

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 328
5404639

BETWEEN	TODD HAYTER Applicant
A N D	WESTBURY THOROUGHBREDS LIMITED t/a WESTBURY STUD Respondent

Member of Authority: James Crichton

Representatives: Stan Austin, Advocate for Applicant
Dean Organ, Advocate for Respondent

Investigation Meeting: 19 June 2013 at Auckland

Date of Determination: 1 August 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Hayter) alleges that he was unjustifiably dismissed from his employment by the respondent (Westbury Stud). Westbury Stud resists that claim.

[2] Mr Hayter was employed by Westbury Stud in July 2011 as a senior stud groom. The employment was subject to a written employment agreement which incorporated a job description, a code of conduct and a set of house rules.

[3] There was an incident involving Mr Hayter on 20 June 2012. Together with other staff, Mr Hayter was assisting with the loading of two young horses onto a transporter. It is common ground that both horses were “frisky”. During Mr Hayter’s attempt to lead one of the horses onto the transport, the horse baulked, and another staff member (Nathan Wilson) struck the horse across the rump with a piece of tree

branch that he was holding. This startled the horse and in the ensuing confusion, Mr Hayter claims to have been kicked in the face by the horse.

[4] Mr Hayter says that in the heat of the moment having just been struck by the horse, he abused Mr Wilson.

[5] Mr Hayter's evidence that he was kicked in the face by the horse is not accepted by Westbury Stud. Critically, Westbury Stud denies that Mr Hayter ever told it any such thing during the disciplinary process. Moreover, Westbury Stud maintains there is no independent evidence of Mr Hayter having been kicked by the horse.

[6] There is also dispute over what exactly Mr Hayter said to Mr Wilson. Critically, the words Mr Hayter accepts he uttered could properly be characterised as common abuse whereas the words complained of by Mr Wilson and an independent witness, Ms Setters, involved a genuine intimidatory threat of personal harm. Contemporaneously with the issues around the 20 June 2012 incident, Westbury Stud was also made aware of allegations that Mr Hayter was using marijuana in the workplace and indeed offering to sell it to co-workers.

[7] Accordingly, Mr Hayter was invited to attend a disciplinary meeting on 28 June 2012. The invitation to that meeting was conveyed in a letter dated 25 June 2012. That letter made four specific allegations in relation to the alleged drug issues, two specific allegations in respect of the incident just described on 20 June 2012, and two further allegations about other staff feeling nervous around Mr Hayter.

[8] As part of the preparation for the disciplinary meeting, Westbury Stud had interviewed relevant staff witnesses. A written statement had been prepared for Ms Amy Setters who was a witness to the alleged intimidation incident, a verbal discussion was held with Mr Wilson to get his evidence and another written statement was taken from Ms Renee Tate about Mr Hayter's alleged drug use at work. The two written statements were provided to Mr Hayter via his then representative, prior to the disciplinary meeting. The disciplinary meeting itself proceeded on 28 June 2012 and was by all accounts relatively brief. The issues set out in Westbury Stud's letter of 25 June 2012 were put to Mr Hayter one by one and he was asked to respond. Westbury Stud did not think Mr Hayter's responses were "helpful" and it did not

think “... *he answered questions fully. He was evasive and reluctant to answer questions*”.

[9] The meeting concluded after barely half an hour, Mr Hayter’s then representative indicating that Mr Hayter had nothing further to say.

[10] At the conclusion of the disciplinary meeting, Mr Hayter’s original representative readily agreed to the employer’s suggestion that Mr Hayter take a drug test. That was arranged immediately and the final result, which Mr Hayter was advised of eventually, was negative.

[11] There was no further meeting between Mr Hayter and Westbury Stud but as the Authority has just noted, the representative of the parties worked hard to try and resolve matters by agreement. In the result, that was not successful and the representatives then discussed whether there should be a further opportunity for Mr Hayter to engage with the employer. Mr Hayter’s original representative declined the opportunity of a further chance for Mr Hayter to be heard and in the result the employer concluded that Mr Hayter had been guilty of serious misconduct in relation to the comment he made to Mr Wilson and Mr Hayter was summarily dismissed. The other allegations were not proceeded with by Westbury Stud; in relation to the drug use, in the absence of a positive drug test, those allegations would be difficult to sustain in any event.

[12] After the dismissal, Mr Hayter got fresh representation and a personal grievance claim was subsequently raised.

[13] By agreement with the parties, the Authority’s determination concerns itself exclusively with issues of justification, that is, whether it was available to Westbury Stud to dismiss Mr Hayter for serious misconduct. In the event the Authority concludes the dismissal is unsafe, there will be another engagement with the representatives to take the matter further.

Issues

[14] In order for the Authority to determine whether the decision of Westbury Stud to dismiss Mr Hayter was a decision which, in the particular circumstances of the case, Westbury Stud could make, the Authority needs to consider the following questions:

- (a) Was Mr Hayter properly advised of the allegations;
- (b) Did the employer conduct a proper investigation;
- (c) Were Mr Hayter's responses properly evaluated;
- (d) Was the decision to dismiss fair?

Was Mr Hayter properly advised of the allegations?

[15] Mr Hayter maintains that he was not properly advised of the allegations when he attended the disciplinary meeting on 28 June 2012. The Authority does not accept that that claim can have any genuine basis.

[16] In the lead up to the disciplinary meeting held on 28 June 2012, Westbury Stud wrote to Mr Hayter and as the Authority has already noted in an earlier section of this determination, set out three bundles of allegations, the first bundle concerning allegations of drug use, the second involving the events of 20 June 2012, and the third involving more diffuse allegations about staff not feeling safe with Mr Hayter.

[17] The Authority is satisfied that that letter properly sets out Westbury Stud's concerns and gives Mr Hayter a fair and full opportunity to understand precisely what it is that he is being accused of. Looked at dispassionately, it is hard to see how the letter could be improved upon.

[18] On top of that, Westbury Stud also made available to Mr Hayter copies of the written statements it had from the two staff members who had written statements prepared. Again, the Authority has already referred to this but for the sake of completeness notes at this point that those statements were from Ms Setters, whose statement concerned the events of 20 June 2012, and Ms Tate whose statement concerned the allegations of drug use. By the time that the parties met together to consider the allegations, there was no other written documentation which Westbury Stud had which was not also in Mr Hayter's possession. All the written material relating to the events complained of had been provided to Mr Hayter and he already had signed copies of his employment agreement attaching the code of conduct, the disciplinary rules, and the house rules. Those last mentioned documents, about which more later, are a comprehensive code setting out the expectations around behaviour.

[19] Mr Hayter's contention is that he did not receive the statements from Ms Setter and Ms Tate prior to the disciplinary meeting. The evidence for Westbury Stud was that it made that material available to Mr Hayter's original representative and the Authority is satisfied on the evidence that that is precisely what happened. If Mr Hayter did not receive those documents from his own representative, that is not a complaint that can be sheeted home to the employer.

[20] The Authority is satisfied then that Mr Hayter was properly advised of the allegations.

Did Westbury Stud conduct a proper investigation?

[21] Mr Hayter alleges that the investigation conducted by Westbury Stud was minimalist at best; the Authority does not agree. Again, as the Authority has already noted, the evidence is clear that after 20 June 2012, Westbury Stud received a number of representations concerning Mr Hayter relating to all three subject matters dealt with in the 25 June 2012 disciplinary letter. It may well be that the episode with the horse on 20 June 2012 acted as a sort of focus point for colleagues of Mr Hayter expressing concerns about him. Whatever the explanation for those series of representations being provided to Westbury Stud at the same time, the fact remains that having been provided with those concerns, Westbury Stud was obligated to deal with them.

[22] The evidence for the employer from Mr Craig Baker who was the operations manager of Westbury Stud, is that he received a verbal report from Ms Setters the day after the incident with the horse, that is 21 June 2012. Ms Setters is the yearling manager and as a consequence a member of the management team. As the Authority noted earlier in this determination, Ms Setters was not in any way involved in the incident that she described; she was no more than a bystander but as such, she felt she had an obligation to report the matter to Mr Baker.

[23] She did that partly because she felt it was her duty to do so and partly because she had discussed the matter with Mr Wilson (the alleged victim of the intimidatory language) and established from Mr Wilson that he was genuinely anxious, not to say frightened, about what Mr Hayter had said.

[24] Once he had received Ms Setters' report, Mr Baker spoke with Mr Wilson. Mr Wilson, according to Mr Baker, seemed genuinely frightened. In his oral evidence to the Authority, Mr Baker described Mr Wilson as being "*very pale and worried*

when I spoke to him". Mr Baker was clear that those symptoms manifested themselves not because Mr Wilson was being spoken to by the operations manager but because of what Mr Hayter had said previously. Mr Baker's evidence was that Mr Wilson told him that he (Mr Wilson) "*wanted something done about it*", namely wanted something done about Mr Hayter's behaviour.

[25] Interestingly, Mr Baker's evidence is that Mr Wilson linked his concern about what Mr Hayter had said with Mr Hayter's alleged drug taking. Clearly, that would have put Mr Baker on notice that there was another underlying issue that might require investigation were it not for the fact that he had contemporaneously been advised by Ms Tate of Mr Hayter's alleged drug taking at the workplace.

[26] Having spoken to Mr Wilson and obtained or prepared statements from Ms Tate and Ms Setters, the disciplinary letter was then drafted. That was the material that the employer took to the disciplinary inquiry and while other material became available subsequently, it did not form part of the material put to Mr Hayter or part of the material that the employer reflected on before deciding to dismiss Mr Hayter, and so the Authority does not bring that into consideration.

[27] Looking at Westbury Stud's investigation, it is difficult to see what else it could have investigated. Mr Baker spoke to the known witnesses to the horse incident and independently (and apparently unsolicited) he received a written statement from Ms Tate which supported something that Mr Wilson had said about Mr Hayter's alleged drug taking. Mr Baker had spoken verbally with Mr Wilson and established that Mr Wilson was both most anxious about what Mr Hayter had said, and wanted to do something about it.

[28] In the Authority's view, the investigation Westbury Stud conducted was appropriate in the circumstances of the case. Certainly, there was enough information there to seek responses from Mr Hayter. It is true that the investigation was neither lengthy nor detailed, but it seems to have established the bare threshold that there was "*a case to answer*" and thus was sufficient for the purposes of seeking responses from Mr Hayter.

[29] If Mr Hayter's responses at the disciplinary meeting had been more fulsome and less equivocal the employer might well have been put to further trouble of conducting more detailed investigations, but that was not what happened.

[30] A particular point Mr Hayter made in the course of the investigation meeting was that Ms Setters appeared to be saying in her evidence that there was another witness to the horse incident who was not spoken to by the employer. However, it appears that Ms Setters has only remembered that other individual in preparing her evidence for the Authority's investigation and that that information was not made available to Westbury Stud when it did its disciplinary investigation. Mr Hayter complains that that witness (whoever it was) was not spoken to, but if the employer did not know that that witness was present, it is unreasonable to expect it to have spoken to that person. Even now, Ms Setters cannot remember who the person was and is clear she did not tell the employer at the time because she had forgotten about it.

[31] Perhaps more importantly, Mr Hayter did not refer to it in his comments to the employer during the disciplinary meeting. He was there and he could easily have referred the employer to that person if he had chosen to but, like Ms Setters, he did not remember that other witness at the time. Of course, it is conceivable that Ms Setters' recollection of that additional witness is mistaken, but in any event the short point is that nobody drew the existence of that other witness to Westbury Stud's attention, at the time, and so the Authority's obligation is to evaluate what Westbury Stud did with the information that was made available to it and which it might reasonably be expected to have knowledge of.

[32] On that basis then, the Authority is satisfied that Westbury Stud did conduct a proper investigation at least to the stage of having formed allegations that it could put appropriately to Mr Hayter.

Were Mr Hayter's responses properly evaluated?

[33] The evidence for Mr Hayter was that he was not, to put it loosely, given a fair go, and in effect should have had his explanations accepted.

[34] But Mr Hayter had his opportunity to put his case at the 28 June 2012 disciplinary meeting and he really failed to take that appropriate opportunity. By all accounts, the disciplinary meeting was extraordinarily short (comparing it with the usual run of disciplinary meetings that the Authority is required to consider) and it seems that Mr Hayter's responses to the allegations in the disciplinary letter, which of course were put to him again verbally at the meeting, were so short as to be almost

staccato. The meeting started at 10am and the exchanges between the employer and Mr Hayter concluded at 10.30am. Westbury Stud gave evidence to the Authority that it thought the exchanges between itself and Mr Hayter strictly on his responses to the allegations took less than 20 minutes.

[35] The essence of what Mr Hayter appears to have said at the disciplinary meeting was to flatly deny drug use or drug cultivation, to suggest a conspiracy between Ms Tate and Ms Setters to set him up, to make an allegation against Ms Setters (which he had never made to Westbury Stud before) and then to seek to minimise the words used against Mr Wilson during the 20 June 2012 incident.

[36] Turning to the drug issue first, Mr Hayter's defence of the allegation was simply to deny impropriety, deny the content of Ms Tate's written statement but provide nothing further to add verisimilitude other than to make a sweeping allegation against Ms Tate which he had never made before.

[37] On the horse incident, Mr Hayter's very brief explanation to the employer was that he had spoken to Mr Wilson but that what he said amounted to common abuse rather than any intimidation. He specifically rejected the contention that he had used language that could possibly be considered intimidatory.

[38] Mr Hayter made no apology for what he said, gave no explanation about what he told the Authority was the position, namely that he had been kicked in the face by the horse and reacted to Mr Wilson on a "spur of the moment" basis, nor did he offer to, for instance, put things right with Mr Wilson by withdrawing and apologising or any of the things that an astute person might have contemplated when they realised they were in jeopardy. Mr Hayter's whole response was to deny all of the employer's allegations and say they were baseless and in effect invite Westbury Stud to agree with him.

[39] In any event, in the Authority's opinion, Mr Hayter really gave Westbury Stud nothing to consider other than his bare denial of the allegations. In those circumstances, all Westbury Stud could be expected to do was to form a view about which version of events was to be preferred and make its determination on that basis. There was nothing that Mr Hayter said that indicated remorse, nothing that indicated that he had been injured by the horse (although he maintained that was the position to the Authority) and nothing to further explain the context in which the remarks were

allegedly made. He simply denied saying what Mr Wilson and Ms Setters said he said and maintained that he said something else.

[40] The position was much the same with the drug use allegation where his response was simply a flat denial of either drug use or drug supply although that allegation at least was able to be dealt with on the sort of black and white basis that Mr Hayter seemed to favour. This was because he readily agreed to a drug test which was attended to that day and the result which was eventually provided back to him was negative. That meant that the employer quite properly could no longer rely on the drug use allegations and it promptly withdrew those allegations.

[41] Mr Hayter seems to have believed that the drug allegations were the serious ones and that the allegations about the horse incident were not of any particular significance. It follows that in his mind, the withdrawal of the drug allegations meant that he was "*in the clear*" and once he was told that the drug test was negative, he assumed that the employer would conclude that the intimidatory language issue was not worth worrying about.

[42] But as the Authority has been at pains to emphasise, none of Mr Hayter's responses to Westbury Stud's allegations were in any sense fulsome and the Authority is absolutely satisfied that Westbury Stud properly considered what Mr Hayter told it. It is particularly important to point up the fact that Mr Hayter's explanation to the Authority about the horse incident was not the explanation that he gave to the disciplinary meeting. In particular, he did not tell the disciplinary meeting that he had been kicked in the face by the horse. Had he told the employer that, it is likely that the employer would have had more sympathy for his outburst and also that the Authority would have been more likely to be persuaded that he was entitled to the benefit of the doubt. But given that Mr Hayter did not tell the disciplinary meeting that, it is hard to see how he can expect Westbury Stud to take it into account.

[43] Nobody else saw him kicked by the horse, nobody who was present saw him with blood on his face or with any other physical manifestations of being kicked in the head as he claimed to the Authority. He made no claim about the incident, as he was required to do in his employment agreement provisions, and so there was no health and safety response which would have backed up his story.

[44] In all the circumstances, the Authority is satisfied that Westbury Stud properly evaluated the responses it got from Mr Hayter.

Was the disciplinary process itself appropriate?

[45] During the course of the investigation meeting, the Authority raised the question of whether it was appropriate for Westbury Stud to have just one meeting with Mr Hayter, do the drug testing and get the result of that, then deliberate on the balance of the outstanding matters, make a decision to dismiss and indicate to Mr Hayter that he was dismissed.

[46] The Authority advanced the view to the investigation meeting that the proper course would have been for Westbury Stud to reach a provisional conclusion as to the outcome and then give Mr Hayter another opportunity to meet with it to engage with the employer about penalty. It is common ground that that second meeting never took place.

[47] Westbury Stud maintained in its evidence to the Authority that it had instructed its advocate to negotiate with Mr Coyle, who then represented Mr Hayter, with a view to seeing whether matters could be resolved by agreement and the Authority is satisfied that that was the factual position. Furthermore, and most importantly, the evidence is that Westbury Stud offered Mr Coyle a further meeting to discuss the provisional conclusion in respect of penalty, once those settlement negotiations collapsed, and Mr Coyle refused that second meeting.

[48] On that basis then, the Authority is satisfied that it was not the employer's decision to bypass best practice and was a considered decision of Mr Hayter's advocate at the time, apparently based on cost.

[49] A second issue, raised forcefully by Mr Hayter's advocate, is the contention that, because two of the employee statements relied on by the employer were actually drafted by the employer, Westbury Stud has predetermined the matter. Indeed, Mr Hayter's advocate alleges that Westbury Stud's Craig Baker " *wrote what he wanted to write..*" and that, having done that, had that version of events firmly fixed in his mind when it came to review the evidence.

[50] Certainly the Authority thinks the practice of the employer preparing evidential material for witnesses on which it later relies, is not a good practice and

Westbury Stud would be well advised to adopt an alternative approach in future. The practice raises the very allegation that is confronted here.

[51] However, the Authority is not persuaded that Westbury Stud have predetermined the matter or indeed, that Westbury Stud wrote what it wanted to write. The evidence is clear that Mr Baker spoke to each of the staff members concerned, established what they had to say, and then prepared their statements accordingly. What the witness available to the Authority said on oath was consistent with her earlier statement.

[52] Moreover, the Authority does not share Mr Austin's distaste for the evidence of Mr Baker. The Authority's view is that Mr Baker was open and transparent in giving his evidence and that the testimony he gave of his initial enquiries (before the statements were drafted) can be relied upon.

[53] Mr Austin also seeks to have the Authority reject Mr Baker's assessment of the nature of the remarks made by Mr Hayter. The employer is entitled to, and indeed must come to a judgement of what was actually said. That judgement must be evidence based. The Authority is satisfied a good and fair employer could conclude that Mr Hayter's observations were threatening rather than just abusive. Faced with two eye witnesses saying one thing (one of whom was a member of the management team) and Mr Hayter maintaining something else, it requires no leap of faith to prefer the view of matters where the weight of evidence lies.

[54] Moreover, Mr Austin's analysis rather overlooks Mr Hayter's less than convincing performance at the disciplinary meeting where he effectively just denied he used the words complained of and did not, until the Authority's investigation meeting, make the claim that his words were a spur of the moment thing activated by a blow to his head from the horse. Had Mr Hayter made that claim to the employer at the disciplinary meeting, there might at least have been some explanation on offer about why he made the outburst at all. In the absence of any possible mitigation, it is not difficult to see how Westbury Stud reached the decision it did.

[55] Mr Austin also maintains that there is an absence of any "*genuine*" evidence from Nathan Wilson that he felt threatened by Mr Hayter. But that cannot be right. Westbury Stud conducted enquiries. Mr Baker spoke to Mr Wilson. So did Mr Warwick. Mr Wilson told Mr Baker and Mr Warwick separately that he was

frightened and wanted something done about it. Mr Baker and Mr Warwick both gave that evidence on oath. The Authority accepts that evidence at face value. What is more, that evidence is consistent with the evidence of Ms Setters, who also spoke to Mr Wilson. While the Authority accepts that Mr Wilson was not available to the Authority, he apparently having left the jurisdiction, Mr Wilson was available to the employer and the evidence of the employer, supported by the evidence of Ms Setters is sufficient.

[56] That being the position, the Authority is satisfied that the disciplinary process adopted by Westbury Stud was appropriate for the particular circumstances of the case.

Was the decision to dismiss a fair one?

[57] Mr Hayter alleges that he should have been given a warning and not dismissed. As the Authority has already noted, Mr Hayter thought that the major allegation was the one around drug use and when the drug test came back negative and the employer quite properly dropped the drug allegations, he thought he would not lose his position.

[58] But that conclusion rather minimises the issue of 20 June 2012 because if Westbury Stud found (as it did) that Mr Hayter had threatened Mr Wilson as distinct from simply abusing him, then it was inevitable that the employer would consider all sanctions including the most significant sanction of dismissal.

[59] Mr Austin, for Mr Hayter, argues that the law requires an intention to inflict harm for a finding to be made of an intimidatory threat. But that is not the law. Whether there was such an intention or not is an element to be considered but it is not definitive. The issue, in simple terms is whether a threat was made or not. Westbury Stud concluded that a threat had been made rather than mere abuse or workplace banter.

[60] Mr Austin also complains that Mr Baker attended the disciplinary meeting with his mind made up. This is because Mr Baker said in his oral evidence that the words attributed to Mr Hayter were a threat “ *in any context..*” But the Authority is satisfied that Mr Baker was simply reflecting the plain words allegedly spoken by Mr

Hayter, not closing his mind to the possibility that Mr Hayter actually said something else. Mr Baker made the complained about comment in the context of responding to a question from Mr Austin about considering Mr Hayter's comments in the context of what happened and Mr Baker's response was that whatever the context was, the words complained about were a threat. The Authority does not take that response to mean that Mr Baker was closed to the possibility that Mr Hayter may have said something else, only that if that is what he said, then irrespective of context, the words were a threat. Moreover, the evidence is that Mr Baker had no power to dismiss without Mr Warwick who attended the disciplinary meeting, had previously spoken to Mr Wilson and formed the view that Mr Wilson was genuinely frightened.

[61] Although it played no part in this dismissal, or indeed in the consideration of penalties, it is a fact that Mr Hayter was already in receipt of a verbal warning for lateness issued on 21 February 2012. The explicit effect of that warning was that it would remain in force for six months from the date of the letter confirming it. On that basis, the earlier verbal warning could have been brought into the mix in the employer's determination of the issues, but it was not.

[62] That aside, Mr Hayter maintains that in the particular circumstances of the case, a decision to dismiss him now exclusively for the events of 20 June 2012, was an over-reaction on the part of the employer. But the employer is entitled to look to its quite extensive documentation around disciplinary expectations which, as the Authority has already noted, is part of the written and executed employment agreement between the parties.

[63] The code of conduct has a specific section relating to harassment which is defined so as to include all forms of harassment in the workplace and the house rules identify harassment of other employees as one of the actions constituting serious misconduct for which a penalty may be dismissal. So it follows that a finding that Mr Hayter had threatened Mr Wilson would equate to serious misconduct which could lead to summary dismissal.

[64] The letter of dismissal dated 12 July 2012 is again carefully written noting first the history of the matter and then setting out the basis on which the company has concluded that Mr Hayter was guilty of serious misconduct and therefore able to be summarily dismissed.

[65] Given the nature of the contractual provisions referring to the particular offending of which Mr Hayter was found guilty, it is apparent to the Authority that it was available to Westbury Stud to make the decision it did to dismiss Mr Hayter from its service.

Determination

[66] For reasons set out in the preceding sections of this determination, the Authority is satisfied that Mr Hayter has not been able to demonstrate that he has a personal grievance for unjustified dismissal and as a consequence his claim fails in its entirety.

Costs

[67] Costs are reserved.

James Crichton
Member of the Employment Relations Authority