

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 187
3064033

BETWEEN

RICHARD WILLIS
Applicant

AND

WINTON ADVISORY LIMITED
First Respondent

Member of Authority: Eleanor Robinson

Representatives: Matthew McGoldrick, counsel for the Applicant
Stephen Langton, counsel for the Respondent

Investigation Meeting: 21 February 2020

Submissions and further
Information Received: 3 April 2020 from the Applicant
3 and 8 April 2020 from the Respondent

Date of Determination: 08 May 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant Mr Richard Willis claims that he was unjustifiably dismissed by the Respondent Winton Advisory Limited (Winton), when Winton summarily terminated his employment on 28 March 2019.

[2] Winton denies that Mr Willis was unjustifiably dismissed and claims that he was justifiably dismissed for serious misconduct.

The Authority's Investigation

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

Issue

[4] The issue requiring investigation is whether or not Mr Willis was unjustifiably dismissed by Winton.

Background

[5] Winton is a privately owned property development company with approximately fifteen projects currently in progress around New Zealand. One of the current developments is the Lakeside development, located near Te Kauwhata in the Waikato (the Lakeside Development), a residential-led community which when completed will have approximately sixteen hundred homes.

[6] Mr Willis was employed by Winton as a project manager for the Lakeside Development on 11 September 2017. He was employed subject to an employment agreement. The offer of employment letter dated 3 August 2017 set out that Mr Willis would report to Mr Oliver Leighs, General Manager. The Standard Terms of Mr Willis' employment headed: '**Your duties and obligations**' stated at clause 1:

- 1.1 Your duties you must:
- (a) Serve Winton Partners, faithfully, diligently and to the best of your ability;
 - (b) Act in the best interests of any group entity;
 - (c) Comply with all directions of Winton Partners from time to time;
 - (d) Comply with all laws that apply to your position and the duties assigned to you;
 - (e) Dedicate all of your time and attention to Winton Partners during your hours of work;
 - (f) Subject to clause 14.1 inform yourself of and comply with any group entities, policies and procedures including but not limited to Winton Partners business principles;
 - (g) Not act in conflict with a Group Entity's interests;.

[7] Mr Willis said that his role as Project Manager of the Lakeside Development was to project manage the design and the physical works to ensure that they were in accordance with the project timetable.

[8] Mr Willis had been provided with a position description which included the following:

Duties and responsibilities

This role is primarily responsible for assisting the team with all aspects of asset and project management ..

General

- At all times exemplify and promote Winton Partners and maintain the integrity and reputation of the Company.

Project Management

- ...
- Work with external advisors to prepare the requisite legal documentation such as construction contracts and service agreements.
- Identify and resolve project specific legal, planning, and construction issues

[9] Mr Simon Ash, General Manager, said he had initially overseen the Lakeside Development and had responsibility for the project prior to Mr Willis and one other employee being appointed.

[10] Mr Ash said he had overseen the private planned change process to rezone the property from its existing zone into a residential designated zone to allow the proposed development to occur, and Mr Willis had reported to him initially during the period while he transferred responsibility for the project management to Mr Willis and the other new employee.

[11] A number of agreements had been put in place between Winton and other parties who either bordered the Lakeside development or had an interest in the property. Mr Ash said he had provided Mr Willis and the other new employee with a copy of the Lakeside Development Private Plan Change submission and the key agreements which were already in place in September 2017.

[12] Mr Ash said he had explained the three key relationships that Winton had in place for the Lakeside Development to Mr Willis. These were: (i) the Whites, previous owners of the property; (ii) the Nga Muka Development Trust, representatives of the local Iwi; and Northland Property Concepts Limited (NPCL). Mr Ken Vincent is the sole director and shareholder of NPCL, the land of which bordered part of the northern boundaries of the Lakeside Development (the Vincent Land).

[13] Mr Ash said he explained to Mr Willis the importance of the relationships and told him he needed to fully understand and comply with the agreements in place with each of the parties because these relationships were vital to achieving a successful outcome in the private plan change process.

[14] Mr Willis denied that Mr Ash had given him copies of the Lakeside Development key agreements but agreed that he had not asked Mr Ash if he could see the key agreements.

[15] He also agreed that Mr Ash had introduced him to the Whites, he had also met the Nga Muka liaison officers and had met Mr Vincent a little later during his employment.

Job Responsibilities

[16] Mr Willis said he initially reported to Mr Ash, and then subsequently to Mr Duncan Elley, Project Director for the Lakeside Development. Mr Willis said he took his directions from Mr Elley, who was the person he went to for approvals and authorisations and with whom he liaised regarding project management and other matters on the development. Mr Elley reported to Mr Leighs.

[17] Mr Willis said that Ross Reid Contractors Limited (Ross Reid) were the civil engineering contractor who were contracted by Winton to undertake the earthworks in civil infrastructure work for the Lakeside Development.

[18] Candor Limited (Candor) was the consultant engineering company engaged by Winton to undertake the design work for the earthworks and civil infrastructure for the Lakeside Development, and Candor was also responsible for such items as the sediment and erosion control plans.

[19] Mr Willis explained that Winton was a client for the purposes of the Lakeside Development contract and said he had a good relationship with all of the representatives of Ross Reid and Candor. The Lakeside Development contract governed the requirements on Ross Reid to undertake the works on the Lakeside Development, based on the engineering design done by Candor.

[20] Mr Willis said that as the client in the relationship Winton could request that Ross Reid did certain things or undertook certain actions but could not direct or instruct it to do so. The channel for making such requests was via Candor.

[21] His role as Project Manager of the Lakeside Development involved him liaising with Ross Reid and Candor about the works. He liaised with Candor about any items that Winton wanted to occur in the Lakeside Development, and Candor would in turn liaise with, and instruct, Ross Reid about Winton's request. He said he could not issue instructions to Ross Reid, this was something only Candor could do.

[22] Mr Elley said that Winton operated a flat hierarchy structure. It employed people with expertise and employees had autonomy to operate within their particular areas of expertise. He explained that Mr Willis' role involved a focus on land development whereas his own role was to manage the development with a focus on strategy, overall project finances, marketing, sales and planning matters. Mr Willis' role was focussed on the technical and engineering side of the development and what happened at the ground level. He said it was Mr Willis' job to ensure that the works on site were progressing in accordance with the plans and to a high standard of workmanship.

[23] Mr Elley said he did not consider that Mr Willis reported to him in the sense that he was responsible for overseeing his work and signing off on his decisions. He had expected Mr Willis to keep him updated and to raise any significant issues with him but said they did not have a formal reporting structure in place.

[24] Mr Elley confirmed that Mr Willis was correct in his assertion that only Candor as the parties appointed engineer to the contract could instruct Ross Reid. However, Mr Elley said that in practice Mr Willis had the final decision on matters and Ross Reid would also act on Mr Willis' instructions when these were provided to it.

[25] Mr Leighs also said that whilst it was contractually correct that only Candor could instruct Ross Reid, in practice Mr Willis could influence and ensure matters were progressed by agreement with Ross Reid and Candor.

[26] Mr Willis said that the masterplan of the Lakeside Development had been completed when he joined Winton but there was still fluidity in the plans for areas other than the main commercial precinct.

[27] Mr Ash said Mr Willis was also involved in obtaining consents for the upgrade to Scott Road. This was the access road for the development which was to be upgraded from the existing country road to a residential road so that the wider Lakeside Development could be accessed. The Scott Road upgrade was part of the initial works at the Lakeside Development.

[28] In regard to the access along Scott Road and permission to stockpile topsoil on the Vincent Land, Mr Willis said he was aware that there was an agreement with Mr Vincent for the plan change and infrastructure to service a greater development but he had not seen it. He said that a large number of the house lots were up against the boundary of the Vincent Land. The work required to construct those properties required shaping of the land on both sides of the boundary.

[29] The design with the property lots being right up against the boundary was in place prior to his employment commencing at Winton and Mr Willis' understanding was that there were a series of agreements in place about it. He believed Mr Vincent and Winton had agreed to a plan change for both properties which was in place prior to when he joined Winton.

[30] He also believed those agreements included an infrastructure agreement between Winton and Vincent about the delivery of the various services to the property and that the agreements covered things including the work necessary on the Vincent Land.

[31] He had assumed that Winton had secured such approval and that was why the shaping of the land on both sides of the Vincent boundary had been ongoing.

January 2019 discussions with Candor and Ross Reid

[32] Mr Willis said that he, and representatives from Candor and Ross Reid and others had a weekly meeting on site at the site office, walked around the site and discussed issues arising. Minutes of the meetings were kept by Candor.

[33] Mr Willis said there had been a meeting in early January 2019 which he believed to have been on 17 January 2019. One of the issues discussed at the meeting had been the location of the sediment detention known as a decanting earth bund (DEB). Mr Willis said that prior to the commencement of works on the Lakeside Development, Candor had drawn up a sediment and erosion control plan for submission to the Waikato District Council (the Council). He had not been involved in that process. After the sediment controls are installed Mr Willis said these are as-built and submitted to the Council for approval.

[34] The location of the DEB on the boundary of the Vincent Land was discussed. Mr Willis said Ross Reid and Candor wanted to move the DEB approximately two metres further into a gully which he understood to be for a period of approximately two weeks. He had agreed with Candor and Ross Reid's request to relocate the DEB on the basis that he had assumed approvals had been granted for the work that needed to be done.

[35] When he returned to the site office, Mr Willis said he told Mr Duncan that he had agreed to Candor and Ross Reid's plan to move the DEB and Mr Elley had no objection to that. Mr Willis said that Mr Elley had not told him that he should not have agreed to the intended actions, and nor had he suggested that he should contact Mr Vincent either in advance or at that point in time.

[36] Mr Elley said he attended the weekly meetings on site with Candor and Ross Reid on occasions, and would be sent copies of the minutes. Mr Willis would report back to him on any significant matters if he had not been able to attend the meeting.

[37] He understood that the meeting that Mr Willis thought had occurred on 17 January 2019 actually took place on 10 January 2019, and he did not attend this meeting which in fact had been recorded in the minutes of the meeting because he had been on leave at the relevant time and did not return to work until 14 January 2019.

[38] Mr Elley said that Mr Willis did provide him with an update during the week following his return from leave which included the information that the DEB had been moved, but said Mr Willis had not told him it was being moved on to land owned not by Winton but by NPCL i.e. the Vincent Land.

8 March 2019 meeting with Ken Vincent

[39] Mr Elley said that Winton was involved in ongoing negotiations with Mr Vincent as the development progressed. A meeting had been scheduled with Mr Vincent and his son for 8 March 2019 to discuss a proposal by Winton to carry out significant earthworks on the Vincent Land whereby Winton would excavate the Vincent Land in order to be able to remove around sixteen thousand cubic metres of soil for use in the earthworks at the Lakeside Development.

[40] The 8 March 2019 meeting was held at the Winton offices and was attended by both Mr Willis and Mr Elley. Mr Elley said that when Mr Vincent arrived he was clearly very agitated and told them that he had discovered that there had been a significant amount of work done on his land without his consent. He had taken a number of photos of the issues which he identified as:

- (a) Unauthorised access to, and trespass on, parts of the Vincent Land by Ross Reid and/or Winton;
- (b) Cutting into the Vincent Land along the boundary, by up to 5 metres at some points;
- (c) A silt retention pond had been constructed on his land;
- (d) Ross Reid was storing material on the Vincent Land; and
- (e) Rubbish had been left all over the Vincent Land and there had been a fuel spill on site.

[41] Mr Elley made a file note of the meeting from his handwritten notes taken at the time which concluded with a statement:

KV indicated that KV and AV were still considering the proposal but would contemplate the following:

- Lakeside utilising the KV land for a period of two years including for storage...
- Allowing the silt retention pond to remain in place...

DE noted that he would put together a draft proposal for internal review and provide this to KV once the internal sign off had been received.

[42] Mr Willis said that throughout the course of construction works the Council monitors that they are happening in accordance with the plan as submitted to the Council Mr Willis said he essentially left the sediment control requirements to Ross Reid and Candor to sort out with the Council.

[43] During the meeting on 8 March 2019 he did not make comments because it was clear to him that Mr Vincent was very unhappy and he did not want to exacerbate the situation.

[44] Mr Elley said Mr Willis had commented that Ross Reid had their own surveyors and should have been aware of where the boundary with the Vincent Land was located. He told Mr Vincent that he would arrange for Ross Reid to remove the material and rubbish stored on site and deal with the fuel spill as a priority.

[45] Mr Elley said he recalled Mr Vincent saying to Mr Willis at least twice: "You must have known this was on my land". However, Mr Willis did not respond to this question. Mr Elley said he believed the impression Mr Willis gave to Mr Vincent was that he did not know it was on the Vincent land.

[46] Mr Willis denied he had said that the DEB was not on the Vincent Land. He said he had not known whether it was on the Vincent Land, but it had been a possibility that was the case. He had agreed that he would get in touch with Ross Reid and Candor after the meeting and request that Ross Reid move all materials which had been stored on Vincent Land as soon as possible.

[47] Immediately following the meeting Mr Willis said he and Mr Elley had talked about the actions which needed to be taken to have Ross Reid remove the material from the Vincent Land. It was agreed that Mr Willis would contact Ross Reid which he had done so that same day, 8 March 2019, emphasising the urgency of the issue and was told in response that it would be actioned as soon as possible.

11 to 20 March 2019

[48] Mr Willis said by Monday 11 March 2019 it was clear that Ross Reid had not actioned the removal of materials from the Vincent Land and he therefore followed up the issue that day, and was again informed it would be actioned immediately. He believed the rubbish and a fuel spill had been cleared up, but there remained an issue about stockpiled materials. As a result, he had further written correspondence with Ross Reid about this between 11 and 15 March 2019 in addition to raising it during their regular weekly meetings.

[49] Mr Willis said rather than complying with the request to remove the material Ross Reid did not do so, and instead put more material there.

[50] Mr Elley said Mr Vincent sent him an email on 14 March 2019. In the email Mr Vincent stated:

...on site we met with Mr Arun Rana who stated that he was the project manager for Ross Reid on the Winton project. Quite simply, we asked Mr Rana who authorised the entry and earthworks on our property. He answered that it was all authorised by Winton and that Richard Willis knew all about it...

Mr Rana was also astounded that Reid's had been instructed by Candor3 to do earthworks on our property. Mr Rana, reiterated that Richard from Winton knew all about it and had monitored the process...

The only communication Mr Rana has had from Richard Willis, was to clean up the rubbish pile by the containers, and clean up the fuel spill next to the fuel tanks. He assured us that he had not been told anything regarding the cut bank or the silt retention pond located on our property...

In relation to the "silt retention pond" we asked Mr Rana who had given authorisation to construct the silt retention pond twenty metres inside our property. Mr Rana said that Reids had in fact, constructed the entire pond system inside the Winton property, and then Richard Willis came along and instructed them to move it to inside our property, in order to keep the Winton sections clear. This completely contradicts the statement made by Richard, during our meeting, denying any knowledge of the silt retention pond location...

After these latest findings we are shocked that Richard Willis, an employee of Winton Associates, has continued to lie to us and given Reid Contractors instructions to trespass and undertake earthworks on our property. As a result of this we will not work with Mr Willis in the future, I do not want any further communication with him.

Disciplinary Process

Letter 20 March 2019

[51] Mr Willis said that on 20 March 2019 he received a letter inviting him to a disciplinary meeting on Tuesday 26 March 2019. Attached was a copy of the email that Mr Vincent had sent to Mr Elley on 14 March 2019 set out the allegations as follows:

At the meeting I would like to discuss with you and hear your version of events in relation to the concerns that you have directed to our contractor, Ross Reid, to trespass and undertake unauthorised earthworks on Northland Property Concept Limited's property (the Vincent Land) and acted dishonestly in your communications with Mr Vincent, which have severely jeopardised our relationship with Mr Vincent. Specifically:

- It is alleged that you directed Ross Reid to undertake unauthorised earthworks on the Vincent Land. Mr Vincent says that Arun Rana of Ross Reid told him that you knew about the earthworks and monitored the process.
- It is alleged that you directed Ross Reid to construct a silt retention pond twenty metres inside the Vincent Land, without Mr Vincent's authorisation. In particular, Mr Vincent says that Mr Rana told him that Ross Reid had constructed the pond system on Lakeside's property, but that you had instructed Ross Reid to move it to the Vincent Land.
- At your meeting with Mr Vincent on 8 March 2019 also attended by Duncan Elley, it is alleged that you were dishonest in your communications with Mr Vincent, which has led to Mr Vincent refusing to work with you in the future or have any further communication with you. In particular, it is alleged that you dishonestly:
 - Denied any knowledge of the silt retention pond location, and
 - Stated that Ross Reid would know where the boundaries of the Vincent Land were as they have their own surveyors implying that any intrusion would be Ross Reid's responsibility.

The above potentially amounts to a breach of your employment agreement and may constitute a serious misconduct.

I must emphasise that the situation is serious. Our relationship with Mr Vincent has been severely jeopardised. Mr Vincent has also advised us that he will not work with you in the future and does not want any further communications with you.

[52] The letter continued to state that other issues would be discussed at the meeting, including:

- a) “the state of the show homes and sales precinct at Lakeside.
- b) Informal feedback: “that your approach with various other stakeholders and consultants has been abrasive and potentially counter-productive to the Lakeside Development.”

[53] The letter advised Mr Willis that he was entitled to bring a support person or representative to the meeting.

[54] Mr Willis said he was shocked to receive the letter and immediately showed it to Mr Elley. He was sent a calendar invitation to the disciplinary meeting which he forwarded to Mr Elley whom he wanted to accompany him to inform Mr Leighs about the meeting on 8 March 2019 in addition to previous discussions between him and Mr Elley about the location of the DEB.

[55] Mr Elley said he had spoken to Mr Leighs and asked him whether he needed to be at the meeting. Mr Leighs had confirmed it was to be a disciplinary meeting, and he (Mr Elley) said he would prefer not to be there.

Disciplinary meeting 26 March 2019

[56] The meeting held on 26 March 2019 was attended by Mr Willis, Mr Leighs and Miss Justine Hollows, counsel for Winton. During the meeting Mr Leighs said that Mr Willis had told him he had assumed the works carried out on the Vincent Land had previously been agreed to as part of the initial consented plan for the development.

[57] Mr Leighs said he had queried that assumption and noted that Mr Willis had been involved in other consent requests for access to the Vincent Land which should have indicated to him that his assumption was unsound.

[58] Mr Willis confirmed that he did not seek consent from Mr Vincent for Ross Reid to undertake earthworks on the Vincent Land and that he should have done so. Mr Willis also confirmed that he usually did seek permission, and not doing so was contrary to the way in which other work on the Vincent Land had been managed throughout the Lakeside Development. He noted that he had sought permission on previous occasions, specifically with Mr Vincent’s express consent in the form of an access agreement or his approval being recorded in an email.

[59] Mr Leighs said that Mr Willis also told them he did not know where the DEB was located but was aware that it had been moved northwards from its original location on Winton land and said that it would only be at the new location for a short period of time.

[60] Mr Leighs said he asked Mr Willis what he would do differently if a similar situation arose in the future. Mr Willis acknowledged that he knew he should have sought consent from Mr Vincent, but commented that Mr Vincent was ‘hard to get hold of’ and that it might ‘hold up the project’.

[61] Mr Leighs said he considered it significant that Mr Willis was non-committal about whether or not he would obtain permission in the future, noting Mr Willis’ comment that ‘Mr Vincent was difficult to get hold of’, which combined with his explanation that the DEB was only going to be on the Vincent Land for a short time, demonstrated to him that Mr Willis considered getting Mr Vincent’s consent to be optional. This indicated to him that Mr Willis was either unwilling or unable to take ownership of the issues.

[62] Mr Leighs said it was his belief that Mr Willis knew that consent was needed to carry out earthworks on the Vincent Land, and he had neither checked whether that consent was in place, nor sought the consent. He believed that Mr Willis knew the DEB was on the Vincent Land and that he knew he would have needed consent to put it there, and he had not done so.

[63] Mr Leighs said he believed Mr Willis had misled Mr Vincent on 8 March 2019 by not telling him he knew to where the DEB had been moved.

[64] Mr Willis said that during the meeting, he had repeatedly stated that Winton should speak to Mr Elley. Specifically, he said Winton should speak to Mr Elley about the discussion that he and Mr Elley had when he returned to the office in January 2019 after discussing the possible movement of the DEB.

[65] Mr Willis said he had told Mr Leighs he assumed permission had been granted to undertake the necessary work for the lots adjoining the boundary to the Vincent Land as this was fundamental to the design of the Lakeside Development. He had explained that his assumption must have been incorrect and that with the benefit of hindsight if he had known that permission had not been granted he would have asked Mr Vincent for that permission.

[66] Mr Willis said at the Investigation Meeting he did not accept he had acknowledged at the disciplinary meeting that his actions were contrary to how work on the Vincent Land had been managed, but he did recall saying that the earthworks for the lots adjoining the Vincent boundary had been undertaken and were fundamental to the design of the Lakeside Development. His actions had been based on an assumption that was incorrect, but based on the fundamental design of the Lakeside Development.

[67] During the meeting he had denied telling Mr Vincent at 8 March 2019 meeting that he did not have knowledge of the DEB location.

[68] Mr Willis said that the issue which had arisen regarding the siting of the DEB was a minor issue in the scheme of a very large development which already had substantial construction work undertaken on the Vincent Land.

[69] Mr Willis said he did not accept Winton's assertions that he was non-committal about whether he would expressly seek consent in the future. He said it had simply been a statement of fact that Mr Vincent was 'hard to get hold of', but that he would have sought consent in the future.

[70] Mr Willis said he had denied telling Mr Vincent at the 8 March 2019 meeting that he did not know the location of the silt retention pond.

[71] Mr Leighs said that since Mr Willis had known the location of the silt retention pond, not telling Mr Vincent this at the 8 March 2019 meeting had been misleading.

Decision to Terminate

[72] After the meeting with Mr Willis, Mr Leighs said he considered the outcome. He had not considered he needed to make any further inquiries of Ross Reid or Candor because it had been Mr Willis' responsibility to ensure that appropriate permissions were in place regardless of what other parties working on the Lakeside Development had believed.

[73] He had a brief discussion with Mr Elley about Mr Willis' explanation. He had reviewed the minutes from the site meeting on 10 January 2019 at which Mr Elley had not been present. He noted that section 1.3 of the minutes stated:

Underfill drainage subsoil from gully fill is to extend outside extent of works. Interface batter extent shown in black on attached plan. Comment on site was to push topsoil band/DEB north so it is clear the interface extent to allow completion of lots until stabilised. ...

[74] Mr Leighs said he also re-read the email dated 5 November 2018 where Mr Willis had asked Mr Vincent if it would be acceptable to stockpile soil on his land. Two days later Mr Vincent had replied giving his authorisation.

[75] Mr Leighs said he had considered the issues and Mr Willis' response. He considered that Mr Willis was aware of how important the relationship with Mr Vincent was to Winton and that he should have known consent to any works on the Vincent Land was required.

[76] The movement of the DEB was also a major concern for him, and he had not been convinced that Mr Willis appreciated the need to seek consent going forward. He was further concerned that during the meeting with Mr Vincent on 8 March 2019 Mr Willis had remained silent about the location of the silt retention pond when he knew where it was located.

[77] After the disciplinary meeting Mr Leighs said he also had a meeting with Mr Elley and Mr Ash and the CEO in which he discussed with them the issues he had raised with Mr Willis, Mr Willis' responses and whether there was anything to alter his initial view that he had lost trust in Mr Willis to continue in his role with Winton.

[78] Mr Elley said the issues discussed regarding Mr Willis included:

- His performance in general;
- Informal feedback from stakeholders that he was abrasive and difficult to deal with;
- The upkeep of the show homes on the Lakeside Development;
- a failure to document decisions and keep records;
- being unable to answer questions from internal staff about the developments;
- not involving a civil engineer in the design process for the utilities plan.

[79] Mr Leighs said that while there were a number of issues raised about Mr Willis' general performance there was nothing that was directly about the disciplinary process or that altered his view on dismissal being the appropriate outcome.

[80] Mr Leighs said that following the meeting he reached the conclusion that he could not trust that Mr Willis would not to act in a similar way in the future, follow procedures, escalate appropriate issues to management, or ensure Winton's interests were protected and promoted at all times.

[81] In conclusion, Mr Leighs said he did not have the confidence in Mr Willis that he would need to have to continue Mr Willis' employment and as a result, he reached the decision that termination of Mr Willis' employment was the appropriate outcome in all the circumstances and that it should be effective immediately.

[82] He confirmed his decision in writing to Mr Willis in an email dated 28 March 2019 and suggested that they meet later that day to discuss the outcome of the process stating:

I suggest that we get together this afternoon to discuss the outcome of this process and, again, you are welcome to bring along a support person.

If you prefer, I can send the decision in writing, but I think it is better if we meet in person. ...

[83] During the meeting held on 28 March 2019 which Mr Willis said was very brief, Mr Leighs had told him of his decision and given him the letter confirming termination. The letter stated:

You have acknowledged that you did not seek consent from Mr Vincent for us (Ross Reid) to undertake the earthworks on the Vincent land. The work was therefore unauthorised, and you should have sought his consent to do so first. You also acknowledge that this was contrary to how all other work on the Vincent land or access across it had been managed; that is, with his express consent in the form of an access agreement or email approval.

You also explained that you were aware that the silt retention pond that you directed Ross Reid to construct was on the Vincent Land, not Winton's and that you instructed Ross Reid to build it there. It follows that your response to Mr Vincent at this meeting on 8 March, where you denied knowing the location of the pond, was untrue.....

I believe that this conduct (each issue on its own, and in combination) amounts to "serious misconduct" under your employment agreement. ...

Also, at the meeting I asked you how you would manage the same issue if it occurred again, knowing what you know now. Your response was that you would probably ask Mr Vincent for permission, but then you qualified that by saying he is hard to get hold of and that might delay matters too much. My take-away from that comment and my observations of you, was that there was not much contrition on your part, and you were less than resolved or definite that you would seek consent at all times.

You also commented that the pond was only going to be on the Vincent Land for a couple of weeks, which indicated that you thought that the pond was only going to be there for a short period of time, and therefore Mr Vincent may not become aware of the temporary works required; hence you instructed Ross Reid to build it without seeking appropriate consent. This reinforced my view that obtaining consent was seen by you as a flexible option; whether you would do it would depend on what you thought warranted it.

And, in line with this, you never escalated or raised the issue of access for these works to your superiors.

[84] The letter concluded by confirming the decision to terminate Mr Willis' employment with immediate effect on the basis of a lack of trust in him, and confirmed that as a gesture of good will Winton would pay Mr Willis one month's salary but that his employment was immediately terminated.

Was Mr Willis unjustifiably dismissed by Winton?

[85] Mr Willis was dismissed from his employment with Winton for serious misconduct which resulted in Winton having a lack of trust in him. Justification for dismissal is stated in the Employment Relations Act 2000 (the Act), which at s 103A sets out the Test of Justification as being:

S103A Test of Justification

- (1) For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[86] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. An employer must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Substantive Justification

[87] Mr Willis was employed as the Project Manager and primarily responsible for all aspects of project management. There were three primary allegations set out in the letter dated 20 March 2019. The allegations were subsequently held by Winton to constitute serious misconduct.

[88] Two of the allegations upheld by Winton and which formed the basis for dismissal were that Mr Willis: (i) failed to seek consent from Mr Vincent in relation to the earthworks on the Vincent Land resulting in the work being unauthorised, and (ii) instructed Ross Reid to construct the silt retention pond on the Vincent land not the Winton owned land.

[89] Mr Willis admitted these allegations during the meeting held on 26 March 2019. He contended that he had acted upon an assumption which he considered to be a reasonable assumption, namely that the consents were in place as a result of the Master Plan or the Earthworks Plan.

[90] Winton did not accept that Mr Willis' explanation was reasonable.

[91] Mr Ash's evidence was that at the commencement of Mr Willis's employment he had provided him with a copy of the key agreements, explained the key relationships which included the agreement with Mr Vincent, and the importance of fully understanding and complying with the key agreements in place.

[92] In addition Mr Willis acknowledged during the disciplinary meeting held on 26 March 2019 that he had sought permission from Mr Vincent on previous occasions, and admitted that he had not done so in relation to the earthworks and silt retention pond on the Vincent Land.

[93] Mr Willis was primarily responsible for all aspects of the project management of what he described as a very large development. I consider that it was reasonable for Winton to expect Mr Willis as Project Manager to check that the requisite consents were in place prior to allowing any works to go ahead on land not under Winton control.

[94] Although there was a Master Plan in place, in a large project this could change and I find the fact that Mr Willis had sought consent from Mr Vincent on previous occasions infers that he understood that it was not sufficient to only rely on the Master Plan as containing all the consents necessary to the ongoing works which needed to be undertaken over a significant period of time.

[95] Mr Willis failing to obtain the requisite consent for work prior to it being carried out could result in Winton alienating the good will and cooperation of parties who were key to the success of the Lakeside Development, and had in fact done so in regard to the unauthorised works undertaken on the Vincent Land. This is exemplified in the letter of complaint from Mr Vincent which Mr Leighs considered had: “severely jeopardised “Winton’s relationship with a key party to the Lakeside Development.

[96] Mr Vincent stated to Mr Elley in the letter dated 14 March 2019 that he refused to work with Mr Willis in the future, and the situation had provided Mr Vincent with commercial leverage in his ongoing dealings with Winton.

[97] I find that Mr Willis’ actions were contrary to his obligation to: “maintain the integrity and reputation of the company”.

[98] The third allegation was that Mr Willis had been dishonest in the meeting with Mr Vincent held on 8 March 2019. This was upheld in the letter of dismissal dated 28 March 2019.

[99] Mr Willis denied he had been untruthful in his responses to Mr Vincent during the meeting held on 8 March 2019.

[100] I find that there is no evidence that the third allegation was established because Mr Willis’ evidence during the Investigation Meeting was that he had denied having told Mr Vincent that he knew where the silt retention pond was located during the disciplinary meeting.

[101] Further the evidence of Mr Ellery upheld Mr Willis’ evidence on the matter, and the file note prepared by Mr Ellery of the meeting does not record Mr Willis denying that he knew the location of the silt retention pond.

[102] The fact that Mr Willis kept silent when Mr Vincent raised the issue may have been misleading but was not a lie or a denial.

[103] The letter dated 28 March 2019 states that: “this conduct (each issue on its own, and in combination) amounts to “serious misconduct” Mr Leighs considered that each individual issue independently amounted to serious misconduct. Two of the allegations were upheld.

[104] As a result Mr Leighs considered he no longer had trust in Mr Willis to continue in his role as Project Manager because Mr Willis had admitted that the allegations regarding the earthworks and silt retention pond had been established, and he also considered that Mr Willis had not given him assurance that he would seek the requisite permissions in the future.

[105] I find that a fair and reasonable employer could take into account that the lack of reassurance was a material factor in determining the outcome.

[106] I find that in the circumstances Winton acted as a fair and reasonable employer could have acted, had substantive justification for reaching the view that the allegations regarding the earthworks and silt retention pond were established.

Procedural Justification

[107] In accordance with s 103A (3) of the Act, Winton was required to carry out a fair investigation and follow a fair procedure. The Authority must consider whether:

- (a) ... the employer sufficiently investigated the allegations against the employee ...
- (b) ... the employer raised the concerns that the employer had with the employee ...
- (c) ...the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...
- (d) ... the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...

Sufficiently investigated the allegations

[108] I find there was no requirement that Winton check with third parties that two of the allegations against Mr Willis were correct given the admission by Mr Willis that he did not seek consent from Mr Vincent to undertake the earthworks, and that he knew the silt retention pond would be on Vincent Land when he permitted Ross Reid to construct it.

[109] At that point Winton concluded the allegations were upheld which I find was an honest belief on its part based on reasonable grounds.

Reasonable opportunity to respond

[110] Mr Willis was invited to bring a support person or representative to the meeting held on 26 March 2019 in the letter dated 20 March 2019, but he chose not to do so.

[111] The invitation to bring a support person was reiterated in the email dated 28 March 2019 inviting Mr Willis to attend a meeting to discuss the outcome of the disciplinary process. Mr Willis chose not to do so.

[112] There is no evidence that Mr Willis did not have the opportunity to respond to the allegations and concerns set out in some detail in the letter dated 20 March 2019.

Performance Concerns taken into consideration

[113] Following the disciplinary meeting with Mr Willis on 26 March 2019 Mr Leighs sought input from Mr Elley and Mr Ash and the Winton CEO. There were a number of issues concerning Mr Willis' performance discussed at that meeting.

[114] I note that some of these issues were referred to in the letter dated 20 March 2019 inviting Mr Willis to a disciplinary meeting and that Mr Willis was therefore put on notice of them, and had the opportunity to discuss them at that meeting.

[115] Mr Leigh's evidence was that he considered dismissal to be the appropriate outcome for the loss of trust and confidence in Mr Willis as Project Manager, but that prior to confirming his decision to dismiss, he wanted to ascertain if there were any reasons why he should not proceed with the dismissal.

[116] I find that the written evidence and that given at the Investigation Meeting supports Mr Leighs having reached the decision that dismissal was the appropriate outcome prior to the meeting with other members of the management team and that he wanted to check with them that there were no reasons why he should not proceed with that decision.

[117] There is no evidence to support Mr Leighs having been influenced that dismissal was the appropriate outcome by consideration of other issues, on the basis that he had already reached that view before the meeting with Mr Elley, Mr Ash and the CEO.

Preliminary Decision not put to Mr Willis for comment

[118] The letter dated 20 March 2019 which invited Mr Willis to the disciplinary meeting set out the allegations concerning the incidents relating to the Vincent Land, and also set out the further issues of the show homes and informal stakeholder feedback which were matters of concern to Winton.

[119] The letter made it clear that Winton regarded the allegations as: "a breach of your employment agreement, and may constitute serious misconduct." The letter reiterated: "the situation is serious" and that Mr Willis needed to be aware that, in the event that Winton was not satisfied with his responses to its concerns, he could be facing: "disciplinary action up to and including summary dismissal".

[120] The meeting held on 26 March 2019 provided Mr Willis with the opportunity to address Winton's concerns. There is no evidence that Mr Willis was constrained in so doing. Mr Willis had

been invited to have a support person at that meeting but he chose not to do so. The evidence is that the meeting was brief, but not that Mr Willis was prevented from making any comment.

[121] Further there is no legal requirement for an employer to put a preliminary decision to an employee for comment.¹

[122] In these circumstances I find no procedure unfairness in Winton not putting its preliminary decision to Mr Willis for comment.

Conclusion

[123] I determine that Winton acted as a fair and reasonable employer could have acted in all the circumstances at the relevant time and that Mr Willis was not unjustifiably dismissed by Winton.

Costs

[124] Costs are reserved. Should the parties seek costs, they are encouraged to try to resolve any issue of costs between themselves.

[125] If they are not able to do so and an Authority determination on costs is needed the Respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[126] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Eleanor Robinson
Member of the Employment Relations Authority

¹ *Elisara v AllianzNew Zealand Limited* [2019] NZEmpC 123 at [54] – [60]