

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 259/08
5046520**

BETWEEN TIATA WITEHIRA
 Applicant

AND PENGUIN WHOLESALERS LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: David Flaws for Applicant
 Derek Slatter for Respondent

Investigation Meeting: 19 July 2007

Submissions Received: 26 July 2007

Further Information: 31 August 2007

Determination: 17 July 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Tiata Witehira ("Mr Witehira") says he was unjustifiably dismissed from his employment with Penguin Wholesalers Limited ("Penguin"). Penguin says Mr Witehira was justifiably summarily dismissed for serious misconduct. The parties were unable to resolve the problem by mediation.

The facts

[2] Mr Witehira commenced full-time employment with Penguin as a Driver/Storeman/Freight in July 2005. He worked five and one half days most weeks from 5.00am to 2.00pm each day. The terms of Mr Witehira's employment were recorded in a written individual employment agreement effective as from 11 July 2005 ("the Agreement").

[3] From early 2006, Penguin's management had established a pattern of product going missing every second Thursday. On that day each fortnight, management

remained particularly vigilant monitoring product movements. Penguin had installed surveillance equipment after previous substantial losses and staff were aware of this equipment in the workplace.

[4] On Thursday 15 June 2006 Mr Witehira drove to his home in between delivery runs. He was observed doing so by another person the identity of which was not disclosed to Mr Witehira. Mr Witehira returned home again after the end of his shift at 2.00pm.

[5] Sometime in the late afternoon around 4.00pm that same day, and as he was tending to his dog at the rear of his property, the Police arrived accompanied by Penguin's General Manager Mr Derek Slatter ("Mr Slatter"). The Police produced to Mr Witehira a warrant to search his residence for Penguin property which they then proceeded to execute. The search did not find any Penguin property.

[6] Mr Slatter handed Mr Witehira a Memo of the same date which stated:-

Re: Disciplinary meeting, Friday June 16th 1Pm, annex.

We need to have a disciplinary meeting to discuss the following issues:

1. *February 17th, M61 parked at your address.*
2. *March 6th, M20 parked at your address*
3. *June 15th, M50 parked at your address*
4. *The other matters relate to unauthorised possession of company property. This relates to items I have reason to believe you have removed from the premises without appropriate documentation or permission. Specifically:*

- a. *May 4th, whole boned pork leg.*
- b. *May 18th, PC cube roll.*
- c. *June 1st PC cube roll.*
- d. *June 15th PC cube roll, 3.424kg.*
- e. *Burger King desserts.*
- f. *I have also received an independent allegation that you have been selling "Penguin" i.e. Ambassador hams from your house. I have researched your staff account and note that you have not purchased any.*

5. *I refer you to your Employment Agreement, specifically Appendix 1(a) Unauthorised possession of company, client or other workers property. This includes scrap, waste and damaged items, and 1(aa) Deviating from the normal and proper route without reasonable excuse when in control of a Penguin Wholesales vehicle, and 1 (r) Unauthorised or improper tampering with any timeclock or device used for determining hours worked, or failure to correctly record hours worked in accordance with Company policy.*

6. *1(a) is in relation to points 4 a. to 4 e. above. 1 (aa) is in relation to points 1 - 3 above. 1 (r) is in connection with the fact that if you were at home then this is not time you should be paid for. These are serious misconduct*

issues. There is also the matter of trust which goes to the heart of the Employee/Employer relationship.

7. The potential consequences are serious and include summary dismissal. I urge you to get independent advice. You were given a copy of your Agreement on July 14th 2005. I have appended a copy of the House Rules for your information.

8. Given the nature of the things that have occurred today - the product being taken and the truck being parked at your residence - I have involved the Police. I suggest that you take advice on how this affects the disciplinary meeting and employment status. Obviously the Police are not involved with the misconduct issues detailed above but there is a degree of cross over with the unauthorised possession matter. I reiterate that you need to get your own advice on this matter.

9. You are entitled to bring a Representative to the meeting and I strongly advise you to do so.

10. You are suspended on pay until the meeting. Please do not attend at Penguin any earlier than 10 minutes before the meeting which will be in the annex and attended by Brett Baker.

*Yours sincerely
Derek Slatter
General Manager*

[7] A disciplinary meeting was held at 2.30pm on Monday 19 June 2006. Mr Witehira was represented by Mr Flaws. Present for Penguin were Mr Slatter and Mr Brett Baker ("Mr Baker").

[8] Mr Slatter followed up this meeting with a Memo he emailed to Mr Flaws in the evening after the meeting.

[9] The following evening on Tuesday 20 June 2006 Mr Flaws responded by email raising various issues and advising he would contact Mr Slatter in due course.

[10] Mr Slatter acknowledged Mr Flaws' advice in an email of Wednesday 21 June 2006. He invited Mr Flaws and Mr Witehira to view video surveillance footage and proposed a further meeting for Friday 23 June 2006.

[11] Mr Flaws responded in an email of 22 June 2006. He advised he could not meet until Monday 26 June 2006. He advised that as Mr Witehira was adamant he had done nothing wrong, he would not incur the expense of his representative attending on Mr Slatter to view the footage. Mr Slatter responded in an email later that same day.

[12] A further disciplinary meeting was held at 2.30pm on Monday 26 June 2006. Mr Witehira was again represented by Mr Flaws. Present for Penguin were Mr Slatter and Mr Brett.

[13] By email of 27 June 2006 sent by Mr Slatter to Mr Flaws, Mr Witehira was advised he was summarily dismissed.

The merits

[14] Mr Slatter's Memo of 27 June 2006 sets out the reasons for Mr Witehira's summary dismissal in terms of the Memo he was given on 15 June 2006 of the allegations he was required to answer. I deal now with each of those specified grounds.

Parking his truck outside his address on three occasions

[15] The first issue related to Mr Witehira returning home in his work truck on three particular dates. Mr Slatter referred Mr Witehira to an Appendix 1(a) of the Agreement which set out items that are stated as constituting serious misconduct and (aa) thereof "*Deviating from the normal and proper route without reasonable excuse when in control of a Penguin Wholesalers vehicle*".

[16] As concerns the earlier two dates, I find that Mr Witehira's response was that the matters were too historical to reasonably expect him to provide an explanation and that he had no particular recall of the dates in question. I also find that Mr Slatter refused to disclose the name of person who had reported seeing Mr Witehira's truck parked outside his home on both occasions and objection was taken to this refusal. I find that these responses were Mr Witehira's substantive response. He also explained that he could recall returning home on two previous occasions to retrieve his driver's licence having obtained permission to do so.

[17] While Mr Slatter accepted that "*these dates were too long ago for [Mr Witehira] to have accurate recall*", he concluded however "*that it goes toward establishing that you were aware of the requirement to have permission and also that on at least one prior occasion you have taken a Penguin vehicle home without permission*". Mr Slatter concluded "*this is also serious misconduct warranting summary dismissal*".

[18] In relation to the specific date of 15 June 2006, Mr Witehira had explained he had returned to his home to go to the toilet and get some lunch money. He maintained his actions in doing so were reasonable. Mr Slatter had asked in his email of 21 June 2006 why Mr Witehira had not sought permission to return home on this date, which was accepted as a 74 metre deviation from his assigned driving route, having regard to his admissions that he had sought permission on previous occasions. The response from Mr Flaws' email of 22 June 2006 was this:-

His response is that he did not do so because he was focused on the internal pressure that he was experiencing at that time, and in the moment it simply did not occur to him to do so. He has commented in hindsight, that if he had in fact used the RT to ask permission to deviate less than 100m for a call of nature, the response would have been derisory, and he would have been advised (in his words) to "Fucken Get Real!".¹

[19] Mr Slatter was not persuaded of the explanation for not asking permission either in advance or retrospectively later that day. He concluded, of this failure to seek permission, *"I find this to be serious misconduct warranting summary dismissal."*

Timeclock allegation

[20] Although no allegation was specified, Mr Slatter's Memo of 15 June 2006 recited item 1(r) of the Appendix to the Agreement *"unauthorised or improper tampering with any timeclock or device used for determining hours worked, or failure to correctly record hours of worked in accordance with Company policy"*.

[21] The implication from this recitation is that in stopping at his house on 15 June 2006 as he had admitted, Mr Witehira ought not be paid for such time in excess of his break entitlements. If he had made claim for payment in excess of his entitlement such claim would be unauthorised. But the allegation was not specified only implied. Notwithstanding that, Mr Slatter advised in his advice of 27 June 2006 that he *"made no finding as there [was] no sound evidence either way of the duration of the break"*.

Unauthorised possession of company property

[22] Mr Witehira's consistent response was that he denied being in unauthorised

¹ In his email the following day Mr Slatter responded *"I would appreciate you avoiding profanities, if for no other reason than that they play havoc with mailmarshall programmes. If you substitute a couple of asterix's I will still get the point."*

possession of any company property.

[23] By his email of 19 June 2006, Mr Slatter advised he accepted Mr Witehira's denial of any responsibility for missing Burger King desserts.

[24] In relation to the whole boned pork leg and PC cube roll that went missing on 4 and 18 May 2006 respectively, Mr Slatter resolved to accept Mr Witehira's denials.

[25] In relation to the "independent" allegation that Mr Witehira had been selling "Penguin" Ambassador hams from his house, Mr Slatter tells the Authority this allegation arose when he was telephoned by one Mr Barry Nalder in May 2006. Mr Slatter tells the Authority Mr Nalder was not known to him but he informed Mr Slatter that a driver who lived on First Avenue, where Mr Witehira resided, had been selling hams for cash at Christmas time. When he asked for details, Mr Slatter says Mr Nalder was unable to provide him with any but advised he was conducting further enquiries. When Mr Slatter made further enquiries of Mr Nalder subsequent to raising the allegation as one for Mr Witehira to answer, Mr Nalder was unable to advance matters. Mr Slatter in his email of 22 June 2006 advised Mr Flaws that he accepted Mr Witehira's denial of any knowledge of the matter. I make no findings on any aspect of this matter, only that Mr Slatter did not pursue it with Mr Witehira.

[26] In relation to the PC cube roll that went missing on 1 June 2006, Mr Slatter concluded that *"the evidence indicates a reasonable chance that you were responsible but it is not conclusive on this point - there is room for reasonable doubt. I make no finding on this and leave it open at this point"*.

[27] In relation to the PC cube roll that went missing on 15 June 2006 Mr Witehira denied and continued to maintain that he had not removed a PC cube roll 3.424kg ("the product") from Penguin's premises. Penguin relied on its video surveillance showing Mr Witehira's movements in the vicinity of the property. Penguin maintained that the product was on the shelf in the chiller at 5.11am and was monitored thereafter. It maintained the video surveillance established Mr Witehira's multiple entry and exit from the chiller where the product was stored between 5.38am and 5.44am. Penguin's floor supervisor Mr Colin Thompson gives evidence to the Authority that he informed senior employee Mr Steve Schoone of the product's

disappearance at 5.44am. Mr Schoone then followed Mr Witehira and observed him visiting his home address at 7.10am. Mr Thompson informed Mr Slatter of these developments when Mr Slatter arrived at work at 7.55am. Mr Slatter then viewed the video footage. Mr Schoone did not observe Mr Witehira's actions outside his home because he says he did want to be seen by Mr Witehira.

[28] It is on the basis of this evidence and primarily because Penguin accepted the PC cube roll had been confirmed present from 5.11am and confirmed disappeared at 5.44am during which time the video footage showed Mr Witehira having access to it, that Penguin resolved that Mr Witehira had removed the product without authority to do so. But the supervisor had believed the product was absent at 5.40am according to Penguin's own evidence. Corroborative of the ultimate conclusion was Mr Slatter's further conclusion that Mr Witehira's visit to his residence was unlikely to be genuine. He considered this so because Mr Witehira had not used his fleetlink radio to report the diversion or the reason for it.

[29] Mr Witehira's sole response was that he denied removing the product. He was not interested in viewing the video footage because he says he knew it did not show him stealing anything because he did not steal anything. When his representative was invited to view the video footage the representative wrote:-

My client is adamant that he has done nothing wrong and that he is unwilling to fund an exercise in which I am engaged at his expense to consider material which will eventually prove to be irrelevant to the ultimate resolution of the matter.

[30] Mr Slatter wrote in a file note that *"it appeared that [the product] had been secreted in a Mad Butcher bin of meat, be we cannot be 100% certain about this"*. Ultimately he concluded that *"... the product was observed closely and it was identified to my satisfaction as being removed by you without authorisation. I find this to be serious misconduct warranting summary dismissal"*.

The determination

[31] Mr Witehira was dismissed for serious misconduct. Firstly for taking a Penguin vehicle home without permission and secondly for "removing" product "without permission".

[32] I dispose of the first ground immediately. It alone would not have constituted grounds for serious misconduct. As a matter of fact and degree I do not agree such conduct amounts to serious misconduct.

[33] In determining whether Penguin's decision to terminate Mr Witehira's employment was unjustifiable the Authority applies the statutory test of justification prescribed at section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. Test of justification

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

[34] Mr Slatter summarises his conclusions on the allegation of removing without authorisation:-

June 15th Tiata was observed by Colin as being the only person who could not be eliminated. Steve subsequently followed the truck and it diverted to Tiata's house. Colin's observations were confirmed in my view by video footage. Colin and Steve are our two most trusted employees, proven over many years. Hence I gave a great deal of weight to their observations especially as there was corroboration. The prospect of someone with the integrity of Colin and/or Steve being "out to get their man" as has been implied is zero in my opinion and experience. So at that point I believed that there was a very high chance that Tiata had taken the meat and that he definitely had an opportunity to drop it off at his house.

[35] Mr Slatter was correct to observe that Penguin could not be certain that Mr Witehira had secreted the product in a Mad Butcher bin of meat. There was no evidence that Mr Witehira had actually done so. Only an inference that he must have because he was in the vicinity of the product around the time it was confirmed absent.

[36] It is unfortunate that Mr Schoone did not observe Mr Witehira's actual movements when he was at his house.

[37] Ultimately I accept as reasonable, the conclusion Penguin reached that Mr Witehira was the only person who could have removed the product. The video

surveillance together with Mr Schoone's and Mr Thomson's evidence established that sufficiently. I consider too that any fair and reasonable employer would have drawn the same conclusion. From that point I also consider it reasonable for Penguin to then have consequentially concluded that Mr Witehira had removed the product. That was in my view an irresistible inference. I am confident that such an inference is also that which any other fair and reasonable employer would have drawn.

[38] The situation to this point is certainly what lawyers call "circumstantial". But there is one final "strand" that I suggest tips the balance. That is Mr Witehira's unauthorised visit to his home. While that fact alone does not establish conclusively possession by Mr Witehira, it is sufficient when woven together with the "opportunity" evidence to lead to the ultimate conclusion that Penguin finally reached.

[39] Considering all the circumstances, I cannot say that Penguin's conclusions were unreasonable or unfair. I also say that I consider any other fair and reasonable employer would have reached the very same conclusion.

[40] For the above reasons, **I find that Penguin's decision to terminate Mr Witehira's employment was a decision that a fair and reasonable employer would have made.**

[41] Penguin claims penalties and an order that Mr Witehira pay reparation of \$64.00 in relation to the missing product. I am not persuaded of these claims and exercise my discretion not to grant such orders.

[42] **There will be no formal orders by the Authority in this investigation.**

Costs

[43] There will be no order for costs as neither party was represented by professional advocate.

Leon Robinson
Member of Employment Relations Authority