

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 659  
3232819

BETWEEN	TONY AUSTWICK Applicant
AND	TAURANGA VETERINARY SERVICES LIMITED Respondent

Member of Authority:	Claire English
Representatives:	Mark Beech, counsel for the Applicant Jeremy Sparrow, counsel for the Respondent
Investigation Meeting:	24 January, 25 January and 18 April 2024 in Tauranga and by AVL
Submissions received:	Up to 6 September 2024 from Applicant Up to 21 August 2024 from Respondent
Determination:	6 November 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Austwick was employed by the respondent (TVSL) as a veterinarian since 2010. At the end of December 2021, a client of TVSL complained that their cat had been diagnosed with a rare condition and had not been offered appropriate treatment by Mr Austwick at an earlier appointment.

[2] In January 2022, Mr Austwick attended a weekend call-out where the owner of a pet cow requested euthanasia of the cow by way of lethal injection. In the event, the heavily sedated cow was euthanised by way of shooting, and on receipt of a bill, the

owner's daughter complained that her mother was distressed by the way the matter was handled.

[3] In February 2022, a colleague of Mr Austwick's raised a concern that a dog with late state diabetes had not been diagnosed by Mr Austwick when presenting for unrelated surgery at an earlier stage.

[4] TVSL wrote to Mr Austwick at the end of February 2022, raising these issues with him and stating that a performance improvement plan or final warning could result.

[5] A meeting followed, as well as correspondence between representatives. TVSL then advised Mr Austwick that his actions amounted to serious misconduct, and despite further meetings and correspondence, Mr Austwick was summarily dismissed on 22 April 2022.

### **The Authority's investigation**

[6] For the Authority's investigation written witness statements were lodged from Mr Austwick himself, and on behalf of TVSL by Mr David McDonnell (Director of TVSL); Ms Janelle Nee (Business Manager); Ms Kate Heller (a veterinarian at TVSL); Mr Christopher McCaughan (as an expert witness); Dr Barbara Beatie (as an expert witness); and Ms Bronwyn Richards (owner of the cow). All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[8] The issues requiring investigation and determination were:

- (a) Was Mr Austwick unjustifiably dismissed?
- (b) If TVSL's actions were not justified in respect of dismissal, what remedies should be awarded, considering:
  - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and

- Compensation under s123(1)(c)(i) of the Act
- (c) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Austwick that contributed to the situation giving rise to his grievance?
- (d) Should either party contribute to the costs of representation of the other party.

## **Background**

[9] Mr Austwick was an experienced veterinarian, who had worked for the practice that became TVSL since 1994. He was employed by TVSL in 2010, after Mr McDonnell purchased the practice from its previous owner.

[10] Mr Austwick's evidence was that he met performance and revenue targets that were required of him over the years. He also said that he would occasionally put forward suggestions for alternative proposals as to how the practice should be run if he disagreed with what was proposed. He expressed some concerns about what he felt to be a focus by the practice on a range of costly diagnostic tests being offered to clients and that those tests could be financially burdensome to owners.

[11] In contrast, Mr McDonnell talked about his goals and ethos for the practice, including embracing a range of diagnostic tests (including blood tests and x-rays) which could give both treating vets and pet owners valuable information about their pet's health, particularly for non-symptomatic conditions. It is fair to say that Mr Austwick experienced some frustration with what he saw as Mr McDonnell's over-reliance on testing, and Mr McDonnell in turn experienced some frustration with what he saw as Mr Austwick's reluctance to embrace testing.

[12] As already indicated, there were three incidents which occurred in short succession which led to Mr Austwick's dismissal. First in time was the case of a cat with a persistent limp who had been prescribed pain killers by Mr Austwick. When the cat returned some time later, it moved freely with no indication of a limp. The client was unsatisfied, and took the cat to another vet who eventually diagnosed a rare disease. The client stated that she had shown a video of the cat limping, and had requested an x-ray be done. Mr Austwick stated that no video was shown to him (the client had also seen another vet at the practice) and could not recall being asked to give an x-ray. TVSL concluded that the it preferred the client's account. It took the view that an xray should

have been taken and “our Bestcare® expectation is that client’s requests are accommodated”<sup>1</sup>. TVSL added that “You do not demonstrate the understanding of what Bestcare ® philosophy means...that our clients feel that they receive this standard of care...”.

[13] The second incident was around the euthanasia of a pet cow. The client had requested a weekend callout, and this ended with her requesting euthanasia for her cow by way of lethal injection. Mr Austwick injected a large volume of barbiturates, rendering the cow deeply insensate. When the cow did not pass within the expected time, Mr Austwick put pressure on the cow’s windpipe. This had no effect, and a neighbour who had a gun was called to assist.

[14] This took some time and Mr Austwick was shaken by this. He mentioned it to colleagues, and to Mr McDonnell, and made a verbal request that the bill be held. When the client received a bill, mainly for the cost of the barbiturates, her daughter complained on her behalf. Ms Richards filing a statement saying she was upset by Mr Austwick’s actions in “choking” the cow, and upset that the cow had needed to be shot in the end, despite being deeply sedated.

[15] Mr McDonnell was highly critical of Mr Austwick for a variety of reasons. The primary concern as explained by Mr McDonnell at the investigation meeting was that Mr Austwick had attempted to end the animal’s life by way of suffocation which was not a recognised euthanasia technique. He was of the view that Mr Austwick should have taken other approaches such as using a second type of medication or severing of the rectal artery. In addition, Mr Austwick was criticised for not completing an incident report, for what Mr McDonnell saw as a flippant or not appropriately serious approach when mentioning the matter to colleagues, and generally failing to be aware that this could have caused serious reputational damage to the practice. Even at the time of the investigation meeting, Mr McDonnell indicated to me that he remained highly concerned about Mr Austwick’s actions in attempting euthanasia by way of suffocation, which he viewed as an animal welfare issue on which there had to be “zero tolerance”, despite it being clear that the cow was so deeply sedated sensation was not present.

[16] Thirdly, there was a concern raised about a pet dog, who had received a successful ligament surgery. As part of the pre-surgery process, blood work was

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<sup>1</sup> Para 47 of the preliminary outcome letter of 5 April 2022.

performed. The test was “inconclusive” as to the dog’s blood sugar levels. Some time later, the dog presented at TVSL for issues unrelated to the surgery. She was found to have diabetes and for various deeply personal reasons (which I will not detail here), her owners made the decision to euthanise her. TVSL took the position that Mr Austwick should have “re-run” the blood tests, “which was required of you”, and that this “was a significant professional omission , and ultimately led to the death of the animal which was avoidable”<sup>2</sup>. In addition, TVSL reached the conclusion that “rather than take responsibility, you have taken a very defensive position...you don’t care about the impact on the client...[which] shows a considerable lack of empathy....This impacts on our trust and confidence in you at a fundamental level”<sup>3</sup>.

[17] In addition, TVSL found that Mr Austwick had not “met our minimum requirements” because one of his colleagues said she felt “compromised” when speaking with the client “due to the potential of incriminating [sic] you”<sup>4</sup>.

[18] TVSL came to the conclusion that all its concerns were substantiated, that they constituted a continuing pattern, that Mr Austwick had denied and justified matters rather than demonstrating “whole hearted acceptance”, and that his actions amounted to gross negligence and (in relation to the cow only) serious misconduct. TVSL acknowledged that Mr Austwick had a “previously unblemished” history, however summary dismissal was appropriate<sup>5</sup>.

[19] In light of all the above, the questions raised on behalf of Mr Austwick are essentially whether his dismissal an action that was open to a fair and reasonable employer, especially in light of Mr Austwick’s experience and length of service; and was his dismissal carried out in a procedurally fair way, especially given that the initial letter referred to performance concerns only with no mention of dismissal, and then later changed to a dismissal discussion when Mr McDonnell became involved?

## **Analysis**

[20] It is submitted for Mr Austwick that the answer to these questions is “no”, and that none of his actions constituted misconduct or serious misconduct sufficient to

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<sup>2</sup> Paragraphs 56 and 57 of the preliminary view letter dated 5 April 2022.

<sup>3</sup> Ibid, paragraph 60.

<sup>4</sup> Ibid, paragraph 64(a) and (b).

<sup>5</sup> Ibid, paragraphs 66, 67, and 69.

justify dismissal, and even if they had, the process followed by TVSL was so poor the dismissal was overall unjustified for want of a fair process.

[21] The key question is “is dismissal an action that was open to a fair and reasonable employer in all the circumstances at the time”?

[22] I then come to consider TVSL’s preliminary view letter of 4 April 2022, which set out its concerns at length. The conclusions set out in that letter are that Mr Austwick’s actions “evidence a continued pattern” of behaviour. That behaviour is described in performance terms, eg, lack of recall, lack of record keeping, failure to show empathy, lack of willingness to change, failure to manage complex cases, failure to meet expected standards of continuing professional development, and failure to articulate what “our guiding philosophy” of Bestcare® meant. These were then described collectively as “gross negligence”.

[23] Considering all the circumstances, I am not of the view that TVSL could properly arrive at the view that Mr Austwick’s actions evidenced a continuing pattern of gross negligence. All three incidents were clinically distinct. Issues arising from euthanasia of a large cow by way of lethal injection and the rare diagnosis for the cat were not part of common practice. All three incidents arose over approximately 2 months. In contrast Mr Austwick had worked for TVSL for 12 years (and with the previous owner for many years longer) with none of these issues arising previously. His prior performance reviews were in evidence, indicating that he had been a valued member of the team, and commended for his implementation of “Bestcare®” and use and promotion of various testing offerings available at the practice. In regards to the cow, which was described as serious misconduct, I remain concerned that Mr McDonnell has mischaracterised this as an animal welfare issue, when the expert evidence was clear that the cow would have felt no pain, and this was not a case of on-going mistreatment of an animal or animals which Mr McDonnell was concerned would require “zero tolerance”.

[24] Finally, there is the obvious change of tack between the first letter sent to Mr Austwick and the second letter. The evidence was that concerns were first raised on behalf of TVSL by Ms Nee, who was aware of all three client complaints, and believed that they were sufficiently serious to raise with Mr Austwick in a formal way. Her letter

clearly set out her view that these were performance concerns, and the letter indicated that a performance management plan could be an outcome.

[25] Mr McDonnell admitted that he had been content to leave this to Ms Nee, and had not looked at the matter in depth until just before the scheduled meeting with Mr Austwick. His evidence was that when he did so, he formed the relatively firm view that Mr Austwick's employment was in jeopardy. Mr McDonnell took the view that Mr Austwick had attempted to euthanise the cow by way of suffocation, which was not a recognised form of humane euthanasia, and that this amounted to an animal welfare concern which needed to be met with a "zero tolerance" approach. Mr McDonnell's evidence at the investigation meeting was very clear that this was his primary concern. His secondary concerns were around what he saw as Mr Austwick's inability to satisfactorily explain or "embody" the "Bestcare®" philosophy, and the advice from TVSL's insurer that Mr Austwick's actions were a breach of professional duties and could lead to related negative publicity and associated risk.

[26] None of this was set out in the letter inviting Mr Austwick to a disciplinary meeting with Mr McDonnell. That letter simply did not give Mr Austwick a realistic idea of the depth and breadth of Mr McDonnell's concerns, or that collectively they were being viewed by Mr McDonnell as a serious misconduct matter likely to result in the termination of employment. The letter indicated the opposite, and Mr Austwick had no way of knowing that this was false hope.

[27] Both at the meeting and subsequently, there was also some extensive discussion between the parties about TVSL's "Bestcare®" philosophy. For the avoidance of doubt, Bestcare® was not a policy, but was described as the way TVSL approached their work. Mr McDonnell was highly critical of what he saw as Mr Austwick's "failure to articulate what Bestcare® means", and considered this to be a type of gross negligence pointing towards termination. This is in circumstances where Mr Austwick was not aware that Mr McDonnell wanted to discuss the importance of the Bestcare® philosophy, or that he was being accused of failing to act consistently with it such that his employment was at risk. After hearing the in-person evidence, I am of the view that it was when discussing the relevance (or otherwise) of Bestcare® that the underlying differences of opinion between Mr McDonnell and Mr Austwick as to the proper running of the practice seem to have surfaced. There is no doubt that this coloured Mr McDonnell's impression of Mr Austwick's answers.

[28] When applying the test of justification set out in the Act, I must consider whether TVSL:

- a. sufficiently investigated the allegations before dismissing Mr Austwick;  
and
- b. raised its concerns with Mr Austwick before dismissal; and
- c. gave Mr Austwick a reasonable opportunity to respond to its concerns;  
and
- d. genuinely considered Mr Austwick's explanation before dismissal.

[29] I may also consider any other factors I think appropriate.

[30] TVSL did not sufficiently investigate the allegations against Mr Austwick before dismissal. In particular, these include the negative views of TVSL's insurer, which in-person evidence indicated was a part of Mr McDonnell's decision to dismiss Mr Austwick, but there was no evidence of what was actually said. Ms Nee and Mr McDonnell also took into account comments from other staff members that were not well-tested.

[31] TVSL did not properly raise the concerns it had with Mr Austwick. The letter dated 5 April 2022 sets out a list of 11 allegations which were described as either gross negligence or serious misconduct, including issues raised by the insurer and the role of "Bestcare® that were never mentioned in the initiating letter. Even then, Mr McDonnell's view that Mr Austwick's handling of the euthanasia of the cow amounted to an animal welfare issue/cruelty to an animal and that TVSL took and was required to take a "zero tolerance" policy towards such matters because of something that had occurred with another employee some time in the past, was never set out, despite Mr McDonnell's in-person evidence that this was part of his decision to dismiss.

[32] This created a fundamental lack of fairness, in that Mr Austwick was never comprehensively put on notice of TVSL's concerns, or of how seriously it (through Mr McDonnell) took matters. These matters were in Mr McDonnell's mind when he first met with Mr Austwick, but he did not tell Mr Austwick this. Instead, Mr Austwick was told that a likely result was a performance improvement plan. As well as being untrue, it is hard to see how this meets the employer's obligations of good faith, to be

responsive, communicative, and to give Mr Austwick access to relevant information in a timely way.

[33] The impact of this flows through to TVSL's ability to genuinely consider Mr Austwick's responses, including reaching the view that Mr Austwick talked about the euthanasia of the cow in a way that was inappropriately serious, preferring the evidence of a client over Mr Austwick's when there was a dispute about a request for x-rays for the cat, and Mr McDonnell's view that when asked to provide a written apology by a set date, this had to be "dragged out" of him, when evidence shows Mr Austwick provided a relatively substantive written apology by the given date but it was the text drafted by the insurer that was sent to the client.

[34] I also consider it relevant that there appears to have been very little serious consideration of Mr Austwick's length of service and otherwise positive yearly performance reviews when reaching the conclusion that there was a "continued pattern" of "gross negligence". I was left with no clear impression as to why Mr McDonnell did not consider 12 years of successful service to weigh in Mr Austwick's favour when dealing with disputed matters such as whether a client had requested an x-ray, or whether Mr Austwick had spoken in a certain tone.

[35] Taking all these matters into consideration, my view is that TVSL's actions did not meet the test of justification, and Mr Austwick has a personal grievance for unjustified dismissal.

## **Remedies**

[36] Mr Austwick is therefore entitled to remedies. The statement of problem sets these out as being: lost income from 22 April 2022 to 15 June 2022 of \$10,661.55, which was later revised to the sum of \$8,238.47 in legal submissions; compensation for hurt, humiliation, and injury to feelings of \$30,000; and costs.

[37] Mr Austwick gave evidence of the impact of his dismissal on him. He sought medical advice as he was not feeling well, and was diagnosed with dangerously high blood pressure. On receiving news of his dismissal, he describes feeling "wiped out and defeated". He says he was initially unable to do much, to the extent that his wife found him unmoving and curled up on the couch. He received medication and counselling. He says he was also very concerned about Mr McDonnell's advice that he

[Mr McDonnell] would be reporting Mr Austwick's dismissal to the veterinary council, as he was concerned about impacts on his ability to practice.

[38] In the end, Mr McDonnell did report Mr Austwick to the veterinary council, but not until some months later. Mr Austwick himself also informed the veterinary council of his dismissal as part of the renewal of his practicing certificate. After an investigation in which Mr Austwick participated, the council reached the decision that no action would be taken.

[39] Mr Austwick submits that the delay and timing of Mr McDonnell's report to the veterinary council, occurring after an unsuccessful mediation, was an indication of retaliatory action. Mr McDonnell on the other hand simply says that he had been very busy. Mr Austwick also submitted that Mr McDonnell had engaged in retaliatory action by contacting the person who interviewed him for his next role, advising that he "should be reticent" about who he employed.

[40] Mr McDonnell says that he did speak with Mr Austwick's new boss as he knew that that practice had employed former TVSL staff without seeking references from himself or Ms Nee. He advised that only he or Ms Nee were authorised to provide references and that the other veterinarian might "want to be reticent" about employing former TVSL staff without an authorised reference. Mr McDonnell says that this was not in reference to Mr Austwick, and the conversation occurred well after Mr Austwick had been employed.

[41] It is submitted for Mr Austwick that I should view this and the late report to the veterinary council as retaliatory behaviour sufficient to increase the amount of compensation for hurt and humiliation Mr Austwick should properly receive, sufficient to justify an award of some \$50,000 rather than the \$30,000 referred to in the statement of problem.

[42] I accept Mr Austwick's evidence of the impact of the dismissal on him. I take into account that this had a particular impact on Mr Austwick given his length of service, and his genuine concerns about the potential impact on his ability to practice. I do not accept that Mr McDonnell's report to the veterinary council must be read as retaliatory, especially given Mr Austwick's own evidence that he himself raised this issue with the council as part of his renewal of his own practicing certificate. I do not accept that there is sufficient evidence for me to assume that Mr McDonnell's admitted

comments to Mr Austwick's next employer were retaliatory given both the dispute about when this occurred, and that Mr Austwick was reemployed in less than two months' time.

[43] When weighing these matters and considering the amount of compensation as originally claimed by Mr Austwick, an award of \$27,000 is appropriate. Orders are made accordingly.

[44] Mr Austwick is also entitled to receive reimbursement for his lost wages for the time he was unemployed. He has quantified his actual loss as being \$8,238.47. Orders are made accordingly.

[45] I must also consider whether Mr Austwick's actions contributed towards the situation which gave rise to his personal grievance, and whether any reduction is required for actions that were both causative of the grievance and blameworthy.

[46] My view is that no reduction is required. The evidence before me, including thoughtful evidence from both Mr McDonnell and Mr Austwick points to the conclusion that even if Mr Austwick had acted differently (for the avoidance of doubt, by offering an x-ray, asking the client if they wished for another attempt at a blood test to be made, and not attempting suffocation on the insensate cow), there would not necessarily have been any clinically different outcomes for the animals concerned. While his actions may have fallen short of best practice, and acting differently might (speculatively) have resulted in TVSL not receiving complaints, this does not go to the procedural flaws resulting in the unjustified dismissal.

[47] On balance, I make no finding of contribution. The conduct of both parties has been sufficiently taken into account in the overall assessment of remedies.

## **Orders**

[48] Mr Austwick has a personal grievance in that he was unjustifiably dismissed.

[49] Tauranga Veterinary Services Limited is ordered to pay to Tony Austwick within 28 days of the date of this determination :

- a. The sum of \$8,238.47 gross as compensation for lost remuneration;

- b. The sum of \$27,000 without deduction as compensation for hurt and humiliation;

### **Costs**

[50] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. My initial view is that tariff costs would be calculated on the basis of a three-day hearing.

[51] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicant may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the respondent will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[52] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>6</sup>

Claire English  
Member of the Employment Relations Authority

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<sup>6</sup> For further information about the factors considered in assessing costs see: [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)