

**Attention is drawn to the Order
Prohibiting Publication of certain
Information (Refer paragraph [5] – [7])**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 219
3082552

BETWEEN TBN
 Applicant

AND UQE
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Tim Oldfield, counsel for the Applicant
 David Grindle, counsel for the Respondent

Investigation Meeting: 24 March 2021 at Rotorua

Submissions and/or further 23 March 2021 from Applicant
evidence 23 March 2021 and 21 April 2021 from Respondent

Determination: 21 May 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, TBN, claims that UQE breached the terms of a Record of Settlement entered into between the parties on 12 April 2019, and signed by a Ministry of Business, Innovation and Employment mediator on 18 April 2019 (the Record of Settlement).

[2] TBN further claims that he was discriminated against by UQE on the basis of his involvement in the activities of a union.

[3] UQE denies that it has disclosed terms of, or breached obligations flowing from, the Record of Settlement. UQE also denies that TBN was discriminated on the grounds of his involvement in the activities of a union.

[4] UQE further claims that the personal grievance was raised outside of the statutory 90 day time limit, and it has not consented, and does not consent, either explicitly or impliedly, to TBN's personal grievance being raised outside of the statutory 90 day time limit.

Note

[5] **I order that the names of the employees and witnesses directly affected and involved in this matter are referred to in this determination by letters bearing no relationship to their actual names, and that any information which may lead to their identification is subject to a permanent non-publication order and not to be published.**

[6] **The reason being that publication of their names would likely render some if not all of the benefits of the confidential settlement nugatory.**

[7] **This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000 (the Act).**

The Authority's investigation

[8] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[9] The issues requiring investigation are:

- whether or not the personal grievance for unjustifiable disadvantage was raised outside of the statutory 90 day time limit?
And if so:
- whether UQE consented to it being raised out of time?
If it did:
- whether UQE breached the Record of Settlement?
- UQE discriminated against TBN on the basis of his involvement in the activities of a union.

Background

[10] UQE and the Pulp and Paper Workers Union Kawerau Inc (the Union) are parties to a collective agreement (the Collective Agreement). TBN was employed at UQE as a Fitter. He was also a union member and a delegate.

[11] During February 2019, following a period of industrial unrest, UQE commenced an employment investigation into the activities of TBN and others.

[12] On 28 February 2019 TBN and others were invited to attend a disciplinary meeting which was held on 5 April 2019 at which it was agreed that TBN would remain away from work on special leave until the matter was resolved.

[13] On 8 April 2019 TBN and others turned up for work and because neither SIO, the Central Plateau Regional Manager of UQE, nor EDR, the General Manager of UQE, were available, SIO said he had requested DHD to go to the worksite and ask them to leave.

[14] As a result of the disciplinary meeting, UQE and TBN and the other employees entered into the Record of Settlement.

[15] In March 2019 TBN applied for a job at another company, POS, and his application was acknowledged on 8 March 2019.

Record of Settlement 18 April 2019

[16] TBN and three other employees and UQE entered into the Record of Settlement on 12 April 2019. The Record of Settlement included the following clauses:

8. Neither party will make any comment that is disparaging or derogatory of the other.

9. All allegations made by either party, the terms of settlement and any matters discussed in relation to settlement must be kept confidential by the parties and their representatives.

[17] The Record of Settlement was signed by the employees and EDR. It was also signed by the mediator on 18 April 2019 who confirmed: "Before I signed the agreed terms of settlement I explained to the parties the effect of sections 148A, 149(1) & (3). I am satisfied that the parties understand the effect of sections 148A, 149(1) & (3)..."

[18] EDR said that he was involved in negotiating the Record of Settlement and that he understood the terms of it. The only people to whom he disclosed the terms of it were to UQE's HR staff, SIO and the UQE Board. DHD had no access to any files referring to the Record of Settlement. EDR said all discussions about the terms of the Record of Settlement were held in his office, and DHD was not at present at any of these discussions.

[19] TBN's uncle ZUD was a Maintenance Manager at POS and had been appointed as the Project Construction Manager for the new operating structure which POS was building. Building commenced in late 2018.

[20] ZUD knew DHD, who at that time was an Estimator/Time Leader with UQE. Their relationship was professional and they liaised on the POS new build project for which UQE were supplying stainless steel flooring. Their relationship was also friendly and they mixed socially in their free time.

[21] DHD was appointed as Branch Manager of the Kawarau workshop on 15 April 2019.

Interview process at POS

[22] ZUD said that he was part of the interview panel for the vacancy for which TBN had applied, and as TBN's uncle, he had notified POS of his conflict of interest. However POS was satisfied that he could continue as a member of the interview panel.

[23] ZUD said that approximately one month prior to TBN's interview on 4 July 2019, he had met with DHD and during their conversation he had asked DHD whether TBN had a good work ethic and was a reliable employer.

[24] He had been surprised when DHD responded that TBN was: "disruptive", a: "very union orientated employee", and that UQE was in the process of terminating his employment which had cost it: "around \$100,000" and said: "if it was not for the threat of strike action he would no longer be employed."

[25] DHD said that the conversation between him and ZUD had taken place at the end of March 2019. He recalled the date because there was an annual shutdown during March and the project at POS had reached fruition at that time. He also recalled the conversation as occurring on or about the time he sold his quad bike to ZUD.

[26] DHD said he had not been aware at the time of the conversation with ZUD that TBN had been applying for employment outside of UQE. He said that ZUD may have mentioned that TBN had applied for a job at POS, but he had not thought, in the context of their casual conversation, that ZUD was seeking a reference.

[27] He had provided his opinion, which was based up rumours circulating at UQE at the time, that TBN was: "hard out into the union" and that he was disruptive, but he denied having said that UQE was in the process of terminating TBN's employment, or that the process was costing it \$100,000.00.

[28] On 5 June 2019 ZUD was at a Tangihanga also attended by his nephew, KZO, who was TBN's brother.

[29] KZO said that ZUD had told him what DHD had said about TBN. KZO subsequently spoke to TBN and told him what ZUD had told him about DHD making negative comments about him (TBN).

[30] TBN said that he had been angry when he heard about the comments because he considered it undermined his reputation in a small town and to people he knew and had grown up amongst. It had also made him feel that he could no longer trust UQE.

[31] TBN subsequently spoke to ZUD himself about what had been said by DHD.

[32] TBN attended the interview at POS on 4 July 2019. ZUD said that TBN's references had been complimentary but he was not the successful candidate for the vacancy. The position had been offered to another applicant whom ZUD described as "exceptional".

Complaint Process

[33] Mr Tane Phillips, Union Secretary, said that TBN had contacted him and raised the issue of DHD's adverse comments. Mr Phillips said that he had told TBN that he needed ZUD to set out in writing what had occurred in order that he could discuss it with UQE.

[34] He had received an email from ZUD dated 2 October 2019 setting out the details of the comments he alleged had been made by DHD about TBN. The email stated:

To Whome it may concern
I am the maintenance manager for [POS] and as such am charged with the employment of staff who will maintain and repaid any issues we may have with our plant.

One of the applicants was [TBN] who is working for [UQE] and as my nephew I needed to be open and transparent, after declaring a conflict of interest I was told to continue with the interview process.

I called in to see [DHD] the area manager [UQE] and who I have worked with before, to ask if [TBN] had a good work ethic and was a reliable employee. Unfortunately his reply was not as expected I was told he is a disruptive and very union orientated employee and [UQE] were in the process of terminating his employment and this process had cost [UQE] around \$100,000 and if it was not for the threat of strike action by the union he would no longer be employed.

Even though we continued with the interview and his referee checks were very complementary [TBN] was not offered a position with [POS].

[35] Mr Phillips telephoned SIO, UQE's Central Plateau Regional Manager, and made arrangements to meet with him the following week. Mr Phillips said that he had told SIO that DHD's comments had been an attack on the Union.

[36] SIO said that when they met on or about 7 October 2019 Mr Phillips gave him the email from ZUD. He had noticed that the email did not state when the conversation between ZUD

and DHD had taken place. He had asked Mr Phillips when the email had been sent but Mr Phillips avoided answering the question.

[37] SIO said he had seen the potential seriousness of the claims made in the email, and he had expressed some concern about what was alleged, telling Mr Phillips that he wanted to investigate it further. He said he would speak with ZUD with whom he was acquainted.

[38] SIO said he had made DHD aware of the allegation and also informed UQE's HR department. He said DHD confirmed there had been a casual conversation between him and ZUD, but the content of it and the date when it had occurred were not clear. He assumed it had been a recent conversation.

[39] During the Investigation Meeting SIO said DHD had told him that he had not seen ZUD since the end of the building work at POS, which was March or early April 2019.

[40] Mr Phillips said he sought legal advice on 10 October 2019 after which he telephoned and met with SIO to raise TBN's concerns.

Meeting 10 October 2019

[41] TBN was present at the meeting held on 10 October 2019 between SIO and Mr Phillips. During the meeting Mr Phillips said he told SIO that:

- a) what had been said to ZUD by DHD was a breach of the Record of Settlement;
- b) TBN was a union delegate carrying out union work;
- c) what DHD had said meant that TBN was being penalised for carrying out union activity; and
- d) TBN wanted financial compensation.

[42] SIO said he had confirmed that the view expressed by DHD during the conversation with ZUD was not the view of UQE, and that it was in the process of giving TBN exposure to supervisory roles. He explained that UQE would investigate the claims before trying to resolve matters.

[43] He said that Mr Phillips had asked for \$50,000.00 to resolve the matter in addition to a formal apology to be published in the local paper, and TBN's company record being deleted.

[44] Following the meeting SIO had written to Mr Phillips reiterating that UQE's procedure was to provide references on a letterhead and that nothing referred to in ZUD's email was the view of UQE. The email dated 10 October 2019 continued to state:

We do however take these allegations very seriously and have consulted with the accused, whom at this time did not hold a managing position within our company and is not privy to any employee information.

The accused does not recall using such words, they were not involved in any part of the investigation nor part of any conversations after. The accused was not aware of a formal reference check with [ZUD] for his nephew [TBN] and at the time was having a general chat with [ZUD] as they have worked closely together over the years.

As part of our investigation and as per our phone conversation I will arrange for [ZUD] and myself to discuss further in person to gain his view on events leading up to today.

[45] SIO confirmed that he had not met with ZUD because he considered the issue had escalated to a point at which a formal process needed to take place.

[46] On 6 November 2019 Mr Oldfield wrote to SIO on behalf of TBN and the Union stating: “we are writing to raise a personal grievance, a claim for penalties and a breach of privacy with [UQE].” The letter continued to set out the personal claims as the alleged breach of the Record of Settlement by the comments made by DHD to ZUD, and of discrimination on the grounds of involvement in the activities of a union and union membership.

[47] Mr Grindle responded on behalf of UQE stating: “we acknowledge your client’s personal grievance and are currently conducting our own enquiry and hope to be in a position to respond more formally to the grievance next week.”

[48] A statement of problem was filed with the Authority on 27 November 2019 in which it was stated that: “in September or early October 2019, a representative of [POS], [ZUD], contacted the Respondent for a reference.’ This was altered to by email dated 31 March 2020 to the Authority to state the contact was made in May or early June.

Was the personal grievance was raised within the statutory 90 day time limit?

[49] TBN claims that he raised the unjustifiable disadvantage personal grievance claims with UQE within the statutory limitation period. Sections 114(1) and (2) of the Act state:

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period;
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to resolve.

[50] TBN knew of the grounds for the personal grievance on 5 June 2019 when he attended the tangi and was advised of the comments about him made by DHD. From that point he had

90 days in which to raise a personal grievance i.e. until 2 September 2019, however he did not do so before the expiry of the 90 day statutory time limit.

[51] The parties agreed by memoranda that a personal grievance was raised out of time, and that no leave to raise it out of time is sought.

Did UQE consent to the personal grievance being raised outside the statutory 90 day time limit?

[52] TBN submits that UQE consented to the late raising of the personal grievance by its attempt to resolve it, submitting that UQE had followed the steps set out in the Collective Agreement for resolving employment relationship problems.

[53] The steps are set out in clause 39 and Schedule C of the Collective Agreement which states:

4. Where a personal grievance has been raised to the Employer, the Employer must respond to the personal grievance within 14 days from the day the Employee has made the Employer aware (or as soon as the Employer ought to reasonably be aware) that the Employee alleges a personal grievance that the Employee wants the Employer to address.

5. The employer must either grant the remedies sought by the Employee or provide a written statement setting out the Employer's view of the facts and the reasons why the Employer is not prepared to grant the remedies sought by the Employee.

6. If the Employee is not satisfied with the Employer's written response or the Employee fails to provide a written response within the 14 day period, the Employee may refer the personal grievance to the Employment Relations Authority and the claim will be dealt with under the Employment Relations Act 2000.

[54] UQE submits that it did not consent to the personal grievance being raised out of time because at the time of the first conversation, SIO did not know when the conversation between TBN and DHD had taken place. It is submitted that it cannot therefore have consented to the personal grievance being raised out of time when it was not aware when the action alleged to be a personal grievance had taken place.

[55] It is submitted by UQE that it was therefore out of time.

[56] It is submitted on behalf of TBN that UQE consented to the late notification of the personal grievance by taking active steps to address it and by using the steps in the Collective Agreement for the resolution of personal grievances to do so.

[57] It is clear that there was some degree of confusion about the date of the relevant conversation between ZUD and DHD. ZUD's evidence was that conversation took place approximately one month before 4 July 2019, DHD said it took place on or about the end of March 2019.

[58] The statement of problem filed on 27 November 2019 stated that the date of the conversation was took place in September or early October 2019, and this was amended on 31 March 2020 to read 'May or early June 2019'.

[59] DHD's evidence was that he believed the conversation to have taken place when he agreed to sell his quad bike to ZUD, however the bank statements filed show that the transaction took place in late February 2019 which is prior to the dates DHD and ZUD state the conversation had taken place, and therefore does not assist to clarify the actual date.

[60] SIO's evidence was that he believed the conversation had taken place at a time proximate to the conversation with Mr Phillips in October 2019. However during the Investigation Meeting SIO stated that when he had spoken to DHD in October 2019, DHD told him he had not spoken to ZUD since the building work at POS had ended, which was at the end of March or beginning of April 2019.

[61] Having considered the evidence I find that it more likely than not that SIO had sufficient information to conclude that the conversation between DHD and ZUD had in fact had taken place early in April 2019 at the latest.

[62] On 10 October 2019 Mr Phillips set out TBN's view that he was being penalised for being a union member and gave details of the financial remedy sought. This was in accordance with step 4 of Schedule C of the Collective Agreement.

[63] SIO responded that same day, 10 October 2019, setting out UQE's response to the allegation and the discussion about the allegation with DHD. I find this to accord with Step 5 of Schedule C of the Collective Agreement

[64] TBN was not satisfied with UBE's response and filed a statement of problem. This accords with Step 6 of Schedule C of the Collective Agreement.

[65] I find that UQE engaged in the process set out in the Collective Agreement from October 2019 by investigating the basis of the allegation as confirmed in the email dated 10 October 2019, and providing the response in the email dated 8 November 2019. Accordingly I find that UQE had consented to the personal grievance being raised out of time.

Was the Record of Settlement breached by UQE?

[66] Section 149(3) of the Act sets out that a Record of Settlement, once affirmed by the parties and subsequently signed: “by the person empowered to do so”, becomes binding, and final on, and enforceable by the parties. Section 149(4) of the Act sets out that any person who breaches an agreed term of settlement is liable to a penalty.

[67] TBN claims that DHD breached clauses 8 and clause 9 of the Record of Settlement during his conversation with ZUD.

[68] To be held to have breached the terms of the Record of Settlement, DHD must have known both of the facts of a settlement having been achieved, and the terms of it.¹

[69] I find that DHD was aware that there were rumours in UQE about TBN being disruptive and he would have been aware of tensions in the relationship, from both the rumours circulating in the workplace and from having been asked to request TBN and the other employees to leave the worksite on 8 April 2019.

[70] However there is no evidence to support that he was aware of the Record of Settlement having been reached, or, more importantly, that he was aware of the relevant terms of it.

[71] I determine that UQE did not breach the Record of Settlement.

Was TBN discriminated against by UQE on the basis of his involvement in the activities of a union and thereby suffered an unjustifiable disadvantage?

[72] An unjustifiable disadvantage personal grievance may arise pursuant to s 103(1)(c) of the Act as a result of discrimination. TBN alleges that he was discriminated by UQE on the basis of his union membership. Section 104 of the Act states:

104 Discrimination

(1) For the purpose of section 103(1)(c), an employee is discriminated against in that employee’s employment of the employee’s employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or involvement in the activities of a union in terms of section 107, -

- (a) Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits or opportunities for training, promotion, and transfer ...
- (b) Dismisses that employee or subjects that any employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment ..

¹ *Musa v Whanganui District Health Board* [2010] NZEmpC 120 at [57] as upheld in *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 165.

(c) ..

- (2) For the purposes of this section, **detriment** includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.

[73] At the time DHD had the conversation with ZUD his evidence was that he was not aware that ZUD was seeking a reference from him and believed it was a casual conversation between two friends.

[74] It is also the evidence of SIO and EDR that the policy of UQE was that only senior members of management could issue formal references, however ZUD did not make a formal reference request in respect of TBN.

[75] In addition there is no firm evidence that the conversation took place after DHD became a Branch Manager rather than before his promotion when he was an employee without managerial responsibility, and therefore could not be regarded as a member of management empowered to provide a formal reference.

[76] Examining the question of whether or not the comments caused a detriment to be suffered by TBN in respect of his application for employment at POS by creating a negative perception of him, I find that there is no evidence that the comments made by DHD to ZUD had an adverse impact on the recruitment process for the POS position on the basis that:

- a) ZUD did not communicate DHD's comments about TBN to the two other recruitment panel members; and
- b) although he may not have recommended TBN as strongly as he may have done prior to the comments made by DHD, his evidence was that TBN was "second in line" and, more significantly, that the successful candidate was "exceptional".

[77] The Employment Court's comments in *NZ Workers Union v Sarita Farm Partnership* that:

... it is important in weighing an allegation of discrimination, to guard against an over-sensitive grievant attributing to discrimination a consequence that would have flowed in any event."²

[78] Having considered the evidence, in particular the comments made by ZUD about the calibre of the successful candidate I find that it is unlikely TBN would have been the successful

² *NZ Workers Union v Sarita Farm Partnership* [1991] 1 ERNZ 510 at pg 516

candidate even if the comments had not been made by DHD, and no discrimination or disadvantage to TBN having arisen during the recruitment process at POS.

[79] It is submitted on behalf of TBN that loss of job satisfaction constitutes a detriment. Such detriment must have been exposed to this detriment by UQE his employer or by UQE's representative. Section 103 (2)(b)(i) and (ii) of the Act defines a representative as a person who either has: "authority over the employee alleging the grievance" or is "in a position of authority over other employees in the workplace of the employee alleging the grievance".

[80] Prior to the alleged date when the conversation between DHD and ZUD took place, TBN had been involved in disciplinary action, and he had applied for alternative employment at POS. In those circumstances it is reasonable to infer that before to the conversation between DHD and ZUD took place, TBN had suffered a reduction in job satisfaction.

[81] DHD was not a Branch Manager until 15 April 2019. He was however an Estimator/Team Leader before that date and I find that being a team leader required a degree of supervision over a team of employees. Consequently DHD would be considered to be a representative of UQE for the purposes of s 103(2)(b)(ii) of the Act.

[82] TBN learnt about the comments made about him by DHD on 5 June 2019 during the tangi when his brother mentioned them to him. Examining the situation after the conversation is alleged to have occurred, I note that there is no evidence that the comments made by DHD were passed on to other community members by ZUD or KZO.

[83] I also note that TBN did not raise the personal grievance in a timely manner which might have been expected had he been very aggrieved about the discriminatory nature of the comments made by DHD.

[84] However I accept that as a result of the comments made by DHD about his being 'disruptive', TBN experienced a reduction in his job satisfaction and mana within his family in the small town community in which he lived which would constitute a detrimental effect on his employment.

[85] He also lost trust in UQE, although I find however that there is no evidence that he suffered any detriment in his terms and conditions of employment.

Remedies

[86] TBN has suffered a detriment, being a loss of job satisfaction and mana arising from his involvement in the activities of a union.

[87] I order that UQE pay TBN the sum of \$3,000.00 in respect of injury to feelings pursuant to s 123(1)(c) the Act.

Contribution

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

[89] TBN did not contribute to the situation in which discriminatory comments were made about him, and there is no reduction to the remedy ordered.

Costs

[90] Costs are reserved. Given the extent to which both parties have been successful, I consider that costs should lie where they fall.

[91] However if costs are sought and an Authority determination on costs is needed the applicant may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the respondent would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

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

[93] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.³

Eleanor Robinson
Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].