

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 486  
3161961

BETWEEN                      WEI YUEN LOO  
Applicant

AND                              UNITEC NEW ZEALAND  
LIMITED  
Respondent

Member of Authority:        Eleanor Robinson

Representatives:            Paul Blair, counsel for the Applicant  
Maree Cassaidy and Mitch Smith, counsel for the  
Respondent

Submissions:                6 September 2022 from the Applicant and from the  
Respondent

Investigation Meeting:      6 September 2022

Determination:              28 September 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Dr Wei Yuen Loo, is seeking a compliance order and a penalty on the basis that he does not believe that the Respondent, Unitec New Zealand Limited (Unitec), has complied with clause 6 of a Record of Settlement.

[2]     Unitec claims that it has complied with clause 6 of the Record of Settlement.

**The Authority's investigation**

[3]     The Authority received written and, under oath or affirmation, oral evidence from Dr Loo, and from Respondent witnesses, Ms Jacqui McManus, former Acting Director of HR Operations, and Ms Christine Hutton, Interim Deputy Chief Executive – People and Culture.

[4]     I also received submissions from the representatives for the Applicant and the Respondent.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **Issues**

[6] The issues requiring investigation are whether or not Unitec has complied with clause 6 of the Record of Settlement.

### **Relevant Background**

[7] Dr Loo is a senior lecturer in Civil Engineering at Unitec. An employment dispute arose between Dr Loo and Unitec and there were two separate proceedings before the Authority, the first of which was concerned with a written warning, the second with a disciplinary investigation into correspondence between Dr Loo and members of the Tertiary Education Union (TEU).

[8] On 22 February 2021 Dr Loo and Unitec executed the Record of Settlement (ROS) which was certified by a mediator under s 149 of the Employment Relations Act 2000 (the Act) and which settled the two separate employment disputes before the Authority.

[9] As part of the ROS Unitec agreed to revoke two previous warnings against Dr Loo including one issued on 6 August 2020 which was based on a number of emails between Dr Loo and TEU members over a period from 1 September 2019 to 9 March 2020 and which had come into the possession of Unitec.

[10] The ROS was signed by the Applicant and by Ms McManus, Acting Director of HR Operations.

[11] The relevant clause of the ROS in respect of this issue is:

6. Unitec agrees that the content of any emails between Dr Loo and Tertiary Education Union (TEU) members over the period 1 September 2019 to 9 March 2020 that came into the possession of Unitec will not be used against any TEU member to ground any disciplinary actions or any disadvantage in any way whatsoever. These emails will be permanently deleted from the Unitec's own equipment.

[12] The ROS was certified under s 149 of the Act by the Mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on 23 February 2021. That certification confirmed that before making the agreement, the parties were advised and accepted they understood the agreed terms:

- a. were final, binding and enforceable; and
- b. could not be cancelled; and
- c. could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[13] In July 2021 Dr Loo instructed his representative Mr Blair to ask Unitec if it had complied with clause 6 of the ROS, and Mr Blair accordingly wrote to Ms McManus.

*Steps taken by Ms McManus in respect of compliance*

[14] Ms McManus said that prior to the second disciplinary investigation into Dr Loo's conduct the former Executive Director – People and Infrastructure authorised a search of Dr Loo's email account for any emails of concern to be used in the disciplinary process.

[15] These were compiled into a single PDF document, and provided to the relevant Unitec Managers, including herself, who were involved in Dr Loo's disciplinary process.

[16] Ms McManus said that in order to comply with clause 6 of the ROS she had considered the various locations in which the emails from the disciplinary process would have been stored by Unitec, based upon her knowledge of the disciplinary matter and Unitec's filing process. These were:

- (a) A physical personnel file for Dr Loo;
- (b) An electronic personnel file for Dr Loo; and
- (c) An electronic disciplinary file for the disciplinary investigation that had been conducted against Dr Loo. This was contained within a Disciplinary Investigation File, so had restricted HR access.

[17] Ms McManus said she had gone through any electronic files she had access to and deleted any files related to the disciplinary matter, following which she had approached HR Services and asked a member of the team to check that all relevant files had been deleted from Dr Loo's personnel files, including the physical file.

*Emails July 2021*

[18] On 26 July 2021 Ms McManus said she had received an email from Mr Blair checking that Unitec had complied with clause 6 of the ROS. She responded to Mr Blair on 29 July 2021, confirming that she had done so and explaining that she had asked a member of the HR Services team to ensure it had been done.

[19] On 29 July 2021 Mr Blair replied, asking her to: “state exactly what has been done and the date or dates those actions were carried out”.

[20] Ms McManus replied by email dated 30 July 2021, the date she left the employment of Unitec stating:

I have confirmed we have complied with the requirements.

I gave explicit instructions to one of my team to ensure this was done. I cannot give you exact dates but I can tell you that it was completed approximately within one month of this agreement being agreed. She confirmed that she had complied with the ROS.

[21] Ms Hutton commenced employment with Unitec shortly after Ms McManus’s departure. Her role was to provide cover for both the former Executive Director – People and Infrastructure and Ms McManus.

[22] On 9 September 2021 she received a request which had been submitted by Mr Blair under the Privacy Act 1993 and the Official Information Act 1982 for evidence that Unitec had deleted certain emails in accordance with clause 6 of the ROS. In particular Mr Blair requested that the evidence include:

- Written or records of verbal instructions from the management team, or HR, to the relevant technical or support team to find and permanently delete the emails.
- A register of the relevant emails and evidence of the actions taken to delete them, and from what equipment they were deleted from, and the date or dates these actions were carried out.

[23] Ms Hutton said she had no knowledge of the events which had led to the ROS, had no involvement with the negotiation or signing of the ROS, and no involvement with the deletion of any emails under the ROS.

*Steps taken by Ms Hutton in respect of compliance*

[24] Ms Hutton had asked the HR Services team if anyone had knowledge of the ROS. All the managers who had been involved with the events which had led to the ROS had left the employment of Unitec by the date she had commenced employment.

[25] Ms Hutton telephoned Ms McManus for information and Ms McManus told her that she had confirmed to Mr Blair that she complied with the requirements of the ROS. Ms McManus explained that she had deleted all relevant emails from her own Outlook account,

and verbally instructed a member of the HR Services team to check the relevant files were removed from elsewhere.

[26] Ms Hutton said she spoke to the relevant HR Services team member who advised her that she had only deleted emails from the personnel files.

[27] Ms Hutton said she had checked across other systems including disciplinary files to examine whether any documents remained, but did not find anything related to Dr Loo. She had however found a PDF of scanned emails in an obscure location within an HR directory which was labelled 'emails'. The emails appeared to have been sent between Dr Loo and some other names unfamiliar to her and contained some potentially contentious comments. Ms Hutton said she had deleted this file without checking the emails to see if they were relevant or not.

[28] Ms Hutton said she had also checked with an HR Services team member who had retained temporary access to Ms McManus' email inbox for a short period after Ms McManus' departure to ensure no emails had been missed when Ms McManus had deleted them. No relevant results were found.

[29] On 20 September 2021 Ms Hutton responded to Mr Blair in connection with his Privacy and Official Information Acts request, explaining that there had been no written requests given, only verbal: that she had spoken to a HR Services team member who confirmed that it was only the information from Dr Loo's personnel file that had been deleted; and also advised that she had found and deleted one document which may have been relevant to clause 6 of the ROS.

[30] Ms Hutton said that she had not been sure how she could prove that Unitec had complied with the ROS without knowing exactly what to look for because she did not know what the relevant correspondence was or who it was with.

[31] In addition, there would also have been many emails between Dr Loo and other members of staff, including TEU members which were not relevant to the disciplinary process. Accordingly it would be challenging to have IT undertake any further searches for the information.

[32] Acting in accordance with a suggestion from Ms McManus, Ms Hutton invited Dr Loo and Mr Blair to go onto the Unitec campus and examine Dr Loo's files themselves. In the email dated 20 September 2021 she stated:

If you would like to seek further certainty, when lock down ends and we can return to campus, I would like to offer the opportunity for you or Wei to view the file. This could also include any hardcopy file that may exist. Please let me know if this is something you or Wei would like to take up?

[33] However Dr Loo did not accept the invitation to view the files, because he said he believed the relevant emails were in locations other than his personal files.

*Email 29 September 2021*

[34] In an email response dated 29 September 2021 Mr Blair reminded Ms Hutton of the need for the parties to the ROS to be: “communicative and responsive with regard to all these matters”. He further stated that in light of Ms McManus’ response dated 30 July 2021 and Ms Hutton’s email dated 20 September 2021 that IT had not been engaged to delete any files and that : “It is clear that it is *prima facie* ‘more likely than not’ that the employer has failed to comply with clause 6 of the agreement.”

[35] Mr Blair advised that he required the following to be provided within 5 working days of the date of the letter:

- A register of all emails between union members and Dr Loo over the 6-month period of 1 September 2019 to 9 March 2020. The register should include the date/time of email, and the names of the correspondents.
- The register should also include the location of these emails on Unitec, i.e. management equipment. This includes employee personnel files, and also all Unitec equipment (i.e. management’s) where they may reside including but not limited to the PCs and emails accounts of former ELT members, [these were named] and Jacqui McManus.
- Dr Loo’s disciplinary investigation letters contain the names of union members and extracts from their communications with Dr Loo. Wherever on management’s equipment or email accounts they must also be deleted.
- Evidence that these instructions have been given to IT to delete the emails on the register, and that these actions have been carried out.

[36] Ms Hutton said she did not think Dr Loo could insist that Unitec carried out his requirements as stated because these were not stated in clause 6 of the ROS. She said it appeared Dr Loo expected Unitec to reactivate a number of former employee’ email accounts in order to complete a register of emails. This was not a requirement of clause 6 of the ROS and she did not see why it would be necessary as these email accounts were no longer active and therefore could not be accessed. As such any emails within them could be regarded as deleted.

*October 2021 emails*

[37] On 5 October 2021 Ms Hutton emailed Mr Blair stating:

Unitec has complied with clause 6 of the settlement agreement. We are of the view that clause 6 did not anticipate that every email between Dr Loo and union members would be deleted – only those “ that came into the possession of Unitec”. I understand that these emails are those that formed the basis of the disciplinary investigation that was commenced against Dr Loo. To the best of my knowledge, these emails have

been deleted, although it is difficult for me to verify this now as I have not viewed the disciplinary letters outlining these emails (because they have been deleted as well). If you retain a copy of this information that you could share with me, I would be happy to undertake a specific search to confirm that these have been deleted (following which I could delete the letter again).

[38] Dr Loo did not provide a copy of the disciplinary investigation letter. However Mr Blair emailed Ms Hutton on 13 October 2021 reiterating Dr Loo's view that Unitec had not complied with the ROS, but also proposing a Zoom meeting to discuss a "working solution" to resolve the matter which was:

- TEU branch members, and former members be emailed, copied to management and the TEU leadership, apologising to them for management's unlawful search of Dr Loo's emails.
- The same communication to contain a personal apology to Dr Wei Loo.
- That any emails over the period will not be used against the writers of those emails or be used to disadvantage them in any way whatsoever.
- Payment of the costs associated with pursuing this compliance.
- The above can be done in lieu of tracking down and destroying the emails and by the employer signing off a statement that says: "While it will be difficult to track down and destroy all the said emails, any such emails that management happens to come across will be permanently deleted from Unitec's own equipment whenever and wherever they are found."

[39] Ms Hutton responded on 18 October 2021 explaining that an apology was not appropriate because this would be contrary to the full and final settlement and confidentiality provisions of the ROS.

[40] However Ms Hutton did offer to put on record the following:

Based on my investigations, including speaking with Jacky McManus twice myself for this purpose, I am confident that Unitec has used all reasonable endeavours to find and permanently delete all emails referred to in Clause 6 of the settlement agreement. Accordingly, to the best of my knowledge and belief, Unitec has complied with Clause 6.

I confirm that management has not used any emails from that period to ground any disciplinary action against any TEU member, and will not use any emails from that period to ground any disciplinary action against any TEU member in the future. Not only does Unitec have no interest in using these emails against any persons in the future, the emails are more than 18 months old and would no longer have any relevance, if for whatever reason they have escaped deletion.

In the unlikely event that management comes across any such emails at any time, those emails will be permanently deleted from Unitec's own equipment.

[41] This counter proposal by Unitec did not satisfy Dr Loo therefore Ms Hutton, who wanted to resolve the matter, contacted the Director of Information Technology on or about November 2021 to see what other options there were to give Dr Loo certainty the relevant emails had been deleted.

[42] He advised her of the possibility of reactivating email accounts which had already been closed and reactivating emails in 'Legal Hold' which were documents which had been tagged

for 7 years despite being deleted. However, even if undertaken, it would be difficult to carry out the search without knowing for what they were looking.

[43] In addition it was explained that 'Legal Hold' is only triggered at the point at which an email is sent or received but not when it is transferred, which would affect the emails which had been copied from one folder to another during the disciplinary process affecting Dr Loo.

[44] Ms Hutton explained the situation in an email to Mr Blair dated 29 November 2021 concluding:

We continue to maintain that we have taken all reasonable steps to comply with the settlement, that there is no risk, to which you are concerned about, that management could use any of the said emails for grounding disciplinary action.

[45] Dr Loo did not accept that the matter was resolved and lodged a statement of problem with the Authority on 27 January 2022.

#### **Did Unitec comply with clause 6 of the ROS?**

[46] A Record of Settlement is an agreement between the parties to it. When a matter comes before the Authority for compliance, it is the role of the Authority to determine whether or not the clause or clauses which represent the terms of the agreement between the parties have been executed as stated.

[47] In this case the parties disagree about the exact meaning of the clause, consequently it is necessary to look at the term applying the principles of contractual interpretation, the aim of which is to ascertain:

.. the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties...

..the context provided by the contract as a whole and any relevant background informs meaning.<sup>1</sup>

[48] The starting point is the plain words of the contract, the ROS. The background is only relevant insofar as it assists a reasonable understanding of what the parties intended as the purpose of the clause.

[49] The ROS resolved two employment disputes, and in particular the employment dispute which concerned the disciplinary matter which involved the content of emails between Dr Loo

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<sup>1</sup> *Bathurst Resources Ltd v L & M Coal Holdings Limited* [2021] NZSC 85 at [43] citing *Firm Pl 1 Ltd v Australian Insurance Ltd* [2014] NZSC 147 at [60] –[63]

and fellow TEU members. The wording of clause 6 of the ROS makes it apparent that it was to address a concern by Dr Loo that the emails might be used to disadvantage TEU members.

[50] Clause 6 of the ROS states:

Unitec agrees that the content of any emails between Dr Loo and Tertiary Education Union (TEU) members over the period 1 September 2019 to 9 March 2020 that came into the possession of Unitec will not be used against any TEU member to ground any disciplinary actions or any disadvantage in any way whatsoever. These emails will be permanently deleted from the Unitec's own equipment.

[51] To comply with clause 6 of the ROS Unitec needed to permanently delete from Unitec's own equipment emails which:

- i. were between Dr Loo and members of TEU;
- ii. were sent/received over the period 1 September 2019 – 9 March 2020;
- iii. came into the possession of Unitec;

[52] I find the emails that 'came into the possession of Unitec' were those emails which were uplifted from Dr Loo's email account and compiled into a PDF document and circulated to former management members of Unitec involved in the disciplinary proceeding involving Dr Loo. It also included the electronic disciplinary file which had restricted HR access.

[53] The reason for the deletion is as stated in clause 6: to prevent them being: "used against any TEU member to ground any disciplinary actions or disadvantage in any way whatsoever."

[54] Examining the specifics of clause 6 of the ROS I note that there is no requirement:

- i. which requires the deletion to occur within a specified time;
- ii. that the IT department carry out that deletion; and
- iii. that Unitec provide details of what steps were taken to make the deletions.

[55] Clause 6 of the ROS requires Unitec to permanently delete the identified emails which were sent during a specified period and were capable of grounding any disciplinary actions or disadvantage.

*Which are the intended emails?*

[56] I find that the emails which came into the possession of Unitec when the former Executive Director – People and Infrastructure conducted a search of Dr Loo’s emails and later compiled them into a single PDF document, are the relevant emails.

[57] There is no evidence that any other emails were removed from Dr Loo’s inbox and these therefore did not ‘come into the possession of Unitec’. Given his position in Unitec, I accept that Dr Loo may have received a significant number of emails from TEU members who were colleagues during the relevant period, which would have been on non-contentious matters and not relevant to the disciplinary investigation.

[58] Given the wording of clause 6 of the ROS in light of the background giving rise to it, such emails would not be capable of providing a basis for any disadvantageous action and I find that clause 6 of the ROS was not intended to encompass these other emails.

*Have the steps taken for deletion been capable of meeting the requirements of clause 6?*

[59] I find that the emails to be deleted in accordance with clause 6 consistent with the intention of the parties to the ROS are those emails which were compiled into the PDF document and subsequently emailed to the Unitec managers involved in the disciplinary process.

[60] The PDF document had been copied into the disciplinary investigation file which had restricted HR access. Ms McManus confirmed to Mr Blair that she had both deleted the file herself, and had instructed a member of the HR Services team to ensure deletion had been done.

[61] Ms Hutton in satisfying herself that Unitec had complied, carried out a check and discovered a file in an obscure location on the HR drive which contained emails referencing Dr Loo. Ms Hutton did not know if these were the specified emails because she had not been involved in the disciplinary action of the ROS negotiations, but she deleted it nonetheless.

[62] I find that whilst there is no evidence that the file Ms Hutton deleted came within the purview of clause 6 as containing relevant emails; if it did so, it has been deleted and therefore complies with clause 6 of the ROS.

[63] Unitec regarded compliance with clause 6 of the ROS as completed. Dr Loo does not accept this on the basis that the deactivated email accounts of those former Unitec employees could be retrieved from Legal Hold and reactivated.

[64] In considering this aspect, I note that Ms Hutton asked Dr Loo for a copy of the disciplinary letter so she could identify the potential emails. He did not provide this. Without

it Ms Hutton would not know for what to search, nor would she be able to provide instructions to anyone else to carry out a search.

[65] Retrieving the deactivated email accounts from Legal Hold would require the assistance of IT which is not specified in clause 6 of the ROS. Moreover it is relevant that the emails, being unable to be verified as constituting the 'specified' emails, could not be used to ground any disciplinary action against a TEU member.

[66] I find that Unitec has complied with clause 6 of the ROS in that the relevant emails have been permanently deleted by Ms McManus, the HR Services department, and possibly by Ms Hutton although as observed, there is no certainty that the file she deleted would have been relevant.

[67] It is possible that there may be some emails in the deactivated email accounts belonging to those former Unitec management members involved in the disciplinary action concerning Dr Loo, although from the evidence it was a PDF rather than the emails themselves that was provided to the management team. However any emails in the deactivated email accounts cannot be accessed by Unitec's management or the HR Services department, nor could they be identified since no existing member of Unitec's management could identify them.

[68] As regards this latter point, I consider that acting reasonably, Ms Hutton invited Dr Loo to provide a copy of the disciplinary investigation letter to help her identify the relevant emails. He declined to do so.

[69] Having considered the issue of whether or not Unitec breached clause 6 of the ROS and taking the context of the contract as a whole, I find that the actions taken by Unitec in regards to compliance have fulfilled the requirement of the clause in that the relevant emails are either permanently deleted, inaccessible or unidentifiable and therefore cannot be used: "to ground any disciplinary actions or any disadvantage in any way whatsoever" against TEU members.

[70] I note as significant that there is no evidence before the Authority that any emails as identified in clause 6 of the ROS have been used as a basis of disciplinary action against or to disadvantage any TEU member despite the passage of time since the ROS was entered into, some 20 months ago.

[71] I determine that Unitec has complied with clause 6 of the ROS.

## **Costs**

[72] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[73] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[74] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>2</sup>

**Eleanor Robinson**  
**Member of the Employment Relations Authority**

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<sup>2</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].