

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 628
3107039

BETWEEN DR WEI YUEN LOO
Applicant

AND THE NZ TERTIARY
EDUCATION UNION (TE
HAUTUU KAHURANGI O
AOTEAROA)
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Paul Blair, advocate for the Applicant
Peter Cranney, counsel for the Respondent

Investigation Meeting: 26 October 2022

Submissions Received: At the investigation meeting

Date of Determination: 25 October 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dr Loo is an employee of the Unitec Institute of Technology in Auckland. He is also an active member of the NZ Tertiary Education Union (TEU) and is a committed trade unionist and at relevant times, he was the President of the Unitec Branch of the TEU. This determination deals with Dr Loo’s employment relationship with his union, TEU.

[2] In early 2020, allegations of serious misconduct had been levelled against Dr Loo by his employer. Dr Loo expected that because he was a member of TEU, that his union would support him in defending the allegations.

[3] However, he says on 7 May 2020, TEU sent him a letter advising him that it would be withdrawing its representation services to him. He says in doing so, TEU breached its obligations under the good faith provisions set out in s 4 of the Employment Relations Act 2000 (the Act). He seeks the following remedies:

- (a) A direction that TEU restore its representation.
- (b) A finding that by withdrawing its representation, TEU not only breached its own rules but breached the good faith provisions of the Act as referred to above.
- (c) A finding therefore that the TEU failed to act towards Dr Loo in good faith.
- (d) A finding that by denying Dr Loo due process and fair procedures and natural justice, TEU has breached the good faith provisions of the Act.
- (e) An order that a penalty be imposed on TEU for its breaches of good faith.
- (f) Compensation for humiliation, loss of dignity and injury to feelings.
- (g) Costs.

[4] Some of Dr Loo's claims, specifically claims in para 3(a) and 3(f) above, are not within the Authority's jurisdiction in the circumstances of this case. However, a claim that there has been a breach of good faith is within that jurisdiction.

[5] TEU denies Dr Loo's claims. It says it ceased to represent him for good reason and acted entirely appropriately at all times. It said that there were legitimate concerns about Dr Loo's behaviour towards itself and others.

Issues

[6] The following are the issues for investigation and determination

- (a) Is Dr Loo in an "employment relationship" with TEU?
- (b) If so, is TEU guilty of a breach of good faith and if so, what remedies should flow?

The Authority's investigation

[7] At the investigation meeting I heard evidence from Dr Loo and from Sandra Grey, the National Secretary of TEU. Both witnesses either affirmed their evidence or gave it on oath.

[8] Having regard to s 174E of the Act, I do not refer in this determination to all the evidence received nor the submissions made on behalf of the parties. I record however, I have fully considered them.

[9] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act. As permitted by s 174C(4), the Chief of the Authority has decided exceptional circumstances existed to allow a written determination of findings at a later date.

Background

[10] Dr Loo was at all material times an active member of TEU. He is employed by Unitec Institute of Technology (UIT) in Auckland. He was the President of the Unitec Branch of the TEU.

[11] It was common ground that during his time as President, Dr Loo had major differences with TEU and with UIT over various matters. In October 2018, Dr Loo received a “final warning” letter from his employer.

[12] On 13 November 2019, TEU stood Dr Loo down from his role as Co-President for a three-month period. It is Dr Loo’s view that this was done without TEU following the correct processes required by its own rules. It was common ground Dr Loo levelled criticisms at TEU but says these were never ill founded as TEU alleges but were well reasoned, thoughtful and well researched. Dr Loo conceded they may have been passionately expressed.

[13] On 25 February 2020, UIT initiated a disciplinary investigation based on a search of Dr Loo’s emails over an extended period of time. The concern was that the emails were critical of UIT. At the initial investigation meeting held on 17 March 2020, TEU represented him.

[14] On 17 April 2020, Dr Loo emailed out to branch members giving notice of his resignation from the role as Branch Co-President. The email could be seen as critical both of his employer and of TEU. He referred to an attitude adopted by some in TEU who seemed to consider their role was simply to ensure management “ticked the boxes”. He commented that redundancies were almost accepted *fait accompli* as an acceptable price to pay and that the branch of TEU was becoming almost like the quality assurance group for management. He commented the Union was being used by management to “soften the edges of the process, for

us to put our arms around members while assisting management to gently show them the door – to bring them along for the ride”.

[15] The email revealed that Dr Loo had become seriously disillusioned with TEU’s approach in respect of UIT.

[16] TEU’s response to the email, was to send a letter on 7 May 2020. That email referred to Dr Loo’s 17 April email and commented:

- (a) Apart from various attacks on the employer, the email also attacked the Union.
- (b) The email was forwarded by Dr Loo in the knowledge that his employer would soon receive a copy. This was based on the observation that because Dr Loo had already faced disciplinary action as a result of what he had said in emails, he was aware his employer had access to them and thus would read the 17 April email.

[17] TEU stated the difficulty they faced in continuing to represent Dr Loo, was they found themselves seeking to defend him for conduct against UIT that was similar to the behaviour he was demonstrating against TEU itself. TEU felt that as they were very unhappy with Dr Loo’s behaviour towards them, it was difficult for them to defend the same behaviour in respect of any position UIT may take.

[18] As a result, TEU advised that they were withdrawing their representation and that Dr Loo would need to arrange his own going forward.

The Law

[19] The situation the parties find themselves in is governed by s 4 of the Employment Relations Act 2000 (the Act). Section 4 provides that parties to employment relationships must deal with each other in good faith. Employment relationship has the meaning ascribed to it in s 4(2) which provides under s 4(2)(c) that an employment relationship is also one between a union and a member of the union. Thus although Dr Loo is not an employee of TEU, nonetheless for the purposes of a requirement to deal with each other in good faith, TEU and Dr Loo have an employment relationship.

[20] Section 4A of the Act provides for a penalty for certain breaches of duty of good faith. The Act specifically provides that:

A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—

- (a) the failure was deliberate, serious, and sustained; or
- (b) the failure was intended to—
 - (i) undermine bargaining for an individual employment agreement or a collective agreement; or
 - (ii) undermine an individual employment agreement or a collective agreement; or
 - (iii) undermine an employment relationship; or
 - (iv) undermine the pay equity claim resolution process under Part 4 of the Equal Pay Act 1972; or
- (c) the failure was a breach of section 59B or section 59C.

[21] Section 59B of the Act relates to bargaining as does s 59C, so accordingly have no application here.

[22] Section 4(1)(a) specifically provides therefore that TEU and Dr Loo must deal with each other in good faith, which in the context of s 4(1) means they must not do anything to mislead or deceive each other; or do anything that is likely to mislead or deceive each other. Section 4A(b)(iii) provides that any action undermining an employment relationship is a breach of good faith for which a penalty may attach.

The process followed by TEU in dealing with its concerns

[23] It is clear from the evidence and not disputed by TEU that the first Dr Loo knew of the decision to terminate representation was when he received TEU's email of 7 May 2020. Whilst Dr Loo was aware there was tension between him and TEU, until he received the email, he was not aware there was any possibility TEU would refuse to represent him in the disciplinary action he faced.

[24] Dr Loo's evidence was that this had a dramatic effect on him. It was unexpected, it was embarrassing, it placed him in a significant disadvantage and he had to urgently arrange other representation.

[25] Dr Loo also complains that pulling representation the way it did, is a breach of TEU's own rules. Whether or not that is the case, is not something I need to go into to resolve the issue between the parties. As indicated above, there are two parts to Dr Loo's claim of a breach of good faith. The provision in the Act is mandatory, parties to an employment relationship must deal with each other in good faith. The second relates to penalties if that does not occur.

[26] In respect of the first part, it must be said that TEU's process lacked any element of procedural fairness. Without any input from Dr Loo and certainly with no consultation, a decision was made over a period of time which ran from the 17 April email from Dr Loo to the response on 7 May without any engagement of Dr Loo. This meant that TEU management met, took legal advice, and made a decision without involving Dr Loo. As the Act notes, the duty of good faith outlined in s 4(1) requires parties to be active and constructive in establishing and maintaining relationships. It can be said by not involving Dr Loo in the process which led to the decision to withdraw representation, TEU failed in that regard.

[27] TEU's defence to the claim it breached good faith was to say that was never its intention. It thought long and hard about the issue and sought legal advice as to its options. That legal advice confirmed that TEU's letter of 7 May 2020 was the correct thing to do. That may be so, but that does not absolve TEU from following a fair process. After all, the legal advice was not on how to set up a process that was procedurally and substantively fair, it was what options were open to TEU. It is likely the writer of the legal opinion may have assumed TEU would follow a fair process before forwarding its letter. In any event, reliance on legal advice cannot absolve TEU from its fundamental obligations to Dr Loo.

Conclusion

[28] TEU breached its duty of good faith to Dr Loo. In withdrawing its representation as it did, without warning and without input from Dr Loo, it was not being active and constructive in maintaining its relationship with Dr Loo.

[29] Dr Loo asks for damages for hurt, humiliation and loss of dignity. There is no provision in the Act for such remedy, in circumstances where the claim is based on a breach of good faith. The consequences of a breach of good faith, under s 4 of the Act are limited to a penalty. Under s 4A however, penalties are not to be given for all breaches of the duty of good faith but only for certain breaches. The only heading under the Act which Dr Loo could potentially rely on would be s 4A(iii) which relates to an undermining of the employment relationship.

[30] Whilst it is possible the effect of the 7 May 2020 letter was to undermine the relationship between the parties, that is not enough for a penalty to be imposed. The action must have been intended to have that outcome. In that respect, the reliance on legal advice throws doubt on whether TEU intended to undermine its relationship with Dr Loo. Further, TEU had genuine concerns regarding its relationship with Dr Loo arising in part out of his

email of 17 April. Dr Loo's claim that there was a breach of good faith succeeds because of procedural fairness failings. His email of 17 April speaks for itself. There is no doubt the email was critical not only of his employer but also of TEU.

[31] The imposition of a penalty is quasi criminal in nature. The breach must be deliberate, serious and sustained or alternatively intended to undermine the relationship. The evidence does not support such a finding in this case.

[32] The only basis for a penalty would be if there had been a finding that TEU committed a breach of good faith with the intention of undermining its employment relationship with Dr Loo. There is insufficient evidence for such a conclusion.

Costs

[33] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, either party may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum TEU 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.

[34] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.¹

Geoff O'Sullivan
Member of the Employment Relations Authority

¹ For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1