

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 12  
3042631

BETWEEN

ANTONY SMITH  
Applicant

A N D

THE VET CENTRE  
MARLBOROUGH LIMITED  
Respondent

Member of Authority: Peter van Keulen

Representatives: Mike Hardy-Jones, counsel for the Applicant  
Miriam Radich and Sarah Wadworth, counsel for the  
Respondent

Investigation Meeting: 20 and 21 August 2019

Submissions Received: 21 August 2019 and 30 August 2019 from the Applicant  
21 August 2019 and 30 August 2019 from the Respondent

Date of Determination: 14 January 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Antony Smith worked as a Merchandising Manager for The Vet Centre Marlborough Limited from September 2005. Over the years that he was employed there were, at intermittent times, issues with Mr Smith's performance and conduct. Any issues were dealt with relatively informally and generally, when they arose.

[2] In 2018, there was an escalation in relation to alleged incidences concerning Mr Smith's performance or conduct. And there was a corresponding escalation in the way the Vet Centre responded to the alleged incidences.

[3] These various allegations relating to Mr Smith's performance and conduct were subject of a disciplinary and performance process, which commenced on 29 June 2018. The culmination of this process was Mr Smith's dismissal on 12 September 2018.

[4] Following his dismissal, Mr Smith raised personal grievances for unjustified dismissal and unjustified disadvantage. In general terms, Mr Smith's complaints about the process and his dismissal included that he believed the decision was predetermined, the allegations changed throughout the process, he was treated differently from other employees and the process canvassed historic matters that had been dealt with. Mr Smith also complained that the conduct alleged did not justify dismissal.

[5] The Vet Centre denies that it acted as alleged and it says that its actions were not only fair they were substantively justified.

[6] The disciplinary and performance process was a significant undertaking. There were many matters raised and discussed, most of which were not straightforward. Both Mr Smith and the Vet Centre engaged experienced counsel to assist them throughout the process, which meant most of the detail of the allegations, the various discussions and the respective positions in respect of the allegations were set out comprehensively in meetings and correspondence.

[7] In the course of investigating this matter, I heard from witnesses who were involved in the disciplinary process (but not counsel) and reviewed a substantial bundle of documents including notes and records of the various meetings and correspondence exchanged, primarily between counsel. There was a large amount of evidence, including a substantial amount that was not disputed, and a significant amount of detail.

[8] I have considered all of the evidence closely as it relates to the issues I must determine and particularly the detail that has informed my decision, however, given the volume of the material it is simply not possible, nor is it necessary, to record all of it. Therefore, in accordance with s 174E of the Employment Relations Act 2000 (the Act) my written determination sets out findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and makes orders accordingly but it does not record all of the evidence and submissions received.

[9] My determination, reserved at the conclusion of the Investigation Meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

### **The disciplinary and performance process**

[10] On 29 June 2018, the Vet Centre gave Mr Smith a letter in which it set out concerns it had over his conduct and performance and commenced a process with him.

[11] The Vet Centre had two areas of concern at that time:

- (a) Two incidents where Mr Smith was allegedly intoxicated and acted in a way which reflected badly on the Vet Centre.
- (b) Performance issues relating to time keeping, excessive time spent dealing with personal matters during work time, including using the work email for personal matters and not following procedures and protocols in relation to selling products.

[12] Mr Smith engaged in the process through his lawyer. What followed was an exchange of correspondence between the parties in which questions were asked and answered and further information relating to the areas of concern were provided.

[13] Part of the further information provided by the Vet Centre included a written complaint about Mr Smith's performance at work, which identified examples of concerns such as leaving work early, making a large amount of personal phone calls and personal emails, using social media during work time and not following clinic procedures (including in relation to selling products).

[14] The written complaint was dated 25 May 2018 and had the two complainant employees' names at the bottom.

[15] When Mr Smith read this complaint, late in the evening on 5 July 2018 he immediately sent a text to one of the complainant employees. That text was sent at 10:28 pm and simply stated “Thanks [name]. Two Tumours.”

[16] For various reasons, the employee who received the text message was very distressed by it and took it as being critical of her and the other employee, inferring they were the equivalent of cancer for having raised the concerns as they did.

[17] The employee brought the text message and her distress at receiving it to the attention of the Vet Centre.

[18] The Vet Centre then raised the text message with Mr Smith as a further concern to be addressed.

[19] The disciplinary and performance process progressed; the Vet Centre and Mr Smith met on two occasions and exchanged correspondence. On 1 August 2018, as a result of the progress made with the process, the Vet Centre set out a comprehensive summary which included Mr Smith’s position on the various concerns and the Vet Centre’s response set out as preliminary findings.

[20] By 1 August 2018 the Vet Centre’s concerns that needed to be addressed included:

- (a) The two incidents where Mr Smith was alleged to have been intoxicated and his actions brought the Vet Centre into disrepute.
- (b) Mr Smith’s text sent to one of the employees who had made a written complaint about his work performance.
- (c) The sale of expired stock and broken down stock (that is product sold in individual lots rather than its designated pre-packaged amount).

[21] In terms of the Vet Centre’s concerns over Mr Smith’s time keeping and productivity whilst at work, the Vet Centre noted that progress had been made with Mr Smith acknowledging the issues and making a commitment to meeting expectations. The Vet Centre recorded that this area of concern was about performance and not serious misconduct, which could be addressed separately through performance management.

[22] Mr Smith and the Vet Centre then exchanged further correspondence following the 1 August letter.

[23] By 21 August 2018, the Vet Centre decided the process had reached a point where it was ready to conclude matters. To facilitate this the Vet Centre set out an updated summary of the outstanding issues and its position in respect of them:

- (a) A specific sale of expired stock in circumstances which the Vet Centre had concluded involved breaches of the Veterinary Code of Conduct (the Rentoul Sale).
- (b) The sale of broken down product, which Mr Smith admitted to doing but explained on the basis that everyone else was doing it.
- (c) The text message sent to one of the employees who had complained about Mr Smith's work performance.
- (d) Mr Smith's conduct at a restaurant, where he approached a customer, appearing to be heavily intoxicated and commented about the Vet Centre charging like a "wounded bull" (the Cartel Incident).
- (e) The residual work performance issue relating to time keeping and productivity, with this being connected to a potential issue with alcohol consumption.

[24] The Vet Centre expressed very clearly in its letter of 21 August, that it considered the concerns to be serious, impacting on the trust and confidence it had in Mr Smith. It doubted his ability to work in the Vet Centre's interests and to work effectively in the team. The Vet Centre was also concerned about Mr Smith's lack of acceptance and taking responsibility for any of the concerns and his lack of insight into his own actions.

[25] Mr Smith responded to the 21 August letter and the parties met again on 3 September 2018.

[26] After reflecting on the information received during the process and the discussions on 3 September 2018, the Vet Centre decided to terminate Mr Smith's employment. Another meeting was held on 12 September 2018 in which Mr Smith was told the outcome.

## **Did the Vet Centre carry out a fair process**

[27] For an unjustified dismissal claim there are two broad issues to consider:

- (a) Did the employer follow a fair disciplinary process in coming to the conclusion to dismiss; and
- (b) Was the decision to dismiss substantively justified.

[28] Sections 4(1A) and 103A of the Act set out the relevant considerations for a fair process. The matters I must consider are:

- (a) Did the Vet Centre investigate the various allegations sufficiently;
- (b) Did the Vet Centre outline the allegations, explain its concerns and the possible outcomes and give all the information it had that was relevant to the allegations to Mr Smith to consider and respond to;
- (c) Did the Vet Centre give Mr Smith a reasonable opportunity to respond to the information and the allegations before it made its decision on whether the behaviour amounted to serious misconduct and that this justified dismissal;
- (d) Did the Vet Centre consider the various explanations given by Mr Smith before it made its decision that the conduct amounted to serious misconduct and justified dismissal;
- (e) If there were any failings by the Vet Centre in the steps outlined above, does that render the disciplinary process unfair?

[29] In terms of the process, Mr Smith raised particular issues in his personal grievance and then in his statement of problem:

- (a) That the Vet Centre did not investigate the allegations properly or fairly, which included using staff to gather evidence to support its concerns.
- (b) The allegations put to him in the process included historic matters that had been dealt with or had been stored up to create a case.

- (c) The storing up of allegations created multiple issues to respond to which overburdened the process.
- (d) That the Vet Centre misled him into thinking the allegations were more serious than they were.
- (e) That the Vet Centre had pre-determined the outcome.

[30] I will consider each of these specific concerns as they relate to the requirements set out in paragraph 27.

*The investigation by the Vet Centre*

[31] Having reviewed the evidence I am satisfied that the Vet Centre did investigate the various concerns and allegations properly and fairly.

[32] As part of the investigation Stuart Burrough, a director of the Vet Centre as well as a practising vet at the centre, spoke to employees about Mr Smith's conduct and performance at work. There is nothing untoward in this; this appears to be a logical step in the investigation process. Further, I do not accept on the evidence I heard that Mr Burrough encouraged employees to collect information or evidence other than as was necessary to provide that information or evidence to explain the concerns the Vet Centre had and give Mr Smith an opportunity to respond to it.

*The Vet Centre provided relevant information*

[33] I have already described the disciplinary and performance process as being significant with information and explanations or positions on issues being set out comprehensively by counsel for their respective clients. I will not dwell on this aspect, suffice to say this process was one of the most compete and comprehensive processes I have encountered and I find no fault in how it was conducted particularly in terms of the information exchanged and considered by both parties.

[34] Turning to the specific issues raise by Mr Smith:

- (a) I do not accept his criticism of the Vet Centre storing up issues to create a case for his dismissal. Rather, it appears to me from the evidence that the Vet

Centre dealt with issues informally over the years but got to a point where the issues escalated and it needed to act more formally. This escalation included the number of concerns and the seriousness of them. Looking at the period of time over which that escalation occurred I cannot conclude that there was any storing up of issues or concerns.

(b) It also follows that I do not accept that there was anything wrong with presenting several issues in the process. That there may have been several issues raised was simply a product of timing not any untoward motive or other agenda by the Vet Centre and I cannot find any fault in this. Reflecting on the process and Mr Smith's involvement in it, the evidence shows there was no prejudice to him in dealing with the issues as they were presented as he was represented ably and had his position and various responses set out comprehensively.

(c) Lastly I do not accept the allegation that the Vet Centre was misleading in how it presented the issues. It presented its concerns and the various issues as it believed them to be. And, objectively, they were serious issues and it was not misleading to describe them in this way.

*Mr Smith had an opportunity to respond*

[35] I find the Vet Centre gave Mr Smith sufficient opportunities to respond to the various issues including any developments and further evidence or information provided throughout the process.

*The Vet Centre considered Mr Smith's responses*

[36] I find that the Vet Centre did consider Mr Smith's responses. I found Mr Burrough to be a credible and straightforward witness and accept his evidence in regards to the analysis he undertook of Mr Smith's explanations.

[37] The fact that the process undertaken evolved over time with some earlier issues and allegations dropping out of the process as the explanations provided by Mr Smith were accepted by the Vet Centre, is also evidence that the Vet Centre considered Mr Smith's responses objectively and with an open mind.

### *Predetermined*

[38] I do not accept Mr Smith's allegation that the Vet Centre had predetermined the outcome and acted to achieve this. I can see the basis for making the assertion and understand his argument but objectively do not accept it to be correct. I believe the Vet Centre kept an open mind throughout the process and responded to the evolving nature of the issues and information in a credible and open way.

### *Suspension*

[39] There was an issue raised in Mr Smith's statement of problem about an alleged unjustified suspension. During the course of the disciplinary and performance process Mr Smith went on leave and he did not return to work at the end of that leave period pending the process being completed.

[40] Having reviewed the evidence, including the correspondence exchanged through the process, I am satisfied that Mr Smith remaining off work was justified and this was handled appropriately in terms of what a fair and reasonable employer could have done in the circumstances.

### *Conclusion*

[41] Overall, I conclude that the Vet Centre conducted a fair process – it acted as a fair and reasonable employer could in the circumstances, in relation to its obligations to investigate and how it advanced the issues it had with Mr Smith.

### **Was the decision to dismiss justified?**

[42] At its simplest, this issue of substantive justification involves assessing whether a fair and reasonable employer could have concluded that dismissal was an appropriate sanction in all of the circumstances<sup>1</sup>.

[43] The decision to terminate Mr Smith's employment was conveyed to him in the letter of 12 September 2018. That letter explained why the Vet Centre had decided to dismiss Mr Smith. An earlier letter from the Vet Centre's lawyers is also relevant to the decision to

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<sup>1</sup> Applying section 103A of the Employment Relations Act 2000

dismiss. This is the letter of 21 August 2018, where the Vet Centre's conclusions on the events that occurred and the consequences for it are summarised.

[44] The Vet Centre's conclusions on what occurred and the implications of those conclusions as they informed the decision to dismiss cover five areas of concern, which I summarised at paragraph 23 above, and which I will set out in more detail below. I will then consider substantive justification for dismissal as it relates to each area in turn and then overall, as the Vet Centre did in its analysis and decision making.

#### *The Rentoul Sale*

[45] The Vet Centre only became aware of the detail of the Rentoul Sale in the course of the disciplinary and performance process. The Vet Centre's concern began with the wider enquiry into Mr Smith selling expired stock. When responding to the Vet Centre's concern about the sale of expired stock, Mr Smith explained that in one instance (the Rentoul Sale) he sold expired stock to customers on an "off label" basis.

[46] The issue with the sale being made on an off label basis, was not just the sale of expired stock but also that in the circumstances the sale of the product needed to be prescribed by a vet of the practice selling it. In this case Mr Smith failed to get a vet from the Vet Centre to sign off on the sale (i.e. prescribe it).

[47] Mr Smith's explanation was that he acted as he did because there was an animal emergency and he could not get hold of a vet at the Vet Centre to sign off on the sale so he spoke to a vet from another practice who he knew.

[48] The Vet Centre did not accept this as an adequate explanation, as there was a vet available in the practice on the day of the Rentoul Sale and the failure to get the appropriate sign off exposed the practice to potential breaches of the Veterinary Code of Conduct (the Code). The sale of expired stock was also in breach of the Vet Centre's policy.

[49] In respect of this issue, the Vet Centre concluded that it had occurred (the events were not disputed in any event) and that this conduct amounted to a breach of policy and a potential breach of the Code. It concluded that this was serious misconduct and impacted on the trust and confidence it had in Mr Smith.

[50] The Vet Centre also concluded that this was an example of a recurring concern it had, that Mr Smith had not shown any insight into his behaviour either contemporaneously or after, when it was questioned, and he failed to accept responsibility for what he had done and simply tried to minimise and excuse his behaviour. The Vet Centre therefore concluded that it did not have any confidence that Mr Smith would change his behaviour.

#### *The Cartel Incident*

[51] The Vet Centre received a complaint that Mr Smith had approached a client one evening at a local restaurant, Cartel. Mr Smith appeared to be intoxicated and when he spoke to the client he told him, amongst other things, that the Vet Centre charged like a wounded bull.

[52] Mr Smith initially denied that this had occurred but in the course of the process he accepted that he did approach the client, at Cartel as alleged. He did not accept that this behaviour brought the Vet Centre into disrepute, advancing the view that the statement was meant to be complimentary of the Vet Centre.

[53] The Vet Centre concluded that the conduct did occur as alleged, as was ultimately admitted by Mr Smith. And it concluded that the behaviour brought the Vet Centre into disrepute. The Vet Centre was also concerned that again, Mr Smith did not appear to understand the implications of his behaviour, in particular the impact it had on the Vet Centre.

[54] Counsel for Mr Smith submitted that the comment made by Mr Smith did not bring the Vet Centre into disrepute.

[55] The test for assessing whether conduct by an employee brings the employer into disrepute is set out in *Wikaira v Chief Executive of the Department of Corrections*<sup>2</sup>. At [159] Chief Judge Colgan stated:

From this, I conclude that a fair and reasonable employer, considering whether an employee's conduct brought, or risked bringing, the employer into disrepute, must consider objectively several factors. These are whether a neutral, objective, fair-minded and independent observer, apprised appropriately of the relevant circumstances, could have considered the relevant actions to have brought, or to be a reasonable risk of bringing, the employer into disrepute.

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<sup>2</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175.

[56] Having analysed the statement made by Mr Smith and the circumstances of it I am satisfied that a fair and reasonable employer could conclude that a neutral, objective, fair-minded and independent observer apprised of the circumstances of Mr Smith's behaviour could have considered there to be a reasonable risk of this behaviour bringing the Vet Centre into disrepute.

*Text message to complainant employee*

[57] I have already set out the circumstances giving rise to this issue. Again, the events are not disputed rather it was Mr Smith's explanation that was contentious. Mr Smith's explanation was simply that his text was sent by way of explanation to the employee for his behaviour that was complained about. The Vet Centre did not accept this explanation and in the circumstances believed that Mr Smith's text was him "lashing out" at an employee who had complained.

[58] Also, for this issue, Mr Smith says the Vet Centre did not act appropriately to de-escalate the situation and enable him to repair the working relationship with the employee in question.

[59] The Vet Centre concluded that Mr Smith's behaviour caused hurt to the employee. And his behaviour damaged the working relationship to the extent that it was difficult to see how he could continue to work with that employee. Again, the Vet Centre was also concerned about Mr Smith's apparent failure to accept responsibility for his conduct instead suggesting the employee misinterpreted his text message and overreacted and that the Vet Centre caused further problems by not acting promptly enough to assist in repairing any harm, through mediation in the first instance.

[60] I do not accept Mr Smith's position that the Vet Centre's handling of this issue meant he was unable to restore the relationship. This argument was advanced on the basis that Mr Smith asked to meet the employee, offering to attend mediation with her to discuss the incident. As the Vet Centre did not action this proposal for several weeks, Mr Smith says by the time it did ask the employee it was too late.

[61] It was clear to me from the evidence that whilst Mr Smith's offer to meet was constructive and may have been a way to restore the working relationship, the employee was

so offended by Mr Smith's text message that no amount of explanation or discussion would have changed what occurred and the employee's response to it. The damage was done by Mr Smith's conduct and it was, on the evidence I heard irreparable.

#### *Sale of broken down product*

[62] The sale of broken down product was a relatively straightforward issue. Mr Smith admitted to selling product in individual lots from packs, which had been "broken down". He did this despite a change in policy at the Vet Centre and he tried to explain his conduct by stating that everyone was doing it and some employees had actually falsified records to cover up what they had done.

[63] The Vet Centre did not accept this explanation and after investigating the suggestion that other employees were doing the same thing it did not discover that this was the case, and specifically it did not find any evidence to support the allegation that some employees had falsified records.

[64] The Vet Centre concluded that selling broken down product was a breach of the Vet Centre's policy and as with the Rentoul Sale the failure to take responsibility for it was problematic.

#### *Performance issues*

[65] The Vet Centre also continued to have concerns about Mr Smith's attendance and time keeping. It concluded that despite raising these concerns and giving Mr Smith the opportunity to improve he had not done so.

#### *Dismissal was an appropriate sanction*

[66] Having reflected on the evidence and the arguments advanced in respect of each aspect of the Vet Centre's decision, I find that a fair and reasonable employer could have concluded the events that occurred in connection with the Rentoul Sale, the Cartel Incident and the text message amounted to serious misconduct, which justified dismissal.

[67] More significantly, I conclude that a fair and reasonable employer could have concluded that it had lost trust and confidence in Mr Smith because he did as he saw fit and then made excuses often blaming others and not taking responsibility. A fair and reasonable

employer could also conclude that the lack of contrition and failure to accept responsibility meant Mr Smith was unlikely to change his behaviour.

[68] I find that a fair and reasonable employer could have concluded that because of the behaviour and Mr Smith's response to it that it had lost trust and confidence in him and therefore dismissal was an appropriate sanction.

[69] Overall, I find that in all of the circumstances a fair and reasonable employer could have concluded that dismissal was appropriate.

### **Orders**

[70] The Vet Centre's dismissal of Mr Smith and its actions in carrying out the process in coming to that decision were justified and Mr Smith's claims are dismissed.

### **Costs**

[71] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[72] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority