

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 6  
3148301

BETWEEN

DENNIS MAGILL  
Applicant

AND

SLT COMPANY LIMITED  
Respondent

Member of Authority: Michael Loftus

Representatives: Robert Morgan, advocate for the Applicant  
Sarah Wadworth, counsel for the Respondent

Investigation Meeting: 6 October 2022 at Blenheim with further information up  
to and including 11 October 2022

Submissions Received: At the investigation meeting

Date of Determination: 11 January 2023

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] The applicant, Dennis Magill, claims he was unjustifiably dismissed by the respondent, SLT Company Limited (SLT), on 19 March 2021.

[2] SLT accepts it dismissed Mr Magill but is of the view it can justify its decision given serious misconduct on his part.

**Background**

[3] Mr Magill was employed by SLT, a vineyard services provider, as an operator in August 2018. While he could be engaged on any of the vineyards to which SLT provided

services he spent the bulk of his time, between 80 and 90 percent, working on a single property near Grovetown (ONL).

[4] With a couple of exceptions the employment appears to have progressed well until the events which led to the dismissal. In saying this there is evidence of a warning for a totally unrelated incident some months before the dismissal and indications Mr Magill had difficulties relating to some of his colleagues though in this regard there was nothing that warranted censure.

[5] On 18 March 2021 Mr Magill was, along with a female colleague, assigned to remove netting from vines in preparation for harvesting. The vines had been double netted and both Mr Magill and the colleague state the nets had been badly applied. This led to difficulties when trying to remove the nets and both say they became extremely frustrated. It was Mr Magill's level of frustration that ultimately led to his dismissal.

[6] He was driving a tractor but the difficulties with the netting required he frequently stop and assist his colleague. It is alleged his level of agitation increased and that he was frequently uttering obscenities and racial slurs directed at those who had placed the netting. It is also alleged he added homophobic comments about a relative of the colleague and other slurs about various supervisors and managers.

[7] By around 10 am the colleague was becoming increasingly concerned about Mr Magill's behaviour and with it, her safety. She says she told Mr Magill that he had crossed a line and his outbursts were scaring her. She says she concluded the situation was such she could no longer work with Mr Magill and she left.

[8] Mr Magill denies the colleague criticised his behaviour and says they discussed the job, the fact it could not be completed and that as a result she would go and work elsewhere. He says they parted on good terms. The colleague denies any such conversation occurred but accepts Mr McGill may not have heard her admonition given machinery noise.

[9] Having departed the workplace she telephoned her brother-in-law who was also SLT's Operations Manager. She says she told him she had left the site and would never work with Mr Magill again. The Operations Manager then telephoned Logie Mackenzie, a viticulturalist employed by a related company, Berakah Vineyard Management (BVM). Notwithstanding the fact Mr Mackenzie was employed by another company the parties agree he was, to all intents

and purposes, Mr Magill's immediate supervisor. The Operations Manager advised Mr Mackenzie there had been an incident before giving an outline of events as he understood them.

[10] Mr Mackenzie then phoned the departed worker and arranged to meet her shortly thereafter to discuss what had occurred. Mr Mackenzie says that upon meeting, she burst into tears and advised she did not want to return to ONL's premises. Mr Mackenzie says the worker said Mr Magill's behaviour had been "triggering" for her as he had made racist comments about others within the workplace before she described his other behaviours. Mr Mackenzie advised the worker to go home and take the remainder of the day off.

[11] During the meeting the worker advised Mr Magill had spoken to one of ONL's employees who might have witnessed events. On that basis Mr Mackenzie phoned ONL's General Manager, Marcus Wickham. He advised there had been some "*sort of altercation*" involving two SLT employees and asked if he could approach one of ONL's employees who he understood might have some relevant information.

[12] Mr Wickham approved that approach and the resulting discussion was confirmed in a subsequent email with employee concerned confirming the amount of swearing was unnecessary and delivered with some anger. She said she was also made to feel very uncomfortable and added there had been derogatory comments about both the SLT employee who had just left and BMV management.

[13] Mr Wickham says the call to him occurred around midday and that it caused some concern and curiosity. As a result he started making some enquiries and discovered there had been at least two other incidents involving Mr Magill about which he had no knowledge, which that being attributable to a fear some held about Mr Magill. Mr Wickham says he was both concerned and disappointed by what he was hearing which led him to telephone Dan Campbell, SLT's General Manager, and advise he wanted Mr Magill removed from ONL's premises. Mr Campbell was, by then, already aware of the mornings' incident having been phoned by Mr Mackenzie.

[14] That call was followed by an email from Mr Wickham to Mr Campbell (copied to Mr Mackenzie) which the witnesses say largely reflects the telephone conversation. It opens by advising there had been an incident involving two of SLT's staff followed by a discussion between Mr Magill and one of ONL's employees. It advises the comments made to the ONL

employee had made her feel very uncomfortable and, as a result, she had also decided to leave the premises. Mr Wickham says that led him to wonder whether this was an isolated incident before going on to say *“It came as a surprise to me that there have been multiple incidents with Dennis and these have gone unreported until now.”*

[15] The email then outlines one particular incident before saying:

There are multiple other small ‘red flag’ type comments and incidents that have surfaced as part of my brief investigation with the few staff that are here at the moment. I won’t go into these in this email.

Given this information, I now have an immediate and real concern that Dennis may do something irrational which could hurt himself or others. In the interests of the safety of our staff on site here at ONL I would like to formally request that Dennis Magill is removed from this worksite until further notice.

[16] Following receipt of the email Mr Campbell made the first of two telephone calls to Mr Magill. He says that occurred around 1.30 and he advised Mr Magill of the allegations, that they were potentially serious and that SLT was going to investigate further. Mr Campbell says *“I was careful to ensure that Dennis understood the seriousness of the position he was in and took some time discussing these matters with Dennis.”*

[17] Mr Campbell closed the conversation by asking Mr Magill leave the workplace for the remainder of the day and says he advised Mr Magill would still be paid. Mr Magill says the first call was between 11.30 and 12 o’clock and all that occurred was that he was asked to attend a meeting the following day at a café in Blenheim. He says *“There were no details of what the meeting was about, just leave the property and attend the meeting the following day.”*

[18] Mr Magill says the second call occurred around 12.20 and was limited to Mr Campbell asking if he had left the workplace. He says he advised he was driving out as they were speaking.

[19] Mr Campbell says it was during the second call that he raised a potential meeting and that was in fact the purpose for the call. He says he advised the meeting was to seek Mr Magill’s responses to the allegations. He also says he advised Mr Magill was entitled to seek legal advice and bring a support person to the meeting. Mr Magill accepts legal advice and support at the meeting was raised but says that was during the first call. He says he replied he was happy for the meeting to proceed and did not wish to seek support at that time.

[20] Mr Campbell says that given Mr Magill's reply he advised he would send an email outlining the matters they had discussed and formally ask Mr Magill attend a disciplinary meeting. That email was sent at 4.30 and states:

**Request to attend formal meeting for potential serious misconduct**

We would like to hold a formal meeting with you to discuss the way you have been allegedly talking to our clients on site staff, our staff and disparaging comments you have made about the company.

Our proposed time and location for this meeting is ... Both Logie and I will be at this meeting.

We want to hear your views in relation to this matter and give you an opportunity to respond. In the meeting you will be able to give us any additional or clarifying information that you believe is relevant.

Please be aware that this is a formal meeting which may result in disciplinary action being taken.

Disciplinary action can range from a reprimand to formal warning or dismissal. You are invited to bring a support person or representation with you if you wish.

Please keep this matter confidential and do not discuss it with any other SLT employees.

If you have any questions about this matter, please contact me directly.

[21] The meeting occurred on 19 March 2021 as scheduled. It comprised three parts: an initial discussion of about 20 minutes, an adjournment of about five and then delivery of a decision.

[22] About the meeting Mr Magill, having accepted the possibility of his seeking assistance or representation was again raised and rejected on his part, says:

Dan told me that I had been using bad language, but did not expand on what the language was. He also told me that I had been saying bad things about SLT. Again I had no recollection. I did explain to Dan that I was trying to get the netting in and that the vines had been double netted, which was making it difficult. And that Kylie left me after a while so I was working on my own.

[23] Mr Magill says he accepted he was swearing and using obscenities but denied any racial slurs or homophobic comments. He says, having accepted he was swearing, he also "*pointed out that lots of people swear at work, especially when they are finding a task difficult or are becoming frustrated*". He denies making racist or homophobic comments and states that what he did say was directed at or about the netting and machinery as opposed to fellow staff as alleged.

[24] Mr Magill says that towards the end of the first session "*When I tried to voice my opinion, Dan said 'I've heard enough' and he ended the meeting*".

[25] Mr Magill also says that having been advised he was dismissed he left still not knowing what he had done wrong or who he was meant to have offended.

[26] Mr Campbell's evidence, almost totally supported by Mr Mackenzie who was also present, is that the meeting opened with advice that it could be adjourned if Mr Magill wished to seek assistance or representation. The parties agree that invitation was made and declined.

[27] Mr Campbell says he was operating to a checklist that he had been provided by an HR consultant to ensure that he followed due and proper process. He says he continued the meeting by reminding Mr Magill it was formal and that his responses would determine whether SLT needed to undertake further investigation and/or whether disciplinary action, up to and including dismissal, might be warranted. He says he produced two emails, one from Mr Wickham and one an exchange with the ONL employee Mr Mackenzie had spoken to on 18 March and which summarised that discussion. Mr Campbell says he then read aloud before offering the emails to Mr Magill though he does not recollect their being accepted. Mr Campbell says he also advised that if the content of those emails was correct, that would be of real concern.

[28] Mr Campbell says he then went on to outline the various allegations regarding the use of abusive and offensive language; the making of discriminatory comments about other team members; the making of disparaging comments about SLT/BMV and female co-workers.

[29] Mr Campbell says he then went on to outline that if these allegations had substance that would be considered a breach of various elements of the code of conduct.

[30] Mr Magill denies he was shown or read the emails, saying that while "*there were some lose (sic) pages at the meeting*" the only one he was referred to was a copy of the company handbook in which Mr Campbell had underlined various requirements which it was alleged Mr Magill had breached. Particular therein are prohibitions on inappropriate verbal conduct or harassment of a racial or ethnic nature. Mr Magill had acknowledged receipt of the handbook by signature on 27 August 2018.

[31] It is Mr Campbell's evidence the meeting was effectively truncated by virtue of the fact Mr Magill accepted and admitted all but one of the allegations put to him. The one not admitted was that homophobic comments had been made about a staff member but the evidence is that was not pursued with any vigour by SLT which concentrated on the racially abusive

comments. He says Mr Magill then went on to explain his actions by suggesting that someone was slagging him off and he felt he could not speak freely in the workplace. It is reported he commented: *“All workers let off steam, talk shit and 90 percent goes nowhere”*.

[32] Mr Campbell says he felt that towards the end of the meeting Mr Magill was trying to direct it into irrelevant areas by raising the conduct of others and he accepts he was of the view “enough’s enough” and may have gone so far as to have used the words alleged by Mr Magill but cannot be sure. Mr Campbell also asserts that at no stage did Mr Magill state he was either working alone or that his language was directed towards the machinery and not his co-workers. Mr Campbell adds that toward the end of the meeting Mr Magill accepted that he could be confrontational and his language offensive.

[33] As already said, the meeting was then adjourned while Mr Campbell collected his thoughts and bounced them off Mr Mackenzie. He says:

It was a difficult decision to determine what action should be taken at the conclusion of the investigation. Given that Dennis had accepted the allegations that had been made against him, however, I determined that no further investigation was necessary and the appropriate course was to terminate Dennis’s employment.

[34] Mr Campbell said he decided to terminate, as opposed to adopting a less severe option, for a number of reasons. These included a conclusion Mr Magill had failed to show any understanding of the impact his comments and language might have on others in the workplace along with a view that the workforces composition meant there was a high probability of conflict once word of the racist and homophobic comments spread (which it inevitably would). Also factored into the consideration was Mr Campbell’s view ONL’s refusal to have Mr Magill back meant SLT effectively had no job for him.

[35] Here comment should be made that Mr Campbell was challenged on this last point on the grounds that is not what Mr Wickham’s email said – instead it said the removal was until further notice. Mr Campbell’s response it that while the email might have said that the oral message conveyed by Mr Wickham had been far more conclusive – the removal was permanent. I accept that given Mr Wickham agreed that was what he had said.

[36] That decision to dismiss was verbally advised upon recommencement of the meeting and confirmed in an email sent later that day.

## Discussion

[37] As already said Mr Magill claims he was unjustifiably dismissed. SLT accepts it dismissed Mr Magill and therefore accepts it is required to justify its actions.

[38] Section 103A of the Act states the question of whether a dismissal is justifiable:

*... must be determined, on an objective basis, [by considering] 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 ... occurred.*

[39] In determining this, the Act requires I consider, having regard to its resources, whether the employer conducted an adequate enquiry into its concerns. An adequate enquiry requires, as a bare minimum, that the employer put its concerns to the employee, allow an opportunity to reply and consider the response with an open mind.

[40] Traditionally and while issues of substance and process overlap and there is no such thing as a firm delineation, separation has often been used for analytical purposes especially as the requirements described in [39] above are enshrined in statute and have a procedural focus.<sup>1</sup>

[41] With respect to substance Mr Campbell concluded Mr Magill had transgressed as alleged and had not only sworn profusely but also made racist comments about other staff. Mr Campbell says he reached this conclusion on the grounds Mr Magill admitted those allegations.

[42] Mr Magill, while admitting to swearing rejects the claim he admitted the making racist comments or that any of his comments were directed at or about people instead being directed at the netting and machinery. On this I prefer the evidence offered on SLT's behalf and do so for the following reasons:

- (a) Mr Campbell's evidence was credible and his oral answers remained consistent with his brief. Mr Magill's was not as consistent being confused and uncertain at times.
- (b) Mr Campbell's evidence was consistent with, and supported by, that of the other witnesses particularly Mr MacKenzie whose oral evidence also remained consistent with his written brief and could not be disturbed by questioning.

---

<sup>1</sup> Employment Relations Act 2000 at ss 103A(3)(b) to (d)

- (c) While Mr Magill denied the allegations regarding abusive and racist comments about his co-workers that is not what his written witness statement says. It records *“I most likely have been cursing those who put the netting on and the way they had done it... And I am certain that I am not the first person in NZ who when frustrated at work, blames the colleague who did the original task for what they had done”*. In other words Mr Magill himself offers evidence that confirms acceptance of more of the allegations than are now being conceded and it follows he might well have done so closer to the time (ie: at the meeting) as stated by both Messrs Campbell and Mackenzie. Those admissions are also reflected in contemporaneous notes taken at the time of the meeting.
- (d) I also have a preference for Mr Campbell’s evidence of particular details such as the timing of events and the content of the two telephone discussions given it is more consistent with the contemporaneous documentary evidence than Mr Magill’s. It is also more consistent with that of the other witnesses.

[43] My preference for SLT’s evidence regarding the meeting means I accept Mr Magill conceded the transgressions as alleged. It follows I accept it was therefore open to Mr Campbell to conclude there was substance to the allegations as he did.

[44] Turning to process. I conclude the basic requirements of the Act have been complied with. While Mr Magill says he had no understanding of what the accusations were my preference for SLT’s evidence means I accept that was in fact explained and in this respect the email inviting Mr Magill to the meeting at least outlines the allegations though it is accepted it does not give chapter and verse of what was actually alleged to have been said. That said I do not consider that fatal for two reasons. They are:

- (a) Mr Magill was advised in the letter inviting him to the meeting to contact Mr Campbell should he have any queries. He chose not to.
- (b) My acceptance of SLT’s evidence about the meeting also means I accept the detail was provided at the meeting prior to Mr Magill’s admissions and again an opportunity to seek assistance as given and rejected.

[45] I also accept, as already discussed, that Mr Magill was given an opportunity to explain and while he says the opportunity was curtailed he accepts that was so. With respect to the allegation his response was curtailed I again note my acceptance of SLT’s evidence which was

that was because that came after Mr Magill's admissions and the comments being offered were not mitigation but instead unrelated accusations about the behaviour of others.

[46] That Mr Magill's responses were considered I also accept given the earlier discussion about his admissions along with Mr Campbell's evidence, supported by Mr Mackenzie, about how and why he reached the decision to dismiss and the fact the two discussed his rationale.

[47] Finally, I note the evidence suggests it is possible the way Mr Magill was asked to leave ONL's premises on 18 March might have given rise to a claim of unjustified disadvantage (suspension). This, however, will be taken no further given it was neither claimed nor pursued.

### **Conclusion**

[48] For the above reasons I conclude the decision to dismiss was one a fair and reasonable employer could have reached in the circumstances and Mr Magill's claim therefore fails.

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed SLT may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date Mr Magill will have 14 days to lodge any reply memorandum.<sup>2</sup>

**Michael Loftus**  
**Member of the Employment Relations Authority**

---

<sup>2</sup> [www.era.govt.nz/assets/Uploads/practice-note-2.pdf](http://www.era.govt.nz/assets/Uploads/practice-note-2.pdf)