



ISSUE

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a regular newsletter for clients of  
mcphail gibson & zwart ltd

## Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

## Dismissed Union Organiser awarded over \$55,000.00

The Employment Relations Authority awarded an employee over \$55,000.00 in *Singh v E Tū Incorporated* [2023] NZERA 384, highlighting that Authority cases are becoming more costly for employers.

Mr Singh was employed by E tū Incorporated as a Union Organiser. He was also actively involved in organisations such as the Migrant Workers' Association ("MWA").

In August 2018 Mr Singh became friends with an employer ("HVF"). Around this time, MWA was investigating allegations against HVF of exploitation, involving underpayment of wages and payment of a premium. MWA suggested HVF meet with MWA and the employee to discuss matters. Mr Sehgal, an MWA representative and an employee of E tū, realised Mr Singh knew HVF and suggested Mr Singh also be involved in the meeting.

Mr Sehgal offered the use of E tū's premises for the meeting on 2 October 2018. MWA saw Mr Singh as acting as a mediator/facilitator. However, HVF appeared to believe Mr Singh was acting on her behalf. In the meeting, the parties came to an agreement on the amount owed to the employee but not whether a premium had been paid. The parties agreed that Mr Singh would decide this point.

Following the meeting, Mr Singh determined there was a premium paid but could not determine the amount. He proposed the parties settle for a payment of \$7,000. HVF was unhappy with the proposal, but eventually agreed to pay the \$7,000 suggested by Mr Singh. However, HVF did not pay the employee.

In July 2020, HVF complained to E tū that she had been harassed by Mr Singh and Mr Sehgal. HVF provided WhatsApp messages about Mr Singh telling her he wanted a "favour" to settle matters for her and that she should book a hotel room. There was also a video about HVF's business that had been shared on social media. HVF argued that the video was evidence that Mr Sehgal and Mr Singh had vandalised her business premises.

Rachel Mackintosh, an Assistant National Secretary of E tū, met with Mr Singh to discuss HVF's complaints and his response, noting that once she had received his comments on the complaints, she would likely start a formal investigation.

Ms Mackintosh later wrote to Mr Singh and set out her concerns, which included that:

- (a) Two text messages between Mr Singh and HVF "*were inappropriate and appeared to be Mr Singh flirting with HVF*".
- (b) Mr Singh was "*involved in a mediation between an employee and HVF at a time when Mr Singh knew HVF*" and the mediation occurred at E tū's offices.
- (c) It seemed Mr Singh had pressured HVF to pay money to the employee after the mediation.
- (d) Mr Singh played three different roles in the meeting: friend, mediator and then arbitrator.
- (e) Mr Singh's activities were inappropriate and placed him and E tū "*at risk*" and may have breached a number of E tū policies.

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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Ms Mackintosh then advised that she would meet with Mr Singh to discuss the concerns and decide whether his conduct amounted to serious misconduct. The matter would then be passed to another E tū leadership team member for a disciplinary process.

Following an email from HVF on 22 July 2020 advising that she had interviews pending with the media about her complaints, Mr Singh was suspended.

Mr Singh met with Ms Mackintosh to respond to the concerns. He explained why the WhatsApp messages were false and how those messages could be faked. Ms Mackintosh could not conclude whether the WhatsApp messages were real or not and decided to disregard the messages.

Ms Mackintosh found that Mr Singh's behaviour did amount to serious misconduct. This was because: he had *"compromised himself and E tū by acting in three roles simultaneously"* in the meeting in October 2018 and *"this was unethical"*; he *"did not appreciate the damage he had potentially caused to E tū"*; and *"E tū's credibility as a legitimate trade union was severely compromised"*, particularly if Mr Singh continued to be employed.

Mr Singh was asked to comment on the above conclusions but was only provided a short time to do so. The matter was then handed to another Assistant National Secretary, Annabel Newman, to reach a disciplinary conclusion. Ms Newman held a further disciplinary meeting on 30 July 2020, and then drew her own conclusions about Mr Singh's behaviour and notably, these conclusions somewhat differed from Ms Mackintosh's conclusions. However, Ms Newman's conclusions about Mr Singh were not put to Mr Singh for his comment.

Mr Singh was dismissed on 30 July 2020 and placed on garden leave for his notice period. Mr Singh raised personal grievances for unjustified disadvantage (for the suspension) and unjustified dismissal.

The suspension was held to be unjustified because:

- (1) E tū did not properly explain its reasons for proposing suspension and Mr Singh did not have an adequate opportunity to respond; and
- (2) Removing Mr Singh from the workplace was not necessary as a statement from E tū in response to the allegations would have been sufficient.

The Authority held that Mr Singh's dismissal was procedurally unjustified because E tū did not properly investigate the concerns it had about Mr Singh's conduct. Ms Mackintosh did not discuss the matter with Mr Sehgal or raise any concerns about his behaviour; nor did she speak to MWA about either Mr Singh or Mr Sehgal. Further, the Authority identified three key areas where further investigation was required, one of which was that there was a campaign targeting Mr Singh for the work he was doing both at E tū and MWA, and that he was being harassed and bullied by a group of employers over his migrant exploitation work. The Authority also held that it was not acceptable for E tū to simply ignore the WhatsApp messages because it could not decide if the messages were real or fake. The messages were significant in terms of the pressure exerted on both Mr Singh and E tū and should have been investigated further.

In addition to this:

- (1) E tū did not put all relevant concerns and information to Mr Singh for his response, particularly Ms Newman's conclusions;
- (2) Mr Singh therefore did not have a reasonable opportunity to respond to E tū's concerns;
- (3) E tū did not properly consider Mr Singh's explanations in regard to E tū's concerns.

Further, the decision to dismiss was not substantively justified. While it was open to E tū to conclude Mr Singh had acted in three roles at the October meeting, a fair and reasonable employer could not have concluded that by doing so Mr Singh had seriously compromised himself and E tū without further information. Further, E tū did not explain to Mr Singh what communications with HVF it considered to be inappropriate, or why.

Mr Singh sought reinstatement to his role, however the Authority declined to order this as it could not be *"achieved successfully"*. E tū was ordered to pay Mr Singh \$18,700.00 compensation and \$32,270.56 lost remuneration. This included a 15% reduction in remedies for contribution, as Mr Singh had acted in a blameworthy way. E tū was later ordered to pay \$5,000.00 as a contribution to Mr Singh's legal fees.

This matter has now been challenged by E tū to the Employment Court – we will keep an eye out for the Employment Court judgment.