IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 320/09
5140768

	BETWEEN	MIHIRAWHITI SEARANCKE Applicant
	AND	SERVICE AND FOOD WORKERS UNION NGA RINGA TOTA INC Respondent

Member of Authority:	R A Monaghan
Representatives:	G Clarke, advocate for applicant S Mitchell, counsel for respondent
Investigation Meeting:	16 April and 25 May 2009
Determination:	7 September 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Service and Food Workers Union Nga Ringa Tota Inc ("SFWU") employed Mihirawhiti Searancke as an organiser. It dismissed her after a disciplinary meeting concerning: an email message in which she commented on the conduct of the SFWU Northern Regional Secretary; aspects of her use of an SFWU vehicle and fuel card for private purposes; and a failure to provide weekly reports.

[2] Ms Searancke has raised a personal grievance on the ground that her dismissal was unjustified. She seeks reinstatement.

Background

[3] Ms Searancke began her employment with the SFWU in March 2006. At the time she was based in Hamilton.

1. The warning in March 2007

[4] By letter dated 13 February 2007 Jill Ovens, the Northern Regional Secretary of the SFWU, advised Ms Searancke of her receipt of a petition signed by SFWU members at one of Ms Searancke's sites. The petition complained about the way in which Ms Searancke fulfilled her duties as organiser and requested a change of organiser. A senior organiser, Shane Vugler, was to discuss the matter further with the members in question. The letter also identified three additional complaints about Ms Searancke from individuals, in respect of three separate and unrelated matters. One was from a member who did not believe she had been represented adequately, while two were from colleagues and concerned Ms Searancke's conduct towards them.

[5] The letter sought a meeting, which went ahead on 9 March 2007. Ms Searancke was herself a member of the Manufacturing and Construction Workers Union ("MCWU"), which had coverage of SFWU employees. She was represented at the meeting by an MCWU district secretary, George Larkins. Ms Ovens and Mr Vugler also attended.

[6] The complaints, as well as a further detailed report from Mr Vugler covering issues with colleagues and members, were discussed at the meeting. The MCWU provided a detailed written response.

[7] A further separate meeting was held in Ms Searancke's absence with a view to achieving a resolution. During that meeting concern was expressed about Ms Searancke's relationships with certain of her colleagues, involving reservations about the colleagues' continued ability to have trust and confidence in her. According to Mr Larkins' written statement of evidence, it became apparent that dismissal was being considered. Ms Searancke's transfer to Auckland was discussed as a way of resolving tensions in the Hamilton office, and Ms Ovens indicated that a warning would also be required.

[8] After consulting with Ms Searancke, Mr Larkins advised that a transfer to Auckland was accepted.

[9] By letter dated 28 March 2007 Ms Ovens advised she did not believe there was a possibility of repairing the relationships between Ms Searancke and her colleagues in the Hamilton office. The letter offered the Ms Searancke opportunity to work out of the Auckland office, and said further:

> "You will be able to use your work vehicle to drive home every weekend and we will cover the petrol to and from Hamilton once a week. You will be expected to contribute towards private usage on the weekend as per union policy."

[10] The letter also set out a warning, couched as follows:

> "While I believe there are grounds to terminate your employment, I intend to allow you an opportunity to repair the trust and confidence that has been lost through your actions. I am issuing you with a final written warning. Because it relates to issues of trust and confidence that are fundamental to your position, it will have a life of 12 months.
>
> Should I receive any more complaints from members, fellow staff members or your local manager about similar matters, this will result in your dismissal."

[11] The letter concluded with a requirement that a performance improvement plan be followed. It said the plan was 'part of the final written warning'. It went on to set out a list of the elements to be included in a performance improvement plan, the details of which were to be discussed if the Auckland position was accepted. One of the elements was a requirement that weekly diary sheets be provided to Ms Ovens every Monday. Others concerned the need to follow instructions, and requirements concerning conduct towards members and colleagues.

[12] I do not read that part of the letter as detailing the conduct that was the subject of the warning. It was a direction that Ms Searancke address the matters listed in a management context, and in the interests of correcting the conduct.

[13] Mr Larkins responded by email message dated 30 March 2007, saying the prospect of a warning was not put to Ms Searancke when the transfer to Auckland was discussed and agreed as a method of resolving the complaints. However his evidence was that he discussed the matter with Ms Ovens himself and did not express any disagreement with the prospect. The 30 March message also queried the wording of the warning, but otherwise did not take the matter any further there has not been any

allegation that a grievance was raised. Mr Larkins said in evidence that Ms Searancke had decided to 'accept the situation and get on with it.' Ms Searancke effectively acknowledged this.

[14] Emailed exchanges between Ms Ovens and Mr Larkins on 3 April 2007 further discussed the terms of the transfer. Ms Searancke's entitlement to petrol to and from Hamilton was varied to allow her an additional round trip in the middle of the week, amounting to two round trips per week at the SFWU's cost.

2. Progress of the employment relationship in Auckland

[15] There were further incidents after the transfer to Auckland.

[16] In May 2007 there was a disagreement over Ms Searancke's attendance at a CTU Runanga hui, leading to a meeting on 14 May and a follow-up letter of the same date. Ms Ovens considered the attendance was unauthorised. A further meeting was held on 29 May to discuss 'how your actions have impacted on your employment relationship and whether there is any possibility of a way forward.' Although the meeting was said to be a disciplinary session - with discussion extending to wider matters including concerns about Ms Searancke's performance and her willingness to accept Ms Ovens' right to manage her - no disciplinary action was taken.

[17] In August 2007 there was a disagreement over Ms Searancke's non-appointment to a position as lead organiser. In a message dated 4 August Ms Ovens detailed her approach to that matter, as well as raising concerns about disparaging statements Ms Searancke allegedly made about a number of people including Ms Ovens herself. The message sought a meeting on 17 August to discuss these concerns, and said Ms Searancke's dismissal may result. It was not clear whether the meeting went ahead, but in any event there was no disciplinary action.

[18] Early in October 2007 there was a dispute about payment for a week's tangihanga leave. In the light of the amount of leave Ms Searancke had taken to date Ms Ovens was prepared to grant only one of the days on pay, while Ms Searancke sought payment for the full week.

[19] Of the matters bearing directly on the decision to dismiss, by message dated 5 June 2007 Ms Ovens commented on the high level of Ms Searancke's petrol usage, and sought suggestions as to how it could be reduced.

[20] By message dated 23 August 2007 Ms Ovens circulated to her staff a 'weekly diary template'. The message asked staff to use that template for their weekly reports. In a further message dated 10 September Ms Ovens advised she had received diaries from only one organiser for the previous week, and asked that the reports be completed by the end of the day.

3. The email message of November 2007

[21] An incident involving Ms Ovens and her partner occurred during a demonstration outside the Labour Party conference on 3 November 2007. The incident attracted media attention.

[22] Ms Ovens' next report to staff included her account of the incident before turning to other unrelated matters. She read out the report at the regular Monday meeting with staff on 5 November. The report expressed support for the subject matter of the demonstration, but not for the approach of the protesters. It also said Ms Ovens did not condone her partner's actions.

[23] Ms Searancke sought a meeting of MCWU members to discuss the report and the 3 November incident. The resulting discussion occurred after Ms Ovens had completed her report and left the 5 November staff meeting.

[24] For their part the MCWU delegates approached Mr Larkins about how to deal with the matter, as they were concerned about how the conduct of Ms Ovens and her partner reflected on the SFWU. The delegates, including Sarah ("Buzz") Worley, also met with Ms Ovens. Ms Worley reported on the outcome of that meeting by sending an email message to Mr Larkins and affected members of the MCWU on 7 November 2007. All of the recipients were named individually in the email address header. The message commented on matters including the conduct of Ms Ovens' partner. It attached a proposed communication extending greetings to the organisation involved

in the demonstration, regretting the actions of 'those linked to the SFWU leadership' and offering support. Comments and suggestions were sought.

[25] Ms Searancke was one of those who found the outcome and proposed communication unsatisfactory. She replied by email of the same date. The reply was sent to those who had received Ms Worley's message. Another of the recipients of Ms Worley's message added to the email chain by message dated 8 November 2007, expressing a contrary view to Ms Searancke's. In replying, rather than naming all of the recipients (or hitting 'reply all') the person used an 'SFWU Auckland' email address. That action sent the chain beyond the staff who were members of the MCWU to everyone in the 'SFWU Auckland' address book, including Ms Ovens.

[26] Ms Searancke's message was headed 'Jill is guilty of Len's actions and to see it any other way is vomit material'. The message was relatively long, and disagreed strongly with the delegates' proposed communication. It expressed an adverse view of Ms Ovens' behaviour during the incident on 3 November, and of Ms Ovens' subsequent actions. It doubted the genuineness of Ms Ovens' view of the subject matter of the demonstration, suggested that if anyone else had acted in such a way they would be 'gone by lunchtime', and asked Ms Worley why was she 'as our representative accepting this sanitised view of something that was grossly abhorrent and publicly demeaning to the union movement and the union we work for.'

[27] Ms Ovens said she was offended by the email, but was involved in an industrial matter elsewhere and did not take any immediate steps to address it.

The disciplinary procedure and the decision to dismiss

[28] By email message dated 29 October, Ms Ovens had responded to an earlier request of Ms Searancke's for a meeting to discuss issues having their source in the March warning and the transfer to Auckland. In particular Ms Searancke had wanted to discuss why she had been given the option of a transfer, and to express her disagreement that there were any performance issues. Ms Ovens' message advised that she wished to discuss: the need for focus on and empathy with members; planning and weekly reporting; leave expectations; and handling disagreement with Ms Ovens' decisions.

[29] In a letter dated 13 November 2007 Ms Ovens advised Ms Searancke of an investigation into her use of the SFWU fuel card to fill up her vehicle while on annual leave. Ms Ovens said a meeting would be held shortly to investigate the matter, and that the outcome could be summary dismissal. In an email message dated 18 November she referred to the 'investigation currently underway about your petrol usage', and repeated her wish to discuss the concerns raised on 29 October. There was a further reference to the possibility of disciplinary action up to and including dismissal. Notably, there was no mention of Ms Searancke's 7 November email message.

[30] During her employment in Hamilton Ms Searancke had been contributing to the purchase of petrol for private use through regular deductions from her wages. The Auckland office did not continue that practice. In a message dated 19 November Ms Searancke asked that a fortnightly deduction from her wages be set up again, to cover petrol used for private purposes.

[31] In a message to Ms Ovens dated 20 November Mr Larkins proposed some meeting dates, and sought further details of the concerns listed in Ms Ovens' message of 29 October. Ms Ovens responded by saying the points arose out of the final written warning, and the meeting being sought was to address her own concerns as well as those Ms Searancke had raised. She did not provide any further detail. There was still no reference to the 7 November email message.

[32] A meeting went ahead on 13 December 2007. Ms Ovens and the Assistant National Secretary of the SFWU, Neville Donaldson, conducted the meeting on behalf of the SFWU. Ms Searancke attended together with Mr Larkins and Ms Worley.

[33] For the purposes of the meeting Mr Donaldson referred to the final written warning, before identifying the issues to be addressed as:

a. the November email message;
b. failing to fill in an FBT form;
c. failing to contribute for the private use of a vehicle;
d. using the union's fuel card while on leave; and
e. failing to provide weekly worksheets.

[34] Otherwise the concerns set out in Ms Searancke's original request for a meeting, and Ms Ovens' message of 29 October, were not included in the list of issues. Further, Ms Searancke felt ambushed by the unexpected raising of the email message and became upset. There was a discussion about adjourning the meeting until the next day.

[35] Ms Ovens was about to go on leave and would not be available to attend a resumed meeting for several weeks. Mr Donaldson said Mr Larkins agreed not to challenge Mr Donaldson's right to conclude the investigation and make a decision, if an adjournment was agreed to. In oral evidence Ms Searancke said she was present when this discussion occurred, and she believed she had a right to be heard by the executive, but because of the time of year her wish was that the matter go ahead. Mr Larkins said he agreed that Mr Donaldson could make a decision subject to the SFWU's adherence to its rules, although he also accepted he was agreeing to a decision being made in Ms Ovens' absence.

[36] The reference to the rules of the union is a reference to a matter the MCWU raised with the SFWU in a more formal way some months later, namely a concern that the SFWU was not observing its rules covering the dismissal of its employees. It used the termination of Ms Searancke's employment as an example.

[37] The rules in force at the time provided in part that:

> 'The Regional Executive, in consultation with the National Executive, shall have the power to dismiss such staff for good cause, and the person concerned shall have the right to a fair hearing.' (Rule 62.2).

[38] I consider it likely that on 13 December Mr Larkins expressed agreement to a decision being made in Ms Ovens' absence, but not that he qualified his agreement as being subject to the SFWU's rules. Moreover since the procedure being followed was not in accordance with the rules, it would have been impossible to proceed as was being proposed in the face of such a qualification. While the failure to observe the rules is of concern the disciplinary process continued by agreement, in the knowledge of the contents of the rules, and for sound practical reasons from the point of view of both parties. The meeting went ahead in reliance on that agreement. Ms

Searancke's representatives are estopped from raising the matter as a reason why the disciplinary outcome – dismissal – was unjustified.

[39] The meeting resumed on 14 December. The issues were addressed as follows.

(a) The emailed message

[40] Although the SFWU had a written policy on email and internet use nothing in the evidence indicated the policy was referred to during the disciplinary investigation other than broadly and in passing, or that it was expressly relied on in the decision to dismiss. The concern expressed about the 7 November message was that it was sent in a manner designed to undermine Ms Ovens, and was not sent in confidence.

[41] Ms Searancke said the message was sent to Ms Ovens in error and was intended only as a response to the request for MCWU members' opinions. Its wording reflected the depth of her feeling about the subject matter of the protest. Moreover, other SFWU members had also expressed strong views against the conduct of Ms Ovens and her partner, and Ms Ovens was aware of at least some of them. Indeed the SFWU acknowledged that two other people were investigated in respect of the matter. They received verbal warnings.

(b) The FBT form

[42] This matter was associated with the private use of the union vehicle, but was not relied on in the decision to dismiss and I take it no further.

(c) The private use of the vehicle

[43] Relevant union policy read:

> "8. …. Personal purchases on the [fuel] card are not permitted.
> 15. Where appropriate the union may authorise the use of the vehicle for personal use by the employee … at times when the vehicle is not required for business use. As per the staff agreement you may take your vehicle out of area for personal use, but permission must be obtained from the appropriate secretary … Petrol receipts for such use shall be provided.

> 20. All costs of running and maintaining the vehicle for personal use by the employee shall be paid by the employee. …"

[44] Relevant provisions in the applicable collective employment agreement ("cea") read:

> "17 Motor Cars
>
> 17.1 Subject to the operational needs of the Union being met, the authorised user of a union vehicle … is permitted to have the private use of a vehicle, on the days it is available for union use, provided that the mileage is reasonable and the costs for petrol are their individual responsibilities.
>
> …
>
> 17.4 Where a staff member wishes to take a union vehicle of which they have private use outside the area serviced by their office, they will make a formal request to the Secretary of their nominee. Consent to this request will not be unreasonably withheld."

[45] The issue with Ms Searancke's private use of the vehicle was not expressed as any failure to obtain authority for private use, or to obtain authority to take the vehicle out of the area serviced by her office. Rather, nine particular occasions of misuse of the work vehicle were alleged against her, involving refuelling of the vehicle at the union's expense when the vehicle was being used other than for union purposes.

[46] The allegations were supported by records of petrol purchases for the vehicle, together with Ms Searancke's leave record. The records of purchases showed the date and place of the relevant purchases, but not the time.

[47] Four of the purchases corresponded with two periods when Ms Searancke was on leave, attending tangis outside Auckland. Ms Searancke said that two purchases were made when she returned to Auckland for work-related purposes during one tangi, then returned to the tangi. The other two occurred at or about the commencement of her absence for the second tangi. It is likely that these purchases incorporated some private use.

[48] The remainder of the purchases were said to have been made before and after commutes to Hamilton which were permitted under the arrangements for her transfer to the Auckland office. Without knowing the times of the purchases, it is not

possible to assess whether those purchases were likely to have incorporated personal use. At the time, however, Mr Donaldson did not find this explanation sufficient.

[49] Nevertheless Ms Searancke accepted in a general way that from time to time she purchased petrol for private use on the fuel card. She explained this was offset by petrol for work-related purposes which she paid for herself when she lost her fuel card in July. In support she provided some petrol receipts, but Mr Donaldson said all but one receipt for $5 were for purchases made on the fuel card so the receipts did not assist. Ms Searancke also pointed to her attempt on 19 November to have regular payments in respect of personal petrol purchases deducted from her wages.

(d) The use of the fuel card

[50] This concern was related to the one set out above, and is encompassed in the above discussion.

(e) The weekly worksheets

[51] Ms Searancke accepted that she had not produced worksheets every week and acknowledged that she had 'been slack'. She pointed out, correctly, that others did not complete the forms either.

2. The decision to dismiss

[52] Clause 21 of the cea read:

> "21. Warning procedure
>
> Unless there are grounds for instant dismissal where it is necessary to issue a warning to any member of staff the following procedure shall be observed:
>
> (a) one oral and two written warnings will be issued before anyone is dismissed.
> (b) …
> (c) …
> (d) warnings in general shall have a life of up to six months. For issues which are fundamental to the position, warnings will have a life of up to 12 months.
> (e) instant dismissal may apply to cases of serious misconduct."

[53] The description of the March warning as a final written warning with a life of 12 months was intended to indicate the subject matter concerned issues 'fundamental to the position.' Mr Donaldson concluded that the final written warning had not been an effective tool in addressing these issues, and he had no option but to dismiss Ms Searancke.

[54] Mr Donaldson viewed the matter of the email seriously. He said he found it offensive and it undermined the ability to rebuild trust and confidence with Ms Ovens. He also believed Ms Searancke had accepted that the email was serious.

[55] Secondly, Mr Donaldson noted the generalised acceptance that the fuel card had been used for personal purchases, and found that Ms Searancke's indications that she made other purchases from her own funds was barely supported and did not allay his concerns. He believed there was no excuse for her failure to follow union policy in respect of personal purchases.

[56] Thirdly, Mr Donaldson believed Ms Searancke had failed to recognise the importance of the weekly worksheets in performance assessment, as well as of her reporting obligations, and had refused to comply with the emails of August and September concerning their provision.

[57] Overall, Mr Donaldson concluded that these matters would not have warranted dismissal on their own, but viewing them cumulatively and against the background of the warning meant dismissal was appropriate.

[58] Accordingly Ms Searancke was dismissed on one month's notice, which she was not required to work.

Whether the dismissal was justified

[59] The test of the justification for a dismissal is objective, with reference to whether the employer's actions were those a fair and reasonable employer would have taken in all the circumstances at the time the dismissal occurred.[1]

[1] S 103A Employment Relations Act 2000.

1. The relevance of the warning

[60] The SFWU relied on the prior existence of the warning in support of the justification for the dismissal. Mr Clarke submitted that the warning was not justified and could not be relied on in support of the dismissal.

[61] No grievance was raised in respect of the warning, but Mr Clarke sought nevertheless to address the justification for it with reference to a number of matters he identified.

[62] The Employment Court has said this about the relevance of unchallenged warnings when addressing the justification for a dismissal:

> "When an employer is seeking to justify a dismissal on the basis of a series of warnings, the onus is on the employer to establish that each of those warnings was justifiable, regardless of the union's previous inaction."[2]

[63] However as Mr Mitchell pointed out, that case was decided under the Labour Relations Act 1987, which did not contain a limit on the time period for raising a grievance. Because there is now a time limit contained in s 114 of the Employment Relations Act 2000, and the limit has passed, it is not open to Mr Clarke to challenge the justification for the warning as if a grievance had been raised.

[64] An approach to the relevance of the warning is suggested by that set out in **Butcher v OCS Limited** [3] as follows:

> "[49] … [Section 103A] requires a consideration of all of the employer's actions and whether the way the employer acted was what a fair and reasonable employer would have done in all the circumstances. This makes it clear that the issue is … whether, in all the circumstances at the time the dismissal occurred, the employer's actions were what a fair and reasonable employer would have done.
>
> [55] An expired warning can be taken into account by an employer when deciding to dismiss an employee, and by a Tribunal in deciding whether the employer has acted fairly or reasonably. Previous misconduct referred to in the expired warning may be relevant in determining the reasonableness of the employer's response to the new misconduct. I therefore accept Mr McBride's submission that a recently expired warning for the same conduct cannot

[2] **Northern Distribution Union v Armourguard Security Limited** [1989] 3 NZILR 262, 267.
[3] [2008] 1 ERNZ 367

> be completely disregarded as it is part of all the circumstances which have to be considered under s 103A."

[65] That approach applies even more so here, because the warning had not expired and was being relied on in assessing the seriousness of Ms Searancke's conduct. Its existence is relevant and it may be taken into account in a decision to dismiss.

[66] The letter of warning concerned the need to maintain constructive relationships with SFWU members, fellow staff members and the local manager. It said dismissal may follow any further complaints regarding 'similar matters'. These 'similar matters' encompassed Ms Searancke's conduct of her duties as an organiser and her conduct towards members, colleagues and her manager.

[67] Mr Mitchell submitted that the warning included specific reference to the need to contribute to private use of the vehicle, the provision of weekly diary sheets, and the importance of being mindful of the professional obligations of the union as well as of acting in a professional way towards colleagues.

[68] While the conduct leading to the dismissal concerned failures to observe policy regarding private purchases of petrol, I do not accept that the reference in the letter of warning to private use of the vehicle was a part of the warning. Instead it set out arrangements associated with the transfer to Auckland which was being implemented together with the warning. Similarly I do not accept that the reference to the provision of weekly diary sheets was part of the warning. It was part of the proposed performance improvement plan.

[69] Ms Searancke's conduct in those respects was not a 'similar matter' in terms of the warning.

[70] The requirements to be mindful of professional obligations, and to act in a professional way towards colleagues, were also part of the proposed performance plan rather than the warning, but are closely linked with the conduct underlying the warning. The complaints about Ms Searancke incorporated complaints about her conduct towards individuals and further complaints of that kind are capable of being 'similar matters' in terms of the warning. The SFWU was concerned about the

disparaging and undermining nature of the 7 November email message. In that sense the circumstances were capable of being similar in kind to the conduct encompassed in the warning, and I now turn to them.

2. The email message

[71] Although not discussed in any detail during the disciplinary meeting or at the investigation meeting, there was an underlying concern about Ms Searancke's alleged statements disparaging of Ms Ovens and others and there was some sensitivity regarding the matter. However the 7 November message was not sent in an attempt to undermine Ms Ovens. It was an internal communication addressed only to the members of the MCWU. It expressed a deeply-felt and genuine view of a controversial incident already under discussion between the members, and was a response to her union delegate's request for comments. Ms Searancke was not responsible for the fact that it subsequently gained an audience beyond the affected members and there was no evidence that she intended such an outcome.

[72] As noted, there was no reliance on a breach of any specific provision in the SFWU's policy on the use of the union's email system, rather the concern was as set out. Further, because the message was a response to a canvassing of opinion about a particular matter and was intended to have limited circulation among those whose opinion was being sought, I regard the circumstances as distinguishable from those in **Beesley and Hawkins v NZ Clerical Workers Union**[4] for example.

3. The use of the motor vehicle

[73] There was a generalised acceptance of the failure to observe policy regarding the private use of union vehicles, and a less than sufficient explanation of some of the use indicated by the records discussed at the disciplinary meeting.

4. The failure to provide weekly worksheets

[74] This matter was addressed in isolation as a failure to provide the worksheets and to observe instructions in that respect. If there was an intention to link it with

[4] [1991] 2 ERNZ 616. Employees of the union circulated pamphlets containing disparaging comments.

concerns expressed in various email messages regarding Ms Searancke's use of her time, for example, the matter was not addressed in that way during the disciplinary meeting or in the decision to dismiss. If reliance can be placed on any reference to it in the March warning, then it formed part of the performance improvement plan but not the conduct to which the warning related. Moreover, the performance improvement plan did not appear to have been monitored and followed up in any systematic way.

[75] It was common ground that not everyone produced worksheets every week and that Ms Searancke was one of those who failed to do so. This significantly diminishes the weight that could reasonably be given to the matter in a decision to dismiss.

5. Conclusion

[76] In general terms if the misconduct addressed at the disciplinary meeting in December were 'similar' to the misconduct leading to the warning then - although relatively less serious – it could warrant dismissal when considered cumulatively with the warning. Plainly a number of matters similar to the subject matter of the warning arose after the warning. While they could and should have been addressed either they were not addressed at all, or were the subject of discussions which did not lead to any disciplinary action. Moreover, the attempt of 29 October to set the basis for a meeting to discuss such matters was not followed up in a timely way and resulted in a meeting that had a different focus.

[77] Of the alleged misconduct addressed at the December meeting, only the 7 November email was arguably 'similar' to the conduct covered by the warning. For the reasons already set out, I find it does not amount to misconduct even of a less serious nature.

[78] Regarding the use of the union vehicle and fuel card, Ms Searancke accepted she had breached policy in respect of the purchase of petrol for private use. On its own, it was less serious misconduct.

[79] Regarding the failure to complete the weekly worksheets, at most this was minor misconduct of which other organisers were also guilty.

[80] Accordingly while I accept in principle that the warning could be relied upon, the further misconduct leading to the dismissal was not similar. Further, it did not itself amount to serious misconduct.

[81] For these reasons I conclude Ms Searancke's dismissal was not the action an employer acting fairly and reasonably would have taken. The dismissal was not justified.

Remedies

1. Reinstatement

[82] When reinstatement is sought, and an employee is found to have a personal grievance, the Authority must provide for it wherever practicable.

[83] It appeared that reinstatement was not sought here until the statement of problem was filed, ten months after the dismissal and seven months after mediation. When she was asked about the matter Ms Searancke simply said she relied on Mr Larkins' evidence. Mr Larkins had set out in his statement his approach to resolving the grievance. He included a comment that Ms Searancke had not asked him to pursue reinstatement, and that he believed it was better to allow matters to calm down and attempt to reach a resolution through mediation.

[84] Meanwhile, Ms Searancke's position was filled and her reinstatement would create a surplus staffing situation requiring a redundancy. In general reasons such as this are not good reasons for finding reinstatement to be impracticable where the employer has had notice that reinstatement was sought. Here, however, there was a significant lapse of time before notice was given and the SFWU was entitled to act to fill the position.

[85] Secondly, and aside from the matter of the November email, it was clear that the workplace relationship between Ms Ovens and Ms Searancke was dysfunctional.

There was a stream of issues and concerns as documented in the emailed exchanges between the two. Reinstating Ms Searancke would cause more than discomfort in the workplace.

[86] For these reasons reinstatement is declined.

2. Reimbursement of lost remuneration

[87] Ms Searancke seeks the reimbursement of remuneration lost as a result of her grievance.

[88] Since her dismissal Ms Searancke has received income in the form of a benefit and a small amount from casual work. She has applied for a number of positions - and has been interviewed for several union organiser's positions - but as at the date of the investigation meeting had not obtained alternative employment.

[89] As at the time of the investigation meeting Ms Searancke had lost significantly more than the three month minimum contained in s 128 of the Employment Relations Act. However her employment was in jeopardy after the March 2007 warning was issued, and she was fortunate not to have been dismissed at the time or as a result of additional incidents occurring after her transfer to Auckland. Although the eventual dismissal was flawed, Ms Searancke was on borrowed time.

[90] For those reasons the SFWU is ordered to reimburse Ms Searancke in the sum of three months' lost remuneration (excluding reimbursing allowances), but I do not exercise the discretion to award any greater amount. Nor, in the circumstances, do I consider it necessary to reduce the amount I would otherwise have awarded in respect of any contribution to the circumstances giving rise to the personal grievance.

3. Compensation for injury to feelings

[91] There was little evidence in support of any compensation for injury to feelings arising out of the personal grievance, although Ms Searancke had deep feelings about some of the issues associated with her dismissal and felt unfairly targeted as a result.

[92] The SFWU is therefore ordered to compensate Ms Searancke for injury to her feelings in the sum of $6,000.

Summary of orders

[93] The SFWU is ordered to pay to Ms Searancke:

a. three months' remuneration (excluding reimbursing allowances) as reimbursement for remuneration lost as a result of her personal grievance; and
b. $6,000 as compensation the injury to her feelings.

Costs

[94] Costs are reserved.

[95] The parties are invited to agree on the matter. If they are unable to do so and seek a determination of the Authority, any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum setting out the party's position. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan
Member of the Employment Relations Authority