

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 58  
5331894

BETWEEN                      NEVILLE TEMAU WAHO  
Applicant

A N D                              P J & PM VELA LIMITED t/a  
PENCARROW STUD  
Respondent

Member of Authority:      K J Anderson

Representatives:            B Rimmer, Advocate for Applicant  
   D McIlraith, Advocate for Respondent

Investigation Meeting:      1 September 2011 at Hamilton

Date of Determination:      17 February 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Waho claims that he was unjustifiably dismissed, effective from 21 December 2010. He asks that the Authority find that he has a personal grievance and award him various remedies. But the respondent (Pencarrow Stud) says that the dismissal of Mr Waho was justified and that he was treated fairly and reasonably.

**Background facts and evidence**

[2] Pencarrow Stud is a well-recognised thoroughbred horse breeding operation located near Hamilton. Property presentation is an important aspect of marketing the premier grade horses for the business and four full-time gardeners and one part-time gardener are employed accordingly. Mr Waho was a full-time gardener and had been employed in that role at Pencarrow Stud since April 2008.

[3] It appears that it is customary to have a meeting first thing on most mornings for the purpose of allocating duties and general discussion about what work is to be done during the day. On 6<sup>th</sup> December 2010, Mr Waho attended the usual meeting and as there was a horse parade that day. He was given the job of tidying the parade area, in addition to carrying out some weeding and using a leaf blower to clear away the debris of the previous windy conditions. The evidence of Mr Leon Casey, the Stud Manager for the business, is that he asked Mr Waho what else he would be working at that day. Mr Casey says that the response from Mr Waho was that he intended to do some weed spraying. At this point, Mr Craig Atherton, the Head Gardener, interjected and reminded Mr Waho that the forecast was for wind that day and that Mr Waho should not carry out the spraying if it became too windy. The evidence of Mr Casey is that it is “*imperative*” that spraying is only carried out when conditions are suitable with no wind or rain as chemical spray drift is not only dangerous to people, but Pencarrow Stud has high value bloodstock to consider and there is a risk of damage to other plants and vegetation.

[4] Following the meeting, at about 8:30 am, it appears that Mr Waho initially went to the horse parade area and did some weeding but the leaf blowing was subsequently carried out by Mr Casey, as it had not been done shortly prior to the parade commencing at 11:00 a.m. Mr Casey says that he took the leaf blower from Mr Waho at about 10:30 a.m.

[5] The timeframe involved appears to be relevant as Mr Atherton’s evidence is that at about 11:00 a.m. it started to become too windy to be spraying. As a result, Mr Atherton thought he should “*double-check*” and make sure that Mr Waho had stopped spraying; he attempted to contact Mr Waho on his cellphone. As there was no reply he left a voice message for Mr Waho not to spray as it was too windy. Mr Atherton’s call records show that he phoned Mr Waho at 11:21 am and made a further call at 3:43 pm on 6<sup>th</sup> December 2010. The purpose and relevance of the second call remains unclear, although it seems that Mr Waho could not be located during the day. Mr Atherton says that he would have expected that Mr Waho would have picked up his first message around 12 o’clock as Mr Waho was in the habit of taking his lunch break at that time. Mr Atherton says that because he did not hear back from Mr Waho he went looking for him but could not find him.

[6] The evidence of Mr Atherton is that at the morning meeting on 7<sup>th</sup> December 2010, he asked Mr Waho if he received his message the previous day about the spraying. Mr Atherton says that Mr Waho responded that he didn't get the message but he "*only did one knapsack [of spray] anyway.*" The evidence of Mr Casey is that Mr Waho left the workplace about 11:00 a.m. on 7<sup>th</sup> December 2010 due to heatstroke. Mr Waho was also absent from work on 8<sup>th</sup> and 9<sup>th</sup> December returning on 10<sup>th</sup> December, but took some further time off to go to his doctor. The further evidence of Mr Casey is that given Mr Waho's absence from work and given that Mr Waho had been absent during the winter "*due to the cold and the wet,*" he spoke to Mr Don McIlraith, a director of the company. As a consequence, via a letter dated 8<sup>th</sup> December 2010, Mr Waho was invited to an *Employment Relations Meeting* on 13<sup>th</sup> December 2010. [The meeting subsequently took place on 15<sup>th</sup> December 2010.] The letter to Mr Waho informed that:

The purpose of the meeting is threefold:

- A To consider whether it is appropriate for the company to terminate your employment pursuant to clause 16 of your employment contract, which provides as follows:  
*Where you are unable to perform your normal duties due to mental or physical illness or accident and will be unable to resume them within a reasonable period, the company may terminate your employment on such notice as it considers appropriate but this will not be less than one month.*

I understand that you cannot work

- i) on an incline; and
  - ii) in hot weather; and
  - iii) in cold weather; and
  - iv) in the rain.
- B. To address an alleged failure to comply with a lawful instruction. You had been instructed not to spray in windy conditions. Specifically, you were told on Monday, 6<sup>th</sup> December 2010 by the Head Gardener, Craig Atherton, not to do any spraying that day on account of the windy conditions. You recorded in your work diary for the same day that you sprayed weeds. On 21<sup>st</sup> April 2010 you were formally warned that a failure to comply with a lawful, reasonable, and safe instruction will almost certainly result in the termination of your employment unless there is a very good reason for that not to occur.
- C. The Stud employs four full-time gardeners and one part-time gardener including you. You are employed as an assistant to the Head Gardener to perform general duties. With the number of days you have been absent during the current year and last year your duties have been significantly covered by

other gardeners. This has raised the question in our mind as to whether or not your position is required by the company. We would like to consult with you as to whether or not your position has indeed become redundant and if you have any proposals in that regard.

### **Meeting 15<sup>th</sup> December 2010**

[7] The meeting on 15<sup>th</sup> December 2010 was attended by Mr Waho. He was represented by Mr Brian Rimmer, Northern Amalgamated Workers Union. Also present was Mr McIlraith, Mr Casey and Mr Atherton. The proceedings were recorded and a transcript has been produced to the Authority. It is apparent that there was considerable discussion about Mr Waho's absences at various times and his fitness to work with the outcome being that Mr Waho agreed to attend a doctor nominated by his employer, in the event of future potential absence due to illness.

[8] The matter of Mr Waho allegedly failing to comply with a lawful instruction, related to the apparent spraying in windy conditions on 6<sup>th</sup> December 2010, was then discussed. The transcript record shows that there was some debate about whether or not Mr Waho did actually spray on that day and how much. There was also some discussion about whether Mr Waho received the two messages that Mr Atherton says that he left on Mr Waho's voicemail and the fact that Mr Waho had not recorded any spraying work in his daily diary, despite the letter from Mr McIlraith (8<sup>th</sup> December 2010) recording that there was an entry.

[9] The discussion then moved on to a third matter; whether or not Mr Waho's position had become redundant. It was put to Mr Waho by Mr McIlraith that due to the number of days that Mr Waho had been absent during the current year and given that his duties had been carried out by other gardeners, a question now arose about whether Mr Waho's position was required. There was further discussion about Mr Waho's absence at times due to illness and his entitlement to sick leave.

### **Termination of employment**

[10] The outcome of the meeting held on 15<sup>th</sup> December 2010 was that via a letter from Mr McIlraith dated 21<sup>st</sup> December 2010, Mr Waho was informed of the termination of his employment with two weeks notice. The reason given for that dismissal was that Mr Waho had failed to comply with a lawful instruction relating to weed spraying on 6<sup>th</sup> December 2010. Mr Waho was informed that:

You say you did not receive Craig's messages not to spray even though you would have gone to lunch after the first call, which would have provided an opportunity to receive Craig's first message. However, even though you say you did not get the message you now say that you did not spray. Craig and Leon were both sure that you said to them that you did spray. I believe Craig and Leon. Leon has been our Stud Manager for 25 years and the company has complete confidence in his integrity and recollection. You have previously been warned about complying with lawful instructions and that any such further failure would almost certainly result in the termination of your employment. That warning was given on 21<sup>st</sup> April 2010 and you have previously been warned in relation to the same matter on 2<sup>nd</sup> October 2009 and on 4<sup>th</sup> December 2009. There appears to be no good reason why the company should not terminate your employment. The company hereby gives you two weeks notice of the termination of your employment from the date you receive this letter.

[11] Mr Waho was informed that he was not required to work out the two week notice period and that he should not report for work, other than to return any of the company's property that he had in his possession. Finally, in relation to the termination, Mr Waho was informed:

In addition, it appears that you have not been truthful concerning the spraying incident and that you may be in breach of your obligations of good faith. Pursuant to clause 15 of your employment agreement, the company may terminate your employment without notice for serious misconduct which includes dishonesty.

[12] Rather oddly, given that Mr Waho had now been dismissed, he was informed that the company reserves its position to investigate the above matter in the future.

### **Analysis and conclusions**

[13] It is obvious that prior to the spraying issue arising, Mr Waho had a very chequered employment history indeed. This is evidenced by the warnings referred to in the letter of 21<sup>st</sup> December 2010, the most recent warning being dated 21<sup>st</sup> April 2010, being a final warning whereby Mr Waho was informed that:

You are warned that a failure to comply with a lawful, reasonable and safe instruction and/or arguing with a superior and/or using abusive language will almost certainly result in the termination of your employment with the company unless there is a very good reason for that not to occur.

[14] The position of Pencarrow Stud is that at the time of the spraying incident, Mr Waho was in receipt of a recent final warning for failing to comply with a fair and

reasonable instruction. And Mr Waho had failed to comply with an instruction given by Mr Atherton on 6<sup>th</sup> December 2010, that spraying should cease in the event that it became windy that day. Therefore, dismissal was an appropriate sanction. Before determining whether or not that proposition can be upheld, there are some other findings of the Authority that should be set out.

[15] First, I accept the evidence of Mr Atherton and Mr Casey that at the morning meeting on 7<sup>th</sup> December 2010, Mr Waho informed that he had sprayed one knapsack of spray. I also accept the evidence of Mr Casey that Mr Waho told him, on or about 13<sup>th</sup> or 14<sup>th</sup> December 2010, that he had applied one knapsack of spray on 6<sup>th</sup> December 2010. It follows that I do not find the evidence of Mr Waho on this matter to be reliable. That then poses a question: when did Mr Waho actually do the spraying?

[16] The evidence of Mr Casey is that he took the leaf blower from Mr Waho at “around 10:30 am” on the morning of 6<sup>th</sup> December 2010. There is no specific evidence about what Mr Waho did after that time but it appears to be assumed that he then went on his way to carry out the spraying; just where has not been identified hence we do not know if he travelled far within the property boundaries. The evidence of Mr Atherton is that a knapsack sprayer contains 17 litres and it would take about half an hour to apply. Therefore, assuming that Mr Waho began spraying at 11:00 am (or possibly sooner) he would have completed the spraying by 11:30 am at the latest.

[17] The evidence of Mr Atherton is that:

*Around 11:00 am it started to get too windy so I thought that I would just double-check and make sure that Neville had stopped spraying. So I called him, there was no reply. I left a message that it was far too windy to spray, don't do any more.*

[18] Mr Atherton says that the call to Mr Waho was at 11:21 a.m. and there is no reason to doubt this.

[19] Mr Waho says that he did not get Mr Atherton's message (or the later message left at 3:43 p.m.). But I conclude that it is more probable than not that he did receive these messages, albeit it may well have been some time later as Mr Waho left his phone on the farm vehicle (the Gator) while carrying out his work. The relevant factor here is that Mr Waho could possibly have completed applying the knapsack of spray

well before he picked up Mr Atherton's voice message. The investigation into Mr Waho's conduct failed to examine such a possibility but it was not put forward by Mr Waho at the disciplinary meeting on 15<sup>th</sup> December 2010 either.

[20] Then there is the further evidence of Mr Atherton and Mr Casey that at the morning meeting on 6<sup>th</sup> December 2010, Mr Waho was reminded that the weather forecast for that day was for wind and that Mr Waho should not apply spray if it got too windy. Mr Atherton's evidence is that by 11 o'clock that morning it was too windy to spray. Yet it appears that Mr Waho went ahead and applied the spray anyway. I have accepted the evidence of Mr Casey and Mr Atherton that at the meeting on 7<sup>th</sup> December 2010, Mr Waho said that he had applied one knapsack of spray. It seems that Mr Waho did not enter this in his diary, possibly because he knew that he should not have been spraying that day.

**Was the dismissal of Mr Waho an action that a fair and reasonable employer would have taken in all the circumstances?**

[21] Section 103A of the Employment Relations Act 2000 provides the test to be applied to a dismissal. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, whether the employer's actions and how the employer acted, were what a fair and reasonable employer would<sup>1</sup> have done in all the circumstances at the time the dismissal or action occurred.

[22] The meaning of s 103A was clarified by a full bench of the Employment Court in *Air New Zealand Limited v V* [2009] ERNZ 185:

*The meaning of the text of s 103A is clear on its face and in the light of its common law antecedent. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of the employer up to and including the decision to dismiss.*

[23] Therefore, in determining whether or not the actions of the company were those of a fair and reasonable employer in the circumstances, the Authority is required to objectively review "all of the actions of the employer up to and including the decision to dismiss." In summary, I find that the circumstances applying to Mr Waho were:

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<sup>1</sup> Because the dismissal of Mr Waho occurred prior to 1 April 2011, the new provisions of the Employment Relations Amendment Act 2010 are not applicable.

(a) He was in receipt of a final warning dated 21<sup>st</sup> April 2010. The pertinent content of which warrants repeating:

Accordingly, the company is prepared to give you one last chance. You are warned that a failure to comply with a lawful, reasonable and safe instruction ...will almost certainly result in the termination of your employment with the company unless there is a very good reason for that not to occur.

(b) At the staff meeting on the morning of 6<sup>th</sup> December 2010, Mr Waho was instructed that he should not carry out spraying if the weather became windy. The weather did become windy by 11:00 a.m. but Mr Waho went ahead and applied a knapsack of spray regardless. It is acknowledged by Mr Waho that as a result of his training, he knew he should not apply spray in windy conditions.

(c) While Mr Waho subsequently told Mr Casey and Mr Atherton that he had applied one knapsack of spray, he later denied saying this.

(d) Mr Waho failed to make an entry in his daily work diary that he had sprayed on 6<sup>th</sup> December 2010, albeit I find that it is more probable than not that he did apply some spray. He also denied receiving the voice messages left by Mr Atherton but I conclude that it is more probable than not that he did receive the messages, albeit exactly when, remains inconclusive.

### **Determination**

[24] In determining the question of whether the dismissal of Mr Waho was justifiable, the Authority is cognisant of the established (and often quoted) finding by the Court of Appeal *Northern Distribution Union v BP Oil New Zealand Limited*:<sup>2</sup>

For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look any further than this Court's judgment in *BP Oil New Zealand Limited v. Northern Distribution Union* [1989] 3 NZLR 580. Definition is not possible for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is an essential of the employment relationship. In the context of a personal grievance claim under the Labour Relations [Employment Relations] Act questions of procedural and substantive fairness are also relevant. In the end the question is essentially whether the decision was one that a reasonable and fair employer would have taken in the circumstances.

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<sup>2</sup> [1992] 3 ERNZ 483, 487

[25] In summary, having weighed the overall evidence and the respective arguments of both parties, I find that a fair and reasonable employer, having conducted a fair investigation and disciplinary process, and faced with the evidence pertaining to Mr Waho's actions, would have concluded that his conduct deeply impaired or was destructive of the basic confidence and trust that is essential to the employment relationship.

[26] This is particularly so given that Mr Waho had previously received a series of warnings and that at the date of his dismissal, he was in receipt of a final warning regarding his failure to adhere to fair and reasonable instructions. I find that the dismissal of Mr Waho was what a fair and reasonable employer would have done in all the circumstances and hence the dismissal was justifiable. The claims of Mr Waho are dismissed.

### **Costs**

[27] Given that the respondent was represented by Mr McIlraith as a director of the company, no obvious costs have been incurred and hence an order for costs is not applicable.

**K J Anderson**  
**Member of the Employment Relations Authority**