IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 206
5375250

	BETWEEN	BOTAU RETIRE Applicant
	AND	SOUTHERN PAPRIKA LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Michal Kyriazopoulos for the Applicant Peter Elder for the Respondent
Investigation Meeting:	15 and 25 May 2012
Determination:	18 June 2012

DETERMINATION OF THE AUTHORITY

A. Southern Paprika Limited (SPL) was not justified in giving Botau Retire a written warning in July 2011 and dismissing him in January 2012.

B. Mr Retire's conduct contributed to the situation giving rise to the personal grievance for his dismissal so remedies of lost wages and distress compensation awarded to him are to be reduced by amounts detailed in this determination.

C. After allowing for that reduction of remedies for contribution, SPL must settle Mr Retire's personal grievance by:

(i) Reinstating him to his position as a glasshouse worker from the date of this determination (subject to particular conditions set out in this determination); and

(ii) Paying him 11 weeks ordinary pay in lost wages under

s123(1)(b) of the Employment Relations Act 2000; and

(iii) Paying him $4500 as compensation under s123(1)(c)(i) of the Act.

D. SPL must also pay Mr Retire $3500 as a contribution to the costs of bringing his claim and reimburse him $71.56 for the fee paid to lodge his application in the Authority.

Employment relationship problems

[1] Southern Paprika Limited (SPL) dismissed Botau Retire on 24 January 2012 for disobeying an instruction that it said was lawful and reasonable. He had worked as a glasshouse worker in SPL's capsicum growing and exporting business since April 2009.

[2] Mr Retire's application to the Authority sought resolution of two problems – firstly a personal grievance for his dismissal and secondly a personal grievance about a written warning issued to him in July 2011. The warning was for "*threatening or aggressive behaviour*" in an incident in which he was said to have 'taken matters into his own hands'. He had raised a grievance with SPL about the warning a few days after receiving it but had taken no further steps to challenge its legitimacy until after his dismissal.

The dismissal for refusing to obey an instruction

[3] The instruction was to remain at work on 19 January 2012 rather than attend a Department of Labour mediation for another SPL employee, Kamwengaraoi Kiraua, being held that morning.

[4] Mr Retire, Ms Kiraua and a number of other SPL workers were from the Pacific island republic of Kiribati. Some of those workers were members of Northern Amalgamated Workers Union and Mr Retire was their union delegate. An organiser from that union, Michael Kyriazopoulos was acting as Ms Kiraua's representative at the mediation. Mr Retire had arranged with Ms Kiraua that he would drive her to the

mediation and act as her translator. Ms Kiraua had been on parental leave from her job at SPL and had two infants she had to bring with her as there was no one home to look after them.

[5] On the morning of 19 January Mr Retire told his supervisor that he was leaving work to attend the mediation and would be back in the afternoon. He was told to see SPL human resources advisor Sheryl Lewis before leaving. He went to Ms Lewis's office and spoke with her and SPL production manager Stuart Atwood. During that conversation Ms Lewis also spoke by telephone to Mr Kyriazopoulos.

[6] Mr Atwood and Ms Lewis told Mr Retire that they did not know Ms Kiraua was a union member, that they did not know Mr Retire had planned to attend the mediation, that he had not applied for leave, that Ms Kiraua could drive herself to the mediation and that she did not need translation assistance. They said he was declined leave to attend. They told him if he did go he would be disobeying a lawful and reasonable instruction to remain at work and he could lose his job. After speaking with Mr Kyriazopoulos on the telephone Mr Retire left the premises and attended the mediation. He returned to the workplace at 1.20pm and resumed work. Later that day Ms Lewis issued a notice of a disciplinary meeting to Mr Retire. He and Mr Kyriazopoulos attended that disciplinary meeting a few days later and Mr Retire was subsequently given notice of instant dismissal in a letter from Ms Lewis.

[7] The letter, dated 24 January, gave the following reasons for SPL's decision to dismiss Mr Retire:

> (i) When he had attended an earlier Department of Labour mediation for another union member (on 18 August 2011) Ms Lewis had told him that – in future – he must provide one week's notice if he wanted to attend a mediation during work time; and
>
> (ii) he was under a Performance Improvement Plan regarding his work attendance and that plan expressly required he give one week's notice using a leave form for any time off or any leave;
>
> (iii) both company policy and the collective agreement required one week's notice for annual leave; and
>
> (iv) he was told not to attend the mediation on 19 January but left work to do

so anyway and the company considered his actions to be a refusal to obey a lawful and reasonable instruction.

The warning for threatening or aggressive behaviour

[8] The written warning SPL issued to Mr Retire on 4 July 2011 was about an incident during the 15-minute afternoon 'smoko' break at SPL's Warkworth plant on 10 June.

[9] During the break Mr Retire and another worker, Ruatamaki Riannaba, approached Jamie Hargroves, an SPL management cadet, in an outdoor covered seating area designated as a smoking area at the premises.

[10] Over a period of perhaps as long as 12 minutes, Mr Retire, Mr Riannaba and other workers who were in the smoking area asked Mr Hargroves what he knew about a text message received on a mobile phone used for company business (referred to as 'the duty phone'). They did so because Mr Hargroves had told some of the Kiribati women working for SPL that he had seen a racist text message on the duty phone. The women had told other workers that Mr Hargroves said the text used the phrases "*black dogs*" and "*a black man hanging from a tree*". From what Mr Hargroves told them the women believed those phrases referred to Kiribati workers at SPL and that the text was sent to or by Ryan Manders, SPL's packhouse and logistics manager. Mr Riannaba heard about the conversation from other workers and told Mr Retire about it when he saw him outside the lunch room at the start of the 10 June afternoon break. They saw Mr Hargroves walking over to the smoking area – a covered outdoor area with seating – and followed him in.

[11] Mr Hargroves later reported that he felt threatened by a group of "*boys*", led by Mr Retire and backed up by Mr Riannaba, who asked him about the text. A few minutes after that conversation began Mr Riannaba went to the lunch room and asked assistant supervisor Kaimanga Tenanoa to come and hear what Mr Hargreaves was saying. Around this time Mr Retire used a mobile phone in his pocket to begin recording the conversation. During a later disciplinary meeting about the incident, Mr Retire provided a copy of that recording to Ms Lewis and Mr Atwood.

[12] The recording was around six minutes long. A copy was provided for the Authority investigation. In parts the recording is of poor quality but I listened to it and played segments of it to witnesses at the investigation meeting. From their evidence I understand that the voices of Mr Tenanoa, Mr Retire, Mr Riannaba and another worker called Kaitaake Been can each be heard at different times asking Mr Hargroves questions about the texts he had read on the duty phone. Mr Been's wife was one of the women to whom Mr Hargroves had earlier talked to about the texts.

[13] Mr Hargroves can be heard very clearly at one point in the recording saying one text contained the words "*the best Christmas present I ever had was a black man swinging from a tree*". He can also be heard saying that he had told Paul Stevenson about that text on the phone. Mr Stevenson was part of the SPL management and supervisory team but Mr Hargroves told the men questioning him that Mr Stevenson had said nothing could be done about the text because it was an old phone.

[14] Within moments of the conversation ending Mr Retire rang Mr Kyriazopoulos about what Mr Hargroves had said. Mr Kyriazopoulos promptly rang Mr Atwood who undertook to look into the issue. Mr Atwood then went and found Mr Hargroves. Mr Hargroves told Mr Atwood he was scared because "*the boys were very angry*" and that Mr Retire and Mr Riannaba had "*lead the accusations against him*" and were "*very angry and very threatening*".

[15] In the following days Ms Lewis interviewed at least 14 employees about what they knew about the texts and the discussion with Mr Hargroves.

[16] Following those interviews Ms Lewis and Mr Atwood held disciplinary meetings with Mr Hargroves, Mr Retire, Mr Riannaba, and Mr Been. The outcomes of those meetings were that Mr Hargroves resigned from his job and SPL issued written warnings to Mr Retire and Mr Riannaba. No disciplinary sanction was imposed on Mr Been.

[17] Mr Retire's written warning said SPL had found his actions were misconduct because he had approached Mr Hargroves "*in an aggressive and threatening manner*

and that to do so was not appropriate in any context". He was told to go to management in the first instance if he "*was unhappy with something a co-worker has done or where something has been alleged*". He was also told if he "*took matters into [his] own hands again*", his employment might be terminated.

[18] Around this time Ms Lewis also drafted a notice to staff with the heading "*Findings from Investigation into Alleged Racist Text*". It was dated 5 July 2011 and issued over the name of SPL managing director Hamish Alexander.

[19] The notice explained that the mobile phone was no longer in use and SPL did not know the exact words used in the text. It stated that the text did not relate to Kiribati people and "*in no way were any SPL staff acting in a racist manner*". It continued:

> *[Mr Hargroves] has created many rumours and lies about the alleged text with co-workers and that this has created a problem between staff at work. [Mr Hargroves] felt his move from Point Wells [another SPL workplace] to SPL [at Warkworth] was a demotion and he may have been using this incident to create problems. We understand [Mr Hargroves] has upset a lot of workers and we regret that this has happened. [Mr Hargroves] has chosen to resign from SPL.*
>
> *Some staff members chose to take matters into their own hands and solve the issue themselves without going to management first. Those people involved have gone through a disciplinary process and have been issued with warnings for their actions."*

Issues

[20] The issues for investigation and determination by the Authority were:

(i) whether the 4 July 2011 warning was justified; and

(ii) whether Mr Retire disobeyed a lawful and reasonable instruction on 19 January 2012; and

(iii) if he had, whether a fair and reasonable employer could have decided to dismiss him for serious misconduct in the particular circumstances; and

(iv) if Mr Retire were found to have a personal grievance for the warning and/or the dismissal, what remedies should be awarded, considering

(a) whether reinstatement to his former position (which he wanted) was

practicable and reasonable; and

(b) whether he should be awarded lost wages and compensation for hurt and humiliation; and

(c) whether any remedies awarded to Mr Retire should be reduced for blameworthy conduct by him contributing to the situations giving rise to his grievance or grievances; and

(v) should costs be awarded to either party, depending on the outcome.

[21] As permitted by s174 of the Employment Relations Act 2000 this determination has not set out all evidence and submissions received but states the Authority's findings of facts and law and its conclusions on matters requiring determination. The material considered included written and oral submissions from the representatives, correspondence and other relevant documents provided by the parties, and written and oral evidence given under oath or affirmation by Mr Retire, Mr Riannaba, Mr Attwood, Ms Lewis, Mr Hargroves, Mr Tenanoa, Mr Manders and another SPL employee, Tenanora Beia. Mr Retire, Mr Riannaba, Mr Beia and Mr Tenanoa had the assistance of an interpreter in answering questions and gave their oral evidence partly in English and partly in the Kiribati language.

The 4 July 2011 warning

[22] SPL submitted its decision to issue the warning to Mr Retire followed a thorough investigation from which it reasonably concluded he was co-leader of a confrontation in which Mr Hargroves was "*the victim*" and scared for his safety. In reaching that conclusion SPL had considered all the statements taken from workers who were present at the discussion or to whom Mr Hargroves had earlier mentioned the texts. Ms Lewis and Mr Atwood also listened to the recording of the last six minutes of the incident and considered it confirmed their conclusions about Mr Retire's behaviour.

[23] I find that a fair and reasonable employer could not have come to the conclusions Ms Lewis and Mr Atwood did regarding the incident in light of the evidence they had available.

[24] Their finding of aggressive or threatening behaviour by Mr Retire relied heavily on what Mr Hargroves said about what had happened. However at the time they knew, or should have known, that Mr Hargroves' testimony was not reliable. Ms Lewis had expressed strong conclusions about his credibility in the notice she drafted at the time and issued to staff on behalf of SPL's managing director. She described Mr Hargroves as a creator of rumours, lies and problems for reasons of his own. She could not, fairly, I find take that view at the same time as relying on his account to make negative findings against Mr Retire.

[25] There were at least three significant discrepancies in Mr Hargroves' account that should have been apparent to Ms Lewis and Mr Atwood.

[26] Firstly, he exaggerated the facts by saying a group of around 20 approached him and backed him into a corner – creating the impression of having been ambushed and harassed by an angry mob – but the subsequent inquiries by Ms Lewis and Mr Attwood established there were only about 10 people in the smoking area at the time, some of whom were sitting and listening to the conversation.

[27] Secondly, in what he accepted at the Authority investigation meeting was a lie, Mr Hargroves said to Ms Lewis and Mr Atwood that he had not told the people questioning him what the text contained because he did not feel comfortable about repeating the words. On the recording however, which Ms Lewis and Mr Atwood listened to, Mr Hargorves could clearly be heard describing the text in detail. Other evidence gathered by Ms Lewis also firmly established that he had earlier told several of the Kiribati women about the words used in the text.

[28] Thirdly, although Mr Hargroves complained that he was scared or terrified during the conversation, his voice and tone on the recording – as he himself agreed when asked at the Authority investigation meeting – was relaxed and he and other participants can be heard laughing at some points.

[29] The recording was mostly of the time during which Mr Tenanoa was there and his presence was said to have calmed the tone of the discussion. However Mr Hargroves alleged that during the brief period of conversation before Mr Tenanoa

arrived (which was probably no more than five minutes) both Mr Retire and Mr Riannaba had their fists clenched and stood close to him with their shoulders up. That description, in respect of Mr Retire at least, was not corroborated by the statements of other witnesses who Ms Lewis interviewed in the following days. Some described "*the boys*" as being angry but that phrase did not distinguish between the ten or so Kiribati men who were known to be sitting and standing in the area at the time, some talking and some listening.

[30] Ms Lewis and Mr Atwood accepted Mr Hargroves had felt threatened and scared because some witnesses reported he appeared upset and Mr Atwood found him shaking and with red eyes about fifteen minutes after the smoko break. They also relied on Mr Tenanoa's report that "*the boys were very angry*" and that Mr Hargroves "*would have been beaten up*" if Mr Tenanoa had not joined the conversation.

[31] However there was no reliable information available to Ms Lewis and Mr Atwood that Mr Retire actually threatened or abused Mr Hargroves. The real reason for disciplining him was that he initiated questioning of Mr Hargroves when, in SPL's view, Mr Retire should have referred any concerns about the text to its managers for investigation. There were, I find, grounds for him not doing so in the first instance. Mr Retire had approached Mr Hargroves that day on the basis of information conveyed to him by Mr Riannaba. And Mr Riannaba, as he said in his statement to Ms Lewis on 14 June, understood that Mr Hargroves had already tried to "*put the issue up to management*" but he had told "*the girls*" (referring to the Kiribati workers he had told about the text) that "*management don't care about it*". That is likely to be a true account of what Mr Hargroves said to them because he can be heard on the 10 June recording recounting a similar story about when he had told Mr Stephenson about the text.

[32] In an interview with Ms Lewis on 15 June Mr Stephenson also confirmed that Mr Hargroves had approached him (at some unspecified earlier time) after getting the duty phone and told him "*there was a racist message on the phone referring to niggers*". Mr Stevenson told Mr Hargroves to "*ignore it*" and get on with his work. SPL later treated what Mr Stevenson said as an instruction to Mr Hargroves rather than a casual comment. In the disciplinary meeting with him, Mr Hargroves was

asked to answer the allegation that he disobeyed that instruction from Mr Stevenson by speaking with Kiribati workers about the text.

[33] The evidence of Mr Atwood and Ms Lewis was that Mr Stevenson had not reported his discussion with Mr Hargroves to either of them at the time. However, in light of the belief – mistaken or otherwise – that SPL's management (at least in the person of Mr Stevenson) was not interested in looking into any concerns about the racist text on the duty phone, there was nothing inherently wrong with Mr Retire calmly approaching Mr Hargroves and attempting to establish whether there was any substance to the rumours about the text. His own evidence to Ms Lewis, during her inquiries soon after, and to the Authority investigation much later, was that he had approached Mr Hargroves and asked him some questions in a low voice. Other workers overheard and joined in with questioning.

[34] Mr Been was among those who asked questions and he was subsequently called to a disciplinary meeting about his own part in the incident. However SPL accepted his explanation for his conduct and limited disciplinary sanctions to Mr Retire and Mr Riannaba because those two men had initiated the conversation in which Mr Hargroves later reported feeling threatened. So for Mr Been, the simple act of asking questions was not deemed to be misconduct requiring a written warning.

[35] Neither was Mr Tenanoa subject to any disciplinary action although on the recording available to SPL he can be heard asking forthright questions of Mr Hargroves and telling him that Kiribati people were not happy about the text.

[36] In all the circumstances SPL's warning to Mr Retire was not proportionate or soundly based on evidence sufficient for a fair and reasonable employer to have reached the conclusion such a warning was warranted. Its action in issuing the warning to Mr Retire was unjustified.

The dismissal

[37] SPL submitted its decision to dismiss Mr Retire was what a fair and reasonable employer could have done because he was clearly and explicitly instructed

not to attend the mediation on 19 January and SPL had meticulously met the requirements of s103A before reaching its conclusions.

Was the instruction lawful and reasonable?

[38] SPL's argument about the lawfulness and reasonableness of the instruction given to Mr Retire relied on its interpretation of its collective agreement, SPL's annual leave policy and a performance management plan in place regarding Mr Retire's attendance. SPL contended that the terms of each of those three documents required him to give one week's notice should he wish to be absent from work to attend the mediation. This was reinforced by an express direction given in the following note Ms Lewis had put to the payslip issued to Mr Retire one week after he had attend the 18 August mediation:

> *Absent without leave 18 Aug for Tarnia's mediation, as discussed please ensure you give one week notice if requiring time off.*

[39] The collective agreement (clause 11.2) "*requested*" one week's notice for annual leave. The company policy said production employees "*must*" give seven days notice for annual leave of less than two weeks. His performance plan said he would not be granted "*annual leave, days in lieu or unpaid leave without providing one week's notice*". It stated he must "*plan ahead and fill in a leave form at least one week in advance if you need to take any time off work*".

[40] SPL submitted there was no general right for a union delegate to be released on pay during work time to attend to union matters unless the collective agreement expressly provided for such leave. It relied for this proposition on two Authority determinations which I accept confirm that the issue must be resolved in relation to any applicable express terms interpreted consistently with relevant principles in case law and statute, including good faith obligations under s4 of the Act.[1]

[41] In the disciplinary meeting Mr Retire said he had a duty as a union delegate to go to the mediation with Ms Kiraua and to act as her translator. He also assumed SPL

[1] *Electrical Union Inc v Transfield Services (New Zealand) Limited* (AA 360/09, 12 October 2009) and *Toleafoa v Vodafone New Zealand Limited* [2011] NZERA Auckland 488.

would have known he would be there as he had attended every other union-related mediation. In doing so he also relied on the term in the collective agreement requiring SPL to "*recognise*" the union delegate.

[42] SPL accepted he had attended meetings with its representatives as the union delegate, including disciplinary meetings for union members and collective agreement negotiations (which also involved attending facilitation sessions at the Employment Relations Authority when the bargaining for that agreement became protracted). However SPL argued that, apart from meetings relating to collective bargaining, the events attended by Mr Retire in his capacity as union delegate were held on site, that is 'at work'.

[43] As a result there was, at the time, clearly a dispute as to the interpretation of clauses of the agreement and how they related to one another. The dispute, broadly, was over whether Mr Retire had to take annual leave – after giving one weeks' notice of his intention to do so – if he wished to attend in his capacity as a union delegate some activities or events held away from the workplace. In the company's contention mediations involving individual workers required him to seek and use annual or unpaid leave but not meetings or hearings regarding collective bargaining.

[44] In light of that dispute, and for other reasons given in the remainder of this determination, I have not made any finding as to the lawfulness of the instruction given. Rather, even if the instruction given was lawful (or could be assumed to be so), I find as a question of fact that it was not reasonable in all the circumstances at the time.[2]

[45] SPL argued it reasonably forbade Mr Retire to leave the premises and attend the mediation because, firstly, it was surprised by his request and, secondly, Ms Kiraua did not need his assistance to attend and effectively take part in the mediation.

[46] I doubt whether SPL was 'caught on the hop' to the degree Ms Lewis suggested (my phrase, not hers) by the news that Mr Retire would attend the

[2] *NZ Shipwrights Union v Honda NZ Limited* [1989] 3 NZILR 791,794

mediation. I find it unlikely that she did not have any inkling Ms Kiraua was a union member given that Ms Lewis had known for several weeks that Mr Kyriazopoulos was representing Ms Kiraua and he was unlikely to be providing such assistance to a worker who was not a union member. And while Mr Retire was told in August to apply for leave to attend future mediations, there was no evidence that he and Mr Kyriazopoulos had said or done anything to indicate they accepted he should do so.

[47] However even if Ms Lewis and Mr Atwood were surprised by Mr Retire's intentions (and were concerned about not having had the opportunity to ensure there was another worker who could cover his work in his absence), they were still required to act reasonably in making a decision which affected the ability of Ms Kiraua to participate effectively in the mediation and was consistent with its contractual obligation to "*recognise*" the union delegate.

[48] Acting reasonably in that context required them to consider and balance not only the interests of SPL but also the interests of Ms Kiraua and Mr Retire. What was done and how it was done needed to be just to all parties in the circumstances, not solely the employer.[3] While SPL was not prohibited from acting as a judge in its own cause, in this case, it should have checked with Ms Kiraua and (possibly) the Department of Labour mediator before deciding that Ms Kiraua could drive herself to the mediation (with her two infants) and participate without the assistance of an interpreter solely because Ms Lewis and Mr Atwood considered – from their dealings with Ms Kiraua in the past – that she would not need any such help.

[49] Neither was it sufficient to say that Mr Kyriazopoulos should have made arrangements with the Department of Labour for an interpreter if one were needed. He thought a suitable interpreter had been arranged – the workplace union delegate who was well known to Ms Kiraua.

Were Mr Retire's actions on 19 January serious misconduct?

[50] If my conclusion on the reasonableness of the instruction is wrong, and the

[3] *Aoraki Corp Ltd v McGavin* [1998] 1 ERNZ 601 (CA) at 618 per Richardson P.

instruction was lawful and reasonable, SPL must still establish its conclusion – that Mr Retire committed serious misconduct by not doing as Ms Lewis and Mr Atwood told him on 19 January – was a decision that a fair and reasonable employer could have made in all the circumstances at the time: s103A of the Act.

[51] SPL submitted it had met all the procedural requirements of s103A(3) in putting the allegations to him and considering his responses through a fair disciplinary process. I agree there were no significant flaws of process in that respect. Rather it was a matter of substance in which SPL, I find, failed to meet the necessary standard for its actions and made a decision that a fair and reasonable employer could not have made in all the circumstances at the time.

[52] The decision of the Employment Court in *Yukich v Carter Holt Harvey,*[4] following principles confirmed by the Court of Appeal in *Sky Network Television Ltd v Duncan*,[5] emphasised that disobedience to what an employer said was a lawful and reasonable instruction would not necessarily justify a dismissal where there was a genuine dispute over the employer's interpretation or application of a contractual provision.

[53] In the present case Mr Retire and his union organiser had not accepted SPL's requirement for annual leave to be sought for attendance at activities that the union considered were within the scope of recognition for its workplace delegate. As the Employment Court's decision in *Duncan* made clear, the interpretation by Mr Retire and his union of those disputed terms need not be correct for the limit to be applied to SPL's powers of dismissal in those circumstances:[6]

> *Where, as in the present, there was a bona fide dispute as to those legal rights, the justification for the dismissal should not depend upon the resolution of that disputed interpretation. If it turns out that the employer's interpretation was incorrect then the order will be unlawful and the dismissal unjustified. It does not follow that if the disputed interpretation is resolved in favour of the employer this will necessarily justify the dismissal of an employee who had bona fide grounds for advancing a contrary interpretation and, objectively*

[4] [2004] 1 ERNZ, 78, 101.
[5] [1998] 3 ERNZ 917.
[6] [1998] 1 ERNZ 354, 361.

> *analysed from the viewpoint of the reasonable and fair employer, was not engaged in activities which destroyed the essential trust and confidence or went to the root of the contract.*

[54] I find Mr Retire had a bona fide belief that he was entitled to reject the command given to him and to attend the 19 January mediation.[7] This was reinforced by Mr Retire's oral evidence that he had consulted with Mr Kyriazopoulos over whether it was necessary to have given earlier notice and was told that "*it did not matter*". He had not sought leave to attend the August mediation or other disciplinary meetings for other workers that he attended as a union delegate.

[55] His evidence established that on the morning of 19 January Mr Retire considered he had a duty or obligation to Ms Kiraua in his capacity as a union delegate. Combined with his bona fide belief that SPL could not make him apply for leave in those circumstances, his action in leaving was not wilful disobedience and could not amount to the serious misconduct asserted by SPL.

[56] As noted by the Employment Court in *Yuckich* – a case of a union delegate dismissed for attending a work-related course without prior leave – a short period of absence in such circumstances was "*not such a fundamental breach of his contract*" that the employer could lose trust and confidence in the worker.[8] In Mr Retire's case, Ms Lewis saw him during this absence – that is at the mediation with Ms Kiraua (and at which the matter was settled) – so she knew he was at a work-related event rather than skiving for reasons of his own.

[57] Mr Retire's dismissal for serious misconduct, in the circumstances in which it occurred, was not justified for reasons similar to those given in the *Yukich* case:[9]

> *Although CHH asserts Mr Yukich was not entitled to act unilaterally in absenting himself where there was a dispute about his entitlement to do so (the dispute about the nature of business leave), it was not open to the company to use this disputed interpretation of the collective agreement to substantiate his dismissal. I do not accept CHH's case that in these circumstances Mr Yukich had a fundamental obligation to follow his employer's instructions and to*

[7] *Duncan* (EC) at 359.
[8] *Yuckich* at 104
[9] *Yukich* at 105.

> *put his employer's interests first. To accept that as a legitimate practice would negate, in practice, the ability of an employee to assert a contractual entitlement. It would also ignore the legislation's on-the-job dispute resolution mechanism.*

[58] There is a further public policy reason for doubting that a fair and reasonable employer would have found Mr Retire's attendance at the mediation was serious misconduct. The applicable collective agreement referred to "*common sense guidelines for resolving disputes and grievances*" including mediation. The statutory framework under which the agreement was made promotes mediation as the primary mechanism to resolve issues between the parties (s3(a)(v) of the Act). Although always subject to the particular circumstances, it will generally not be reasonable for a union delegate to face disciplinary action from their employer for having attended a Department of Labour mediation to assist and support a union member.

[59] In light of the findings made I have not needed to make any determination about Mr Retire's additional claim of disparity of treatment. He alleged SPL had imposed harsher sanctions on him than other employees disciplined for breach of company rules or requirements.

Remedies

[60] Having found SPL was not justified in issuing a written warning to Mr Retire and dismissing him, I have considered remedies for his personal grievances.

Reinstatement

[61] SPL submitted reinstatement of Mr Retire was "*not appropriate*" because his defiance of the instruction not to attend the January mediation meant it could have no trust and confidence he would obey instructions given to him in future. Having found SPL was not justified in the conclusion it reached on the January instruction, reinstatement cannot be denied on that basis.

[62] Mr Retire's evidence was that he still wanted to go back to his job at SPL, was still able to do the job and believed he could work happily with other employees and managers there.

[63] In considering Mr Retire's application I was mindful of the following longstanding guidance of the Employment Court about the exercise of the discretion to award reinstatement:[10]

> *"The important criterion is that employees are entitled not to be deprived of their employment unjustifiably and when they have been they ought ordinarily to be put back, if that is their wish. That would be a proper exercise of a discretion conferred on the Tribunal for the benefit of employees unless there are features in the case or indications pointing in a contrary direction that outweigh the employee's right to have his or her job back. Factors that produce that result ought to be substantial reasons and not mere assertions by an employer that it does not want to be forced to employ the employee whom, it will be recalled, it should never have dismissed in the first place. Such an assertion, if anything, aggravates the injury and renders reinstatement an even more compelling imperative. That is so notwithstanding the alteration in emphasis on reinstatement in the current statute. While each case must be determined on its own facts, the statistics given above indicate that the Tribunal is not mindful to an adequate degree that it is called upon to be the impartial referee in a playing field dominated by the goal of job protection.*
>
> *"That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals."*

[64] That guidance was given at a time when the then-applicable legislation – the Employment Contracts Act 1991 – provided reinstatement as a remedy to settle a personal grievance of unjustified dismissal but did not accord that remedy any primacy over money remedies. That is again the statutory position following the amendments to the present Act effective from 1 April 2011.

[65] Having regarding to the Court's guidance and the statutory criteria and because Mr Retire seeks reinstatement, he should be awarded that remedy unless it is not practical and not reasonable to do so or the remedy must be denied due to factors considered under the s124 inquiry about contributing behaviour by the employee.

---

[10] *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at 436.

[66] Practicability concerns the prospects for successfully re-establishing the employment relationship.[11] It involves the question of whether Mr Retire would be a sufficiently harmonious and effective member of SPL's workforce if he were reinstated to his former position as a glasshouse worker.[12] Assessing the reasonableness of reinstatement requires "*a broad inquiry into the equities of the parties' cases*" and into the prospective effects of an order for reinstatement not only on Mr Retire and SPL but also any relevant third parties.[13]

[67] SPL did not meet the onus on it to establish that reinstatement of Mr Retire to his former position was not practicable and reasonable. The evidence from Ms Lewis and Mr Atwood was sparse. In answer to a question Mr Atwood described Mr Retire as "*an OK worker*" and Ms Lewis said he was "*an OK picker*" who proved to have good skills as a pruner and a twister.

[68] I find reinstatement is practicable because he was accepted as an "*OK worker*" and there was no evidence that his former position was not available or that he would not be able to be work harmoniously with others. The parties have the means to resolve any further dispute over whether notice of leave is required to attend to some activities as a union delegate – by direct negotiation or with mediation assistance or by seeking a determination of the Authority on the issue. Those are the dispute resolution steps set in the collective agreement so the parties must have accepted those were practicable and reasonable measures to use if necessary.

[69] I have also considered whether reinstatement was reasonable given SPL had imposed a Performance Improvement Plan (PIP) on Mr Retire due to its concerns about his work attendance. However I find the PIP was itself unreasonable because it put him under the threat of disciplinary consequences for some absences that were, in fact, statutory entitlements.

[70] SPL's PIP policy is triggered when attendance is said to drop below 45 per

---

[11] *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 286 (EC)
[12] *Northern Hotel IUOW v Rotorua RSA Inc* (1989) ERNZ Sel Cas 535, 540 (LC).
[13] *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [65] and [68].

cent. However attendance is marked "*bad*" for a whole fortnight if there is a single absence (where for some hours or a whole day) at any time in that period. 'Bad' attendance includes use of sick leave or bereavement leave, and, in Mr Retire's case, included time he was involved in legal strike action. Two of the days for which he received a 'bad' mark were for being on strike during negotiations for a collective agreement and because he had not given one week's notice of that absence. Another two days were for days for which he had paid sick leave entitlement. I doubt PIP disciplinary measures are fairly deployed against workers for using their statutory rights to strike or take sick leave or use bereavement leave.

[71] Another three days were marked "*bad*" because he clocked out at 4pm – the usual finishing time – rather than working until 5pm with other workers who were asked to work later on those days. Although he may not have addressed that directly with the supervisor or manager arranging for workers to stay later, I am satisfied his absence was related to a dispute as to whether he was bound by a new collective agreement term providing for hours to be extended for short periods (clause 1.3) or was exempted due to a supposed 'grandparenting' provision retaining more favourable hours for some workers that was also included in the agreement (clause 1.8). The issue is more properly addressed as a dispute rather than by use of PIP disciplinary measures.

Lost wages

[72] Mr Retire sought lost wages for the 16 weeks period from his dismissal until the date of the investigation meeting. He had no earnings in that period, surviving on a WINZ benefit. He had applied for a supermarket job and some other unspecified jobs advertised in newspapers. In the week of the investigation meeting he was about to start a temporary part-time warehouse job he had gained with WINZ assistance.

[73] Without supporting documentation the evidence Mr Retire provided of his attempts to mitigate his loss was inadequate to grant lost wages for the full period sought. Instead I assessed the amount he could be awarded for lost wages under s123(1)(b) of the Act as being limited to the 12 weeks ordinary time remuneration provided under s128 of the Act.

Compensation for humiliation, loss of dignity, and injury to the feelings

[74] Mr Retire said he felt ashamed as a result of his dismissal and being subject to ridicule from some people in his community when he believed that he had "*been doing things the right way*". He gave no evidence of any similar feelings regarding the warning.

[75] The humiliation, loss of dignity and injury to his feelings as a result of his dismissal by SPL should be compensated for by a modest award of $5000 under s123(1)(c)(i) of the Act.

Contribution

[76] SPL submitted that "*in the unlikely event*" Mr Retire's personal grievance application succeeded, remedies should be reduced by 100 per cent due to contribution.

[77] I find no blameworthy conduct by Mr Retire contributed to the situation giving rise to his personal grievance regarding the written warning.

[78] There was an element of contribution by him to the situation that gave rise to his dismissal. He knew that SPL disputed his right to attend off-site mediations with the Department of Labour. Although he disagreed with that view, he could have initiated discussions with the company about it following the August mediation. It would also have been reasonable to give the company some notice of his intended absence from the workplace on 19 January rather than assume it would be anticipated. It would have allowed SPL to make alternative arrangements to cover any necessary work he might otherwise have done that morning. Although he had relied on his union organiser for advice on what to do, the cost for having acted on that advice falls on him.

[79] There was an obligation of good faith on Mr Retire, and his organiser, to do more to work out the representation and recognition issue with SPL rather than each

party simply acting on its own interpretation of what was right. Failing to do so should be marked by a reduction of one week in the lost wages award (around 8 per cent) and a reduction of $500 in the distress compensation awarded (10 percent). There is to be no reduction to the remedy of reinstatement as it is not amendable to partial reduction.

Orders

[80] In summary, the orders made (after allowing for the reduction for contribution) are for SPL to settle Mr Retire's personal grievances by:

(i) Reinstating him to his position as a glasshouse worker from the date of this determination (subject to particular conditions set out below); and

(ii) Paying him 11 weeks ordinary remuneration under s123(1)(b) of the Act; and

(iii) Paying him $4500 as compensation under s123(1)(c)(i) of the Act.

[81] The order for reinstatement is subject to the following conditions:

(i) Mr Retire is to be reinstated to SPL's pay roll from the date of this determination; and

(ii) SPL may, at its discretion, direct Mr Retire not to return to work for a period of up to 14 days; and

(iii) During that period of up to 14 days SPL may direct Mr Retire to undertake such retraining and reorientation activities it deems necessary for him to resume duties at its premises; and

(iv) The parties are to seek mediation assistance to resolve any problems re-establishing the working relationship.

Costs

[82] The parties' representatives agreed during closing submissions that costs could by determined by the Authority on its usual tariff basis and without seeking further

submissions. I have done so using the familiar principles.[14]

[83] Mr Retire has been successful in his substantive claims and costs follow that event. Costs may be awarded for the services of his union organiser as his representative. Although the investigation meeting went from 10am until after 7pm on one day and reconvened at a later date for an hour-and-a-half of submissions, I consider costs can reasonably be set on the basis of the notional daily rate for one day. There are no factors requiring an upward or downward adjustment of the rate.

[84] SPL must pay Mr Retire $3500 as a reasonable contribution to the costs of bringing his personal grievance application to the Authority. SPL must also reimburse him for the fee of $71.56 paid to lodge the application in the Authority.

Robin Arthur
Member of the Employment Relations Authority

[14] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.