

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 143  
3229219

BETWEEN            ADRIAN LAWRENCE  
                                 Applicant  
  
AND                    WAI-WEST HORTICULTURE  
                                 LIMITED  
                                 Respondent

Member of Authority:     Philip Cheyne  
  
Representatives:            Simon Pankhurst, advocate for the Applicant  
                                 Sarah Moon, counsel for the Respondent  
  
Investigation Meeting:     4 December 2023 in Nelson  
  
Further Information and     18 December 2023 from the Applicant  
Submissions Received:     11 and 20 December 2023 from the Respondent  
  
Date of Determination:     11 March 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Wai-West Horticulture Limited is a fruit growing business producing boysenberries, kiwifruit and apples from eight orchards on the Waimea Plains.

[2]     Adrian Lawrence worked for Wai-West Horticulture Limited (WWH) from 2010 until he was dismissed in September 2022.

[3]     Mr Lawrence raised his personal grievance with WWH. Mr Lawrence says he was unjustifiably dismissed, based on accusations of theft. He says no theft was ever proven by

WWH or criminally by the Police. Mr Lawrence also says that WWH did not follow proper dismissal procedures. Reimbursement of lost wages and compensation are sought as remedies.

[4] WWH says that it justifiably dismissed Mr Lawrence for serious misconduct and its actions were what a fair and reasonable employer could have done in all the circumstances.

[5] Despite mediation, matters were not resolved.

### **The Authority's Investigation**

[6] The documentation provided during WWH's disciplinary investigation is in evidence. One of the disciplinary meetings was recorded and a transcript was produced. The recording is now not available, but the accuracy of the transcript was never in dispute.

[7] I heard evidence from Mr Lawrence. There are supporting statements from three other people. I also heard evidence from three WWH employees who had provided information during WWH's disciplinary investigation, Jacqueline Day (Manager of People, Performance and Safety) and Anton Boeyen (General Manager).

[8] Both sides made submissions as part of the investigation meeting. Some information was provided after the investigation meeting and there was an opportunity for further submissions.

[9] In this determination, I will state relevant factual findings, state and explain relevant legal findings, and express conclusions on issues necessary to conclude the matter and set out any orders.

### **Issues**

[10] Whether the dismissal was justifiable must be determined on an objective basis by assessing whether WWH's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time.

[11] The issues are:

- (a) Did WWH sufficiently investigate the matter considering available resources?
- (b) Did WWH raise its concerns with Mr Lawrence before deciding to dismiss him?

- (c) Did WWH give Mr Lawrence a reasonable opportunity to respond to its concerns before dismissing him?
- (d) Did WWH genuinely consider Mr Lawrence's responses before deciding to dismiss him?
- (e) What other factors should be considered?
- (f) If Mr Lawrence has a personal grievance, what remedies should be ordered?

[12] Mr Lawrence disputes the substantive grounds relied on by WWH and says that it adopted an unfair process. Despite that, there are few factual disputes about what happened during WWH's disciplinary investigation. I will explain what caused WWH's concerns and give an overview of that investigation before addressing the specific issues.

#### **WWH's disciplinary investigation**

[13] Most orchard blocks have a diesel fuel tank for orchard equipment such as tractors and diggers. Each orchard tank has a logbook for the dispensing staff member to write the date, time, machine ID, its hours or kilometre reading, start litres reading, finish litres reading, total litres dispensed and their name. The "litres reading" information came from a gauge on the dispensing tank, not from the machine being filled. Sometimes, the dispensing staff member filled tote bags rather than a tractor or other equipment directly.

[14] The logbook includes a request for the dispensing staff member to send a picture of their entry to a WhatsApp group to assist with reconciliation of fuel use. Logbooks are supposed to remain at the orchard.

[15] Ms Eggers is a block supervisor employed by WWH. At the time, Ms Eggers reported directly to Mr Lawrence who was Production Team Leader. She had previously reported to one of Mr Lawrence's direct reports.

[16] Ms Eggers often saw Mr Lawrence filling up totes. Mr Lawrence did that openly, except once when Ms Eggers thought that he was awkward about it. Ms Eggers' evidence is that they were supposed to record details of filling totes in the logbook, but Mr Lawrence did not.

[17] In early June 2022 Ms Eggers took a picture of her May entry in the Ashfield logbook to send to the WhatsApp group, but noticed the entry by Mr Lawrence immediately above hers. Ms Eggers thought Mr Lawrence's entry was wrong.

[18] Some days later, another employee drew Ms Eggers' attention to a second entry by Mr Lawrence. Ms Eggers thought it "strange" as Mr Lawrence's entry meant that the machine should have had more fuel in it than Ms Eggers observed when she (and the other employee) used it a week later.

[19] That same day, Ms Eggers and the other employee noticed a third entry by Mr Lawrence. Ms Eggers knew that the machine could not have been used on the date recorded by Mr Lawrence and had not been in use meantime. Ms Eggers checked the machine's fuel gauge. It showed less fuel than Mr Lawrence had recorded as having been dispensed.

[20] Ms Eggers went to Ms Day's office on 15 June 2022 and reported her concerns about the three discrepancies and the totes. Ms Day made notes, told Ms Eggers that she would speak to Mr Boeyen and would get back to her. Ms Day then spoke to Mr Boeyen. He said it would be discussed at a management meeting the next day.

[21] Mr Boeyen also recalled a similar issue from 2021. He asked Ms Day to analyse diesel fuel data. Ms Day formatted the data into various graphs. The graphs demonstrated that Mr Lawrence had dispensed more fuel than others. Ms Day also sought some external human resource advice. At a management meeting, it was decided to defer any further action until Mr Boeyen's return from leave.

[22] Meantime, two other WWH employees encountered another apparent discrepancy by Mr Lawrence on 22 June 2022. The next day, one of them reported it to a manager and was then required to meet with Ms Day. Ms Day made notes of what she was told.

[23] That manager later collected logbooks from the orchards, as a result of which he noticed a further apparent discrepancy concerning diesel dispensed by Mr Lawrence into a digger at Ashfield orchard. The manager reported the matter to Ms Day.

[24] Mr Boeyen decided to initiate a formal meeting with Mr Lawrence. Ms Day compiled the various concerns into documents setting out "Diesel Fuel Discrepancies – Fuel Log Investigations" and "Allegations from Wai-West Employees". By letter dated 28 June 2022

Mr Boeyen requested Mr Lawrence to attend a formal meeting. The meeting was to discuss “irregularities” regarding fuel dispensing. Mr Lawrence was cautioned matters may result in disciplinary action such as a reprimand, formal warning or dismissal. The two documents were attached to the letter.

[25] Mr Lawrence engaged a lawyer to represent him. There was a meeting on 14 July 2022. Mr Lawrence through his lawyer provided comprehensive written responses to the “Discrepancies” and “Allegations” documents and to Mr Boeyen’s letter. Points were discussed. Mr Lawrence requested further information.

[26] Following the meeting, Mr Boeyen and Ms Day checked several matters with employees who had raised the concerns. Some additional material was gathered in response to those discussions and Mr Lawrence’s request.

[27] WWH’s representative wrote to Mr Lawrence’s lawyer on 20 July 2022. The letter included additional material, employees’ responses and WWH further questions. WWH offered Mr Lawrence paid special leave so he could prepare for a further meeting.

[28] Through his lawyer by letter on 26 July 2022, Mr Lawrence denied that he had taken WWH’s fuel for his personal gain and summarised the allegations as based on assumptions, unverified evidence and hearsay. Other aspects of the correspondence need not be mentioned. The disciplinary concerns were not resolved.

[29] There was a second meeting on 4 August 2022. It was recorded by agreement. It ended with Mr Boeyen to review matters. Following the meeting, Mr Lawrence provided evidence of personal fuel purchases as part of his answer to the allegation he had taken WWH’s diesel for personal use.

[30] By the consultant’s letter of 10 August 2022 to Mr Lawrence’s lawyer, WWH advised its “Preliminary decision” to terminate Mr Lawrence’s employment based on its belief that he had taken fuel from the company for his personal use causing the company to have lost trust and confidence in Mr Lawrence. Mr Boeyen’s comments about Mr Lawrence’s explanations were set out. Mr Lawrence was given until Friday 12 August 2022 to provide any additional information before WWH’s final decision.

[31] There was an email exchange between the lawyer and the consultant on 11 and 12 August 2022. It ended with the consultant on WWH's behalf confirming the decision to dismiss Mr Lawrence "effective immediately".

[32] Mr Lawrence's personal grievances of unjustified dismissal and unjustified disadvantage arising out of WWH's investigation into fuel irregularities were raised on 22 September 2022.

[33] Mr Lawrence was off work from 24 June 2022, initially due to a public holiday, followed by sick leave then annual leave and paid special leave before he was dismissed on 12 August 2022. Mr Lawrence did not raise a personal grievance with respect to being on special leave.

**Did WWH sufficiently investigate the matter considering available resources?**

[34] The employment agreement required WWH to hold a meeting where practicable, if serious misconduct was alleged. WWH promised to give Mr Lawrence an opportunity to be represented and to explain, to fairly investigate his conduct and fairly consider his explanation.

[35] A code of conduct expressed the expectation that WWH and employees would always act with fairness.

[36] Under its disciplinary and performance management policy, WWH would notify the employee of any requirement to attend a disciplinary meeting, provide relevant information, permit the employee to be independently advised, supported and represented and allow the employee an opportunity to provide commentary on WWH's concerns.

[37] The provisions in the agreement, the code and the policy in substance repeat the statutory good faith obligation to provide access to relevant information and an opportunity to comment on the information where an employer is proposing to make a decision that might have an adverse effect on the continuation of an employee's employment.

[38] WWH had access to internal and external professional advice with respect to its statutory and contractual obligations. The concerns being investigated had the potential to result in Mr Lawrence's dismissal, so were serious. WWH was obliged to fully investigate matters.

[39] Mr Lawrence's evidence was that WWH should have had an independent investigator to look at it from both sides fairly. Mr Lawrence also told me that he could not think of anything that WWH should have but did not do. The law does not necessarily require WWH to engage an independent investigator to establish that its actions were what a fair and reasonable employer could have done. I will assess later whether WWH looked at matters from both sides fairly, but agree that its investigation had to meet that standard.

[40] I find that WWH met its obligation to fully investigate the concerns that caused it to dismiss Mr Lawrence.

**Did WWH give Mr Lawrence a reasonable opportunity to respond to its the concerns before dismissing him?**

[41] WWH raised its concerns initially in its 28 June 2022 letter and the two attached documents – “Diesel Fuel Discrepancies - Fuel Log Investigations” and “Allegations from Wai-West Employees”.

*September 2021 concerns*

[42] The concerns included three dates in September 2021 when some employees had spoken to WWH managers about alleged irregularities regarding Mr Lawrence dispensing diesel. One employee also claimed to have witnessed something a year earlier. That employee and two others claimed to have witnessed irregularities on 24 September 2021 and a fourth employee apparently expressed a more general concern about Mr Lawrence being associated with fuel irregularities.

[43] In response, Mr Lawrence pointed to the delay in these matters being raised with him. He questioned how a fuel logbook entry could be attributed to him when there was no name associated with the entry, outlined his understanding about the whereabouts of the tractor involved and made some points about standard practice.

[44] By the time of the meeting on 4 August 2022, WWH had agreed to remove the concerns relating to September 2021.<sup>1</sup> It is not necessary to determine whether the delay meant that Mr Lawrence did not have a reasonable opportunity to respond to the September 2021 matters.

*Comparative fuel use information*

[45] The “Fuel Log Investigations” document set out an analysis of WWH’s fuel spreadsheets for the period 1 January – 16 June 2022. WWH compared fuel use for its Same tractors and for its John Deere tractors. The June 2022 concerns related to fuel dispensing recorded for a Same tractor (T34) and a John Deere tractor (T2). T34 and T2 both had significantly higher fuel usage than the other matching models. T34 had a broken hours meter so dispensed fuel could not be checked against tractor hours. T2 was out of use for three weeks of the twenty-eight week period and showed about 40% higher fuel use on a litres/hours basis than the average of the other John Deere tractors.

[46] Other graphs showed Mr Lawrence dispensed significantly more fuel in total than any other employee. Graphs showed a breakdown by vehicle type as follows: Mr Lawrence dispensed more fuel by Ute as expected; Mr Lawrence dispensed much more fuel for tractors than others in the same position but less fuel than other categories of employees; Mr Lawrence dispensed much more fuel for forklifts than his peers and the other categories of employees; and Mr Lawrence dispensed much more fuel for diggers than his peers and more fuel than operators.

[47] In response, Mr Lawrence said he routinely offered supervisors and orchard assistants to refuel machinery they were using in the interests of efficient use of labour and equipment. That was exacerbated by staffing shortages. He accepted that he dispensed more fuel, rather than used more than others. He said that he recorded fuel dispensed into totes against the machine ID the fuel was intended for, in accordance with standard practice. Mr Lawrence challenged the reliability of the data. He also set out business reasons to explain the fuel dispensing by vehicle type comparisons.

[48] WWH did not accept that Mr Lawrence routinely refuelled equipment for others for business efficiency purposes. Rather it came to the view expressed in the preliminary decision

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<sup>1</sup> Bundle of documents p 123.

letter that it gave Mr Lawrence regular access to fuel bowsers in order to dispense fuel into totes and take them off-site to use the fuel for use other than for work purposes.<sup>2</sup> I deal later with whether WWH can justify that view.

[49] For present purposes, I find that WWH raised concerns based on the “Fuel Log Investigations” document before it dismissed Mr Lawrence.

*Concerns raised in June 2022*

[50] On 26 May 2022 Mr Lawrence recorded dispensing 25L into T34 in the Ashfield logbook. However, the logbook showed an employee had filled it at the end of the day on 25 May 2022. T34 was not at Ashfield on 26 May 2022 as an employee had taken it to Lansdowne, so Mr Lawrence could not have fuelled it.

[51] On 7 June 2022 Mr Lawrence recorded dispensing 52L into T34 in the Ashfield logbook. However, an employee noted that T34 had not been used and the fuel gauge read less than ½ full. T34 had a 58L tank so 52L should have meant the gauge was at full not ½ full.

[52] On 10 June 2022 Mr Lawrence recorded dispensing 26L into T2 in the Ashfield logbook. T2 has a 60L fuel tank but the gauge showed ¼ full when it should have showed ½ full. T2 was out of service from 25 May – 14 June 2022 so could not have been used by Mr Lawrence.

[53] On 17 June 2022 there was an entry for T34 of 49L dispensed on 10 June 2022 at Lansdowne in the name of an employee. The employee was at Stables not Lansdowne and the writing was not theirs. Mr Lawrence’s manager identified the handwriting as that of Mr Lawrence.

[54] On 29 March 2022, an employee parked T17 near a bowser while they went to help another worker. Mr Lawrence recorded dispensing 75L into T17 that day in the logbook. T17 has a 75L fuel tank. When the employee returned to T17, they asked Mr Lawrence about the logbook entry, as T17 had been ¾ full when it was parked. Mr Lawrence first said he put 60L into T17 and 15L into a tote. When challenged, Mr Lawrence said he put 15L into T17 and

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<sup>2</sup> Bundle of documents p 84.

60L into totes. Mr Lawrence's logbook entry is for 75L but the fuel counter on the bowser shows 121L as having been dispensed.

[55] On 22 June 2022, an employee saw Mr Lawrence at Top-1 around 8.00am writing down the hours shown on the meter on T33. Another employee (H) was working with T33. Later, that employee needed fuel for T33 but it was loaded up and so could not be driven to get fuel. H was sent by the first employee with a tote and a note of T33's hours to get the fuel at Fords. H noticed that Mr Lawrence had recorded in the Fords logbook dispensing 25L into T33, noting the same hours reading. H rang the first employee to tell them about the apparent discrepancy. The first employee rang Mr Lawrence and challenged him about the logbook entry as T33 had been at Top-1 with the employee (H) all day. Mr Lawrence said he put the fuel into a tote. The first employee insisted that Mr Lawrence bring the 25L in the tote for it to be put into T33. Mr Lawrence did so.

[56] A discrepancy in the Ashfield logbook for 23 June 2022 was raised with Ms Day that day. Mr Lawrence recorded dispensing 65L into a digger at 3pm. The digger had just arrived at Ashfield that day and the operator said it had been  $\frac{1}{2}$  full then. About 30L of the 65L could not have been put in the digger. There was no record of where the 30L had gone.

[57] Regarding 26 May 2022, Mr Lawrence said that the employee spent half the day at Lansdowne doing cloth, returned T34 to Ashfield at lunchtime then returned to Ashfield to do wire work.

[58] Regarding 7 June 2022, Mr Lawrence said he occasionally used T34 and was unsure why the employee said it had not been used and that they had seen the fuel gauge at less than  $\frac{1}{2}$  full. Mr Lawrence confirmed that the hours meter did not work.

[59] Regarding 10 June 2022, Mr Lawrence said that he would not have filled T2 if it was  $\frac{1}{4}$  full. Mr Lawrence also said that T2 had a very slow leak but was still useable. He dispensed 26L of fuel for T2 intending to move a sprayer around the yard, was interrupted, did not move the sprayer and put T2 back in the shed.

[60] Regarding 17 June 2022, Mr Lawrence denied writing the T34 logbook entry and dispensing any fuel for T34 that day. He did not accept that his manager could identify his

handwriting and queried why he would use the name of an employee who he knew was not at Lansdowne that day.

[61] Regarding 29 March 2022, Mr Lawrence said he filled T17 from “practicably empty”, having told the employee he would fill it. He also said that the unaccounted-for fuel (121L – 75L = 46L) must have been dispensed into another tractor but he must have forgotten to write it down as it was busy. Mr Lawrence said it was standard practice to record fuel by machinery ID, without reference to totes.

[62] Regarding 22 June 2022, Mr Lawrence said he checked T33 for fuel in the morning but did not check the hours gauge as he had no reason to do so. He said he was called by the first employee at 11.17am who asked for fuel to be brought to Top-1. He dispensed it into a tote, took it to Ford-1, transferred it into T33, noted the hours gauge, returned to Top-1 and added the hours to the logbook. Mr Lawrence said that the call later in the afternoon was about irrigation not fuel.

[63] Regarding Thursday 23 June 2022, Mr Lawrence said that he used the digger to spread gravel that day, then dispensed 65L for the digger at 3pm. He topped it up with about 40L and put the additional 25L into a tote to go with the digger the following week. Friday was a public holiday. The tote was stored on his Ute, he was sick from Monday 27 June 2022 and it remained on his Ute.

[64] After Mr Lawrence’s responses to each of the specific concerns, WWH checked back with employees who had initially raised concerns and assembled some further material. Material was provided to Mr Lawrence. Employees’ comments and WWH’s questions were outlined for Mr Lawrence’s further response. It is not necessary for present purposes to set the comments and responses.

[65] A second meeting was held on 4 August 2022. Mr Lawrence responded to the comments, further material, questions and to matters raised during the meeting. It is not necessary for present purposes to summarise the meeting.

[66] On 10 August 2022 WWH set out in writing its preliminary conclusions and reasons with respect to the issues dated 29 March, 10 June, 22 June and 23 June 2022. In summary, WWH considered that Mr Lawrence had dispensed fuel into totes and removed them from its

worksites and used (or intended to use with respect to the 23 June 2022 incident) the fuel for purposes other than work. Mr Lawrence was given an opportunity to provide any additional information before close of business on 12 August 2022. Nothing further of substance was received before then, so WWH confirmed its decision to dismiss Mr Lawrence.

[67] From this, I find that WWH raised its concerns with Mr Lawrence before its decision to dismiss him.

**Did WWH give Mr Lawrence a reasonable opportunity to respond to its the concerns before dismissing him?**

[68] WWH first raised matters on 28 June 2022.

[69] There was correspondence at and after the 14 July 2022 meeting, a further meeting on 4 August 2022 followed on 10 August 2022 by the letter setting out the preliminary decision and reasons.

[70] I find that WWH gave Mr Lawrence a reasonable opportunity to respond to its concerns before it decided to dismiss him.

**Did WWH genuinely consider Mr Lawrence's responses before deciding to dismiss him?**

[71] I find that WWH genuinely considered Mr Lawrence's explanations before it decided to dismiss him. The following points illustrate that conclusion.

[72] WWH managers heard about the September 2021 matters at the time, but they were not raised with Mr Lawrence until late June 2022. Mr Lawrence referred to the unfairness caused by delay. That challenge caused WWH to remove the 2021 concerns from any further consideration.

[73] In its preliminary decision, having considered Mr Lawrence's earlier responses, WWH took a number of the 2022 matters no further. However, it set out conclusions on the following matters.

[74] WWH considered Mr Lawrence's explanation that the unaccounted-for fuel recorded by him as being dispensed to T16<sup>3</sup> on 29 March 2022 must have been put into another tractor by him but not written down because he was busy. WWH did not accept the explanation. Mr Lawrence had recorded just one dispensing event. WWH reasoned that if he had time to record the fuel for T16, he would have had time to record fuel for a second tractor. WWH's reasoning demonstrates that it genuinely considered but did not accept Mr Lawrence's explanation.

[75] WWH considered Mr Lawrence's explanation that he had dispensed 26L into T2 on 10 June 2022 as recorded by him in the logbook. The explanation did not account for documented circumstances. Before use on 25 May 2022, the checklist showed T2 at 1880.7 hours. Its use that day would have taken about 5 hours. In the logbook entry on 10 June 2022 Mr Lawrence recorded its hours at 1886, consistent with it not being used after 25 May. If Mr Lawrence had put 26L into T2, the fuel gauge would have shown close to ½ full, as it had a 63L capacity. On 15 June 2022, the T2 fuel gauge showed ¼ full, but the hours meter still showed 1886. The hours meter meant that T2 had not been used between 10 – 15 June 2022. If Mr Lawrence had put 26L into T2 on 10 June 2022, the fuel gauge on 15 June 2022 would have shown ½ full not ¼ full. WWH genuinely considered but did not accept Mr Lawrence's explanation as it did not accord with documented circumstances.

[76] WWH considered Mr Lawrence's explanation regarding the 22 June 2022 incident. Mr Lawrence acknowledged checking T33 for fuel when he was at Top-1 on the morning of 22 June 2022. WWH knew from a picture of the Fords logbook taken at about 11.00 am on 22 June that Mr Lawrence had already written "22.6.22 3pm T33 4665 ... 25" in the logbook. Mr Lawrence wrote 4665 for T33's hours meter reading. The employee who had been sent from Top-1 recorded the fuel he dispensed into an Isuzu at 11.00 am on 22 June 2022, just below Mr Lawrence's entry. He also took the picture, as he did not understand why there was already an entry dated 22 June for the T33. He then returned to Top-1. Phone records showed that Mr Lawrence received a call at 11.17am that day. Mr Lawrence then wrote "22.6.22 12pm T33 4669 ... 25" below the Isuzu entry and took a tote with that fuel to Top-1 to fuel T33. At some point, Mr Lawrence's entry for 3pm on 22 June was changed to read "21.6.22 3pm T33 4660 ... 25" (emphasis added). Mr Lawrence told WWH that he actually dispensed the

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<sup>3</sup> See Bundle pp 85 – 86 where WWH also clarified that the issue related to T16 not T17. The concern was always about Mr Lawrence's fuel log entry for T16, despite the tractor being incorrectly identified as T17 earlier in disciplinary process.

fuel on 21 June not 22 June as he had recorded, but he denied altering the logbook entry. WWH considered that Mr Lawrence would not have had any reason to check T33 for fuel in the morning on 22 June if he had put 25L into it at 3pm on 21 June as he claimed. WWH also considered that T33 would not have shown an orange fuel warning light at around 10.30am on 22 June if Mr Lawrence had filled it with 25L of fuel at 3pm on 21 June. For those reasons, after considering Mr Lawrence's explanation, WWH did not accept it.

[77] There was an email exchange between the representatives on 11 and 12 August 2022. Mr Lawrence's lawyer advised that Mr Lawrence had no further information to provide, but considered he had answered all questions openly. WWH offered to consider any "input" from Mr Lawrence on its preliminary decision. Mr Lawrence's lawyer replied with several points. WWH responded to the points, but confirmed its decision to dismiss Mr Lawrence.

[78] I find WWH genuinely considered Mr Lawrence's explanations before it dismissed Mr Lawrence.

#### **What other factors should be considered?**

[79] Mr Lawrence says that WWH predetermined the decision to dismiss him. However, that view is not supported by the evidence. WWH took time and care to advise Mr Lawrence of the basis of its concerns by writing to him, disclosing relevant material, responding to requests for further information and meeting twice with Mr Lawrence. Mr Boeyen as general manager made the decision after hearing from Mr Lawrence and assessing his explanation against the other information. WWH did not predetermine the decision to dismiss Mr Lawrence.

[80] A point raised in response to the preliminary decision letter was that WWH had conducted an "investigation phase" but not a "disciplinary process". However, in the 28 June 2022 letter WWH expressly advised Mr Lawrence that the "formal meeting" may result in disciplinary action up to dismissal. Mr Lawrence was always properly on notice that WWH might make a decision that would adversely affect the continuation of his employment.

[81] Mr Lawrence is critical that WWH did not provide witness interview records or signed statements for the employees who were spoken to. However, WWH did put to Mr Lawrence for his response what WWH had been told by those other employees, setting that out in the

initial letter and attachments, in subsequent correspondence, at both meetings and in the preliminary decision. As matters unfolded, the four concerns that WWH based its decision on turned on undisputed matters, documents and the implausibility of Mr Lawrence's explanations. Records or signed statements of what the other employees said would have added nothing to WWH's investigation, Mr Lawrence's ability to respond or WWH's decision.

[82] Even if not arranging for the employees to provide signed written statements could be regarded as a defect in the process followed by WWH, it would be minor and would not have resulted in Mr Lawrence being treated unfairly.

[83] There is a submission that the employees were not impartial. Two of the employees still work for WWH and one was dependent on WWH for a visa. The point is that WWH could not properly rely on what was said by them and that I should be cautious about their evidence.

[84] My assessment of the employee witnesses is that they each gave reliable evidence, taking care to accurately describe what they heard, saw and did.

[85] An employer conducting a disciplinary investigation should be mindful of the potential for partiality to colour what is said. However, here WWH did not need to resolve competing accounts between Mr Lawrence and the other employees in order to conclude that there were proper grounds to dismiss Mr Lawrence.

[86] The employment agreement permitted WWH to dismiss Mr Lawrence summarily by notice in writing in the event of serious misconduct. Under the agreement, if WWH alleged Mr Lawrence had committed serious misconduct, it would meet with him and his representative for him to explain, to investigate his conduct and to consider his explanation. There is a submission that WWH could not dismiss Mr Lawrence without notice as it had not alleged serious misconduct at any point before the preliminary decision letter on 10 August 2022.

[87] WWH's concerns were initially characterised as "incorrect records being made by you" regarding tractors not in use or on other site, and "you may have entered incorrect information ... using another employee's name". By 26 July 2022, Mr Lawrence through his lawyer described his understanding of the concerns as him taking "Wai-West's fuel for his personal use". Even though WWH did not expressly describe it as an allegation of serious misconduct,

the misconduct that was alleged was made clear to Mr Lawrence. Such conduct, if established, would amount to serious misconduct under the employment agreement.

[88] There is a submission that there is no evidence that options other than dismissal were considered or discussed by WWH's management team. It arises from an email exchange between Ms Day and WWH's external HR advisor where the advisor suggested that WWH install a camera to monitor fuel dispensing. However, instead of adopting the suggestion, WWH decided to conduct the disciplinary investigation described above.

[89] WWH's decision not to install a camera could have no bearing on whether it should have initiated a disciplinary process to investigate existing concerns arising from prior events. Mr Lawrence denied taking WWH's fuel for his personal use. Despite that, WWH concluded that he had. The circumstances did not require WWH separately to consider whether it should warn rather than dismiss Mr Lawrence.

[90] Mr Lawrence says that there was no proof that he took any fuel. In support he says he was not charged with or convicted of any offence and he provided documentary evidence to show purchases from petrol stations. WWH had regard to that material, but considered it did not affect the implausibility of Mr Lawrence's explanations. WWH does not need to rely on a conviction or proof to the criminal standard to establish justification for its decision to dismiss Mr Lawrence.

### **Conclusion - Justified decision to dismiss**

[91] Following its full and fair disciplinary process, WWH came to the view that Mr Lawrence had taken fuel from the company for his personal use, causing it to lose trust and confidence in him.

[92] I find that WWH's actions and how it acted were what a fair and reasonable employer could have done in the circumstances at the time.

[93] Mr Lawrence does not have a personal grievance. His application to the Authority fails.

[94] Costs are reserved. If the matter is not resolved between WWH and Mr Lawrence, WWH may lodge and serve a memorandum, within 14 days. Mr Lawrence may then lodge and

serve a memorandum in response within a further 14 days. I will determine costs on the papers, with regard to those submissions and the Authority's standard practice regarding costs.

Philip Cheyne  
Member of the Employment Relations Authority