

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Waikato District Council
AND Dion Gough
REPRESENTATIVES Julie Hardaker for Applicant
Alex Hope for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 6, 9 & 14 June 2006
DATE OF DETERMINATION 3 July 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant, Waikato District Council (WDC) seeks a determination that, an instruction given to Dion Gough (Wainui Reserve Farm Manager) to relocate his dogs away from the Council owned Reserve and farm, is a lawful instruction.

The respondent submits the instruction is not a lawful and reasonable order as it is:

- Not within the scope of Dion's obligations under his employment agreement (IEA) and;
- Even if it is within the scope of Dion's obligations under his IEA it is unreasonable in that less drastic steps are available to the WDC to address its concerns.

Background

The parties have submitted an agreed statement of facts (paraphrased below).

Mr Gough was employed by WDC as the Manager of the Wainui Reserve in Raglan in October 2001. He was employed under a written IEA signed by him on 11 October 2001. The job description pertaining to the position is dated 6 August 2001.

Mr Gough is required pursuant to Clause 8.1 of the IEA to live in the house (sited at the Reserve) at 316 Wainui Rd, Raglan. Mr Gough lives there with his partner and two children. There is no written tenancy agreement.

There is nothing in the IEA preventing Mr Gough from keeping dogs at his premises and in the past he has bred rottweiler dogs on the premises at 316 Wainui Rd, with the knowledge and, therefore, the implied consent of his then Manager Gary Allis.

After an incident involving one of Mr Gough's dogs on the premises of 316 Wainui Rd, Gary Allis approved signs being erected around the premises warning that guard dogs were on the premises. The height of the fences around the perimeter of the house section was increased and locks installed on the gates.

The property at 316 Wainui Rd consists of the house and outbuildings which are bound by a fence. An adjacent paddock also bound by a fence contains dog kennels (which were present before the respondent moved to the property). (In this determination this area is referred to as "the compound").

The respondent currently keeps three dogs. One is a dog neo mastiff named Viking. There is a bitch neo mastiff named Monster. The third dog is a rottweiler bitch named Smash.

On 13 February 2006 WDC received a complaint relating to the dog Viking which had pushed through the fence around the compound.

Mr Gough has requested that contractors visiting the Reserve notify him of their presence and produce a health and safety plan.

The incident was investigated by WDC Animal Control Manager, Noel Barber. He completed a report on the incident.

On 17 March 2006, Gavin Ion, Chief Executive WDC wrote to Mr Gough asking for a meeting with him on 24 March. That meeting took place on 27 March. There was another meeting on 4 April.

On 5 April 2006, Richard Bax (Community Assets Group Manager WDC), Megan Payne (HR Manager WDC) and Noel Barber visited the premises at 316 Wainui Rd and inspected the fencing.

On 7 April 2006 Gavin Ion issued a direction to the respondent, Dion Gough as follows:

"We therefore require you to relocate the dogs away from the Council owned farm and Reserve by Friday 21 April 2006".

On 10 April 2006 Mr Gough advised WDC (Megan Payne) that he would not be complying with the instruction.

Mr Gough subsequently attended mediation with the representatives of WDC on 20 April and 5 May 2006.

The dogs presently remain at Mr Gough's premises at 316 Wainui Rd.

The Evidence

Wainui Farm Reserve

Mr Gough's position description describes the Wainui Reserve as follows:

The Wainui Reserve is located at Raglan. It is a property of 300 acres that is open to the public, provides access to Ngaranui surf beach and is one of the most important Waikato District Council reserves. It has been described as a "jewel" on the west coast. While part

of the reserve is maintained for public use approximately 180 acres are operated as a dry stock beef farm.

IEA and Job Description

The preamble to the IEA records the agreement of the parties that the IEA will be administered “*in accordance with the true intent of its terms and provisions and will give to each other the fullest co-operation to maintain harmonious industrial relations*”.

Clause 4 (Hours of Work) sets a range of ordinary hours that are wide in their scope being a minimum of 40 hours worked between 7 am - 8pm, Monday to Sunday inclusive, with the worker warranting his willingness to work extended hours to meet the seasonal requirements of Council. Mr Gough is required to work at weekends for stock and urgent work and on a rostered basis for toilet cleaning and reserve maintenance.

As noted, Mr Gough is required to live on the Reserve in a house provided by the Council (Cl.8.1). There is no written tenancy agreement. The value of the accommodation is set at \$150 per week and taxation on this value is deducted from the respondent’s remuneration. The Council also provides Mr Gough with a vehicle, a fax and cell phone and makes a contribution to the cost of the home telephone.

Non-taxable allowances are provided being dog registration for up to two dogs and a dog allowance of \$250 per annum (Cl 6.2 (a) & (b)).

Clause 19 of the IEA contains a provision relating to health and safety. The parties’ attention is drawn to the provisions of the Health and Safety in Employment Act 1992. (Cl. 19). In accordance with the Act all employees shall report to the employer all personal work related injuries and accidents within 24 hours of their occurrence. All safety equipment must be used and all health and safety policies and procedures must be adhered to at all times.

Mr Gough’s position description encompasses two key areas of work. Mr Gough is to carry out the “*farming operations efficiently, maintain productivity and ensure the farm is well presented*”. Mr Gough is also required to “*undertake the reserve maintenance, operation and minor development to enhance the enjoyment of the public while ensuring the environment is protected*”.

The evidence discloses that Mr Gough divides his work between these two key areas on a 50:50 basis.

The Reserve and farm are open to the public.

The position description describes a number of key relationships. In addition to the relationship between Mr Gough and the Group Manager Community Assets & Services and the Reserves Overseer, Mr Gough’s position description describes relations with the Wainui Reserve Committee and Whaingaroa Harbour Care as being key internal relationships. Key external relationships include relationships with ratepayers and the public.

Wainui Reserve Management Committee

Management of the farm/reserve is given to the Wainui Reserve Management Committee which is established under Schedule 7, Cl. 31 of the Local Government Act 2002. Included among the Objectives of the Committee are objectives to:

- To implement the Wainui Reserve Management Plan.
- Encourage involvement of the community and special interest groups in the development and use of the reserve.
- To monitor use of the reserve.
- To maintain the reserve at a standard generally acceptable to Council.

The Duties and Powers of the Committee includes the requirement to “*manage, maintain and develop the Wainui Reserve in accordance with [the Committee’s] objectives*” and, among other things, the Committee is empowered “*to do such other lawful acts that are incidental to or conducive to the objectives of the committee*”.

The Reserve Committee is made up of a Ward Councillor and 5-8 members being community volunteers appointed by the Council for 3 years terms together with a Tangata Whenua representative. The Committee elects a chairperson and other executive officers from within its ranks. As I understand the evidence the Committee has further divided into three subcommittees which take responsibility for the farm, property and the environment. These subcommittees assume responsibility for the day-to-day management and development of the Reserve and farm.

Whaingaroa Harbour Care Society Inc

The Whaingaroa Harbour Care Society Inc is an incorporated society formed to improve the quality of the water entering the harbour by replanting coastal and stream margins. The nursery is responsible for growing native plants, planting out in the catchments and regeneration on the Wainui Reserve and in other areas. Over 100,000 plants have been planted. The Society is supported by Environment Waikato and receives grants from the Waikato District Council and the Regional Council. The Society has 5 full time staff. The Society’s nursery is situated on the Reserve a short distance from, and visible from, the house at 316 Wainui Rd. The only access to the northern end of the Reserve is up the road/driveway to the house. It is used regularly by the public and the nursery uses this access to carry out its work.

The Society also conducts tours of its nursery and educational programmes including plantings. Up to 700 children visit the nursery per annum and take part in educational programmes and plantings. Other groups visiting the Reserve because of their special interest in the Harbour Care project include scientific groups, farmer groups and the media. The project has become a national model for improving the quality of waterways and harbours.

The Public

The public make extensive use of the Reserve. The Reserve incorporates the main swimming/surfing beaches in the area and attracts the public for these and other beach related activities. The Reserve is also used by hang gliders, para ponters, kite flyers, model aeroplane enthusiasts, walkers, tourists and sightseers¹. Events are held on the Reserve. Evidence was given that it is planned to encourage greater use of the Reserve and plans are in place to build more walkways including walkways which will pass close to the house property at 316 Wainui Rd.

The Dogs

Mr Gough has always owned big dogs and he has and continues to breed these dogs. As I understand the evidence, Mr Gough has traditionally favoured rottweilers. More recently he has

¹ There are stunning views of the harbour coastline from the Reserve.

favoured neo mastiffs. At this time he has two neo mastiffs – one is a two-year-old male, the other a younger female. Mr Gough plans to mate these dogs in the future. Mr Gough also has a female rottweiler. The dogs are well cared for.

Both Mr Gough and his partner Ms Rowe assert the dogs belong to the family. The evidence shows they are loved family pets and they are also valued by the family for their guarding abilities.

The New Zealand Kennel Club describes these dogs as follows:

- **Neo Mastiff:** The neo mastiff is an extra large dog weighing in at 50 – 70 kg (bitches somewhat less). It originated in Italy as a guard, military and fighting dog. It is no longer bred as a fighting dog. It is gentle and kind to those it knows but wary of strangers and will ruthlessly guard its house and family. Its temperament is described as devoted and loyal guard of owner and property.
- **Rottweiler:** The rottweiler is a large dog. It is described as a very territorial, imposing dog breed and is ideal for protection. It is headstrong and stubborn and requires a strong leader and firm training.

The evidence also reveals (Minutes of the meeting between Council staff and Mr Gough on 27 March 2006) that the male neo is approximately 80kgs. Mr Gough has only had it for a short time and when he took it on he knew it had behavioural problems (aggressive to other dogs). Mr Gough told Council staff at the meeting that the other two dogs take a lead from the male neo. He advised Council these dogs get more aggressive and territorial from two years of age.

Incidents Involving the Dogs

There have been a number of incidents over the last 4 – 5 years that have involved Dion Gough's dogs rushing endangering and attacking members of the public, council staff, Committee members and others in key relationships.

- Some two to three years ago Bill Kennedy, Chairman of the Reserve Committee, called at the house at 316 Wainui Rd to speak to Mr Gough on Reserve business – he wanted to tell Dion the place was looking good. He was attacked and bitten by a female rottweiler. A younger rottweiler joined the fray. He rang Gary Allis (the then Community Assets Group Manager) to complain about the incident. Mr Allis responded by asking Mr Kennedy why he had gone there. Mr Kennedy replied that he felt he should be able to go to the house to speak with Mr Gough. Mr Gough rang him the next day he was very angry that he (Mr Kennedy) had gone to the house without telephoning first. Mr Kennedy did acknowledge in his evidence that he had been told previously by Mr Gough not to enter the house property when he was not present. He said his complaint to Gary Allis was as far as the matter went.

Mr Kennedy described himself as an experienced farmer. He has had his own dogs for years both farm dogs and pets. He has owned rottweilers. He gave evidence that anyone can come to his house and “they won't be chewed”. This is not the case at Mr Gough's home. It does not have the appearance of a normal home and it is not a normal home - the dogs are “guarding a compound”.

Mr Kennedy noted this was his personal opinion and stated the Reserve Committee has not taken a formal position on the matter of Mr Gough's dogs and their conduct/management.

- Alan Hall is a member of the Reserve Committee who has served on the subcommittees including the farm subcommittee. He too is an experienced farmer and an employer of farm managers. He described visiting the house on farm business when Mr Gough was there. At the time he had rottweilers and they were friendly when Mr Gough was present. Mr Hall described himself as having a blasé attitude to the dogs given his observations of the dogs when Mr Gough was present. One day – seeing Mr Gough’s ute at the house - he went to the house to speak to him on Reserve business. Mr Gough’s older rottweiler, Ocean, did not hear him at first but woke when he knocked on the door. It bailed him up in the back porch. Dion rushed out of the house and was upset he’d gone to the house. He said, “don’t come to the house unless you call”. Mr Hall said that if Mr Gough had not been there he would have had trouble getting back to his vehicle. He accepted Mr Gough may have told him previously not to come to the house unless he was there.

It was Mr Hall’s evidence that after that he was much more cautious and it made liaising with Mr Gough and undertaking casual farm inspections more difficult. He could meet with Mr Gough only by appointment. Mr Hall contrasted this with his own experience of dealing with his farm managers. He provides accommodation for his managers and calls at the manager’s house a couple of times per week to discuss farm business.

Mr Hall said he is now spokesperson for the housing subcommittee. He said the dogs are always aggressive – they are more so now and are bigger. They jump and leap at the fences. He said Mr Gough has them for guarding purposes and they are an unnecessary risk on the Reserve.

- There is a Council Incident Report on file that a Task Force Green employee (Steven Llyod) was bitten by the guard dog ‘Ocean’ when he went onto the house property on 8 January 2003.
- On 16 February 2004 a group of 25 school children visited the Reserve to take part in planting activities in association with Harbour Care. The children were accompanied by teachers and Harbour Care staff and were proceeding across the Reserve (in the vicinity of the house property) to the planting site. Mr Litchwark, Manager of the Nursery, was driving ahead with the plants and tools. A rottweiler jumped the fence and ran towards the children in an aggressive attack mode. The adults ordered the children to sit in a group and put themselves between the dog and the children. The children were frightened and some were screaming. Mr Litchwark took a fence post and chased the dog back to the house. Mr Litchwark described the incident as lasting 5-10 minutes during which the dog was attempting to round up the children.

Mr Litchwark laid a formal complaint with WDC about the incident and about other issues relating to Mr Gough’s management of the reserve. He described the relationship between Harbour Care and Mr Gough as “unworkable”.

In his evidence Mr Litchwark described the dogs as aggressive and intimidating. He has been asked by visitors if the house is a gang headquarters. Visitors are frightened by the presence of the dogs especially the children.

He said he is annoyed the Council has not dealt with his complaints about the dogs and noted that after the ‘school children incident’ the Council’s response was to raise the height of the house fence and put up “Beware of the Dog” signs. He said the place has the appearance of a fortress, which is the wrong message to send the public. They might be pets and they might be under the control of Dion Gough when he is there but they frighten

people and on two occasions dogs have got out and endangered the public. He is also aware of the other incidents where the dogs have bailed up and bitten committee members and WDC staff. His evidence was that the presence of the dogs interferes with work the Society and Nursery does.

- On 17 February 2004 two Task Force Green workers were working inside the house boundary on a fence. One of the workers was bitten by a rottweiler. Mr Gough had left the property and two rottweiler dogs were free on the property at that time. At the time the Council investigated the matter. Mr Gough was issued with infringement notices for keeping unregistered dogs (3) and for failure to keep a dog under control (1). Mr Gough. The incident was also investigated as a disciplinary matter and resulted in Mr Gough being issued with a final written warning (12 months) for serious misconduct. The warning was stated in the following terms:

“Behaving in a way or engaging in a work practice that jeopardises the safety of another employee or non employee while an employee of the Waikato District Council.

By leaving your dog off the chain and leaving the property whilst Rick and Taitai were working on the fence you jeopardised their safety which resulted in an incident with your dog assaulting Tai”.

At the same time Mr Gough was counselled that if there were any further incidents the dogs would have to go.

Mr Gough and one of his witnesses now challenge the fact that the incident occurred referring to it as a malicious complaint. It is not however in dispute that Mr Gough did not challenge the infringement notices or the employment warning at the time.

- On 13 February 2006 there was another incident, which resulted in a formal complaint to WDC dated 15 February. This incident involved a TV crew of four who came to the Reserve to film a documentary about the Whaingaroa Harbour Care nursery and its work. The film director, Te Hira Henderson, gave evidence that he took a great deal of care to select a place to interview Mr Litchwark, Nursery Manager. The place chosen was on the Reserve². It gave panoramic views of the nursery, the Reserve, the plantings and Raglan Harbour. The sun was on the right side and the spot chosen for the interview was out of the wind. When they arrived at the film spot the dogs appeared at the compound fence barking and jumping at the fence. One dog (it was the male neo mastiff, Viking) pushed his way through the fence and ran barking and snarling towards the film crew. One of the other dogs was trying to jump the fence and got to the top of the fence but fell back on the house side. It then tried to ram its way through the fence. The dogs were in aggressive attack mode. Mr Henderson called “cut” and the crew together with Mr Litchwark made for their vehicle as fast as they possibly could. The camerawoman was scared and was trying to get to the safety of their vehicle whilst carrying 60lbs of camera gear and leads. She was agitated and upset. When they got to their vehicle they drove off and did the interview elsewhere. As a result they did not get a shot of the nursery itself.

Mr Henderson was subsequently interviewed by WDC’s Animal Control Officer (Noel Barbour). He said he told the officer that if he had had a gun he would have shot the dog. It was definitely coming at them in aggressive, attack mode. He believes that if they had not cut and run one of them would have gotten mauled.

² The place chosen was in the proximity of the farmhouse at 316 Wainui Rd.

Noel Barber investigated the complaint. He came to the conclusion there had been a “rushing incident” within the meaning of s.57A of the Dog Control Act 1996. He gave evidence that he could deal with this one dog under the Dog Control Act but he was concerned there are other dogs on the property. He knows what has happened in the past and has seen the reaction of the dogs when he has been at the property.

For this reason he referred his report to WDC management because the land is owned by Council, the public use the land and Dion Gough is a council employee.

Positions of the Parties

The Applicant

The applicant Council’s position is succinctly summarised in paragraph 14 of the evidence of Gavin Ion, CEO of WDC.

“ The instruction from Council to re-house the dogs is within the scope of the employment relationship and is a reasonable instruction to give to Dion. The Reserve and farm including the house, are owned by the Council and form part of the workplace. Council has a right to manage its business. The presence of the dogs affects the employment relationship. Dion has relationship obligations to key stakeholders under his job description. Those relationships, and the day to day operation of the stake holder’s business and objectives, is being detrimentally affected by him having the dogs. Council’s legislative obligation’s to the wider community is being affected by its employee’s behaviour. The instruction is reasonable because of the history and number of incidents that have occurred. Any one of the dogs create a situation that has caused harm to people or has the potential to cause harm and Council must ensure that anyone that comes onto the Reserve, including into the house section, is safe from the risk of harm from the dogs. It is reasonable for Council to refuse to allow more of a fortress to be created around the house on the Reserve. Council is responsible for the creation and implementation of the dog control bylaws and so has to lead by example. Permitting the dogs to continue to remain on the Reserve is counter to the very policies the Council is promoting to the public. This is not a usual farm situation; we are dealing here with a public reserve use by thousands of people a year and one where there are groups of school children on the Reserve regularly. Having considered the options, there is no other way to remove that risk except to have dogs re- housed away from the Reserve”

Extensive legal submissions were provided to support the Council’s position.

The Respondent

It is submitted by and on behalf of the respondent, Mr Gough, that he always kept dogs at the premises at 316 Wainui Rd. Prior to having the neo mastiffs he had rottweilers. He is changing to neo mastiffs because they are quieter and more docile. He does, however, have one rottweiler.

Mr Gough has also bred dogs at the premises and plans to breed his neo mastiffs in the future.

It was pointed out that Mr Gough is permitted under his employment agreement to keep dogs and he receives the non – taxable allowances payable for dogs under Cl. 6 of the IEA.

It is argued, therefore, that Mr Gough has kept and bred his dogs with the knowledge and implied consent of the employer and it is submitted that Council’s conduct since 2001 (including its conduct in permitting and assisting in the raising of the height of fences and erecting warning signs) is an

affirmation of the respondent's actions in keeping the dogs whether it be under his employment agreement or in accordance with his tenancy.

It is submitted that Mr Gough is a tenant of the house at 316 Wainui Rd and that he has all the rights accorded to him under the Residential Tenancy Act 1986 including right to quiet enjoyment of the premises pursuant to s.38 of that Act. He is entitled to revoke the implied licence to enter his property and has done so by telling Committee members and Council staff not to enter his property without calling first. In this regard, it was submitted, that Bill Kennedy, Alan Hall and Steven Lloyd (refer incidents involving these people pp. 5-6) were the authors of their own misfortune in that they came onto his property contrary to his instructions to them. They were, it was submitted, trespassers.

The evidence for the respondent was that the dogs are primarily family pets. They are good with children and one of the neos is a mascot for the children's rugby team. They are also guard dogs and on occasions Mr Gough has used the rottweiler Smash as a cattle dog. It is submitted that the house at 316 Wainui Rd is isolated and the dogs are needed for security.

It is submitted the dogs belong to Mr Gough and his partner Ms Rowe.

Mr Gough disputes (in respect of the TV crew incident) that it was a "rushing" incident within the meaning of s. 57A of the Dog Control Act 1996. He submits that photographs taken at the time show the dog was 100 metres from the crew and running back towards the compound fence. He submits there was no real harm to the film crew although he accepts the film crew were frightened by what happened.

Since the incident Mr Gough says he has added hot wires to the fences around the compound. The dog, Viking, had not previously experienced an electric shock. Since the incident he has had a shock and will not now go near the fences. Mr Gough also says he does not leave his dogs free in the compound when he is not there. It was also pointed out that after the "school children incident" the house fences were raised and the dogs have never since got out of the house surrounds.

Since the 'TV crew incident' Mr Gough has given a number of undertakings to Council regarding his dogs. They are:

- He has offered to re-home his male neo mastiff – Viking.
- He has not allowed the dogs to be in the "compound" unless they are shut up in their kennels. This means they are only allowed loose on the house property.
- He keeps his rottweiler Smash caged when he is not present on the property.

In his oral evidence Mr Gough did volunteer that he was very aware of the ramifications of the latest incident (the TV crew incident); that he was very aware of the seriousness of the situation and even that Council was within its rights to ask him to relocate his dogs. On the other hand he believes he is entitled to keep his dogs as long as they are under control. He submits that the solutions he has offered Council will mean that there will never be another occasion when the dogs will get off the house property. He did however, admit that his previous offer to relocate the dog Viking to his brother's home was no longer feasible.

Mr Gough also gave evidence that if he is required to relocate his dogs away from 316 Wainui Rd he and the family will have to go too.

Extensive legal submissions were provided to support Mr Gough's position

Legal Considerations

The Employment Relations Authority is an investigative body that has the role of “*resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.*” (S.157).

Pursuant to s.161 (1) of the Act the Authority has exclusive jurisdiction “*to make determinations about employment relationship problems generally*”, including among other problems:

- Disputes about the interpretation, application, or operation of an employment agreement (s.161 (a)) and;
- Any other action (being an action that is not directly within the jurisdiction of the Court) arising from or related to the employment relationship...(s.161 (1)(r)).

The definition of an *employment relationship* includes “*the relationship between an employer and an employee employed by the employer*” (s.5 & 4 (2)).

An *employment relationship problem* is defined as including “*a personal grievance, a dispute and any other problem relating to or arising out of an employment relationship*” (S. 5).

Also relevant to my findings in this matter are the good faith provisions of the Act. Parties to an employment relationship must deal with each other in good faith (s 4 (1) (a)). The duty of good faith is wider in scope than the implied mutual obligations of trust and confidence and require the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship. (ss 4 (1A) (a)&(b)).

Lastly I record what constitutes a “*lawful and reasonable instruction*”. In *Wellington etc Clerical etc Workers IUOW v College Group Ltd* [1984] ACJ 315 the Court stated that an order would be lawful and reasonable if it:

- Does not require the worker to perform any act contrary to law; and
- Is within the scope of the worker’s contractual obligations; and
- Does not involve the performance of any impossible or dangerous task.

Note: The Authority was referred to a number of other pieces of legislation which, it was argued, are relevant to the consideration and determination of this matter. They include the Residential Tenancies Act 1986, the Dog Control Act 1996 and the Health and Safety in Employment Act 1992.

For brevity’s sake the relevant provisions of these Acts are not set out in full here. They will be referred to where necessary to explain the reasons for my determination.

Discussion & Findings

In arriving at a determination in this matter I have considered the evidence, the submissions of the parties, relevant legislation and case law.

Jurisdiction

I find the Authority has jurisdiction to hear and determine the question put. It concerns an employment relationship and an employment relationship problem being a dispute or problem relating to or arising out of an employment relationship.

For reasons that will become clear I find the problem calls for the resolution of bone fide differences between the parties as to the interpretation, application or operation of the relevant employment agreement. The problem would any event come within the wide powers given to the Authority which extend to resolving any problem – not being within the jurisdiction of the Court – related to or arising out of an employment relationship (s. 161 (1) (r)). The facts of this matter reveal there is sufficient connection between the problem and the employment relationship to resolve the matter pursuant to this subsection.

This is not to say the problem might not also be addressed pursuant to other legislation e.g. dog control or tenancy legislation. However, as it is also an employment relationship problem the applicant is entitled to elect to lodge the problem in the Authority and the Authority does not usurp the powers of other institutions when it addresses the problem pursuant to its powers under the Employment Relations Act 2000.

In closing on this point I note that *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ, 917 CA is authority supporting the proposition that where there is a bone fide belief by a worker that an instruction given is contrary to his/her contractual rights that dispute should be referred to the appropriate dispute resolution processes for resolution. This proposition underpins the Council's application to the Authority.

The Dogs

I find for the purposes of this problem and its resolution that the dogs in question, Viking, Monster and Smash, belong to Mr Gough. He is the registered owner and he receives the dog allowances described in Cl. 6 of the IEA in respect of the dogs³.

I find Mr Gough favours dogs of the breeds he keeps for all the qualities they exhibit. They are large and imposing dogs. By training, they are firmly under control with the family and know their place in that environment. On the other hand they are valued for their guarding characteristics. Not only have these characteristics not been discouraged – they have been encouraged and the dogs are maintained in circumstances (being free in the house environs) where they are expected to guard the house and family from any person approaching or entering the property.

The evidence as to whether or not the dogs are used as farm dogs was contradictory. I find that the dogs have rarely if ever been used as farm dogs. They are family pets and guard dogs.

I find there have been incidents both inside the grounds of the property at 316 Wainui Rd and on occasions on the Reserve itself (where the dogs have escaped from the house property) where WRC Committee members, fellow council employees and members of the public (including children) have been intimidated, endangered and/or bitten by Mr Gough's dogs.

On the matter of the Taitai Ringia incident I do not accept the evidence of Mr Gough and his witness that this incident did not occur. The incident was investigated, infringement notices were issued under the Dog Control Act and Mr Gough was given a final written warning and counselled

³ By way of an aside, I note, that a proper construction of the IEA would result in the dog allowances being paid for working dogs only.

that if there was another incident the dogs would have to go. Mr Gough did not challenge these outcomes and I cannot now take seriously the claim the incident did not happen.

In respect of the TV crew incident I accept the evidence given by Te Hira Henderson, Fred Litchwark (both of whom were present at the time of the incident) and that of Mr Barbour, an experienced Animal Control Manager, that the incident occurred and that it warranted the call that it was a “rushing” incident.

It was submitted by and for Mr Gough that incidents involving a particular dog reflect the position that prevailed at the time of the incident in question and that he has re-homed one difficult dog (Krash) and is moving towards owning neo mastiffs because they “are quieter and more docile” than rottweilers. Under Mr Gough’s solutions proposed to Council only the female neo, Monster, would be left free in the environs of the house.

I don’t accept this submission. The evidence shows that neos are larger than the rottweiler. They are big powerful dogs. The evidence of witnesses for both parties was that these dogs are more difficult to read in that they don’t necessary display aggression before an attack is launched. In this regard they are arguably more dangerous than Mr Gough’s rottweiler.

I note too, on this point, that Mr Gough encourages the guarding characteristics his dogs naturally exhibit. That is not going to change regardless whether the dog is called Smash, Krash, Monster or Buffy. Any one of Mr Gough’s dogs that is unrestrained presents a danger and that includes Monster who has not yet fully developed. There is no reason to believe – once she is fully developed – that she will be any different in terms of her temperament and tendency to attack should the circumstances arise.

The Instruction Given to Mr Gough

I find the instruction given to Mr Gough by the Council to relocate his dogs from the property at 316 Wainui Rd is a lawful and reasonable instruction. The reason for this finding centres principally on clarification of the rights and obligations of the parties under the IEA in respect to access to Mr Gough by the Council (and others in key relationships) both on the Reserve and at the house at 316 Wainui Rd (having regard to his rights as a tenant). The other reason lies in the obligations which rest on both parties under the Health and Safety in Employment Act 1992 – the provisions of which are specifically embedded in the IEA.

The reasons for this finding are addressed in more detail below.

Employer Access to Mr Gough

Among the obligations imposed on Mr Gough pursuant to the IEA and the associated job description I note the following:

- Mr Gough is the required to live on the Reserve in the house provided by the Council.
- Mr Gough is required, among other things, to carry out the farm operations and to undertake the maintenance and operation of the reserve to enhance the enjoyment of the public.
- The ordinary hours during which Mr Gough can be expected to undertake his duties are wide (a minimum of 40 hours from 7am-8pm, Monday to Sunday). Mr Gough can be called to carry out urgent and rostered work on weekends.

- The Job Description describes relationships with the Reserve Committee, Harbour Care, ratepayers and the public as key relationships. Mr Gough is responsible to the Reserves Overseer and the Wainui Reserve Committee farming sub-committee. He is required to liaise with the Wainui Reserve Committee and work with that Committee to increase farm production.
- Mr Gough has the specific obligation pursuant to his job description to liaise with public users of the Reserve.
- Mr Gough is required to supervise labourers, contract workers and Task Force Green employees to a standard of no complaints.
- The preamble to the IEA records that “*the parties will administer it in accordance with the true intent of its terms and provisions and will give to each other the fullest cooperation to maintain harmonious relations*”.

The parties also have a statutory duty under the good faith provisions of the Act to be active and constructive in establishing and maintaining harmonious relationships.

Against this I acknowledge that Mr Gough also has rights as a tenant, including a right to quiet enjoyment of his home. Mr Gough’s landlord (WDC) shall not cause or permit any interference with the *reasonable* peace, comfort or privacy of Mr Gough and his family as tenants. (S.38(2) Residential Tenancies Act 1986). (Emphasis mine).

On weighing all this, I find that the rights of Mr Gough as a tenant must be read in light of the purpose for which the tenancy exists. It is a service tenancy. Mr Gough is required to live at the house provided and carry out his duties in a manner consistent with the true intent of the terms and provisions of the IEA. This calls for Mr Gough to be alert to the wider purposes of the relationship i.e. the operation and maintenance of the farm and reserve as a business unit and a place of recreation for the public. Mr Gough is the only representative of the Council on the Reserve 24/7 and while I can accept that Mr Gough may have not been explicitly told he must be accessible at home in an emergency situation, I find, as the only representative of Council permanently located at the Reserve, there is an implied obligation on him to be accessible – both at home and on the Reserve - in such circumstances.

Consistent with this interpretation of the IEA, I find, that the Council managers and staff (and others with delegated and implied authority including Reserve committee members and management/staff of Harbour Care) have a right to call upon and meet with Mr Gough at reasonable times for work related purposes at the house property at 316 Wainui Rd or elsewhere on the Reserve. I find, specifically, that right of reasonable access at reasonable times to Mr Gough at the house property must be unimpeded access i.e. free from the risk of intimidation or attack by dogs or by revocation of an implied right of access however given. Members of the public too should have access to help, through Mr Gough at his home, in an emergency situation.

None of this amounts to an *unreasonable* interference with Mr Gough’s rights as a tenant under s.38 of the Residential Tenancies Act having regard to the purpose of the tenancy, the scope of Mr Gough’s duties, the key relationships and the wide hours of work provisions. In particular the Council’s rights of free access to Mr Gough at reasonable times, for work related purposes are not inconsistent with the reasonable notice the Council is expected to give to Mr Gough as his *landlord* for purposes of inspecting the accommodation pursuant to Cl. 8.3 of the IEA.

I am not saying here that Mr Gough is tied to the Reserve 24/7 or that he is to be accessible at the whim of Council at any time of the day or night. What amounts to access at reasonable times for work related purposes depends on the circumstances and normally it would be appropriate to refer the parties back to mediation to agree on protocols regarding accessibility particularly given that Council has previously allowed the issue of access to Mr Gough at the house to be defined by Mr Gough's interpretation of his rights and the fact that the Council has impliedly allowed the current situation to develop i.e. the situation where staff and others in key relationships are unable to access Mr Gough freely at home for fear of intimidation/attack by the dogs

However, regardless of any protocols relating to accessibility that might be developed between the parties, the wide range of circumstances in which reasonable access to Mr Gough on the Reserve and at his home can be expected means that for all practical purposes the dogs - given their nature and training – will have to be relocated away from the Reserve.

Lastly on this point. If the IEA between the parties is to be administered in accordance with its true intent, the house occupied by Mr Gough must be seen to be accessible. That means that fences should be at a height consistent with keeping stock out (not dogs in) and the warning signs should be removed.

Obligations Arising Under the Health and Safety in Employment Act 1992

It is the applicant's position that it has a statutory duty to take all practicable steps to ensure the safety of its employees while at work. It also has a statutory duty to take all practicable steps to ensure that no action or inaction of any employee while at work harms any other person. It submits that by issuing the instruction to Mr Gough to relocate the dogs away from the farm and Reserve it is taking all practicable steps to ensure that employees and others are safe in the workplace.

For the purposes of founding this instruction the Council submits the farm and Reserve including the house are a workplace within the meaning of the Act and that the instruction is within the scope of the employment relationship and the written and implied terms of the employment agreement.

The respondent owns the Wainui Reserve and farms and operates it as a farm and as a Reserve open to the public for a wide range of recreational activities. The Council also owns the house property on the reserve and requires Mr Gough to live there pursuant to the broad purpose of its business.

Mr Gough is provided with a cell phone, fax and the Council contributes to the cost of the landline at the house. Equipment and vehicles owned by WDC and used by Mr Gough are housed in and around the farm house property. Mr Gough is required to prepare rosters and an annual farm budget. The employer and others with delegated and implied authority including Committee members and WDC employees are, I have found, entitled to access Mr Gough on the Reserve or at the house at reasonable times for work related reasons.

I find, therefore, that the farm and Reserve and the house are a place of work to which the provisions of the Health and Safety in Employment Act 1992 apply.

The Court of Appeal in *Central Cranes v Department of Labour* [1997] ERNZ 520 provided a useful summary of the history, philosophy and approach to interpretation of this Act

The Court referred to the Minister of Labour's statement in the House in support of the Bill.

"It would change, he said, the emphasis from the control of specific hazards to managing risks in relation to work activities and provide a coherent legislative framework to promote a

high standard of risk management at the place of work. While acknowledging that the main thrust of the Bill set out the duties of an employer to employees, the Minister emphasised that other duties were also set out in the bill relating to persons who had control over places of work, self-employed people, employees and principals to contractors and subcontractors”.

The Court went on:

“It is clear that the Act adopts a **preventive approach to maintaining and promoting health and safety in the workplace**. Its principal object is to provide for the prevention of harm. To achieve this object employers are required to promote safety in the workplace and both employers and others associated with the workplace are subject to the duty to take all practicable steps to ensure such safety or ensure that employees and others in the workplace are not harmed. The fact that the primary obligation to procure safety rests upon the employer does not exonerate or diminish the responsibility of other persons in the other capacities recognised in ss 15 to 19 from discharging the statutory duty imposed upon them”.

(Emphasis mine).

And:

“Being a remedial measure, the Act should be read so as to attain the object of the legislation and to accord with the scheme of the legislation so far as the wording fairly and reasonably permits. See Harrison v National Coal Board [1951 AC 639, per Lord Porter at p 650. Section 5 (j) of the Acts Interpretation Act 1924 dictates the same approach”.

The Act is unequivocal in its purpose (reflected in its Objects s.5). That purpose is given effect by the provisions of the Act which impose on employers (principally) but also on others (including employees) obligations to take all practicable steps to prevent harm to any person in the workplace or in the environs of a workplace. In this regard I note the obligation on Mr Gough (s.19 (b)) to himself ensure, that no action or inaction on his part while at work causes harm to any other person.

The Act’s provisions are referenced in the IEA (Cl. 19). It is explicitly incorporated into the Agreement which governs the relationship between the parties.

I also find that the preamble to the IEA (that the Agreement will be administered in accordance with the true intent of its terms and provisions) and the statutory requirements of good faith between the parties are consistent with and must inform the conduct of the parties in respect to the promotion harm prevention. In this regard, I note Mr Gough’s submission that if one of his dogs escaped and harmed someone he would forfeit it or destroy it himself is an inadequate response to his statutory and contractual obligations which focus on the *prevention* of harm.

Against this background of the clear obligations on the parties to prevent harm to any person in the workplace the evidence discloses that there exists in that place a source of actual and potential harm. That source of actual and potential harm arises from the presence and conduct of Mr Gough’s dogs. The evidence discloses that over the last 4-5 years there have been six known incidents where the dogs have frightened, endangered and/or bitten persons entitled to be at or in the farm/Reserve including the house property.

It is ironic that it was one of Mr Gough’s own witnesses that first highlighted to Council the risk to workplace safety posed by the dogs. Steve Layton (the then Animal Control Manager for WDC) wrote to Gary Allis, after the Taitai Ringia incident in February 2004. He said:

“Dion’s dogs are clearly dominant aggressive and territorial. This is likely to impact on workplace safety especially if the dogs are permitted to be involved in herding cattle or near other workers”.

In his evidence Mr Layton did not resile from this statement.

Quite apart from the actual and potential harm posed by the dogs there is an apprehension of real harm that exists in relation to the dogs. The evidence discloses that WDC staff, Committee members and others who are aware of the presence and risks imposed by the dogs are proscribed, by that risk, from engaging with Mr Gough in legitimate work related business at the house or in its environs.

The evidence also discloses that over that time steps have been taken with the assistance and implied consent of Council to isolate the risk posed by the dogs. Fences have been raised and hot wires added to contain the dogs in the house property. Mr Gough’s actions (in dictating how and on what terms his employer and others may meet with him) amount, in fact, to another measure to reduce the potential for harm arising from the dogs. As noted this is inconsistent with operation of the IEA having regard to its true intent.

Despite the measures taken over time to isolate the risk posed by these dogs the risk of real and potential harm posed by the dogs remains as is evidenced by the recent incident involving the White Gloves Television crew.

To conclude on this, I find the dogs can reasonably be described as constituting an actual and potential source of serious harm in the workplace and the Council is obliged to take all practicable steps to eliminate the hazard that exists.

It is submitted for Mr Gough that the instruction given to Mr Gough is not reasonable as less drastic steps are available to address any risk posed by the dogs. Mr Gough has offered to re-home one dog and to cage another when he is away from the house property.

I do not accept these are sufficient remedies in all the circumstances.

The hierarchy of duties imposed on employers under the Act calls, firstly, for all practicable steps to be taken to eliminate hazards identified in the workplace. Lord Reid in Marshall v Gotham Co Ltd [1954] AC 360 1 All ER 937 said:

“I think it is enough to say that if a precaution is practicable it must be taken unless in the whole circumstances that would be unreasonable.”

Isolation and minimisation of hazards are to be addressed only when elimination is impracticable.

Mr Gough’s proposals speak only to the isolation of the hazard posed by the dogs. This approach has failed in the past. The reality of Mr Gough’s proposals is that the male neo remains at the property as the proposal to re-home it has fallen through. Further, the corollary of Mr Gough’s proposal to shut up his rottweiler when he is away from the property is that Mr Gough will allow this dog and the other dogs to be free when he is at the property. Under Mr Gough’s proposals the female neo, Monster, will be free at other times. These dogs pose a proven and unacceptable risk to the safety of Council employees and others who are legitimately on the farm and Reserve and who have the right to access Mr Gough at the house in the circumstances I have described.

As a result I find that the measures proposed by Mr Gough will not eliminate the hazard posed by the dog's presence at the farm and Reserve and they will do little, if anything, to effectively isolate the risk they pose.

Lastly, I find that it is not the case that in its dealings with Mr Gough over this matter, that Council has subjected him to a defacto disciplinary inquiry and bullied him. Quite the opposite. The Council has involved Mr Gough in its inquiries and has considered his proposals to remedy the safety concerns raised. It has offered to address the security issues raised by Mr Gough and it has held off the draconian step of taking disciplinary action against Mr Gough for failing to comply with its instruction to allow that disputed instruction to be considered through the appropriate dispute resolution process.

If anything the Council has been remiss in allowing this situation to develop both as a party to the employment relationship and as creator/enforcer of the dog control bylaws. That being said, there are important workplace safety issues now recognised to be at stake here along with the wider public interest to be considered in the management of a public reserve. Further, the Council's instruction is consistent with the public interest reflected in amendments to dog control legislation over recent years.

Determination

For the reasons given, it is my determination that the instruction given to Mr Gough by his employer, Waikato District Council, to relocate his dogs away from the Wainui farm and Reserve is a lawful and reasonable instruction.

Mediation

I am mindful of the one of the principal obligations of the Employment Relations Act 2000, which is to build productive employment relationships.

Mr Gough said in evidence that if his dogs went he and the family would have to go. I hope he will reconsider this position as he and his family are settled and valued members of the community. To that end I am directing the parties to return to mediation to consider whether there are options that will enable Mr Gough to remain in employment with Council whilst complying with the instruction to relocate his dogs away from the farm and Reserve.

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot agree they are to file and serve submissions to allow the matter to be determined.

Janet Scott
Member of Employment Relations Authority