small charitable trust with a primary focus on the needs of migrants, and in particular, refugees. At the time of Mr Manganda’s employment, there were two employees, himself and Ms Banafsheh Ostad, Director, and a number of volunteers.

[9] Mr Manganda commenced a voluntary position with WEFST in July 2016, initially for one day a week, but increasing to a full-time voluntary position. In October 2016 Mr Manganda was offered and accepted employment with WEFST as a result of WEFST obtaining funding from WINZ.

[10] Mr Manganda was provided with an individual employment agreement (the Employment Agreement) which included the following clauses:

1.1 You will be employed in the position of **Administration Manager**.

2.1 Your employment will commence on 7/10/2016 and will continue until terminated by either party in accordance with this agreement.

5.1 Your normal hours of work will be: **30 hours per week**

(a) **6 hours per day (Monday to Friday)** and in addition, such other times as may reasonably be required by Waikato Ethnic Family Services Trust having regard to the duties and responsibilities of the position.

6.1 Your salary shall be **\$594** gross per week; you shall be remunerated at a wage rate of **\$19.80** per hour, payable to your nominated bank account (minus tax and any other taxable deductions) in equal weekly instalments.

18.1 This employment agreement should be read in association with all other Waikato Ethnic Family Services Trust policies and procedures. You shall comply with all of our procedures or policies in place and as amended from time to time.

23.0 TERMINATION OF EMPLOYMENT

23.1 This agreement may be terminated at any time by either party giving not less than four weeks' written notice of termination to the other party. We may choose to pay you in lieu of that notice period.

Serious misconduct

23.2 Notwithstanding clause 24.1, if you engage in serious misconduct we shall be entitled to terminate your employment summarily (without notice).

23.3 "Serious misconduct" shall include (but not be limited to):

- (a) any material breach of the terms of this agreement;
- (b) any dishonesty or theft;
- ...
- (d) falsification of Waikato Ethnic Family Services Trust's records;
- ...
- (f) unauthorised absence from work

Suspension

23.4 If it is alleged that you have engaged in misconduct or serious misconduct, we may suspend you on full pay pending the outcome of any investigation by us into that alleged misconduct or serious misconduct.

27.1 If you believe that you have a personal grievance or any other employment relationship problem, we encourage you to try and resolve it directly with the person with whom you think you have a grievance or problem. You may choose to do this verbally or in writing. You may also seek the assistance of your manager to facilitate a resolution. ...

[11] The Employment Agreement had been signed by Mr Manganda and Ms Sally Ridley, Chairperson of the Board of WEFST (the Board).

Meeting 6 December 2016

[12] Mr Manganda said he had been on his way to work on 6 December 2016 when he saw a response email to Ms Ostad sent by Mr Anaru Gray, a member of the Board. The email asked Ms Ostad to organise a meeting at 1.00 p.m. to include herself, Mr Manganda and Mr Gray.

[13] Mr Manganda had scrolled down the email stream and saw an email from Ms Ostad to Ms Gray dated 5 December 2016 which detailed concerns about himself and which concluded:

I wonder if there is any way that we can let Lloyd in MSD knows (sic) about the current concerns and give us some guidance about his agreement and the organization commitments to this agreement?

[14] When he arrived at WEFST office, he had seen an email from Ms Ostad detailing the time of the meeting.

[15] The concerns noted by Ms Ostad in the email dated 5 December 2016 included Mr Manganda:

- Not being at WEFST office on an unspecified date
- Not following specific tasks allocated to him
- Sending mails other than through WEFST email system
- Changing his job title without advising her
- Advising a volunteer to enter him as service manager and Ms Ostad as the manager of a driving school in a document
- Changing WEFST email addresses and not sending passwords as requested.

[16] Ms Ostad said that she had raised her concerns with Mr Manganda verbally with him on five occasions prior to 5 December 2016, and with Ms Ridley, who had told her to put her concerns in writing. The result had been the email dated 5 December 2016.

[17] Mr Manganda said he was distraught as he had believed he had a good relationship with Ms Ostad and he had not been made aware prior to seeing the email she had sent to Mr Gray on 5 December 2016 that she had any concerns with his performance. He considered that the comment at the conclusion of the email about letting 'Lloyd at MSD' (the contact who had been involved in providing the funding for his position) know about their concerns indicated that WEFST wanted to end its employment relationship with him.

[18] Mr Manganda did not have any recollection of Ms Ostad raising any of the issues outlined in her email with him, apart from a discussion they had about the number of volunteers attending WEFST office in which he had expressed his view that having five volunteers on one day was not efficient.

[19] Mr Gray said that he had decided to invite Mr Manganda to the meeting held on 6 December 2016 when he realised that Mr Manganda had inadvertently been sent the emailed letter of complaint about him from Ms Ostad. He explained that the purpose of the meeting was to address Ms Ostad's concerns about Mr Manganda, and to hear his response.

[20] The meeting held on 6 December 2016 was attended by Ms Ostad, Ms Ridley, Mr Gray and Mr Manganda.

[21] Mr Manganda had not been advised that he could bring a representative or support person with him to the meeting. Mr Gray explained that although he believed Ms Ostad had raised serious concerns about Mr Manganda, he had not believed that the meeting would result in a resolution to those concerns.

[22] During the meeting Mr Manganda had tried to provide responses to the concerns set out by Ms Ostad. This included his response that there had not been a major change to his job title and that he had sent the requested passwords to Ms Ostad and provided a copy of the email under which they had been sent.

[23] Mr Manganda said he had been interrupted and believed his responses were not being listened to during the meeting. He believed that Ms Ridley's attitude towards him during the meeting was hostile, disrespectful and that of pre-judgment.

[24] Ms Ostad, Ms Ridley and Mr Gray said it had been agreed that timesheets recording the sign-in and sign-out times of staff would be completed during the meeting. Mr Manganda said he had not agreed to the proposal, nor had any implications of him not completing the timesheets correctly been advised to him.

[25] Following the meeting Mr Gray emailed Ms Ostad asking her to create a document monitoring the attendance of the employees and volunteers, and to: "*inform Admiral to sign in and out when he attends work*".

7 December 2016: First personal grievance notification

[26] By an email sent to Ms Ridley and Mr Gray on 7 December 2016 Mr Manganda provided a detailed response to the concerns which had been raised with him during the meeting the previous day. He stated his concern in the email that he had felt that:

I was not respected enough to finish my argument without interjections. Sadly I felt I was being attacked, mistreated and ambushed. There was an insufficient time of notice, less than 6 hours and I was not afforded the opportunity to have a support person present during the proceedings.”

[27] Mr Manganda concluded the email by stating that he felt: *“I have no other option but to lay a personal grievance”*.

[28] Mr Gray responded to Mr Manganda’s email that same day (7 December 2016) thanking him for his ‘detailed response’ and advising that: *“Management and the members of the Board will consider the points that you have raised and will respond to you accordingly. This may be in written form or another we may arrange another meeting to respond to you accordingly.”*

[29] Mr Manganda said he had received no written response to the issues raised in his email, nor had a meeting been held to address his response.

[30] Mr Manganda said he had received a revised job description from Ms Ostad which altered his job description from ‘Administration Manager’ to ‘Administrator’. He had responded to Ms Ostad by email, copying it to Mr Gray and Ms Ridley, stating:

I am writing this email to inform you that I don’t think it fair to agree and/or sign any role-altering requests from the organization until I have had a response on the issues I raised regarding the meeting on Tuesday. The proposed job description effectively alters my role/title which is contrary to my employment agreement.

Although I received an acknowledgement of my concerns in the previous email, I am yet to get a time frame given, for a resolution of the matter at hand.

[31] Mr Manganda had sought advice from Cardon Dispute Resolution (Cardon) in December 2016 because of his concerns about the meeting held on 6 December 2016 and as a result Mr Hamish Burdon (Cardon) had raised a further personal grievance on Mr Manganda’s behalf with WEFST.

23 January 2017: Second personal grievance notification

[32] Mr Gray said that the Board had not met to discuss Mr Manganda’s letter sent on 7 December 2016, and when a further personal grievance had been raised by Cardon on Mr Manganda’s behalf on 23 January 2017, the Board considered that it had superseded the first personal grievance raised by Mr Manganda in the email dated 7 December 2016.

[33] The letter sent by Cardon outlined the personal grievance claims, specifically that (i) Ms Ostad had failed to follow clause 27 of the Employment Agreement as she had not raised

the issues outlined in her email dated 5 December 2016 with Mr Manganda; (ii) Mr Manganda had felt ambushed at the meeting held on 6 December which appeared to be that of an investigation meeting into the issues Ms Ostad had raised; and (iii) the Board had failed to respond to Mr Manganda in regards to his personal grievance letter dated 7 December 2016 which had made his working relationship difficult.

[34] Cardon had requested mediation on Mr Manganda's behalf; however this had not been agreed prior to Mr Manganda receiving an emailed letter from Ms Ridley on 15 February 2017.

Letter dated 15 February 2017

[35] Ms Ridley said she had returned to WEFST workplace after the Christmas/New Year period in mid-January 2017, at which time she had sought advice from Mr Wilkinson and engaged him to act for WEFST in response to the personal grievance raised by Mr Manganda.

[36] Ms Ridley emailed Mr Manganda on 15 February 2017 informing him that he was required to attend a pre-disciplinary meeting on 17 February 2017, for the purpose of informing him of a number of allegations of misconduct which had been made against him. No details of the allegations were set out in the email.

[37] The email advised that the possible outcomes of the meeting were that either no formal disciplinary action would be taken, or he would be suspended on full pay while the matter was being conducted. Mr Manganda was invited to bring a support person to the meeting.

Sick leave

[38] As a result of the email Mr Manganda said he had felt sick and anxious, and had visited his GP on 16 February 2017. As a result of the GP visit, he was medically certified as unfit to attend work from 12.30 p.m. on 16 February until 27 February 2017.

[39] He had returned to WEFST office after his medical appointment on 16 February 2017 and rebooked clients who had appointments with Ms Ostad, emailing her to advise that he would be leaving WEFST office 30 minutes early.

[40] Ms Ostad had responded by email thanking Mr Manganda for looking after the clients and advising him to take the following day off work also.

[41] The pre-disciplinary meeting was subsequently rescheduled to take place on 21 February, and this was confirmed by Ms Ridley in an email which she signed on 17 February 2017. There were no changes to the email content.

Pre-Disciplinary Meeting 21 February 2017

[42] Ms Revell had been advising Mr Manganda on behalf of Cardon, however she was not available to attend the meeting on 21 February 2017, and Mr Burdon had accompanied Mr Manganda to the meeting. Mrs Manganda also attended as support for Mr Manganda; and Ms Ridley, Mr Gray and Mr Wilkinson attended for WEFST.

[43] The meeting held on 21 February 2017 was recorded by Mrs Manganda, albeit without the knowledge of either Cardon or WEFST. Mrs Manganda said she had done so as Mr Manganda had no advance time to prepare for the meeting held on 6 December 2016 and there had been no notes recorded or provided subsequent to the meeting.

[44] The recording of the meeting held on 21 February 2017 and a written transcript was provided to the Authority.

[45] During the meeting Mr Manganda was advised of the allegations which were of unauthorised absence from work, and inappropriate use of electronic media including computers and internet, and that these allegations were to be investigated.

[46] Mr Burdon had queried whether or not the issues related to the concerns Ms Ostad had raised on 5 December 2016 and had been advised by Mr Wilkinson that the allegations had been triggered by that process.

[47] Mr Burdon asked why suspension was being considered, and upon Mr Wilkinson stating that the Employment Agreement provided at clause 23.4 for suspension in a situation in which serious misconduct was alleged, Mr Burdon had observed that matters relating to serious misconduct should have been acted upon immediately, and not some two and a half months later

[48] It was pointed out by Mr Wilkinson that Mr Manganda was presently on unpaid sick leave and suspension would be on full pay. On that basis suspension was tacitly agreed on behalf of Mr Manganda.

[49] The meeting concluded with Mr Wilkinson asking Mr Manganda not to access any of WEFST's information.

Serious Misconduct Investigation

[50] Ms Ridley wrote to Mr Manganda on 24 February 2017 advising that she would be presenting an investigatory report setting out three allegations namely:

- Not completing timesheets as required

- Falsely/dishonestly completing timesheets
- Causing loss of emails though (sic) negligence

[51] Ms Ridley pointed out that the list of allegations was not definitive and might change during the course of her investigation.

[52] Mr Manganda was advised that it had been agreed at the meeting on 6 December 2016 that he would keep timesheets recording his hours at work, and he had stated on the timesheets he had been at work on 18 and 19 February 2017 when in fact he had not been present. It was also alleged that he had not completed timesheets from the 15 to 17 February 2017. The timesheets for the relevant period were attached to the letter.

[53] In relation to the loss of emails allegation Ms Ridley stated:

You were responsible for moving the website from one provider to another. At stage 2 of the project, you were advised by ANZ Tech Enterprise to backup all the emails associated with the domain. It is alleged that you failed to do so causing the loss of important of emails containing important and confidential information.

[54] Attached to the email was a statement and commentary from ANZ Tech as evidence of the allegation concerning the loss of emails.

[55] The letter did not advise Mr Manganda of the potential outcome of the investigation process.

[56] Ms Revell responded on 25 February 2017 by proposing that the meeting date be changed due to her unavailability, and stating that any further allegations should be disclosed prior to the meeting, and signed statements should be available in the event of disagreement on the evidence.

[57] Mr Manganda said although he had been given restrictions on accessing WEFST premises, documents and equipment, he had retained the mobile telephone provided by WEFST which contained his backed-up emails.

[58] Ms Ridley confirmed in a letter to Ms Revell dated 27 February 2017 that the change of meeting date requested by Ms Revell was satisfactory, and confirmed possible outcomes as being: (i) no further action; (ii) a written warning; or (iii) dismissal. The letter also set out WEFST's view that:

- the meeting held on 6 December 2016 had not been part of any disciplinary process; and

- Mr Gray had responded to Mr Manganda's personal grievance letter on 7 December 2016, however Mr Manganda had not replied.

Meeting held on 7 March 2017

[59] The meeting held on 7 March 2017 was attended by Mr and Mrs Manganda accompanied by Ms Revell, and by Ms Ridley, Mr Gray and Mr Wilkinson on behalf of WEFST.

[60] The meeting was recorded by Mrs Manganda. Ms Revell said she had been aware that Ms Manganda would be recording the meeting. She explained that although she had asked WEFST for meeting notes from the meetings held on 6 December 2016 and 21 February 2017, none had been provided by WEFST. On that basis she believed that a recording of the meeting would be helpful.

[61] The meeting commenced with Ms Ridley inviting Mr Manganda to provide his responses to the allegations.

(a) Timesheet allegations

[62] In relation to the allegation that he had not completed the timesheets correctly on 28 December 2016, and 6 and 17 January 2017, Mr Manganda explained that he collected his daughter from day-care at 3.00 p.m. in the afternoon, and because he had finished his work close to her pick-up time he would have been rushing to collect her and had forgotten to sign on those dates. However he would have completed his full 6 hours on those days.

[63] Ms Revell pointed out that other Trust personnel had also omitted to sign out on certain dates, including Ms Ostad and a volunteer. Moreover on occasion Ms Ostad had changed the times on the timesheet.

[64] Ms Revell stated that Mr Manganda could provide detailed confirmation from his bank which showed he had used the town carpark when he attended WEFST office, and suggested that WEFST could examine the files Mr Manganda had worked on during the dates in question to ascertain the dates and times the files had been opened and closed.

[65] It was pointed out that the dates of 18 and 19 February 2017 were incorrect dates, and should have read 15 and 16 February 2017 when Mr Manganda had been present in the workplace. It would also be possible for Mr Manganda to question those volunteers in relation to the dates queried.

[66] In respect of the allegation that Mr Manganda had not completed the timesheets for the dates of 15 to 17 February 2017, Mr Manganda had explained that he was at work on 15 and 16 February, and that he had been on sick leave on 17 February 2017

[67] Ms Revell requested information concerning the policy in relation to signing in and out process and a copy of the policy. There had been no response to her request during the meeting.

(b) Loss of emails allegation

[68] Ms Ridley asked Mr Manganda to explain the migration of emails and the website.

[69] Mr Manganda explained that WEFST emails had been backed up when WEFST had upgraded to a new system provided by Spark which had occurred when WEFST had been experiencing problems with its website.

[70] He had gathered quotes for the website work from three different contractors which he had passed to Ms Ostad as part of the quotation process. Ms Ostad had made the decision to use ANZ Tech which had not been part of the quotation process. He and Ms Ostad subsequently held a telephone discussion with the ANZ Tech contractor who requested a log in so he could move the website domain. This had been agreed.

[71] Thereafter Mr Manganda said he had been in constant contact with the ANZ Tech contractor through emails, and he had provided the information required to enable the website domain to be moved.

[72] He had received an email from an unknown source on 12 December 2016 informing him WEFST had a new email account. Mr Manganda said he had logged in and had access to the new email site, however after Ms Ostad had tried unsuccessfully to access her director email, they had contacted Spark which advised that WEFST mailboxes were being deleted and could not be retrieved.

[73] Mr Manganda explained that he and Ms Ostad had held a telephone conversation with the ANZ Tech contractor at which a Trust volunteer, Akshay, had been present.

[74] The ANZ Tech contractor had apologised during the call and acknowledged that he had proceeded to carry out the computer transfer without informing WEFST and without its permission.

[75] During the meeting Mr Manganda's mobile telephone was provided to Ms Ridley and Mr Wilkinson who compared the emails recorded on it to those which had been provided to

Mr Manganda in support of the allegation that he had been responsible for the email loss and which had originated from ANZ Tech. Ms Revell pointed out that the email from ANZ Tech appeared to have been altered.

[76] At the conclusion of the part of the meeting addressing WEFST's allegations, Ms Revell asked to discuss Mr Manganda's personal grievances; however Mr Wilkinson advised that the Board had not discussed them as it had not held a Board meeting since receiving Mr Manganda's personal grievance on 7 December 2016.

[77] Ms Ridley, when questioned at the Investigation Meeting, confirmed that no investigation had been carried out into the explanations made by Mr Manganda following the meeting held on 7 March 2017

[78] Ms Revell sent an email to Ms Ridley outlining concerns raised by Mr Manganda about Ms Ostad breaching confidentiality, involving parties outside of WEFST, and failing to follow policies. Ms Revell advised that the Board should meet and discuss the issues as matters pursuant to the statutory requirements as they constituted serious misconduct.

[79] A further email from Ms Revell to Ms Ridley dated 12 March 2017 noted that Mr Wilkinson had said a report would be completed by 8 March 2017, but there had been no update and Mr Manganda remained on suspension. As a result Ms Revell requested an update as to when the report would be provided and a further meeting scheduled.

Dismissal

[80] Ms Ridley wrote to Mr Manganda on 13 March 2017 advising that the Board had decided to terminate his employment with effect from 13 March 2017 with 4 weeks' notice to be paid in lieu. Attached was a copy of the Board's Summary and Decision.

[81] The Board Summary and Decision confirmed that all the Board members were present, outlined the process, and concluded: "*that the whole process had been conducted in a fair and reasonable manner with due consideration to all parties*".

[82] The Board, with the exception of Ms Ridley, Mr Gay and Mr Wilkinson, had discussed the allegation that Mr Manganda had been responsible for the loss of emails, concluded that the process had been at fault, and the allegation had been dismissed.

[83] In regard to the allegation about timesheet falsification, the Board observed that Mr Manganda had agreed to fill in the timesheets and was aware of their importance. The Board concluded:

... on the balance of probabilities, Admiral had been filling out the timesheets retrospectively and was not recording the actual hours he had worked. It also noted that Admiral, on the balance of probabilities, had not been to the office when he stated on the time sheet that he had been.

[84] The Board decided that Mr Manganda's actions amounted to serious misconduct and warranted summary dismissal, but considered that it would be fair and reasonable to pay Mr Manganda his contractual notice.

Determination

Was Mr Manganda unjustifiably dismissed by WEFST?

[85] Mr Manganda claims that he was unjustifiably dismissed by WEFST. The test of justification in s 103A of the Act states:

103A Test of justification

- 1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- 2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[86] The test of justification requires that the employer acted in a manner that was substantively and procedurally fair. WEFST must therefore establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[87] In accordance with s 103A (3) of the Act, WEFST was required to carry out a fair investigation and follow a fair procedure.

[88] *Ministry of Maori Development v Travers-Jones*¹ Chief Judge Goddard stated in regards to a fair procedure:²

What amounts to a fair procedure has been described often enough. It is generally accepted that the minimum elementary components must be clear notice to the employee of the misconduct alleged, a fair opportunity to answer

¹ [2003] 1 ERNZ 174

² Ibid at para [30]

or explain, including adequate time for preparation, followed by consideration by a mind at least receptive to the need to evaluate the answers and explanations and generally open to the possibility that there may be an innocent explanation for suspicious circumstances.

[89] Mr Manganda was dismissed for serious misconduct in relation to timesheet falsification.

[90] The issue of Mr Manganda's '*commitment and interest in working as an administrator at WEFST*' was initially raised by Ms Ostad in an email to Mr Gray, at that time co-chairperson of the Trust, dated 5 December 2016. As a result of those concerns Mr Manganda was invited by email dated 6 December 2016 and timed at 8.51 a.m. to attend a meeting to be held that afternoon at 1.00 p.m. to address the concerns. There was no mention of any irregularities relating to his timekeeping.

[91] The meeting held on 6 December 2016 had been called to address serious concerns raised by Ms Ostad in her email to Mr Gray. Whilst WEFST states that this was not a disciplinary meeting, I note that concerns raised in that meeting formed a basis for the subsequent allegations made against Mr Manganda in February 2017.

[92] I find that the meeting held on 6 December 2016, being an investigation into serious concerns raised in relation to Mr Manganda's performance, was the start of a disciplinary process.

[93] I find that a fair and reasonable employer would have provided Mr Manganda with advance notification of its concerns and all relevant information relating to those concerns. I find that the accidently including on a stream of emails the concerns raised about Mr Manganda's performance with WEFST does not adequately fulfil this requirement.

[94] I note Ms Ostad's evidence that she had raised her concerns verbally with Mr Manganda on five occasions, but there was no documentary evidence supporting this assertion, which Mr Manganda denied. Ms Ostad said at the Investigation Meeting that she had recorded her verbal raising of her concerns on her mobile telephone, but no evidence of this was provided to the Authority.

[95] I find that a fair and reasonable employer would have provided Mr Manganda with an opportunity to obtain representation or support at that meeting, but he was not given a reasonable opportunity to do so because of the inadequate notification of the meeting.

[96] WEFST's evidence was that it was agreed at the 6 December 2016 meeting that the use of timesheets was to be introduced and were to be completed by Mr Manganda. Mr Manganda's evidence was that he did not recall agreeing to do so.

[97] No notes of the 6 December 2016 meeting were kept or provided to Mr Manganda.

[98] Moreover the emailed instruction sent by Mr Gray to Ms Ostad following the meeting does not refer to an agreement reached on the completion of timesheets during the meeting on 6 December 2016.

[99] Mr Manganda's evidence was that he had not been informed of the consequences of not completing timesheets, and there is no written evidence that such information had been provided to him.

[100] The requirement for an employee to complete timesheets is a reasonable instruction on the part of an employer, pursuant to cl 3.1 of the Employment Agreement, however I find that if non-completion, or incorrect completion, of the timesheets was to be considered a serious misconduct matter of which a potential outcome was dismissal, this should have been clearly communicated by WEFST to Mr Manganda at the time when the timesheet proposal was implemented.

[101] In the email Mr Manganda sent to WEFST on 7 December 2016, he provided a detailed response to the concerns submitted to WEFST by Ms Ostad, and raised a personal grievance.

[102] I find that a fair and reasonable employer would have responded in a timely manner to such a communication from an employee in an attempt to resolve the problem: "*quickly and fairly*" as set out in Schedule 1 of the Employment Agreement.

[103] The emailed response from Mr Gray indicated that the Board would consider the points raised by Mr Manganda and respond accordingly. It did not do so, nor did it respond to the personal grievance raised on Mr Manganda's behalf by Cardon on 23 January 2017.

[104] I find this to be a breach of the duty of good faith which WEFST owed to Mr Manganda.

[105] The letter dated 15 February 2017 in which Ms Ridley invited Mr Manganda to a pre-disciplinary meeting on 17 February 2017 stated that allegations of misconduct would be put to him. There were no details of the allegations set out in the letter.

[106] I find that it should have been apparent to WEFST that unspecified allegations would be a matter of concern to an employee, and in fact Mr Manganda's evidence was that he had been so concerned as a result of the email that he had sought medical assistance.

[107] During the meeting held on 21 February the allegations of serious misconduct were advised and clarified following the pre-disciplinary meeting in the letter sent by Ms Ridley on 24 February 2017.

[108] The letter dated 24 February 2017 stated that Ms Ridley was carrying out an investigation and the list of allegations was not definitive. Potential outcomes were clarified in the latter letter dated 27 February 2017 but the letter did not clarify whether or there were further allegations.

[109] I find that, given that Mr Manganda was on sick leave as a result of stress and anxiety about the concerns raised with him, it would be reasonable to conclude that this action would have increased that anxiety.

[110] During the meeting held on 7 March 2017 Mr Manganda offered explanations and subsequently one of the allegations, that of causing a loss of emails was dismissed by the Board.

[111] However, despite Mr Manganda's suggestions of how WEFST could verify the explanations he offered, namely by checking his evidence about parking, but more significantly by checking WEFST's computer data for the relevant dates and times, and by querying those volunteers who were present in the workplace when Mr Manganda alleged he had been, it failed to do so.

[112] I find that a fair and reasonable employer would have carried out further investigation before rejecting the explanations offered by Mr Manganda, especially when it had full access to its records and volunteers.

[113] I also note that the allegation that according to the timesheet Mr Manganda had been at work on 18 and 19 February 2017, and the timesheets not completed on 15 – 17 February 2017 were easily verifiable given that WEFST was aware Mr Manganda was absent on sick leave from 16 February, and he had emailed Ms Ostad from WEFST office on 16 February 2017 to that effect and said he had contacted the clients with whom she had appointments.

[114] Examining the substance and procedure adopted by WEFST, I find that it did not act as a fair and reasonable employer would have acted in the circumstances, in particular:

[115] Considering all these circumstances, I find a lack of substantive and procedural justification in the dismissal of Mr Manganda for serious misconduct.

[116] I accept that the WEFST is a small employer without the resources of a larger organization; however it did have access to advice from mid-January 2017. I find the defects in its process to have been more than minor.

[117] I determine that Mr Manganda was unjustifiably dismissed by WEFST.

Was Mr Manganda unjustifiably disadvantaged by WEFST by reason of suspension?

[118] Mr Manganda is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[119] The elements of s103 (1) (b) are twofold:

- An unjustifiable action by the employer, which
- Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[120] Mr Manganda must therefore establish that there was some unjustifiable action by WEFST which affected his terms and conditions of employment to his disadvantage.

[121] The Employment Agreement provided for suspension in relation to allegations of misconduct or serious misconduct at clause 23.4.

[122] The proposal of suspension was discussed during the meeting held on 21 February 2017 confirmed that the allegations in regards to Mr Manganda were of a serious misconduct nature and it was suggested that paid suspension replace unpaid sick leave.

[123] Examining the transcript of the meeting I find that this suggestion was accepted by Mr Burdon.

[124] I find that WEFST had a contractual right to suspend Mr Manganda, and the suspension was agreed by Mr Burdon acting on behalf of Mr Manganda. I further find that Mr Manganda's terms and conditions of employment were not affected to his disadvantage since he moved from unpaid sick leave to paid suspension leave.

[125] I determine that Mr Manganda was not unjustifiably disadvantaged by WEFST by reason of suspension.

Did WEFST breach the duty of good faith it owed to Mr Manganda?

[126] An employment relationship is founded on the fundamental basis that an employer and employee can have trust and confidence in each other to behave in good faith one towards the other during their employment relationship.³

[127] The duty of good faith requires that the parties to an employment relationship:

... to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...⁴

[128] Following the meeting on 6 December 2016 Mr Manganda had written to Mr Gray setting out his concerns about how the meeting had been called without prior notice, and the manner in which it had been conducted. In the email from Mr Manganda dated 7 December 2016 he had outlined how seriously he viewed the matter by stating that he had felt he had no option but to : “*lay a personal grievance*”.

[129] These were serious concerns raised by an employee with an appropriate person within the organisation in accordance with Schedule 1 of the Employment Agreement which stated that: “*It is ideal if we can solve our own problems quickly and fairly whenever possible.*”

[130] Despite this, WEFST failed to address the concerns raised by Mr Manganda in a timely manner in December 2016, or later on 23 January 2017 when Cardon raised a further personal grievance on Mr Manganda’s behalf, and requested mediation.

[131] During the Investigation Meeting Ms Ridley stated that she had believed that the subsequent allegations of serious misconduct ‘trumped’ the personal grievance raised by Mr Manganda.

[132] I cannot accept the delay in responding to Mr Manganda’s concerns was consistent with the statutory duty to behave in good faith towards Mr Manganda, particularly when the letter outlining the serious misconduct allegations was sent to Mr Manganda some two months after he had first made his concerns known to WEFST, and one month after Cardon had raised a further notification of a personal grievance.

³ Section 4 of the Act

⁴ Section 4 (1A)(b) of the Act

[133] I find that a fair and reasonable employer acting in good faith would have been: “*active and constructive*” and: “*responsive and communicative*” by engaging with Mr Manganda in a timely manner about his concerns.⁵

[134] I determine that WEFST breached the duty of good faith it owed Mr Manganda by failing to respond to his concerns and personal grievance as required by s 4 of the Act.

Remedies

[135] Mr Manganda has been unjustifiably dismissed and he is entitled to remedies

Lost remuneration

[136] Mr Manganda said he had returned to study after having applied for a number of jobs without success. In particular he noted that he had progressed to a final stage of an ANZ graduate programme but received a letter advising him he had been unsuccessful after informing the selection panel, in response to a question concerning previous disciplinary action, that he had been terminated from his previous employment.

[137] Whilst there is no proof that the reason for his not having been selected for the ANZ graduate programme was based upon his response during the final stage interview, it is accepted that an employee dismissed for serious misconduct will have some hurdles to overcome when seeking alternative employment.

[138] Mr Manganda has provided evidence of other unsuccessful attempts to obtain alternative employment prior to his returning to study.

[139] **WEFST is ordered to pay Mr Manganda lost remuneration in the sum of \$7,128.00 gross (calculated as 12 weeks x \$594.00 gross per week) pursuant to s 128(2) of the Act.**

[140] **From that sum is to be deducted any wages earned by Mr Manganda during that 12 week period.**

Compensation pursuant to s 123 (1)(c)(i) of the Act

[141] Mr Manganda suffered a reoccurrence of depression as a result of the unjustifiable actions of WEFST which resulted in his being prescribed medication for depression and anxiety.

⁵ S 4 (1A)(b) of the Act

[142] The loss of an income caused him and his family financial hardship and distress.

[143] I find that Mr Manganda suffered significant humiliation and injury to feelings as a result of his dismissal by WEFST.

[144] **WEFST is ordered to pay Mr Manganda the sum of \$15,000.00 pursuant to s 123 (1) (c) (i) of the Act.**

Contribution

[145] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[146] I find no contributory conduct on the part of Mr Manganda and there is to be no reduction of the remedies ordered.

Penalty

[147] I have found that WEFST did not act in good faith in respect of the concerns and personal grievances raised by Mr Manganda.

[148] Whilst I consider that a breach of good faith is an appropriate matter for awarding a penalty, I take into account the fact that the breach of good faith is also reflected in the events that resulted in the unjustifiable dismissal of Mr Manganda, and for which remedies have been ordered.

[149] **I order that WEFST to pay a penalty of \$500.00 for its breach of the duty of good faith and order \$300.00 of that amount be paid to Mr Manganda and \$200.00 to the MBIE trust account.**

Costs

[150] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[151] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority