

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 392/07
5100086

BETWEEN SERGIU SMINCHISESCU
 Applicant

AND FIVE STAR DISTRIBUTION
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: Catherine Garvey ,Counsel for Applicant
 Dean Organ, Advocate for Respondent

Investigation Meeting: 13 November 2007

Submissions received: 27 November and 11 December 2007 from Applicant
 5 December 2007 from Respondent

Determination: 13 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Five Star Distribution Limited (“Five Star”) employed Sergiu Sminchisescu as a night supervisor in its road transport distribution centre at Onehunga. It dismissed him because of its view that he had returned to the company’s premises in breach of a lawful and reasonable instruction that he not do so (or in breach of a suspension).

[2] Mr Sminchisescu says the dismissal was unjustified and has raised a personal grievance. He has also raised a personal grievance in respect of the suspension. He seeks reinstatement and applied for an order for interim reinstatement in association with his grievances. By agreement, and following mediation, the Authority has moved directly to address the substance of the grievances.

[3] Five Star says the suspension and the dismissal were justified.

Events leading to the dismissal

1. The incident of 23 August

[4] Mr Sminchisescu's employment began on 2 October 2006.

[5] On the night of Thursday 23 August 2007 he was on duty along with at least two other warehouse storemen.

[6] At about 9.30 – 10.00 pm that night a truck from Protos Transport Limited ("Protos") returned to the distribution centre from a delivery run. Dave Smith, the driver and an employee of Protos, unloaded some 15 damaged cartons of Steinlager beer which were not delivered to the customer who had ordered them because of the damage. Mr Smith's customer entered on a freight incident report ("FIR") form details of the affected consignor and consignee, as well as a description of the damage and how it occurred. At the distribution centre Mr Smith made a copy for his own employer, and left the original at the distribution centre.

[7] The supervisor was to complete the rest of the form. It included a question about whether the freight was salvageable, and other details of the action taken in respect of it including whether it was returned to the consignor, redelivered to the consignee or forwarded for the purposes of a claim.

[8] The storemen asked Mr Smith if they could have the beer. Mr Smith said they could. According to Mr Smith such exchanges were often made in a joking way, and were not taken seriously. There was no suggestion that Mr Smith had any authority to allow the beer to be taken, or that he was doing any more than making the usual joke.

[9] On this occasion, however, two of the storemen decided they would take the beer, and a third person associated with Protos also took some. I refer to the two storemen as Galo and Ene. It was common ground that, when Mr Sminchisescu found the storemen taking the beer several hours later, he instructed Galo not to take any beer. Galo said he would take the beer anyway. Mr Sminchisescu told Galo not to come into work the next day, and he could return 'on Monday' (27 August) with a

union delegate. Ene later alleged that he was told he could take the beer, although Mr Sminchisescu said Ene was present during the discussion with Galo. In any event Mr Sminchisescu denied giving Ene permission to take the beer. Both Galo and Ene were subsequently dismissed.

[10] Andy King, a driver employed by Five Star, later informed the company that he was about to start work at 3 am on 24 August, when he saw the storemen taking the beer. When he asked Mr Sminchisescu whether there was any beer for the day shift, Mr Sminchisescu said it was all 'spoken for'. Mr King discussed the matter with Zane Hutching, the Auckland branch supervisor, when he had finished his run. I accept Mr King gave that information to Mr Hutching, but make no finding about whether or not it was correct. Mr King's written statement was dated Monday 27 August 2007. It formed part of Five Star's investigation into the taking of the beer, but Mr King did not give evidence in the Authority. Again, I accept the statement was provided, but make no finding about the correctness of its contents.

[11] Mr Sminchisescu denied telling Mr King the beer was 'spoken for'.

[12] Mr Sminchisescu left for home at the end of his shift, at about 4.30 am. He did not contact Mr Hutching to report that the storemen had taken the beer without authority, nor did he contact Richard Tyson, the general manager operations. He did contact the owner of Protos, leaving a message requesting that the owner contact him.

[13] Later on 24 August Mr Sminchisescu phoned Lionel Kereone, Five Star's customer relationship coordinator, to advise of the return of the beer and enquire about a price for it. It was appropriate that Mr Sminchisescu contact Mr Kereone, but probably not necessary to request a price.

[14] Meanwhile Mr Hutching became aware that another storeman was needed for that day. He spoke to Mr Sminchisescu at about midday on 24 August, enquiring about whether Galo could be called in. Mr Sminchisescu told him Galo had taken some beer and been told not to come into work. There was no discussion about Ene's involvement. Mr Hutching found out later in the afternoon that Ene had taken some beer too, when he overheard Mr King discussing it. He spoke to Mr King, who gave the information set out above.

2. The suspension

[15] Mr Hutching in turn reported the incident to Mr Tyson, who commenced an investigation. To that end he sought a meeting with Mr Sminchisescu. The meeting went ahead at 5.30 pm on 24 August.

[16] During the meeting Mr Tyson asked Mr Sminchisescu to explain what had happened, and why he had not reported the matter sooner than he did. Mr Sminchisescu gave a brief description of how the three people concerned had taken the beer, mentioning that he had told Galo not to do so. He denied taking any beer himself. He said that when he saw Galo taking the beer he tried to stop him but backed off when the discussion became heated. He also mentioned the receipt of 'some texts' from Galo. It was put to him that, even so, he could have stopped Ene. The meeting note records Mr Sminchisescu as responding, oddly, that he wanted to think about what had happened. In evidence Mr Sminchisescu said he explained to the company that he did not want to get into a fight. That response is credible and I accept it.

[17] When he was prompted about why he had not reported the matter sooner, the meeting note records Mr Sminchisescu as saying 'sometimes things happen I had told Galo not to come in.' In his statement of evidence Mr Sminchisescu said his reply was that, as it was 3.30 in the morning, he did not believe anything more could be done. He went further and said it was not his practice to contact his managers at that hour of the morning and did not see any need to do so on this occasion. Although not recorded in the meeting note, it was common ground at the investigation meeting that Mr Sminchisescu asked a question about how he should have handled the matter. Mr Tyson replied that Mr Sminchisescu could have called the police or 'us'. Overall I find Mr Sminchisescu was justified in his understanding that the company's concern was with how he had managed his shift.

[18] Mr Tyson said in evidence that at that point he was uncertain of whether Mr Sminchisescu was involved in the taking of the beer, or whether there had been some sort of collusion with the storemen or intimidation by them. He believed there were a

number of matters to be followed up, although he did not specify what they were. According to the meeting note he informed Mr Sminchisescu:

“... there are a number of things that concern me that need to be investigated. This can be completed better if you are not here as these are guys that report to you. I think it is best that we suspend you on pay until I have completed the interviews and have a clearer picture on what has happened. I don't understand why you have not contacted one of us?”

Please do not make contact with any staff nor come on site until the matter has been resolved as this is best for all concerned

I will try to clear this up over the weekend but it may be Tuesday ...”

[19] Mr Tyson took Mr Sminchisescu's cell phone. Mr Sminchisescu said it contained what from his point of view were abusive text messages from Galo, and he wanted Mr Tyson to review them.

[20] Mr Sminchisescu was also told he would not be required to work his shift that night.

3. Mr Sminchisescu's actions after the suspension

[21] Mr Sminchisescu returned to his office to send some email messages advising of his absence and providing contact details. He then left the premises. That action later contributed to the company's suspicions, but I do not accept there was anything suspicious about it.

[22] At about 8.00 pm that evening Mr Sminchisescu telephoned Mr Tyson to enquire about progress with the investigation. Mr Tyson repeated to Mr Sminchisescu that he was not happy about the circumstances surrounding the taking of the beer, explained the investigation procedure he intended to follow, and repeated that Mr Sminchisescu should stay away from work so he could complete his investigation.

[23] At about 9.30 pm that evening Mr Sminchisescu was driving to Onehunga from his home in Remuera. He said in evidence he was going to a Chinese takeaway in Onehunga to obtain a meal for his family. While in the area he telephoned Mr Hutching to ask whether he could go to work to collect his personal diary. Mr

Hutching gave him permission to do so. Mr Hutching agreed there was such a call, but said Mr Sminchisescu told him he was already at the premises. That is why Mr Hutching gave permission. Mr Sminchisescu duly collected his diary, although an issue later arose over what else, if anything, he collected that night.

[24] Joe Walker, a storeman/driver employed by Five Star, had been asked to replace Mr Sminchisescu as supervisor on the night of 24 August. He gave evidence that he saw and spoke to Mr Sminchisescu at the premises at about 7.30 pm that night. Mr Walker also saw Mr Sminchisescu talking to Mr Smith¹. He said he commented to Mr Sminchisescu “I don’t think you are supposed to be here” to which Mr Sminchisescu replied “Why, who is going to tell management?” When Mr Sminchisescu continued his discussion with Mr Smith, Mr Walker approached him again to say “I think you should go.”

[25] Mr Walker’s account was not raised with Mr Sminchisescu during the company’s investigation, but in a properly conducted investigation it should have been. When Mr Walker gave evidence he said he spoke to Mr Hutching on or about 27 August, and to Mr Tyson. He gave them the information in the statement he gave the Authority, although no written statement was completed at the time.

[26] Mr Sminchisescu denied Mr Walker’s account, except that he agreed he saw and spoke to Mr Smith at the premises at about 10 pm that night. For his part, Mr Smith effectively confirmed at least that Mr Walker asked Mr Sminchisescu what he was doing on the premises. Although he was mistaken as to the time, I accept Mr Walker’s account. I regard it as Mr Sminchisescu’s acknowledgement at the time that he understood his employer did not want him on the premises. It would have been better if he was honest about that. However for reasons I will later discuss, in the circumstances this exchange has little bearing on the outcome of Mr Sminchisescu’s grievances.

[27] Mr Tyson suspected that Mr Sminchisescu was at the premises for the very purpose of speaking to Mr Smith, although he did not put his suspicion to Mr Sminchisescu at the time. He should have.

¹ Which, with reference to Mr Smith’s movements as recorded in his logbook, means the alleged exchange occurred no earlier than 9.00 pm, and on Mr Smith’s further evidence was probably closer to 10 pm.

[28] As for the conversation between Messrs Smith and Sminchisescu, Mr Smith said in a statement dated 24 August (but probably prepared and signed a day or two later) that Mr Sminchisescu:

“told me that he had instructed the boys not to take the product but they still did and he was a little bemused at why he had been suspended. Given what he had told me and that there was a paper trail it would not be a problem for him.”

[29] When Mr Smith was asked at the investigation meeting about the reference to Mr Sminchisescu’s being ‘bemused’ at his suspension, Mr Smith said that arose out of a conversation he later had with Mr Walker. Whichever is accurate I accept that Mr Sminchisescu was confused about why he had been suspended.

[30] Further it was common ground that Mr Smith told Mr Sminchisescu he had spoken to Mr Tyson, as indeed he had. Mr Smith said he had confirmed to Mr Tyson that he told the storemen they could have the beer. The conversation amounted to little more than that. There was no evidence of any attempt on Mr Sminchisescu’s part to interfere in whatever Mr Smith might have to say.

[31] Mr Tyson attended the premises on Saturday 25 August to further his investigation, as he had told Mr Sminchisescu he would. He, and later Mr Hutching, searched without success for the FIR relating to the beer.

[32] It was common ground that Mr Sminchisescu telephoned Mr Tyson again that day. Mr Tyson confirmed to him that there was no allegation of theft against him, but there was a process to work through with the storemen.

[33] Mr Sminchisescu telephoned Mr Hutching on Sunday 26 August to enquire yet again about the investigation. Mr Hutching told Mr Sminchisescu he believed the storemen would be dismissed. Their dismissals were effected after disciplinary interviews conducted on 28 August 2007.

[34] On Monday 27 August Mr Sminchisescu contacted Five Star’s general manager IT regarding whether the text messages had been extracted from his cell phone. The manager had no knowledge of the matter. From Mr Sminchisescu’s

account of them, the messages amounted to Galo's reaction to being told not to report again for work. The first message advised that Galo would report for work. When Mr Sminchisescu responded that he was not to do so, the response was 'OK godfather', and the third message was 'I will never work with you crying girls. I have had enough'. I did not understand Mr Tyson to be disputing the existence or content of the messages, although he did not consider them as threatening as Mr Sminchisescu did. Even if his view of the nature of the texts was correct, Mr Tyson was unduly dismissive of Mr Sminchisescu's view and should have assessed the texts as part of a fuller investigation into Mr Sminchisescu's role in the incident.

[35] A further meeting with Mr Sminchisescu was arranged for 9.00 am on Tuesday 28 August.

[36] According to Mr Sminchisescu, some time after 8.10 am on 28 August he arrived at the office to collect his work diary. He also collected the FIR. He then went on to the meeting.

[37] Messrs Hutching and Tyson said in evidence they believed Mr Sminchisescu had taken both the work diary and the FIR when he returned to the premises on the night of 24 August. They did not accept that Mr Sminchisescu had collected the documents just before the 28 August meeting or that he had accessed the office at that time at all. That belief was not properly followed up at the time.

[38] They relied on CCTV footage in that respect, although they did not rely on it at the time. Since the footage did not show a clear and unobstructed view of both of the doors into the office, and moreover the footage I was shown had been edited to shorten it, it cannot be relied on to show Mr Sminchisescu did not enter the office that morning. Not only that, I was told the response to subsequent enquiries made with the office staff was that Mr Sminchisescu had been seen in the office on the morning of 27 or 28 August. If Mr Sminchisescu says he entered the office on the morning of 28 August I accept that was correct.

[39] Regarding the whereabouts of the FIR, Mr Sminchisescu was adamant that he had left it in a folder in the centre of his desk and he collected it from there just before the meeting on 28 August. He assured me he was certain of that. However I accept the evidence of Messrs Hutching and Tyson that, in the preceding weekend, they had

both made a thorough search for the document and could not find it. They could not have overlooked the FIR if it was where Mr Sminchisescu said it was. Moreover Mr Hutching was expecting to find it in a folder on the desk, but it was not there. I therefore conclude that it was not where Mr Sminchisescu said it was, and do not accept his evidence on the point. That in turn leaves me unable to accept that he collected the FIR on 28 August even if he did visit the office that morning.

4. The 28 August meeting

[40] The FIR was important to Mr Tyson because he wanted to see what had been recorded regarding whether the beer was salvageable or not. Even now, the original has not been produced. The company does not have it, and the copy it produced for the investigation meeting was obtained through Mr Smith. Further, it was common ground that Mr Sminchisescu had an FIR with him during the 28 August meeting. Mr Sminchisescu denied being asked for it, although it was common ground that – when reference was made to his possession of it (to put it neutrally) – he said ‘this is my copy’ and closed the diary in which it was resting. Mr Tyson took the response as a refusal to provide the FIR. All of this led the company to suspect Mr Sminchisescu was attempting to prevent it from seeing the FIR, and it was very suspicious about why he would do so. However it did not put its suspicions to him.

[41] Regarding the rest of the 28 August meeting, Mr Tyson opened by reiterating that the meeting was to go over the events of the 23 August night shift, then asked Mr Sminchisescu if he required representation. Mr Sminchisescu declined because at that point he did not understand his position to be in jeopardy, an understanding he was entitled to have held at the time.

[42] Mr Tyson again summarised the bare facts surrounding the taking of the beer, before asking Mr Sminchisescu why he had returned to the premises on the night of 24 August. Mr Sminchisescu explained that he was passing, and needed his diary. Mr Tyson also asked Mr Sminchisescu why he had included his personal telephone number in the emails he had sent after the 24 August meeting, why he had ‘the paperwork’ with him and why he had spoken to Mr Smith. Mr Sminchisescu replied that he provided the number for contact purposes, the ‘paperwork’ was a copy, and he

had spoken to Mr Smith 'because he was there'. It does not appear that the questioning on these points of concern was any more probing than I have recorded.

[43] Mr Tyson then asserted that Mr Sminchisescu's actions had made it difficult to complete the investigation, without giving any indication of why, before referring to the need to complete the interviews with the storemen.

[44] At the end of the meeting Mr Tyson advised Mr Sminchisescu he was still not happy, that the matter was serious, and that he sought a further meeting at the end of the afternoon. Mr Sminchisescu obtained legal advice and the meeting was rescheduled.

5. Further meetings leading to the decision to dismiss

[45] By email message dated 29 August 2007 to Mr Sminchisescu's then-solicitor, Mr Tyson advised:

"Even though he has been suspended and advised not to return to the site, during the investigation it appears your client has removed paperwork pertaining to part of our investigation.

We have requested that [an advisor] attend a disciplinary meeting tomorrow morning at 10.30 am to discuss the issue of removal of our customer's product from our premises.

The company deems this issue as one of serious misconduct ..."

[46] That message does not make it clear whether the issue of serious misconduct arises out of the removal of customer's product (the beer), or the alleged removal of paperwork (probably the FIR although that was not specified) during the suspension. As written, the message seems to be referring primarily to the removal of the beer. That lack of clarity in particular means Ms Garvey, who was by then instructed, had more reason than usual to request written particulars of the allegations against Mr Sminchisescu as well as relevant documentation.

[47] On 1 September Ms Garvey received copies of the statements of Messrs Smith and King, notes of the disciplinary meetings held with the dismissed storemen (which occurred after the 28 August meeting with Mr Sminchisescu), and notes of the parties'

own 24 and 28 August meetings. The notes of the meetings held with the storemen indicate questioning focussed on whether they took the beer and whether they thought they had permission to do so, and do not indicate there was any wider questioning bearing on the company's suspicions about Mr Sminchisescu's conduct.

[48] The rescheduled meeting went ahead on 3 September. Mr Sminchisescu attended together with Ms Garvey.

[49] Mr Tyson opened by saying the meeting was part of a disciplinary process. He said the 24 August meeting had been a preliminary meeting to gather information, and that Mr Sminchisescu had been suspended pending the completion of an investigation. The meeting of 28 August was said to have been for the purpose of discussing the facts discovered to date. Mr Tyson went on to ask why Mr Sminchisescu had not reported the incident promptly, to which Mr Sminchisescu replied that he was attempting to resolve it. That reply was not followed up. Mr Tyson also indicated that he was struggling with 'the inconsistency and events after the suspension'. He did not specify which inconsistencies concerned him and why, or which aspects of the 'different versions of events' concerned him and why.

[50] Discussion then turned to Mr Sminchisescu's return to the site on the night of 24 August. Up to and including that point there had not been any indication that those circumstances were in themselves considered grounds for disciplinary action. The note of the discussion indicates Mr Sminchisescu said he collected a copy of 'the paperwork' on the evening of 24 August and attached it to his diary for the purpose of resolving matters. He denied trying to influence Mr Smith, and said he had obtained Mr Hutching's permission to go on-site.

[51] Near the end of the meeting that Mr Tyson was asked on what grounds the termination of Mr Sminchisescu's employment was being considered. I accept the grounds had never been made clear. I do not accept that ongoing vague references to the matter being 'serious', and to other generalised concerns of the kind I have noted, were adequate for that purpose. It was not until the direct question was asked of him that Mr Tyson said the ground was the refusal to follow instructions.

[52] Ms Garvey pointed out that the suspension was unlawful, and the meeting was adjourned briefly so the company could take advice about the suspension. When it

reconvened Mr Tyson merely reiterated that the suspension was to allow the investigation to go ahead, and that ‘further points’ had been raised at that meeting. He needed further time to follow these up.

[53] Although the ‘further points’ were not specified, I infer that they concerned the lawfulness of the suspension. During a further meeting on 4 September Mr Tyson asserted that the suspension was valid, done in good faith and carried out to allow the investigation to proceed without the risk of collusion or intimidation. Mr Sminchisescu had failed to comply with ‘these instructions’. For that reason Mr Sminchisescu was to be dismissed with immediate effect.

[54] The associated letter of dismissal expressed the reason as follows:

“... whilst on suspension with pay and specifically being asked not to go back on site, or make contact with staff involved, you did. This we consider a serious misconduct offence for refusing to perform a lawful and reasonable request. By doing so you have breached the trust necessary between an employer and employee.”

Justification for the suspension

[55] I apply the following approach to determining whether the suspension was unjustified and Mr Sminchisescu has a personal grievance as a result.

“[104] Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of an employer’s proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from **Tawhiwhirangi** ... confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer’s conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.”²

² **Graham v Airways Corporation of New Zealand** [2005] ERNZ 587, 613

[56] While I bear in mind the above a further decision of the Employment Court's addressed the relevance of the lack of any contractual provision for suspension, which was also the case here. Also as here, that decision addressed a suspension imposed on the day after an incident into which an investigation was just beginning and for the purpose of 'enabling further investigations to be made'.

[57] The court said:

"In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct or even serious misconduct does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue."³

[58] Mr Organ submitted that the 'other significant issue' here was that that the situation facing Five Star was so serious and unusual as to make Mr Sminchisescu's suspension necessary.

[59] The situation facing Five Star by about 5.30 or 6 pm on 24 August was that it was aware two of its employees had taken some damaged cartons of beer, and that the driver of the delivery truck carrying the cartons had jokingly said they could do so. At least one of the employees had been told not to take the beer, and to go home when he did take it. Mr Sminchisescu was indicating there had been a degree of resistance from that employee. The incident had occurred at about 3.30 am on 24 August, Mr Sminchisescu had not formally reported it to his managers although he discussed it with Mr Hutching at about midday, and information about it had been gathered on a relatively piecemeal basis throughout the day. There was no allegation that Mr Sminchisescu had taken any beer and no reasonable grounds for suspecting he could have.

[60] I take into account the detail of the company's concerns as set out in the submissions, but I believe the implications of the matters raised have been significantly overstated. Indeed a remarkable feature of this problem has been the

³ **Singh v Sherildee Holdings Limited t/a New World Opotiki** (Judge Couch, 22 September 2005, AC 53/05)

extent to which circumstances I consider from the outset were indicative of a need to follow up with Mr Sminchisescu regarding the way in which he did or should have handled the incident, descended into a whirlpool of unresolved and sometimes unreasonable suspicion of his motives and actions. Matters reached their nadir in the evidence and argument about whether or not Mr Sminchisescu had been to the company's office prior to his attendance at the 28 August meeting.

[61] Accordingly I do not accept that the circumstances as they related to Mr Sminchisescu's conduct were unusual, let alone that they warranted suspension even in the absence of a relevant contractual provision.

[62] In such circumstances the company's position is made even weaker by its failure to allow Mr Sminchisescu an opportunity to be heard on his suspension before it was imposed.

[63] As for the adverse effect on an employee of a suspension, it is not sufficient to say that paying the employee redresses any damage that might be associated with the suspension. The courts have commented on the adverse effects on employees even of paid suspensions⁴, and the concern and anxiety Mr Sminchisescu exhibited here is an example of those effects.

[64] For all of these reasons I do not accept that an employer acting fairly and reasonably would have decided to suspend Mr Sminchisescu.

[65] I therefore conclude that the suspension was not justified. Mr Sminchisescu has a personal grievance in respect of it.

Justification for the dismissal

1. The company's suspicions

[66] Five Star's suspicions about Mr Sminchisescu's conduct inflamed its view of the significance of his behaviour between 23 and 28 August, and influenced the decision to dismiss. This was so much so that, although matters arising out of the

⁴ Ref: **Birss v Secretary for Justice** [1983] 1 NZLR 513

suspicions were not themselves cited as grounds for the dismissal, I comment on the evidence relevant to them.

[67] First, there was the concern about why Mr Sminchisescu had not made a full and prompt report of the incident. I accept that the incident was serious, and consider that, as supervisor, Mr Sminchisescu should have made such a report as soon as possible and regardless of whether there was a formal policy to that effect. He did not do so. Quibbling about matters such as whether it was usual for him to contact his managers in the middle of the night begged the question of why there was no report. Further, at best the explanations Mr Sminchisescu gave in evidence overlooked his obligations as supervisor in the light of such an incident. However the concern about the lack of a proper report was covered at the time in only the most cursory way, and I believe the concern led to a suspicion about Mr Sminchisescu's motives in failing to report fully and promptly which was not supported by proper investigation or evidence.

[68] Second, there were concerns about differences or 'inconsistencies' in Mr Sminchisescu's treatment of Ene and Galo respectively. None of these were raised with Mr Sminchisescu in any but the vaguest of terms, and no aspect of the concerns was put directly to him for comment or explored in any detail.

[69] It transpired there was a concern about why Mr Sminchisescu told Galo not to come back to work, but did not say that to Ene. Such a question is relevant to Mr Sminchisescu's handling of the incident. I do not accept that it justifies a suspicious approach, particularly as the matter was the subject of only the most cursory of questioning.

[70] Another concern about the respective treatment of Ene and Galo lay in why Galo was allegedly instructed expressly not to take the beer, while Ene was not. However Ene admitted to the company that he was aware of the instruction to Galo, but took the view that in the absence of an instruction aimed directly at him Mr Smith's permission to take the beer still stood. Aside from the fact that I do not believe the company correctly assessed the information available to it at the time, I do not believe that any perceived difference of this kind suggests suspicious conduct on Mr Sminchisescu's part. The matter is more directly relevant to Ene's culpability.

[71] The company was suspicious even about why Mr Sminchisescu advised Mr Hutching on 24 August that Galo had taken some beer, but did not refer to Ene. A proper report should have included Ene, and in a properly conducted investigation it would be reasonable to ask Mr Sminchisescu why he mentioned Galo but not Ene. However there was no basis for treating as suspicious the lack of such mention. In any event, none of this was put to Mr Sminchisescu.

[72] Aside from all of the above, the company has not specified just what was suspicious about any perceived difference in treatment.

[73] I turn thirdly to the very generalised concern about collusion. The nature of that concern was not specified. There was no direct evidence of collusion between Mr Sminchisescu and either or both of the storemen at all, and not even any allegation directly implicating Mr Sminchisescu in some form of collusion. If suspicions arising out of the treatment of Ene and Galo were being relied on in that respect, then for the reasons indicated I find they fall far short of providing reasonable grounds for a suspicion of collusion.

[74] Finally the concern about intimidation was just as vague as the concern about collusion, and there were no details of who intimidated whom and why. The raw information raises a question about Galo's response to Mr Sminchisescu's instruction not to take the beer, and Mr Sminchisescu's attempt to suspend Galo, but again the circumstances raise a question primarily in respect of Mr Sminchisescu's handling of the matter. Again, the matter was not addressed in any but the vaguest of detail.

[75] I do not overlook what Mr King is alleged to have said on the afternoon of 24 August. Even if it was said, it has been given a significance it does not deserve given that no proper context for its assessment has been established.

[76] Overall I find the company's suspicions arose out of snippets of information that were not drawn together in a coherent whole and certainly never put properly to Mr Sminchisescu.

2. The reason for the dismissal

[77] Five Star faces difficulty in justifying a dismissal for refusing to obey a lawful and reasonable 'request' (which for present purposes I take as meaning 'instruction'), when the request was associated with a suspension I have found to be unjustified. To justify such a dismissal it would probably be necessary to show the existence of conduct associated with the refusal and sufficiently destructive of the relationship of trust and confidence to warrant disciplinary action despite the unlawful instruction. That conduct would itself have to be the subject of a fair and reasonable investigation.

[78] Here, the principal concern was with Mr Sminchisescu's return to the premises on the night of 24 August. Not only did he do so, but he spoke to staff members when he had been asked not to. That is not in itself sufficient to overcome the fact that the associated suspension was unjustified.

[79] Moreover on the evidence the visit occurred in a context of Mr Sminchisescu's uncertainty and anxiety about the basis of the suspension, and an obvious wish to keep a close eye on what was, or might be, alleged about him. That is understandable. As for whether Mr Sminchisescu went further and actively attempted to interfere with the company's investigation, at worst there is a question mark over the whereabouts of the original of the FIR.

[80] Not only that, Mr Sminchisescu's conduct overall was not properly investigated and the dismissal process was profoundly flawed. As far as the company's investigation is concerned, Mr Tyson told Mr Sminchisescu on 24 August variously that a number of things concerned him, and he was not happy about the circumstances. That was far from enough to indicate to Mr Sminchisescu what aspect of his conduct, if any, was under investigation, let alone provide him with a proper opportunity to respond.

[81] At the 28 August meeting Mr Tyson purported to characterise the meeting as being for the purpose of going over the 23 August events, but there was no more than a cursory exploration of Mr Sminchisescu's role and none of the concerns about that aspect were properly followed up. When discussion turned to Mr Sminchisescu's return to the premises on 24 August, there was no suggestion that it was being treated as a possible disciplinary concern in itself. The assertion regarding the difficulty in

completing the investigation was not explained, and nor was there any indication at the end of the meeting about why Mr Tyson was still not happy.

[82] Similar flaws were evident in the conduct of the 3 September meeting, as I have already described it.

[83] I have also commented in the findings of fact on a number of occasions where it appeared there was no follow up discussion of responses which should have been followed up in order to obtain a full picture of what happened, and detailed the numerous occasions where various suspicions or concerns were not put to Mr Sminchisescu for his response at all.

[84] I consider the flaws in the investigation to be so extensive that I find Mr Tyson was not entitled to reach the conclusions he did. He simply did not obtain the information reasonably necessary to support those conclusions, and drew inferences that were not warranted. Further an employer acting fairly and reasonably, and who had conducted a fair and reasonable investigation, would not have dismissed Mr Sminchisescu. The dismissal was unjustified. Mr Sminchisescu has a personal grievance.

Remedies

1. The suspension

[85] Mr Sminchisescu seeks compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 for injury to his feelings resulting from his unjustified suspension.

[86] The anxiety and uncertainty he exhibited is evidence of injury. Five Star is ordered to pay to Mr Sminchisescu the sum of \$2,000 in respect of the injury.

2. The dismissal

[87] Mr Sminchisescu seeks the reimbursement of remuneration lost as a result of his personal grievance.

[88] He obtained temporary employment after his dismissal, in the form of a series of engagements through an employment agency. I accept that he lost remuneration to 21 November 2007 in the sum of \$5,210.26 gross. He is entitled to the reimbursement of that sum and I order accordingly.

[89] He is also entitled to the reimbursement of further remuneration lost from that date to the date of reinstatement. The parties should address that matter and leave is reserved to refer it to the Authority if there are any difficulties.

[90] Mr Sminchisescu seeks compensation under s 123(1)(c)(i) for the injury to his feelings arising out of the unjustified dismissal.

[91] When assessing an appropriate amount it is open to me to take into account the mix of remedies awarded. Since there is to be an order for reinstatement, which is capable of addressing some of that injury, Five Star is ordered to pay to Mr Sminchisescu the sum of \$3,000.

[92] Mr Organ submitted that, should I find the dismissal unjustified, Mr Sminchisescu's contributory conduct should be taken into account under s 124 of the Act, and his remedies reduced accordingly.

[93] My reservations about Mr Sminchisescu's conduct are these. Despite my acknowledgement of his anxiety over his suspension, I find there was an element of underhandedness in his actions in returning to the premises on the night of 24 August. I do not accept his evidence to the effect that he was in Onehunga for unrelated reasons when he thought there was a convenient opportunity to retrieve his diary from his workplace. Nor do I accept his denial that he told Mr Hutching he was already on the premises when he purported to request permission to enter them. He was calculating in the way he came to be in Onehunga on the night of 24 August, misled Mr Hutching about where he was, and purported to seek permission to attend the premises from Mr Hutching when he knew Mr Tyson would not give such permission.

[94] The employer's unfair treatment of him does not excuse conduct of that kind and while I do not consider the conduct warrants a reduction in remedies, I do not

consider it appropriate to overlook it. This is particularly so because I am ordering reinstatement, and it is incumbent on both parties to work to support the relationship of trust and confidence.

[95] Turning to reinstatement, s 125 of the Employment Relations Act says this:

“125

- (1) This section applies where –
- (2) If this section applies the Authority must, whether or not it provides for any of the other remedies provided for in s 123, provide, wherever practicable, for reinstatement as described in s 123(1)(a).”

[96] Mr Tyson said it would not be practicable to reinstate Mr Sminchisescu because he had lost trust and confidence in him. Such a viewpoint is difficult to sustain in a reinstatement context when the reason for the loss of trust and confidence is the same as the reason for a dismissal which has been found to be unjustified. In particular, not only did the dismissal follow what amounted to an alleged breach of the terms of a suspension that was unjustified, the suspicions about Mr Sminchisescu’s role in the 23 August incident have never been properly investigated. Nor has any concern about Mr Sminchisescu’s handling of the incident been properly investigated or addressed. In the absence of any properly completed investigation Five Star cannot rely on any loss of trust and confidence arising out of those matters.

[97] As for Mr Sminchisescu’s alleged breaches of the terms of his suspension, I have found he behaved in an underhanded way but also that the suspension was unjustified. I do not consider Mr Sminchisescu’s conduct to be serious enough to base a finding that the resulting loss of trust and confidence means he should not be reinstated.

[98] I therefore order Mr Sminchisescu’s reinstatement in his former position or a position no less advantageous to him.

Summary of orders

[99] Five Star is ordered to reinstate Mr Sminchisescu.

[100] Five Star is ordered to pay to Mr Sminchisescu the sums of:

- (a) \$2,000 in respect of the unjustified suspension;
- (b) \$5,210.26 as reimbursement of remuneration lost from the date of dismissal to 21 November 2007, together with additional remuneration lost from that date to the date of reinstatement and to be quantified by the parties;
- (c) \$3,000 as compensation for the unjustified dismissal.

Costs

[101] Costs are reserved.

[102] The parties are invited to agree on the matter. If they seek a determination from the Authority they are to file and serve memoranda setting out their positions by 25 January 2008. If either wishes to reply to anything in the other's memorandum, such reply is to be filed by 1 February 2008.

R A Monaghan

Member of the Employment Relations Authority