

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

Determination Number: AA 384/07
File Number: 5049357

BETWEEN JOSEPH PRYOR
 Applicant

AND NORSKE SKOG TASMAN
 Respondent

Member of Authority: R A Monaghan

Representatives: Kathryn Beck, Counsel for Applicant
 Richard McIlraith, Counsel for Respondent

Investigation Meeting: 12 and 13 June 2007 at Rotorua

Submissions received: 17 August 2007 from Applicant
 6 September 2007 from Respondent

Determination: 5 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Joseph Pryor is employed as a machine tender on the number three paper machine (“PM3”) at Norske Skog Tasman Limited’s (“Norske Skog’s”) paper mill in Kawerau. He has raised personal grievances on the ground that two warnings he has received are not justified. He says he has been disadvantaged in his employment as a result. Norske Skog does not agree that the warnings are unjustified.

[2] Mr Pryor also says the warnings were issued because of his union activities. He is a site delegate, and a member of the council of the Manufacturing and Construction Workers Union (“the union”).

[3] The warnings were dated 3 August 2006 and 17 November 2006.

The 3 August warning

1. The facts

[4] Mr Pryor was rostered to begin a shift at 7.00 pm on 25 July 2006.

[5] There had been an unplanned shutdown on PM3 during the immediately preceding shift. While the fault which caused the shutdown was being repaired the opportunity was taken to change the pick up felt on the machine, a maintenance requirement that was to fall due shortly in any event. The maintenance and re-start work was not expected to be completed in time for Mr Pryor's shift to commence as usual.

[6] The assistant line manager for PM3, Clinton Boyes, assessed the necessary tasks and prepared a plan for ensuring their orderly and timely completion. Cliff McKenzie was the machine tender on duty at the time, and Mr Boyes discussed his plan with Mr McKenzie. Although Mr McKenzie subsequently responded to enquiries from Leon Viret, then the line manager for PM3, it was Mr Boyes who had immediate charge of the matter. Mr Boyes' plan included assessing what tasks should be carried out at what time, and arranging for anyone on the shift willing to work overtime to assist with the re-start. Mr McKenzie made enquiries and reported that he and two others were willing to stay on to work the overtime.

[7] According to Mr McKenzie, most of the work was completed by about 7.00 pm so the other two employees went home. Mr McKenzie stayed on to complete the outstanding tasks. When Mr Pryor arrived to start his shift, he and Mr McKenzie began the usual shift handover discussions. Mr McKenzie explained the work still to be done, and asked Mr Pryor if he considered it necessary for Mr McKenzie to stay. Mr Pryor did not believe it was, and said so.

[8] As Mr McKenzie was about to leave Mr Boyes entered the control room, where the handover discussions were being held. Mr Boyes wanted to discuss the maintenance and re-start plan and co-ordinate the remaining activities. In his view there were a number of tasks remaining and he wanted to allocate them efficiently.

[9] According to Mr Boyes, Mr Pryor advised that he (Mr Pryor) was sending Mr McKenzie home. Mr Pryor told Mr Boyes he was doing so because in his view the crew were showing goodwill to the company but the management was not showing goodwill by forcing 'certain directives' on the crews. Mr Boyes believed at the time that the reference to 'directives' concerned an unrelated requirement regarding the provision of medical certificates by employees on sick leave, although he was probably wrong about that. Mr Boyes told Mr Pryor he wanted Mr McKenzie to stay on, and that Mr McKenzie could work in parallel with Mr Pryor during preparation for the re-start. For example Mr Pryor could run the felt while Mr McKenzie prepared the 'former'. Mr Pryor informed Mr Boyes this was 'not going to happen'. After a discussion about whether Mr McKenzie should run the felt instead, Mr Pryor repeated that was 'not going to happen' and said he was sending Mr McKenzie home.

[10] Mr Pryor denied sending Mr McKenzie home, saying instead that he merely advised Mr McKenzie he would not be needed. I find this disingenuous. It was obvious from the direct evidence and the parties' conduct during the investigation meeting that Mr McKenzie was seeking an indication of what he should do from Mr Pryor rather than from Mr Boyes, and Mr Pryor knew that. Further, I did not find convincing Mr McKenzie's attempts to downplay the nature or detail of the arrangements that had already been made. In reality even if Mr Pryor 'merely advised' Mr McKenzie that he should go home, the 'advice' had the same effect as a direct 'instruction' from Mr Pryor to Mr McKenzie.

[11] It was also obvious that, when the discussion occurred, Mr Pryor had an axe to grind. His resistant attitude frustrated attempts by Mr Boyes to explain the arrangements and their background. At the investigation meeting Mr Pryor said he was unaware Mr Boyes had already made these arrangements with Mr McKenzie. Mr McKenzie could have informed Mr Pryor of the earlier understanding, but did not. He deferred to Mr Pryor. Mr Pryor made no attempt to listen to or co-operate with Mr Boyes.

[12] Having said that, it was common ground that when overtime was necessary as a result of a planned shutdown, it was normal for the crews concerned to make coverage arrangements for themselves. Moreover I understand the matter is

addressed in the parties' collective employment agreement, although the agreement was not otherwise raised or discussed during this investigation. The shutdown on 25 July was not planned. That was a reason why it was Mr Boyes who acted to plan the re-start and request extra assistance. It was not suggested that there was anything inappropriate in his doing so.

[13] Regarding Mr Pryor's concern about goodwill and the forcing of 'certain directives' on the crews, Mr Pryor explained in evidence that he believed workers were taken advantage of in that they felt unable to decline requests to stay on and work, so they would agree to stay. That view is not consistent with the agreed workplace practice of operating self-managing teams. Thus when Mr Pryor gave an example in support of his view, the employee concerned was present at the investigation meeting and said he agreed to stay on 'to help the guys'. Mr Pryor believed that amounted to 'taking advantage' of the employee. On that evidence I do not accept the concern was well-founded, let alone that it excused the attitude Mr Pryor displayed on 25 July.

[14] There was a further exchange between Messrs Pryor and Boyes after Mr McKenzie left the workplace. Mr Pryor repeated his concern about 'directives' and raised another concern to the effect that Mr Boyes' plan suggested Mr Boyes believed Mr Pryor was not capable of restarting PM3. Mr Boyes felt the discussion was going nowhere, instructed Mr Pryor to start work, and made other arrangements in respect of the work Mr McKenzie was to have done.

[15] Mr Boyes said in evidence he was used to banter and having his decisions questioned, but in an appropriate manner. He believed Mr Pryor had gone beyond this, going out of his way to make a point and undermining Mr Boyes' position. For those reasons he complained about Mr Pryor's conduct to Mr Viret. Mr Viret concluded the complaint was serious and an investigation would be necessary.

[16] On 26 July Mr Viret contacted Mr Pryor to advise there would be a meeting to discuss his conduct of 25 July, he had the right to bring a representative with him to the meeting, and the outcome of the meeting could be disciplinary action including dismissal.

[17] Mr Viret made available to Mr Pryor a copy of Mr Boyes' complaint, which by then had been reduced to writing. It amounted to Mr Boyes' account of the facts, together with Mr Boyes' conclusion that:

“... the behaviour displayed by Joseph Pryor was counter productive. He overruled and refused requests that I made about help on the start up. He undermined my position by insisting that Cliff McKenzie goes home when I had organised that Cliff stays to help so we could use his skills with certain activities so that paper machine could get away sooner (sic). I then had to pull in other resources that were already allocated to other jobs in order to fill these gaps.”

[18] The meeting went ahead on 28 July. Mr Pryor attended together with Harold Appleton, the secretary of the union. The meeting began with an introductory statement about the purpose of the investigation and the essence of Mr Boyes' complaint. The issue being addressed was identified as follows, according to the notes of the meeting:

“Clinton Boyes has submitted a complaint regarding your actions on Wednesday night where you allegedly instructed Cliff McKenzie to go home after Cliff had committed to Clinton to work overtime to help get the machine away Your alleged behaviour is deemed to have been counter-productive and undermining of Clinton's authority ...”

[19] Mr Appleton sought clarification of the nature of the complaint, which was provided.

[20] The 'clarification' involved four elements. Discussion of them followed. They included: counter productive behaviour; undermining of Mr Boyes' authority; inciting of an illegal work stoppage (an allegation which was found not to be substantiated); and refusal of a reasonable request (an allegation which was considered to be substantiated but was not taken into account when considering what disciplinary action to take). Because the last two allegations were not part of the basis for the warning, I take them no further.

[21] Mr Pryor was also asked to give his account of the facts. According to that account, before speaking with Messrs McKenzie and Boyes Mr Pryor had noticed the

machine was down and had asked one of the employees on the earlier shift what was happening. He was told some of the crew members had been asked to stay on to assist, and that was when it was suggested to him that the company did not believe he was capable of handling the matter.

[22] Mr Pryor went on to explain that he told Mr McKenzie he was Mr McKenzie's relief and he could go home. He said it did not occur to him to consult with Mr Boyes about the matter, and did not recall that Mr Boyes disagreed with Mr McKenzie going home. He agreed that he directed Mr McKenzie to go home, and said he did not believe it was necessary for Mr McKenzie to stay, or for that matter that overtime was necessary that day.

[23] The meeting was then adjourned. Mr Viret said he would review Mr Pryor's personnel file. As the parties were aware, at the end of the previous year concern had been expressed about Mr Pryor's bullying behaviour although no formal warning had resulted.

[24] The meeting resumed on 3 August. The notes from the 28 July meeting were available at the start of the meeting, and their accuracy was discussed. There were some changes, but they are not relevant to the overall issue here.

[25] Mr Viret announced his conclusions. He listed relevant aggravating and mitigating factors, and why he had concluded Mr Pryor's behaviour was counter productive as well as undermining of Mr Boyes.

[26] Aggravating factors included the lack of respect and disregard for management which Mr Pryor had shown, as well as the display of bullying behaviour towards Mr McKenzie. Mitigating factors included the lack of any formal warning on file, the mill's history of self-regulating teams, Mr Pryor's competence and his long service.

[27] Regarding counter productive conduct, Mr Viret concluded Mr McKenzie had been told to go home without Mr Pryor having considered the situation or establishing why the request to stay on had been made.

[28] Regarding the undermining of Mr Boyes' authority, Mr Boyes had made arrangements prior to the start of Mr Pryor's shift, and Mr Pryor did not consult with Mr Boyes about them. Mr Boyes had arranged the overtime and Mr Pryor's conduct undermined Mr Boyes' decision.

[29] Accordingly Mr Pryor was issued with a written warning dated 3 August 2006. The warning advised that Mr Pryor's behaviour and attitude on 25 July was considered to be serious misconduct.

2. Justification for the warning

[30] The thrust of the submissions for Mr Pryor regarding the nature of his conduct was that Mr Pryor was not doing any more than disagreeing with Mr Boyes (albeit robustly), that he had not undermined Mr Boyes, and that he had not 'instructed' Mr McKenzie to leave.

[31] For the most part these submissions have been dealt with in my discussion of the facts. I do not accept that Mr Pryor was doing no more than disagreeing with Mr Boyes. For his own reasons and without being properly informed he did, in effect, act in a way that countermanded part of Mr Boyes' plan for the shut down and re-start of PM3. He overstepped a line between engaging in robust and constructive discussion, and deliberately defied Mr Boyes because he did not accept what Mr Boyes was trying to say or agree with the arrangements Mr Boyes was entitled to make. His defiance, and his instructing Mr McKenzie to depart, obliged Mr Boyes to amend those arrangements. In acting in that way he undermined Mr Boyes. There were some infelicities in the way the company expressed its concerns, but the foregoing lay at the heart of the matter and there was no room for any real uncertainty about that. Mr Viret was entitled to reach the conclusions he did on those matters.

[32] The submissions for Mr Pryor also challenged the fairness of the disciplinary investigation. For example Mr McKenzie was not questioned about his role in the matter – whether with reference to his own conduct in failing to observe the arrangement he had reached with Mr Boyes, or to Mr Pryor's conduct in 'instructing'

him to leave. Mr Viret said in evidence that he had changed shifts and ‘lost track of the need to follow up with Cliff’. Second, a question was raised about the real extent to which earlier allegations of bullying against Mr Pryor were taken into account without Mr Pryor being asked to respond to any allegation of bullying at all. Mr Viret said in evidence that he believed the earlier concerns about Mr Pryor’s conduct were relevant, but he was not seeking to link those concerns with the matter at hand in order to identify a pattern.

[33] Regarding Mr McKenzie’s role, I do not believe the failure to discipline him is sufficient to raise a question about disparity in his treatment and Mr Pryor’s as the conduct in question was different in nature. That Mr McKenzie’s role was not investigated or acted upon is not satisfactory, but his conduct involved preferring Mr Pryor’s instructions to his agreement with Mr Boyes. For his part Mr Pryor was openly defiant, and influenced Mr McKenzie.

[34] Regarding the relevance of the allegations of bullying, counsel for Mr Pryor submitted that from the company’s perspective the problem was really with Mr Pryor’s pattern of bullying behaviour. She said that matter was not put to Mr Pryor or Mr McKenzie when it should have been. Overall, however, I am satisfied that the basis for the disciplinary action was the 25 July incident between Messrs Pryor and Boyes. Mr Viret’s view that Mr McKenzie had been bullied was not reached after a proper investigation and I would not accept it as a justifiable reason for the warning, but the matter was regarded as an aggravating feature in an incident that was primarily concerned with Mr Pryor’s defiance of Mr Boyes. Mr Pryor was not warned for bullying Mr McKenzie. Further, the company was entitled to consider Mr Pryor’s workplace conduct in a general sense, and it did. It took into account the existence of concerns about him on the one hand, balanced with the absence of any formal warning together with positive aspects of his performance on the other.

[35] Finally, it was probably overstating matters to describe the conduct as serious misconduct. However I do not consider the labelling of the behaviour as serious misconduct in these circumstances to be fatal to the justification for the warning because, despite the label, the conduct does not appear to have been treated as serious

misconduct in the legal sense.¹ I say that because dismissal did not result from the conduct itself, and nor did it result from the subsequent events of 17 November. At the same time the company should take care with its use of the term 'serious misconduct'.

[36] Overall I consider the company formed a reasonable belief on genuine grounds that Mr Pryor's behaviour amounted at least to misconduct. A disciplinary warning was the response a fair and reasonable employer would have made to conduct of the kind Mr Pryor exhibited. I therefore conclude the warning was justified.

The 17 November warning

1. The facts

[37] Early on the morning of 10 November 2006 Peter McCarty, Norske Skog's performance manager, was informed there was a problem with finding someone to work as the stock tender on PM3 for the shift beginning at 7.00 am that day. Mr Pryor was also rostered for that shift.

[38] Stock tenders' work is to ensure appropriate quantities of the components needed to make paper are provided to the paper machines at the appropriate times. This includes mixing the stock and chemicals that are pumped into each machine. Other than at the set point much of this is done automatically, but monitoring and occasional adjustments are necessary. The monitoring function is conducted from a control room. If the data on a viewing screen indicate there is a problem with the machine the tender goes out onto the floor to identify or if possible rectify the problem, or report it so arrangements can be made for any repair. Similarly if an adjustment is necessary the tender will make it.

¹ Being conduct so serious as to deeply impair or be destructive of the basic confidence or trust that is an essential of the employment relationship: ref **Northern Distribution Union v BP Oil NZ Limited** [1992] 3 ERNZ 483.

[39] Five stock tenders were trained on PM3, with four being allocated to that machine - on the basis of one for each shift - and one being 'spare'. The person rostered to work on the shift in question, Robbie Martin, had just been placed on sick leave. The circumstances of his being placed on sick leave were being considered in the context of possible disciplinary action against him, although there was also a question about whether he was affected by a certain medical condition.

[40] When enquiries were made as to who was available to provide cover for Mr Martin, two stock tenders could not be contacted. A third was unavailable in any event. Mr McCarty contacted another union delegate, Tane Phillips, to seek his assistance. They arranged that Mr Phillips would try to contact one of the two stock tenders who might be available by visiting that person's home. Meanwhile Cliff Edwards, the stock tender on the shift which was about to end, agreed to work on until 9.00 am.

[41] At or about 8.00 am Mr Phillips advised Mr McCarty he had been unable to make contact with the person he had gone to see. Mr Phillips is himself a trained stock tender on PM2. For that reason Mr McCarty suggested one option would be for Mr Phillips to sit in the control room to perform the control room functions for PM3, while Mr Boyes or another assistant line manager assisted with duties requiring knowledge of the plant layout. Mr McCarty's evidence was that, while the stock tending function on the PM2 and PM3 machines was essentially the same, the physical layout of the plants is different. For that reason stock tenders do not usually switch between machines. He believed his suggestion addressed the point.

[42] However Mr Phillips declined Mr McCarty's suggestion on the ground that he was not trained on PM3.

[43] In an effort to find another alternative, Mr McCarty sought to ascertain whether, despite being on sick leave, Mr Martin was able to work. He spoke to the on-site doctor, who advised that would be possible provided someone stayed with Mr Martin. Mr Martin indicated he would be prepared to work, but after further consultation with the mill manager and the HR manager Mr McCarty reconsidered. The decision instead was that Mr Phillips would be directed to do the work. Mr

McCarty conveyed the direction to Mr Phillips, who said he would seek legal advice. When Mr Martin reported for work at about 8.45 am, he was sent home again.

[44] Meanwhile Mr Phillips had been in contact with Mr Appleton over the problems with cover. The two had discussed whether Mr Martin could or should be called back to work, and there was a further discussion following Mr McCarty's direction that Mr Phillips work on PM3. Mr Phillips' concern was that he was not 'signed off' (in other words had not been trained) on PM3. Messrs Appleton and Phillips were about to contact the union's solicitor when Mr Pryor telephoned Mr Appleton.

[45] Mr Pryor was telephoning to ask Mr Appleton's advice. He had arrived at work to start his shift, and become aware both that Mr Edwards would have to leave at about 9.00 am and that there was difficulty in finding a replacement stock tender for Mr Martin. He said in evidence that he was concerned about the unavailability of a stock tender, hence decided to approach to Mr Appleton concerning what he should do. There was no suggestion that he spoke to Mr McCarty before making the call.

[46] There was confusion and inconsistency in the evidence both of Mr McCarty and Mr Pryor over whether the call to Mr Appleton was commenced after Messrs Martin and Edwards had left the premises or while they were in the process of leaving, and whether Mr McCarty was present when the call commenced. In the light of the remainder of my findings there is no need to resolve those conflicts.

[47] Mr Pryor told Mr Appleton the stock tender had been sent home and there was no-one acting as stock tender. Mr Appleton asked if PM3 was running without a tender. Mr Pryor replied that it was.

[48] Mr Appleton asked to speak to Mr McCarty, who by then was present, and Mr McCarty came onto the line. Mr Appleton asked if Mr McCarty had sent the stock tender home, and said in his brief of evidence that "[Mr McCarty] said that there was more to it than that and talked about the background without answering directly."

[49] That approach to Mr McCarty's efforts to explain the background to the problem, and the attempts being made to address it, meant Mr Appleton did not listen and did not engage with Mr McCarty on the matter. From his perspective he merely sought, and obtained, confirmation that the machine was unattended at that time. That was the end of the matter. He did not address the matters Mr McCarty was attempting to raise. He should have considered and responded to them instead of taking a closed and narrow approach to the fact that the machine was unattended at the time, and a dismissive approach to the attempts to discuss why and what was to be done about it. Moreover, he did not advise Mr McCarty of any view that it was not possible to run PM3 safely without a PM3-trained tender, that Mr Phillips had been raising concerns with him, or that he had concluded PM3 should be shut down.

[50] Mr Appleton then spoke again to Mr Pryor, said it was unsafe for the machine to run unattended and instructed Mr Pryor to shut the machine down on safety grounds.

[51] Mr Pryor informed Mr McCarty that he had been instructed to shut the machine down. Mr McCarty explained that he had an alternative plan. He said in evidence that he instructed Mr Pryor to keep the machine running, and that a shutdown would amount to an illegal stoppage of work.² Mr Pryor denied being instructed to keep the machine running, but accepted that Mr McCarty referred to the stoppage being illegal. Mr Pryor took the view that, since none of Mr McCarty's alternatives involved having a PM3-trained stock tender available, Mr Appleton's instruction stood and the machine was to be shut down. He told Mr McCarty that Mr Appleton had instructed him to shut the machine down, and left to make the necessary arrangements.

[52] Mr McCarty contacted the mill manager, Ernie Hacker, to report the matter. He then went after Mr Pryor and spoke to the shift crew, saying again that shutting down the machine would amount to an illegal stoppage. According to Mr McCarty, Mr Pryor instructed the crew to shut down PM3. The shut down procedure began at about 9.25 am.

² I was informed that proceedings were filed in the Employment Court in respect of the stoppage, but I am unaware of the outcome. To date the matter has not been the subject of a decision by the court.

[53] By then Mr Hacker had arrived at PM3. He asked why the machine was being shut down, and Mr Pryor advised it was because of the lack of a stock tender. There was another discussion about deploying Mr Phillips on PM3, with assistance from Mr Boyes.

[54] Further to the deployment of a stock tender trained on a machine other than PM3, Mr Hacker said at the investigation meeting that Mr Pryor commented ‘that could work’ but that an instruction to shut had come from ‘over the road’ (from Mr Appleton). Mr Pryor did not deny making such a comment, although he said it was made before the machine shut down rather than afterwards as Mr Hacker had said. Indeed a note Mr Hacker made at about that time reads:

“He told me that [Mr Phillips] had refused to do the work and therefore he could not operate the machine.

I then told him that we would move a person up from the floor (a PM3 operator) and we would have a competent staff person to work with him to ensure that he could do the job.

He said that this would be okay with him but his instruction had come from across the road so he was going ahead.”

[55] There was also some discussion at the investigation meeting concerning whether Mr Pryor’s comment referred to the suggestion involving Mr Phillips or the alternative suggestion. The latter is more likely, but the significance of the comment, especially if made before the shutdown, is that it did not reject outright as unsafe the company’s suggestions regarding alternatives to a shutdown. That is not to say, however, that the suggestions did not cause concern.

[56] Ultimately Mr Pryor said he had been instructed to shut the machine down, and that is what he was going to do.

[57] Mr Hacker, too, said he instructed Mr Pryor to keep the machine running, with Mr Pryor again denying receipt of such an instruction. I return to these denials later.

[58] Mr Pryor very fairly acknowledged during the investigation meeting that it would have been better to talk through matters first and that, at the time, he was probably more frustrated than he should have been. He said the earlier warning was

playing on his mind, and he felt he would not have been listened to if he had raised his safety concerns.

[59] The machine was shut down. Mr Hacker met again with the crew to discuss ways of re-starting the machine. One option was having a PM1-trained tender cover the job, with someone else to assist. The response again was that the instruction had come from Mr Appleton and it was for him to authorise a re-start.

[60] Mr Hacker acknowledged that, although he had not included the exchange in the note from which I have quoted above, Mr Pryor raised his concern about the need for trained operators. His view was that the crew was well trained, and he did not see a big issue there. Messrs Pryor, Phillips and Appleton did not see matters that way. Their view was that, in the interests of safety, a stock tender with machine-specific training was required.

[61] Later that morning another PM3 stock tender was contacted. He arrived on-site at about 12.30 pm and the PM3 re-start was completed by approximately 3.00 pm.

[62] Mr Pryor was asked to attend a disciplinary meeting over the incident. The meeting was to investigate the circumstances of the shutdown, with the company's concern being Mr Pryor was guilty of serious misconduct by refusing a lawful instruction. The meeting went ahead on 15 November.

[63] Mr McCarty conducted the meeting on behalf of the company. Mr Appleton attended with Mr Pryor, and the HR advisor was present and took notes.

[64] The parties discussed their views of the facts. Mr Pryor raised the concern that an arrangement under which a PM2 or PM1-trained tender worked with assistance on PM3 would be unsafe. There followed a discussion about how, from time to time, arrangements of the kind the company suggested were made as an interim measure while cover was arranged. There was some consensus that the requirement that a stock tender be present at the machine at all times is not an absolute one - although any absences would be relatively brief and would usually be because the tender was attending to a matter elsewhere in the plant - but I am not in a position to form a

conclusion about the extent of the tolerance to leaving a machine unattended. Nor, it seems, was the matter resolved during the disciplinary meeting.

[65] Overall, as the meeting notes recorded, the union view was that it was unsafe for untrained people to run PM3, while the company view was that there was an alternative plan to a shutdown and the crew that had been organised was competent to monitor the machine.

[66] The meeting was adjourned. Notes prepared by Messrs McCarty, Hacker and Boyes respectively, as well as minutes of a meeting of August 2003 regarding a process in respect of health and safety issues when untrained staff were covering absences, were to be sent to the union and its solicitor.

[67] Further to the process in respect of health and safety issues, Mr Pryor and Mr Phillips were present at the August 2003 meeting. The process addressed what an individual was to do as an alternative to shutting down a machine. In particular, according to a note of the meeting, there was discussion about:

“Incidents of people not turning up – cover with untrained staff – instead of shutting down machine.

Process agreed as attached.”

[68] The ‘process as attached’ was set out in the form of a diagram. It seemed to recognise that a concerned employee was to refer a safety issue to the assistant line manager, although it went on to do no more than list the management and union hierarchies. The role of the union was not clear, and the diagram itself did not show any direct links between the union and the management. However I consider it likely that some link (in the form of consultation or discussion) was intended, and I did not understand anyone to be suggesting otherwise.

[69] The disciplinary meeting resumed on 15 November. Mr Pryor made the further statement that he assumed people would know there was a safety issue in that there was no trained and signed off PM3 stock tender available, and he was raising that issue on 10 November. Mr McCarty decided that did not change his decision.

[70] Mr McCarty did not agree with Messrs Pryor's and Appleton's assertions that a safety issue had been raised on 10 November, and did not accept that Mr Pryor genuinely viewed the problem as raising a safety issue. He took into account Mr Pryor's existing warning and the loss of production caused by the shutdown, as well as the existence of other incidents in which Mr Pryor had displayed an unwillingness to take direction. He also took into account Mr Pryor's length of service, his reputation as a good machine tender and his facilitation of the early arrival of the replacement stock tender. Overall Mr McCarty considered Mr Pryor was guilty of serious misconduct. A final written warning would be appropriate.

[71] The warning was couched as follows:

“We advise you that you have been issued a final written warning for failing to follow a lawful instruction, specifically not to shut down PM3.”

2. Justification for the warning

[72] The justification for the warning was challenged on the grounds that neither Mr McCarty nor Mr Hacker gave Mr Pryor a clear and unequivocal direction to keep the machine running, together with a clear statement of the consequences if the direction was not followed. Secondly, there were substantial safety issues with continuing to run the machine, Mr Pryor communicated his view on the matter, and in any event the safety issue was self-evident. I take this as a reference at least in part to case law to the effect that a 'lawful and reasonable' instruction is one which:

- (a) does not require the performance of an act contrary to law;
- (b) is within the scope of the employee's contractual obligations; and
- (c) does not require the performance of an impossible or dangerous task.³

[73] Regarding whether there was an instruction that PM3 was not to be shut down, it is possible that neither Mr McCarty nor Mr Hacker used words as direct as 'I instruct/direct you not to shut down PM3.' It is difficult to say precisely what words were used – for example in the contemporaneous note from which I have already

³ **Wellington etc Clerical etc Workers IUOW v College Group Ltd** [1984] ACJ 315

quoted Mr Hacker said he ‘commented’ that Mr Pryor should continue to run the machine although other company witnesses including Mr McCarty used the word ‘instructed’ – but I do not accept that Mr Pryor could have understood anything other than that the company required him to keep the machine running. He was a very long-standing employee and an experienced union delegate, and was aware that alternatives to a shutdown should be discussed before going ahead with one. He was told the company would view a shutdown as an illegal stoppage. I do not accept he was unaware of the implications of shutting the machine down anyway. He did so on the instruction of Mr Appleton, whose instruction he chose to follow rather than those of Messrs McCarty and Hacker.

[74] Further to the second major ground on which justification was challenged, it was accepted that Mr Pryor did not refer explicitly to a safety issue in his discussions with Messrs McCarty and Hacker. He relied principally, instead, on the fact that Mr Appleton had instructed that the machine be shut down.

[75] I accept in principle that there were safety issues arising out of the unavailability of a PM3-trained stock tender. The company did not deny that, rather it believed it had addressed the issues in its proposals that a tender trained on another machine would work with a support person. Although Mr Phillips had told Mr McCarty (and Mr Appleton) of his concern about the proposal involving him, Mr Appleton did not engage with the company prior to the shutdown regarding the acceptability of those options or the existence of any others while Mr Pryor deferred to Mr Appleton in his limited attempts to do so.

[76] The poor communication to the company of any safety concerns means it is not surprising Mr McCarty did not accept the concerns were genuine. He was correct in finding Mr Appleton did not raise such concerns on 10 November. However he was not correct in finding Mr Pryor had failed to raise a concern that day, because Mr Pryor had raised the matter of training with Mr Hacker. As I have said, Mr Hacker did not record Mr Pryor’s comment in his note, and his evidence suggests he did not understand it to be a concern that a stock tender with machine-specific training was necessary. Hence although the concern was discussed at the disciplinary meeting, it appeared to be raised for the first time in that forum.

[77] For that reason, and because of the evidence I heard about the various discussions between Messrs Phillips, Appleton and Pryor, I do not agree that Mr McCarty was correct in finding the safety concerns were not genuine.

[78] Mr McCarty also reached the conclusion he did because he did not consider that any health and safety issue was raised by operating PM3 in the way the company was proposing, and because Mr Pryor was aware of the protocols for addressing safety incidents on-site.

[79] Regarding the first point, the evidence before the Authority was largely comprised of a number of the safety hazards posed by the operation of the machine (from the union point of view) to which the response was that the company's proposals addressed those hazards. The other aspect of that area of evidence concerned the significance of machine-specific training. The company did not share Mr Pryor's view of its significance.

[80] Those matters were not canvassed fully at the time. By the end of the investigation meeting it appeared there was some consensus that consultation would have been appropriate before the shutdown went ahead. Moreover if there was a dispute between the parties about the existence of a threat to safety, in terms of the agreed procedure some form of consultation should have been embarked upon before the shutdown went ahead. The responsibility for the failure in that respect is Mr Appleton's and Mr Pryor's.

[81] Counsel for Mr Pryor submitted that Mr Pryor acted as he did because he considered the safest thing to do was to shut the machine until cover could be found. I do not accept that was quite the case, given Mr Pryor's insistence at the time on following Mr Appleton's instruction and his effective acknowledgement that consultation would have been appropriate before action was taken.

[82] All of this leaves me with a conclusion that the decision to issue a warning was influenced by an incorrect conclusion regarding the genuineness of Mr Pryor's safety concern, although the conclusion was affected by poor communication on the part of Messrs Pryor and Appleton aggravated by the failure of both to observe an

obligation to consult before going ahead with a shutdown. In addition, for that reason and because of certain acknowledgements of Mr Pryor's, I would not accept Mr Pryor's concerns were such that he rejected the possibility of alternatives to a shutdown.

[83] My findings mean there was an element of wilful disobedience in Mr Pryor's shutting down of the machine, but the nature and extent of Mr Pryor's culpability in the matter rests on different grounds from those found by Mr McCarty. I believe there was enough in the conversations on 10 November between Messrs Hacker and Pryor in particular to indicate the circumstances were not as straightforward as a mere refusal to obey a lawful and reasonable instruction, and this was not simply another act of defiance on Mr Pryor's part.

[84] That aspect was not addressed directly. It means the warning did not take into account relevant information available to the company at the time. A fair and reasonable employer making a decision about disciplinary action would not have failed to take that information into account.

[85] I therefore find that Mr Pryor has a personal grievance on the ground that an unjustifiable action of his employer's affected his employment to his disadvantage.

[86] I do not, however, believe that the circumstances call for any remedy. I did not detect any dispute with the proposition that alternatives to a shutdown should have been discussed before a shutdown went ahead. Neither Mr Pryor nor Mr Appleton acted as they should have in that respect. Nor did I detect any dispute with the proposition that machines can be, and are, left unattended by stock tenders from time to time although the degree of tolerance to that in a safety sense remains unresolved. Finally, Mr Pryor chose the path he would take, and in doing so contributed substantially to the circumstances of his personal grievance.

Discrimination

[87] For reasons that should be apparent from the preceding discussion, I find the warnings were not issued to Mr Pryor because of his union activities. The company

had genuine concerns about Mr Pryor's conduct which it was entitled to, and did, seek to address. Mr Pryor was not unlawfully discriminated against on the ground of his union activities.

Costs

[88] Costs are reserved.

[89] The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and serve memoranda setting out their positions within 28 days of the date of this determination.

R A Monaghan

Member of the Employment Relations Authority