

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 36
5553001

BETWEEN JAKE SIM
Applicant

AND SOUTH PACIFIC MEATS
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Jeff Goldstein, Counsel for the Applicant
Christine Pidduck, Counsel for the Respondent

Investigation Meeting: 5 November 2015

Submissions Received: At the investigation meeting and on 16 December 2015

Determination: 30 March 2016

DETERMINATION OF THE AUTHORITY

- A. Jake Sim was unjustifiably disadvantaged by his suspension and unjustifiably dismissed.**
- B. Within 28 days of the date of this determination South Pacific Meats Limited is to pay Jake Sim:**
- (i) lost remuneration for his suspension period ending on 6 March 2015, calculated on the basis set out in this determination, plus 5% interest on any outstanding amount. Interest is to be calculated from the date of dismissal until the date of payment.**
 - (ii) lost remuneration for the period ending on 22 March 2015 calculated on the basis set out in this determination less 20% for contribution, plus 5% interest on any outstanding amount. Interest is to be calculated from the date of**

dismissal until the date of payment.

C. Within 28 days of the date of this determination South Pacific Meats Limited is to pay Jake Sim compensation of:

- (i) \$2,000 under s 123(1)(c)(i) of the Employment Relations Act for his unjustified suspension;**
- (ii) \$4,800 under s 123(1)(c)(i) of the Employment Relations Act for his unjustified dismissal.**

D. Within 28 days of the date of this determination South Pacific Meats Limited is to pay a penalty of \$2,000 to the Employment Relations Authority for payment into the Crown Account.

Employment relationship problem

[1] Jake Sim worked for South Pacific Meats Limited (SPM) as a maintenance electrician from 18 July 2011 until he was summarily dismissed on 6 March 2015. He says his dismissal was unjustified.

[2] Mr Sim also says he was unjustifiably suspended and not paid during that suspension. He claims that SPM breached its duty of good faith to him.

[3] He also claims SPM breached express terms of his individual employment agreement (IEA) by:

- failing to provide him with a safe workplace;
- failing to comply with clause 8.31 (re suspension) of his IEA;
- failing to pay his notice period; and
- failing to follow a fair process when dismissing him.

[4] Mr Sim claims a penalty for each breach of SPM's duties to him. He says the penalty should be paid to him.

[5] SPM says Mr Sim was justifiably dismissed because he sent emails and text messages which breached his duty of good faith, brought SPM into disrepute and destroyed the required level of trust and confidence necessary in the employment relationship.

[6] SPM says if there were any breaches of fair process, they were minor and did not result in Mr Sim being treated unfairly.

[7] It also says that if I find SPM unjustifiably dismissed Mr Sim he significantly contributed to the situation leading to his personal grievance. Therefore, I must reduce any remedies accordingly.

[8] I have issued this determination outside the statutory period of three months after receiving the last submissions from the parties. I record that the Chief of the Authority has decided under 174C(4) of the Employment Relations Act 2000 (the Act) that exceptional circumstances existed for providing this written determination of findings later than the latest date specified in s 174C(3)(b) of the Act.

Factual background

[9] Clause 4.2 of Mr Sim's IEA required him to work a minimum of 45 hours a week. His normal hours per day were between 6 am and 4 pm, inclusive of a 30 minute unpaid lunch break. Clause 4.2 also said:

... in order to perform their duties effectively the employee may be required to work additional hours as necessary. ... These hours may be changed, after consultation, to suit production/business needs ...

[10] On 17 April 2014 Dean Burgess, SPM's Plant Manager, sent an email to Mr Sim and other employees:

... this is to confirm work SAT 19/04/14 lamb boning and freezers only.

[11] Mr Sim replied:

I won't be there, have plans with family. Next time can we have more than 24hrs notice please. Especially on a public holiday long weekend.

[12] Mr Burgess replied:

It's Thursday and work is Saturday. Is more than 24 hours. Will not reply to messages unless very urgent.

[13] Mr Sim replied:

Have a great long easter weekend with your family Dean. I will be, see ya on Tuesday.

[14] Scott Goodsir, SPM's Engineering Manager, replied:

*Knock it off jake. ...
Relax and enjoy the break. Come back energized and happy please.*

[15] Mr Sim sent Mr Goodsir a reply which amongst other things said:

I will not be working any future Sat from now on as this company has not in the past and will not in the future respect its employees.

[16] Despite that exchange, records show that between 23 August 2014 and 21 February 2015 Mr Sim worked an average of 55.75 hours a week. Most weeks he worked on Saturdays having also worked Monday to Friday.

[17] No disciplinary action followed Mr Sim's refusal to work Saturday on 19 April 2014.

[18] On Friday, 20 February 2015 at 11.20 pm Mr Sim texted Mr Goodsir:

Won't be in tomorrow, big night. Well fucked.

[19] He sent an email to Mr Goodsir and Mr Burgess at 11.46 pm:

*After discussions with my family and friends I have decided that I will no longer be working on Saturdays.
This is not negotiable and my reasons are personal. This won't be discussed further and I won't be attending any meetings about it.
If you feel that this requires a written warning, please file it in the round circular [filing] cabinet by the door.*

[20] He sent an text to Mr Burgess at 11.59 pm:

*... look after your trades team a little better than ya did me!! Seeya round Nigel.
Oh and I include boilerman with trades team, just in case you thought you could still keep fuckin his life up.*

[21] On 23 February 2015 Mr Burgess emailed:

... You are required to work Saturdays when requested pursuant to your employment agreement. You are required to work this Saturday, 28 February. Failure to attend work this Saturday will be treated as a disciplinary matter. As you are currently on your final warning, any further warning issued will result in your dismissal.

[22] On 26 February 2015, Mr Sim attended a meeting with Wayne Lindsay, SPM's Human Resources Manager, and James McFarlane, who took notes. The notes reflect Mr Lindsay told Mr Sim:

- His contract required him to work on Saturdays as necessary and as he had been doing.
- His refusal to work on Saturdays and the content of the email constituted gross misconduct.
- Mr Lindsay had been instructed to stand him down without pay, effective immediately.
- He was on a final written warning dated 22 April 2014.
- He was required to attend a disciplinary meeting the following day at 2 pm and he was entitled to bring a support person.
- The likely outcome of that meeting will be dismissal.

[23] Mr Lindsay asked Mr Sim if he had anything to say about being stood down. Mr Sim indicated that he did not. Mr Sim said that he stood by the content of the email to Mr Burgess and Mr Goodsir.

[24] Mr Sim indicated twice during that meeting that he expected to be dismissed. He asked when he could pick up his tools and was told to wait until the outcome of the disciplinary process was known.

[25] Later that evening Mr Sim emailed that he would not attend a meeting the following day, as he required more time to get a suitable support person.

[26] At 5.43 am the next day, 27 February, Mr Sim sent an email to five supervisors at SPM:

Hey just to let you guys know. I have been stood down without pay until further notice. Have also been advised that they are treating my actions as serious misconduct and if I don't play ball I will be fired after my disciplinary meeting with no notice period.

I will then be escorted to workshop to pick up tools and then shown the door.

Thanks for your support.

[27] At 5.56 am, Mr Sim sent an email to three people external to SPM. Those people worked for businesses that were suppliers, or former suppliers, to SPM. Mr Sim says they were friends of his. The subject line read *Dismissal*:

Hey guys, this is regarding my refusal to do Sat morning work anymore. After doing 60hrs a week for 3 [years] this is how I am now being treated.

Nice working with you mate, you are a good laugh. Hope to catch up again in the future.

[28] The existence of that email was drawn to Mr Goodsir's attention after he had a discussion with another supplier who had heard that Mr Sim had been *let go*. Mr Goodsir denied that and replied that Mr Sim was merely suspended pending an investigation.

[29] Mr Goodsir asked SPM's IT manager to deactivate Mr Sim's work phone temporarily. He wanted to make sure Mr Sim did not make calls or send emails in his work capacity during the suspension. He also wanted to prevent Mr Sim from remotely accessing SPM's systems, such as the refrigeration system. Mr Sim was not told the deactivation was going to occur.

[30] In the morning of 27 February 2015 Mr Sim's work phone was deactivated. He was unable to access SPM's email system from then on. In addition, Mr Lindsay went to Mr Sim's house and collected his work keys.

[31] At 12.56 pm that day Mr Sim sent an email from his personal email to another supervisor at SPM:

...been officially sacked by the looks of it. Wayne came round to get keys and phone number has been disconnected.

This is my home email. Keep in touch.

[32] At 10.02 pm Mr Sim emailed Mr Goodsir that he would like to come and collect his tools and personal belongings the next day. Mr Goodsir responded that 1 pm would suit him. However, Mr Burgess sent a further email telling Mr Sim he should wait until after their meeting the following day. He wrote no decision had been made but that he did not want Mr Sim on site until after the meeting.

[33] On 2 March Mr Sim notified SPM he was unavailable for a meeting in the first part of the week but would be available on Thursday and Friday, 5 and 6 March.

[34] On 4 March, Mr Sim consulted his doctor who wrote:

I feel Jacob should not be working more than 45 hours a week. He is under a lot of stress and would be unable to concentrate for 60 hours a week. The stress is causing poor sleep, and that may have an effect on his work too. Please allow him to work no more than 45 hours a week.

[35] Mr Sim emailed the doctor's letter to SPM on 4 March.

[36] On 4 March, SPM delivered a letter to Mr Sim's letterbox. The letter set out a further allegation of serious misconduct that SPM proposed to deal with during the investigation meeting the following day:

... you have sent emails and text messages to suppliers and other SPM employees which breach your obligation of good faith to SPM, bring SPM into disrepute and seriously undermine, if not destroy, the required level of trust and confidence necessary in the employment relationship.

*...
If for any unavoidable reason you or your representative or support person is unable to deal with the allegation raised in this letter at the investigation meeting tomorrow at 2pm, please advise immediately.*

[37] Mr Sim attended the meeting at 2 pm the next day with his wife as his support person. Mrs Sim and Mr Lindsay took notes. Mr Burgess and Mr Lindsay represented SPM. Mr Sim was asked if he had received SPM's letter of 4 March and answered *No*.

[38] Mr Burgess asked Mr Sim about the allegation he refused to work on Saturdays and communicating that via text. He also asked Mr Sim about his 'circular filing cabinet' email. Mr Sim agreed texting was not an appropriate way to communicate that he was not able to work the next day.

[39] Mr Sim also accepted the text to Mr Burgess that mentioned 'the boiler man' was not appropriate.

[40] Mr Burgess asked about the significance of the medical certificate. Mr Sim said that such long hours were not helping him and so he spoke to his doctor. There was no further discussion about this.

[41] Mr Sim said he wanted a pay rise. Mr Burgess told him it was not the right time for that discussion.

[42] Mr Lindsay asked Mr Sim if he would be interested in an outcome that saw him working 45 hour per week. Mr Sim said he would accept that. He said he was prepared to do extra hours to keep the plant running but would not work a blanket 60 hours per week.

[43] Mr Sim asked to be paid for the time of his suspension.

[44] Mr Burgess said he was not ready to make a decision about the allegations. He then handed Mr Sim a copy of the 4 March letter. They arranged another meeting for 9 am the following day.

[45] That evening Mr Sim sent an email to Mr Lindsay and Mr Burgess:

I am happy with the way today's meeting went and would carry on my employment (if you decide not to dismiss me!) in the interim if you could agree on the hrs to be worked.

I would be more than happy to carry on with the current arrangement of 10.5hrs per 5 days a week. This would total 52.5hrs per week which would give me a little wiggle room ...

As stated in the meeting I have enjoyed working for SPM, it's just the hrs per week that are getting too high.

I do regret the way I handled this but also feel that your side could have been handled better too.

Look forward to your decision in the morning.

[46] At the meeting the following day, there was no discussion about the hours of work or Mr Sim's email. The meeting focused on Mr Sim's emails, both internal and external, of 27 February.

[47] Mr Sim did not agree the emails brought SPM into disrepute and did not accept that the content was incorrect. He explained that by then he thought he had been dismissed. Mr Burgess did not ask why he held that view.

[48] Mr Lindsay and Mr Burgess left the room for some time before returning and summarily dismissing Mr Sim.

Did SPM unjustifiably suspend Mr Sim?

[49] Under clause 8.3 of Mr Sim's IEA SPM had the contractual right to suspend him in certain circumstances. However, that was not an unqualified right.

[50] The statutory duty of good faith requires an employer contemplating possible suspension of an employee to be active and constructive, responsive and communicative.¹

[51] An employer contemplating suspending an employee, against whom serious misconduct has been alleged, will normally be required to tell the employee of the possibility of suspension, explain the grounds for the proposed suspension, and offer the employee an opportunity to persuade them not to suspend. It will be relatively rare for an employer to be justified in unilaterally suspending without advice to, or input from, the affected employee.²

[52] It is well established that suspension of an employee from employment is a disadvantageous action so far as the employee is concerned. SPM bears the onus of justifying the suspension.

[53] Ms Pidduck submits that Mr Sim was invited to comment on the proposal to suspend him prior to the decision being made.

[54] However, document 33 containing the points Mr Lindsay made during 26 February meeting show he said he had been *instructed* to stand Mr Sim down without pay *as of now*. *Do you have anything to say about this?*

[55] Even if Mr Sim had anything to say, it would have been too late because SPM had already made its decision to suspend before calling him to the meeting.

[56] At that point, the only misconduct SPM alleged Mr Sim was guilty of was his refusal to work additional hours on Saturdays and the content of the 'circular bin' email sent to Mr Burgess.

¹ Section 4(1A)(b) of the Act.

² *Sefo v Sealord Shellfish Limited* [2008] ERNZ 178

[57] Even with a contractual right to suspend, a suspension must only occur if there is a real business need to suspend. It is unclear why SPM made the decision to suspend Mr Sim on Thursday, 26 February when he had been at work, apparently without incident, from Monday to Wednesday of that week. No reason was given to Mr Sim other than to complete an investigation. There is no reason the investigation could not have been completed while Mr Sim was still working.

[58] SPM's decision to suspend Mr Sim on 26 February without pay was not a decision that a fair and reasonable employer could have made without first consulting with Mr Sim and hearing his feedback on proposed suspension. SPM unjustifiably disadvantaged Mr Sim when it suspended him without a fair process.

Did SPM unjustifiably dismiss Mr Sim?

[59] Section 103A of the Employment Relations Act 2000 sets out the test I need to apply to determine whether SPM justifiably dismissed Mr Sim. The test is:

... whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[60] Section 103A(3) of the Act requires me to consider a number of factors in determining whether a dismissal has been implemented in a procedurally fair manner.

These factors include whether the employer:

- sufficiently investigated the allegations, having regard to its available resources;
- raised its concerns with the employee before dismissal;
- gave the employee a reasonable opportunity to respond to its concerns before dismissal; and
- genuinely considered the employee's explanation before dismissal.

[61] Section 103A(4) of the Act allows me to consider any other procedural factors I think are appropriate. However, I cannot determine Mr Sim's dismissal to be

unjustified solely because of procedural defects if they were minor and did not result in him being treated unfairly.³

Did SPM comply with all procedural requirements of the Act?

Sufficient investigation?

[62] SPM was required to conduct a sufficient investigation into any allegations. It is a well-resourced employer with its own human resources manager.

[63] The process began sufficiently well into the allegations set out in the 26 February letter. At that stage, the only allegations were the refusal to work Saturdays and the inappropriateness of the email. The only investigation necessary was to confirm with Mr Sim that he had sent the email in question on the night of 20 February conveying his refusal to work Saturdays. That happened in the 5 March meeting.

[64] However, the reason behind Mr Sim's refusal to work on Saturdays was not investigated despite SPM later receiving a letter from Mr Sim's doctor.

[65] I do not consider that SPM sufficiently investigated the further allegations it made on 4 March. Mr Sim accepted he sent the emails in question. He explained he contacted the supervisors to let them know what was going on.

[66] He also said by then he thought he had already been dismissed. SPM did not ask him why he came to that conclusion. I consider it had a duty to do so.

[67] Mr Sim was not asked why he sent the external emails and so was not able to give any explanation, other than to say he did not consider any of the emails to bring SPM into disrepute.

Did SPM adequately raise its concerns with Mr Sim before the decision to dismiss was made?

[68] SPM did raise its concerns with Mr Sim before meeting with him but I do not consider the concerns about the emails and texts breaching his duty of good faith were adequately put to him before he was required to answer them. That is because SPM

³ Section 103A(5) of the Act.

was aware that he had not seen the allegations until the end of the meeting on 5 March but it required him to answer those allegations the following morning at 9 am. He had no time to seek independent advice on the new allegations.

[69] Mr Sim was never made aware that the issue of Saturday work had moved down in SPM's list of concerns. That is made clear by SPM's letters outlining its reasons for dismissing Mr Sim. Refusal to work on Saturdays is not mentioned once.

[70] By 5 and 6 March Mr Burgess' view was that he had had *a gutsful* of Mr Sim's disrespectful attitude to him and other managers. However, SPM did not make Mr Sim aware that by then the 4 March allegations, rather than him not agreeing to work on Saturdays, were the 'main event'.

[71] Mr Burgess did not tell Mr Sim he believed he had disclosed confidential information in the 27 February emails. Therefore, Mr Sim could not give his view on that.

[72] After hearing from Mr Burgess at the investigation meeting I am satisfied that in making the decision to dismiss he took into account the whole history of Mr Sim's email and text communication with him. However, he did not tell Mr Sim that.

Did SPM give Mr Sim a reasonable opportunity to respond to its concerns?

[73] SPM did not conduct the meetings of 5 and 6 March in a structured enough way to make sure Mr Sim had a reasonable opportunity to answer each allegation. For example, Mr Sim was not asked about whether he thought his actions were in breach of his duty of good faith to SPM.

[74] He was not asked why he believed he had been dismissed already.

[75] Given that some of the things SPM relied upon to decide to dismiss Mr Sim were not put to him he did not have a reasonable opportunity to respond to all of SPM's concerns.

Did SPM genuinely consider Mr Sim's explanations before making its decision to dismiss?

[76] Mr Sim's conciliatory email of 5 March in which he expressed regret for how he handled things does not appear to have been considered before the decision to dismiss was made.

[77] Since not all information SPM took into account was put to Mr Sim it could not have taken his explanations into account before making its decision to dismiss him.

[78] Mr Lindsay's letter setting out the reasons for dismissal demonstrates aspects of serious concern to me. The letter misrepresents what Mr Sim said, or did not say, at the meetings on 5 and 6 March.

[79] SPM was on notice that Mr Sim believed the process would end in his dismissal because he said so more than once in his meeting on 26 February. That is recorded in Mr Lindsay's notes yet it does not seem to have been considered as a mitigating factor related to the emails sent on 27 February.

[80] In addition, SPM did not give Mr Sim an opportunity to give feedback about whether he thought dismissal was a reasonable outcome.

Any other procedural flaws?

[81] At the meeting on 26 February inviting him to a disciplinary meeting Mr Sim was not told he was entitled to bring a representative. He should have been given that option.

Did Mr Sim's actions amount to serious misconduct or seriously undermine or destroy the trust and confidence requirement?

[82] There was a history of Mr Sim sending intemperate texts and emails to Mr Burgess and Mr Goodsir. No action was taken about the content or tone of Mr Sim's texts in April 2014, although Mr Burgess agreed that he had serious concerns about Mr Sim's communication at least as far back as 2014.

[83] Given that history, by 20 February 2015, when Mr Sim sent the texts relied on by SPM, he could not be expected to know his disrespectful tone to Mr Burgess and Mr Goodsir may result in his dismissal.

[84] I do not consider SPM could rely on the emails sent to its supervisors as serious misconduct of the type that damaged the requirement of trust and confidence. When Mr Sim was suspended SPM did not tell him the suspension and planned investigation were to remain confidential.

[85] I do not consider the internal emails could have brought SPM into disrepute. Perhaps they had that potential, however, they did not actually do so. That is largely because SPM undertook 'damage control' by sending the supervisors an email saying Mr Sim had not been dismissed. The email conveyed he was suspended pending investigation and that the outcome of that was not yet known.

[86] At the most the emails sent internally could be seen as misconduct. In addition Mr Sim had a genuine belief that should have been taken into account but was not.

[87] The last email clearly set out Mr Sim's genuine view that he had been dismissed because Mr Lindsay had collected his keys and his phone had been disconnected. The email did not disclose any confidential information.

[88] Therefore, the only emails SPM could rely on to have brought SPM into disrepute were those sent to three external parties. Again Mr Sim had a genuine view that what he wrote was correct. As at 27 February 2015 Mr Sim already believed he had been dismissed.

[89] The main problem with assessing whether SPM could have found that Mr Sim's actions had seriously undermined or destroyed the required level of trust and confidence is Mr Lindsay's 9 March letter giving the reasons for dismissal:

During the investigation meeting on 5 March 2015 you agreed that your conduct in sending the emails to suppliers and other SPM employees and the text messages sent to SPM employees was unacceptable. You did not dispute that the conduct breached your obligation of good faith to SPM, brought SPM into disrepute or that it

seriously undermined, if not destroyed, the required level of trust and confidence necessary in the employment relationship.

When given a further opportunity to put forward your response to the allegation on 6 March 2015, you refused to participate in the investigation by choosing to remain silent. Accordingly, we had to make a decision based on the responses that you provided on 5 March 2015.

As advised on 6 March 2015, SPM came to the decision that you did in fact commit serious misconduct by sending the emails and text messages (and you did not deny sending the emails/text messages) and in doing so you breached your obligation of good faith to SPM, brought SPM into disrepute and destroyed the required level of trust and confidence necessary in the employment relationship.

[90] The letter is unclear about which allegations were found proved and which texts and emails were relied on.

[91] Mr Lindsay's letter also wrongly represents what Mr Sim said at the meetings in the following ways:

- It said on 5 March he agreed sending the emails to suppliers and supervisors was unacceptable. He did not accept that. The emails to suppliers were not discussed that day, as Mr Sim was not aware of that allegation at that meeting.
- It said that he did not dispute that his conduct breached his obligation of good faith to SPM, brought it into disrepute and seriously undermined the required level of trust and confidence. Mr Sim did not make any comment on those points in the meetings because he was not asked to do so.
- He chose to remain silent on 6 March. That meant that SPM had to reply on his response provided on 5 March. However, there was no opportunity on 5 March for Mr Sim to respond to the main allegations SPM relied on to dismiss him.
- Mr Sim initially remained silent on 6 March but then said he did not think the emails brought SPM into disrepute because by then he believed he had been dismissed for his refusal to work Saturdays.

Conclusion on whether SPM unjustifiably dismissed Mr Sim

[92] The procedural flaws were more than minor and resulted in Mr Sim being treated unfairly.

[93] In all the circumstances, the decision to dismiss was not one a fair and reasonable employer could have made. SPM unjustifiably dismissed Mr Sim.

Did SPM comply with its good faith obligations when dismissing Mr Sim?

[94] Mr Sim claimed that SPM did not comply with its good faith obligations under s 4 of the Act.

[95] Mr Sim and SPM had a duty of good faith to each other to be:

- active and constructive in establishing and maintaining a productive employment relationship;
- responsive and communicative.

[96] When considering whether to dismiss Mr Sim SPM also had to provide him with access to all information relevant to the continuation of his employment, and give him an opportunity to comment on that information before the decision was made.⁴ This part of the good faith duty mirrors the procedural requirements set out in s 103A(3) of the Act.

[97] SPM failed in its duty to be active, constructive, and communicative to maintain a productive working relationship when it suspended Mr Sim without consultation and carried out a flawed disciplinary process.

[98] SPM breached its duty under s 4(1A)(c) of the Act when it failed to disclose all the information it considered in making its decision to dismiss Mr Sim, for example, that he had breached confidentiality when sending the 27 February emails.

[99] Section 4A makes a party that breaches its duty of good faith liable to a penalty if the failure was deliberate, serious and sustained or was intended to undermine an employment relationship.

⁴ Section 4(1A)(c) of the Act.

[100] I consider that by the time the allegation letter of 4 March was written SPM had decided that dismissal was the only acceptable outcome. The breaches of good faith were deliberate and serious. The breaches of good faith were sustained from the date of suspension until the date of dismissal. The imposition of a penalty is warranted.

[101] The Authority's power to order a penalty is discretionary. In *Xu v McIntosh*⁵ the Employment Court provided guidance for the Authority. It made the following observations:

A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

*The next question focuses on the perpetrator's culpability. Was the breach technical and inadvertent or was it flagrant and deliberate? In deciding whether any part of the penalty should be paid to the victim of the breach, regard must be had to the degree of harm that the victim suffered as a result of the breach.*⁶

[102] I also need to consider other factors such as SPM's remorse and the range of penalties imposed in other comparable cases.⁷

[103] SPM showed no remorse. Its breaches of good faith were disadvantageous to Mr Sim. In this case it is important to highlight to SPM and to other employers that breaches of good faith are unacceptable.

[104] I have had regard to penalties awarded in other cases in which a company has breached its duty of good faith. In all the circumstances, I consider a penalty of \$2,000 to be appropriate. It is appropriate that SPM pays the penalty to the Crown.

Did SPM fail to provide Mr Sim with a safe workplace?

[105] Mr Goldstein submits that SPM breached its health and safety obligations by requiring Mr Sim to work excessive hours, including on Saturdays. He submits that SPM was well aware that Mr Sim was unwell as a result of working those excessive

⁵ [2004] 2 ERNZ 448

⁶ Ibid, Paragraphs [47] and [48].

⁷ *Tan v Zhang* [2014] NZEmpC 65, at paragraph [32].

hours. He cites Mr Sim's doctor's letter of 4 March as evidence of Mr Sim's ill health caused by stress due to long hours.

[106] In April 2014, Mr Sim first notified SPM he did not wish to work every Saturday.

[107] On 5 May 2014, after Mr Sim faced charges related to drink driving, he emailed Mr Goodsir that he had been diagnosed with, and was on medication for, depression and alcoholism. He also said he was taking sleeping pills. SPM reacted to that information by supporting Mr Sim to remain in its employment when he faced the charges. It also supported Mr Sim to leave work to keep probation and other court-related appointments during 2014.

[108] From August 2014 until February 2015 Mr Sim worked most Saturdays without any protest and without notifying SPM he considered the long hours were causing him health problems. Therefore, I conclude that in early 2015 SPM was not on notice that Mr Sim was suffering any ongoing health problems. Mr Sim's evidence was that by then he was no longer on medication for depression. SPM was not on notice that Mr Sim was suffering any ill effects on his health from his hours of work.

[109] Mr Sim's doctor's letter dated 4 March 2015 is insufficient evidence to conclude that Mr Sim's prior long hours of work caused the stress Mr Sim reported that he was under. It does establish that from 4 March he should not work more than 45 hours a week for an unspecified period. However, the very next day Mr Sim himself proposed that he work 52.5 hours a week on an ongoing basis.

[110] I do not find it proved that SPM breached its duty to provide Mr Sim with a safe workplace by requiring him to work excessively long hours.

[111] It follows that no penalty will be imposed.

Should SPM have paid Mr Sim for his four-week notice period?

[112] Mr Goldstein submits that SPM breached its duty set out in clause 8.1 to give him one month's notice. Mr Goldstein says that the breach of the IEA means SPM should pay Mr Sim special damages of \$7,025.76; being four weeks' lost remuneration.

[113] Clause 8.1 would have applied if SPM wished to dismiss Mr Sim for unsatisfactory performance after a procedure set out in the IEA had been followed. Clause 8.1 does not apply to this case. Mr Sim was unjustifiably dismissed but it does not follow that he should be compensated because SPM failed to follow a contractual process it was only bound to follow for performance-related dismissals.

[114] Instead, I consider the statutory remedies for unjustifiable dismissal are appropriate. It follows that no penalty will be imposed.

Remedies

[115] By way of remedy Mr Sim claims:

- lost remuneration for wages lost during the suspension plus interest; and
- lost remuneration for wages lost between 6 March and 22 March 2014⁸ plus interest; and
- Compensation for humiliation, loss of dignity and injury to his feelings of \$5,000 for the suspension and \$15,000 for the dismissal; and
- A penalty of \$20,000 for the breach of good faith with the penalty to be paid to Mr Sim personally; and
- Legal costs.

Lost remuneration

During suspension

[116] Mr Sim claims that he should be paid for the days he was suspended. He was employed by SPM when he was suspended on 26 February until he was dismissed on 6 March 2015. The suspension was unjustified. Had he remained working he would have earned his wages during the suspension.

[117] SPM submits it paid Mr Sim from 26 February to 3 March. It says that it was ready to meet with Mr Sim on 27 February. However, Mr Sim put off the date of the meeting in order to get a suitable support person.

⁸ The day before he began his new job.

[118] I consider it was reasonable for Mr Sim to seek to extend the date of the meeting to take advice. Mr Sim notified SPM he was not available on Monday, Tuesday or Wednesday, 2, 3 and 4 March on the grounds he was busy on those days.

[119] Mr Sim says he saw his lawyer on one of those days and his doctor on the 4th. Had Mr Sim not been suspended it is likely he would have been able to take some leave to have appointments with his lawyer and his doctor in advance of a meeting.

[120] The money he would have been paid had he not been suspended is money he lost as a result of his unjustified suspension. SPM should pay Mr Sim for the balance of the days up to and including 6 March 2015. If he has not been paid from 23-26 February he must be paid for those days. I set out at paragraphs 123 to 124 how the lost remuneration should be assessed.

Post dismissal

[121] Mr Sim mitigated his loss and gained new employment beginning on 23 March 2015. He claims lost remuneration from the week beginning 9 March until 22 March 2015.

[122] I find that Mr Sim's loss of remuneration over that period was because of his unjustified dismissal. Mr Sim should be paid for those two weeks on the basis set out below.

How lost remuneration should be assessed

[123] Mr Sim made it quite clear on 20 February and subsequently that he would not work on Saturdays, at least for the foreseeable future. Mr Sim's evidence is that he usually worked for 6 hours on a Saturday ending at 12 noon. I consider he should be paid for 49 hours per week over the period 23 February to 22 March 2015.

[124] Mr Sim's pay from SPM up to and including 3 March has been calculated as if he worked 8 hours a day. Had he not been suspended I am satisfied he would have been required to work longer days than that. SPM owes Mr Sim a top up of the hours paid for those days.

Interest

[125] The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the current rate of 5% per annum.⁹ It is reasonable that SPM pay Mr Sim 5% interest on all outstanding money owed to him by way of wages.

*Compensation***Suspension**

[126] Mr Sim did not give specific evidence about the effect of the suspension on him. However, I am able to ascertain from the emails he sent at the time that he believed it to be unfair. I also take into account his doctor's assessment of his stress levels, including problems with sleeping, which I consider to have been at least in part caused by his suspension.

[127] SPM provided some evidence from Mr Sim's Facebook page which it says show that Mr Sim was preparing to resign from SPM. Those entries were not dated. However, it appears that at least some of them were made the day before the 5 March meeting when he expected his dismissal to be confirmed.

[128] Mr Sim says he had started looking for other jobs. I consider his Facebook posts to be examples of bravado. There is no evidence he ever said or did any of the things he claimed on Facebook.

[129] SPM submits that Mr Sim's problems with depression and alcoholism predated his employment, continued during his employment and so cannot be pinned on Mr Sim's suspension or dismissal.

[130] However, I consider that there were some adverse effects on Mr Sim from the unjustified suspension and I consider an award of \$2,000 to be reasonable, subject to contribution.

⁹ Judicature (Prescribed Rate of Interest) Order 2011.

Dismissal

[131] Mr Sim says when he was dismissed he felt shocked and surprised. When he was told it was effective immediately, meaning his pay had stopped, he felt utter disbelief and panic. He said he was distraught and shaking and felt physically sick. He says he rarely slept. He felt un-employable having been dismissed after three years.

[132] Mrs Sim confirms that her husband had trouble sleeping and was very concerned about the family's financial future. She says he would often lose his temper with her and with their children.

[133] Mr and Mrs Sim both mentioned an escalation in Mr Sim's drinking as a problematic outcome of his dismissal.

[134] Mr Sim says he was humiliated by being escorted through the plant to pick up his tools and personal belongings and being denied the ability to bring his vehicle onsite to load them into. He thought that SPM did that to make him look like a criminal. He felt SPM singled him out because other workers who had left had been able to bring their vehicles on site to collect their gear.

[135] Mr Sim says it was clear to all staff that he had been dismissed and within a short space of time, rumours started circulating that he had been dismissed for dishonesty.

[136] SPM submits no compensation should be payable.

[137] SPM submits that Mr Sim courted publicity following his dismissal as evidenced by comments he made under a TradeMe SPM ad for electricians and fitters. However, I note those comments were in June 2015 after Mr Sim had been working in his new role for three months.

[138] I consider Mr Sim's Facebook posts to have been bravado rather than a true intention to resign, because he did not resign. His comments in June 2015 do not disclose that SPM had dismissed him and, if anything, show he remained bitter about his treatment by SPM.

[139] SPM submits that any compensation payable should be limited by the fact that Mr Sim had pre-existing depression and alcoholism, which may have affected how he reacted to his dismissal.

[140] I consider that compensation of \$6,000 is reasonable, subject to contribution. In setting the amount of compensation payable, I have taken into account Mr Sim's pre-existing depression and alcoholism. However, while they may have contributed to his desire not to work Saturdays and the tone of his emails on 20 February 2015, SPM cannot resile from the effects on him of his unjustified dismissal.

Contribution

[141] Section 124 of the Act requires me to consider whether Mr Sim contributed to the situation that gave rise to his dismissal and if so to reduce remedies accordingly.

[142] Mr Goldstein submits that I should not reduce Mr Sim's remedies for contributory conduct. He submits that Mr Sim's actions in sending honest emails which did not breach any confidentiality and did not contain any disparaging remarks about his employer indicate that his actions did not cause his dismissal and were not blameworthy.

[143] SPM submits that Mr Sim communicated in a hostile and antagonistic way to Mr Burgess and Mr Goodsir. Ms Pidduck referred, as examples, to Mr Sim's emails of 17 April 2014 and 20 February 2015.

[144] I will not take into account Mr Sim's 17 April 2014 communication. That did not cause his dismissal almost a year later. If it did contribute to his dismissal, it ought not to have done because Mr Sim was not notified it was being considered.

Suspension

[145] SPM did not dismiss Mr Sim for refusing to work on Saturdays. However, that refusal contributed to his unjustified suspension. I do not consider that, by itself, was sufficient reason to suspend him and I conclude that it did not contribute to his suspension in a sufficiently blameworthy way to result in reduced remedies. There is no reduction made to the \$2,000 compensation or to Mr Sim's lost remuneration during his suspension.

Dismissal

[146] Mr Sim's email of 20 February and his 27 February emails were the genesis of the situation leading to his unjustified dismissal. I accept that his first email to SPM supervisors and the email to three people external to SPM were inflammatory and contributed to the situation leading to his dismissal. I do not accept that they were merely a neutral expression of what Mr Sim believed to be true. If they were not designed to bring SPM into disrepute they were designed to make Mr Sim appear the victim of unfair treatment by SPM. Those emails did contribute to the situation giving rise to his dismissal in a blameworthy way.

[147] The last email, once his phone and email access were disabled and the keys collected, was not blameworthy as it was based on a reasonably held view that he had already been dismissed.

[148] I consider it reasonable to reduce the remedies awarded by 20%.

Costs

[149] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[150] I invite the parties to agree on costs. I am likely to adopt the Authority's notional daily tariff-based approach to costs. The daily tariff is \$3,500. The investigation meeting lasted a day, including the oral submissions made on 16 December 2015.

[151] If the parties cannot reach agreement the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply. The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority