IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2016] NZERA Christchurch 60
5585842

	BETWEEN	CLIFF KRUSKOPF Applicant
	A N D	SOUTH PACIFIC MEATS LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Peter Churchman QC, Counsel for Applicant Rachel Webster, Counsel for Respondent
Investigation Meeting:	23 and 24 March 2016 at Invercargill
Submissions Received:	24 March 2016
Further Information Received:	30 and 31 March 2016
Date of Determination:	12 May 2016

DETERMINATION OF THE AUTHORITY

A South Pacific Meats Limited unjustifiably disadvantaged Cliff Kruskopf in his employment.

B South Pacific Meats Limited is ordered to:

(i) Treat Cliff Kruskopf from the date of this determination as if he had not received the written warning dated 3 June 2015 and the warning should be removed from his file.

(ii) Pay the sum of $200 gross being lost wages under s 123 (1)(b) of the Employment Relations Act 2000 to Cliff Kruskopf for one day's unpaid suspension.

(iii) Pay the sum of $1000 compensation without deduction under s 123(1)(c)(i) of the Employment Relations Act 2000

C South Pacific Meats Limited is to pay to Cliff Kruskopf a penalty for a breach of good faith in the sum of $2,500.

D Costs are reserved and failing agreement a timetable for an exchange of submissions has been set.

Employment relationship problem

[1] Cliff Kruskopf has been employed by South Pacific Meats Limited (SPM) as a labourer at its Awarua plant in Invercargill in the boning room for three seasons since November 2013. Before employment with SPM, Mr Kruskopf worked in the meat industry for 28 years for Alliance Meats at its Lorneville plant. Mr Kruskopf has been a member of the New Zealand Meat Workers & Related Trades Union Inc (the Union) for all the time that he has worked in the meat industry.

[2] Mr Kruskopf says that his employment with SPM was affected to his disadvantage as follows:

(a) That he was falsely accused of serious misconduct, namely distributing a Union newsletter at the SPM's premises at Awarua, in breach of SPM's obligation of good faith to him;

(b) That on 29 May 2015 SPM unlawfully suspended him without pay on the basis of that allegation and a further allegation that he had posted a Union newsletter on a company noticeboard without following a fair and proper procedure;

(c) That at a disciplinary meeting on 3 June 2015, SPM denied Mr Kruskopf the right to be represented by his counsel via teleconference; and

(d) That on 3 June 2015 SPM imposed a formal written warning on Mr Kruskopf for serious misconduct *for the posting of the April 2015 Union News on the canteen company notice board, a document that brings the company, its shareholders and its directors into disrepute.*

[3] Mr Kruskopf says that the actions were unjustified and he seeks:

a. Withdrawal of the formal written warning;

b. Reimbursement of a sum equal to the wages lost due to his suspension without pay;

c. Compensation in the sum of $1,000;

d. The imposition of an appropriate penalty for breach of SPM's obligations of good faith under s 4A of the Employment Relations Act 2000 (the Act) together with costs.

[4] SPM does not accept that Mr Kruskopf's employment was affected to his disadvantage by its actions. It denies that it falsely accused him of serious misconduct in breach of its obligations of good faith and says it had reasonable grounds to support the allegations put to Mr Kruskopf. SPM denies that it unlawfully suspended Mr Kruskopf and says that clause 19.4 of Mr Kruskopf's individual employment agreement provides for suspension without pay and further it says that it followed a fair and proper process around the decision to suspend.

[5] SPM says the meeting on 3 June 2015 was to deliver a written warning and that Mr Kruskopf attended the meeting with a support person and it was not necessary for Mr Churchman to be contacted. It says that the written warning for posting misleading and inappropriate information on the noticeboard was substantively justified and procedurally fair.

[6] This mater was heard by agreement with counsel consecutively with another personal grievance arising out of similar facts within the same time period *Katrina Murray v South Pacific Meats Limited*[1]. There are some factual similarities to the matters and an element of overlap in the legal submissions.

The issues

[7] The Authority needs to determine the following issues in this case:

(a) Was Mr Kruskopf unjustifiably disadvantaged by being accused of serious misconduct for distributing a Union newsletter at Awarua ;

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(b) Was Mr Kruskopf unlawfully suspended without pay on the basis of that allegation and a further allegation that he had posted a Union newsletter to the noticeboard on 28 May 2015;

(c) Was Mr Kruskopf unjustifiably denied his right to be represented by his counsel via teleconference at a meeting on 3 June 2015 and did it cause him disadvantage;

(d) Was the finding of serious misconduct and the formal written warning justified;

(e) If there was an unjustified action or actions that caused Mr Kruskopf disadvantage, what remedies is he entitled to; and

(f) Were there breaches of good faith and, if so, should there be a penalty awarded?

Background against which these actions are to be considered

[8] On 27 May 2015, Mr Kruskopf was in the canteen at Awarua during his break. He noticed the April 2015 Union newsletter on a table in the canteen and read it, although he said in his evidence that he did not have his glasses with him. When his break was over, he pinned the newsletter to the employee/staff noticeboard in the canteen and returned to work.

[9] It was clarified at the investigation meeting that there are two notice boards in the canteen. Both, of course, belong to the company but one is known as a company notice board for company notices and the other a staff notice board. It is common ground that Mr Kruskopf affixed the newsletter to the staff notice board.

[10] Mr Kruskopf said that he did so because he expected other workers may be interested in news from the Union and that he did not know that removing the newsletter from the table and pinning it to a noticeboard was something that would result in disciplinary action. He did not discuss the content of the newsletter with anyone and the next day the newsletter had been removed from the noticeboard.

[11] On 29 May 2015, toward the end of his shift, Mr Kruskopf was advised by the leading hand, Stevie, to go to the main office. When Ms Kruskopf got to the main office the manager of Awarua, Kevin Hamilton, was present as was Norris Tait 2IC.

[12] Mr Kruskopf was told about the nature of the allegations that he had been seen distributing the Union newsletter in the canteen as well as pinning the newsletter to the news board. Mr Kruskopf agreed that he had pinned the Union newsletter to the noticeboard but denied he had distributed the newsletter.

[13] Mr Kruskopf was then given an undated letter which referred to an allegation of serious misconduct. The letter provided amongst other matters that Mr Kruskopf was aware that workers were not entitled to post anything on company noticeboards without the express permission of management. The letter further advised that the content of the Union newsletter was untrue and was *obviously written with the specific intent to misrepresent and damage the reputation of the company and its directors*.

[14] Mr Kruskopf was invited by way of the letter to a disciplinary meeting in Mr Hamilton's office at 2pm on Tuesday, 2 June to respond to the allegations and that if he was found guilty of either allegation, it was likely he would face disciplinary action from a warning to possible dismissal. The letter advised that Mr Kruskopf was to be stood down from work immediately on unpaid suspension while Mr Hamilton undertook his investigation which he expected to conclude by midday on 2 June 2015.

[15] On 2 June 2015, Mr Kruskopf attended a disciplinary meeting. He attended with the Union's lawyer, Mr Churchman, and Mr Hamilton attended together with a staff member at SPM, Kelly, who took notes. Mr Kruskopf said that he told Mr Hamilton at the meeting that he did not know it was prohibited to post notices on the noticeboard without permission. Mr Kruskopf advised that *he was at work to work and not to cause any trouble*. There was a dispute whether Mr Hamilton promised he would send Mr Churchman a copy of any decision regarding the allegations and at the end of the meeting Mr Kruskopf returned home as he was still suspended without pay.

[16] Mr Hamilton telephoned Mr Kruskopf at home later that same day and advised him that he would be receiving a warning for his actions and that he was to return to work.

[17] On 3 June 2015, Mr Kruskopf attended a further meeting, taking along a support person, another employee Alan Murdoch. Mr Hamilton was present at this meeting. Mr Kruskopf had written Mr Churchman's telephone number on a paper towel and he asked if Mr Churchman could be called by Mr Hamilton and put on

speaker phone. That request was refused by Mr Hamilton. Mr Hamilton said that this was because Mr Kruskopf already had a representative with him and he knew in advance about the nature of the meeting. Mr Churchman was not sent a copy of the decision letter.

[18] Mr Kruskopf would not sign the notice of warning as he felt it was an extreme over-reaction to him removing a newsletter from a table and pinning it to the noticeboard.

Justification test in section 103A

[19] The justification test in s 103A of the Act is to be applied by the Authority in determining justification of an action or dismissal. This is not done by considering what the Authority may have done in the circumstances. The Authority is required under s 103A of the Act to consider on an objective basis whether SPM's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[20] The Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Mr Kruskopf were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to the concerns and whether such explanation was considered genuinely by SPM. The Authority may take into account other factors as it thinks appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.

[21] A fair and reasonable employer could be expected to comply with the good faith obligations set out in s 4 of the Act.

Was Mr Kruskopf unjustifiably disadvantaged by being accused of distributing a Union newsletter at Awarua?

[22] Ms Murray distributed the Union newsletter and not Mr Kruskopf. Mr Kruskopf accepted at the meeting on 28 May 2015 that he had pinned the Union newsletter to the notice board.

[23] Ms Webster submits that Mr Hamilton had reasonable grounds to raise an allegation of distributing a newsletter as well as pinning one to the notice board because workers had advised Mr Tait who in turn informed Mr Hamilton that both Mr Kruskopf and Ms Murray were involved with the Union newsletter. Mr Churchman submits that as only one newsletter was posted onto the notice board and the same allegations were made against Ms Murray it was impossible for both to be responsible for the same allegation.

[24] There was a CCTV camera in the *smoko* room so SPM could have verified the employee who had undertaken each action before the matter was raised. There has to be a balance between not unduly delaying raising an allegation with an employee and fair treatment. In this matter both allegations were taken account of in reaching a decision to suspend Mr Kruskopf without pay and the possible disciplinary outcome referred to in the suspension letter which ranged between a warning to dismissal. In circumstances where SPM was moving quickly to suspension without pay a fair and reasonable employer could be expected to take more care about the allegations and view the footage. Mr Kruskopf said that he was shocked at the possibility of dismissal and being falsely accused at the time he was suspended.

[25] A fair and reasonable employer could be expected to take reasonable care in all the circumstances including where unpaid suspension was being considered not to make an allegation that viewing CCTV footage would have conclusively shown to be without foundation. There was no mention in the decision letter given to Mr Kruskopf on 3 June 2015 about the allegation of distributing a Union newsletter. Objectively assessed, I find that making the allegation to Mr Kruskopf that he distributed a Union newsletter and the failure to make it clear that the allegation was not substantiated in the letter advising of the disciplinary outcome was unjustified and caused disadvantage to Mr Kruskopf for the reasons set out above.

Was Mr Kruskopf unlawfully suspended without pay on the basis of that allegation and a further allegation that he had posted a Union newsletter to the noticeboard on 28 May 2015?

[26] Mr Hamilton accepted that the process he used to suspend Mr Kruskopf may not have been fair. I agree. The evidence supports that Mr Kruskopf was not advised to bring a support person with him to the meeting and his views were not sought

before he was suspended. The letter suspending him was written at the time of the meeting which supported a degree of predetermination.

[27] I accept Mr Churchman's submission that while there was the ability for SPM to suspend without pay in clause 19.4 of Mr Kruskopf's employment agreement, this was not a situation where a fair and reasonable employer could have done that.

[28] Mr Hamilton said that he suspended Mr Kruskopf because he could post other information on the board and may talk to others about the situation. Those matters were not put to Mr Kruskopf for him to respond to but I am not satisfied that they would justify suspension for the single action of posting a Union newsletter to the staff notice board from its previous position on the *smoko* room table.

[29] The suspension without pay which resulted in one days lost wages for Mr Kruskopf was procedurally and substantively unjustified.

Was Mr Kruskopf unjustifiably denied his right to be represented by his counsel via teleconference at a meeting on 3 June 2015 and did it cause him disadvantage?

[30] Mr Hamilton said that Mr Kruskopf knew in advance of the meeting on 3 June 2015 that he would be getting a warning and as he was represented by Mr Murdoch he did not believe Mr Churchman needed to be involved.

[31] There was no justifiable reason not to connect Mr Churchman to the meeting on 3 June 2015 by way of speaker phone simply because Mr Kruskopf knew what the outcome would be. It would not have delayed the meeting had Mr Churchman been connected in that way. Mr Kruskopf had the right to ask for his legal representative to be present and Mr Churchman had represented him at the disciplinary meeting the previous day.

[32] I find that the failure to connect Mr Churchman to the meeting disadvantaged Mr Kruskopf particularly in circumstances where he took issue with the justification of the warning and did not sign it.

Was the finding of serious misconduct and the formal written warning justified?

[33] Conduct that constitutes serious misconduct is usually that which damages or is destructive of the trust and confidence that there must be in an employment

relationship[2]. The conduct in this matter was that Mr Kruskopf pinned a Union newsletter to a notice board.

[34] Mr Hamilton said that the policy about not pinning items to the notice board without getting permission from management is widely communicated at staff meetings although he accepts there is nothing in the employee handbook about not pinning items to the staff noticeboard without permission.

[35] Mr Kruskopf explained at the 2 June meeting that he did not know it was prohibited to post notices on the noticeboard without permission and was unaware of any policy. He said in his evidence that such a policy was never brought to his attention at staff meetings and he said that he could not recall a sign on the board and to the best of his recollection it was not there when he posted the newsletter.

[36] Mr Hamilton in his written evidence referred to an attached photograph of the sign above the notice board and said it had been in place since the time of the previous Plant Manager before 2011. The copy of the sign attached to his evidence reflects that it is for the company noticeboard and it states - *This noticeboard is for official company notices only*. Mr Kruskopf did not pin the Union newsletter to the company noticeboard but to the staff noticeboard. Mr Hamilton when asked said in his oral evidence that someone had taken a photo of the wrong sign and that there was a similar sign above the staff noticeboard. There is no evidence of that in front of me.

[37] As part of its investigation into this matter SPM considered CCTV footage which would have showed a sign above the staff notice board if indeed it existed. The Authority was not provided with a copy of the footage.

[38] I do not find in all the circumstances a fair and reasonable employer could have concluded Mr Kruskopf knew that there was a policy whereby approval was required from management before anything was placed on the staff noticeboard and acted in contravention of that policy.

[39] I agree with Mr Churchman that the appropriate course of action a fair and reasonable employer could have been expected to have undertaken after removal of the Union newsletter would have been to talk to Mr Kruskopf about the policy. Mr Kruskopf is a hard working employee in his late sixties who has never posted

[2] *Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZ 483 (CA) at 487

anything previously on the notice board. All Mr Kruskopf wants, as he told Mr Hamilton, is to do his work and not cause any trouble.

[40] There were submissions about the content of the Union newsletter. Ms Webster submits that Mr Kruskopf in pinning the newsletter to the noticeboard published derogatory and highly critical content that other workers could read. Mr Kruskopf did accept that he would not have personally written what is in the newsletter but he is, as he is entitled to be, a member of the Union. It is a Union newsletter and contains views of the Union.

[41] Mr Churchman says that there is nothing in the newsletter that is not accurate and referred to a long line of cases recording the animosity of SPM and its parent companies towards the Union. Both SPM and the Union have strong views about the other. I accept Mr Churchman's submission that what is said in judgments and any historical relationship difficulties are largely irrelevant to Mr Kruskopf and he was not in a position to make any proper assessment of the content of the newsletter.

[42] The Union newsletter appears to have been promptly removed from the noticeboard. There is no evidence that it was viewed by other workers before it was removed. If there were issues about the content of the newsletter then they should have been raised with the Union.

[43] I do not find that this is a case where I need to consider submissions about the New Zealand Bill of Rights Act 1990 and the rights therein of freedom of association and freedom of expression. This was a straightforward issue that could and should have been talked through with Mr Kruskopf if it was of concern to SPM. The fact that it went down the path it did gives weight to Mr Churchman's submission that Mr Kruskopf was simply caught up in an ongoing dispute between SPM and the Union. He should not have been. Mr Hamilton denies that the disciplinary approach taken by SPM was designed to send a message to others in the workplace about involvement with the Union. I find that it would have had that consequence.

[44] I do not find that a fair and reasonable employer could in all the circumstances conclude that the action of Mr Kruskopf in posting one Union newsletter to the staff noticeboard from where it sat on the *smoko* table was serious misconduct. It follows therefore that I am not satisfied that a written warning was an outcome that a fair and reasonable employer could have imposed.

[45] Mr Kruskopf has a personal grievance that he was unjustifiably disadvantaged in his employment for the above reasons. He is entitled to consideration of remedies.

Remedies

Removal of the warning

[46] The most important remedy for Mr Kruskopf is the withdrawal of his warning. That requires the Authority to make an order to reinstate Mr Kruskopf or put him into a position no less advantageous. The only objection from SPM was that it considered the written warning justified. I have not accepted that. Mr Kruskopf is well respected at SPM and the evidence supports he is an asset to SPM, works hard and fast and helps to make the plant efficient. I find therefore that it is practicable and reasonable to order reinstatement and I do so.

[47] I order that Mr Kruskop be treated from the date of this determination as if he had not received the written warning dated 3 June 2015 and the warning should be removed from his file.

Lost wages

[48] Mr Kruskopf is entitled to be reimbursed for one day's unpaid wages whilst he was on suspension which he assesses at $200 gross. Subject to any issue of contribution he is entitled to this sum.

Compensation

[49] Mr Kruskopf seeks the sum of $1000 under this head. Mr Kruskopf said that it did not make sense that he got a warning for removing a newsletter from the table to a notice board and that he felt like the situation was about something bigger. I accept that there was concern on his part at that he could be dismissed because that was a possible outcome in the suspension letter. That would have had severe financial ramifications for Mr Kruskopf.

[50] Subject to any issue as to contribution Mr Kruskopf is entitled to payment of $1000 for compensation.

Contribution

[51] The Authority must consider under s 124 of the Act when it determines that an employee has a personal grievance whether the actions of the employee contributed towards the situation that gave rise to the grievance and, if the actions require, to reduce the remedies.

[52] The evidence does not satisfy me on the balance of probabilities that Mr Kruskopf knew he must obtain permission before pinning something to the staff notice board but nevertheless pinned the Union news up. There is no evidence to satisfy me that there was a sign at the top of the staff notice board at that time.

[53] SPM may have been unhappy with the content of the newsletter but the content of the newsletter was largely irrelevant to Mr Kruskopf and if of concern should have been raised with the Union. I do not find that Mr Kruskopf contributed to the situation that gave rise to his personal grievance and the remedies above should not be reduced.

Orders made in respect of the unjustified disadvantage grievance

[54] South Pacific Meats Limited is ordered to treat Cliff Kruskopf from the date of this determination as if he had not received the written warning dated 3 June 2015 and the warning should be removed from his file.

[55] South Pacific Meats Limited is ordered to pay Cliff Kruskopf the sum of $200 gross being lost wages under s 123(1)(b) of the Act.

[56] South Pacific Meats Limited is ordered to pay Cliff Kruskopf the sum of $1000 without deduction being compensation under s 123(1)(c)(i) of the Act.

Penalty

[57] A penalty is sought under s 4A of the Act for breaches of the duty of good faith. A party to an employment relationship who fails to comply with the duty of good faith is liable to a penalty if the failure was deliberate, serious and sustained or intended to undermine an employment relationship.

[58] Mr Churchman raised a personal grievance in writing on 5 June 2015 with Mr Hamilton. There was no response to that. In October 2015 Mr Churchman lodged a statement of problem with the Authority. The failure to engage with Mr Churchman where he has raised a grievance, particularly where there is an ongoing employment

relationship, is a breach of the duty of good faith under s 4(1A)(a) to be active and constructive in maintaining a productive employment relationship in which the parties are responsive and communicative.

[59] I asked Ms Pidduck to advise why Mr Hamilton had not responded to Mr Churchman during a telephone conference in November 2015. She advised by memorandum dated 5 February 2016 that all grievances and disputes are managed by in-house lawyers and not Plant Managers. Clause 27.4 of Mr Kruskopf's employment agreement provides that an employment relationship problem should be raised and discussed with the employee's manager as soon as possible. That person is Mr Hamilton and the grievance was raised with him.

[60] The length of the delay and the failure to even acknowledge by email or a telephone call the raising of the grievance was I find such that I conclude under s 4A (b) it was intended to undermine the employment relationship that Mr Kruskopf had with his employer. In that employment relationship he had a reasonable expectation that employment relationship problems would be responded to within a reasonable time without a four month delay. The failure to respond increased the concern and stress for Mr Kruskopf and the ability to resolve this straightforward matter at an early stage.

[61] I find that there should be a penalty ordered and that it should be paid in full to Mr Kruskopf.

[62] I order South Pacific Meats Limited to pay to Cliff Kruskopf a penalty in the sum of $2500.

Costs

[63] I reserve the issue of costs. I encourage the parties to reach agreement as to costs. Mr Churchman has until 1 June 2016 to lodge and serve submissions as to costs and Ms Webster has until 15 June 2016 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority