

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 303  
5394558

BETWEEN                      WARREN ALBERT WILTON  
Applicant

AND                              CARTER HOLT HARVEY  
LIMITED  
Respondent

Member of Authority:      T G Tetitaha

Representatives:            J Forret, Counsel for the Applicant  
D France, Counsel for the Respondent

Investigation Meeting:     30-31 January 2013 and 18-19 April 2013

Submissions Received:    25 January and 19 April 2013 from the Applicant  
25 January and 19 April 2013 from the Respondent

Determination:              17 July 2013

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**DETERMINATION OF THE AUTHORITY**

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- A.      Warren Wilton was justifiably dismissed by Carter Holt Harvey.**
  
- B.      Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.**

**Employment relationship problem**

[1]      Warren Albert Wilton was employed by Carter Holt Harvey Limited (CHH) as a caustic and kilns operator at the Kinleith Mill, Tokoroa in August 2010. He was dismissed after he failed to improve his performance in one area of a performance improvement plan.

[2] Mr Wilton submits he was unjustifiably dismissed and there was a breach of good faith. He alleges he was not given all relevant information, no reasonable opportunity to improve performance and CHH made no genuine attempt to assist him or genuinely consider the decision to dismiss. He seeks reinstatement to his job.

[3] CHH disagrees. It submits the dismissal was substantively justified and procedurally fair. Mr Wilton was unable to perform critical tasks in a safe and competent manner and put others at risk of harm. He was terminated following a three month period of performance management including support and assistance. Reinstatement is not practicable or reasonable.

*Facts leading to dismissal*

[4] Mr Wilton previously worked at the Mill between 1980 and 2003 as a fitter and turner. He was made redundant in 2003, then rehired in 2010 as a caustic and kilns operator. CHH was aware Mr Wilton did not have any previous experience as a caustic and kilns operator and required training.

[5] From 16 August to 2 September 2010, Mr Wilton undertook induction training and familiarisation with areas of the Mill including line kiln and mud filter training.<sup>1</sup> The remainder of Mr Wilton's training was "on the job". He was paired with three experienced operators, Messers Dave Dewar, Robert Dargaville and Willem Dippenaar.

[6] An important part of his job involved "isolations." Isolations are the procedure for shutting down parts of the Mill to enable maintenance or repair work to be undertaken. This involved turning off then shutting down the affected area of plant by opening and/or closing valves for the purposes of isolating the flow of material or liquids away from the area of plant that required maintenance or repairs. The affected valves were tagged with tickets signed off by an operator such as Mr Wilton and one other person. The ticket butt was detached and kept.

[7] When the work was completed, the process of de-isolation was undertaken, i.e. returning valves to their original positions required for the plant to run normally including removing the tickets. The plant was then restarted.

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<sup>1</sup> Respondent Bundle of Documents (RBD) pp 2-3, Warren Wilton training plan.

[8] There were two types of isolations – personal and plant. Personal isolations involved less than 12 tickets or valves. Plant isolations involved more than 12 tickets or valves, or more than 3 people were required to undertake the isolation.

#### *May 2011 Incidences*

[9] In May 2011 issues about Mr Wilton’s job performance arose. These included inappropriate correspondence, “over-liming” the No 2 Caustic slaker and computer literacy. His manager, Mr Keith Haystead, prepared a report suggesting removal of Mr Wilton from operational duties and returning him to supervised training.<sup>2</sup>

[10] Following discussions between CHH and his union representative, Mr Wilton was disciplined by a warning for the correspondence. The remaining issues were to be addressed by an experienced operator, Mr Robert Dargaville, and computer training.

#### *May 2012 Incidences*

[11] In May 2012 job performance issues arose again. On 6 May 2012 Mr Wilton was tasked with the de-isolation of the No 4 green liquid clarifier. He removed all of the tickets but did not return the valves to their positions required for the plant to run normally. He alleges he was instructed by his manager, Mr Haystead, to leave the valves ‘in the position they were in’.

[12] Another operator started the No 4 green liquid clarifier when Mr Wilton alerted him that he had left the drain valve open. He shut the drain valve, but not before 20 to 40 litres of liquid escaped into a bunded area and pumped back into the system. He was later told by other operators irrespective of what Mr Haystead said, when de-isolating, drain valves must be closed to prevent chemical spills.<sup>3</sup>

[13] On 13 May 2012 Mr Wilton was asked to undertake an isolation where he failed to close a drain valve. Mr Haystead saw the valve and closed it before anything further occurred.<sup>4</sup>

[14] On 14 May 2012 Mr Wilton asked Mr Haystead to check a de-isolation he undertook on the No 5 white liquid clarifier. Mr Haystead checked it and found one

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<sup>2</sup> Exhibit A p 4, Brief of Evidence (BoE) W Wilton 29 November 2012.

<sup>3</sup> BOE W Wilton paras. 30 - 32

<sup>4</sup> Oral evidence and BOE K Haystead para. 41.

of the valves in an incorrect position. If the plant had been re-started, CHH alleges it would have resulted in blocked lines and a shutdown of the plant until the problem could be remedied costing time and money. Further incidences included incorrect position of valves and lack of knowledge of the plant.<sup>5</sup>

### *Performance Improvement Plan*

[15] Mr Haystead was concerned Mr Wilton had competency issues. He discussed this with his superior, Mr Stephen Dunne. They determined a performance improvement plan would be offered to Mr Wilton, which Mr Haystead drafted.

[16] The performance improvement plan (PIP) identified three focus areas of knowledge of the plant and isolating procedures, monitoring of plant and attitude towards work. It set out actions to be taken by Mr Wilton and by CHH. The timeframe for completion of the PIP was end of June 2012, after which Mr Wilton was to be set a series of practical exercises to test his competency in focus area 1.

[17] Mr Haystead met with Mr Wilton on 22 May 2012 and went through the PIP and gave him a copy. Mr Wilton confirmed he understood he may lose his job if his performance did not improve.

[18] Mr Wilton satisfactorily completed the tasks set for focus areas 2 and 3. He did not satisfactorily complete the tasks under focus area 1.

[19] On 25 July 2012 Mr Wilton undertook the first practical exercise. This was not completed satisfactorily.

[20] An assessment against plan meeting was held on 2 August 2012. Mr Wilton was provided with the above feedback on his first practical exercise and an opportunity to reply. The errors including failure to flush the pump, lack of knowledge about how long to flush a line and spraying Mr Haystead with hot water.

[21] On 17 August 2012 he undertook a second practical exercise involving a personal and plant isolation. Mr Wilton accepts this did not go well.

[22] On 24 August 2012 he attended a further meeting. A report on his second practical exercise was read through to him and he was given an opportunity to reply. Mr Wilton recalled at hearing saying he was "*away with the birdies and not*

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<sup>5</sup> Oral evidence and BOE K Haystead para.51

*concentrating*” during the exercise. The meeting was adjourned for CHH to consider his reply. It reconvened the same day and Mr Wilton was dismissed with notice.

### **Issues**

[23] The issues for determination by the Authority are:

- (a) Was Mr Wilton unjustifiably dismissed?
- (b) Alternatively, was there a breach of good faith?
- (c) What remedies (if any) is Mr Wilton entitled to?

### **Legal Framework**

[24] The fact Mr Wilton was dismissed is accepted. The onus falls upon CHH to justify whether its actions “*were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*”.<sup>6</sup> In applying this test, the Authority must consider the matters set out in s103A.

[25] The Authority must not determine a dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (s103A(5)).

[26] When there is dismissal for reasons of alleged unsatisfactory work performance, fairness and reasonableness require that the specific reasons for dissatisfaction are disclosed to the employee; a reasonably specific and measurable improvement demanded of him or her; and a reasonable period of time given for it to be established whether the employee is able to achieve that improvement, and at the end of that time a dispassionate consideration given to the question whether enough progress has been made to avert dismissal.<sup>7</sup>

[27] Where there are performance concerns, the employer must carry out a fair investigation before it is then entitled to come to a decision whether the employment of the employee is going to be continued. The employer must have previously identified the perceived deficiencies to the employee and given them an opportunity

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<sup>6</sup> S103A(2)

<sup>7</sup> *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, 679

that is reasonable to improve their performance by means and to a standard both of which are objectively measurable and have been objectively measured.<sup>8</sup>

[28] The duty of the employer can require it to provide the proper training and support to the employee. A failure to provide such support can be a breach of the relationship of trust and confidence.<sup>9</sup>

[29] The conflict of evidence between the parties requires express findings of credibility upon evidence given by brief and orally at hearing.

[30] Credibility can be assessed upon two bases – the witness personally, and the story the witness tells. Relevant factors to personal credibility are inconsistencies and contradictions; prevarication; concessions made where due, despite risk to the witnesses own credibility in giving that evidence.

[31] Credibility of the story is an assessment of it within the context of other evidence, such as undisputed facts or facts unknown to the witness. Is this evidence absurd or is there other evidence making the conclusion inevitable?

[32] The Authority may draw inferences and fill gaps in evidence by application of common sense, knowledge of human affairs and the state of the industry and any matter that seems capable of being taken into account as indicating the probabilities of the situation. Bearing this framework in mind, the Authority turns to consider the matter before it.

### **Was Mr Wilton unjustifiably dismissed?**

[33] The same allegations raised in respect of the unjustified dismissal are also raised in support of a breach of good faith. To avoid duplication, the findings of fact relevant to both issues are dealt with in the unjustified dismissal claim below.

### ***Substantive Justification***

[34] Mr Wilton accepted the incidences occurred in paragraphs [9] to [14] above. There is an issue of credibility regarding the alleged instruction Mr Haystead told Mr

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<sup>8</sup> *Ramankutty v Vice-Chancellor of the University of Auckland* EmpC Auckland AC53B/01, 25 October 2001 at [23]–[24]

<sup>9</sup> *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659, 679 citing *Auckland etc Local Authorities Officers IUOW v Mt Albert CC* [1989] 2 NZILR 651, 657

Wilton when de-isolating, to leave the valves as they were. This alleged instruction is inconsistent with other evidence and illogical.

[35] If Mr Wilton had been following this instruction, all of his isolations would have been completely wrong. The plant would, at best, be unable to run, and at worst, material or liquid would escape causing contamination and/or blocked pipes. This did not occur everytime. It infers during previous isolations, Mr Wilton was not following any instruction to leave the valves as they were.

[36] If Mr Wilton understood the isolation procedure and its consequences, he should have checked this alleged instruction with another operator. Mr Wilton admitted he had previously been told when de-isolating to return the valves to their original positions to enable the plant to run. It is more probable than not Mr Wilton was mistaken about Mr Haystead's alleged instruction.

[37] The Authority rejects Mr Wilton's evidence these incidences did not create potentially dangerous conditions for other employees<sup>10</sup> or had any other effect. The Mill had material or liquid including caustic liquids and hot water flowing through the pipes.<sup>11</sup> Containment and control of these materials and liquids is an absolute necessity. Opening or closing valves incorrectly during isolations could allow material or liquid to escape. Caustic liquid and hot water is hazardous. If splashed in the eyes of an employee it could detrimentally affect sight and potentially burn exposed skin. Hot water could scald. Contamination and blocked pipework could be caused by valves being left in the wrong position following de-isolation. Production would have been halted or delayed while this was remedied, resulting in lost time and money.

[38] Mr Wilton's explanation for his errors in the first exercise was not helpful. He stated there was no need to flush the pump because he had done this prior. The exercise required the pump to be flushed. He did not check at the time if he could omit this step. He simply chose not to do it. Although he denied seeing water spray Mr Haystead, he acknowledged asking another employee to move away because of the spraying water. He did not think this was important. It is more probable than not Mr Haystead was sprayed. He gave no explanation for his lack of knowledge about flushing a line.

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<sup>10</sup> Brief of evidence (BOE) W Wilton dated 29 November 2012 at para. 34.

<sup>11</sup> BOE KS Haystead at para. 40.

[39] In respect of the second exercise he accepted this went poorly but it was due to other work matters he had on his mind and his unfamiliarity with the valves. He now also alleges the exercise did not include all relevant tags, including the tag to the hot water dregs filter vat and the tags produced were not the ones he used. This was because he “*had not completed any of those tags*” referring to the fact the tags lacked his signature.<sup>12</sup>

[40] Mr Wilton conceded saying he “*was away with the birdies*” during the second practical exercise. If so, it infers it is more probable than not he was not concentrating and omitted to sign the tags at all. No motivation for CHH to swap the tags was evidenced.

[41] He believed the first practical exercise was a personal isolation and the second assessment exercise as a plant isolation only.<sup>13</sup> This was incorrect. The first exercise involved more than 12 tickets so was a plant exercise. Mr Haystead deposed (which was accepted by Mr Wilton) he did both a personal and plant isolation in the second exercise.<sup>14</sup>

[42] The evidence supports the conclusion Mr Wilton’s performance was defective and continued to be so following the imposition of the PIP. The issue of sufficient resources to improve performance is dealt with below.

[43] Given the above, the Authority determines there was substantive justification for the dismissal.

### ***Process of Dismissal***

[44] Mr Wilton accepts the concerns were raised with him. He denies there was sufficient investigation, reasonable opportunity to improve or genuine consideration prior to the decision to dismiss. He further submits there was no genuine consideration because the practical exercises were designed to make him fail due to lack of opportunity to practice isolations prior to the practical exercises and the lack of consideration of his progress under the PIP in focus areas 2 – 3 and successful

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<sup>12</sup> BoE W Wilton 29 November 2012, paras. 64 – 69 and E2.

<sup>13</sup> BOE W. Wilton at para. 51 to 56 and attachment “E”

<sup>14</sup> Rebuttal evidence W Wilton dated 17 January 2013 does not refer to para.76.

completion of 1 of the 3 isolations. Mr Wilton alleged bias by Mr Haystead in the decision making resulting in his dismissal.<sup>15</sup>

*Sufficiency of Investigation*

[45] Mr Wilton submits CHH would have appreciated Mr Wilton had not done isolations without direction from his supervisor if a sufficient investigation had occurred. This submission is rejected. CHH would not have deduced by further investigation Mr Wilton was unable to do isolations without supervision based upon the evidence before it at the time.

[46] He had had 2 years on the job. He had undertaken 5 isolations in 2011 and 1 in 2012 as the operator correctly. At no stage prior to the decision to dismiss did Mr Wilton admit he'd never done any isolations without assistance. It arose at hearing that other employees checked, ordered and even placed the tickets upon valves for him. This was despite him signing off the isolation tickets, confirming they were correctly placed upon valves by him, when they were not.

[47] Mr Wilton also gave many explanations for defects in his performance. At no stage did he admit he could not do isolations without assistance. It is probable CHH was operating under the false impression Mr Wilton was competent with a few defects which he could improve without further assistance. The evidence before it at the time certainly did not show an inability to do isolations to the degree he now states.

*Reasonable Opportunity*

[48] Mr Wilton submits CHH took no active steps to improve his performance. CHH had adequate resources to provide private tuition, practical exercises and written material which it did not provide him. The PIP meeting minutes were not provided to him so he did not know about the available computer resources and even if he did, he couldn't print them out.

[49] CHH submits it would not provide any further resources under the PIP unless requested by Mr Wilton. Mr Wilton was expected to drive the improvement plan

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<sup>15</sup> BOE W Wilton at paras. 18-22

himself, use the existing resources or ask his colleagues for assistance. He did not raise lack of resources as an issue during the PIP.<sup>16</sup>

[50] The actions to be taken by CHH in respect of focus area 1 in the PIP were provision of P&C's (drawings showing locations of valves), manuals and access to trained persons. It is accepted CHH did not provide the above. It assumed Mr Wilton knew how to obtain the resources himself or to ask them for assistance if required.

[51] The notes of the PIP meetings were produced. No issue was taken with their accuracy. The 2 August 2012 meeting notes record Mr Wilton being offered further assistance which he declined. He was also told to use the experienced operators and the practical exercises from the computer. A copy of the PIP meeting notes would not necessarily mean he sought out or accessed the resources available.

[52] Mr Wilton's oral evidence confirmed he was aware Messers Dewar, Dargaville and Dippenaar were available to assist him and he knew there were manuals. He did not consult any of the experienced operators or manuals despite being told to do so.

[53] Mr Wilton was aware of P&C's, but not how to access them through the computer to simulate practical exercises. He did not ask how or whether others could download these for him. There was evidence the P&C's may be inaccurate – extra valves were sometimes noted on the drawings but unable to be found.<sup>17</sup> P&C's could not replace actual knowledge of valve location gained from 'walking' the pipelines, which Mr Wilton did.

[54] Mr Wilton did not ask for any help, and certainly not in the form he is now alleging should have been offered by CHH. In his oral evidence he stated he preferred to get on with it by himself, spending most of his time walking the pipelines to familiarise himself with valve placement. Even had CHH proactively directed Mr Wilton to the resources as set out in the PIP it may have not affected the outcome given his evidenced reluctance to access resources such as experienced operators or manuals.

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<sup>16</sup> BOE K. Haystead at para. 84 ff

<sup>17</sup> RBD at p 29.

[55] Whilst CHH should have deleted reference to the action it would take under focus area 1 in the PIP, this was a minor procedural defect and did not result in unfairness (s103A(5)).

[56] The Authority determines there was reasonable opportunity for Mr Wilton to improve his performance.

*Genuine Consideration*

[57] Mr Wilton alleges the practical exercises were designed for him to fail given the lack of resources provided and CHH failed to consider he met focus areas 2 -3 and performed 1 of 3 isolations correctly.

[58] The issue of available resources is dealt with above.

[59] The achievement of focus areas 2 – 3 did not have the same health and safety consequences as isolation procedures in focus area 1. On 2 August 2012 Mr Dunn reinforced the employers concern it had confidence Mr Wilton could logically and safely undertake isolations.<sup>18</sup> He was well aware of the importance of this part of the performance plan. The remaining focus areas were not of the same importance in terms of health and safety.

[60] There is no evidence Mr Wilton completed 1 of 3 isolations acceptably. Neither practical exercise was completed acceptably. Mr Haystead being sprayed with hot water was unacceptable. Mr Wilton's explanation why he did not flush the pump when he was required to do so as part of the first practical exercise, was unacceptable. The second practical exercise in its entirety was unacceptable.

[61] The allegation of bias against Mr Haystead has little if any evidential basis sufficient to meet the required standard of proof. There was substantive justification for the dismissal. The decision to dismiss was also made by another person, Mr Dunn. There was no suggestion Mr Dunn was not impartial.

[62] Taking into account the above, the Authority determines CHH actions were those of a fair and reasonable employer. Mr Wilton was justifiably dismissed.

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<sup>18</sup> RBD p30.

**Alternatively was there a breach of good faith?**

[63] Given the above factual findings, the breach of good faith personal grievance is also dismissed.

[64] As a result of this determination consideration of remedies is not required.

[65] Costs are reserved. If costs are sought, submissions are to be filed within 14 days of the determination. The other party may file submissions in reply 14 days thereafter.

**T G Tetitaha**  
**Member of the Employment Relations Authority**