

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 477
3032391

BETWEEN PAMELA MANNING
Applicant
AND E TŪ INCORPORATED
Respondent

Member of Authority: Christine Hickey
Representatives: Anthony Drake and Dylan Pine, counsel for the Applicant
Simon Meikle, counsel for the Respondent
Investigation Meeting: 19 and 20 February 2019
Submissions Received: 27 February and 3 April 2019 from the Applicant
20 February and 27 March 2019 from the Respondent
Date of Determination: 15 August 2019

DETERMINATION OF THE AUTHORITY

[1] This determination has been issued outside the statutory period of three months after receiving the last submissions. The Chief of the Authority has decided that exceptional circumstances exist for providing this outside the latest date specified in s174C(3)(b) of the Employment Relations Act 2000.

Employment Relationship Problem

[2] Pamela Manning was employed as a Membership Administrator for the Engineering, Printing and Manufacturing Union (EPMU) beginning in 26 February 1996. In 2015 E tū Incorporated (E tū) was formed following the merger of EPMU, the Service and Food Workers Union and the Flight Attendants and Related Services Union.

[3] On 1 December 2017 Ms Manning was dismissed at the end of a meeting with Bill Newsom, E tū's National Secretary, after an investigation and disciplinary process.

[4] Ms Manning says the dismissal was unjustified and that she was unjustifiably disadvantaged during her employment. Ms Manning says that E tū treated her in a discriminatory manner. She also claims that the changes to her job responsibilities after the merger were so significant that they amounted to a redundancy.

[5] Ms Manning claims that she should be reinstated, or be paid redundancy compensation. She also claims lost remuneration and \$20,000 for compensation for humiliation, loss of dignity and injury to her feelings, including the loss of her reputation.

[6] Ms Manning originally alleged that E tū had treated her in an in an adverse way in alleging she failed to work in excess of her guaranteed hours of work and that it had treated her disparately to other employees. These issues were not pursued in submissions. However, I have dealt with the concern about disparity and some other issues separately in my consideration of procedural fairness.

[7] E tū says that the dismissal was justified, both substantively and procedurally, and that Ms Manning was not unjustifiably disadvantaged in her employment.

[8] E tū denies that Ms Manning was ever made redundant, and says therefore that she is not entitled to a redundancy payment. In any event, E tū says that no personal grievance was raised in relation to the redundancy within 90 days from the date of the merger in October 2015.

[9] In the event that the Authority finds that Ms Manning's dismissal was unjustified, E tū says that reinstatement is neither practicable nor reasonable.

Issues

- [10] In order to determine Ms Manning's claims I need to determine the following issues:
- (a) Was Ms Manning made redundant after the merger by significant changes to her job description?
 - (b) Did E tū act as a fair and reasonable employer could have done in all the circumstances in relation to:
 - (i) its investigation and disciplinary process? Did it act in line with the Collective Employment Agreement?
 - (ii) its conclusion that Ms Manning had committed serious misconduct?
 - (c) Did E tū:
 - (i) treat Ms Manning in a discriminatory way in relation to her diagnosis of Acute Adjustment Disorder?
 - (ii) treat her in an unjustified way in denying her access to her computer although her final pay had not been paid?
 - (iii) disadvantage her by instructing her not to discuss the allegations with her peers?

Was Ms Manning's role made redundant?

[11] On 3 September 2015, Bill Newson, the EPMU's National Secretary, wrote to Ms Manning about her transition to the new union. He wrote that there would be no change to the EPMU as a legal structure and, as she already knew, the EPMU:

proposed that all staff transfer into the new union in their current roles (unless you have accepted an alternative role in the new union) and without loss of currently applicable wages and employment conditions.

I confirm your transfer on that basis, taking effect as of Monday 19 October 2015

The terms and conditions of employment for the new union will remain the same as currently contained in your collective ... employment agreements until such time as the new agreements are renegotiated with staff representatives. We are hoping that this can be finalised as soon as possible after the transfer.

[12] While she worked for the EPMU Ms Manning's job had evolved over the years and encompassed more than her written position description set out.

[13] Administrative staff from the merging unions became co-located in E tū's Christchurch office.

[14] After the unions merged, there was significant work, including analysis of what work was needed, on forming a new structure for E tū and on crafting new job descriptions to undertake the work and to recognise employee's skills and strengths. Mr Newson explained that it was E tū's hope that no-one would be made redundant in the restructure.

[15] Ms Manning was dissatisfied with how the new structure placed her and her role, particularly in relation to Ms X who came from another merged union.

[16] On 9 June 2017 Christopher Gordon, the National Administration Manager, emailed Ms Manning attaching an updated job description for her. He wrote that E tū had conducted an extensive administration staff role and skills analysis, which led to the updated job description. He noted that her job description included a greater emphasis on administration support for education and health and safety. He wrote that Ms Manning would be required to report to the Southern Regional Administration Co-ordinator, who was Ms X.

[17] I heard evidence that Ms Manning had originally applied for Ms X's role but had withdrawn her application.

[18] Mr Gordon suggested a meeting be arranged for Ms Manning, her support person if she wanted one, Ms X, Alan Clarence, E tū's Southern Regional Organising Director, and himself to work out protocols for her and Ms X to work together "in a collegial and supportive manner."

[19] I disagree that Ms Manning should have raised a personal grievance that she was entitled to be paid redundancy within 90 days of 19 October 2015. It was not until 9 June 2017 she saw the details of new role proposed for her.

[20] Ms Manning's 16 June 2017 email stating that the new job description did not resemble the job responsibility she had had for the past 15 years was sufficient to raise a personal grievance:

Well before a new and alternative role was advertised you began a process over 18 months of systematically dismantling my historical role without consultation.

I particularly note that in the last 18 months you have taken away the mana that I gained over 22 years of loyalty, diligence, and expertise in my role.

I am not prepared to agree to the proposal ... until such time that you can fully explain to me what you envisage my role will be vis a vis the proposed Christchurch Safety Hub.

[21] Mr Gordon and Ms Kokanovic met with Ms Manning and her support person to discuss her concerns about her role and her new job description. On 9 August 2017, Ms Manning signed the new job description and noted that E tū agreed that there would be a review of the job description in six months.

[22] The relevant part of the collective agreement that covered Ms Manning's work is:

26.4.7 Alternative Employment

26.4.7.1 In lieu of redundancy compensation, the employer may arrange the otherwise declared redundant to a suitable alternative position within the employer's operation or any subsidiary or parent company, provided that such position is acceptable to the employee, who will not unreasonably withhold their acceptance.

26.4.7.2 A suitable alternative position shall be:

(a) A position at a range of rates and under minimum conditions of employment not less favourable than those which applied immediately prior to the transfer, unless at the employee's choosing.

...

(d) In accepting an alternative position, the employee shall experience no reduction in normal earnings and shall retain all service-related entitlements.

[23] I consider E tū acted appropriately in working with Ms Manning to overcome her concerns about the new job description. In accepting the new job description in August 2017, Ms Manning accepted a suitable alternative position under clause 26.4.7.1 of the collective agreement. Therefore, Ms Manning was not made redundant. I dismiss her claim for redundancy payment.

[24] Ms Manning's alternate claims for redundancy pay or for reinstatement are incompatible.

Staff complaints notified to Ms Manning

[25] On 9 October 2017 Alan Clarence, E tū's southern region organising director, emailed Ms Manning to bring to her attention three complaints about her behaviour. He set out the three complaints and stressed that E tū was only undertaking an investigation at that stage and not a disciplinary process.

[26] Mr Clarence asked Ms Manning not to discuss the allegations with anyone, however, he told her she was of course entitled to discuss them with her representative.

[27] On 13 October 2017, Marina Kokanovic, E tū's business strategy director, emailed Ms Manning. Her email set out the three complaints that the union had received the previous week about her behaviour between 25 September and 3 October 2017. The email had the written complaints attached.

[28] Ms Kokanovic had been instructed, along with Mr Clarence, to investigate the allegations on behalf of E tū. Ms Manning was advised that she was entitled to bring a support person to the meeting and to any other follow-up meeting. She was advised she would have the opportunity to present any additional or clarifying information she believed was relevant to the investigation. Ms Kokanovic informed Ms Manning that she and Mr Clarence would consider her responses and undertake any further required investigation before any decisions were made.

[29] Ms Kokanovic wrote:

The complaints contain serious allegations of unacceptable behaviour by you towards members of the staff located in the Christchurch office and your failure to follow lawful and reasonable instructions.

...

After we interview all staff and other people who officially complained we will give you an opportunity to comment on these alleged allegations and offer you the chance to meet with us in the Christchurch office

The purpose of this meeting is to determine if [your behaviour] warrants disciplinary action, up to and including dismissal.

The first complaint

[30] The first complaint related to training on Friday 29 September 2017 provided through videoconference by an external supplier of the Ready Messenger system, a new communication system. There had been a complaint that Ms Manning had failed to follow a lawful and reasonable instruction. It was alleged Ms Manning had initially refused to take part in the training and at the end of the training said that she had not needed to do the training because she would not be using the software. When Ms X told her she would have to use it, allegedly Ms Manning made no response.

The second complaint

[31] The second complaint concerned an alleged breach of E tū's Mutual Respect policy and a refusal to follow lawful and reasonable instructions. On Monday 2 October 2017 at the Christchurch team meeting, processing membership forms was discussed. Ms X made it clear that a different process to the one that Ms Manning used was preferable and should be used from then on:

You allegedly stated that you would not be changing your process, you also said to [Ms X] "just zip it". Your reported tone and responses were aggressive and negative and we allege that they have breached the Mutual Respect policy (copy of complaint attached). This behaviour was confirmed further by the attached response you gave at the morning's team meeting.

[32] This complaint is essentially made up of complaints about two separate meetings. The second part to the complaint was an allegation about Ms Manning's behaviour at the staff meeting on 9 October 2017. Another staff member, who had heard the "zip it" comment, was talking about how important it was for all staff to behave in line with the policy on Mutual Respect. Ms Manning was alleged to have said "he is talking about me, and what I said, which I stand by". That was taken to be a reference to what Ms Manning had said at the meeting on 2 October.

The third complaint

[33] On Tuesday 3 October 2017 staff members were organising transport to a colleague's funeral. Ms Manning allegedly refused to travel in a certain vehicle, saying that she would take your own vehicle. Ms X, and another person from the Combined Trade

Unions (CTU) who worked closely with the Christchurch E tū staff, took Ms Manning to be refusing to travel in the same vehicle as Ms X. The CTU staff member made a written complaint.

The investigation process

[34] Ms Kokanovic and Mr Clarence interviewed the three people that had made complaints about Ms Manning's behaviour and six other staff that had witnessed, or may have witnessed, one or more of the alleged incidents. They provided all the notes made, which had been confirmed for accuracy with those interviewed, to Ms Manning before meeting with her.

[35] Ms Kokanovic and Mr Clarence met with Ms Manning and her representative and heard her responses. They provided notes taken during that meeting to Ms Manning. They re-interviewed two people after hearing from Ms Manning.

[36] Ms Manning's representative provided written email responses and noted that while they were surprised they had re-interviewed two people, they were pleased to note that the recollections of those two people support what Ms Manning said. However, they noted some inconsistencies between the notes from the first and the second interviews.

[37] Ms Manning and her representative offered corrections to the notes to clarify what she had said in the meeting.

[38] Ms Manning's representative expressed Ms Manning's willingness to find a way forward, including being willing to undertake any courses, personal development training or any other requirement E tū might have of her. Ms Manning asked for assistance to help her adjust to the "new union world."

Outcome of the investigation of complaints

[39] On 17 November 2017 Ms Kokanovic and Mr Clarence issued their investigation report. In relation to the first complaint about the Ready Messenger Training on 29 September 2017, the investigation report found that Ms Manning:

- Behaved unprofessionally ... by making inappropriate, unhelpful and negative comments including that she did not see the point of the training, it was a waste of her time as she had

no need to use it until next year. It is clear from Pamela's evidence she was resistant to the training and saw little point in doing it.

- undermined the development work [Ms X] was trying to do legitimately in her role as Regional Administration Co-ordinator.
- distracted other staff members attending the training.
- there was no outright refusal to ever use the software in future, ... the behaviour does not constitute, in this instance, a failure to follow a reasonable and lawful instruction.
- However ... this behaviour falls within the generally accepted range of behaviour that may be regarded as misconduct.
- Further Pamela's comments ... undermined [Ms X's] authority to carry out the training.
- We consider this behaviour falls within the union's definition of harassment by belittling and undermining the Authority/standing of another in the workplace. It also falls outside of the E tū Policy on Mutual Respect which requires that commitment is given to creating and maintaining a working environment based on dignity and mutual respect.
- In our view these actions by Pamela were such that they could be regarded as either misconduct or serious misconduct.

[40] In relation to the complaint about behaviour at the staff meeting on 25 September, the investigation found that Ms Manning:

- stated that she would not be changing her process regarding the membership cards, even though that task is part of her job description. At this stage in the meeting when [Ms X] clarified this was part of Pamela's job description, Pamela took offence at being reminded what her job required and responded to [Ms X] "Zip it".
- There were a number of other members of staff present at this meeting and Pamela was viewed as being aggressive and agitated when she said this, and her body language showed this also by the folding of her arms and leaning back.
- In the preliminary investigation meeting held on 25 October 2017, Pamela again said "She will stick" to her process of sending the forms weekly to the Auckland Office.
- After this meeting on 25 September [another staff member] approached [Ms X] to suggest Pamela should no longer be able to attend the organiser meetings due to her ongoing poor behaviour. To her credit [Ms X] felt this was not a positive way forward and did not wish for Pamela to be excluded.
- The [other staff member's] evidence is that after the meeting three organisers approached him ... asking him to "do something" about Pamela's behaviour. He himself felt compelled to consider having Pamela removed from attending these meetings in the future. In [his] evidence he also referred to an event that occurred earlier in the year involving another member of staff ... who felt it necessary to remove Pamela from a meeting due to her behaviour.¹
- We find Pamela used inappropriate language, acted aggressively and verbally abused [Ms X] ... this behaviour on 25 September is behaviour that falls within the definition of

¹ Ms Manning's behaviour in that meeting was also described by other meeting participants as having been disrespectful to [Ms X].

serious misconduct, speaking to another colleague in this way and using inappropriate language is not acceptable workplace behaviour.

- Further these behaviours were in breach of the Mutual Respect Policy, and may also be viewed as making embarrassing and intimidating remarks to a work colleague, a further act of belittling another's opinion and undermining their authority which are in breach of E tū's Harassment Policy.
- having considered Pamela's response we accept her explanation and we did not make a finding of failure to follow a lawful and reasonable instruction.

[41] Ms Manning's behaviour at the staff meeting on 9 October 2017 was also investigated. The investigation found:

- Pamela [agreed she] repeated her position around the process of the membership forms at the staff meeting in Christchurch on 9 October 2017 ("he is talking about me, and what I said, which I stand by").
- This was in response to another staff member's raising on the agenda the Mutual Respect Policy and the team charter. [That other staff member] had decided to raise these for discussion due to Pamela's actions on 25 September and that organisers wanted him to address her behaviour in some way
- Pamela was essentially saying my behaviour on 25 September and challenging [Ms X], by telling her to "Zip it" not part of my job description was ok [sic].
- this behaviour ... can also be viewed as further unprofessional and inappropriate behaviour ...
- again behaviour that is in breach of the Mutual Respect Policy. Again Pamela's behaviour disrupted and undermined the work [the other staff member] was attempting to do.
- Her behaviour showed a disregard for her colleagues and the process of trying to improve the office environment and staff relations.
- The fact this meeting needed to have this on the agenda was directly related to Pamela's behaviour around that time, the fact she spoke and behaved in this way is a further illustration of her lack of insight into the impact of her behaviour on those around her.

[42] In relation to the third complaint about the events of 3 October, the investigation accepted Ms Manning's explanation. The complaint was not substantiated and the investigators decided it should not be pursued further.

What did the investigators recommend?

[43] Mr Clarence and Ms Kokanovic recommended that E tū:

- (a) Undertake a disciplinary investigation into the allegations of misconduct, including serious misconduct that they had found;

- (b) Offer additional support to Ms Manning to assist and support her in dealing with the challenging feedback from her workmates outlined in the report;
- (c) To direct Ms Manning's workmates to set their personal perceptions aside and ensure their own compliance with the Mutual Respect Policy by engaging constructively with Ms Manning so that she has every opportunity to move forward so that the current state of disharmony in the office could be repaired.

[44] Without intending to influence or bind whoever undertook the disciplinary process the investigators stated:

we do not seek to pre-empt this but would note that in our view an appropriate disciplinary sanction may be up to and including termination for serious misconduct.

[45] They also suggested that the union should consider whether there was an incompatibility problem in light of Ms Manning's attitude towards Ms X and because some staff members had said during the investigation that they would not/did not use Ms Manning for administrative assistance.

First disciplinary meeting

[46] After Mr Newson received the preliminary investigation report he wrote to Ms Manning by email outlining the report's findings and informing her that he intended to commence a disciplinary investigation process. He proposed to meet with Ms Manning and her representative on 23 November 2017 in the Wellington office:

We have suggested that the venue for this meeting be in Wellington in order to preserve your confidentiality by having this meeting away from your workplace... you are entitled to bring a legal or union representative or other support person such as family member or friend to this meeting and I encourage you to do so.

[47] Mr Newson informed Ms Manning that the potential outcomes from the process ranged from no further action through a warning which may include a final written warning, to a performance and improvement process or termination of employment. He offered Ms Manning access to the EAP assistance and provided the appropriate phone number for this.

[48] On 23 November 2017 Ms Manning and her support person went to Wellington and met Mr Newson and George Hollingsworth. Mr Newson took notes.

[49] Ms Manning raised a number of issues in mitigation of her behaviour. Her representative raised some procedural issues of concern. Ms Manning again raised concerns about her “work being stripped away”. Her representative said that Ms Manning used to be the “mother hen” but now saw herself as “an underling of Ms X.” He said that Ms Manning felt excluded rather than involved at work. He said that she had difficulty accepting her new role, felt isolated and that the “change has encroached on her mana.” He said that EAP would not change Ms Manning’s behaviour and that E tū needed to put support around her:

We are not denying the behaviour is unacceptable. But Ms Manning is not coping. It is the union that needs to do better. Could do, should do.

[50] At the end of the meeting Mr Newson offered Ms Manning special paid leave for a week. She declined to take it. He signalled that there was a potential for dismissal based on the investigation report. After the meeting, E tū sent Ms Manning and her representative the notes of the meeting.

[51] Mr Newson followed up on some things Ms Manning had told him with Ms X. A second meeting was held on 1 December 2017, also in Wellington.

[52] At that meeting, Ms Manning provided two medical certificates and raised the issue of stress from the Pike River disaster in 2010, the Canterbury earthquakes, two union related bereavements and a family member passing away earlier that year.

[53] Ms Manning’s representative provided a number of copies of letters of support for Ms Manning. Mr Newson expressed his displeasure at Ms Manning having apparently approached those people about the investigation having been asked not to do so.

[54] Again, Ms Manning’s representative raised the issue of how the change had been managed over the prior two years. Mr Newson made it clear that there were no problems with the standard of Ms Manning’s work or her long service; the problem was the complaints.

[55] At the end of the meeting, Mr Newson terminated Ms Manning’s employment immediately by giving her a letter he had previously written. He told her she would be paid her usual fortnightly salary, be paid for four weeks’ notice and all her statutory entitlements.

[56] Ms Manning says she was humiliated by staff being told that afternoon that she no longer worked for E tū and was disadvantaged by access to her work computer being removed before she had a chance to clear any personal documents, emails etc. off it.

[57] On 13 December 2017 Mr Newson wrote to Ms Manning giving further reasons for her dismissal. He wrote that he had considered a lesser sanction but that Ms Manning's reluctant response that she could consider an apology to Ms X only if Ms X "sat down with you and effectively renegotiated your roles" left him with no confidence that alternatives to dismissal were appropriate.

Did E tū act as a fair and reasonable employer could have acted?

[58] The Authority needs to consider whether E tū acted as a fair and reasonable employer could have in all the circumstances at the time of the dismissal. The Authority needs to be satisfied that E tū had reasonable grounds for concluding that:

- (a) the misconduct in question occurred, and
- (b) altogether the events amounted to serious misconduct for which dismissal was warranted in all the circumstances.

[59] The Authority also needs to assess whether, before deciding to dismiss Ms Manning, E tū:

- (a) sufficiently investigated the allegations against her;
- (b) raised its concerns with her;
- (c) gave her a reasonable opportunity to respond to the concerns; and
- (d) genuinely considered any explanation regarding the allegations.

[60] The Authority must not determine a dismissal to be unjustifiable solely because of defects in the process followed if the defects were minor and did not result in the employee being treated unfairly.

Could a fair and reasonable employer have found Ms Manning's behaviour to be misconduct that was so serious as to justify dismissal in all the circumstances?

What do the policies say?

[61] The Policy on Mutual Respect does not include a procedure to follow if it is breached. Instead it refers to the Harassment Policy and procedure.

[62] The policy on Mutual Respect is clear that it applies to all staff and members in all E tū meetings, activities and social gatherings, wherever they take place:

E tū is committed to creating and maintain a working environment based on dignity and mutual respect. E tū neither condones nor tolerates behaviours that undermine the dignity or self-esteem of any individual or creates an intimidating, hostile, abusive or offensive environment.

...

As an employer E tū has a legal as well as moral responsibility to protect its employees, delegates and members involved in an E tū event from any form of harassment, abuse or similarly unacceptable behaviour.

[63] This policy statement applied to Ms Manning and the behaviour E tū had concerns about. Ms Manning was aware of the policy.

[64] The Harassment Policy applies to all employees and contractors engaged by E tū:

This Union is committed to providing a safe working environment, which is free of harassment.

Harassment of any type is totally unacceptable and such behaviour will not be tolerated. Harassment fails to respect a person's dignity. Harassment can affect workplace morale, and job performance.

...

In most cases, harassment is an attempt by one person to inappropriately exert power over another person. However, harassment may be unconscious or stem from ignorance, but the intention or motive of the alleged harasser is not relevant when determining whether the behaviour was offensive or unwelcomed.

... harassment can include the sort of behaviour that might cause distress or offence and ranges from overt behaviour such as physical assault to covert behaviour, such as continually undermining a colleague.

The following are indications of types of behaviour that may constitute harassment and should not be considered an exhaustive list:

- Bullying ...
- Embarrassing ..., humiliating, ... remarks

- Belittling opinions or constant criticism ...
- Undermining another's authority/standing in the workplace ...
- Publicly insulting/humiliating a person in the workplace

[65] The policy states that all reported instances of harassment will be investigated and, if substantiated, may result in a disciplinary process, with one possible outcome being the dismissal of the harasser.

[66] This policy applied to Ms Manning and she was aware of it.

Was the outcome of the investigation process pre-determined?

[67] I agree with submissions for Ms Manning that the investigators did not act in a completely impartial manner. During the meeting with Ms Manning and her representative the investigators did more than merely investigate. They attempted to secure promises from Ms Manning that she would act with more respect towards Ms X in the future.

[68] That is because they knew the background to the events they were investigating. It would have been preferable for an independent person, that is, outside of E tū's staff, to have been the investigator.

[69] However, given that Ms Manning did not dispute what she said in the 25 September and 3 October meetings, I do not consider that the investigators were biased against her in relation to their findings on those meetings. I consider their findings were largely fair and could have been made by any fair and reasonable investigator, save in two instances.

[70] The dictionary meaning of "abuse" is to speak to someone in an insulting and offensive way.² I do not consider the finding that Ms Manning verbally abused Ms X to be a fair finding.

[71] The dictionary meaning of "intimidating" is "having a frightening, overawing or threatening effect." There is nothing in the evidence that I have seen that justifies that conclusion.

² Online Oxford Dictionary, lexico.com.

[72] In relation to the Ready Messenger training, I consider their findings were fair despite Ms Manning disputing what the complaint said she had said and what she meant by what she said. Any fair and reasonable investigator could have reached the same conclusions.

[73] I consider the fact that the investigators did not find that Ms Manning had failed to follow lawful and reasonable instructions in relation to the Ready Messenger training or the processing of membership cards means they had not pre-determined the outcome of the investigation.

[74] Their finding that the complaint about the transport to the funeral was not made out is also evidence of their lack of a predetermined view.

[75] I consider that the process of the investigation was largely fair. Any unfairness was minor and did not cause Ms Manning to be treated unfairly.

[76] I consider that the investigators' conclusions were largely sustainable and reasonable.

What were the grounds on which E tū dismissed Ms Manning?

Ready Messenger training

[77] Ms Manning disputed what E tū alleged she had said and done at the Ready Messenger training, and said that what she had said had been wrongly reported and/or interpreted.

[78] Below I outline what Mr Newson found proved and other issues he took into account.

[79] In Mr Newson's letter of dismissal dated 1 December 2017, E tū found that:

- Ms Manning's behaviour was unprofessional and inappropriate and had been disruptive of the training;
- Ms Manning had failed to treat her colleagues, including her manager, with respect and dignity;
- Ms Manning's behaviour was in breach of the Mutual Respect and Harassment policies;

- Ms Manning explained that Ms X had failed to take into account her style of learning. However, after further investigation Mr Newson rejected that because Ms X also arranged for a manual to be provided after the video training session;
- Ms Manning incorrect to object to how the training was supplied because it was supplied by video link from the UK and provided simultaneously to other staff in different locations;
- the allegation of misconduct was established and that it bordered on serious misconduct;
- Notwithstanding Ms Manning's acknowledgement that her behaviour was inappropriate she remained unapologetic about it.

'Zip it' meeting and 9 October 2017 staff meeting

[80] In relation to the 25 September staff meeting, Mr Newson wrote that:

- Ms Manning use inappropriate language and acted aggressively;
- she 'verbally abused' Ms X;
- she breached the Mutual Respect policy by causing embarrassment to and making intimidating remarks to Ms X, belittling her opinion and undermining her authority;
- Those actions also breached the Harassment policy;
- Her actions constituted serious misconduct.

[81] Mr Newson considered issues raised by Ms Manning and her representative. He decided the process used had been fair and reasonable. He dismissed Ms Manning's allegation that Ms X had been harassing her and gave reasons why the two examples she gave did not amount to harassment.

[82] His letter proposed dismissal but gave Ms Manning and her representative time to take an adjournment so that they could raise anything else for him to consider before he made a final decision. However, after further consideration he confirmed at the end of the meeting that Ms Manning was summarily dismissed.

Did E tū treat Ms Manning in an unfairly disparate way?

[83] Ms Manning argued that the culture in the Christchurch office was robust and swearing was not infrequent. She provided some examples. Therefore, she argued it would be wrong to dismiss her for her actions when compared with the actions of other staff.

[84] In Mr Newson's 13 December 2017 letter, he wrote that he had not received any complaints of comparable conduct by any other staff members.

[85] There is no proof that Ms Manning was treated unjustly disparately to any other employee who had behaved in a similar way.

The significance of earlier events

[86] In deciding on an appropriate sanction for serious misconduct an employer is entitled to take into account an employee's earlier conduct, and any existing warnings.

[87] In late 2015 Mr Gordon wrote to Ms Manning inviting her to a meeting about her reaction to him when he told her that Ms X was to be the person she reported to. She told him to "fuck off."

[88] He wrote that he considered her tone and words to have been unprofessional and unacceptable. He invited her to a meeting to discuss that and another allegation about her interaction with colleagues in the office.

[89] In addition, the meeting was to progress discussions with administration staff to get a detailed understanding of their current roles.

[90] However, later that investigation and disciplinary process was discontinued. There was no disciplinary sanction. However, in a letter Mr Gordon stressed to Ms Manning that:

the union expects all employees to be professional and respectful in their dealings with one another, at all times. The amalgamation process has been unsettling and has generated a lot of discussion but it is important to ensure, whatever the setting, that we do not cause offence or show disrespect to one another.

[91] On 11 August 2016 Mr Gordon wrote to Ms Manning that E Tū had decided not to proceed with any disciplinary action regarding some allegations against her. He

acknowledged that she had made an effort since May 2016 to change her behaviour and to work more co-operatively within the office and with the administration team. He stated that she was required to work on keeping herself updated with what was happening in the team and in being professional and respectful in her dealings with other staff at all times. He offered support to her from Mr Clarence and from himself if she faced any work related problems.

[92] On 22 March 2017 Mr Gordon initiated an investigation into a complaint made by a colleague about Ms Manning's behaviour towards Ms X in a team meeting.

[93] On 13 April 2017, Mr Gordon wrote Ms Manning a letter stating that E tū believed her behaviour in that meeting breached its mutual respect policy. He wrote that he understood that she was frustrated by her feeling that Ms X had been put in a position of seniority over her. However, he wrote that Ms Manning's role had not been changed and that Ms X had not been appointed as her manager. He wrote that her beliefs about that "cannot excuse your rudeness and aggressive tone towards" Ms X. Ms Manning was given a first written warning to last for 12 months.

[94] Mr Gordon offered Ms Manning the use of the EAP services. He wrote "any repetition of this behaviour would have more serious disciplinary consequences."

[95] When the events found to be misconduct/serious misconduct occurred the written warning remained in place. In addition, the history of Ms Manning's behaviour towards and about Ms X was relevant to E tū's consideration of whether her September and October 2017 conduct was serious misconduct.

[96] I have decided that Ms Manning did not verbally abuse or intimidate Ms X. Notwithstanding that, could a fair and reasonable employer conclude taking all circumstances into account, including those raised by Ms Manning in her defence and in mitigation, that her behaviour taken as a whole was serious misconduct?

[97] I consider that was a reasonable view because Ms Manning's admitted conduct alone showed significant disrespect towards Ms X and also towards her other colleagues who were

at the meetings. In those circumstances, dismissal was one of the disciplinary outcomes that a fair and reasonable employer could have considered.

[98] However, I need to consider the issues Ms Manning has raised and the procedure used by E tū to decide whether the dismissal was justifiable. I am aware that it is not the Authority's role to subject the employer's process to minute and pedantic scrutiny.

Did E tū treat Ms Manning in a discriminatory way in relation to her diagnosis of acute adjustment disorder?

[99] Ms Manning presented two medical certificates from the same doctor at the meeting on 1 December 2017. Both were dated 29 November 2017. One said that she had been suffering recently from acute adjustment disorder due to stress with recent bereavements and other anxiety provoking situations.

[100] Her work circumstances were not mentioned as "anxiety provoking". No other anxiety provoking situations were listed.

[101] The second medical certificate, from the same GP, confirmed that Ms Manning had some long term medical conditions that she managed and did not interfere with her work capacity.

[102] Mr Newson accepted the medical certificates and said that E tū recognised the stress the disciplinary process was causing. That was why he had offered special leave. He noted that Ms Manning, along with all staff, was supported throughout the time of the Pike River tragedy and the earthquakes.

[103] There was very little detail on the medical certificate diagnosing acute adjustment disorder. There was no information about when Ms Manning's GP had diagnosed her with that and how long she had been suffering from it. If the diagnosis was made on the date the medical certificate was dated it may have been partly caused by the investigation and disciplinary process. There was no evidence the disorder was present and affected Ms Manning's behaviour in September and October 2017.

[104] Given that the same GP certified that she was fit to undertake her current work, I do not consider that E tū was in any way unfair in its approach to the diagnosis.

Holding the disciplinary meetings in Wellington

[105] Ms Manning was concerned about the date of one of the meetings clashing with the first day of a two-day training she had been instrumental in organising. She thought that her colleagues would know why she was not there. However, I heard no evidence that she proposed the meeting should happen on another date because of that. There is no way of knowing if E tū would have been open to holding the meetings on another date. I do not consider that this was a failure of process. If it was, it was a minor one that did not cause Ms Manning to be treated unfairly.

[106] Ms Manning was also concerned that the meetings were in Wellington because she could not take any member of her family in support. There is no evidence that she raised that as an issue for her. There is no way of knowing what E tū might have been able to do to assist with that concern.

[107] In addition, Mr Newson gave the reason for the meetings being in Wellington, which was to save Ms Manning from the embarrassment she may have felt if they were held in the Christchurch office. If Ms Manning had seen it differently it was her responsibility to raise it as a concern. I do not consider this was a failure of a fair process.

Was there pre-determination in the investigation or the disciplinary process?

[108] Ms Manning submits that Mr Newson had predetermined that she would be dismissed before the meeting on 1 December 2019. That is because he had pre-written the letter he gave her at the end of the meeting.

[109] However, I note that by the time Mr Newson had written that letter he had already had a meeting with Ms Manning at which she was represented and had listened to her explanations, undertaken further interviews based on issues she had raised and foreshadowed to her that dismissal was a possible outcome.

[110] I am satisfied that during the last meeting Mr Newson was open to imposing a different and lesser sanction had Ms Manning been able to provide him with some confidence that she could change the way she worked with Ms X.

[111] That is why he and Ms Manning's representative explored whether Ms Manning was open to apologising to Ms X. Mr Newson sent Ms Manning a letter on 13 December 2017. He provided further reasons to justify the dismissal.

[112] He wrote that after the adjournment, during which was spent exploring alternatives to dismissal, Ms Manning's representative asked her if she would consider an apology to Ms X:

You responded with some reluctance that you could consider it as long as [Ms X] sat down with you and effectively renegotiated your roles.

Your reluctance to fully accept the union's current structure and reporting lines and your unwillingness to genuinely apologise for your behaviour you have acknowledged was inappropriate gave me no confidence that any alternatives to dismissal were appropriate and I concluded, on reflection, that the appropriate outcome was to terminate your employment ...

[113] Submissions for Ms Manning raised the Employment Court case of *Allen v C3 Limited*³ in which Judge Inglis considered a case where the employee had failed to offer an apology, which the employer viewed as the "last straw". The employee was dismissed. Judge Inglis wrote:

[53] ... if he had apologised he would not have been dismissed. I do not consider that a fair and reasonable employer would have concluded that the lack of an apology, in circumstances in which Mr Allen said that he would apologise if he had to (and it was not made explicit that he would be dismissed if he did not) justified dismissal, having particular regards to the surrounding circumstances and mitigating factors involved.

[114] However, I consider the case to be considerably different, in that Mr Allen was dismissed after a one-off incident. Ms Manning's behaviour formed a pattern. Ms Manning was already aware that she was likely to be dismissed but still only reluctantly offered a conditional apology. The lack of an apology was not the main reason that she was dismissed.

Was it reasonable to ask Ms Manning not to speak to any other staff about the allegations against her and the process being used?

[115] Ms Manning had been offered EAP support and was able to talk with her own family and personal friends outside of work about what was happening.

³ [2012] EmpC 124.

[116] In all the circumstances, considering how many of the Christchurch based staff were to be interviewed by the investigators and the availability of an experienced representative that understood Ms Manning's workplace, I do not consider that Ms Manning was unjustifiably disadvantaged by the request not to speak to other staff about the disciplinary process.

Was it reasonable to restrict Ms Manning's access to her work laptop before she received her final pay?

[117] This did not form a part of E tū's decision to dismiss Ms Manning summarily. I consider that E tū's action was not unfair. I understand that Mr Clarence understood and communicated to Ms Manning that she would be able to get access to the laptop by getting a new password but that did not eventuate.

[118] I do not consider this was a matter that amounted to E tū treating Ms Manning in an unfair manner in relation to its decision to dismiss her.

Conclusion

[119] I consider that a fair and reasonable employer in E tū's position could have considered that Ms Manning's combined behaviour, in all the circumstances amounted to serious misconduct for which dismissal was a reasonable sanction. All the circumstances included:

- Ms Manning's ongoing attitude to Ms X and lack of insight into how seriously her behaviour was considered;
- E tū's obligation to keep other staff free from bullying; and
- the existing written warning for similar behaviour towards Ms X.

[120] None of the procedural issues raised by Ms Manning either alone or together render the dismissal unjustifiable. Therefore, I conclude that E tū justifiably dismissed Ms Manning.

Costs

[121] Costs are reserved. The unsuccessful party is usually expected to make a contribution to the successful party's costs. The Authority generally calculates costs on a daily tariff basis with a tariff of \$4,500 for the first day and \$3,500 for each day after that. The investigation meeting took 1.5 days.

[122] The parties are encouraged to seek agreement on costs. If that is not possible, within 28 days of the date of this determination the party who wishes to be paid costs should apply to the Authority to award costs. The other party has a further 14 days in which to make submissions on the application for costs.

Christine Hickey

Member of the Employment Relations Authority