Can the fair and reasonable employers please e tū?

A warning to all "*well-resourced*" employers

The recent Employment Court judgment in *E tū Incorporated v Singh* [2024] NZEmpC 84 is a reminder that large and well-resourced employers will be held to a higher standard.

What also naturally follows is that smaller and less-well-resourced employers should be granted greater leniency particularly in their processes of investigating allegations against an employee. That has been recognised in numerous Employment Court judgments and Employment Relations Authority determinations—although perhaps not so consistently in the latter.

The facts

Mr Singh was employed as a union organiser. He was approached by a third-party employer (who he initially became friendly with) to assist with a meeting involving issues relating to that employer allegedly failing to pay wages and demanding an employee pay a premium for employment. Mr Singh attended the meeting and was asked to make a recommendation as to how the issues could be resolved. Mr Singh's role morphed into brokering a resolution between the employer and employee.

The individual who had approached Mr Singh for assistance later made serious complaints to E tū (as Mr Singh's employer) that Mr Singh had mentally and physically harassed her. The complainant threatened to go to the media about the concerns if E tū did not address them.

E tū's concerns were Mr Singh had been representing an employer and not an employee, and that he had acted unethically and compromised himself and E tū by acting in the roles of support person, mediator, and adjudicator all at the same time. E tū believed its credibility as a trade union was severely compromised by Mr Singh's actions, and that his actions had potentially caused reputational damage to E tū.

E tū commenced an investigation, suspended Mr Singh, and began a disciplinary process. Mr Singh was ultimately dismissed.

The suspension was rushed, because E tū's primary concern was its reputation, and it did not consider alternatives before confirming the suspension.

E tū's investigation into Mr Singh's workplace conduct failed to meet the required standard. It was limited to considering the communications and attachments provided by the complainant, and considering Mr Singh's responses. The court described these as being of "limited scope", observing E tū did not make any further inquiries, such as by verifying Mr Singh's movements, the authenticity of the messages, and interviewing others involved at the meeting to understand the role Mr Singh had played during it.

Those concerns (and the investigation conclusions) were put to Mr Singh at a disciplinary meeting. There were issues with how the meeting was run, including a lack of clarity as to who the E tū decision-maker was. Prior to adjourning the meeting, Mr Singh was advised that dismissal was proposed. There was no indication E tū had considered alternatives to dismissal. After the brief adjournment, Mr Singh was told his employment was terminated. A letter confirming the dismissal followed.

What is fair and reasonable, taking into account the resources available to the employer?

The *Singh* judgment articulated the question of resourcing as:

> *A further balance is reflected in s 103A* [the statutory test of justification] *in the requirement that the Authority/Court must (not may) have regard to the employer's resources in assessing the justification for what they did and how they did it. A well-resourced employer can be expected to do more; an owner/operator of a small business not so much. Resources may impact at each stage of the process – the nature and extent of the steps reasonably required of employer X as*

> *opposed to employer Y; and the scope of the options that may reasonably be available to employer X as opposed to Y in terms of (for example) disciplinary outcome. This is a key consideration which is often overlooked. As the Act makes clear, a one-size-fits-all approach is not the applicable framework for assessing justification.*
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> (our emphasis)

Unsurprisingly, and accepted by E tū's representative, E tū was described as being well resourced, most particularly in respect of its knowledge and understanding of employment requirements, including around disciplinary processes. With that knowledge and understanding, E tū would be expected to both know what it needs to do to be a good employer, and to put it into action.

Outcome

The court concluded Mr Singh's suspension was unjustifiable (and he was unjustifiably disadvantaged because of it), and E tū's decision to dismiss Mr Singh was further unjustifiable (and he was unjustifiably dismissed).

The Employment Court confirmed trade unions are not immune from being bad employers, telling *E tū* to "e noho rā" by ordering the Union pay Mr Singh $25,000 in compensation, a sum equivalent to 12 months' lost remuneration, and a $11,500 contribution to legal costs.

Our thoughts

Recent cases reiterate large and otherwise well-resourced employers will (and should) be held to a higher standard than smaller employers. That reflects the reality that larger employers have the ability to do more, before taking action against or dismissing an employee.

The corollary is that smaller and less well-resourced employers should not be held to the same standard. Too often personal grievances are notified in circumstances where a small employer has done its best in attempting to do the right thing. In other words, that small employer has done what a fair and reasonable employer could have done in the circumstances.

All employers need to turn their mind to what they (in their own circumstances) could (and should) do to act fairly and reasonably.

Want to know more?

If you have any questions about the case or the topics discussed in this article, please contact our specialist employment team.