

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 442  
3077932

BETWEEN	WILLIE AWATERE Applicant
AND	TECHCRETE READYMIX LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Alex Kersjes, advocate for the applicant Rod Palmer for the respondent
Investigation Meeting:	21 July 2020
Submissions and further information received:	Submissions from both parties on 21 July 2020 Further information from the applicant on 24 July 2020
Date of determination:	27 October 2020

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**DETERMINATION OF THE AUTHORITY**

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- A. Willie Awatere was subject to an unjustifiable action to his disadvantage when Techcrete Readymix Limited suspended him.**
- B. Mr Awatere's unjustified dismissal claim is not successful.**
- C. No remedies are awarded.**
- D. Costs are reserved and a timetable set if the parties cannot reach agreement.**

**What is the Employment Relationship Problem?**

[1] Willie Awatere was the dispatch manager for Techcrete Readymix Limited (Techcrete or the company). Techcrete is a small company which sells and delivers concrete, mainly for residential projects.

[2] Mr Awatere was dismissed for demanding alcohol from customers and taking it home. He claims that he was unjustifiably suspended and dismissed by the company. Techcrete replies that its actions were justified.

[3] An investigation meeting was held on 21 July 2020. I heard evidence from Mr Awatere, Rod Palmer (Techcrete's managing director) and Phillip McLarin (Techcrete's sales representative).

[4] As permitted by s 174E of the Employment Relations Act (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified resulting orders.<sup>1</sup>

### **What are the issues?**

[5] The issues for investigation and determination are:

- (i) Was Mr Awatere subject to an unjustified action by Techcrete to his disadvantage when it suspended him?
- (ii) Was he unjustifiably dismissed by Techcrete?
- (iii) If Mr Awatere establishes a personal grievance, what remedies (if any) should he receive?
- (iv) Should either party have to contribute to the other party's costs?

### **What was Techcrete's policy and practice regarding alcohol?**

[6] Techcrete had no written policy on alcohol or gifts from customers. Mr Palmer described the company's policy as being that all alcohol given to staff should be put in a container in the yard's office, to be shared amongst everyone. Occasionally if a driver was given a box of beer Mr Palmer might tell him or her to keep it. It was his call.

[7] This reflected Mr Palmer's experience of how gifts of alcohol were dealt with in the concrete industry, particularly at Holcim where both he and Mr Awatere had worked previously.

[8] Staff were told when they started that that was the practice. Mr Palmer says that he spoke to Mr Awatere on many occasions about the practice. Mr Awatere agreed he

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had been told this a few times over three or four years, including in September or October 2018. Both agree that it was less common to get gifts of alcohol than it had been in previous years.

[9] Mr Palmer accepted that historically there had been a practice in the concrete industry of customers offering concrete company staff beer for left-over concrete. This was less common in recent years. Mr Awatere accepted that when beer was obtained in these circumstances it should be brought to the yard rather than the staff member taking it home.

### **What lead Techcrete to investigate?**

[10] Mr Palmer described himself, Mr Awatere and Mr McLarin as the management team of Techcrete.

[11] The company suffered an unexpected drop in sales with some customers discontinuing using Techcrete. Other suppliers did not appear to be having the same problem and it was not a traditionally quiet time of year. Mr Awatere said it must have been the sales rep not doing his job properly. The sales rep Mr McLarin went out to see what he could find out.

[12] Mr McLarin asked several customers why they were buying less from Techcrete. Some did not want to comment but he was able to get responses from Ms A, Mr B and Mr C. Ms A was tired of having to give Mr Awatere alcohol for prompt service. She said he kept asking her for a box (of beer). Ms A showed Mr McLarin a number of texts where Mr Awatere asked for alcohol.

[13] Mr B said that Mr Awatere demanded alcohol if better service was wanted. Without the alcohol the service received was rubbish.

[14] Mr C was a reseller of concrete. He was not that keen to get involved but was prepared to speak to Mr Palmer. He had started using an alternative supplier as he was not happy with Mr Awatere demanding beer from the builders Mr C supplied Techcrete's concrete to.

[15] Mr McLarin was convinced that the demands for alcohol were not in the nature of gifts the customers wished to give.

[16] Mr McLarin had occasionally seen Mr Awatere putting boxes of beer into his ute but did not think much of it until he heard the customers' complaints. Mr McLarin also spoke to a Techcrete owner driver who reported that Mr Awatere had asked him to get beer from customers for Mr Awatere and that on one occasion he brought back two boxes of beer which Mr Awatere took home for himself.

[17] Mr McLarin reported to Mr Palmer that customers were saying Mr Awatere was demanding alcohol for timely service. Mr Palmer had previously had a sense that something was not right but nothing was confirmed and nobody complained directly to him. He was however, reluctant to believe that Mr Awatere had demanded alcohol, as the two had worked together off and on for almost 15 years.

### **How did Mr Palmer investigate?**

[18] Mr Palmer went to see the customers himself. Mr McLarin did not accompany him.

[19] Ms A told Mr Palmer that Mr Awatere had been demanding alcohol for service. Either she would drop the beer off at his home or Mr Awatere would pick it up. Mr Palmer recalled that he had once spoken to Ms A when she turned up at Techcrete's yard asking for Mr Awatere. He had directed her to where Mr Awatere was working. Mr Palmer found the situation odd as Ms A and her employee had opened their car boot but closed it again when they realised Mr Awatere was not there.

[20] Ms A told Mr Palmer that Mr Awatere's demands for alcohol had been going on for most of the time she had been buying concrete from Techcrete. When asked why she had not told Mr Palmer earlier, she replied that she had assumed he knew what was going on. Mr Palmer found this very embarrassing.

[21] Mr Palmer also went to meet with Mr B, who he had not met before. Mr B also reported having to supply beer to get orders from Mr Awatere.

[22] Techcrete's sales to Mr C's customers had dropped in volume by about 80%. Mr C told Mr Palmer that Mr Awatere had been demanding whiskey and beer and Mr C did not like that, hence he reduced his business with Techcrete.

[23] All three customers told Mr Palmer that Mr Awatere demanded alcohol for himself in order to provide Techcrete's services, not that they gave him alcohol as a

gift. They described an on-going arrangement with Mr Awatere rather than being able to detail particular instances. Nothing was obtained in writing from the customers at that time.

[24] When asked by the Authority about the possible connections between the customers, Mr Palmer said that Ms A and Mr B may have known each other but did not think they were friends. At the time Mr Palmer investigated Mr C did not seem to know Ms A or Mr B.

[25] Techcrete provide the Authority with an email from Ms A and a letter from Mr C, although these were from after Mr Awatere was fired. Mr Palmer sought letters from them for the purposes of the Authority case. These were not considered when assessing Techcrete's decision to dismiss.

[26] Some other issues were also mentioned in the course of the evidence but as they were not the reason Mr Awatere was dismissed I will not go into them.

#### **When was Mr Awatere informed of the allegations?**

[27] Techcrete wrote to Mr Awatere on 7 March 2019 about customer complaints that he demanded alcohol for the company's service. The letter also referred to an issue about the wrong concrete being sent or sent without the order being confirmed with the customer. Mr Awatere was invited to a meeting. The letter noted that "due to the seriousness of the complaints" it was suggested that Mr Awatere brought a support person with him.

#### **What happened at the 11 March 2019 meeting?**

[28] Mr Palmer and Mr McLarin met with Mr Awatere.

[29] At the meeting Mr Palmer named the customers he had spoken to, describing what each of them had told him. He told Mr Awatere that customers reported they were required to provide Mr Awatere with alcohol to get service.

[30] Mr Awatere denied that he had demanded alcohol from customers. Mr Palmer's sense was that Mr Awatere had a "no one can touch me" attitude.

[31] Mr Awatere suggested that it was normal for dispatchers to get and keep gifts from customers. This was not Mr Palmer's experience.

[32] Mr Awatere acknowledged that he had received alcohol from customers on two occasions. One was when a customer left beer at Christmas on his doorstep at home without meeting Mr Awatere face to face.

[33] On the other occasion he received alcohol as a thank you gift from a customer who he had saved money for by on-shipping concrete which they would otherwise have had to pay for. This was delivered by a Techcrete owner driver to Mr Awatere.

[34] Mr Palmer did not accept that that situation warranted a thank you gift as it was Mr Awatere's job to arrange on-shipping in such situations. In any event the alcohol was a gift which belonged to the company and should have been brought to the yard fridge.

[35] Mr Awatere mentioned that he had not met Mr C before. However, at the Authority's investigation meeting he accepted that they had talked on the phone many times.

[36] Mr Awatere's explanation about the wrong concrete order was accepted by Mr Palmer. That issue was not pursued further.

[37] The meeting lasted about 15 minutes. Mr Palmer spoke for most of the time with Mr Awatere saying relatively little.

[38] Mr Palmer told Mr Awatere that he was suspended. Mr Awatere was asked to hand over his company phone and laptop. Mr Palmer did not want Mr Awatere holding the phone as all calls to Techcrete dispatch went through that phone. Also, the laptop allowed access to the company's dispatch and accounting systems.

### **Was the suspension unjustified?**

[39] Before he was suspended, Mr Awatere was informed of the allegations against him. However, Mr Palmer admitted that he did not ask Mr Awatere about the possibility of suspension to see if he had anything to say. There was no justification for deciding to suspend Mr Awatere without hearing from him about suspension at the 11 March meeting.

[40] Mr Awatere was therefore subject to an unjustified action by Techcrete to his disadvantage. The suspension was paid so there is no claim for lost wages for that time.

The claim for compensation for humiliation, loss of dignity and injury to feelings caused by the suspension is considered below.

**Was there any further investigation?**

[41] Mr Palmer wanted time to consider what the outcome should be. He had worked with Mr Awatere for a long time.

[42] Mr Awatere had offered no information at the first meeting which the company thought required further investigation. Thus no further steps were taken.

[43] Mr Palmer sent Mr Awatere an email inviting him to a second meeting. Mr Awatere agreed.

**What happened at the second meeting?**

[44] A brief meeting was held on 13 March 2019. Mr Palmer asked Mr Awatere if he had anything further to say. The response was no. Mr Palmer informed Mr Awatere that he was dismissed as Mr Palmer could not trust him anymore because he had demanded alcohol from customers.

[45] Mr Palmer described the demanding of alcohol as unacceptable, not good business practice and extremely embarrassing.

**What did the dismissal letter say?**

[46] Mr Palmer wrote on 13 March confirming the dismissal on the basis of lack of honesty which left him in the position of not being able to trust Mr Awatere.

[47] Reference was made to the owner driver saying that Mr Awatere had taken home two boxes of beer the driver had picked up from a customer, although Mr Awatere only admitted to one. The letter noted that Mr Awatere had been told numerous times to put any alcohol in the yard fridge. Mr Awatere's demanding of beer from customers and then taking it home himself is referred to.

[48] The behaviour is described as amounting to theft, which could not be tolerated with Mr Awatere being in a position of responsibility.

[49] Mr Awatere was dismissed as of 13 March 2019.

### **What was Mr Awatere's explanation to the Authority?**

[50] Mr Awatere's evidence at the investigation meeting was different in some important ways to what he said at the meeting with Techcrete.

[51] At the meeting with Mr Palmer, Mr Awatere denied demanding alcohol from customers. Significantly, he admitted to the Authority that he was given alcohol by Ms A on a regular basis, around two or three times a month, for a couple of years. When I questioned whether he had asked Ms A for alcohol he said "not directly". He described saying "that's going to cost you a box" or the like, when Ms A wanted concrete quicker than it would normally be available. He put a similar message in texts to Ms A.

[52] Mr Awatere classified saying "it's going to cost you a box" not as a demand but a comment made in jest. He says that he never expected her to give it to him. While that may have been the case on the first or second occasion, it is hard to see, when it was happening two or three times a month, that it remained a surprise. When I suggested that the fact Ms A kept supplying the beer implies she thought she was obliged to do so, Mr Awatere replied that he did not think so and he "tried not to come across that way".

[53] Mr Awatere admitted that he had taken for himself what Mr Palmer estimated to be about 60 boxes of beer from Ms A over a couple of years. Mr Awatere was asked why, if he had not demanded it he did not tell Ms A when she supplied it, that it was not expected. He accepted that that was a fair point.

[54] Mr Awatere told the Authority that he made the same joke with other people as well although he did not remember saying it to Mr B or Mr C.

[55] I asked Mr Awatere whether he had raised the joke comment at either of the meetings with Techcrete. He initially said no. However, he then said he was pretty sure he had raised it at the first meeting. However, he makes no mention of it at all in his witness statement which, at 40 paragraphs, is not short. When asked about that, Mr Awatere said he probably overlooked it. I consider it unlikely that this crucial response would not have been mentioned in the witness statement had he mentioned it at the meetings with Techcrete. I conclude that he did not.

[56] Mr Awatere also gave contradictory evidence to the Authority regarding the Christmas gift. His witness statement referred to the gift of beer being left at his house

without him meeting the customer face to face. However, at the Authority meeting he said that Ms A had handed him a gift box of Jack Daniels whiskey.

[57] Mr Awatere admitted that in early 2019 he had received through the owner driver a customer's gift of a box of 12 bottles of beer and a box of six which was opened. He had taken it home which he described as an oversight.

### **What about Mr C?**

[58] Mr Palmer described having spoken to Mr C about his experiences with Mr Awatere. Mr Awatere says that after his dismissal he spoke to Mr C who denied having spoken to Mr Palmer. Techcrete filed a 25 June 2019 letter from Mr C on his company's letter head in which Mr C described his builder customers reporting Mr Awatere asking them to drop alcohol off to them. Mr C writes that he passed the messages on to Mr McLarin and told him that they could not deal with Techcrete on those terms.

[59] I found Mr Palmer's evidence of the discussion and the letter from Mr C to be credible and conclude that Mr Palmer spoke to Mr C as part of his investigation.

### **Was the dismissal justified?**

[60] The test is whether the employer's actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances.<sup>2</sup>

[61] This includes consideration of whether:

- (i) there was a sufficient investigation of the allegations;
- (ii) the employer raised the concerns with the employee before acting;
- (iii) the employer gave the employee a reasonable opportunity to respond;  
and
- (iv) the employer genuinely considered the explanation.<sup>3</sup>

[62] The dismissal was for extorting alcohol from customers, as well as taking alcohol home when according to policy it should have taken it into the yard.

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<sup>2</sup> The Act, s 103A.

<sup>3</sup> The Act, s 103A(3).

[63] Mr Palmer described Mr Awatere's dispatch role as pivotal to Techcrete. Mr Awatere received most of the orders and arranged for the concrete to be delivered.

*Did Mr Palmer carry out a full and fair investigation?*

[64] Mr Palmer spoke to the three customers, not simply relying on Mr McLarin's report. Mr Palmer had the opportunity to assess their credibility and later compare that to Mr Awatere's credibility.

[65] It was suggested that Mr Palmer should have spoken to Techcrete's owner drivers to see what information they had. However, customers had been spoken to and Mr Awatere accepted that a driver had delivered beer from a customer to him.

[66] This was not the perfect investigation. Mr Palmer did not get written statements from customers or copies of the texts from Ms A. The disciplinary process proceeded on the basis of the information received from the three customers, passed on in the 7 March letter and verbally. There were no notes kept of the meetings with Mr Awatere. I take into account that Techcrete had limited resources, being a company with less than five employees.

*Predetermination*

[67] In other circumstances the taking back of the work phone and laptop at the end of the first meeting could be seen as evidence of predetermination. Here though, given the nature of the allegations and Mr Awatere's role, removing his access to the orders as well as the dispatch and accounting systems was a reasonable action. It also reinforced to Mr Awatere that this was a serious process.

*Length of the meetings*

[68] Mr Awatere's representative was critical of the shortness of the meetings suggesting that they did not allow sufficient opportunity to understand the issues. I do not agree. The allegations were outlined in writing in advance of the meeting. Mr Awatere thus had time to consider them before the meeting.

[69] The first meeting lasted around 15 minutes. The time was sufficient for Techcrete to outline the allegations and evidence, the company's policy and Mr Palmer's view of the seriousness of the allegations. Mr Awatere denied the main

allegation of demanding alcohol, described two situations when he had taken alcohol home and mentioned the wrong order issue. Mr McLarin appears to have said little.

*Mr McLarin's presence*

[70] Mr McLarin's presence at the meetings with Mr Awatere might not be seen as ideal. He was the person who had gone out looking for the reasons for the drop in sales and brought the complaints back. However, this was a small company. Other than an administrator, there were no other employees.

*Procedural elements*

[71] Considering the requirements in s 103A of the Act:

- (i) Mr McLarin heard the allegations initially from several customers;
- (ii) Mr Palmer personally spoke to three customers without Mr McLarin present and confirmed that all complained of Mr Awatere demanding alcohol in return for service;
- (iii) Mr Awatere was informed in advance in writing of the allegation that he demanded alcohol for service;
- (iv) Mr Awatere was told both in writing and at the first meeting that the allegations were serious;
- (v) It was suggested that Mr Awatere bring a support person to the meeting;
- (vi) A meeting was held where Mr Awatere was told the names of the customers and the nature of the allegations;
- (vii) Mr Awatere was given a chance to respond;
- (viii) The explanation about the wrong order was accepted and this was not considered in the decision to dismiss;
- (ix) Mr Palmer took time to then consider what he was going to do, including contemplating his long involvement with Mr Awatere; and
- (x) Mr Awatere was given another opportunity to respond at the second meeting before being told that he was dismissed.

### *Substantive justification*

[72] In terms of the substantive reason for the dismissal, Mr Palmer regarded the extortion of alcohol from customers is a very serious matter. He had direct evidence from three customers that this had occurred. In opposition to that, Mr Awatere denied at the first meeting that he demanded alcohol. Mr Awatere's explanation about joking was not made at the time so Techcrete did not have that to consider.

[73] The evidence of alcohol sometimes being used as a gift in the industry did not affect the customers' evidence that Mr Awatere had demanded that they supply alcohol to him personally in order to get either any service at all or more prompt service.

[74] Mr Palmer spoke to the customers directly rather than relying on what Mr McLarin had reported. Three customers told the same story. The customers did not have any reason to lie that Mr Palmer was aware of. They were not closely associated and some were not connected at all it seemed. Mr Palmer was not aware of any reason Mr McLarin might have had for causing trouble for Mr Awatere.

[75] In addition, Mr Awatere admitted that he had taken beer twice, despite being warned a few months before that alcohol must be handed in at the yard. This was a breach of company policy.

[76] I am satisfied that Mr Palmer, having carried out a sufficiently full and fair investigation, held an honest belief that Mr Awatere had committed serious misconduct in his demands for alcohol from customers as well as breaching company policy about taking alcohol to the yard.

### *Conclusion on dismissal*

[77] Any inadequacies there were in Techcrete's actions can be seen as minor and not resulting in Mr Awatere being treated unfairly.<sup>4</sup>

[78] I conclude that Techcrete acted as a fair and reasonable employer could have done in terms of its process and decision to dismiss on the basis of the three customers' complaints. The dismissal was justified.

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<sup>4</sup> The Act, s 103A(5).

### **Should Mr Awatere receive remedies?**

[79] I go on to consider the issue of remedies, firstly as regards the suspension and secondly, in the event that I am wrong about the dismissal being justified.

[80] In *Xtreme Dining Limited Trading as Think Steel v Dewar* a full bench of the Employment Court found that where misconduct is so egregious, no grievance remedy should be given.<sup>5</sup>

[81] Even on his evidence, Mr Awatere joked about requiring payment in alcohol for service. He failed, over two years and on receipt of possibly 60 boxes of beer, to tell Ms A that she did not have to provide the beer. In addition, even if the beer could be characterised as a gift, which I am not satisfied it was, Mr Awatere then took home large amounts of alcohol. This was despite his previous experience of alcohol being brought into the yard for distribution and being told on several occasions by Mr Palmer that that was Techcrete required.

[82] In these circumstances, I consider Mr Awatere's actions so egregious as to mean that based on equity and good conscience, he should not be granted any remedies.

### **Costs**

[83] Techcrete has been largely successful in defending Mr Awatere's claim. However, the company represented itself. Although Mr Palmer spoke of the effects on him of these events, it was not evident that the company has paid any fees to receive advice about this case. If the company wishes to apply for costs it shall have 21 days from the date of this determination in which to file and serve a memorandum. Mr Awatere shall have a further 14 days in which to file and serve a memorandum in reply.

[84] Submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Nicola Craig**

**Member of the Employment Relations Authority**

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<sup>5</sup> *Xtreme Dining Limited Trading as Think Steel v Dewar* [2016] NZEmpC 136 at [216].