

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 59
5585915

BETWEEN KATRINA MURRAY
 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: 29 March 2016

Date of Determination: 12 May 2016

DETERMINATION OF THE AUTHORITY

A Katrina Murray was subject to unjustified actions by South Pacific Meats Limited that caused her disadvantage.

B South Pacific Meats Limited is ordered to pay Katrina Murry:

(i) \$640 gross being reimbursement of lost wages for a period of three days unpaid suspension under s 123(1)(b) of the Employment Relations Act 2000.

(ii) \$4000 gross being reimbursement of lost wages for the period Ms Murray was available to work for the bobby calf season under s 123(1)(b) of the Employment Relations Act 2000.

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

C Katrina Murray was unjustifiably dismissed from her employment with South Pacific Meats Limited.

D South Pacific Meats Limited is ordered to pay Katrina Murry:

(i) \$17,400 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.

(ii) \$10,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

E South Pacific Meats Limited is to pay to Katrina Murray a penalty for a breach of good faith in the sum of \$2,500.

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

Employment relationship problem

[1] Katrina Murray was employed by South Pacific Meats Limited (SPM) at its Awarua Plant near Invercargill in November 2005¹ and worked as a labourer in 2005 and 2006 and thereafter as an A Grade slaughter person. Before working at Awarua, Ms Murray worked for two years at Alliance Lorneville and for all the time she has worked in the meat industry she has been a member of the New Zealand Meat Workers and Related Trades Union (the Union).

[2] Ms Murray says that she was disadvantaged in her employment by the following actions of SPM that she say were unjustified:

- a. She was accused of serious misconduct namely posting a union newsletter to the notice board in breach of the obligation of good faith;

¹ Shortly after the plant opened

- b. On or about 28 May 2015 she was suspended without pay on the basis of that allegation and a further allegation that she had distributed the newsletter in the workplace;
- c. On 3 June 2015 she received a formal written warning for the issue of inappropriate material in the *Smoko room*;
- d. She was not engaged for the bobby calf season in circumstances in which she says she had habitually worked the bobby calf season;
- e. When her counsel inquired as to the reason for that there was no explanation as to why she was not called back.

[3] Ms Murray says that she was a person intending to work for the 2015-2016 season with SPM in accordance with a letter dated 5 May 2015 but was not called back to work for that season and there was no good reason advanced why that did not occur. Ms Murray says that she was then unjustifiably dismissed by SPM.

[4] She says that the failure to engage her for the bobby calf season and the failure to call her back for the 2015 – 2016 season was because she had distributed union material and had challenged the suspension and warning.

[5] Ms Murray seeks:

- a. Reimbursement of a sum equal to wages lost for her suspension without pay;
- b. Compensation in the sum of \$1,000 for the unjustified action relating to the imposition of a warning;
- c. Reimbursement of lost wages during the bobby calf season which she says was four weeks lost earnings;
- d. Reimbursement of a sum equal to wages lost by reason of the unjustifiable dismissal;
- e. Compensation in the sum of \$10,000 for the dismissal together with payment of costs;

- f. The imposition of an appropriate penalty under s 4A of the Employment Relations Act 2000 (the Act).

[6] SPM does not accept that Ms Murray's employment was affected to her disadvantage by its actions and says that she was suspended without pay and given a written warning in circumstances where that was justifiable and procedurally fair. It does not admit that it omitted to offer or afford her the same terms and conditions of work offered to other employees at the time of the bobby calf season. It does not accept that Ms Murray was unjustifiably dismissed from her employment. It says that she failed to make contact on her return to work for the 2015-2016 season and SPM was unable to contact Ms Murray because her telephone number was disconnected and she did not keep SPM advised of her current address and phone number.

[7] During the investigation meeting I asked for copies of the employee information sheets Ms Murray had completed at the start of each season she had worked at SPM. Ms Webster, who was not the solicitor acting initially on this matter, kindly attended to the provision of the sheets. They show that Ms Murray had provided her cellphone number, residential address and landline number.

[8] This matter was heard by agreement with counsel consecutively with another personal grievance arising out of similar facts within the same time period *Cliff Kruskopf v. South Pacific Meats Limited*². There are some factual similarities in both matters and an element of overlap in the legal submissions.

The issues

- [9] The Authority needs to determine the following issues in this matter:
- (a) Was Ms Murray disadvantaged by being accused of serious misconduct for posting a Union newsletter to the noticeboard at the respondent's premises at Awarua;
 - (b) Was Ms Murray unjustifiably suspended without pay on the basis of that allegation and a further allegation that she had distributed the newsletter in the workplace;

² [2016] NZERA Christchurch 60

- (c) Was the finding of serious misconduct and the formal written warning justified;
- (d) Did SPM omit to offer or afford Ms Murray the same terms of employment and conditions of work offered to other similar employees for the bobby calf season;
- (e) Was Ms Murray dismissed from her employment with SPM for the 2015-2016 night shift;
- (f) If Ms Murray is successful in one or more of her grievances, what remedies is she entitled to and are there issues of contribution or mitigation?
- (g) Were there breaches of good faith for which a penalty should be awarded?

Background against which these actions are to be considered

[10] The Authority heard evidence in this matter from Katrina Murray, Daryl Carran who is the President of the Otago Southland Branch of the Union and Kevin Hamilton who is the plant manager at Awarua.

[11] Ms Murray said that she has been active in the Union since she started at Awarua and was the contact person at the Awarua Plant that the Union sub-branch official got in touch with to assist members. Although she was never formally elected Ms Murray said that she was the union delegate for the slaughter board. I'll return to the issue of elections.

[12] Before commencement of the shift on 27 May 2015 at about 6.05am, Ms Murray provided a copy of the April 2015 edition of the Union newsletter, which is published by the Union, to two or three members of the Union in the Awarua Plant. At about 6.25am, she passed copies of the newsletter to three other Union members in the plant.

[13] The next day, 28 May 2015, Ms Murray was called to a meeting with Mr Hamilton and Norris Tait who is the 2IC at Awarua. Ms Murray covertly recorded the meeting. As a matter of good faith Ms Murray should have advised that she was intending to record the meeting. There was a dispute in the evidence about what

occurred at that meeting and I have given consideration to the recording of that meeting and the transcript provided. It has enabled me to reach conclusions about what was said at the meeting.

[14] Ms Murray was suspended without pay for a period of three days.

[15] On 29 May 2015, Mr Churchman wrote to Mr Hamilton and requested further information regarding the allegations. Mr Hamilton clarified that the allegations were incorrectly recorded and that the rule that Ms Murray had broken was that she was not to intentionally mislead or be dishonest.

[16] On 2 June 2015, Ms Murray attended an investigation meeting with Mr Churchman. Mr Hamilton was in attendance for SPM as was another staff member, Kelly, who took notes.

[17] The allegation that Ms Murray was required to answer was that the newsletter contained information written with the specific intent to misrepresent and damage the reputation of SPM and its directors. Mr Churchman raised questions about why Ms Murray's suspension was without pay.

[18] Following the meeting, Ms Murray was provided with an email dated 2 June 2015 from Mr Hamilton. It provided amongst other matters that:

As a result of the investigation the company maintains that the distribution of material with this content by an employee is misconduct of a serious nature, however, I have decided that a formal written warning is the appropriate outcome in this instance. A formal written warning will be issued to you at work tomorrow. Any further misconduct of this nature will likely result in dismissal.

[19] Mr Churchman raised a personal grievance on 5 June 2015 but that was not responded to by Mr Hamilton and proceedings were subsequently lodged.

[20] Around late July every year, a large number of bobby calves are processed at the plant. Mr Hamilton gave evidence that there is no separate bobby calf season. To the extent that there was a dispute as to whether there was a bobby calf season at Awarua I simply record lamb and mutton were also processed from in or about July to November. Not all workers are engaged to process bobby calves but Ms Murray has been engaged to process the bobby calves for the previous nine seasons by SPM. She said that she was not led to believe that the 2015-2016 season would be any different and expected to be called back for the bobby calf season. Ms Murray heard other

workers were returning to work for the bobby calf season so she called Mr Hamilton to ask him why she had not had a call back to work and Mr Hamilton advised that he no longer required her services at that stage.

[21] Ms Murray asked Mr Churchman to write to Mr Hamilton to seek an explanation that same day. Mr Churchman duly made an inquiry on Ms Murray's behalf on 23 July 2015. He advised in his email that Ms Murray had telephoned Mr Hamilton to ascertain the reason she had not been called back to commence the bobby calf season and was *apparently told that she may not be required*. Mr Churchman wrote that Mr Hamilton apparently gave no reason as to why she might not be required and that Ms Murray had undertaken such work for previous seasons and there were no issues. Mr Hamilton failed to respond to this email. Mr Churchman subsequently raised a further personal grievance in relation to the bobby calf season.

[22] Ms Murray left for Norway on 31 August 2015 and estimates that she missed out on work for four weeks for the bobby calf season at \$1,000 per week in wages. Ms Murray said that she believed that SPM was excluding her from doing the bobby calf processing before she went to Norway as an act of retribution against her for the newsletter incident.

[23] Ms Murray has in earlier years with a number of colleagues worked part of the *off season* in a meat processing plant in Norway. In May 2015, Ms Murray formally sought SPM's permission to work in Norway during the 2015 *off season* and Mr Hamilton agreed to this. The letter dated 5 May 2015 provided:

Dear Katrina,

This letter is to advise that your requested leave to work overseas has been approved for the length of time you have indicated. Also on the start-up of the 2015/2016 night shift you will be able to recommence your employment at South Pacific Meats with your original length of service being maintained.

Please make contact with the plant on your return confirming the start date. I wish you all the best in your work overseas and safe travels.

*Yours truly,
Kevin Hamilton*

[24] Ms Murray returned from Norway on 3 November 2015. She did not make immediate contact with SPM and was not called up to work for the respondent at the start of the season. Ms Murray emailed Mr Hamilton on 17 November 2015 to

inquire why she had not been contacted as others who had been to Norway with her had recommenced work. Ms Murray's email read as follows:

Hi Kevin,

Inquiring about seasonal start at SPM Awarua, Kevin I know that the boys from Norway have started back on day shift and the Night shift has started.

I have again not heard from you via phone or letter until I contacted you via phone 23/07/2015, the last conversation we had on the phone was quote, "That you no longer require my services at this stage"

I want to know if you have any intention of re-employing me for the new season at SPM Awarua given that other workers with less seniority than me have started back?

Please email me back.

*Regards,
Katrina Murray*

[25] On 18 November 2015, Mr Hamilton sent an email to Ms Murray in response which provided:

Katrina,

The Company attempted to make contact with you at the commencement of the second shift using the contact number recorded on your personnel file, being ... on the 27th October at 2.50pm. This number had been disconnected.

I acknowledge that our last conversation was 23/07/2015 as you've stated, however at this point you were only available for some 3-4 weeks due to your upcoming trip and I informed you your services were not required at this point, as you had been laid off with the second shift. I attempted to reach you at the startup of this shift.

You are correct that a number of the Norway workers have commenced work. These workers were all able to make contact with, or be contacted by, the company to ascertain their return date, and as you failed to make contact with the Company and your notified contact number was disconnected we were not able to make plans for your return and our production requirements are currently fully manned.

*Regards,
Kevin*

[26] On 26 November 2015, Mr Churchman wrote to Mr Hamilton about the lack of re-engagement and said that in the absence of an acceptable explanation the inference was that this was retribution for earlier matters. Christine Pidduck, solicitor for AFFCO New Zealand Limited, responded by letter dated 4 December 2015 to Mr

Churchman. In her letter she repeated the explanation that SPM had tried to contact a disconnected phone line and that there was an obligation on Ms Murray to provide her current contact details to SPM. She wrote that Ms Murray did not contact the company to update her contact details and the company was not able to contact her.

[27] Ms Murray said that several new employees with no prior work history at the plant were engaged at the season and there were some opportunities for SPM to start her later in the season if that was the reason that she was not re-engaged.

Justification test in section 103A

[28] 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.

[29] The Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Ms Murray were sufficiently investigated, whether the concerns were raised with her, whether she 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.

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

Was Ms Murray disadvantaged by being accused of serious misconduct for posting a Union newsletter to the noticeboard at the respondent's premises at Awarua?

[31] Mr Kruskopf posted the union notice to the notice board. It was not Ms Murray. There was a CCTV camera in the *smoko* room, so that was capable of being verified. A fair and reasonable employer could be expected to take some care not to make allegations that are without foundation, particularly where thought is being

given to unpaid suspension. Mr Hamilton said the camera footage had not been checked before the suspension meeting and the complaint had come from other workers. Failure to do that until after Mr Churchman raised the issue was unjustified.

[32] Any period of disadvantage for Ms Murray was short lived as in response to a request from Mr Churchman in an email dated 29 May 2015 Mr Hamilton accepted in a letter of the same date that the allegation was incorrectly recorded. Nevertheless that allegation was taken into account in suspending Ms Murray without pay and that did cause disadvantage.

Was Ms Murray unlawfully suspended without pay on the basis of that allegation and a further allegation that she had distributed the newsletter in the workplace?

[33] Mr Hamilton properly conceded that he may have got some things incorrect with the process leading to suspension. The process for suspension was not in accordance with clause 20 (a) and (b) of Ms Murray's individual employment agreement (the employment agreement) which requires a worker to be advised why they are suspended and be given the opportunity to have a support person present. The recording does not support Ms Murray was advised to have a support person present or that she was told why it was necessary to suspend her.

[34] The letter that Ms Murray was handed inviting her to a disciplinary meeting does refer to consultation before a final decision was made on suspension but such consultation, it is clear, did not actually occur. The only matter that Ms Murray did comment on was the unpaid nature of the suspension and the recording reflects Ms Murray asking Mr Hamilton why other people suspended were paid and Mr Hamilton responded that *we're not dealing with other people here Katrina, we're dealing with you. Alright?* I've listened to the recording and in particular that statement. I do not conclude as Mr Churchman submits that the statement is so clear that by itself it indicates an intention to treat Ms Murray more harshly because of her Union affiliation. I do agree with his submission that the letter which was already written at the time of the meeting does indicate a degree of predetermination about suspension including the unpaid nature of suspension.

[35] Ms Webster submits the suspension was substantively justified and it was justifiable that it was not paid. Mr Hamilton said that the suspension was justified

because Ms Murray may speak to others and interfere with the investigation or distribute other material. She did not have an opportunity to comment on these matters.

[36] It is necessary to objectively consider both the allegation and the concerns. The only allegation with any foundation was that Ms Murray had distributed the Union newsletter. A fair and reasonable employer could not have reached a conclusion that Ms Murray could interfere with the investigation by speaking to others because it relied solely on CCTV footage after other workers had told Mr Hamilton about the action. A fair and reasonable employer could not in all the circumstances be concerned about the distribution of further material. The allegation was about the content of one newsletter and I accept Mr Churchman's submission that a concern about distribution of further material could not justifiably be a ground to suspend Ms Murray.

[37] Clause 19.4 of the employment agreement did permit SPM, where a potentially dismissible offence may have occurred, to suspend an employee without pay. A fair and reasonable employer could not even with that express provision have concluded in the circumstances of this matter that an allegation of distributing a Union newsletter could justify suspension without pay.

[38] Finally, Ms Murray attended the meeting on 28 March 2015 with Mr Hamilton and Mr Norris alone. She was very surprised that what she had allegedly done was being treated as serious misconduct. She asked if the matter could be discussed later in the day because Mr Carran was coming down. Mr Hamilton responded *This is nothing to do with Daryl* and Ms Murray then said that she was a union member and that Mr Hamilton was aware of that. Mr Hamilton then said he didn't know she was. I'll return to that matter later because Ms Murray said that he was very aware that she was. Mr Hamilton then said that *it has got nothing to do with the Union. This is to do with you....* Ms Murray responded *But you're saying that it's serious misconduct, so...* and Mr Hamilton confirmed that was how it was being treated. There was no agreement to delay the meeting until Mr Carran was available. That was not, I find, the action of a fair and reasonable employer on being advised that an employee wanted representation from their Union in the circumstances set out above.

[39] In conclusion, I find the suspension was procedurally and substantively unjustified.

Was the finding of serious misconduct and the formal written warning given to Ms Murray justified?

[40] The allegation that Ms Murray was facing changed. In the undated letter handed to her on the day of the suspension there was reference to the content of the document being untrue and written with the specific intent to misrepresent and damage the reputation of the company and its directors. At the meeting during which she was suspended, Ms Murray responded at one point that she had not written the document. Mr Churchman asked for clarification of the company rule that Mr Hamilton said Ms Murray had broken because the extract sent to him from the employee handbook was marked beside the rule - *misrepresentation of SPM or any shareholders to obtain personal advantage*.

[41] In a letter dated 29 May to Mr Churchman, Mr Hamilton wrote that the allegation was distribution of a document that brings the company, its shareholders and its directors into disrepute. He advised the rule relied on in the handbook was not to intentionally mislead or be dishonest and that an employee must act in good faith and not in a manner that brings his/her employer into disrepute. Finally, the letter containing the formal written warning referred to the Union newsletter bringing the company, shareholders and directors into disrepute.

[42] I accept Ms Webster's submission that an employee has obligations of good faith and fidelity. Ms Webster referred me to an Authority determination³ where breaches were found on the part of the employee in the copying of significant employer confidential information to his personal external hard drive without his employer's authority when he resigned.

[43] Ms Webster submits that the admitted action of Ms Murray was a breach of good faith and fidelity because she published the derogatory and critical comments in the newsletter to a wider audience. She places reliance on an Authority determination *Blylevens v Kidicorp Limited*⁴. In that case the employee was found to have committed serious misconduct by liking on Facebook what was described in that case as derogatory and critical posts about her employer and publishing a comment on the post. By doing that the posts were published to a wider audience including staff and parents with children at the respondent's centre.

³ *Tag Oil (NZ) Limited v James Winston Watchorn* [2014] NZERA Wellington 58

⁴ [2014] NZERA Auckland 373

[44] Ms Webster submits that the actions of Ms Murray handing out the union news to other union members⁵ had the same effect of publication to other workers.

[45] The sort of 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 relationship⁶. A union member or delegate distributing a union newsletter to union members in the workplace is not the sort of conduct that would in the normal course of events be considered serious misconduct. It is commonplace in many workplaces and if seen would not be something reported to a manager as a troubling or concerning event.

[46] There was no evidence that there was any policy or rule about the conduct of distributing union newsletters at SPM. *Blylevens* is distinguishable on that basis as there was a policy about social media⁷. Ms Murray was not alerted to the possibility of a finding of serious misconduct and/or a formal written warning with any repeat of such behaviour likely to result in dismissal if she distributed the April 2015 Union newsletter to a few union members before work started for the day. Her written evidence was that she thought she was entitled to distribute the newsletters as she often acted as the point of contact between the Union and Union members at the Awarua plant.

[47] I turn to the newsletter itself as I need to objectively consider what a fair and reasonable employer could do in all the circumstances. The newsletter does, as Mr Churchman accepts in his submission, have statements that are critical and unfavourable of the respondent, its directors and the Talley family. Mr Churchman submits that the newsletter reflects what has been said in various judgments and determinations of the Employment Court and Authority and it is not clear how anyone was misled or dishonest. He submits that there was nothing incorrect or inaccurate in the newsletter. Ms Webster submits that Ms Murray by handing out the April 2015 Union news breached her duty of good faith and fidelity to SPM because she published the derogatory and critical comments to a wider audience.

⁵ There was no evidence to support that the newsletter was distributed to any workers who were not union members.

⁶ *Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZ 483 (CA) at 487.

⁷ I do not reach any conclusion on the lawfulness of such a rule about distribution of union material if there was one.

[48] There have been a number of cases between SPM and its parent companies and the Union from which it is clear there are significant differences and difficulties between them. Mr Churchman's submission is eminently sensible that much of what had transpired between the union and SPM and its parent companies is irrelevant to Ms Murray in her role at that time as a worker at SPM. That was not the situation in *Blylevens*. What Ms Blylevens liked on a Facebook post was not irrelevant to her.

[49] The distribution of the newsletter was only to Union members who are entitled to receive information from their Union. The Union wrote the newsletter not Ms Murray. Although Ms Murray said she knew of SPM's view about the Union she did not know the company would view her conduct in distributing the newsletter as serious misconduct or even misconduct. The changing nature of the allegations in my view supports a lack of clarity on the part of SPM about what she had actually done wrong in terms of its rules. I am not satisfied that a fair and reasonable employer could conclude in all the circumstances that the distribution of the April Union newsletter by Ms Murray was serious misconduct.

[50] Counsel's submissions included reference to freedom of expression and association rights in the New Zealand Bill of Rights Act 1990. I do not consider I need to address those matters.

[51] I do not find that a fair and reasonable employer could have issued Ms Murray with a formal written warning. That was a disproportionate response to the conduct. The appropriate course of action a fair and reasonable employer could have taken would have been to raise the concerns about the content of the April 2015 newsletter with the Union if it was thought to have been inaccurate or defamatory. Mr Hamilton could have then talked to Ms Murray about distribution or further distribution of the April Union newsletter in the work place.

[52] Ms Murray has a personal grievance that she was unjustifiably disadvantaged in her employment for the reasons set out above.

Did SPM omit to offer or afford Ms Murray the same terms of employment and conditions of work offered to other similar employees for the bobby calf season?

[53] This claim was pleaded as an unjustifiable action causing disadvantage although the wording of the action or omission is similar to s 104 of the Act which

concerns discrimination. Ms Webster approached that matter as one of discrimination in her submissions but I intend to consider it as a disadvantage claim as pleaded. Disadvantage is a broad concept.

[54] The Court of Appeal in *Auckland City Council v Hennessey*⁸ stated this about an unjustified action - *its integral feature is the word unjust-that is to say not in accordance with justice and fairness. A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness.*

[55] The Authority needs to consider whether Ms Murray had a reasonable expectation of being called back for the bobby calf season and if she did whether there was some justifiable reason that she was not called back or was it for reasons other than those which were fair and just.

[56] Ms Murray said that she had been called back the previous nine seasons since 2007 and could have worked four weeks before she departed to Norway on the bobby calf season. She had previously worked for the bobby calf season for a shorter period before departure overseas. The evidence supports that some of the other employees who travelled overseas to Norway or Iceland were called back to work the bobby calf season. Mr Hamilton said that at the time processing started SPM had workers available to work through the season whereas Ms Murray was travelling overseas.

[57] I find that Ms Murray had a reasonable expectation to be called back for the season in 2015 notwithstanding that she was going overseas after a few weeks. She had worked on the bobby calf season in those circumstances previously.

[58] I then turn to whether there was a justifiable reason for not calling Ms Murray back. Mr Hamilton in his oral evidence said that there was a slow stock flow at the beginning of the processing of bobby calves and not all A grade slaughter persons were required. He said that another worker, Tom, who was also going to Norway was engaged ahead of Ms Murray due to having longer length of service. Aside from what was said in oral evidence by Mr Hamilton there was no other evidence given to support this.

[59] I find that I must treat that evidence with some caution. Ms Murray telephoned Mr Hamilton on or about 23 July 2015 about the bobby calf season but he

⁸ [1982] ERNZ SelCas 4 (CA) at 9

did not advise her of the reasons she was not called back except to say that her services were not required at that time. If it was a situation as straightforward as Mr Hamilton stated in his oral evidence then it is surprising he did not afford Ms Murray the courtesy of a fuller explanation at the time.

[60] Significantly, Mr Churchman then wrote to Mr Hamilton on 23 July 2015 by email about the bobby calf season commencing the following week and asked for an urgent response as to why Ms Murray had not been called back to work. Mr Hamilton failed to respond at all. I do not therefore have any statement made by Mr Hamilton at the time as to why Ms Murray was not re-engaged which would be the most reliable evidence.

[61] I have then considered whether there is any basis for Ms Murray's belief that she was not called back because of her union involvement. Ms Murray in her evidence said that she thought the reason that she was not called up for the bobby calf season and then the 2015/2016 season was because she helped the Union. She said SPM wants other workers to know that they are better off if they do not join the Union and that SPM have created a climate of fear where people are afraid of retribution if they are seen talking to a Union official. She said some Union members will only stay as members because they know the Union will not tell the respondent they are members. Her evidence was that Mr Hamilton and the other senior managers take every opportunity to run down the Union and its officials.

[62] Mr Carran gave evidence about SPM managers intimidating Union workers and representatives and frustrating the Union attempts to access the plant. He said that Ms Murray was one of the few workers who was not intimidated by SPM and was publically identified as a Union member. Mr Carran said in his evidence that there is a fear at the Awarua plant amongst workers that if you are in the Union you will not get a job back at the plant. Mr Carran says that Ms Murray was more confident than some of the other workers and she was prepared to be more active than many others. Even then he said that Ms Murray asked him when he attended on the plant not to specifically talk to her for fear of repercussions. He says that the actions against her are to make a public example of her to other workers.

[63] Mr Hamilton denies that this is the position. He denies that SPM has been trying to eliminate the Union from Awarua or that there is a climate of fear created

where people are afraid of retribution if they talk to a Union official. He does not accept that SPM management badmouth the Union and its officials.

[64] I am aware there have been cases between the parties that support difficulties for the Union in accessing the Awarua plant. I need to reach views on the evidence I heard in this case whether there was a justifiable reason why Ms Murray was not called back to undertake the bobby calf season work as she had done over the previous nine seasons or whether, on the balance of probabilities, it was a retaliatory action because of her activities in distributing a Union newsletter and then raising a grievance.

[65] Mr Hamilton denied that he knew Ms Murray played an active role in the Union. He denied that Ms Murray had accompanied about 100 individuals when they had had meetings in Mr Hamilton's office as a support person in her unofficial Union role as delegate of the slaughter board. He did not accept as Mr Carran and Ms Murray said in their evidence he had sent Ms Murray a drug policy which was a significant issue between SPM and the Union. Mr Carran said that Mr Hamilton knew Ms Murray was the delegate.

[66] I prefer Ms Murray and Mr Carran's evidence that Mr Hamilton knew Ms Murray played an active role in the Union. She had indicated that she was the delegate in some of her employment sheets when she was inducted each season over the period of time that she worked at SPM. I conclude it likely that she supported other employees at meetings with Mr Hamilton. It would seem unlikely that the role she played in the Union went unnoticed at SPM.

[67] The evidence I heard about SPM's response to what seemed like innocuous actions supported an effort to limit and frustrate a Union presence on the Plant. An example is the delegate elections. Mr Carran said SPM has made it impossible for the Union to hold an election for site delegates at the Awarua plant and that managers had taken down nomination forms from noticeboards and removed them from tables. This had meant that Ms Murray had to be an unofficial delegate for Union purposes.

[68] Mr Hamilton said that the reasons the forms were removed was the proper permission process for putting them up on the notice board had not been used. When Mr Churchman asked Mr Hamilton to confirm to the Authority that if the authorisation process was used the forms could go on the notice board Mr Hamilton

would not commit to that. That is notwithstanding in his written evidence Mr Hamilton had stated that if the correct procedure had been followed the notice could have been posted.

[69] The fact that another worker would report the distribution of Union newsletters by Ms Murray shows that there is awareness on the part of the workers at the plant about the view SPM has about the Union.

[70] Ms Murray was a straightforward witness. She initially hesitated in answering yes to my question of whether she had previously distributed Union newsletters in the plant. I found that quite telling.

[71] I have stood back and considered the evidence and in particular the failure to give Ms Murray or Mr Churchman reasons why Ms Murray was not called back before the bobby calf season started.

[72] I find on the balance of probabilities that it is more likely than not that the failure to engage Ms Murray for the bobby calf season was related to the issues about the Union newsletter and the grievance raised.

[73] To fail to call Ms Murray back for the bobby calf season in those circumstances was unjustified because it was not in accordance with justice or fairness. Ms Murray was disadvantaged because she lost out on wages for a period. Ms Webster suggests this was three weeks but I find that four weeks is the period of wages lost because Ms Murray did not leave for Norway until 31 August 2015.

Was Ms Murray unjustifiably dismissed from her employment with SPM for the 2015-2016 night shift?

[74] I find that Ms Murray by virtue of the letter from Mr Hamilton dated 5 May 2015 was a person intending to work for the 2015/2016 season and therefore an employee within the meaning of s 6(1) of the Act. She is able to pursue a personal grievance of unjustified dismissal.

[75] I have then considered why Ms Murray was not re-engaged for the season. SPM say that Ms Murray was not re-engaged because she did not, as stated in the letter of 5 May 2015, make contact with the company upon her return until she had been back from Norway for 14 days. Further, that SPM attempted to contact her but

the number in the database was disconnected. Finally, in breach of clause 4.7 of Ms Murray's employment agreement she did not keep the company advised of her current address and phone number and it was not unreasonable of SPM if a worker cannot be contacted on the number provided for them not to be engaged. That is because of the large number of workers being engaged in a short timeframe.

[76] Ms Murray did not make contact with the company until she emailed Mr Hamilton on 17 November 2015 when she knew that other employees from Norway had started back on day shift and the night shift had started.

[77] Mr Hamilton placed some weight in his evidence on the failure by Ms Murray to provide a cell phone number to SPM. Ms Murray in her evidence said that she was sure she had. As it transpired Ms Murray is absolutely correct. Her employee forms that she completed at the start of each season showed SPM had full contact details including her mobile number, land line, address and the home number of her mother.

[78] The Court of Appeal in *E N Ramsbottom Limited v Chambers*⁹ stated that an employer must be cautious in drawing an inference that an employee has abandoned their employment. I accept Mr Churchman's submission that an attempt to contact a land line number when Ms Murray was out of the country and had been promised a job on her return is not an adequate inquiry on the part of SPM for it to conclude that she had abandoned her employment. That conclusion is strengthened in light of the fact that Ms Murray had provided her cell phone number to SPM and nobody had taken the obvious and simple step of checking the employee information forms.

[79] I was concerned that no check had been made of the employee forms by SPM in preparation for this matter. This is particularly so because Mr Churchman in a memorandum of 2 March 2016 to the Authority sought production of documents from SPM including records of Ms Murray's contact details. Ms Pidduck responded to Mr Churchman by memorandum dated 4 March 2016. She stated that the respondent accesses an electronic employee data base for staff contact information. There was no mention of the underpinning information that should be in the data base which is the information the employee provides each season about their contact details. Ms Pidduck said that SPM sent a copy of Ms Murray's personnel file to Mr Churchman

⁹ [2000] 2 ERNZ 97

on 23 February 2016 but there was no provision of the employee information sheets with any contents of that file.

[80] I find that SPM failed to deal in good faith with Ms Murray and make further enquires to ascertain her intention regarding work that season. Instead, reliance was placed on one call before Ms Murray was back from Norway to a disconnected land line. Ms Murray had not clearly evinced an intention not to return to work that season even though she did not immediately make contact with SPM. Other employees who worked in Norway had been contacted or had contacted SPM and had returned to work for the season. The evidence supported Ms Murray was a hard worker and there were no performance issues with her work. I accept Ms Murray's evidence that Mr Hamilton could still have engaged her later in the season if there was a genuine reason she had not been re-engaged because SPM continued to engage several new workers throughout the season.

[81] Ms Murray was a person intending to work for the 2015/2016 season with SPM. SPM deemed that she had abandoned her employment and she was not offered any further work. I find that Ms Murray did not abandon her employment but was unjustifiably dismissed by SPM.

[82] Ms Murray has a personal grievance that she was unjustifiably dismissed from her employment.

Remedies

[83] I now turn to consider the remedies for the personal grievances that I have found of unjustified action causing disadvantage and unjustified dismissal.

Unjustified action causing disadvantage grievance

Suspension (lost wages)

[84] Ms Murray is entitled to be reimbursed for the period that she was on unpaid suspension. Her evidence was that this was for a period of three days and although her wages vary she estimated that she had lost \$640 during this period of suspension.

[85] Subject to any findings as to contribution, South Pacific Meats Limited is to pay to Katrina Murray the sum of \$640 gross being reimbursement of wages lost

during the period of unpaid suspension under s 123(1)(b) of the Employment Relations Act 2000.

Bobby Calf season (lost wages)

[86] Ms Murray is entitled to be reimbursed for a period of four weeks when she was not re-engaged for the bobby calf season in circumstances where she had habitually worked the bobby calf season. Ms Murray said that on average she received about \$1000 per week. She thought SPM would be able to indicate more accurately the actual loss. SPM have not provided information to suggest that is an incorrect basis for calculation.

[87] Subject to any findings as to contribution, South Pacific Meats Limited is to pay to Katrina Murray the sum of \$4000 gross being reimbursement of wages lost under s 123(1)(b) of the Employment Relations Act 2000 during the bobby calf season.

Compensation

[88] Ms Murray maintains her claim for \$1000 under this head for her grievance of unjustified action causing disadvantage. I accept there is ample evidence to support that claim by virtue of the unjustified suspension, the fact it was unpaid and the unjustified formal written warning. The evidence supports those matters impacted on Ms Murray. Initially Ms Murray wanted the warning removed from her record but given that she is no longer an employee at SPM that is not pursued.

[89] Subject to any findings as to contribution South Pacific Meats Limited is to pay to Katrina Murray the sum of \$1000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

Contribution to unjustified action causing grievance disadvantage

[90] I have found that Ms Murray has a personal grievance and the Authority is required in those circumstances to consider whether the actions of Ms Murray contributed towards the situation that gave rise to the personal grievance and, if so, reduce the remedies that would otherwise have been awarded.

[91] Ms Webster submits that Ms Murray read the Union news and therefore knew of its critical and derogatory content but nevertheless handed it out. The content of

the newsletter as earlier set out was largely irrelevant to Ms Murray. Although she had read the Union newsletter she was not in a position to make an informed assessment about whether the newsletter was about what had been said in judgments and determinations about the relationship between the Union, SPM and its parent companies or whether it was defamatory and untrue. She did not know of any rule that she was breaching in distributing the newsletter and indeed had previously distributed newsletters.

[92] I do not find that Ms Murray's actions in distributing the newsletter were blameworthy and the above amounts are not reduced for reason of a finding of contribution.

[93] I make the following orders in respect of the grievance of unjustified disadvantage:

(a) South Pacific Meats Limited is to pay to Katrina Murray the sum of \$640 gross being reimbursement of wages lost during the period of unpaid suspension under s 123(1)(b) of the Employment Relations Act 2000.

(b) South Pacific Meats Limited is to pay to Katrina Murray the sum of \$4000 gross being reimbursement of wages lost under s 123(1)(b) of the Employment Relations Act 2000 during the bobby calf season.

(c) South Pacific Meats Limited is to pay to Katrina Murray the sum of \$1000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

Unjustified dismissal grievance

Lost Wages

[94] Ms Murray is currently living with her mother in Katikati in the Bay of Plenty. After it was clear that she would not be re-engaged at SPM she continued living in Katikati where her mother is undergoing chemotherapy. Ms Murray confirmed she has other family living in Katikati who would be able to assist her mother with chemotherapy and I do not find her mother's treatment would have prevented her returning to SPM. Ms Murray was still paying rent for a flat in Invercargill at the time of the Authority investigation. Ms Murray said that she had applied for jobs at

Waihi Meats, Ag First Kiwifruit, Humes pack house, a honey producer and at Woolworths. I accept as Ms Webster submitted there was no written evidence of her applications. Ms Murray had not found another role at the time of the investigation meeting and puts her start date had SPM contacted her as 9 November 2015. At the time that Ms Murray signed her statement of evidence on 17 February she had been without work for 16 weeks.

[95] Ms Murray did make attempts to find other work. She was limited though by her decision to remain in Katikati as there were not as many employment opportunities in that town and both meat processing plants were about an hour drive away. Had Ms Murray been permitted to return to SPM she would have in all likelihood worked the entire season. I do take into account her failure to make contact with SPM until a fortnight after she had returned to New Zealand. Taking all matters into account in the exercise of my discretion under s 128(3) of the Act, including that SPM had all of Ms Murray's contact details which seems to be an important reason it says that she was not re-engaged, I order a sum payable greater than 3 months ordinary time from 23 November 2015 to the date of the investigation meeting on 23 March 2016. That is a period of 17 weeks and 2 days.

[96] Subject to issues of contribution and using the figure of about \$1000 per week as set out earlier South Pacific Meats Limited is to pay to Katrina Murray the sum of \$17,400 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.

Compensation

[97] Ms Webster submits that there was minimal evidence of the effect of the grievance. Ms Murray seeks the sum of \$10,000 for compensation. Ms Murray was coping with her mother's illness at the time she was advised that she was not able to return to SPM. I accept that she felt that she had been treated very unfairly and I concluded from her evidence that she felt powerless in her dealings with Mr Hamilton. Ms Murray had worked 10 seasons for SPM and the only attempt to contact her was by way of a land line when it was known she was away overseas. I accept that it was difficult financially for her to be suddenly without work.

[98] Ms Murray in her written evidence said that she felt humiliated to know that the other workers were back at work and that they must think she had done something wrong.

[99] Subject to issues of contribution South Pacific Meats Limited is to pay to Katrina Murray the sum of \$10,000 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

Contribution to personal grievance of unjustified dismissal

[100] I have found that Ms Murray has a personal grievance and the Authority is required in those circumstances to consider whether the actions of Ms Murray contributed towards the situation that gave rise to the personal grievance and, if so, reduce the remedies that would otherwise have been awarded.

[101] The only possible matter in which Ms Murray could be said to have contributed was her failure to contact SPM upon her return to the New Zealand. The previous year the season had not started until December and SPM had all Ms Murray's contact details. The alleged failure to provide those seemed to be the cause of the conclusion that she had abandoned her employment. For completeness I have taken the failure to contact SPM into account in terms of the lost wages. I do not find that Ms Murray contributed to the circumstances that gave rise to the personal grievance and the above amounts are not reduced for reason of a finding of contribution.

[102] I make the following orders in respect of the grievance of unjustified dismissal:

(a) South Pacific Meats Limited is to pay to Katrina Murray the sum of \$17,400 gross being reimbursement of wages lost under s 123(1)(b) of the Employment Relations Act 2000.

(b) South Pacific Meats Limited is to pay to Katrina Murray the sum of \$10,000 without deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

Penalty

[103] The Authority has been asked to consider imposing a penalty against SPM for alleged breaches of good faith. A party to an employment agreement 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. I accept that there were breaches of good faith in this matter. In particular I am concerned at the failure by SPM to respond to Mr Churchman at all when he raised a concern about the bobby calf season and raised personal grievances. Mr Hamilton said that Mr Churchman should have raised these issues with the SPM lawyer as did Ms Pidduck when I asked her to advise the Authority why there had been a failure by Mr Hamilton to respond. Ms Murray's employment agreement provides in clause 27.4 that an employment relationship problem should be raised and discussed with the employee's manager as soon as possible. Ms Murray's manager was Mr Hamilton.

[104] The failure to engage and respond to Mr Churchman on both occasions 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 where both parties are responsive and communicative.

[105] The length of delay and failure to respond was such that I conclude under s 4A(b) it was intended to undermine the employment relationship Ms Murray had with SPM. She had an expectation that her manager would respond within a reasonable period of time. The failure to do so left her uncertain of a future with SPM.

[106] I find there should be a penalty ordered and that it should be paid in full to Ms Murray.

[107] I order South Pacific Meats Limited to pay to Katrina Murray a penalty in the sum of \$2,500.

Costs

[108] 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 submission 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