IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE

[2024] NZERA 65
3213619

	BETWEEN	JACKIE HARTE Applicant
	AND	MIDWIFE EMPLOYEE REPRESENTATION AND ADVISORY SERVICE INCORPORATED Respondent

Member of Authority:	David G Beck
Representatives:	Luke Acland, counsel for the Applicant Simon Mitchell KC for the Respondent
Investigation Meeting:	28 November 2023 in Nelson
Submissions Received:	8 December and 22 December 2023 from the Applicant 8 December 2023 from the Respondent
Date of Determination:	7 February 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Jaqueline Harte, a self-employed midwife, is asking the Authority to address her claims that her union the Midwife Employee Representation and Advisory Service Inc (the Union) breached duties owed to her. Ms Harte was the subject of an abandoned employment investigation instigated by her former employer, Te Whatu Ora – Health New Zealand

(TWO), following the Union advancing concerns on behalf of a group of her colleagues who were also union members. Ms Harte is also suggesting that the Union organiser representing her colleagues had a conflict of interest having previously represented Ms Harte and, thus breached a fiduciary duty owed. Mr Harte also asserts the Union breached a statutory duty of good faith owed to her and in a tortious action, Ms Harte contends the Union unlawfully interfered and undermined the employment relationship that previously existed between Ms Harte and TWO. Ms Harte sought various compensatory remedies.

[2] In contrast, the Union says in the circumstances, no fiduciary duty arose and whilst accepting good faith duties may have been owed, the Union claims no breaches occurred and they deny unlawfully interfering in any employment relationship existing between Ms Harte and TWO. Broadly, the Union says they were properly engaged in attempting to resolve conflict between their members and that the Union organiser involved, merely functioned as a conduit, highlighting the existence of workplace conflict and the nature of such.

The Authority investigation

[3] During the investigation meeting under both oath and affirmation, I questioned Ms Harte and the Union official at the centre of Ms Harte's concerns. In addition, I questioned two ex-colleagues of Ms Harte and an experienced union official who did not work for MERAS, who gave a view on the operational dilemma facing a union official when members are in dispute amongst themselves.

[4] Pursuant to s 174E of the Employment Relations Act 2000 ("the Act"), I make findings of fact and law and outline conclusions to resolve the disputed issues and make orders but I do not record all evidence. I have carefully considered the available correspondence and submissions of the parties.

Issues

[5] The issues I must determine are:

(i) What was the extent of the duties owed by the Union to Ms Harte;

(ii) if established, were any duties breached, sufficient to establish and quantify any remedies being made available to Ms Harte.

(iii) How costs of these proceedings are to be dealt with.

What caused Ms Harte's employment relationship problem?

[6] From November 2014 to January 2023, Ms Harte, an experienced midwife, worked at Nelson Hospital, latterly as a clinical co-ordinator of a midwifery team. The position Ms Harte occupied is the subject of a collective employment agreement negotiated by the Union. Ms Harte was and had been, a member of the Union since 2009.

[7] In late March 2022, a colleague of Ms Harte's approached a paid official of the Union located in the Waikato region (working both as part-time for the Union and part-time as a midwife in a maternity service) to raise concerns about her interactions with Ms Harte. The Union official had never worked in Nelson but had previously assisted Ms Harte in an interpersonal dispute with a manager in 2020 and with others in 2021 to address concerns with Nelson Hospital management around work allocation issues (at the time Ms Harte was a seconded team-leader of four midwives). On the latter intervention, Ms Harte says she formed an impression that the Union official allied herself with management's position.

[8] The colleague of Ms Harte initially made it clear she did not want to be identified and she detailed various issues of negative interaction between herself and Ms Harte and other team members and Ms Harte. The Union official says they sought advice from a local Union workplace representative on the veracity of the concerns and said they also spoke to various identified team members. The result was, after informally approaching the midwifery

manager and being told something in writing was required, the Union official in a letter of 12 April 2022, detailed issues pertaining to Ms Harte's allegedly negative interactions with unidentified colleagues and negative traits they perceived of Ms Harte. Emails disclosed, showed that the employer's Human Resources Business Partner initially told the Union official that the information provided was not sufficient to commence an investigation and natural justice required a disclosure of the complainants' identities.

[9] In a further letter of 27 April (sent on 11 May), the Union's Nelson maternity unit workplace representative (one of two) wrote to the same manager in a similar vein that referenced and broadly supported the sentiments expressed in the 12 April letter. The Union official says she did approach the said workplace representative, to gain a perspective of the identified complaints and encouraged her to put the concerns they described in writing. This further letter did not identify the complainants.

[10] The Union did not approach Ms Harte to gain her perspective of the situation nor were other midwives known to be supportive of Ms Harte, approached. In addition, before Ms Harte was apprised of the issues, there was collaborative email traffic between the Union official and management including the original complainant identifying herself to management and being encouraged to expand upon her specific concerns.

[11] Despite no complainants being identified, on 11 May Nelson hospital management emailed the Union official to indicate once Ms Harte returned to work from leave, they would "look into the complaint received". It is clear from disclosed emails, that further informal contact from the Union official sought to keep the concerns 'live.' The upshot was, management wrote to Ms Harte on 22 July 2022, outlining a planned independent investigation of concerns identified by the original complainant (now named), the Union official and the Union workplace representative. The letters from the Union and a bullet-pointed document from the original complainant were disclosed to Ms Harte. This was the first point in time Ms Harte became aware of her colleagues' concerns.

[12] Ms Harte says she promptly sought advice from the New Zealand Council of Midwives (NZCOM) and then on their suggestion, contacted another experienced official of the Union. This union official assured Ms Harte she would not be discussing her situation with the other Union official who advanced the concerns. This premise was detailed to Nelson hospital management in an email of 25 July and the Union confirmed they were representing Ms Harte and they sought and had approved, a period of paid special leave for Ms Harte.

[13] However, Ms Harte says despite having no concerns about her allocated Union official's integrity and assurances of confidence, she decided to seek legal representation independent of the Union. Consequently, Ms Harte's counsel, by letter of 5 August 2022, sought and was granted further paid leave for Ms Harte for the duration her employer's investigation. When pressed why she switched representation, Ms Harte explained she felt the Union had inappropriately advanced and been involved in an anonymous complaint against her and resolved to take that up separately with the Union as a complaint about their official's actions. I am thus unable to assess whether the Union would have adopted the same course of defensive action to highlight the employer's procedural difficulties in embarking upon a formal investigation without sufficient threshold reasons to do so. I, however, have no evidence before me to suggest the Union would have failed to act equally as vigorously in defence of Ms Harte. What I have is evidence of the Union appropriately allocating Ms Harte an experienced official who promptly approached the employer to initially and successfully, secure Ms Harte paid special leave to preparer a response to the allegations.

The investigation

[14] The appointed independent investigator interviewed the Waikato based Union official and the Nelson workplace representative on 4 August. An analysis of the interview notes and previous email correspondence with management disclose the Union official related what unidentified union members had discussed with her and gave a personal view of Ms Harte and generalised comment on the negative nature of the complaints raised. The Union official gave her subjective view of a past situation concerning work allocation issues, where

she was the advocate for Ms Harte and others' concerns. The Union official also suggested to the investigator, that Ms Harte had manipulated colleagues into raising issues with management and gave a view of Ms Harte's leadership capabilities.

[15] Ms Harte in contrast, suggested during the Authority investigation meeting, that in the cited incidence she was, with others, just raising legitimate concerns and had an expectation that the Union were attending in a supportive capacity.

[16] In addition, at one point in the interview notes, the Union official relates a personal concern, claiming they had been told that Ms Harte was making negative comment about the Union official in the workplace and then linked this to an observation that people were reluctant to complain, fearing recrimination from Ms Harte or her supporters. The Union official related generalised allegations in the knowledge none would be supported by corroborating evidence.

[17] None of the comments made to the investigator portrayed Ms Harte in a positive light. When asked why they consented to being interviewed, the Union official says they felt their task was to relate the midwives' stories and they did not consider the potentially tricky situation this would place themselves in.

[18] However, the observations of the Union official were made in the knowledge that the interview was recorded and Ms Harte would be provided with a transcript of the interview. I balance matters up, by accepting that the comments made could be viewed as the Union official merely relaying what they had been told by union members that in their honestly held opinion, suggested all was not well in the workplace and a level of anxiety was prevalent. I also consider that the Union official's evidence was they had not previously experienced the complexity of such serious complaints being advanced without a willingness of their members to engage with management. I found the Union official's evidence to be genuine in a belief that they were simply relaying concerns and generalised observations with no suggestion of a personal agenda.

[19] I stress that given the employer investigation was abandoned incomplete I have not formed or need to, any view on the veracity or otherwise of the issues of concern raised against Ms Harte as such was beyond the scope of this investigation.

The investigation outcome

[20] A progress report from the investigator to management, disclosed as part of the Authority investigation process, showed that by 13 September, the investigator had significant misgivings about the scope of the investigation and suggested it was too broad and "could cause more harm than good" if it proceeded in its current format. Misgivings were also expressed about the concept of proceeding on anonymous complaints and a view was expressed by the investigator, that the only identified complainant who was yet to be interviewed, had disclosed historical issues that appeared on the surface to lack seriousness in the present context. The investigator suggested a switch in the investigation focus to examine general team dynamics may have been more appropriate.

[21] Events, including Ms Harte's counsel filing an unjustified disadvantage personal grievance and an interim application in the Authority seeking to restrain the employer from proceeding further with their investigation (filed on 15 September), led to an agreement to pause the investigation and mediation then occurred. Subsequently, no adverse findings were made about Ms Harte's conduct (confirmed by the employer on 14 October 2022) but Ms Harte remained away from the workplace until November 2022.

[22] Ms Harte subsequently resigned in January 2023, claiming she had been constructively dismissed by her employer failing to address what she saw as an unsafe workplace and a failure to adequately address the issue of the conduct of the paused investigation process. In a determination of 8 August 2023, following an investigation by Member Doyle, the Authority concluded that Ms Harte was not constructively dismissed but was successful in her unjustified disadvantage claim related to the aborted employer investigation. The Authority's decision criticised how the investigation was initially advanced. It was found the employer did not provide Ms Harte with a fair opportunity to

respond to anonymous concerns that lacked specificity. In addition, a breach of good faith was established due to the employer being found to have misled Ms Harte leading up to the decision to conduct a formal investigation. Ms Harte was awarded compensation under s 123(1)(c)(i) of the Act and a penalty for the breach of good faith was ordered with 75% of such being directed to be paid to Ms Harte.[1]

[23] Mr Harte then pursued a formal complaint against the Union but the matter remains unresolved.

What duties did the Union owe to Ms Harte?

The union rules

[24] A starting point defining the nature of the relationship between the Union and a member, in the Union's constitution (also described as the 'rules") that is registered as part of its incorporated society status. In the "OBJECTS" section the Union is established:

> (a) To develop, negotiate and promote a national collective employment agreement for midwives
> (b) To protect and enhance the economic and industrial interests of MERAS membership
> (c) To do all things as are incidental or conducive to the attainment of the above objects and to promote any other activity that is in harmony with the said objects and those of the New Zealand College of Midwives.

[25] The reference to NZCOM is explained under the "MEMBERSHIP" section of the rules as: "To become a member of MERAS, a midwife must first be a member of NZCOM" who promote various aspects of professional practice.

[26] There is no guidance in the rules or any policy document I requested, on how the union manages conflicts of interest between members and no NZCOM policies were provided on guidance for handling employment related conflict between midwives. Evidence given

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[1] *Jackie Harte v Te Whatu Ora – Health New Zealand* [2023] NZERA 421.

during the investigation by the Union was that when inter-member conflict was apparent each side is allocated a different Union official or workplace representative and it is tacitly understood they do not share compromising information between each other.

[27] I conclude that the objectives of the Union as stated, do little to define specific duties owed to individual members other than broadly and impliedly, to provide representation and or advocacy services on employment related issues.

The Law

[28] In terms of statutory obligations owed, the good faith requirements alluded to in s 4 of the Act by dint of s 4(2)(c), apply to the employment relationship between a union and a member of a union. While Ms Harte was not in an employment relationship in the sense of being employed by the Union, the Act takes a broader approach in its interpretation section (s 5) by cross referencing s 4(2) to indicate employment relationships include those between a union and a member of the union.

[29] In the above context, in an interlocutory judgment, the Employment Court (*McCartney v Atlas Concrete Ltd and First Union*) and later the Authority (in *Gilbert v ETU* Incorporated and *Loo v NZ Tertiary Union*) has accepted that good faith obligations exist in union dealings with its own members (and vice versa) and whilst none of these obligations fit neatly within the "matters" listed in s 4(4) of the Act, sub s (5) does not limit the obligations set out in s 4(1).[2]

[30] Good faith obligations were found in *McCartney* to broadly include the obligation that the parties will not whether directly or indirectly, do anything to mislead or deceive the other[3] and be "active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things. responsive and

[2] *McCartney v Atlas Concrete Limited and First Union Inc (Formerly the National Distribution Union Inc)* [2014] NZEmpC 85 at [13] – [15]. See also *Gilbert v ETU Incorporated (Formerly Called NZ* and *Amalgamated Engineering Printing & Manufacturing Union Inc)* [2017] NZERA 115 and *Loo v NZ Tertiary Union (Te Hautuu Kahurangi O Aotearoa)* [2023] NZERA 628.
[3] Section 4(1)(b) Employment Relations Act 2000.

communicative." [4] Although not explicitly stated, I take the latter observations to recognise that in engaging a union for advocacy, the individual member has created a relationship were the union is effectively working for them. I hasten to add that the cited decisions do not contain parallel facts with the circumstances under consideration (being concerned with a union's exercise of discretion as to whether to advance personal grievances or to withhold representation and admissibility of evidence).

[31] Counsel for Ms Harte contended the good faith obligation extended to the Union not interfering with Ms Harte's terms and conditions of employment with her employer (TWO) or doing anything that could harm or bring pressure to bear upon her in that employment relationship. I find the source of this obligation is potentially in s 4(5) of the Act that specifies the examples of matters where good faith obligations apply (cross referencing s 4(4) of the Act) which are examples only, and do not limit the specified duties outlined in s4(1) of the Act.[5]

Assessment – were the identified duties breached?

[32] The first identified good faith duty is one involving an obligation to not engage in misleading conduct. Ms Harte's counsel suggests that without Ms Harte's knowledge, the Union advanced what she perceived as false complaints to her employer and that in doing so the Union official and workplace representative also became personally involved in advancing and advocating the complaints.

[33] Before assessing whether the actions of the Union in any way misled Ms Harte, I stand back and assess the situation the Union found themselves in and what were the objectively practical and reasonable actions they could have undertaken. This also involves as identified in *McCartney* an implied obligation not to act in an arbitrary fashion. [6]

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[4] Ibid at s 4(1A)(b).
[5] Ibid at s 4(5).
[6] Op-cit 2 at [18].

[34] From the evidence, I can establish union members approached the Waikato based Union official with evidently legitimate concerns about Ms Harte and expressed a desire that the employer be apprised of those concerns and impliedly take some action to resolve matters. The Union official says they then exercised a judgment that the concerns appeared genuine and despite the complainants being adamant they did not want to be identified and some of the concerns being historical, they decided to advance the complaints to management.

[35] I observe that there is objectively nothing untoward in a union official raising such issues with management and that was a reasonable action, commonly undertaken either on an informal or formal basis. The actions were not arbitrary or ill considered. I do not find it was either practical or reasonable to seek Ms Harte's view of the situation or alert her to the fact that a complaint had been made – that objectively was the task of the employer to assess the seriousness of the issues raised and take appropriate action including categorising the nature of the concerns.

[36] Once the employer became aware of the situation and decided that Ms Harte should know of the concerns, the Union was obligated (if requested) to provide Ms Harte with support and advocacy. The latter obligation was fulfilled and I had no suggestion or evidence before me that the Union official allocated to Ms Harte acted in a partial or inappropriate manner.

[37] In this narrow context, I can see no conduct by the Union that misled Ms Harte intentional or otherwise and no good faith breach was apparent in the Union legitimately raising membership concerns.

[38] Further, I find the Union reasonably had no obligation to communicate the concerns to Ms Harte. Objectively it is not a union's role or obligation to resolve or adjudicate workplace conflict – they are not the employer. In these narrow circumstances, no duty to be communicative is at issue.

[39] At best for Ms Harte, it could be said that the Union owed a duty (in good faith) to undertake its inquiries of the situation, in a reasonable and informed manner before presenting concerns to the employer. Noting such an exercise is within the limitations of the fact that it was not the job of the union to carry out an extensive investigation, it was objectively, a difficult assessment for the union to make and inherently involved a significant degree of subjective judgment. On the facts, I was just persuaded by the Union official's evidence and documentation that sufficient concerns had been communicated to the Union that warranted them being raised with the employer and, that any further exploration of the concerns would have been impractical and constrained by the complainants' desire to not be identified.

[40] One criticism I make, is one of the concerns expressed by the complainant midwives was a suggestion that a new inexperienced staff member was the subject of negative behaviour from Ms Harte. That now ex staff member gave evidence at the Authority investigation meeting that her dealings with Ms Harte were overwhelmingly positive but crucially the Union had not approached her at the time to validate any alleged concerns. However, this was not the only concern raised, albeit one that could have been easily explored by the Union official to check its veracity.

[41] The significant area where I find the Union official acted unwisely, was in agreeing to be interviewed as part of the employer investigation and during that interview expressing a personal assessment of Ms Harte's capabilities (based largely upon what she had been told by anonymous sources). During the Authority investigation meeting, the Union official conceded she had during their interview, made a direct criticism of Ms Harte's leadership 'style' based upon her observation of an interaction with a manager when she was participating in an AVL meeting as purportedly Ms Harte and others' advocate. The AVL interchange was in October 2021 but the midwifes concerns expressed to the Union official were not communicated until March 2022. When pushed about the raising of the AVL interchange as being ostensibly historical, the Union official conceded it was related to the resignation of two midwives, neither of whom had latterly advanced concerns about Ms Harte.

[42] A prudent course of action would have been to refuse the investigator's interview and inform the employer that the union task was confined to acting as a conduit for the anonymous concerns and not to make subjective comment on such or if interviewed, strictly confine comment to contextual matters. Greater caution was required here when the main complainants refused to participate in the employer investigation.

[43] I find a breach of an obligation the Union owed to Ms Harte is made out. The breach, in these specific circumstances, was a failure of the Union to take due care to remain neutral during an employer investigation. This duty is akin to what Goddard CJ described in *De Soysa v Porirua College* as the union having to be "watchful in the interests of all" in a situation where a union was faced with competing members' interests in a restructuring situation.[7]

[44] The breach was compounded by the Union official knowing that the main protagonists had refused to identify themselves and some complaints were not corroborated by main sources. Also, the Union official involved in previously representing Ms Harte, was the subject of Ms Harte's confidence on two identified occasions. More care should have been taken given the latter fact.

[45] In addressing this matter during the investigation meeting, the Union official indicated they thought management would have resiled from a full investigation and tried to resolve the matter informally with Ms Harte. I had no evidence to show that this was what the Union official advocated and sufficient evidence to conclude it was more likely than not, that the Union official working with the Union workplace representative, pushed for an investigation and then, they both participated in the employer investigation without protest or in the Union official's situation, without realising they were potentially compromising themself. This was compounded by the unfortunate fact that at the time the investigation was paused, the only two people interviewed were the Union official and the Union's workplace representative.

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[7] *De Soysa v Porirua College Board of Trustees* [1996] 1 ERNZ 569.

A penalty?

[46] Having identified a breach of a duty of good faith owed, I consider the gravity of such, whether the breach caused or impacted Ms Harte and then whether any remedy of a penalty is appropriate pursuant to s 4A of the Act.

[47] Ms Harte gave evidence of the distress she suffered from her perspective that the Union was advancing subjective and uncorroborated concerns about her that had a potential to be driven by malice or undisclosed agendas. Central to that distress, was Ms Harte's perception that the Union inappropriately advanced anonymous allegations to her employer in the 12 April 2022 letter. The problem in this regard is the letter is clear at several junctures, that the concerns have been communicated to the Union by members and there is no suggestion that the Union official had witnessed any of the behaviours described.

[48] The letter did not seek a solution or suggest any course of action. However objectively viewed it was the raising of significant concerns with an expectation that they would be formally addressed. The second letter (delivered on 5 May) by the union workplace representative is somewhat different as the author, while making it clear they are writing in the capacity of "MERAS rep Nelson Maternity", claims to have directly witnessed and/or experienced matters broadly described. The employer could reasonably have treated this letter, and did, as being from an actual complainant. The workplace representative I find, did not purport to act for the Union when interviewed later but merely as was her right, disclosed what she says she had experienced and perceived of Ms Harte, as a colleague.

[49] Overall, given I have found the Union initially, properly raised the concerns on behalf of its members, it logically follows that the distress Ms Harte experienced was unavoidable at this point. The employer then resolved to carry out a formal investigation; a decision made independent of the union. Any subsequent distress accentuated by the way in which the employer proceeded from this point, was an issue between Ms Harte and her employer that has been the subject of separate litigation.

[50] Given once the employer initiated its investigation, the Union offered Ms Harte support and advocacy, I cannot find that the Union took any unreasonable steps to exacerbate Ms Harte's understandable unease.

[51] I then consider what contribution the Union official's decision to participate in the ongoing employer investigation had upon Ms Harte. In this context, given the employer had already made an assessment that the weight of the identified issues warranted an investigation and chose to eventually step back from completing the investigation once the investigator communicated reservations about the process, I do not see how the Union official's contribution overly influenced the employer decision-making.

[52] In terms of causation, I can not find that the Union official was culpable by dint of simply raising the concerns that had been identified to them and, no further damage was caused by the act of reinforcing the concerns during the investigation. The plain fact is, the employer felt obligated in the circumstances to engage in a further inquiry then upon realising insufficient evidence had been gathered by the investigator, chose to not proceed with any disciplinary action against Ms Harte.

[53] The fact is, the employer once the scope of the concerns became apparent, decided upon a course of action that was objectively found later by the Authoirty to be deficient. Despite the Union's identified breach of good faith that I do not assess (having heard from the Union official), to be deliberate or motivated by malice, the unfortunate approach the employer took in initiating an investigation of largely uncorroborated concerns, was causative of Ms Harte's understandable distress.

[54] A final matter to deal with is the suggestion that the Union inappropriately interfered with the employment relationship between Ms Harte and TWO (essentially a tortuous claim). For the reasons detailed above being predominantly that I have found the Union's advocacy of its members concerns was legitimate, I can not find that any inappropriate interference is made out nor have any threshold elements of the tort including intentionality, been made out.

Breach of fiduciary duty?

[55] It is arguable that the breach of good faith I have identified also constituted a breach of an owed fiduciary duty of confidence or loyalty between a union advisor and union member where the Union official made subjective observations of Ms Harte during the employer initiated investigation, that were partially arising from a past situation when they represented Ms Harte in a meeting with management. However, the comments made did not objectively disclose confidential comment shared between Ms Harte and the Union official but strayed into an area of potential disloyalty to Ms Harte, by commenting adversely on her approach to a prior matter where the Union official's role was to advocate for Ms Harte and others' interests.

[56] The extent of such duties was alluded to as potentially arising in some factual contexts and is discussed by the Employment Court in *Lloyd v Museum of New Zealand Te Papa Tongarewa* [8] but even if I found it existed here, it is problematic as the union also owes a duty to preserve their members collective interests or have regard to a range of competing interests that inevitably require some prioritisation. [9]

[57] I consider the breach is adequality identified as a breach of good faith, finding it was also a breach of a fiduciary duty adds little to the analysis or outcome discussed below.

[58] In *Llyod* the court found no contractual relationship existed between a union and its member to enable any action for breach of contract. Further, the Authority in dealing with a claim of a union failing to adequately represent a member based upon a supposed obligation arising from a collective agreement , has found no positive duty existed.[10]

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[8] *Lloyd v Museum of New Zealand Te Papa Tongarewa* [2003] 2 ERNZ 1.
[9] See comment in *Darwin v New Zealand Post Primary Teachers Association*, ERA Wellington WA35/07, 8 March 2007 that a union has a range of functions and interests beyond individual advocacy at [10].
[10] *Health Waikato, Waikato District Health Board and Public Service Association v Renee Turner* AA 119/05, 6 April 20005, Member Urlich, a decision that also referenced *De Soysa v Porirua College Board of Trustees* [1996] 1 ERNZ where a teachers' union was found to have been in breach of a collective contract provision and

Finding

[59] In the overall circumstances, although I have found a breach of good faith has occurred, I determine it was not of such a gravity to warrant a penalty or any other remedy in favour of Jackie Harte as the breach was not deliberate, sustained or objectively intended to undermine the employment relationship. I have found that the Union legitimately advocated the interests of its members and finding itself in a conflicting situation, offered appropriate support and potential advocacy to Ms Harte.

A recommendation

[60] This finding should not be seen to condone the union's identified breach and I consider it appropriate pursuant to s 123(1)(ca) of the Employment Relations Act 2000 to issue a recommendation that the Union develop and publish guidelines to assist their employees in dealing with raising inter-member conflict including the handling of anonymous complaints and what role union officials should undertake in employer investigations, to avoid committing breaches of the same or a similar nature to that identified in this determination where conflicting interests are at issue. I also recommend that for transparency, the Union publish separate guidance for their members setting out what can be expected of the Union when dealing with inter member conflict.

Costs

[61] Costs are reserved. The parties are invited to resolve the matter. I observe this may be a case where serious consideration is given to letting costs lie where they fall but I stress this is an observation uniformed by submissions. Thus, if the parties are unable to resolve costs, the party seeking costs has 14 days from the date of this determination in which to file and serve a memorandum on costs and the other party has a further 14 days in which to file and

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damages were awarded against the union for their failure to be aware of and uphold, their member's right to preserve an ongoing employment status during a staff restructuring.

serve a memorandum in reply. Costs will not be determined outside this timetable unless prior leave is sought and granted by the Authority.

[62] The parties can expect the Authority to determine costs on its usual "daily tariff" basis unless specific circumstances or factors, require an adjustment upward or downward. [11]

David G Beck
Member of the Employment Relations Authority

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