

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 59
5336435

BETWEEN STEPHEN WHALLEY
 Applicant

AND TAKOU WERE-TE-MOKAI
 LANDCARE CHARITABLE
 TRUST
 Respondent

Member of Authority: Robin Arthur

Representatives: Murray Broadbelt and Wendy Silver for the Applicant
 No attendance for the Respondent

Investigation Meeting: 15 February 2012 by telephone in Whangarei

Determination: 17 February 2012

DETERMINATION OF THE AUTHORITY

- A. The Takou Were Te Mokai Landcare Charitable Trust (the Trust) unjustifiably dismissed Stephen Whalley.**
- B. By no later than 28 days from the date of this determination, the Trust must settle Mr Whalley's personal grievance by paying him:**
- (i) lost wages of \$5737.50; and**
 - (ii) compensation for hurt and humiliation of \$2000, an amount reduced for blameworthy conduct by Mr Whalley; and**
 - (iii) costs of \$1500 and \$71.56 in reimbursement of the fee for lodging his application in the Authority.**

Employment relationship problem

[1] Stephen Whalley said his job as a trainee hapu ranger for the Takou Were-Te-

Mokai Landcare Charitable Trust (the Trust) ended with his dismissal in November and the dismissal was conveyed to him by text message.

[2] His employment agreement was for a fixed term from 23 August 2010 to 25 February 2011.

[3] The role included work trapping and poisoning pests at various Northland sites and also undertaking training at Northland Polytech's Kerikeri premises for a Certificate in Professional Hunting and Pest Control.

[4] During 8 November 2010 there was an exchange of texts between Mr Whalley and Trust manager Clinton Rameka over whether Mr Whalley should attend a training camp being held at Takou Bay. The exchange ended with a text from Mr Rameka reading:

Catch u up then boy U ungrateful bald head fuk U must think yur good alright

[5] The following morning Mr Whalley and another trainee went to a bush area to clear traps. After receiving a further text from Mr Rameka which read: "*No timesheets, no pay*", Mr Whalley and the other trainee drove that afternoon to Mr Rameka's home in Takou Bay but he was not there. Mr Whalley left timesheets for the previous three weeks with one of Mr Rameka's children.

[6] Mr Whalley did no further work for the Trust from that point on and regarded himself as dismissed. Through his representative he raised a personal grievance on 14 December 2010 seeking lost wages and compensation for hurt and humiliation.

[7] In a letter dated 21 January 2011, replying to the grievance, Mr Rameka did not deny Mr Whalley was dismissed but accused him of breaching his employment obligations. Those breaches were said to include disobeying an instruction to attend a two week training programme at Takou Bay, performing unauthorised work and failing to supply time sheets. In the statement in reply lodged in the Authority the Trust said Mr Whalley "*was dismissed after he failed to follow instructions and employment contract guidelines*".

The Authority's investigation

[8] Mr Whalley lodged a statement of problem in the Authority on 21 July 2011 after the Trust had twice failed to attend mediation on agreed dates. The Trust lodged a statement in reply on 13 September in which it said mediation had not occurred as the parties "*haven't been able to meet*". At Mr Whalley's request a direction to mediation was issued but the matter was not resolved when the parties met with a Department of Labour mediator on 11 October. An Authority case management conference was scheduled, with Mr Rameka's agreement, for 6 December but he advised on 5 December that he was not able to attend the telephone conference as he had "*a whanau grievance on this week*". In light of earlier delays in the Trust attending mediation and lodging a statement in reply, the Authority proceeded to set the matter down for an investigation meeting and issued timetable directions for the parties to lodge witness statements and for the Trust to provide pay records requested by Mr Whalley.

[9] Authority records show the Notice of Investigation Meeting and an Authority Minute setting out the timetable directions were delivered by courier and email to addresses given in the Trust's statement in reply.

[10] Mr Whalley lodged a witness statement and supporting documents as directed but the Trust did not lodge any witness statements or the pay records. Mr Rameka did not respond to the Authority's inquiry about the Trust's failure to do so.

[11] Shortly before the investigation meeting was due to start in Whangarei Mr Rameka contacted an Authority support officer by telephone. He was responding to telephone messages left for him the previous day checking that he or a Trust representative would attend the hearing. I am advised that Mr Rameka said he could not attend the investigation meeting due to a staff member being ill. He said no-one else would attend on behalf of the Trust. He was asked to confirm by email the reason for his absence and he said he would do so that afternoon. (When this determination was issued two days later, the Authority had not received the requested email from Mr Rameka).

[12] In light of the history of this matter to date, and particularly the repeated previous delays, I was not satisfied that the Trust had shown good cause for failing to attend or be represented at the investigation meeting. Accordingly I exercised the power given under clause 12 of Schedule 2 of the Act to proceed and act as fully in the matter as if the Trust had attended or been represented at the meeting. In doing so I took full account of the Trust's statement in reply and the content of Mr Rameka's 21 January 2011 letter setting out his account of Mr Whalley's conduct as an employee.

[13] Due to a cancelled flight I was not able to physically attend the investigation meeting in Whangarei at the notified time. Instead I made arrangements for the meeting to be conducted by telephone conference. Under affirmation Mr Whalley confirmed the content of his written statement and answered questions from me and additional questions from his representative, Mr Broadbelt. As his evidence referred to text messages saved on his mobile phone I arranged for Shona Kelly, a health and safety inspector at the Department of Labour offices in Whangarei, to read those messages on Mr Whalley's mobile phone and to verify whether the words were as reported in his witness statement. Under affirmation Ms Kelly did so.

[14] As permitted by s174 of the Employment Relations Act 2000 (the Act), this determination has not recorded all evidence and submissions received but has stated findings of fact and law and expressed conclusions on matters requiring determination. The Authority's findings were made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened.

Issues

[15] The issues for investigation and determination were:

- (i) Whether Mr Rameka terminated Mr Whalley's employment on 8 November; and
- (ii) if so, was that termination justified – this is, was it what a fair and reasonable employer would have done in all the circumstances at the time

(being the statutory test at s103A of the Act at the time of the dismissal);
and

- (iii) if the termination was unjustified, what remedies should be awarded, considering lost wages, and compensation for hurt and humiliation; and
- (iv) should any remedies awarded to Mr Whalley be reduced due to blameworthy conduct by him contributing to the situation giving rise to his personal grievance; and
- (v) should any award of costs be made?

A dismissal occurred on 8 November

[16] For two reasons I am satisfied the evidence confirmed Mr Whalley was dismissed by Mr Rameka on 8 November.

[17] Firstly, neither Mr Rameka's 21 January 2011 letter nor the Trust's statement in reply denied the allegation that Mr Whalley's employment had ended by dismissal.

[18] Secondly, I find the content of the texts sent by Mr Rameka to Mr Whalley on 8 November, read together, amounted to a "*sending away*".¹ Mr Whalley's evidence was that the following texts were exchanged:

4.35pm	<i>From Mr Rameka</i>	<i>Need yur timesheets b4 Thurs and write me up report 4 work u guys have dne using yr diary</i>
9.29pm	<i>From Mr Whalley</i>	<i>Its nt my job 2 do yr reports</i>
9.29pm	<i>From Mr Rameka</i>	<i>then wat da fuk u doing every wk u can get yr arse over here every wk or I nt gona pay u 4 fuk all or u can go fuk yurself and history. U been gettn it swt ova boy</i>
9.39pm	<i>From Mr Rameka</i>	<i>Bro my job to tell u wot 2 do u get 2 Takou every day then want 2 play that game or ova boy u stick that up yur arse. Think yur gona gt paid 4 fuk all. Gt fuked smart guy. Gav u a chance now u be here 2moro and do real work jst like da rest of da boys. Wat u got 2 say now</i>

¹ [Actors IUOW v Auckland Theatre Trust Inc](#) (1989) ERNZ Sel Cas 247 (CA),

9.40pm *From Mr Whalley* *Every time Ive gone places 2 do work with u
guys its ben a big fuk around*

9.47pm *From Mr Rameka* *Catch u up then boy U ungrateful bald head fuk
U must think yur good alright*

[19] I accept that read in the context of earlier references to whether Mr Whalley’s job would be “*ova*” (over) or “*history*”, Mr Whalley reasonably understood the phrase “*catch you up then*”, to mean Mr Rameka had ended the employment relationship on 8 November.

[20] Despite this he and another trainee went the following morning to one of the sites where they had been responsible for setting traps, laying out poison and clearing traps. This appears inconsistent with Mr Whalley’s declared belief that his employment was ended the previous evening. However I accept Mr Whalley’s answer to that point – that he could not leave the cyanide bait that had been laid out and he returned to finish the work of clearing traps and bringing back equipment out of a sense of responsibility. There was, I find, another incentive to have done that work the following morning even though he understood he was dismissed – the trainees plucked the fur from possums caught in the traps and sold it for cash. That particular morning there were 32 trapped possums, so that at the price per kilo paid at the time, he and the other trainee were able to sell the plucked fur for more than \$90.

Was the dismissal justified?

[21] I find the three reasons given by the Trust for dismissing Mr Whalley were either not justified or not acted on in a way that was justified.

[22] Firstly, there was insufficient evidence Mr Whalley was carrying out unauthorised work, which Mr Rameka’s 21 January letter had said was “*ma[king] up his own line of work*” and “*doing possum fur to make himself money*”. I accept Mr Whalley’s evidence that he and three other trainees carried out work at various land blocks as directed by Mr Rameka. Frequently those instructions were sent by text to Mr Whalley and he and the other trainees would then have to work out how to do what they were told without any direct supervision from Mr Rameka.

[23] I also accept Mr Whalley's evidence that he and the other trainees were allowed to take the possum fur and sell it and that Mr Rameka himself did the same thing.

[24] Overall the evidence did not suggest a lack of diligence by Mr Whalley during his employment. His notebook records regular work at various work sites and regular attendance at the Polytech training course. An academic transcript from Northland Polytechnic showed he achieved merit level passes for the four NZQA achievement standards in the certificate.

[25] Secondly, it was not clear the alleged failure to provide timesheets was entirely Mr Whalley's fault. The initial arrangement was for him and other trainees to hand in timesheets to Mr Rameka when they were attending the Polytech training sessions at Kerikeri. This arrangement faltered when Mr Rameka did not attend the sessions and it is not clear that he, as manager, had set up any other satisfactory means of getting timesheets to him.

[26] Thirdly, while it is arguable that Mr Whalley breached his duties by not obeying an instruction to attend the Takou camp, there is some cause to doubt whether that order was reasonable and, even if it were reasonable, that Mr Rameka's actions in response to Mr Whalley's apparent defiance was what a fair and reasonable employer would have done.

[27] Mr Whalley had attended a three-day training camp in early October at Waipoua Forest. He was disappointed most of the trainees spent a lot of time at the beach or fishing and did little training. He feared that experience would be repeated over a longer period at the two week Takou Bay camp Mr Rameka told him to attend. Mr Whalley also doubted the facilities were sufficient and was concerned that attending would mean missing certificate classes at Kerikeri during that time.

[28] Those views may have been incorrect but a fair and reasonable employer would have dealt with them by talking directly with the employee about them. Instead of sending abusive texts Mr Rameka could have used the same mobile

telephone to ring Mr Whalley and either talk with him or arrange a time to talk to him face to face.

[29] In this respect the trainee nature of the employment is important to assessing the lack of reasonableness in the actions of the employer. Mr Whalley was 17 years old. He had left school at 16 and worked on a dairy farm before hearing of the Trust's scheme to train pest control workers who could then seek employment on conservation and land management projects in the area. If Mr Whalley was wrong in his concerns about the training camp or acted improperly in suggesting he would not attend, a fair and reasonable employer would have recognised his relative youth and inexperience and given him some measured guidance (or possibly even a warning) about accepting orders as an employee and only taken matters further if he did not respond to that direction. Telling him by text to "*get yur arse over here*", "*stick that up yur arse*" and calling him an "*ungrateful bald head fuk*" was a long way short of that standard. Mr Whalley was not given any fair warning of the consequences or an opportunity to properly explain his concerns and have them considered by Mr Rameka before the action to dismiss him was taken.

Remedies

[30] Having established his dismissal was unjustified, Mr Whalley was entitled to an award of remedies.

[31] Mr Whalley's claim for lost wages was limited to the period from 9 November 2010 to the expiry of his fixed term employment agreement on 25 February 2011 – that is just over 15 weeks. It included ten days of holiday to be taken within that term and to which he would have been entitled if he had not been dismissed.

[32] I was satisfied from Mr Whalley's evidence that he made reasonable endeavours to find work to mitigate his loss but was not able to do so. Under s123(1)(b) of the Act he is awarded lost wages of \$5737.50 – that is wages of \$12.75 an hour for 30 hours a week for 15 weeks.

[33] He also suffered hurt and humiliation from the manner of his dismissal. He

accepted that he heard people swear in conversation, that this was not unusual in bush and farm work, and that he had sworn himself in response to one of Mr Rameka's texts. However no employer, teacher or tutor had previously personally abused him in the way that Mr Rameka did. This caused distress and injury to his feelings that should be compensated by an award of compensation under s123(1)(c)(i). However Mr Whalley's written and oral evidence disclosed no long-term effects after the initial distress caused by Mr Rameka's actions and I consider a modest award of \$3000 is sufficient compensation.

[34] Mr Whalley, in closing submissions made by his representative, accepted he had contributed to the situation giving rise to his grievance because he resisted Mr Rameka's instruction to attend the Takou camp. He submitted the contribution was minimal. Even allowing for the prospect that there may have been some arguable reasons for not going to the camp (inadequate facilities, effect on attendance at scheduled Polytech classes), and that Mr Rameka did not follow a fair process for dealing with what may have been insubordination, Mr Whalley's actions in defying the direction was blameworthy conduct. It required a reduction of remedies under s124 of the Act. I consider this contribution should be marked by a one third reduction of the award of compensation made under s123(1)(c)(i) of the Act but no reduction of the award of lost wages.

Costs

[35] Mr Whalley, through his representative, sought a contribution of \$1500 to the costs of \$3945 he had incurred to pursue his personal grievance application following mediation. I accept that is a reasonable amount to award in costs in this matter. The Trust is to pay Mr Whalley \$1500 costs along with a further \$71.56 in reimbursement of the fee paid for lodging the application in the Authority.

Robin Arthur
Member of the Employment Relations Authority