

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 193
5394411

BETWEEN ERU COOPER JUNIOR
Applicant
A N D CMP CANTERBURY LIMITED
Respondent

Member of Authority: James Crichton
Representatives: Peter Moore, Advocate for the Applicant
Andrew Shaw, Counsel for the Respondent
Investigation Meeting: 9, 10 and 14 September 2015 at Christchurch
Date of Determination: 8 December 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Cooper) alleges that he has suffered disadvantage as a consequence of a series of unjustified actions of the employer (CMP) and all of those claims are resisted by CMP which alleges that three of the six claims have not been raised within time and are accordingly unable to be progressed and the balance involve neither unjustifiable actions nor disadvantage and therefore should be struck-out.

[2] Mr Cooper was employed by CMP as a meat worker on and from 4 November 2002 and at the time of the Authority's investigation meeting, Mr Cooper was a boner/sawman. His employment was covered by the operative collective employment agreement. That collective agreement imported CMP's Code of Conduct, a document that was agreed between CMP and the Meat Workers Union (the Union).

[3] Critical to the present dispute between the parties, or part of it, is a provision in the Code of Conduct which provides that where an employee has a continued pattern of absenteeism which impacts either on fellow employees (through their ability to earn income including bonuses) and/or the employer, the subject employee may either be relegated to a lower paid position or lose the bonus component of their wage. The process for addressing any such issue involved CMP's manager engaging with the Union's secretary.

[4] Part of the process by which this absenteeism pattern was addressed in the workplace involved the generation of what CMP called counselling letters.

[5] It is common cause that Mr Cooper received such letters on 29 January 2008, 8 January 2009 and 5 December 2011. They are all in similar terms. An example is the letter dated 5 December 2011 which is in the following terms:

Dear Eru,

re Attendance Record

Our records indicate that your work attendance this season has been far from satisfactory.

We rely on our employees to attend work every day and strongly suggest that if there is not considerable improvement in your attendance you may be liable for formal disciplinary action under the Code of Conduct which may range from a warning to dismissal.

As your continued employment with the company could be jeopardised by future absences, we suggest you make every effort to attend work every work day.

[6] Then on 2 July 2012, Mr Cooper received a letter from CMP which followed a meeting wherein Mr Cooper's continued absenteeism was discussed. The effect of the 2 July 2012 letter and its attachment was to remove Mr Cooper's entitlement to bonus for a three week period from the date of the letter down to Friday, 20 July 2012. That decision was made in reliance on clause 5 of the Code of Conduct which I referred to above. That clause allowed CMP, with the agreement of the Union, to impose either a loss of bonus for a period or a reduction to a lower paid role for a period.

[7] Then, by letter dated 27 July 2012, CMP wrote again to Mr Cooper referring to "the number and the types of claims that you have had" in the context of the Health and Safety in Employment Act 1992. The evidence from CMP was that the company

took health and safety incredibly seriously, was an accredited employer for ACC purposes and, in conjunction with the Union, sought to engage with any staff who it discerned were in any way compromising the ability of CMP to protect its total workforce.

[8] Then, in anticipation of yet another meeting between CMP and Mr Cooper about his lateness (compared with the earlier actions which related to absenteeism simpliciter), Mr Cooper caused his advocate to write to CMP raising a personal grievance in respect of the decision CMP made to remove payment of bonus to Mr Cooper for a three week period in July 2012.

[9] The 24 August 2012 meeting between CMP and Mr Cooper resulted in Mr Cooper being given a verbal warning for being late for work three or more times.

[10] Then on 7 September 2012, CMP conducted a disciplinary meeting with Mr Cooper concerning his "*continued absences from work, specifically: August 8th, August 9th (present for one hour), and August 10th 2012*". At that meeting, Mr Cooper was presented with his absenteeism record, the CMP Code of Conduct, the warning he received on 2 July 2012, together with all of the counselling letters he had received from 2008 onwards concerning his absenteeism.

[11] Then on 29 October 2012, CMP provided a tentative decision pertaining to the 7 September 2012 meeting, the parties having been to mediation in the meantime without success, and that letter summarised the history of Mr Cooper's absenteeism and concluded that his most recent behaviour contributed to a conclusion that he was in fact showing a continued pattern of absenteeism which entitled the employer to respond in terms of clause 5 of the Code of Conduct which, as I have previously indicated, gave CMP, after engagement with the Union, the option of either relegating the subject employee to a lesser paid position or removing the bonus component of the subject employee's pay for a period.

[12] Mr Cooper's advocate provided a response to the employer by letter dated 12 December 2012 and CMP's decision issued the following day, 13 December 2012. That letter confirmed the tentative decision previously issued on 29 October 2012 and imposed a stand down period of six weeks the effect of which was that Mr Cooper would from Monday, 17 December 2012 revert from being a knife hand to being a labourer, for the ensuing six weeks' work.

[13] In the meantime, a letter dated 23 November 2012 from Mr Cooper's advocate sought to raise other personal grievances and/or complaints.

[14] Then by email dated 5 March 2013, Mr Cooper's advocate raised a personal grievance in respect of the decision of CMP dated 13 December 2012 wherein Mr Cooper was stood down from one role to a lesser role for a period of six weeks.

[15] However, in November 2012, there had been a further issue between Mr Cooper and CMP relating to his role as a step-up sawman. CMP has nine sawmen working in rotation per shift. In addition, there are two additional men whose role is a step up sawman and those two employees relieve the permanent sawmen when that is necessary because of absence for any reason.

[16] When those step-up sawmen do fulfil the role of sawman, they are paid additionally for "*acting up*". I heard evidence from CMP and especially Mr Peter Hislop, who was a supervisor at the time, that during November 2012, Mr Cooper's behaviour deteriorated to the point where it was "*a concern to me and others because of health and safety risks both to himself and other workers*". Mr Hislop referred to Mr Cooper being "*very angry and bitter*" and he told me that he had tried to talk to Mr Cooper and that he "*... couldn't even hold a conversation with [Mr Cooper]*".

[17] As a consequence, Mr Hislop made the decision not to allow Mr Cooper to step up to the role of sawman which of course had an effect on Mr Cooper's income. The basis for the decision, according to CMP, was around health and safety issues and the long history of absenteeism.

[18] I heard evidence to the effect that the sawman role was a potentially highly dangerous role within the works and it was important that operators of the saw literally "*had their mind on the job*". Moreover, it was equally important that a key role like that of sawman was actually filled as and when required. The risk of a sawman with a high absenteeism rate was greater to production than would be the case with someone without that profile.

[19] This is a continuing employment relationship. Mr Cooper's advocate, in correspondence with CMP and its counsel, entreated CMP not to penalise Mr Cooper while his alleged personal grievances were in the course of resolution.

[20] Notwithstanding those observations, which are of course entirely appropriate, Mr Cooper's advocate has hardly distinguished himself by failing absolutely to file this matter promptly in the Authority so that it could be investigated and disposed of. Given that the parties were unable to resolve matters on their own terms, one would have thought Mr Moore would have acted promptly to get the matter before the Authority.

[21] But the statement of problem was filed on 18 May 2015 which is fully 2½ years after the events complained of and indeed it is common cause that the relationship between Mr Cooper and CMP has materially improved since the events complained of.

[22] In this general connection, I am bound to observe that I accept the point made for CMP that the unreasonable delay in bringing this matter on for hearing has materially contributed to the challenges for CMP in resisting Mr Cooper's various claims.

[23] That has been contributed to as well by the complete failure of Mr Cooper and his advocate to properly raise all of the matters in dispute within the justiciable period. There are six claims that Mr Cooper wanted the Authority to investigate, but only three of them have been properly put before the employer by way of the raising of a personal grievance within time.

[24] For the avoidance of doubt, I do not accept the submissions made for Mr Cooper that the raising of a personal grievance can somehow be implied from conduct.

[25] Certainly it is true to say that the law allows a personal grievance to be raised orally but I am satisfied that the oral raising of a grievance requires exactly the same elements to be present as would be the case if the raising were in writing. Those elements are the fact of a personal grievance being raised, the particular nature of the personal grievance and the facts being relied upon to support the grievance, together with the remedies sought to resolve the matter.

[26] These are not elements of minutiae that can be overlooked; the point is that the law is established in this way to give employers the best opportunity to resolve personal grievances promptly at their source and without those elements that I have

identified being present in the raising process, there is little if any prospect of matters being able to be resolved.

[27] I will comment later in this determination on each of the matters Mr Cooper seeks to have me consider.

The issues

[28] It will be necessary for me to consider each of Mr Cooper's allegations of personal grievance by way of unjustified disadvantage.

[29] Accordingly, I will address the following questions:

- (a) Does Mr Cooper have a personal grievance because of the lateness issue in July 2012;
- (b) Does Mr Cooper have a personal grievance because no copy of the collective agreement was provided;
- (c) Does Mr Cooper have a personal grievance because of CMP having misleading policies around basic legal rights;
- (d) Does Mr Cooper have a personal grievance for loss of bonus;
- (e) Does Mr Cooper have a personal grievance for being stood down as the step-up sawman;
- (f) Does Mr Cooper have a personal grievance for being demoted for six weeks to the labourer role?

Does Mr Cooper have a personal grievance for lateness in July 2012?

[30] There is no evidence before me to suggest that this issue was ever the subject of the proper raising of a personal grievance and it is apparent from CMP that no consent has been given to the matter proceeding out of time.

[31] There is also no specific application from Mr Cooper claiming exceptional circumstances; the most that one could say is that the submissions filed for Mr Cooper at the end of the proceeding suggest that in some circumstances (and not specifically relating to this issue), the raising of a personal grievance can be implied.

[32] It follows that I do not need to take this particular matter any further but I do desire to make some observations about the general issue of absence and absenteeism as it pertains to the employment relationship problem.

[33] I note first that the applicant erroneously claims in his statement of problem at para.1.1 that he received a verbal warning for lateness in July 2012. This is incorrect; the disciplinary response of the company was not to lateness but to absenteeism and they are of course different.

[34] Lateness contemplates attendance at the workplace at a later time than the stipulated start time. Conversely, absenteeism as the concept is used by CMP, constitutes a generic grouping of the various bases on which an employee might not be at work when he was expected to be.

[35] The evidence for CMP was that absenteeism was a significant problem at the plant. The evidence of Mr Hislop for example indicated that CMP operated a rotation process designed to give all workers a variety of jobs and to combat the possibility of repetitive strain injury.

[36] Mr Hislop went on to indicate in his evidence that that rotation process is difficult to operate if workers expected to turn up simply fail to show and it impacts on production, on cost per unit and also on the ability of the remaining workforce to generate the bonuses which augment their income.

[37] There was evidence from Mr Hindson, the Lamb Processing Manager, who told me that when staff do not turn up, other employees have to work harder and longer and by virtue of the absences of a few, production is reduced and that impacts on the ability of those remaining to earn bonus payments.

[38] Moreover, he told me that where absenteeism resulted in the slowing down of processing, it became necessary for CMP to airfreight product to overseas markets at a cost of around \$5 per kilogram which of course is a cost that CMP has to absorb because it guarantees supply to its overseas clients.

[39] It was also apparent on the evidence I heard both from CMP and from the two union officials who attended my investigation meeting on subpoena that both parties to the collective agreement were concerned to try to reduce the incidence of absenteeism because the negotiating parties were each of them satisfied that

absenteeism had a negative impact, both on the employer's bottom line and on the earning capacity of employees.

[40] The latter factor is particularly important because of the team nature of the organisation of the workplace, the use of the rotation system which Mr Hislop explained to me, and the fact that as a consequence, workers had to rely on each other in a collaborative sense.

[41] In that context then it is appropriate that I make the fundamental point that I am satisfied on the evidence I heard that Mr Cooper had one of the worst absentee records in the company. That statement is made as baldly as that by Mr Hindson and despite Mr Cooper's various explanations for why he was absent and his complaints about the way in which the employer maintained its records, I am satisfied on the balance of probabilities that the evidence Mr Hindson gave me in that regard can be relied on.

[42] It is evident that the Code of Conduct on which CMP relied to impose a penalty on Mr Cooper from 2 July 2012 down to 20 July 2012 was negotiated between CMP and the Union and was clearly seen as an article of faith by both parties.

[43] Given that both negotiating parties were clear that they had something to gain from reducing absenteeism, that ought not to be surprising. Nonetheless, Mr Cooper raised vociferous objections to the process, suggested amongst other things that there was no proper basis on which the Union could agree to such an arrangement and even maintaining that, despite the manifest evidence to the contrary, there had been no assent to the Code of Conduct provision by the membership of the Union at large.

[44] I decline to take the matter any further because the personal grievance relating to this particular subject matter was never raised with CMP and there is no proper basis on which it can be considered now. However, although it is not germane to this decision, for reasons I have just identified, I do observe that I see nothing in principle wrong with a contractual provision which allows the negotiating parties to try to encourage staff to attend the workplace as required. The Union officials who gave evidence at my investigation meeting made the point in the clearest terms that in their judgement (and I agree), it is much preferable to have employees suffering a short financial penalty which may impact on their behaviour positively, than to have the

same workers being marched down the disciplinary trail with the prospect of ultimate dismissal as the final outcome.

[45] Nor do I accept Mr Cooper's argument that because he did not agree to the Code of Conduct provisions concerning absenteeism, they ought not to apply to him. The fact of the matter is that Mr Cooper, as a member of the Union, must take the rough with the smooth; he is bound by the majority of union members who have accepted the provision and that is an end of it.

Does Mr Cooper have a personal grievance because of the collective agreement?

[46] Mr Cooper says that the employer and the Union failed to provide him with a copy of the collective employment agreement and that in consequence he has a personal grievance because of that failure.

[47] On the evidence I heard, there were two difficulties with that thesis. The first is that it is by no means clear that Mr Cooper himself ever sought a copy of the collective agreement and second, the inquiry that was made by others on his behalf would have been made in late July 2012 (by context) and a personal grievance was not raised until 23 November 2012, so again that personal grievance is out of time.

[48] Moreover, there is no application from Mr Cooper for the exceptional circumstances provision to apply and CMP does not consent to the grievance proceeding out of time so there is nothing further for the Authority to consider in this regard either.

[49] However, I would observe for the sake of completeness that I am absolutely satisfied on the evidence that the collective agreement was readily available both from the employer and from the Union. Union officials were very clear that if any member wanted to see the collective agreement or indeed get advice about any particular aspect of it, they had only to ask and the evidence for the employer was also clear that if an employee preferred to talk to it rather than the Union, it would be happy to provide one as well.

[50] It is true that the employer had a reluctance for copies of part of the collective agreement to be removed from the site because it contained information which would be of use to competitors. There is nothing in law which prohibits an employer from

protecting that sort of information and it is a relatively common practice amongst large employers.

[51] Moreover, the contention that Mr Cooper did not have a copy of the agreement is also not right because he was provided with one by one of his support people, Mr Campbell, and so certainly on and from the date that the personal grievance was purportedly raised, Mr Cooper would have had a copy of the collective agreement in his possession.

[52] It follows from that analysis that even if there were a viable personal grievance, and I have found that there has not been such a personal grievance raised, there would be no proper ground for any objection to be taken because Mr Cooper both had proper access to the collective agreement onsite (in exactly the same way as every other employee had) and in any event had been provided with a copy of the agreement to take offsite by the time the personal grievance was actually raised.

Does Mr Cooper have a personal grievance because of CMP's misleading policy?

[53] Again, the evidence before me is that this grievance was not raised within time although in this particular occasion the gap would appear to be very small, as little as two days.

[54] The essence of Mr Cooper's complaint here is the contention that, because CMP warnings all contain a disclaimer to the effect that the warning can be challenged within five days of issue, CMP is somehow seeking to abrogate the personal grievance right which allows workers to bring the grievance within 90 days of the events complained of.

[55] If this allegation were true, one would expect that Mr Cooper would not have been aware of his rights to bring a personal grievance but actually Mr Cooper, in this proceeding, seeks to have the Authority investigate six of them which suggests that he knew perfectly well there was a personal grievance procedure as well as the company procedure.

[56] I am not attracted by Mr Cooper's claim that the effect of the CMP proviso is an attempt by the company to contract out of the Employment Relations Act and its provisions for personal grievance.

[57] It is, I am satisfied, what a fair and reasonable employer could do in all the circumstances by effectively giving employees who are subject to a warning the opportunity to revisit the matter after a cooling off period. There is nothing in the wording that CMP uses which suggests any attempt to abrogate the statutory provisions in the Employment Relations Act and in any event, given that this is a highly unionised workplace, one would have thought that any employee (especially a member of the Union such as Mr Cooper) would have engaged with his union officials if he felt there was any impropriety in what the company was doing or indeed any confusion.

[58] But actually, the Union was involved in the creation of this particular provision and clearly assented to it, albeit that it was some many years ago now that the provision was first inaugurated.

[59] I am not persuaded that Mr Cooper has been misled by this provision into failing to raise personal grievances; indeed, as I have already made clear, he is seeking to raise six of them which rather gives the lie to any contention that he has been misled by the company's attempt to provide workers with another opportunity to be heard after a cooling off period immediately following a warning.

Did Mr Cooper suffer a personal grievance because of the loss of bonus in July 2012?

[60] The focus of this grievance appears to be the alleged financial loss suffered by Mr Cooper and the contention that he was effectively being punished for what he considered were "*reasonable absences*".

[61] I have already made clear my view of the evidence on this point. It seems to me evident that Mr Cooper's absenteeism was amongst the worst in the company and the employer was properly applying a process which was mandated by the negotiating parties to the collective agreement, which was less onerous than the alternative disciplinary process, and which provided an environment in which the negotiating parties could effectively bargain for an outcome that was appropriate for the particular circumstances of the individual case.

[62] In my view, the approach taken by CMP was an approach that a good and fair employer could have taken in the particular circumstances of the case.

[63] In order for Mr Cooper to satisfy me that he has a personal grievance in this regard, he must demonstrate that there is both a disadvantage to him and that that disadvantage has been occasioned by unjustified actions of the employer.

[64] As to the second of those points, I have already indicated that I think a good and fair employer could have responded in the way that CMP did and I certainly do not accept Mr Cooper's contention that the provision is in effect a penalty clause and can be considered in the same light as the provision that His Honour Judge Couch was considering in *GL Freeman Holdings Ltd v. Livingston* [2015] NZEmpC 120.

[65] That case involved a contractual provision, the effect of which was that workers who failed to give the appropriate period of notice, forfeited a proportional amount of their final pay. In the present case, the negotiating parties are trying to promote good behaviour for the benefit of everyone and with a view to encouraging that good behaviour have identified two separate devices which provide a financial penalty to workers who are guilty of persistent absenteeism instead of the alternative which would require disciplinary action, potentially ending in dismissal.

[66] Not only am I satisfied that a good and fair employer in CMP's position could conclude that this was a proper way of reducing absenteeism, but I also have to accept the deficit suffered by Mr Cooper is hardly grave, amounting as it does to \$256.

[67] On the facts then, there has been a deficit to Mr Cooper, albeit a modest one. The question remains whether, at law, there has been any unjustified action. I have already indicated my view that a good and fair employer could take the steps that CMP took. Moreover, I do not accept Mr Cooper's reliance on *Livingston*; I think a proper construction of the arrangements that the negotiating parties made in respect of persistent absenteeism can properly be construed as a genuine attempt by the parties to quantify liquidated damages. After all, Mr Cooper is a member of the Union and the Union is empowered by its rules to negotiate for Mr Cooper and others and to reach satisfactory outcomes with the employer that benefit the members (including Mr Cooper).

[68] Mr Cooper cannot have it both ways; he is a member of the Union and as a consequence must accept the consequences of the Union's actions, driven as they are by a majority vote of members.

[69] The same logic applies in respect of Mr Cooper's reliance on the Wages Protection Act where he seeks to establish that because there is no written authority for a deduction to be made from his wages, the Wages Protection Act applies to preclude the operation of the subject provision.

[70] But again, I observe that the subject provision is not an imposition by CMP but is the result of negotiation between CMP and the Union where both parties seek to gain a benefit and given the involvement of Mr Cooper's union in the creation of the clause in question, I consider that the Union's role in the drafting and development of the provision in question together with the Union's engagement with the employer in the application of that clause, provides the consent which Mr Cooper claims does not exist.

[71] Nor for the sake of completeness do I accept Mr Cooper's submission that the policy was inflexible; the evidence I heard was to the contrary and suggested that the negotiating parties looked at each case on its merits and subject to the need to treat like for like, was very flexible as to outcomes. This is demonstrated by a number of occasions where Mr Cooper himself benefited, principally from the involvement of officials of his union who were able to negotiate better terms for his default than would otherwise have been the case.

[72] Nor do I accept Mr Cooper's claim that there was somehow a failure to notify this policy. Mr Cooper has been in this workplace for over a decade, has had access to the employment agreement throughout that time and indeed has been in possession of a copy of the agreement since some time in 2012 and the provisions in contention are clearly set out as part of that document.

[73] It seems to me inconceivable that workers would not have been talking about this provision from time to time and if Mr Cooper had a particular interest in the matter, he could readily have engaged with his supervisor or talked to his union. While his absenteeism was a problem at the time that these events happened, it seems that Mr Cooper's performance in that regard has improved dramatically since, and there has never been any question about Mr Cooper's ability as a worker. He is thought of highly by the employer and notwithstanding these proceedings, that attitude appears to remain. It follows that if Mr Cooper had particular concerns about this policy and wanted to discuss it, his supervisors would, I fancy, have been very happy to do so.

[74] Finally in connection with this issue, I observe that I do not accept Mr Cooper's contention that there is something wrong with the way CMP records absence. The evidence from the management team at CMP was that Mr Cooper's absenteeism was amongst the worst in the company and I have no reason to doubt the veracity of that evidence given as it was by witnesses such as Mr Hindson who seemed to me to be a straightforward and honourable man who had himself once been a member of the Union and had come up from the floor of the plant.

[75] Mr Cooper's advocate spent a great deal of time and energy trying to undermine that evidence by suggesting there was something wrong with the recordkeeping of CMP; I am not persuaded that he has established anything of the kind. The facts as I discern them are that this is not a sophisticated computer-based system but is a paper-based system which is subsequently transferred onto computerised systems. I accept it may not have the level of sophistication of some systems, but the short point is that if witnesses who I think are trustworthy give me evidence on oath that a particular staff member has one of the worst levels of persistent absenteeism in the company, in the absence of concrete evidence to the contrary, I will take judicial notice of such evidence.

[76] What is more, CMP acknowledged there were some records of absence which simply were not official documents. The existence of this material is hardly helpful but I am satisfied that if the employer identifies the official material and reliance is placed on that material then the official material ought to be the documentation to place reliance on.

[77] Apart from Mr Moore's complaints about the nature of the structure of the data and the way it was kept, the fact is that Mr Cooper's own evidence confirmed that he had a problem with attending at the workplace but sought to explain that by giving the various absences he referred to, a different context from the categorisation made by the employer. Moreover, even Mr Cooper's own witness, Mr Campbell seemed to accept that Mr Cooper's attendance was "*not great*" although he maintained that other staff were as bad as Mr Cooper.

[78] The same witness (Mr Campbell) also gave evidence, which went unchallenged by the employer, that there would regularly be only 67 or 68 men present on shift in the lamb room when the compliment was 74. That evidence would suggest a continuing challenge with absenteeism particularly when the same witness

acknowledged that a failure of a worker to turn up without notification put extra pressure on the staff who do turn up.

Does Mr Cooper have a personal grievance for losing his step-up sawman role?

[79] Mr Cooper says he has a personal grievance because of the employer's decision in November 2012 to stand him down as step-up sawman. Mr Cooper says in his statement of problem that the employer did this because of his absences from work. That statement is not consistent with the evidence. As I have already noted on this matter, the employer took the step it did for reasons of health and safety and his record of absenteeism.

[80] Mr Hislop, a senior supervisor with CMP, gave evidence that he made the decision not to allow Mr Cooper to step up to the sawman role because he "*became very angry and bitter*" and Mr Hislop was unable to have a conversation with Mr Cooper because of this attitude problem.

[81] Given the evidence I heard about how dangerous the saw actually is, it seems to me quite clear that CMP would have been failing in its duty if it had not taken the step that it did at the time that it did.

[82] In terms of the Health and Safety in Employment Act 1992, employers have an obligation (as do employees for that matter) to use their best endeavours to provide a safe workplace for everyone and having employees operating potentially dangerous pieces of equipment when their mind is literally not on the job could have disastrous consequences.

[83] Mr Cooper goes to some lengths in his evidence to say how much of a team player he is but I do not think the evidence supports this conviction. He also has no memory of talking to Mr Hislop in November 2012 about the operation of the saw and maintained that he had no idea until these proceedings were on foot that the loss of the step-up sawman role for that period was for reasons that included health and safety.

[84] Again I have to say that I prefer the evidence of Mr Hislop to the evidence of Mr Cooper. Mr Hislop produced an erroneously dated handwritten note recording the events in question and Mr Hislop was questioned by me and cross-examined by Mr Cooper's advocate and was quite unable to be shaken on his evidence on the point and I accept it.

[85] I conclude then that there was no unjustified action by the employer in respect of this incident and so there can be no personal grievance.

Has Mr Cooper suffered a personal grievance because of being demoted in December 2012?

[86] By letter dated 13 December 2012, CMP issued its final decision letter in respect of a disciplinary process which began with a letter dated 4 September 2012 wherein Mr Cooper was requested to attend a meeting to discuss further absences, all on sick leave. A meeting between the parties took place on 7 September 2012 at which Mr Cooper was represented via telephone by his advocate, Mr Moore.

[87] A letter dated 29 October 2012 was generated as a consequence of that meeting which amongst other things provides a summary of Mr Cooper's absenteeism in all categories during the employment.

[88] The final decision letter which I note was dated 13 December 2012, imposed a six week stand down from the position of knife hand to the position of labourer commencing on Monday, 17 December 2012.

[89] It is apparent from the covert transcript of the 7 September 2012 meeting that CMP went to some considerable lengths to seek to explain to Mr Cooper and his advocate why his absenteeism was a cause of such grave concern and why it impacted not just on CMP's ability to deliver product to its customers on time and in good condition, but also impacted on the ability of Mr Cooper's workmates to generate the maximum income they could aspire to.

[90] Those observations were added to by the 29 October 2012 letter, which makes the same points in summary form.

[91] In the result, although the decision invoked a stand down of six weeks, the reality was that because of the statutory holidays over the Christmas/New Year period, the stand down was actually for under five weeks, the total loss to Mr Cooper from this period of reduced earnings was \$1,978 gross. It follows from that fact that it is clear that Mr Cooper has suffered a deficit. The question remains whether the action by CMP was justified in all the circumstances. I conclude that it was.

[92] CMP's decision was a further imposition of a penalty in terms of the Code of Conduct provision that I have already referred to at length in this determination and I

do not propose to repeat my earlier observations about the propriety of that provision. For present purposes, it is enough to say that I conclude that a good and fair employer in CMP's position could conclude that the imposition of a loss of bonus is the action that a good and fair employer could have taken in all the circumstances.

[93] While the initial focus of the engagement between the parties was the three days of lost time in August, while the disciplinary process was underway there was a further period of absenteeism of another two days lost during November 2012. So the pattern of excessive absenteeism just continued.

[94] It is important that I observe that the concept of persistent absenteeism includes all of the reasons that an employee might be absent including reasons that on their face are perfectly proper such as sickness, accident and the like. But the point is that even in respect of those categories of absence, if the total picture discloses a pattern which is unwholesome and which puts an impact on the safe, economic operation of the workplace for the benefit of the employer and the employees, then I am satisfied that a good and fair employer cannot simply ignore that pattern and must take some steps.

[95] Of course, there are a variety of steps that the notional good and fair employer can take and they include the conventional approach of disciplinary action leading ultimately to dismissal. The evidence I heard from both CMP and from the Union representatives who were summoned to give evidence before me was that both parties thought that the traditional disciplinary process would likely achieve less satisfactory results than the alternative that they agreed to and which is effectively the centrepiece of this employment relationship problem.

[96] As I have already observed, I am satisfied that the arrangement in place here, agreed to by the negotiating parties many years ago, and continually applied since that time in a collaborative way, is an approach that a fair and reasonable employer could take and the particular application of it in this case seems to me also to be one of the approaches that such an employer could take.

[97] No doubt there could be criticism of an employer who is perceived to be penalising an employee for taking time off sick, but the reality is that if that were the only reason that a particular employee was absent from the workplace, then such an employee would not meet the test for persistent absenteeism.

[98] Persistent absenteeism can only exist where there are significant numbers of days of absence, no doubt for a range of reasons but some anyway of those absences will be within the ability of the employee to avoid and the purpose of the joint employer/union approach in this workplace is to seek to try to address the problem appropriately.

Determination

[99] I have not been persuaded that Mr Cooper has any personal grievances and accordingly I dismiss his claim in its entirety.

[100] I observe again that this matter has not been assisted by the unreasonable delay in the filing of this proceeding. The matters in contention took place in calendar 2012 and as I write this determination now, at the end of calendar 2015, it seems to me appropriate to emphasise that all of the evidence I heard suggested that Mr Cooper was a valued employee for his work skills, that his absenteeism problem and his attitude had improved significantly since 2012 and it would be concerning if the effect of this present proceeding was to disestablish the progress that the parties appear to have made in getting along with each other better.

Costs

[101] Costs are reserved but as costs usually follow the event and CMP has been entirely successful in its defence of Mr Cooper's various claims, in the normal course CMP could look to Mr Cooper for a contribution to its costs.

[102] As the evidence I heard suggests that Mr Cooper is a person of modest means, I would commend to the parties the prospect that they might be able to resolve costs on their own terms and that CMP might consider taking a more conciliatory approach to the issue of seeking a contribution to costs than might be mandated by a strict application of the legal rules.

James Crichton
Chief of the Employment Relations Authority