



## **Motor Vehicle Accident and Conviction**

[5] Mr Peake had a motor vehicle accident in September 2007. On 10 September 2008 Mr Peake was convicted for drunk driving. He lost his licence for fifteen months and had home detention for six months.

[6] Mr Timothy Henry, the Vineyard Manager, said he became aware of Mr Peake's conviction in mid 2008. He was concerned that Mr Peake might lose his licence as he needed it to carry out his duties. Clause 4.1 of the employment agreement required Mr Peake to have a current driver's licence. It provides that if his licence is withdrawn or suspended his employment may be terminated.

[7] On 22 July 2008 Mr Henry sent Mr Peake a memo with a follow up letter on 8 September asking him to notify Mr Henry of the outcome of the court case. In late September Mr Peake provided a note with the outcome and said he was in the process of obtaining a work licence.

[8] By this stage Mr Henry had become aware of a newspaper article regarding Mr Peake. It stated Mr Peake had previous convictions for drink driving yet in his job application Mr Peake had declared that he had no previous convictions.

[9] Mr Henry spoke with Mr Warwick Bruce, the Regional Viticulture Manager, about how to deal with the matter. They decided to deal with the issues of the recent conviction and non-disclosure of convictions separately.

[10] A letter dated 30 September 2008 signed by Mr Bruce was given to Mr Peake by Mr Henry. A meeting was set for 3 October. Matters to be discussed were the conviction and its impact on Mr Peake's ability to carry out his job; and that the conviction constituted behaviour which could be detrimental to the company's reputation. Mr Peake was informed the matter was serious and could affect his continued employment; and that he was welcome to bring a support person.

[11] The meeting was attended by Mr Bruce, Mr Henry and Mr Peake. Mr Bruce asked Mr Peake if he wanted a support person. He said he did not. Mr Bruce said the issues were serious and that his job was on the line. Mr Peake said he understood.

[12] Mr Bruce went through the issues, first dealing with the fact of the disqualification and then the concern regarding the impact of the conviction on the company's reputation.

[13] Both Mr Bruce and Mr Henry said Mr Peake did not seem to understand that the conviction was a problem. He said he was going to apply for a limited licence and it was not a big deal. Mr Peake had five previous convictions for drink driving and they felt he had a cavalier attitude to alcohol consumption. When the concern about the effect on the company was raised Mr Peake said he didn't care about the company and that the company didn't look after its employees and that not enough money was spent on plant and equipment.

[14] There was a discussion about equipment and Mr Henry said he was not happy with the way Mr Peake treated the equipment and that he was very rough on the gear. He gave a number of examples. One reference was to damage caused to the two rear wheels of a tractor. Mr Peake said that was the company's fault because the wrong tractor had been used for the job.

[15] Mr Bruce said they spent some time discussing the equipment issue but that was not the purpose for which the meeting had been called. Mr Bruce and Mr Henry said they were concerned about Mr Peake's "do not care" attitude. They told Mr Peake they would discuss the matter and let him know the decision the following week.

[16] In his evidence regarding the issue of the non-disclosure of his previous convictions, Mr Peake said "they gave me the job and I did not see why this was now a problem but I offered to resign anyway if it was a problem for them."

[17] Mr Peake said he left the meeting thinking things were ok, that he had to get a work licence and he did not think anyone had problems with his work. This is a surprising conclusion to draw.

## **Final Written Warning**

[18] Mr Henry and Mr Bruce were concerned about Mr Peake's attitude. However, taking into account his seven years' service they decided to give him a final warning.

[19] The warning letter stated that the current situation where Mr Peake did not have a licence was manageable in the short term but he needed to obtain a licence by 19 January - the busy period of the year - or there could be an impact upon his employment.

[20] The letter noted that his actions in relation to the conviction were of a serious nature and could have been deemed to have been reasons for dismissal. However, a final warning was being issued instead. A copy of the warning was to remain on his file for twelve months. The terms of the warning were the following are set out:

*The acceptable performance, actions and behaviour required from you includes:*

- *You obey all Company policy, rules and procedures – this includes following standard operating procedures and the rules within the Employee Handbook.*
- *You obey the Company's lawful and reasonable instructions – this includes reasonable instructions from the Vineyard Manager to complete tasks in a careful and considerate manner.*
- *You are helpful and cooperative, and carry out your work duties in good faith and to the level and standard required of your position as a Level 3 Vineyard Worker.*
- *You support and cooperate with fellow team members and manager.*

[21] The warning also stated;

*Please understand that any further instances of similar allegations or breaching Company rules which is proven, may lead to further disciplinary action up to and including the termination of your employment.*

[22] Although the actions that Mr Peake was required to take were couched in broad terms, I am satisfied that they did relate to what had taken place at the meeting and to concerns about the attitude manifested by Mr Peake. Mr Peake was being given a last chance and it was fair and reasonable of the employer to set out its expectations of his future behaviour.

[23] Mr Peake was informed that further instances of similar allegations or breaching company rules may result in termination. He was asked to sign the letter to acknowledge that he understood its contents. The letter bears Mr Peake's signature and that of Ms Sarah Phillips, the Senior Viticultural Services Manager, and is dated 6 October.

[24] Mr Peake says when Mr Henry brought the letter to him he was told to read it and sign it. That was all that was said. He signed it without reading it. Mr Henry had not told him it was a final warning. He did not become aware that it was a final warning until his lawyer pointed it out in February 2009. No-one had told him they were unhappy with his work and he did not understand how he could be given a final warning suddenly like that.

[25] Issues regarding Mr Peake's work performance came up in the course of the meeting in response to Mr Peake's comments about his attitude to the company.

[26] Ms Sarah Phillips deposed that Mr Henry told Mr Peake it was a final written warning and that he needed to take it seriously. Mr Peake exhibited a casual "who cares" attitude. Ms Phillips told Mr Peake to read the letter and say if he did not understand anything. After Mr Peake had read it he was asked if he had any questions and replied that he did not.

[27] I prefer the evidence of Ms Phillips and Mr Henry. I also do not accept Mr Peake's statement that the first time he realised it was a final warning was in February

2009. This is because the warning was referred to at the dismissal meeting in November 2008.

[28] The applicant says the final warning letter on 6 October given to Mr Peake following a disciplinary meeting on 3 October was unfair because it was not given in accordance with Pernod Ricard's procedures as set out in clause 16 of the individual employment agreement.

[29] The employment agreement provides that a representative is to be present when the warning is signed. Mr Peake complained that he did not have anyone at the meeting on 3 October and that that was unfair. I accept the company's evidence that Mr Peake chose not to have anyone present at the disciplinary meeting. That was his choice and he cannot now complain about the result of his own decision.

[30] Furthermore, the applicant is not able to raise the matter of the employment warning as a disadvantage or query its validity because no issue regarding it was raised within 90 days of 6 October.

### **Smoking**

[31] Mr Henry said there were no improvements in Mr Peake's behaviour. Smoking was an issue. Mr Henry told Mr Peake on several occasions not to smoke in the tractor cab or in the implement shed where there was large "no smoking" sign, over which Mr Peake would hang his jacket.

[32] On 6 November Mr Henry saw Mr Peake smoking in the tractor cab. He told him not to smoke. He did not tell him that continuing to smoke could result in the termination of his employment. However, the standard operating procedures for the tractor state that there is to be no smoking in the tractor cab and the final warning referred to the requirement to follow the standard operating procedures – which an employee would be expected to do in any event – or risk further action. The final warning states that he is follow all lawful and reasonable instructions. The direction to cease smoking was a lawful and reasonable instruction.

[33] The following day he again saw Mr Peake smoking in the cab. This time he did not approach him but decided to consider what to do as his instructions were being ignored.

### **Use of Incorrect Spray**

[34] On 7 November Mr Peake was meant to spray the Gewürztraminer and Pinot Gris grapes with sythane, dithane and pilan. Certain sprays are to be used at certain times only. Mr Henry said there were standard operating procedures regarding spray application. Any instruction to apply spray was put in writing so there could be no doubt about what spray had to be applied where and in what concentration. Mr Henry said he prepared the spray instructions the day before they planned to spray as it was necessary for him to check that the quantity of chemicals needed was in stock. He would then run through the instructions with whoever would be spraying. The computer printout which he had run through was placed on the clipboard on the bench inside the shed where the sprays were stored and where the drivers had to go to pick up the chemicals on the day of the spraying.

[35] Mr Henry said he was absolutely certain he followed that procedure on 6 and 7 November. On 6 November Mr Peake sprayed Euparen on Chardonnay grapes. This spray could only be sprayed once in the season when the grapes had started to flower.

[36] Mr Peake's job for the next day was to spray the Gewürztraminer and Pinot Gris blocks with three different sprays. Those grapes had not begun to flower. He went through the instructions with Mr Peake and put the spray sheet on the bench inside the shed.

[37] A few days later when Mr Henry was doing a stock take he found that the amount of Euparen was lower than it should have been. He raised this with the two staff who did spraying and Mr Peake said he might have put the wrong chemicals on.

[38] They went back to the storage shed to look at the sprays. He said to Mr Peake "You realise what you have done". Mr Peake just mumbled.

[39] At the hearing Mr Peake said he had realised earlier that he had applied the wrong spray. When I asked him why he had not told his employer he said he was not too sure. Mr Peake said Mr Henry did not have a printed out copy of the spray programme. He said Mr Henry was talking to him and Mr James Kelly, who was also to spray, and it was confusing. However, he did not ask for clarification. He thought he was to spray the same chemical he had sprayed on 6 November.

[40] On 7 November Mr Peake started work at 3.30am. He said there was a spray sheet printed and left in the shed but it had not been there the day before. Despite having said he was confused about what he was to spray he did not read the sheet. Later that day he found out he had put on the wrong spray on. How he reached this conclusion was not clear.

[41] Mr Henry contacted Mr Bruce. They decided they needed to involve HR and head office as it was clear the final warning had not made any impact on Mr Peake's performance. Mr Bruce organised a disciplinary meeting for 17 November.

[42] On 17 November Mr Peake was granted a limited licence. Mr Henry assisted him in obtaining this.

#### **14 November Letter**

[43] The letter dated 14 November regarding the disciplinary meeting states:

*This is a notice advising you of a disciplinary meeting to discuss the allegation of serious misconduct regarding damage to company property and failing to follow a number of reasonable instructions from your manager.*

[44] He was told Mr Michael Insley and Mr Bruce Borthwick of Human Resources would be attending the meeting and that he could bring a support person. Mr Insley was the National Viticulture Manager and Mr Borthwick the General Manager for HR.

[45] Mr Henry was also at the meeting but his role was to provide any information and clarification that was needed. Messrs Insley and Borthwick were the decision makers.

[46] Mr Peake said Mr Henry gave him the letter but did not tell him what the meeting was about. Mr Peake thought it was about the damage to the tyres and did not think it would be a big deal and he did not know anyone was unhappy with his work.

[47] The letter lacks specificity regarding the content of the meeting.

### **17 November Dismissal Meeting**

[48] Mr Peake attended with his partner, Ms Kathleen Howland, and his father

[49] Mr Peake said Ms Howland said she had spoken to Mr Henry that morning 17 November and he had told her he had never had to fire anyone so he knew he was going to be fired. Mr Henry denied saying this or even seeing Ms Howland prior to the meeting. Mr Henry did not have authority to dismiss staff. Ms Howland was concerned and asked Mr Peake senior to attend the meeting.

[50] The meeting did not progress well. Mr Borthwick explained that they were to discuss serious concerns regarding Mr Peake's conduct and referred to the final written warning. He said Mr Peake senior did not appear to be aware of this. Ms Howland was not aware of the final warning either.

[51] He explained to Mr Peake that the company's concerns were serious and that his job was on the line. He asked Mr Peake if he understood. He replied "yep".

[52] Mr Insley then went through three areas of concern. The first was damage caused to equipment, namely the subsoiler, the drive shaft on the tractor and the cable. The damage to the tractor tyres was mentioned but as this had taken place prior to the 6 October warning it was not taken into consideration.

[53] Mr Peake said there had been no damage to the subsoiler, that the shaft had been damaged before he started it and he had only used it because Mr Henry had insisted that he did. Mr Henry denied that and said there had been some prior damage which had been fixed.

[54] The smoking issue was raised. Mr Henry said he had told Mr Peake not to smoke in the cab and that had seen him smoking there twice recently. Mr Peake did not deny smoking but said his previous manager had permitted smoking so he did not see why he should stop now.

[55] Mr Peake senior became agitated and said they were pathetic for having a go at his son for something as pretty as smoking and that what was really driving things was the driving conviction.

[56] Mr Insley said things became heated and he tried to calm them down by saying the issues of concern were distinct from the conviction.

[57] They then talked about the spray issue. Mr Peake said he had followed Mr Henry's verbal instructions and not the spray sheet. Mr Insley asked whether Mr Peake if he wanted to add anything to what he had said. He replied "Nah". He also asked Ms Howland and Mr Peake senior and they had nothing further. At that stage Mr Borthwick said they would take a break to consider matters.

[58] Mr Insley and Mr Borthwick considered the matter and decided to terminate Mr Peake's employment. When they did so there was an uproar. This worsened when Mr Borthwick said he wanted Mr Peake to move his property from the rented house which he was not occupying as he was serving his home detention in a flat in Gisborne.

[59] The dismissal letter, written the following day, stated:

*After careful consideration of your explanations it was decided that you were found guilty of the allegations mentioned above and as a result of your serious misconduct the company has no option but to terminate your employment.*

[60] The allegations referred to were smoking, which constituted failure to follow a reasonable instruction, using the incorrect spray which constituted gross negligence and wilfully damaging company property.

[61] Surprisingly, no notes were taken of the meeting. Mr Insley produced notes he had made on 31 August 2009, nearly a year later. Contemporaneous notes would have been helpful as there is disagreement as to the extent of the discussions that took place and whether the subject of the subsoiler was raised at all.

[62] Mr Insley's 2009 notes state that when he and Mr Borthwick broke to discuss matters they thought there were grey areas regarding the damage to the machinery. There were conflicting views and statements and all they knew for sure was that the machinery had been damaged. Given that latterly expressed view, it is surprising that the contention in the dismissal letter was that the damage had been wilful. It is also surprising that the company has a counterclaim alleging that the equipment was deliberately damaged. Mr Henry said he did not believe it was wilful damage but carelessness.

### **Disadvantage**

[63] On 30 September 2009 Mr Peake, Ms Howland and Pernod Ricard reached an agreed full and final settlement of all matters relating to the tenancy at River Point before a Tenancy Tribunal mediator.

[64] Furthermore, claims regarding the company's decision that Mr Peake move out of the rented property at River Point while serving home detention are statute barred as they were brought outside the 90 day period.

### **Predetermination**

[65] The evidence does not support this assertion. Mr Peake senior said he was told by another person that Pernod Ricard were going to shaft his son. This was about six weeks prior to the dismissal. This is not evidence of predetermination.

[66] Neither is Ms Howland's evidence that Mr Henry told her he had never had to dismiss anyone before. He was not the decision maker.

[67] If Pernod Ricard were determined to dismiss Mr Peake they would not have brought in two people with no prior involvement in the matter.

[68] Mr Henry had prepared a document which was a chronology of events related to Mr Peake, which was shown to Messrs Insley and Borthwick prior to the 17 November meeting. This included the tractor tyre issue and allegations of smoking marijuana. Mr Peake was unaware of this document.

[69] Messrs Insley and Borthwick did not consider the issue of marijuana smoking nor did they discuss the tractor tyre issue. It was raised but they did not deal with it as it was not one of the subjects they were considering taking disciplinary action about. The applicant says they were unduly prejudiced by this document.

### **Justification**

[70] Section 103A provides that the question of whether a dismissal or action was justifiable must be determined objectively by considering whether how the employer went about it was what a fair and reasonable employer would have done in all the circumstances.

[71] In *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 4 NZELR 418 Colgan CJ said that the new statutory test required an assessment of the merits of the employer's factual conclusions which would require a balanced assessment of both procedure and substance rather than an undue focus upon procedure.

[72] Some facets of the process relating to the dismissal were less than ideal. There was no specific notice of the allegations and the meeting progressed in an unfortunate manner. Mr Peake was aware prior to the meeting of the general nature of the concerns held by the company. He also knew he had been told not to smoke in the tractor and that there had been a problem regarding the application of the incorrect spray.

[73] At the meeting the issues of smoking in the tractor cab, damage to vineyard equipment and applying the wrong spray were raised.

[74] The allegations regarding the damage to the equipment were insufficiently canvassed for the company to have reached the conclusion that Mr Peake had wilfully or carelessly damaged it.

[75] The smoking was admitted by Mr Peake and it was evident that he did not consider it to be a serious matter.

[76] The company was entitled to conclude that Mr Peake had not exercised proper care in his use of the spray. His failure to read the spray sheet, particularly given that he was confused about what he was to spray, constitutes serious misconduct.

[77] On the issue of the spray alone the company was entitled to conclude that Mr Peake's employment should be terminated. Despite the fact that he was not alerted to this matter in the letter I am satisfied that Mr Peake was clear about the allegation at the meeting and was able to address it. Mr Peake knew he had applied the wrong spray and the raising of this as a concern can hardly have come as a surprise. Mr Peake had the opportunity to state his case and respond to the allegation.

[78] In *Angel v Fonterra Co-op Group* [2006] ERNZ 1080 the Court stated at para [17] that the:

*focus should be on the extent of the employee's responsibility for his or her inadvertence, oversight or negligence in light of their knowledge of the relevant policy or code of conduct. The breach of that policy or code need not be intentional*

[79] The employer was entitled to conclude that Mr Peake had exercised insufficient care before he applied the spray. This was a dereliction of duty. That conduct, in all the circumstances of the case, was a reasonable and sufficient ground for the dismissal of the employee.

[80] This was not an isolated instance of misconduct. Mr Peake had also continued to smoke despite an instruction not to do so. Despite the imperfections in the procedure looking at the issue of fairness from the perspective of both parties I have to conclude that the dismissal was justified.

### **Counterclaim**

[81] The costs of the spray and the damaged equipment are potentially recoverable: *Masonry Design Solutions v Bettany* AC 30/09, 21 August 2009, Colgan CJ. The evidence is not sufficient to establish responsibility for the damage to the equipment. However, Mr Peake is liable for the cost of the wasted spray of \$555.00.

### **Costs**

[82] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King

Member of the Employment Relations Authority