

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 191
3003938

BETWEEN PHILLIP SYLVA
 Applicant

AND COUNTIES POWER LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Roland Samuels for Applicant
 Jodi Sharman for Respondent

Investigation Meeting: 22 May 2017

Additional Information
Received: 23 May 2017

Submissions Received: 26 May and 7 June 2017 from Applicant
 2 June 2017 from Respondent

Determination: 3 July 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Mr Sylva was not unjustifiably dismissed.**

- B. One or more conditions of Mr Sylva's employment were not affected to his disadvantage by unjustified actions of Counties Power Limited.**

- C. Mr Sylva has failed to establish Counties Power Limited breached its statutory obligations of good faith.**

- D. Mr Sylva is ordered to pay to Counties Power Limited the**

amount of \$4,500 within 28 days of the date of this determination as a contribution to its costs.

Employment relationship problem

[1] Mr Phillip Sylva claims he was unjustifiably dismissed, that one or more conditions of his employment were affected to his disadvantage by the unjustifiable actions of Counties Power Limited (Counties Power), and that Counties Power breached its statutory duty of good faith. Counties Power denies the claims.

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Sylva and Counties Power but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[3] The issues for determination are whether:

- a) Mr Sylva was unjustifiably dismissed and if so, what if any remedies should be awarded;
- b) one or more conditions of Mr Sylva's employment were affected to his disadvantage by the unjustifiable actions of Counties Power Limited and if so, what if any remedies should be awarded;
- c) Counties Power breached its statutory duty of good faith and if so what if any penalties should be imposed.

Unjustified dismissal

[4] Mr Sylva was summarily dismissed from his employment on 2 December 2016 for breach of his delegated authority and as a result of Counties Power reaching a conclusion that it could no longer have trust and confidence in him. Mr Sylva claims the decision to dismiss him was unjustified because Counties Power did not fully investigate the allegations made against him.

[5] The Authority must consider the four procedural fairness factors set out in section 103A(3) of the Act. These are whether the allegations against Mr Sylva were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to the concerns and whether such explanation was considered genuinely by Counties Power.

[6] The Authority may take into account other factors as it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Sylva being treated unfairly.

[7] The Court of Appeal has confirmed that the effect of section 103A(3) is that there may be a variety of ways of achieving a fair and reasonable result and that the overall requirement is for an assessment of substantive fairness and reasonableness, rather than minute and pedantic scrutiny to identify failings.¹

[8] The Authority's task is to examine objectively the employer's decision making process and determine whether what the employer did and how it was done were steps that were open to a fair and reasonable employer.²

Relevant terms of the employment agreement and Counties Power policies

[9] Mr Sylva's employment was subject to the terms and conditions set out in a written individual employment agreement dated April 2016. The employment agreement through clause 2.2 requires Mr Sylva to comply with all policies and procedures implemented by Counties Power.

Individual Employment Agreement

[10] Clause 14.0 of the employment agreement sets out the obligations of the parties regarding conduct and discipline. The clause requires that where allegations of misconduct are made against an employee and there is a possibility of dismissal the employee is to be provided with the opportunity for explanation and representation.

[11] Clause 14.0 also requires that where an employee is judged to have acted in a manner constituting serious misconduct Counties Power may consider penalties up to and including summary dismissal.

¹ *A Ltd v H* [2016] NZCA 419 at [46].

² *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [26].

Delegation of Financial Authority Policy

[12] The Delegation of Financial Authority Policy sets out the rules applying to financial delegations including sub-delegations.

[13] Mr Sylva signed an acknowledgement that he accepted a sub-delegated financial authority of up to \$10,000 on 16 May 2016. The acknowledgement included that Mr Sylva had read and understood the basis of the sub-delegation. A similar acknowledgement was signed by Mr Sylva on 24 November 2016.

Code of Conduct and Ethics (the Code)

[14] Counties Power has published a Code setting out the standards expected of employees working for and on behalf of the company. Under its core principles Counties Power states that maintaining its professionalism and high performance is of utmost importance and all employees must represent the company in the best possible light.

[15] Conflicts of interest are addressed in the Code which states:

Avoiding conflicts of interest in all Counties Power business decisions is essential to our values. Conflicts of interest may occur when outside activities or personal interests conflict or appear to conflict with Everyone's responsibilities to act in the best interests of Counties Power, or interferes with good judgment in carrying out work duties. Gifts and entertainment serve an important business purpose by promoting successful working relationships and building goodwill. However, Everyone must ensure that giving or receiving gifts or entertainment does not suggest a conflict of interest.

[16] The Code sets out the expectation that all employees will conduct their activities legally and ethically and that violations of the Code, company policies, standards or rules could result in disciplinary action including the termination of employment.

Sensitive Expenditure and Gifting Policy

[17] Sensitive expenditure is discretionary spending by Counties Power which may be considered unusual or might imply a form of perk or bonus for an individual. The policy recognises that gifts are not strictly sensitive expenditure but can be a sensitive issue.

[18] Gifts include goods received by employees and which may be for their private use. The policy states that under no circumstances are gifts to be exchanged for cash. Acceptance of any gift with a monetary value exceeding \$100 must have the express

approval of the department manager for the employee to retain it and the gift must be logged into a gift register.

Events leading up to dismissal

[19] At a team meeting on 24 November 2016 Mr Errol Shoemark, Manager Underground Works, met with the management team of the underground works unit which included Mr Sylva. During the meeting Mr Shoemark was asked if Counties Power would fund a Christmas function for the team. At the investigation meeting Mr Shoemark confirmed there was discussion about alcohol, transport and a venue for the function. The team accepted Mr Sylva's offer to host the function at his house. Mr Shoemark was asked if Counties Power would fund the transport and the alcohol. Mr Shoemark told the team it was unlikely the company would fund the function but offered to seek clarification from Mr Dale Carline, General Manager Field Operations. Mr Shoemark and another manager in the team offered to contribute financially to the cost of the function.

[20] Later that same day Mr Shoemark approached Mr Carline who declined to fund either the alcohol or the transport as the function was not supported by Counties Power. Mr Shoemark relayed this information to each of the team members who had attended the meeting earlier in the day including Mr Sylva. Mr Sylva denied being advised of Mr Carline's response. I have concluded it is more likely than not that Mr Shoemark did relay this information to Mr Sylva not only because he was hosting the function but also because the actions Mr Sylva took the following day make sense in light of Mr Sylva knowledge that the alcohol would not be funded by Counties Power.

[21] On Friday, 25 November 2016 Mr Sylva rang a contracting client of Counties Power and had a discussion with him about supporting a Christmas function for Counties Power field staff by contributing towards buying drinks and food. Mr Sylva advised the client that there would be around 40-50 people and about \$400 to \$500 would cover it.

[22] After the call the client contacted Ms Alison Moody, Procurement Manager and the client liaison for this particular client. The client advised Ms Moody about the telephone call he had with Mr Sylva. The client reported that Mr Sylva had offered to produce a Purchase Order if the client thought it was necessary and advised the client that he had done this previously when working in New Plymouth.

[23] A purchase order is raised when Counties Power engages someone to do work, hire equipment or buy materials for jobs. Details of the services or product to be provided together with an estimate of the price are loaded into Counties Power's financial system. The supplier then renders an invoice to Counties Power for the services, equipment or materials using the purchase order number. The purchase order is checked against the invoice and then paid.

[24] Ms Moody immediately reported the telephone discussion to Mr Carline and Mr Shoemark, who met with Mr Sylva later that day where they outlined the information they had received from the client. At the time Mr Sylva acknowledged the conversation had taken place but denied he had offered a supply a purchase order to the client. Mr Sylva was requested to put a statement in writing over the weekend and was advised that the matter was serious and a formal process would follow.

[25] After the meeting had ended Mr Shoemark and Mr Sylva walked outside together. Mr Sylva was upset and asked Mr Shoemark for advice. Mr Shoemark advised Mr Sylva to tell the truth. During their brief discussion Mr Sylva admitted he may have offered the client a purchase order and suggested to Mr Shoemark that maybe he should resign. Mr Shoemark suggested he not resign and think about matters over the weekend. Mr Sylva indicated he wanted to resign and the two men went back inside to find Mr Carline but could not find him. Mr Sylva left the worksite and went home.

28 November 2016 meeting

[26] When Mr Sylva attended work on Monday 28 November 2016 Mr Carline met with him.

[27] In his written evidence Mr Sylva told me that when he attended the meeting he understood the meeting was to gather further information. Mr Sylva told me that at the end of the meeting he was provided with a letter dated 28 November 2016 which sets out an allegation that Mr Sylva had offered a client a purchase order for works in return for a monetary contribution for a team function to be held at Mr Sylva's home.

[28] The letter advises Mr Sylva that the issue was considered serious misconduct and dependent on his explanation may result in dismissal. The letter encourages Mr Sylva to bring a support person or representative to the meeting.

[29] In his written evidence to the Authority Mr Sylva states that the letter was given to him after the formal meeting had started. Counties Power says the letter was provided to Mr Sylva prior to the meeting starting and after Mr Sylva had read the letter he was asked if he wished to postpone the meeting to allow him the opportunity to consider the letter and allegations and take advice. Counties Power told me Mr Sylva wanted the meeting to proceed.

[30] I find it is more likely than not that Mr Sylva was provided with the letter prior to the formal meeting being started. At my investigation meeting Mr Sylva admitted his written evidence was not correct and that he was given the letter and asked to read through it before the formal disciplinary meeting commenced.

[31] After receiving the letter and reading through it Mr Sylva provided Mr Carline his written statement in which he confirmed he had invited the client to make a contribution to the cost of alcohol for the team function.

[32] Mr Sylva's statement confirms he told the client he would do a purchase order if that suited the client. In his statement Mr Sylva explains that the offer of a purchase order was made in the context of the client providing a purchase order rather than cash. In his statement Mr Sylva denies he has the authority to provide a purchase order as it is done through another department.

[33] Mr Carline's evidence is that Mr Sylva was equivocal about whether he suggested a purchase order be raised or not. Mr Carline was concerned that throughout the investigation into the allegations Mr Sylva's responses changed from acknowledging he offered a purchase order, to denying he had done so, to telling Mr Carline that it was the client who would raise the purchase order and not Mr Sylva.

[34] The disciplinary meeting was adjourned twice to allow further investigations and enquiries to be undertaken by Mr Carline. The enquiries related to Mr Sylva's explanation that he was not able to raise purchase orders. Mr Carline was satisfied Mr Sylva had authority to and did raise purchase orders. During my investigation meeting Mr Sylva admitted that he could raise purchase orders and had done so the week prior to his dismissal.

[35] After the second adjournment Mr Carline outlined his initial conclusions to Mr Sylva. He advised Mr Sylva that he had reached a preliminary view that Mr Sylva's conduct amounted to serious misconduct.

[36] Mr Carline told Mr Sylva that he was concerned about the changes to his explanations and was concerned he was not being truthful. Mr Carline advised Mr Sylva that asking a client to pay for alcohol for a private party was inappropriate and could be deemed serious misconduct. Mr Carline's preliminary view was that Mr Sylva's employment should be terminated.

[37] Mr Sylva was invited to think things over and advised that they would meet again during the week so that both parties could give more consideration to the possible outcome and to provide any further feedback.

[38] Mr Sylva wanted to meet the following day. Mr Carline agreed with this and also offered Mr Sylva the opportunity to take up EAP. As events transpired the meeting did not take place until 2 December 2016. By this time Mr Sylva had sought advice and at the meeting on 2 December 2016 he was represented.

2 December 2016 meeting

[39] At the meeting on 2 December 2016 Mr Carline set out, once again, the allegations and his preliminary views. These were discussed and further information was provided by Mr Sylva through his representative. It was suggested, for the first time, that the client may have had a vendetta against Mr Sylva because Mr Sylva had undertaken site audits of the client's site and had raised non-conformance issues against the client.

[40] Mr Carline adjourned the disciplinary meeting to seek feedback from the client regarding Mr Sylva's claim that the client had a vendetta against him. Mr Carline accepted the client's denials.

[41] Mr Carline concluded he did not have the requisite trust and confidence in Mr Sylva and decided that his employment should be terminated. Mr Sylva was dismissed without notice for serious misconduct.

Conclusion

[42] For the reasons that follow I am satisfied the decision to dismiss Mr Sylva was a decision an employer acting fairly and reasonably could make in all the circumstances.

[43] Mr Sylva has never denied asking a client to fund alcohol for a team function in a situation where Counties Power had made it clear the function was to be funded

by the team personally and Counties Power did not support a private function. The request to a client to fund a private function was a breach of Counties Power policies on Sensitive Expenditure and Gifting and had the potential to become a conflict of interest for Mr Sylva when he undertook future audits on the client's site.

[44] Mr Sylva's explanations about the offer of a purchase order were changeable. Mr Carline formed the view that Mr Sylva was not being open and honest with him in his explanations which was a view open to him in all the circumstances.

[45] Mr Sylva has criticised County Power's processes. I am satisfied Mr Sylva had received full information about the allegations for which he was to provide an explanation. Mr Sylva was provided an opportunity for representation. Even though he received the letter setting out the allegations just prior to the disciplinary meeting, Mr Sylva was told he would be given as much time as he needed to review the letter and the contents of an email received from the client confirming the details of his telephone discussion with Ms Moody. Under those circumstances Mr Sylva told Mr Carline he was happy for the disciplinary meeting to commence.

[46] Before the disciplinary meeting started Mr Sylva was also asked whether he wanted to obtain representation or a support person. Again, Mr Sylva confirmed he was happy to proceed. At my investigation meeting Mr Sylva confirmed that he wanted the meeting to proceed as he did not want the matter hanging over him.

[47] Mr Sylva was offered the opportunity of representation for each of the formal meetings and took up that opportunity for the 2 December 2016 meeting. Adjournments were taken throughout both meetings to allow Mr Carline to consider Mr Sylva explanations and to conduct further enquiries.

[48] At my investigation meeting Mr Sylva told me if he had known the matter was as serious as dismissal being a possibility he would have insisted on getting representation prior to the meeting starting. I have concluded Mr Sylva was very aware of the seriousness Counties Power viewed the claims made by the client. Immediately after the meeting on 25 November 2016 he asked Mr Shoemark if he should resign, and despite being advised not to, he went in search of Mr Carline so that he could resign. The only thing that prevented Mr Sylva from resigning on 25 November 2016 was the fact that he could not find Mr Carline.

[49] By 28 November 2016 Mr Sylva was in no doubt that his employment was in jeopardy. He was advised by Mr Carline of his preliminary findings and in accordance with Counties Power's obligations of good faith advised Mr Sylva of the proposal to terminate his employment and gave Mr Sylva to consider the proposal and an opportunity to comment on it.

Unjustified disadvantage

[50] Pursuant to section 103A I must be satisfied on the balance of probabilities that one or more conditions of Mr Sylva's employment were affected to his disadvantage due to Counties Power's unjustified action. This requires a two-step process, firstly I must be satisfied of the disadvantageous actions and then I must determine whether those actions were justifiable.

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

[52] At my investigation meeting Mr Sylva confirmed that the disadvantageous actions he claimed were unjustified were the disciplinary process followed by Counties Power and its decision to dismiss him.

[53] I have found Mr Sylva's dismissal to be justified and am satisfied the process followed by Counties Power contained no elements of unfairness.

[54] Mr Sylva has failed to establish that one or more conditions of his employment were affected to his disadvantage by the unjustified actions of Counties Power and his application is declined.

Breaches of Good faith

[55] Mr Sylva has failed to provide any evidence of breaches of good faith on the part of Counties Power.

Costs

[56] Counties Power seeks a contribution to its costs in accordance with the Authority's normal daily tariff. This matter was lodged with the Authority on 27 February 2017 so the applicable daily tariff is \$4,500.

[57] Mr Sylva was provided with the opportunity to lodge and serve submissions in reply to Counties Power submissions which included submissions on costs.

[58] The hearing took one day and there was nothing overly complex about the matters in question. Taking all the circumstances into account I consider it appropriate that Mr Sylva pay Counties Power the amount of \$4,500 as a contribution to its costs and that this payment be made within 28 days of the date of this determination.

Vicki Campbell
Member of the Employment Relations Authority