IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 157
5337828

	BETWEEN	LEO LEITCH Applicant
	AND	CRUSADER MEATS NEW ZEALAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Scott, counsel for the Applicant Simon Menzies, counsel for the Respondent
Investigation Meeting:	1 December 2011
Determination:	9 May 2012

DETERMINATION OF THE AUTHORITY

A. Crusader Meats New Zealand Limited (CMNZL) was justified in concluding Mr Leitch committed serious misconduct but his dismissal was not justified because it did not act fairly in how it investigated allegations against him and decided to dismiss him.

B. The remedies awarded to settle Mr Leitch's personal grievance have been reduced by one half due to his contributory conduct.

C. CMNZL must pay Mr Leitch the following sums:

(i) three months ordinary salary under s123(1)(b) and s128 of the Act; and

(ii) $3000 as compensation under s123(1)(c)(i) of the Act.

Employment relationship problem

[1] Crusader Meats New Zealand Limited (CMNZL) employed Leo Leitch as

Technical Compliance Manager at its Benneydale plant from 15 June 2009 until it suspended him on 21 February 2011 and then dismissed him on 14 March 2011 for serious misconduct.

[2] At the time of his suspension Mr Leitch had already been notified on 16 February 2011 of a disciplinary meeting to discuss one allegation of serious misconduct – that he had arranged additional training for a particular cleaner despite an express instruction from CMNZL General Manager Anne Kelly not to do so.

[3] MCNZL Human Resources Manager Dave Wackrow had issued a final written warning to Mr Leitch on 28 October 2010. That warning was for refusing to obey a detailed written instruction from Ms Kelly and plant manager Mike Ramsay – that Mr Leitch must fill out certain maintenance reports. Mr Leitch had argued other managers should do the work.

[4] By letters to Mr Leitch dated 16 and 24 February CMNZL set out its latest allegations and warned him the disciplinary process could result in his dismissal.

[5] Mr Leitch and his representative met with Ms Kelly and Mr Wackrow in a disciplinary meeting on 3 March 2011. The discussion in the meeting addressed three allegations:

(i) Mr Leitch had refused to obey a lawful instruction (over the training of a cleaner); and

(ii) Mr Leitch disregarded "*the mandated and delegated responsibility of senior management*" with instances given including:

  (a) disputing an instruction from Ms Kelly to vary the night of the week on which he carried out inspections of cleaning work; and

  (b) telling Ms Kelly he had instructed cleaners to "*ignore*" instructions she had given them at a time he was not at the worksite; and

  (c) writing "*Bullshit!*" on top of a copy of an email from Mike Ramsay (in which Mr Ramsay told Mr Leitch to delay a meeting with cleaners over a performance issue until he had investigated the matter fully) and then leaving the email on Mr Ramsay's office chair.

(iii) Mr Leitch did not develop and maintain a good working relationship with

other management staff, with instances given including:

(a) telling a maintenance manager who expressed concern about a lack of proper communication and courtesy to "*get well soon*"; and

(b) demanding Mr Wackrow explain himself to Mr Leitch about what Mr Leitch said were "*fabrications*"; and

(c) sending Mr Wackrow a further email about those alleged fabrications after being told by Mr Kelly to "*refrain from any more communication with [Mr Wackrow] on this issue*".

[6] On 4 March Ms Kelly sent Mr Leitch a letter rejecting his explanation that the concerns raised with him were really performance issues rather than matters of conduct. She said there were several specific examples where Mr Leitch had deliberately not followed specific instructions "*accompanied by a belligerent and disrespectful attitude*". She said his "*acknowledged conduct*" of what he wrote in email exchanges between him, her and other managers was behaviour amounting to serious misconduct. She did not agree there should have been any confusion about his job description or lines of reporting. She said she was entitled to instruct Mr Leitch in relation to the manner in which he undertook his job and "*that is the case whether or not you agree with the instruction*".

[7] Ms Kelly said she accepted Mr Leitch did not 'complete' his refusal in two instances – one involving the training of a cleaner and, because he was suspended before he could do so, one about altering the timing of his night visits to the plant. However she said this was only because external events intervened and were no credit to any action or decision by him. She said the problem was "*the attitude [Mr Leitch] displayed in forming the view and expressing the view that [he] did not intend to carry out a lawful and reasonable instruction*".

[8] Ms Kelly declined Mr Leitch's proposal that the parties attend mediation. She said she did so because the behaviour in question was not isolated and Mr Leitch was a mature person who had to be responsible for the way in which he behaved and the consequences of what he said and did.

[9] She gave Mr Leitch an opportunity to comment on her provisional view that

the "*only realistic outcome*" was to dismiss him as he already had a final written warning for "*very similar misconduct*".

[10] Although Mr Leitch and his representative did not know and were not told at the time, the conclusions expressed by Ms Kelly were reached after she had discussed the matter with Mr Mike Ramsay at the Benneydale plant and, by telephone conference, with CMNZL's managing director John Ramsay who is based in Auckland. CMNZL is a family-owned business and John Ramsay is the father of Mike Ramsay.

[11] In a reply to Ms Kelly's 4 March letter, Mr Leitch (through his representative) repeated his view that the matter was a problem of performance and communication, amendable to mediation to restore relationships. Ms Kelly then confirmed her preliminary decision and dismissed Mr Leitch.

[12] Mr Leitch promptly raised a personal grievance on two grounds – firstly, that as Ms Kelly and Mr Wackrow were "*primary complainants*", CMNZL's investigation and disciplinary process should have been carried out by John Ramsay and, secondly, that the allegations against Mr Leitch were "*unproven*". He said the dismissal was unjustified and CMNZL should, instead, have implemented a performance plan with training in communication for Mr Leitch. He lodged a statement of problem in the Authority seeking reinstatement, lost wages and distress compensation.

[13] CMNZL responded by claiming its investigation was full and fair, with Mr Leitch given a fair opportunity to respond to all the allegations and to comment on the preliminary decision. It said Mr Leitch raised no concerns during the disciplinary procedure about who conducted it and there was a "*sufficient cooling-off period*" between the email exchanges and CMNZL's investigation meeting.

Issues and investigation

[14] For the purposes of the Authority investigation written witness statements were lodged by Mr Leitch, his wife Patricia Leitch, Ms Kelly, Mike Ramsay, and Mr Wackrow. Each witness attended the investigation meeting and, under oath,

confirmed their written statement and answered any questions asked by me and the parties' representatives. The representatives also gave closing oral submissions, speaking to a written synopsis. A few days after the investigation meeting the Court of Appeal issued its decision in *Sam's Fukuyama Food Services Limited v Jian Zhang* and, by leave, the representatives lodged further written submissions on how the principles discussed in that case applied to Mr Leitch's claim for lost wages.[1]

[15] As permitted under s174 of the Employment Relations Act this determination has not set out all evidence and submissions received but has stated the Authority's findings of facts and law and its conclusions on matters requiring determination. Those findings were made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened.

[16] From the claims made, responses given and evidence heard, the following issues required determination:

(i) Would a fair and reasonable employer have concluded, in all the circumstances at the time, that Mr Leitch had refused to follow lawful and reasonable instructions, and by doing so, had committed serious misconduct (applying the test of justification under s103A of the Act as applicable prior to 1 April 2011); and

(ii) Had CMNZL conducted a full and fair investigation in reaching that conclusion and deciding to dismiss Mr Leitch – considering particularly the involvement of Ms Kelly and Mr Wackrow in the disciplinary investigation and of Mike Ramsay and John Ramsay in the decision to dismiss Mr Leitch; and

(iii) If CMNZL's actions were unjustified, what remedies should be awarded to Mr Leitch – considering reinstatement, lost wages and distress compensation; and

(iv) Whether, under s124 of the Act, a reduction of any remedies awarded to Mr Leitch was required due to blameworthy conduct by him that contributed to the situation giving rise to his grievance?

[1] [2011] NZCA 608.

Did Mr Leitch disobey instructions and commit serious misconduct?

[17] Mr Leitch's argument was, in summary, that he had sincerely held reservations about the rationality of various instructions Ms Kelly, Mr Wackrow and Mr Mike Ramsay gave him but he had intended, ultimately, that he would do as he was told. He submitted that the emails he sent those three managers, read as a whole, reflected his frustration and genuine concerns over who he was to take instructions from, who he was to report to, and how many managers had authority to direct the cleaners.

[18] The evidence did not, I find, support Mr Leitch's argument. There was no real room for doubt that the instructions given to him were lawful and reasonable in the sense that he was told to do certain things that were within the scope of his contractual obligations and that were not unlawful and were not dangerous or harmful. Neither does it matter that Mr Leitch ultimately may eventually have carried out some of those instructions. His declared intention to defy the authority of his managers was enough for CMNZL to act on without having to wait for the actual failure to act as instructed.[2] However the test on which the Authority must determine the matter is ultimately not whether there was wilful disobedience to obey a lawful and reasonable instruction, but rather whether Mr Leitch's misconduct was so serious it justified dismissal.[3] That test is satisfied if a fair and reasonable employer would have considered its basic confidence or trust in Mr Leitch – essential to its employment relationship with him – was deeply impaired or destroyed by his conduct.[4]

[19] A fair and reasonable employer would have reached such a conclusion about its confidence in Mr Leitch from the number of occasions that he indicated he did not intend complying with instructions given to him and that he made abrasive and sarcastic comments to other managers seeking to guide him. Consequently CMNZL was entitled to find his written comments to Ms Kelly, Mr Wackrow and Mr Mike Ramsay amounted to serious misconduct. That conduct was demonstrated in the following instances:

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[2] *Corry v Clouston & Co Limited* (1904) 7 GLR 213, 241-242.
[3] Applying the test stated in *Samuels v Transportation Auckland Corporation* [1995] 1 ERNZ 462, 472 and approved by the Court of Appeal in *Sky Network Television v Duncan* [1998] 3 ERNZ 917, 923.
[4] *BP Oil NZ Limited v Northern Distribution Union* [1992] 3 ERNZ 483, 487.

(i) When Ms Kelly instructed Mr Leitch to vary the nights and times on which he made visits to check on cleaners working the night shift, he responded that it was his "*prerogative to manage it as I see best unless convinced otherwise*" and told Ms Kelly she was "*unconvincing*". He also told her that he "*was now planning to ...leave the night time visits up to you*" (10 February) and later asked her by email "*[a]re you going to keep dithering, or are you going to confirm that you'll be doing the night-time visits from now on*" (15 February).

(ii) Mr Wackrow forwarded to Ms Kelly copies of emails he had received from Mr Leitch in which Mr Leitch accused Mr Wackrow of "*fabrications*" over the arrangements for the night checks. Ms Kelly sent Mr Leitch an email (17 February) asking him to "*please refrain from any more communication with [Mr Wackrow] on this issue.*" However, according to Mr Wackrow's evidence, Mr Leitch again told him later that day that "*he was still waiting for me to explain myself to him and that I had better do it soon*".

(iii) Mr Wackrow and Mr Leitch had disagreed over whether a particular cleaner should be trained to work in a particular area of the plant (11 February). When Mr Wackrow referred the issue to Ms Kelly she sent both men an email saying the named cleaner was "*not to be trained*" (14 February). Mr Leitch sent Ms Kelly a response saying the cleaner would start training two nights later "*unless you wish to take over management of the admin/amenities cleaning*". Ms Kelly responded with an email telling Mr Leitch to do as he was instructed. Mr Leitch did arrange for that cleaner to attend work for training but that did not go ahead as she was needed in another area of the plant where the cleaning team was shorthanded. Mr Leitch was then issued with a notice of a disciplinary meeting (the 16 February letter).

(iv) On 14 January a cleaner who was doing extra work to help the night cleaning team asked Ms Kelly what work she should do and, as Mr Leitch was not onsite at the time, Ms Kelly gave the cleaner some directions about what work to do. Mr Leitch arrived on site later that evening and sent Ms Kelly an email saying he had told the cleaners "*to ignore your instructions because I had already made arrangements, and I'm the*

cleaning mgr".

(v) instances of abrasive and sarcastic responses included:

(a) Mr Leitch sent Ms Kelly an email (17 February) in which he said: "*I have no skill in reading your mind. And it is neither my intention nor my duty to report to you every detail of every little action I take while managing issues that fall within my responsibilities*." This was in response to an email from her saying Mr Leitch had "*taken sufficient appropriate action*" after she had passed on a staff complaint about cockroaches in a 'smoko room' microwave oven.

(b) After receiving a report showing some cleaning work did not meet required hygiene standards Mr Leitch told the cleaners to attend a meeting after which some of them would be sent to Mr Wackrow for "*disciplinary action*" (15 February). Mr Leitch told Mr Wackrow of that arrangement. Mr Wackrow urged caution and asked Mr Leitch to talk with him about the basis for disciplinary action before having a meeting with the cleaning team. Mr Leitch responded that he would go ahead with the meeting and tell the cleaners "*that they can expect to be called to your office for disciplinary action*". He also told Mr Wackrow that he could "*make an appointment*" to talk with Mr Leitch about the reports on whether cleaning standards were being met. Mr Wackrow referred the matter to Mr Mike Ramsay who told Mr Leitch by email that "*once again there appears that there is an issue between you and someone else on the management team that cannot be resolved how issues are normally resolved – by sensible logical discussion and I have to step in and play mediator/referee*". Mr Mike Ramsay told Mr Leitch not to hold the meeting with the cleaners before he had fully investigated the matter and talked with the relevant managers to decide on the appropriate action. When Mr Leitch went to talk to Mr Mike Ramsay about the issue, he was busy and after waiting some time to talk with him, Mr Leitch wrote the word "*Bullshit!*" on a copy of the email and left it on Mr Mike Ramsay's office chair.

[20] In this last example, about holding a meeting with cleaners, there were sound management reasons not to threaten or take disciplinary action against them without

investigating the matter further. However Mr Leitch was not prepared to take the advice of the person who was responsible for management of human resource matters at the plant and challenged whether Mr Wackrow had any authority to direct him on such matters. It was not a credible argument given Mr Wackrow was the manager who had signed the final written warning issued to Mr Leitch only a few months earlier, but adequately illustrated why CMNZL was justified in reaching the conclusion it did on its deep lack of trust in Mr Leitch.

[21] Neither was it enough for Mr Leitch to say he intended to follow instructions given to him in the end. He had told Ms Kelly in December 2010 that he would not "*guarantee*" to follow what he considered to be illogical or irrational instructions. By doing so he created uncertainty for senior managers as to what orders Mr Leitch would deem sufficiently rational and logical to obey. Ms Kelly acknowledged in her oral evidence that Mr Leitch had not, in fact, disobeyed her directions regarding training of a particular cleaner and varying his night visits to the plant but his actions or words had clearly indicated he would not comply. I have accepted, as a conclusion that a fair and reasonable employer would reach, Ms Kelly's evidence that she could not run the business on that basis.

Was the investigation fairly conducted and the dismissal decision fairly made?

[22] CMNZL submitted that, due to the relatively small size of its management team, it was appropriate for Ms Kelly and Mr Wackrow to conduct the investigation although they were what Mr Leitch called the "*primary complainants*" against him. It also submitted that a cooling off period was provided before the disciplinary process began, the process was fair because Mr Leitch was legally represented throughout and was given the opportunity to comment on its preliminary view before dismissal was decided, there was no real dispute on the facts of the situations being investigated, and there was no evidence of the process being carried out with a closed mind.

[23] While the bare facts of the submission – as to what happened and when – are correct, I have found CMNZL did not fairly conduct its investigation of its concerns about Mr Leitch's conduct and did not fairly make the decision to dismiss him on the basis of its conclusion from that investigation. That finding was based on concerns

about two interrelated aspects of who was involved in the investigation and the decision to dismiss.

[24] As Mr Mike Ramsay, Ms Kelly and Mr Wackrow were each in some way or other subject to what was seen as unsatisfactory conduct by Mr Leitch, there were no managers based at the plant sufficiently removed from the situation to be able to investigate the complaints with what could be seen as relative independence or detachment from the dynamics of what had become a dysfunctional working relationship.

[25] Between the three of them they decided Ms Kelly and Mr Wackrow would conduct the investigation. That may have been reasonable if CMNZL was a smaller scale enterprise but there were other options which would have enabled it to have the investigation conducted by representatives who – objectively observed – would be demonstrably open-minded in considering the allegations made and explanations given.[5]

[26] The matter could have been referred to Mr John Ramsay as he was more removed from the day-to-day interactions and tensions in the plant or CMNZL could have engaged an independent investigator. As CMNZL had two managers and an external legal advisor involved throughout the disciplinary process, it had sufficient resources to adopt such options.

[27] CMNZL's witnesses, paraphrasing their evidence, said Mr John Ramsay would not have been any more suitable because he took a broad brush approach to such matters and would have been impatient with the necessary process. Even if that is correct, he could have been assisted to properly carry out a disciplinary investigation with the assistance of the legal advisor involved in the process anyway.

[28] The difficulty with CMNZL's reasoning on this point is further highlighted with the reality of how its conclusions were reached and the decision to dismiss was made. Mr John Ramsay and Mr Mike Ramsay were, in fact, both directly involved in

[5] *The Warehouse Limited v Cooper* [2000] 2 ERNZ 351 at [32].

crucial aspects of that process although the disciplinary investigation was supposedly delegated to Ms Kelly and Mr Wackrow.

[29] Their oral evidence at the Authority investigation meeting established that the decision about the future of Mr Leitch's employment with CMNZL was really made by Mr John Ramsay during a telephone conference with Ms Kelly, Mr Wackrow and Mr Mike Ramsay after the disciplinary meetings. Mr Mike Ramsay's written witness statement said he and Ms Kelly had made the final decision to terminate Mr Leitch's employment because they had the authority to do so and made the decision together. However Ms Kelly said she and Mike Ramsay made a "*recommendation*" to Mr John Ramsay about dismissing Mr Leitch. This was more than what CMNZL submitted was merely a "*final blessing*" to a decision actually made locally. Mr Mike Ramsay recalled Mr John Ramsay telling them that "*if he [Mr Leitch] is not going to do what you tell him to do, sack him*".

[30] Neither Mr Mike Ramsay nor Mr John Ramsay had heard directly from Mr Leitch but relied on a briefing from Ms Kelly and Mr Wackrow about the issues and their assessment of his explanation for the allegations put to him. That was fundamentally unfair. Mr Leitch was denied the opportunity to effectively put his case to the person or all the people who were making the decision about the future of his employment with CMNZL.[6]

[31] It cannot be presumed such an opportunity could have no effect on the outcome because Mr Leitch might have been able to persuade Mr John Ramsay that the issue was not just his own conduct but a more systemic issue regarding how management decisions were made or that – even if he had committed serious misconduct – a disciplinary sanction less than dismissal was appropriate and feasible.

[32] Mr Leitch's dismissal was unjustified because how CMNZL made its decision to dismiss him was not what a fair and reasonable employer would have done. Remedies have been considered for the resulting personal grievance.

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[6] *Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424 at 442.

Remedies

Reinstatement

[33] Mr Leitch sought reinstatement if he were found to have a personal grievance for unjustified dismissal.

[34] There is some debate as to whether the appropriate test for the remedy in a case such as this is the one in the Act at the time of Mr Leitch's dismissal on 14 March 2011 (being the pre-April 2011 question of whether reinstatement was "*practicable*") or the one at the time many months later when the Authority issued its determination that there was a grievance (being the post-April 2011 question of whether reinstatement was "*practicable and reasonable*").[7] However I need not reach a conclusion on that issue of statutory interpretation as I consider reinstatement of Mr Leitch would be so plainly unworkable, neither test would be satisfied.

[35] I have accepted CMNZL's submissions that no order for reinstatement should be made because there was no realistic prospect its employment relationship with Mr Leitch could be successfully re-established given his descriptions of his work environment as "*toxic*" and "*intolerable*". His actions during January and February 2011, which I have found CMNZL was justified in concluding was serious misconduct, demonstrated an unwillingness to accept the guidance necessary to work effectively with those managers.

[36] The tone of Mr Leitch's comments about Ms Kelly and Mr Wackrow through much of his 35-page written witness statement confirmed the damage done was too great to realistically expect it could be repaired. He wrote of what he accepted in his oral evidence was an imagined rather than real conversation about Ms Kelly chiding Mr Wackrow for not intimidating him enough. In an email to a former CMNZL employee he called her "*Acid Kelly*".

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[7] See *Thomas v AsureQuality Ltd* [2012] NZERA Christchurch 4 at [23]-[24] and *Employment Law* (online loose-leaf ed, Brookers) at ER125.02 "April 2011 substitution – prospective or retrospective?".

Lost wages

[37] I considered the parties' supplementary submissions on the application of s128 of the Act to the question of any award of lost wages under s123(1)(b) of the Act.

[38] Mr Leitch's actual loss from the time of dismissal to the Authority's investigation meeting was just over nine months. He took reasonable steps during the period to mitigate his loss by seeking work. He applied for more than 80 jobs within his skill range (gained through around 40 years work experience, variously in food production, insurance and banking before joining CMNZL).

[39] However, allowing for contingencies and the so-called counter-factual analysis, I have assessed the extent of his loss for which an award should be given to be no longer than six months. There was, I considered, a real prospect his employment with CMNZL would have ended in that period anyway. Such a termination may have been by a dismissal as a result of his continuing abrasive relationship with other managers or because he resigned. His evidence confirmed that likelihood because Mr Leitch said he had got to the point early in 2011 where he doubted he could continue with the job at CMNZL because of what he described as being "*control freaked*" by Ms Kelly. Putting aside his characterisation of the reason for his disillusionment, there was a real likelihood he would have left anyway.

[40] I have set the award of lost wages under s123(1)(b) and s128 of the Act at six months ordinary salary (subject to reduction for contribution).

Compensation for hurt and humiliation

[41] Although limited, Mr Leitch gave evidence of humiliation and injury to his feelings as a result of his dismissal. This included distress arising from his financial worries as the breadwinner for himself and his wife and having to move from their Benneydale home to stay with their daughter in Hamilton. He was also too embarrassed following the dismissal to socialise with some people he knew in the area. Mr Leitch sought $20,000 compensation under this heading but I have accepted CMNZL's submission that there was no basis to depart from the usual approach

resulting in a "*statistical average*" of around $5000 for such awards. In Mr Leitch's case I have concluded $6000 should be awarded as modest compensation under s123(1)(c)(i) of the Act (subject to reduction for contribution).

Reduction for Mr Leitch's blameworthy conduct contributing to the conduct

[42] Under s124 of the Act reduction of remedies awarded by the Authority may be required due to blameworthy conduct by the employee that contributed towards the situation giving rising to his or her personal grievance.

[43] This determination has found certain conduct by Mr Leitch was justifiably regarded as serious misconduct so his contribution to the situation giving rise to his grievance was substantial. It warranted a reduction of remedies by one half.

Summary of orders

[44] To settle Mr Leitch's personal grievance, and after having reduced the remedies awarded by fifty per cent due to his contributory conduct, CMNZL must pay Mr Leitch the following sums:

(i) three months ordinary salary under s123(1)(b) and s128 of the Act; and
(ii) $3000 as compensation under s123(1)(c)(i) of the Act.

Costs

[45] Costs are reserved.

[46] The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and an Authority determination of costs is sought, Mr Leitch may lodge and serve a memorandum as to costs within 28 days of the date of this determination. CMNZL would then have 14 days from the date of service to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

[47] If a determination on costs is sought, the Authority is likely to make an award

on its usual tariff basis, subject to the parties' submissions about any factors requiring an upward or downward adjustment of the notional daily rate in the particular circumstances of the case.[8]

Robin Arthur
Member of the Employment Relations Authority

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